

## PUBLICATION

### Verbal Contracts: How do they stand up in the Court of Law?

Brent Cooper

September 14, 2017

Verbal Contracts: How do they stand up in the Court of Law?

"A verbal contract isn't worth the paper it's written on." - Samuel Goldwyn, Movie Producer

In preparation for a litigation case, I found myself recently thinking of this quote. There is a common misconception that you cannot have a contract unless it is in writing. Generally speaking, that's not true; verbal agreements *can* be binding contracts.\*

Why then, are lawyers so insistent about putting your agreements in writing? Indeed, at a seminar I was presenting at recently, an attendee referred to a verbal agreement she had entered as, "A deal's a deal. Case closed!"

I acknowledged that the law entertains verbal agreements, *if* they can be proved. But she agreed to participate in a little experiment during the session. I said to her: "I'm going to say something to you, and you immediately reply 'deal', okay?" She agreed.

I said to her, "Regarding the car you drove here tonight, I'll give you 20,000 smackeroos for it!" She said "deal".

I then asked her, "Do we have a contract?" She assured me we did.

Harkening back to Sam Goldwyn's point however, I said to her "what *is* the deal that we have? What is the contract?"

On cue, she replied "We have a contract where I am to sell you my car in exchange for \$20,000." I suggested she was misquoting me, and she acknowledged that.

She further clarified, "What you said is that you offered me 20,000 'smackers', and I accepted." Again, I pointed out that she was misquoting me. The other audience members confirmed I was right.

Furthermore, I pointed out that she had quickly applied her own interpretation to what she *thought* I had said.

And yet, all of this transpired over the course of perhaps a minute. Indeed, my 'offer', and her 'acceptance' spanned only 10 seconds, and 15 words.

The law says that for a binding contract to exist, you must have (*at least*) the following:

- An offer
- Acceptance of the offer
- 'Consideration'
- Certainty
- An intention to enter into legal relations

As to the first two items above, our verbal exchange *probably* qualifies as an offer and acceptance. But what about the next three ingredients to a contract? Was there 'consideration'?

This legal term is not the same as a layperson's. In contract law, it means an act, "forbearance or promise, from one person in exchange for the same from another." Consideration can be a promise, or something as inconsequential and unusual as a "peppercorn". Indeed this is why many written contracts mention '\$1' as 'consideration'.

As to the need for 'Certainty', it is *here* that verbal agreements often fail in Court. Even in my seminar experiment, the need for 'Certainty' raises two challenges:

1. Had the audience not corrected her, the 'car-seller' would apparently have told a Judge that I expressly offered "20,000 smackers!" That is incorrect; it's not what I said. Therefore, our dispute would regress into a 'he-said/she-said' scenario. And yet, it's the Plaintiff (the party seeking to enforce the alleged contract) who must satisfy the court as to 'Certainty' of terms.
2. Even if a Judge concluded that I said "smackers", it raises the additional question: "What does that word mean? Does the term mean 'money', with sufficient 'certainty'?"

Black's Law Dictionary contains no definition of the word. I have found one case dealing with the word but ironically it's a criminal case as to whether use of the term amounted to fraud. *Not* a strong precedent.

All that said, some dictionaries define the word "smacker" as meaning "a dollar". Furthermore, the Courts strive to interpret the language of individuals so as to give meaning to their intent.

But in this scenario, the Court would need to make a finding as to what exactly was said, notwithstanding contradictory evidence, and *then* decide what was meant by it. Finally, it would need to consider whether the two parties 'intended' to enter a contract. If a Court was left without sufficient 'certainty', the alleged agreement would fail.

And so, my volunteer had to acknowledge that her chances of proving our 'contract' in Court were extremely unlikely. Indeed, I assured her I purposely used the word 'smackeroos', to signify my *lack* of legal intent. It was, after all, just an experiment.

\*(Arguably, contracts regarding *land* must be in writing. Furthermore, judges sometimes 'imply' employment contracts *without any agreement* between the parties whatsoever).

I might add, 'A *poorly drafted* contract' also isn't worth the paper it's written on.

For further information, please contact any member of our Litigation & Dispute Resolution group.