

## REPRESENTATIONS AND TERMS

### Contractual and Pre-Contractual Statements

- A **contractual term** is a provision considered part of the contract and represents a legally enforceable obligation on one party to the other.
- If a contractual term is false, it becomes a **breach of contract**.
- A **pre-contractual representation** is a statement by one party to the other intended to induce that party to contract.
- A pre-contractual representation is not part of the contract.
- If a pre-contractual representation is false, it becomes **misrepresentation**.

### Types of Contractual Terms

- **Express Terms** are statements by one of the parties that a reasonable person would believe was intended to create an enforceable obligation.
- **Implied Terms** are terms of a contract that are included by implication under common law or by statute.
- Under common law, courts will imply a term into a contract if:
  1. It is an obvious consequence of the parties' agreement or
  2. If it is required for business efficiency (e.g., "reasonable notice" of termination)

### Standard-Form Agreements

- **Standard-Form Agreements** are adopted for reasons of commercial efficiency and to provide for the terms under which the organization will offer its products or services.
- They are by definition one-sided (i.e., the party producing the agreement ensures that its rights and desired limitations are included and properly described).
- They are also enforceable.
- The general rule is that as long as any provisions are clear, not ambiguous, and reasonable efforts are made to bring them to the other party's attention, they are enforceable.

### Misrepresentation

- **Misrepresentation** is a false pre-contractual statement.
- It is an incorrect statement of an existing fact and is false when made.
- However, not every incorrect statement is a misrepresentation.
- For example, an incorrect statement of belief or opinion is not misrepresentation.
- The possible legal consequence of misrepresentation is **tort** not breach of contract.

### Nature of Misrepresentation

- The general rule that parties are not obliged to disclose material facts during negotiations is subject to certain exceptions (that can constitute misrepresentation).
- Silence is misrepresentation when it:
  1. Distorts a previous assertion
  2. Is partially true (a statement cannot be made partially true and the rest silenced)
  3. Statutory provision requires disclosure
  4. Is actively concealed
- **Inducement** is when the deceived party must demonstrate that misrepresentation induced the contract (i.e., the deceived party relied on the truthfulness of the misrepresentation in agreeing to the contract).

### Types of Misrepresentation

- **Innocent Misrepresentation** is when a person makes a statement without knowing that it is false nor should they have known it is false.
  - To prove this, one must show that:
    - (1) The representor neither knows nor should have known
    - (2) It induced the contract
  - The remedy for innocent misrepresentation is **rescission** (i.e., void the contract).
- **Negligent Misrepresentation** is when a person makes a statement carelessly or unreasonably that is false.
  - To prove this, one must show:
    - (1) It was a false statement
    - (2) The false statement was made in an unreasonable or careless manner
    - (3) The false statement induced the contract
  - The remedies for negligent misrepresentation are rescission and damages in tort.
- **Fraudulent Misrepresentation (Deceit)** is when a person makes a statement that they know to be false or have no reason to believe it is true.
  - Deceit can also be a result of recklessness.
  - To prove this, one must show:
    - (1) The false statement was made without belief in its truthfulness (i.e. a lie)
    - (2) It was made with intent to induce the contract
    - (3) It induced the contract
  - The remedies for deceit are rescission (i.e., contract is voided and parties return to their pre-contractual positions) and damages in tort.