Chapter 11
Consideration

Consideration
“In contract law, something of legal value that has been bargained for and given in exchange by the parties.”

The Doctrine of Consideration
“Promises are enforced only where the parties have exchanged something of value in the eyes of the law.”
Legal Value Question

☑ What has “legal value”?

Or another way to ask it:

☑ How can we tell if something has “value in the eyes of the law”?

Legal Value (Answer)

☑ The promisee does or promises to do something he had no prior legal duty to do, or

☑ Refrains from doing (or promises not to do) something he had a legal right to do.

Consideration Example

☑ When Mike is 16, his Mom says “Mike, you’ve been such a good son, I’m going to give you a brand new Porsche 911 on your 18th birthday.”

☑ His 18th birthday comes and she doesn’t buy him a Porsche.

☑ He sues her for the Porsche.

☑ Will he win? Why or why not?
Hamer v. Sidway

In 1869, an uncle promised to pay his nephew $5,000 if he refrained from smoking, drinking, swearing, and playing cards or billiards for money until he was 21.

Nephew did so. Uncle said I’ll pay you in a few years.

The uncle died and his estate refused to pay.

Nephew “transferred his rights” to Mr. Hamer

Mr. Hamer sued the estate.

Legal Value (Answer)

The promisee does or promises to do something he had no prior legal duty to do, or

Refrains from doing (or promises not to do) something he had a legal right to do.

Legal Value Revisited

Another way to look at legal value is it must be either a:

1. Legal benefit to the promisor, or a

2. Legal detriment to the promisee.
**Typical Bilateral Contract**

<table>
<thead>
<tr>
<th>Buyer</th>
<th>Seller</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promises to pay $150</td>
<td>Promises to give used surfboard in exchange</td>
</tr>
<tr>
<td>Buyer’s promise is both a detriment to buyer and a benefit to seller</td>
<td>Seller’s promise is both a detriment to seller and a benefit to buyer</td>
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**Each Promise Must Be Supported by Consideration**

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**Exchanges That Fail to Meet Consideration Requirements**

- Past consideration
- Illusory promises
- Preexisting duties
Past Consideration

- Despite its name, is not consideration at all.
- Because it was not bargained for in exchange, past consideration is not valid consideration.
- “Thanks for fixing my car stereo. I really appreciate it. I’ll tell you what, I’ll give you $100 when I get my next paycheck.”

Kelsoe v. International Wood Products

- What did Carol Kelsoe’s supervisor at International Wood promise her?
- What did the trial court do?
- What did the Supreme Court of Alabama decide? Why?

Illusory Promises

- An illusory promise is one that does not bind the promisor to do anything, e.g.
  - “I promise to buy all the sugar I want.”
  - “I promise to buy your bike for $350 if I feel like it (after looking at it).”
- An illusory promise cannot serve as consideration.
Culbertson v. Brodsky

Did Mr. Brodsky give valid consideration that makes Culbertson’s promise enforceable?

Show of hands

Decision

Discussion

Requirements Contracts

A promise to supply all that another firm requires for a specified period of time

Is it supported by consideration?

Many common law courts said the buyer’s promise was illusory, since they could decide to require zero units.

But with the enactment of the UCC, the law was changed to make requirements contracts enforceable.
Output Contracts

A promise to purchase the entire output of a supplier for a specified period of time (at a specified price per unit.)

Under the common law, the seller’s promise was seen as illusory, or the key term of quantity was seen as too indefinite.

The UCC enforces these contracts for two reasons: 1) Because business people find them valuable, and 2) Because if the seller acts in good faith, his promise could bind.

Preexisting Duties

A promise to perform a preexisting duty, whether public or private, cannot constitute consideration...

...because the promisor already had an obligation to do it.

Examples of preexisting public duties:

- The duty not to commit assault, battery, arson, defamation, etc.
Preexisting Private Duties: The General Rule

✓ Under the common law, an agreement to modify an existing contractual obligation requires some new consideration to be enforceable.
✓ Otherwise, a person could be forced to agree to a change in contract terms that is disadvantageous to them because they have made plans and commitments.

Additional Work

✓ If, on the other hand, the builder offers to finish the house on August 15th if you agree to pay an additional $60,000, then you will be bound to pay the additional $60,000!

Preexisting Private Duties: Exceptions to the General Rule

✓ Unforeseen circumstances
✓ Contract rescission and substitution
**Contract Substitution**

- A contract substitution consists of a *rescission* and a new contract.
- A rescission must meet all the tests of a contract: agreement, *consideration*, legality, and capacity.
- Each party absolves the other party of their remaining promises.
- But what if one party has secretly coerced the other party?

**Modification of contracts under UCC Article 2**

- Under UCC 2-209, an agreement to modify a contract for the sale of goods *requires no consideration to be enforceable*!
- The modification can even be ORAL even though the original contract was WRITTEN!

**Adequacy of Consideration**

- *Adequacy* has a very different meaning than *legally valuable* under the law.
- Courts generally do **not** look at whether the consideration was *adequate* to the promise given.
- They don’t want to second guess the bargaining decisions of the parties.
Adequacy of Consideration: The General Rule

- The courts define adequacy as "the degree to which the consideration is equal in value to the promise or item given."
- Then they very clearly say that consideration need not be adequate as so defined if the two parties have freely agreed to the exchange and if the consideration was the inducement for the promise!

Exceptions to the General Rule on Adequacy of Consideration

- Courts may refuse to enforce disguised gift promises supported by nominal consideration.
- Courts may use inadequacy of consideration as evidence that there was fraud, duress, undue influence, lack of capacity, or unconscionability, and may look elsewhere in the facts for additional evidence.

Preexisting Duty and Agreements to Settle Debts

- An agreement by a creditor to accept less than what was originally agreed upon may be enforceable.
  - Depends on the nature of the debt and whether the loan is past due or not.
- Liquidated debt – a debt that is both due and certain.
Liquidated Debts
✓ A creditor’s promise to discharge a liquidated debt for part payment at or after its due date is **unenforceable** for lack of consideration.
✓ Example: You and your friend Felicity

Citizens Trust Bank v. White
You Be the Judge
✓ Herbert White owed $43,000 on his home mortgage.
✓ White offered the bank a $33,000 cashier’s check and a promise of another $2,000 to postpone the foreclosure.
✓ White paid the additional $2,000, but still owed $5,986.43. The bank foreclosed.
✓ The trial court awarded White $250,000.

Unliquidated Debts
✓ Unliquidated debt: A debt for which there exists a good faith dispute about its existence or amount.
✓ The settlement of an unliquidated debt is called an accord and satisfaction.
✓ The consideration that supports an accord and satisfaction is the rendering of the disputed debt into a **certain** debt of known amount.
Hench v. Taylor

Jim Henches, massage therapist, billed Benjamin Taylor $11,945.86 for:
1. Massage treatments, and
2. Trial preparation for expert witness services for Mr. Taylor
✓ Mr. Taylor’s lawyer sent Mr. Henches a check for $5,243.45 with “final payment” written on it.
✓ Mr. Henches crossed out “final,” wrote “attorney/fee” in its place, cashed the check, and sued for the remaining $6,702.41. Who won?