

CONSIDERATION

Consideration

- Noun
- Something of value to either the promisee or the promisor of a contract (usually cash, but also property, a promise to do something or not to do something, and so on) that is given or will be given by the promisee to the promisor in exchange for a performance or a promise of a performance by the promisor. For the contract to be enforceable, the consideration must be something that the promisee, to his or her detriment or loss, is giving up, or something that benefits the promisor. -

<http://law.yourdictionary.com/consideration>

- Some right, interest, profit or benefit accruing to the one party of a contract, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

<http://www.duhaime.org/LegalDictionary/C/Consideration.aspx>

What Is Consideration?

- Consideration is the difference between a promise and a contract. It is how, as a society, we determine that a party is serious about exchanging legal rights and not simply making an empty statement.
- To be valid consideration, you must have three elements:
 - 1. The Promisee Must Incur Legal Detriment - this means the promisee must agree to do something he is not already obligated to do, or refrain from doing something he is entitled to do.
 - 2. Detriment Must Induce the Promise - the objective of incurring the detriment must be entering into the agreement.
 - 3. The Promise Must Induce the Detriment - Mutuality - the offeree must know of the promise
- "Bargained for" Objectively Understood - the fact that you have not read the terms of the click wrap license does not mean you did not "bargain for" them.

Adequacy of Consideration

- General rule - Courts do not review adequacy of consideration.
 - *Haigh v. Brooks*, 113 Eng Rep. 119 (K.B. 1839)
- Exception - Attorney Retainer Agreements
- Economic inadequacy of consideration does not defeat contract formation, but may be evidence of:
 - Fraud
 - Duress
 - Undue Influence
 - Over reaching
 - Mistake
 - That detriment was not, in fact, bargained for

Conditions to Gift Distinguished

- Unilateral contract versus condition to gift
- 1. If it rains tomorrow, I will give you \$10
- 2. If you refrain from drinking until you are 25, I will give you \$5,000

Of Sham and Nominal Consideration

- Sham1:
- “In consideration of \$10 and other valuable consideration”
 - What if \$10 is never paid? Does it matter if there is no additional consideration? How does Parol Evidence Rule fit in?
- Sham 2:
- Parent & Child agreement - “In exchange for your paying me \$10, I agree to deed you my \$450,000 house within the next 70 years.
- Is agreement binding? Two views: 1) No, because to do so undermines the concept of consideration; and 2) Yes, because we need a mechanism to make gratuitous promises binding, and consideration is consideration

Mixture of Gift and Bargain

- Where there is a mix of gift and bargain, the inclusion of a gift motive generally will not defeat the contract. (I agree to sell my \$35,000 car to the man who saved my life for \$10,000)
- Surrender of an Invalid Claim as Detriment
- Surrender of a claim is only valid consideration if there is at least a good faith dispute about its validity.
- Same rule applies to forbearance to assert an invalid claim
- An invalid claim is one with a defense to it (performance, void or voidable contract, statute of limitations, etc.)
- Distinction between an invalid claim and a worthless claim (judgment against a judgment-proof debtor, e.g.)

Pre-Existing Duty Rule

- Performance of an act which a party is already contractually bound to perform does not constitute valid consideration for a new promise. Example: a party's offer of a performance already required under an existing contract is an insufficient consideration for modification of that contract.
- These include:
 - Duties Imposed by Law
 - Duties Imposed by Contract
- Many cases require only the slightest of duties to satisfy this rule
- Some jurisdictions allow contractual modification without new consideration if there is an unforeseen change in circumstances. Must be in good faith.

Pre-existing Duty Rule: Three-Party Cases

- Can a preexisting duty from A to B serve as consideration for a new agreement between A and C?
- Classical view - No, a pre-existing duty is a pre-existing duty
- Modern view - Yes, even though A had the duty, C had no basis to enforce it prior to agreement, so a benefit has been conferred. Also, less likelihood of duress or unfair pressure.
- Part Payment Cannot Satisfy a Debt
- If there was no dispute as to the original amount of the debt, there is no consideration for the compromise, and so the original amount of the debt stands.
- If there was a good faith dispute as to the original amount of the debt, there is consideration for the compromise, and so the debt is discharged.

Consideration in Bilateral Contracts

- Promise as consideration vs. Promise of Performance as consideration
- Bilateral Contracts and Mutuality of Obligation
- No contract unless there is mutuality, i.e., one party cannot be legally bound to perform unless both parties have provided consideration
- Unilateral Contracts and Mutuality of Obligation
- No mutuality - Offeree is not bound to perform. (Ergo: Unilateral Contract)

Voidable and Unenforceable Promises

- Voidable Promise IS valid consideration - Unless and until voided, parties are both bound.
 - Policy reason - Voidable agreements (i.e. agreements with minors) are usually voidable to protect a specific party. Allowing the agreements to be enforced serves also to protect that party.
- Illusory Promises
- Illusory Promise = Promise whose execution is totally under one of the party's control. You give me \$50 and I will give you this book if I feel like it.
- Illusory Promise is NOT consideration because one side has no true obligation

Consideration Supplied by Implied Promises

- Promises are implied by law (legal fiction) in order to create consideration where none may actually exist.
- *Wood v. Lucy, Lady Duff Gordon*, 222 N.Y. 88 (1917) - Court inferred promise to "act in good faith"
- Are Conditional and Aleatory Promises Illusory?
 - Aleatory promise - Definition: a promise (as to compensate an insured individual for future loss) whose fulfillment is dependent on a fortuitous or uncertain event
 - While the actual requirement to perform is uncertain, the obligation to perform upon certain conditions is definite. So long as the conditions are not solely within a party's own control, there IS consideration.

Requirements and Output Contracts

- Requirements Contract
 - An agreement whereby a buyer assents to purchase for a sufficient consideration (the inducement to enter into an agreement) all the merchandise of a designated type that he or she might require for use in his or her own established business.
- Output Contract
 - An agreement in which one party assents to sell his or her total production to another party, who agrees to purchase it.
- Validity of Requirements and Output Contracts
- Although quantities are undetermined at time of contracting, they are, retrospectively, determinable. Therefore, consideration is not illusory.

UCC 2-306 Output, Requirements and Exclusive Dealings.

- (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
- (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.
- Quantity a Requirements Buyer is Entitled to Demand - Parties must act in good faith
- Diminution or Termination of Requirements - Allowed if occurring in good faith

Choice of Considerations

- Consideration is still valid if a party has a unilateral choice of more than one performances, provided each such choice would constitute valid consideration.
- One Consideration Will Support Many Promises.
- Provided they are between the same two parties in the same agreement, e.g., For \$500, I agree to buy your lamp, your desk and your chair.