

Legal Insight



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Asked & Answered: Essential Contract Principles

Business owners and managers encounter contracts—varying in type, purpose, and complexity—daily. The finer points of how contracts are formed, what the essential provisions are, and when a breach excuses performance are legal questions; but, the answers vary depending on each fact-driven scenario. To help you spot the thorny issues, we highlighted key general principles below.

What are the elements of an enforceable contract?

Enforceable contracts have three required components:

- Offer—party A must offer party an arrangement with definite terms
- Acceptance—party B must agree to party A's terms
- Consideration—something of value must be exchanged (e.g., goods or services for money)¹

What if party A and party B agree to make a deal but the specifics are TBD. Is that enforceable?

No, agreements to agree are not enforceable contracts in Wisconsin.² For example, a general contractor for an eighteen-story office building in downtown Milwaukee solicited bids from subcontractors for a glass “curtainwall.” The contractor selected one subcontractor’s bid but never entered into an agreement. The subcontractor bailed on the project, after negotiating with the general contractor for more than one year, and the general contractor sued. The court considered the parties’ conduct and writings (including two letters of intent) to determine their intent—not to be bound by the subcontractor’s bid but to reach a final, binding agreement.³

Are oral contracts enforceable?

It depends. Some contracts must be in writing including, for example, contracts concerning real property (e.g., leases, offers to purchase, and mortgages),⁴ settlement agreements (for actions pending in court),⁵ contracts which cannot be performed within a year,⁶ and agreements to be liable for the debt or default of another person.⁷

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Upcoming Events

Workshop: Ten Tips to Prevent and Detect Investment Fraud

05/09/2017 | 10:30am | Mequon, WI

Connect and Discover: Contract Smart

05/31/2017 | 6:00pm | Mequon, WI

Asked & Answered: Dept. of Labor’s Fiduciary Rule

Last issue, *Asked & Answered* took a deep dive into the Department of Labor’s so-called Fiduciary Rule. At the time, we answered the question “Could the new administration block the rule?” with all the ways the incoming President could affect the rule. The President and his administration chose one of them: delay implementation of the Fiduciary Rule. In early April, the Department of Labor delayed the implementation of the Fiduciary Rule by 60 days.

CNBC reported that the delayed implementation of the Fiduciary Rule costs American investors \$32,344 a minute. The stat is based on the 2015 analysis performed by former President Barack Obama’s Council of Economic Advisers, which estimated that bad investment advice—or advice not in the investor’s best interest—costs retirement savers \$17 billion a year. To put it in context, CNBC said “[t]he one-minute number is exactly enough dough to wipe out the average college grad’s entire student loan tab.”

Allegations of Fraudulent Valuations: Cautionary Tale for Investors

A Milwaukee-based private investment fund is under investigation by the FBI, according to an article published in early April by the *Milwaukee Journal Sentinel*.¹ The investigation involves allegations of fraudulent valuations of the fund's assets, including precious minerals and gems.

According to an FBI agent's sworn statement, the managers of the private investment fund "engaged in a scheme to defraud investors by systematically overvaluing assets held by the private investment fund . . . in order to increase their management fees and profit allocations from the fund." The FBI agent, as quoted by the *Journal Sentinel*, also highlighted a possible conflict of interest: the fund's managers were paid based on the value of the fund.

In addition, the FBI agent alleged that the fund's managers misled investors to believe that the funds invested in more traditional investments, such as "distressed housing assets", not "more easily manipulated" rare gems and minerals.

The FBI executed search warrants for vaults and offices housing the alleged overvalued precious minerals and gems. However, Christopher Nohl, whose company Chrysalis Financial manages the fund, disavowed any wrongdoing during an interview with a reporter from the *Journal Sentinel*. He refuted the FBI's assertion that the fund overvalued the precious minerals and gems and stated that the FBI incorrectly characterized the fund's allocation of assets. Mr. Nohl also insisted that investors in the fund were fully aware of the fund's strategy and investments.

Although none of the fund's managers involved, including Mr. Nohl, have been criminally charged, the article serves as a good reminder for investors that anyone can be a victim of investment-related schemes, even highly educated investors who look beyond traditional investments.

Investments such as those utilized by the private investment fund are not required to be as transparent as those securities registered with the Securities and Exchange Commission ("SEC"), such as mutual funds and stocks of publicly traded companies. According to the SEC, whereas mutual funds must disclose a variety of information to investors, hedge funds' required disclosures are minimal, making it difficult for investors to fully comprehend and assess what they're being told by fund managers.²

The limited disclosures for hedge funds also make it easier for fund managers to gloss over conflicts of interest.³

Moreover, securities laws dictate how mutual funds can advertise and calculate specific metrics, including average annual total return and after-tax return. Hedge funds, however, "do not need to follow any standard methodology when calculating performance."⁴ Hedge funds also invest in securities that are difficult to value or that are illiquid, which compounds this problem.⁵

The SEC encourages individuals interested in investing in hedge funds to do their research and ask plenty of questions before doing so. For example:

- Read the fund's offering memorandum and any other written documentation provided;
- Don't sign any limited partnership agreements or other legally binding documents unless you've thoroughly analyzed them or discussed them with an attorney;
- Research the fund managers' backgrounds, including educational, employment, Financial Industry Regulatory Authority ("FINRA") or SEC registrations, and disciplinary backgrounds—all of which is easily available online;
- Ask questions to make sure you understand the fund's investment strategy, fees and expenses, and methods for valuing assets and performance; and
- Analyze and question the fund manager's potential conflicts of interest.

¹ Cary Spivak, [The FBI is investigating the brothers who once managed the Wisconsin Funeral Trust](http://www.jsonline.com/story/news/local/milwaukee/2017/04/06/fbi-investigating-brothers-who-once-managed-wisconsin-funeral-trust/100080670/), *Milwaukee Journal Sentinel* (April 6, 2017), <http://www.jsonline.com/story/news/local/milwaukee/2017/04/06/fbi-investigating-brothers-who-once-managed-wisconsin-funeral-trust/100080670/>.

² Office of Investor Education and Advocacy, U.S. Securities and Exchange Commission, SEC Pub. No. 139, *Investor Bulletin Hedge Funds 4* (2013).

³ *Id.* at 2.

⁴ *Id.*

⁵ *Id.*

For an independent review of the legal side of your investments, email info@melnickmelnick.com.

Celebrating Our Inaugural Connect and Discover

Melnick & Melnick, S.C. was pleased to welcome female business owners and professionals to our office on March 7 for an interactive presentation, Connect & Discover: Empowering Female Business Owners to Prepare for the What If's. Stephanie led an interactive presentation, using real-world examples that highlighted proactive ways to safeguard your business. We enjoyed a lively discussion, wine, and appetizers.

Next Installment: Contract Smart

Mark your calendar for part two of our series for female business owners—Connect & Discover: Contract Smart on May 31 at 6:00 p.m. Network with other women in business and learn from one another during an interactive program addressing the benefits and pitfalls of contracts, all kinds of contracts. Wine and appetizers will be served. Watch your email for an invitation! To make sure you (and your friend, business partner, or relative) are on our email list, please email your request and contact information to info@melnickmelnick.com with the subject “Connect & Discover.”



Pictured above: Attendees at the inaugural Connect & Discover discussing the importance of an operating agreement for when disagreements arise between business partners. Other topics of discussion included how your business should handle negative reviews online and what to do when a service provider does not fulfill the terms of its contract.

Melnick & Melnick, S.C. is Partnering with Enterprising Women

Ask a woman how she got from there to here in the work world and you'll rarely find a straight line. Women's work-related struggles are different, but common threads exist including lower pay ([a woman earns only 79% of what a man earns](#)) and slower promotion rates. Still (or maybe because), in 2015, over [30 percent of U.S. businesses were owned by women](#)—bringing in \$1.6 trillion in revenue and employing over 8 million people combined. *By 2018, 1 in 3 new jobs will be generated by women-owned businesses.*

As a woman-owned business, we are committed to Partnering with Enterprising Women. We allocated web space to this mission—supporting women business owners and encouraging their personal growth and development.

[In the News](#)

Read the stories and research we've curated to help you work smarter, explore further, and smile more.

[Inspiration and Innovation](#)

Spark your imagination and inspire action with the work and words of women talking business, culture, and womanhood.

[Inside Law and Policy](#)

Get up to date on the latest law and policy changes that impact women at work.

[In Our Community](#)

See upcoming events for, by, or about women in the Milwaukee metro area.

Pictured above: Screenshot from the Partnering with Enterprising Women home page. We update content regularly and keep tabs on issues affecting women, business, and the law.

Please visit our [Partnering with Enterprising Women page](#) at melnickmelnick.com and tell us what you think, including what you want more of, less of, and how you use the information we share. Email your comments to info@melnickmelnick.com. You can also subscribe to our Partnering with Enterprising Women mailing list by clicking the “subscribe” button on our website's side bar and entering your email address. Our subscribers will receive a weekly email with the latest content!

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That said, many oral contracts are valid. But, enforceability requires that courts consider the parties' conduct (including texts, emails, and other writings) and intent.⁸

Are there limits on who may enter into a contract?

Yes, only competent adults (at least 18 years old) may enter into contracts.

Are there limits on activities for which people or entities may form contracts?

Yes, the activity required under the contract must be legal. For example, a contract to supply marijuana is illegal, and therefore, unenforceable in Wisconsin.

What clauses should be included in every contract?

Price, term, and the parties' obligations are the basics of every contract. But, how they are defined and what other clauses are required varies depending on the type of contract (e.g., lease, sale of goods, service agreement), parties involved, and complexity of the transaction. As a result, there's no one-size-fits-all approach to drafting or negotiating contracts.

What constitutes a breach of contract?

Only a "material" breach of contract will excuse the other party from performing.⁹ A breach is material when it is "so serious a breach of the contract . . . as to destroy the essential objects of the contract."¹⁰ Examples of material breaches include:

- Failing to complete construction project phases at agreed dates.¹¹
- Converting a gym to a "women's facility" when the lease required the tenant to operate an "athletic club."¹²
- Operating repeatedly outside a franchisee's territory.¹³

What is the "right to cure" a breach of contract? How can a breach be cured?

The right to cure, or fix a problem, exists to an extent in common law, but more clearly, and with defined requirements, in certain Wisconsin statutes. For example:

- Sellers of goods have a right to cure delivery of goods that don't satisfy the contract's specifications. Wis. Stat. § 402.508 (2)
- Residential contractors have a limited right to cure flawed construction before the homeowner may sue. Wis. Stat. § 895.07

- Tenants have a limited right to cure various breaches, including failure to pay rent, but the timeframe depends on the lease's term. Wis. Stat. § 704.17

When statutes don't provide the right to cure, contracts may define them. Courts are apt to apply well-defined cure provisions and contracting parties are wise to define terms clearly, rather than leaving their contract open to a court's interpretation.

¹ *C.G. Schmidt, Inc. v. Permasteelisa N. Am.*, 825 F.3d 801, 805 (7th Cir. 2016).

² *Id.*

³ *Id.*

⁴ Wis. Stat. § 706.02

⁵ Wis. Stat. § 807.05

⁶ Wis. Stat. § 241.02(1)(a)

⁷ Wis. Stat. § 241.02(1)(b)

⁸ *C.G. Schmidt, Inc.*, 825 F.3d at 805-806; *Associated Milk Producers, Inc. v. Meadow Gold Dairies, Inc.*, 27 F.3d 268, 271 (7th Cir. 1994) ("Even if the parties' writings do not constitute a contract, however, the parties may nonetheless be found to have established a contract through their actions.").

⁹ *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 183 (1996).

¹⁰ *Id.*

¹¹ *International Prod. Specialists Inc. v. Schwing Am. Inc.*, 580 F. 3d 587, 597-98 (7th Cir. 2009).

¹² *44 Assocs. Ltd. P'ship v. Capital Fitness LLC*, No. 2005AP3091, 2007 WL 704179 (Wis. Ct. App. Mar. 8, 2007).

¹³ *Manpower Inc. v. Mason*, 405 F. Supp. 2d 959, 970-73 (E.D. Wis. 2005).

Need A Business Consultation?

As a small business owner, taking steps to incorporate or file for a trademark can be daunting. Our Attorneys offer business formation, consultation, and trademark services for flat fees to make your legal costs predictable. Visit our website melnickmelnick.com for more details.