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Contracts Fall 2014: Memo on Fall Break Optional Essay Assignment

The Prompt:

Please discuss the following statement in 2 pages or less with examples from the course materials to illustrate your answer: “Freedom of contract has two distinct dimensions: The first – freedom from contract – stipulates that persons should not have contractual obligations imposed on them without their consent. The second – freedom to contract – stipulates that persons should have the power to alter by consent their legal relations... a moral theory of promising, standing alone, would have courts enforcing purely moral commitments, which is tantamount to legislating virtue. Such an open-ended rationale leads to serious problems for the value of freedom of contract... it commits courts to enforcing promissory commitments that the parties themselves may never have contemplated as “contractual” or legally enforceable, thereby undermining the value of freedom from contract.”

Randy E. Barnett, *Some Problems With Contract as Promise*, 77 *Cornell L. Rev.* 1022, 1023-5 (1992)

Thoughts on an Essay on this Topic Based on the Material Covered Before the Break

The quotation suggests that Freedom of Contract involves two ideas: freedom to contract (that people should be able to alter their legal relations by contract, and that courts should not invalidate contracts) and freedom from contract (that people should not have contractual obligations imposed on them). The quote suggests that there may be two sets of problem: that courts don't enforce contracts and that courts enforce problems that involve merely moral obligations rather than contractual commitments. But although both aspects of freedom of contract are described in the quote there is much more in the quote about freedom from contract (because I edited the text that way and because we have covered more material that relates to this issue).

The prompt asks you to discuss the statement. It is therefore a very open ended question. This sort of open ended essay question is more complicated to deal with than a hypothetical because you have to find a structure for your answer. When you are answering a hypothetical problem the facts of the question help you to structure your answer and you don't have that structure here. So you need to think a bit about organizing your thoughts to respond to the essay prompt.

We have seen some examples in the course materials of circumstances where courts have imposed liability on a party who had made a promise they “may never have contemplated as “contractual” or legally enforceable.” The doctrine of promissory estoppel (Restatement 2d. §90, *Feinberg v Pfeiffer*, *Ricketts v Scothorn*, *D&G Stout v Bacardi*, *Wright v Newman*, *Cohen v Cowles Media*) is one context in which we can see what the courts are doing as enforcing promises which are not really contractual. So an essay responding to this prompt could discuss

the advantages and disadvantages of promissory estoppel.

These promissory estoppel cases really involve a court finding detrimental reliance as a substitute for consideration as the basis for enforcing a promise. I think it would be a good idea to think about what function consideration performs in contract law and how promissory estoppel relates to this issue. I think there are some different possibilities. Sometimes parties may intend to change their legal rights and obligations and fail to ensure that they adopt the formalities necessary to effectuate their intent (Feinberg v Pfeiffer feels like a good example of this sort of case to me, also Ricketts v Scothorn). But other cases move further in the direction of providing a remedy for injustice where there is no issue as to failure of formalities (e.g. D&G Stout v Bacardi). If you trust courts to make good decisions about fairness then you may have no problem with this approach. But it makes it harder for people to predict how their actions will be interpreted by a court.

I think (especially given the 2 page limit) that a fine answer to the question could be based only on the promissory estoppel cases but there are other examples you could use. For example we read some cases where courts have refused to enforce promises on the basis that there was only a moral obligation (e.g. Mills v Wyman, Harrington v Taylor but contrast Webb v McGowin). And some of the cases involving families that have been referred to in the notes suggest a reluctance to enforce certain family promises (eg Balfour v Balfour, Hewitt v Hewitt but contrast Pyeatte v Pyeatte).

It would also be possible to answer a question like this using more of the material we have covered. As to the freedom to contract issue we might look for examples of cases where courts try to enforce bargains the parties have reached even if they don't fit neatly into ideas of consideration, for example (e.g. Dyer v National By-products, Lakeland v Columber). We haven't seen examples really of courts refusing to enforce agreements which are contractual on the basis that they conflict with public policy, although we have noticed that contracts to perform illegal acts are unlikely to be enforced, and we know that minors lack capacity to enter into contracts. Thus there are some limits on who is able to contract validly and the possible subject matter of contracts. Unconscionability (which we have discussed since the break) is another basis on which courts refuse to enforce contracts.

What I am looking for in an essay like this is an organized discussion of the prompt using examples of material from the course to illustrate your answer. I am not looking for vague statements with no support- make your essay concrete with examples. The question has a normative component - it isn't just about what the rules are but what they should be. So what courts say about the need to ensure fairness etc is relevant to an answer but I would also like to read about your opinions. I am interested in seeing you show me that you have been thinking about the material we have been reading. A hypothetical problem allows me to see how well you can apply legal rules to a set of facts. A question like this allows me to see whether you have been thinking about what is going on in contract law to the extent that we can tell from the materials we are studying. It is a big picture type of question (but with specific, concrete examples). Although I have my own views on the issues raised by this question your grade will not depend on whether you share my views. I would like to see an organized thoughtful response that uses the course materials to support an argument.