Enforcing Oral Contracts

BY MARK COHEN

This article discusses the enforceability of oral contracts under Colorado law.

A common misconception, particularly among non-lawyers, is that oral contracts are not enforceable. This misconception sometimes causes those with potentially winnable claims to prematurely decide against pursuing them. This article summarizes Colorado law governing oral contracts and discusses issues practitioners should consider when advising and representing clients seeking to recover on an oral contract.

The General Rule: Oral Contracts are Enforceable

Oral contracts are enforceable unless a specific enactment, such as a statute of frauds, renders a particular category of oral contracts unenforceable.[1] Colorado courts follow this rule, declaring that formation of a contract requires only a meeting of the minds about terms sufficiently definite to enable the court to determine whether the contract has been performed.[2] Further, an express contract may be evidenced by the parties' written or spoken words.[3] Colorado also recognizes contracts implied in fact, which arise from the parties' conduct.[4] Both express and implied contracts are created by a meeting of the minds to contract with each other.[5] Like a written contract, an oral or implied contract must be supported by adequate consideration, but any benefit to a promisor or detriment to a promisee at the time of the contract, no matter how slight, constitutes adequate consideration.[6]

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Colorado's Statutes of Frauds

Though lawyers sometimes refer to "the statute of frauds" as if there is only one, Colorado has several statutes that require certain contracts to be in writing. The two most often asserted as a defense to an oral contract claim are CRS § 38-10-108, which applies to leases for a period longer than one year and to the sale of (or any interest in) lands, and CRS § 38-10-112(1)(a), which applies to agreements not to be performed within one year.

CRS § 38-10-108 provides that "[e]very contract for the leasing for a longer period

than one year or for the sale of any lands or any interest in lands is void unless the contract or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is to be made."

CRS § 38-10-112(1)(a) states:

> Except for contracts for the sale of goods which are governed by section 4- 2-201, C.R.S., and lease contracts which are governed by section 4-2.5-201, C.R.S., in the following cases every agreement shall be void, unless such agreement or some note or memorandum thereof is in writing and subscribed by the party charged therewith: (a) Every agreement that by the terms is not to be performed within one year after the making thereof.

Both statutes are similar in that, to overcome them, a claimant need only (1) provide a "note or memorandum" (2) subscribed by the party sought to be bound. Predictably, this has led to litigation over what constitutes a "note or memorandum" and what constitutes a subscription.

The Note or Memorandum Requirement

Courts have taken a broad view of what constitutes a note or memorandum. An email exchange may satisfy the requirement,[7] as may an invoice,[8] and even a notice of premium due may suffice.[9] The note or memorandum need not be a single document but may consist of several writings with different dates.[10]

While courts have taken a broad view of what might be a note or memorandum, the contents of the note or memorandum must be sufficiently detailed to evidence a meeting of the minds as to the essential contract terms. In a case interpreting CRS § 13-10-108, the Colorado Court of Appeals held that the note or memorandum must show on its face or by reference to other writings (1) the parties' names, (2) the contract's terms and conditions, (3) the interest or property affected, and (4) the consideration to be paid.[11] Similarly, in an older case involving the sale of grain pursuant to a contract evidenced by letters and telegrams, the Court of Appeals held the writings were sufficiently definite when they established the kind and quantity to be sold, the price to be paid, and the time and place of delivery.[12]

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The Subscription Requirement

In general, courts have interpreted the word "subscription" to require a signature. "A party subscribes to a document for purposes of the statute of frauds when she affixes her signature thereto with the intent to authenticate it as her own."[13] However, a closer examination of the reported cases shows that it may not be necessary to show that the party sought to be held liable signed a particular document. In *Beckwith v. Talbot*,[14] the Colorado Supreme Court held that where a contract was signed by one party and retained by the other, letters that the latter party subsequently wrote referring to the signed contract were sufficient to show he had subscribed the contract.

As to what constitutes a signature, "[i]t may be signed at any place, at the top or in the body. A signature, however, there must be, and a name, written or printed, is not to be reckoned as a signature unless inserted or adopted with an intent, actual or apparent, to authenticate the writing."[15] The signature requirement evolved with the coming of the Information Age, and a party's typewritten name on an email may suffice.[16]

Burden of Proof

The burden of proof is on the plaintiff to show that the contract is not void because of the applicable statute of frauds.[17]

Exceptions to the Statutes of Frauds

If the party claiming under an oral contract subject to a statute of frauds cannot show that the other party subscribed to a note or memorandum containing the contract's essential terms, all is not lost. There are two exceptions to the statute of frauds—for full performance and partial performance.

Full Performance

Colorado courts will not enforce a statute of frauds where one party fully performs all the acts required by the oral agreement on which that party relied. In *Schust v. Perington*,[18] the Colorado Supreme Court overruled the trial court's determination that an oral agreement was void under the statute of frauds. The Court observed:

> [T]he full performance on the part of Schust of the acts required of him under the oral agreement would remove the case from the statute of frauds.
>
> Numerous decisions of this and other courts of last resort might be cited in support of the doctrine that, although a contract may have been void under the statute of frauds, nevertheless, if it has been fully performed by one of the parties it is binding on the other party.[19]

Partial Performance

Colorado law recognizes that a plaintiff's partial performance of an oral agreement, undertaken in reasonable reliance thereon, is sufficient to overcome a statute of frauds defense.[20] When applicable, the partial performance exception

precludes application of the statute of frauds.[21] To hold otherwise would allow the statute of frauds to operate as a cloak for, rather than a shield against, fraud, and thus unjustly deny a party the benefit of her bargain.[22]

Partial performance of an oral contract occurs when the performance is substantial, required by the contract, and referable to no theory other than the alleged oral agreement.[23] Whether partial performance occurred is a question of fact.[24] *L.U. Cattle Co. v. Wilson*[25] is instructive regarding the partial performance exception. There, a lessee of farmland sued the lessors for breach of an oral extension of a farmland lease. The lessee had mailed a written memo to the lessors stating, "[w]e will start plowing next week."[26] The defendants admitted receiving and reading the memo but did not sign it. The trial court rejected the lessor's statute of frauds defense, finding that the lessee's actions in fertilizing constituted partial performance of the agreement sufficient to remove it from the statute of frauds. The Court of Appeals agreed.

Alternative Theories of Recovery

Even if a party claiming relief under an oral contract subject to a statute of frauds cannot demonstrate full or partial performance to support a contract claim, that party may yet be able to assert claims based on promissory estoppel and/or unjust enrichment.

Promissory Estoppel

Promissory estoppel is a quasi-contractual cause of action that, under certain circumstances, provides a remedy for a party who reasonably and detrimentally relied on a promise made by another party, even though the promise was not contained in an enforceable contract.[27] Promissory estoppel is part of the common law of Colorado.[28]

A claim for promissory estoppel consists of (1) a promise, (2) which the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party, (3) on which the promisee or third party reasonably and detrimentally relied, and (4) that must be enforced to prevent injustice.[29] "A promise that is binding pursuant to the doctrine of promissory estoppel is a contract, and full-scale enforcement by normal remedies is appropriate."[30]

Unjust Enrichment

A person is unjustly enriched when he or she benefits as a result of an unfair detriment to another.[31] Unjust enrichment occurs when (1) at the expense of a plaintiff (2) a defendant received a benefit (3) under circumstances that make it unjust for the defendant to retain such benefit without paying for it.[32] The scope of this equitable remedy is broad, "cutting across both contract and tort law, with its application guided by the underlying principle of avoiding the unjust enrichment of one party at the expense of another."[33]

The proper remedy for unjust enrichment is to restore the harmed party "to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its monetary equivalent."[34]

Oral Modifications of Written Contracts

The parol evidence rule may also apply in the context of oral agreements. While this rule generally prohibits evidence of prior or contemporaneous agreements if offered to vary the terms of a written agreement,[35] it does not apply to agreements made subsequent to the contract, so a written contract may be modified by a later oral agreement.[36] This is true even if the written agreement requires that modifications be in writing.[37] Additionally, an express provision in a written agreement may be waived, either expressly or by implication.[38] Such a waiver may be implied if a party engages in conduct that "manifests an intent to relinquish the right or privilege, or acts inconsistently with its assertion."[39] The question of waiver is one of fact that is normally appropriate for summary judgment.[40]

The Complaint

In most cases based on an alleged oral contract, the plaintiff will assert a breach of contract claim and alternative claims based on theories such as promissory estoppel and/or unjust enrichment. CRCP 8(a)(3) provides that "[r]elief in the alternative or of several different types may be demanded." Further, CRCP 8(e)(2) allows a party to "also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both."

A defendant may move to dismiss a complaint that includes a breach of contract claim and alternative claims such as unjust enrichment, asserting that a plaintiff cannot recover on both. However, this defense appears inconsistent with CRCP 8's allowance for different types of relief and relief pled in the alternative, and for separate claims or defenses based on both legal and equitable grounds.

While a plaintiff who recovers on a breach of contract claim cannot also recover on an unjust enrichment claim, a court cannot make that determination based solely on the pleadings. The factfinder must first determine whether there was a contract and whether it was breached. *Jorgensen v. Colorado Rural Properties, LLC*[41] is illustrative. In that case, the plaintiffs asserted claims for breach of contract and unjust enrichment. After a trial, the court found there was no contract, but found for the plaintiffs on their unjust enrichment claim.

Right to a Jury Trial

Breach of contract is a legal claim, and upon demand the plaintiff is entitled to a jury trial.[42] However, promissory estoppel is an equitable claim and there is no right to a jury trial.[43] Unjust enrichment is also an equitable remedy.[44]

If a complaint "joins or commingles legal and equitable claims, the court must determine whether the basic thrust of the action is equitable or legal in nature."[45] If the claim is essentially breach of the alleged contract, the plaintiff should be entitled to a jury trial on the breach of contract claim. As to the equitable claims, CRCP 39(c) permits a jury to act in an advisory capacity upon motion or on the trial court's own initiative.

Conclusion

It is generally preferable for parties entering into an oral agreement to memorialize that agreement in writing. However, failure to commit an agreement to writing may not bar a claim for relief based on breach of an oral agreement.

Lawyers advising clients on the enforceability of oral agreements must consider whether the particular agreement is sufficiently definite and is supported by consideration. Further, a statute of frauds and/or exceptions thereto may apply. Finally, equitable remedies may be available based on promissory estoppel and unjust enrichment. CL

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NOTES

1. *Samra v. Shaheen Bus. and Inv. Group*, 355 F.Supp.2d 483, 497 (D.D.C. 2005).
2. *Stice v. Peterson*, 355 P.2d 948 (Colo. 1960) (holding agreement too indefinite). *Cf. Kuhlmann v. McCormack*, 180 P.2d 863 (1947) (enforcing oral agreement to forbear from foreclosure).
3. *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187 (Colo. 2001).
4. *Id.*
5. *Id.*
6. *Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011).
7. *Buckles Mgmt., LLC v. InvestorDigs, LLC*, 728 F.Supp.2d 1145 (D.Colo. 2010); *PayoutOne v. Coral Mortg. Bankers*, 602 F.Supp.2d 1219 (D.Colo. 2009).
8. *H.Daya Int'l Co., Ltd. v. Arazi*, 348 F.Supp.3d 304 (S.D.N.Y. 2018); *Skyline Steel Corp. v. A.J. Dupuis Co.*, 648 F.Supp. 360 (E.D.Mich. 1986).
9. *Mass. Bonding & Ins. Co. v. Bd. of Comm'rs of Adams Cty.*, 68 P.2d 555 (Colo. 1937).
10. *Beckwith v. Talbot*, 2 Colo. 639 (Colo. 1875).
11. *L.U. Cattle Co. v. Wilson*, 714 P.2d 1344, 1347 (Colo.App. 1986).
12. *Crystal Palace Flouring-Mills Co. v Butterfield*, 61 P. 479, 481 (Colo.App. 1900).
13. *Doehla v. Wathne Ltd., Inc.*, 1999 WL 566311 (S.D.N.Y. 1999).
14. *Beckwith*, 2 Colo. 639.
15. *Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co.*, 245 N.Y. 305, 310 (N.Y.App.Div. 1927) (internal citations omitted).
16. *Rosenfeld v. Zerneck*, 776 N.Y.S.2d 458 (N.Y.Sup.Ct. 2004).
17. *Salomon v. McRae*, 47 P. 409 (Colo.App. 1896).
18. *Schust v. Perington*, 453 P.2d 599 (Colo. 1969).
19. *Id.* at 601.
20. *Kiely v. St. Germain*, 670 P.2d 764, 769 (Colo. 1983).
21. *Nelson v. Elway*, 908 P.2d 102, 108 (Colo. 1995).
22. *Burnford v. Blanning*, 540 P.2d 337, 340–41 (Colo. 1975).
23. *Nelson*, 908 P.2d at 108 (citing *L.U. Cattle Co.*, 714 P.2d at 1347).
24. *Adcock v. Lieber*, 117 P. 993 (Colo. 1911); *Buckles Mgmt., LLC*, 728 F.Supp.2d 1145.
25. *L.U. Cattle Co.*, 714 P.2d 1344.
26. *Id.* at 1345.
27. *Pinnacol Assurance v. Hoff*, 375 P.3d 1214, 1220 (Colo. 2016).
28. *St. Germain*, 670 P.2d at 767; *Vigoda v. Denver Urban Renewal Auth.*, 646 P.2d 900, 905 (Colo. 1982).
29. *Pinnacol Assurance*, 375 P.3d at 1221.
30. *Board of Cty. Comm'rs of Summit Cty. v. Delozier*, 917 P.2d 714, 716 (Colo. 1996).
31. *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000).
32. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1007 (Colo. 2008).
33. *Id.*
34. *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008).
35. *Neves v. Potter*, 769 P.2d 1047, 1054 (Colo. 1989).
36. *Cordillera Corp. v. Heard*, 592 P.2d 12 (Colo. App. 1978), *aff'd*, 612 P.2d 92 (Colo. 1980).
37. *Colo. Invest. Servs., Inc. v. Hager*, 685 P.2d 1371 (Colo.App. 1984).
38. *Ebrahimi v. E.F. Hutton & Co.*, 794 P.2d 1015 (Colo.App. 1989).
39. *Cooper v. First Interstate Bank of Denver, N.A.*, 756 P.2d 1017 (Colo.App. 1988).
40. *Burman v. Richmond Homes Ltd.*, 821 P.2d 913 (Colo.App. 1991).
41. *Jorgensen v. Colo. Rural Properties, LLC*, 226 P.3d 1255 (Colo.App. 2010).
42. CRCP 38(a).
43. *Snow Basin, Ltd. v Boettcher & Co., Inc.*, 805 P.2d 1151, 1154 (Colo.App. 1990).
44. *Salzman*, 996 P.2d at 1265.
45. *Snow Basin, Ltd.*, 805 P.2d 1151.