Welcome to this podcast on Agreements Lacking Consideration: Past Consideration and Moral Obligation brought to you by CALI. I am Professor Jennifer S. Martin.

The topic of this podcast is when agreements are not enforceable as contracts because they are not supported by consideration due to the fact that the promise is based on past action or a moral obligation. In this podcast, we will look at common situations involving past consideration, including the exception provided under the material benefit rule.

We don’t enforce all agreements as contracts just because the parties mutually assented. In forming a contract, we require a bargain comprised of a manifestation of mutual assent and consideration or some other justification for enforcing the promises. For purposes of this podcast, presume that the mutual assent element is satisfied. We will focus on the consideration element of contract formation. Consideration requires a bargained-for exchange, which is established when the promisor gives the promise or performance in exchange for the return promise or performance given by the promisee. In turn, the return promise by the promisee is given in exchange for the promisor's promise. The word “consideration” is often used as a justification for enforcing a promise. A promise that is made for a benefit already received, so-called “past consideration”, however, is not consideration due the lack of a bargained-for exchange. Similarly, a promise that is based on some form of “moral obligation” is not consideration because it also lacks a bargained-for exchange.

Suppose I say to Aaron, “Will you watch my dogs for $50 per day for 3 days?”, and Aaron replies, “Sure.” The consideration in this contract would be that I am seeking the promise of dog watching for three days from Aaron in exchange for my promise of $50 per day totaling $150. Aaron is seeking my promise of the $150 in exchange for his promise of watching the dogs for three days. On the other hand, suppose I ask my friend, Francis, to watch the dogs for three days while I am on a trip and he agrees. Then, when I return, I promise to pay him $150 for having watched the dogs. There is no consideration here because there is no bargained-for exchange. When Francis promised to watch the dogs, he was not seeking a promise of payment from me in exchange for the dog watching. As such, my later promise to pay for the dog watching is past consideration and my promise to pay Francis the $150 would not be enforceable.

In the well-known case of *Mills v. Wyman*, 20 Mass. 207 (1825), Levi Wyman, the 25-year-old son of Seth Wyman, fell ill and was cared for by Daniel Mills. After caring for Levi, Mills wrote to Seth Wyman, who promised to pay the expenses incurred by his son. Later, Seth Wyman did not pay Mills and Mills brought suit for “assumpsit” (which is essentially an old form of action for recovery for damages for non-performance of a promise or contract). The lower court found there was no consideration for the promise and the Supreme Judicial Court of Massachusetts affirmed. The court noted that the breaking of promises in such cases is “a violation of moral duty.” While a parent might have some duty to pay for the necessaries of a minor child, a parent is not legally obligated to pay the expenses of adult children. Where there is no previous request of the father to care for the adult son, the later promise to pay the debt is not enforceable. In essence, the promise of the father made after Mills provided the care of the son was a promise based on past consideration and was not enforced due to the lack of consideration. Likewise, any moral obligation of Seth Wyman to pay Mills for the care of his son was insufficient to support enforcement.

In *Mills*, the benefit conferred was made to the adult son of Seth Wyman. Sometimes, a promisor making such a promise has done so based upon a benefit received by the promisor in the past. Restatement (Second) of Contracts § 86 validates these types of promises, finding them enforceable so long as justice requires. This approach is commonly referred to as the “material benefit rule.” The rule operates to prevent unjust enrichment where it is applicable and permits the claimant to recover the value of the benefit conferred. The material benefit rule would not change the result in *Mills v. Wyman* as the benefit was not conferred on Seth Wyman, the person making the promise.

A common use of this rule is where there is a promise made when a benefit is conferred by mistake. For instance, Owner hires Landscaper to provide lawn services at her home at the cost of $100. Landscaper provides the requested lawn services, but mistakenly performs them on Neighbor’s property. Neighbor later promises to pay Landscaper $100 for the lawn services. There would not be consideration for Neighbor’s promise because it was based upon past consideration. Moreover, the promise would not be enforced due to moral obligation. Nor would there likely be a claim for restitution without the promise, for the benefit was conferred “officiously,” that is, without the consent of Neighbor. However, Neighbor’s promise is binding under the material benefit rule of Restatement § 86.

Another use of the material benefit rule is to validate promises to pay for prior emergency services. The leading example of this is the case of *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935). In this case, Webb worked at McGowin’s lumber company and was seriously injured while dropping a pine block from an upper floor to the mill’s floor below. Webb’s injury occurred because he fell while trying to save McGowin from injury. In consideration of the act of saving him from injury, McGowin promised Webb $15 every two weeks for the rest of Webb’s life. McGowin paid Webb while he was alive, but the payments were discontinued after McGowin’s death. After the payments stopped, Webb brought an action in assumpsit. The lower court entered a non-suit. On appeal, the court reversed and remanded, holding that Webb conferred a material benefit on McGowin through his act of saving him from injury and McGowin was “morally bound” to pay Webb. While the saving of McGowin was done without his request, Webb had preserved the life of McGowin and this was a “sufficient consideration” for the later promise to pay the $15 bi-weekly. As such, the promise was enforceable.

As another example, suppose that my dog, Porter, has escaped from the back yard of our home. Aaron finds Porter, keeps him and feeds him. Aaron is not able to reach me for two days, but eventually does and notifies me that he has Porter and that I can come and collect him. I promise to pay Aaron $80 for having taken care of Porter (an amount that is the rate paid for pet boarding services). My promise to Aaron would be based on past consideration, as Aaron has already taken care of Porter. In making my promise of $80, I am not seeking anything in return from Aaron. My promise to Aaron, though, would seem to be enforceable under the material benefit rule, as I have received a benefit from Aaron, the care of Porter, and I promised to pay him $80 for that care. It would seem unjust not to enforce the promise here, but Aaron may only collect the value of the services rendered, here $80. Even if I’d promised Aaron a larger amount, he can only recover the value of the benefit conferred.

It is worth noting that the material benefit rule has no application in terms of enforcing a simple promise where there has been a gift. To illustrate, Parent gives Daughter a new sofa for her apartment while attending graduate school. Daughter later gets a high paying internship and promises to pay Parent $500 for the sofa. Here, the promise of Daughter of the $500 would not be enforceable due to lack of consideration. Daughter’s promise of the $500 would be based on a past benefit of the sofa and her moral obligation is not sufficient to support a promise. Moreover, the material benefit rule would not seem to apply here as the promise of the $500 would not seem to raise issues of unjust enrichment as Parent gave Daughter the sofa as a gift.

Similarly, the material benefit rule has no application to cases covered by the pre-existing duty rule or to promises that are not enforceable due to the statute of frauds. For instance, suppose Aunt promises to rent Niece a room in her home for $400 per month for two years while Niece is attending graduate school and Niece agrees. The fair market of the rental is $600 per month. Niece later promises to pay Aunt $500 per month for the room rental. The Niece’s promise, as modified, would not be enforceable under the pre-existing duty rule due to the lack of new consideration for the modification. Moreover, the material benefit rule would have no application and does not override the pre-existing duty rule. Likewise, the material benefit rule has no application in a defense based on the statute of frauds if Aunt terminates the lease prior to the expiration of the two-year time.

At this point, you should be able to explain that in order for there to be a contract, there must be consideration or another justification for enforcing the agreement. You should be able to explain and apply the rule for bargained-for exchange as requiring a promise or performance sought by a party in exchange for the other party’s own promise or performance where the exchange is made on a reciprocal basis. You should be able to explain and apply the rule that promises that are based on a benefit previously received are not supported by consideration but are referred to as having “past consideration” or “moral obligation.” You should be able to identify situations where there is no consideration because of the past nature of the benefit, but that the promise may nevertheless be enforceable under the material benefit rule where a promise is made after the promisee conferred a benefit on the promisor and it would be unjust not to enforce the promise.

I hope you’ve enjoyed this podcast on Agreements Lacking Consideration: Past Consideration and Moral Obligation.

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