

Costello v. Grundon, 625 F. 3d 342 - Court of Appeals, 7th Circuit 2010

Restatement (First) of Contracts § 598 (1932), which sets forth the general rule that a party to an illegal bargain cannot recover damages for breach of contract. It is also consistent with the Restatement (Second) of Contracts § 178 (1981), which provides: “A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable”

No private right of action under a statute is necessary to assert a violation of that statute as an affirmative defense. See, e.g., *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1982) (allowing defense under § 8(e) of the National Labor Relations Act where defendant had no private right of action to enforce the statute); *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 566 (1961) (holding conflict of interest on the part of a government official who participated in contract negotiations in violation of federal law rendered contract unenforceable); *E. Bement & Sons v. Nat’l Harrow Co.*, 186 U.S. 70, 88 (1902) (assuming that only the Attorney General could bring an action to enforce the Sherman Act, yet allowing the defense that the contract was illegal under the antitrust laws); *Rush-Presbyterian-St. Luke’s Med. Ctr. v. Hellenic Republic*, 980 F.2d 449, 455

(7th Cir. 1992) (noting that illegality may be a defense to contract even though statutes that make conduct illegal ordinarily prescribe public remedies); *Johnston v. Bumba*, 764 F. Supp. 1263, 1279 (N.D. Ill. 1991) (allowing defendant to assert as a defense to an action on a promissory note that the securities were sold in violation of securities laws), *aff'd* on other grounds, 983 F.2d 1072 (7th Cir. 1992). *Kaiser Steel* explains:

Refusing to enforce a promise that is illegal under the . . . laws is not providing an additional remedy contrary to the will of Congress. A defendant proffering the defense seeks only to be relieved of an illegal obligation and does not ask any affirmative remedy based on the . . . laws. “[A]ny one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action.” 455 U.S. at 81 n.7 (quoting *E. Bement & Sons*, 186 U.S. at 88).

Recognizing that only the National Labor Relations Board could provide affirmative remedies for unfair labor practices, *id.* at 86, the Court held that “a court **may not** enforce a contract provision which violates [federal law].” *Id.*; see also *id.* at 83 (“[A] federal court has a duty to determine whether a contract violates federal law before enforcing it.”). By refusing to enforce a contract that violates a statute, the court serves the public interest of deterring contracts in violation of the law and promoting adherence to the

law. Id. at 77; see also N. Ind. Pub. Serv. Co. (NIPSCO) v. Carbon Cty. Coal Co., 799 F.2d 265, 273 (7th Cir. 1986) (refusing to enforce a contract that violates a statute deters behavior forbidden by that statute). Accordingly, the Court held that the defendant was entitled to raise and have adjudicated its defense that the agreement sued on was void and unenforceable as in violation of federal law. Kaiser Steel, 455 U.S. at 77-86.