Welcome to this podcast on The Basics of Consideration and the Bargain Theory brought to you by CALI. I am Professor Jennifer S. Martin.

The topic of this podcast is when agreements are enforceable as contracts because they are supported by consideration. In this podcast, we will look at common descriptions of consideration, including benefit-detriment and “bargained-for exchange.” We will look at traditional issues of consideration, as well as common disputes involving unequal bargains, nominal or sham consideration, and past consideration.

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 aspect is satisfied. We will focus on the consideration element of contract formation. Consideration is generally used to indicate that each promisee “gave consideration” for the promise or performance of the promisor. The word “consideration” is often used as the justification for enforcing a promise, though sometimes the word “consideration” indicates promises that are not sufficient to enforce a promise, such as when we speak of “past consideration,” “illegal consideration,” “sham consideration” and the like.

Historically, courts described consideration as a benefit given or detriment suffered in exchange for the promise or performance received. In the well-known case of *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891), an uncle while at a large family gathering, and later in letters, promised $5000 to his nephew on his 21st birthday if the nephew did not drink, smoke, swear or gamble until that age. The nephew so promised and refrained from the stated activities. Did the uncle benefit from this promise? It is possible that the uncle was benefited in that he wouldn't have to worry so much about his young nephew or that the family name would be protected. However, both of these benefits are unclear from the evidence in the case. The court, however, enforced the promise and found that the lack of clear benefit to the uncle was not fatal to the claim on the contract when there was a detriment to the nephew in forbearing his legal right to pursue the behaviors the uncle wanted him to quit.

The modern approach to consideration is set forth in the Restatement (Second) of Contracts § 71, which describes consideration as a “bargained-for exchange.” In order for there to be consideration, “the promise or performance must be bargained for.” The bargained-for exchange 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. Said another way, why did the promisor make the promise? To get the promise or return performance of the promisee. Why did the promisee give the promise or performance? To get the promise or return performance of the promisor. The purported consideration must be provided by both parties on a reciprocal basis. The presence of a bargained-for exchange by only one party is not sufficient; the bargained-for exchange by both parties is necessary for there to be consideration. However, the parties may make a bargain for the benefit of a third party.

Recall that a bargained-for exchange can consist of either a promise or a performance. Let’s consider hypothetical #1. Suppose I say to Aaron, “My dog Angus has wandered off, I will give you $50 if you find him and bring him back to me,” and Aaron replies, “Sure.” The consideration in this contract would be that I am seeking the performance of Aaron finding Angus in exchange for my promise of $50 if he finds the dog and returns him to me. As such, there is a bargained-for-exchange, and, thus, consideration here. The consideration here is a performance for a promise, even where I have not performed my promise at the time of the making of the contract.

Let’s consider hypothetical #2. Suppose I say to Aaron, “Will you agree to watch my dogs next week 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 the dog watching for three days next week 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. As such, there is a bargained-for exchange, and, thus, consideration here. The consideration here is a set of promises even though neither Aaron nor I have performed at the time of the making of the contract. If one of us later does not perform, that does not make it not a contract; it makes it that a contract that was breached.

While an exchange of promises can be consideration, a promise to make a gift is not consideration because gift promises do not have a bargained-for element. This is the case even if there were some promise or performance in the past, as past consideration also does not support a present bargained-for exchange. The earlier hypotheticals #1 and 2 can be compared with another different hypothetical #3 where the promise to pay comes later. Suppose Aaron, a neighbor, watches my dogs for three days as a favor. Afterwards, I am thankful for the dog watching and promise to pay Aaron $150. There is no consideration here because there’s no bargained-for exchange. Aaron watched the dogs gratuitously. Aaron was not seeking a promise of payment from me in exchange for the dog watching. My promise to pay is an example of past consideration, which is one where I am not seeking a promise or performance from Aaron. It can’t be bargained-for since he has already done the dog watching before I made my promise.

Recall that consideration can be for the benefit of a third party. Consider hypothetical #4. Parent promises to guarantee payment of rent to Landlord for Daughter, who is attending graduate school, if Landlord agrees to rent to Daughter. There is consideration here because Parent is seeking the promise of Landlord to rent to Daughter in exchange for Parent’s promise to guarantee the rent payment. Landlord is seeking the promise of Parent guaranteeing the rent in exchange for its own promise to rent to Daughter.

Knowing that a contract requires consideration, we might wonder whether unequal exchanges can be consideration. The answer is yes, so long as the consideration is not a sham or nominal. In the case of *Basatkis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App. 1949), the Texas Court of Appeals considered an agreement where during World War II in war-torn Greece, Eugenia Demotsis promised to pay George Basatkis $2000 plus 8% interest after the war in exchange for 500,000 Greek drachmae given to her at the time of the agreement. Demotsis needed the money for food, and made the bargain even though the 500,000 drachmae had an exchange value of approximately $25 due to the wartime conditions. Why would Demotsis agree to get 500,000 drachmae and to pay Basatkis $2000? The situation in Greece was dire at the time of the bargain, so the decision to accept 500,000 drachmae was unequal, but done so out of necessity. The court enforced the promises despite the large difference in value, finding that adequacy of consideration generally has no bearing on enforcement. Parties may, and often do, make contracts with different or uncertain values. Courts will not inquire into the adequacy of consideration. It is enough that the parties bargained for the exchange, as Demotsis and Basatkis did. Of course, an unequal bargain may be a clue that there is some defense to formation, but it’s not a problem of consideration.

Let’s consider hypothetical #5. Alum promises to pay School $50,000 if School creates a garden and names the garden after Alum. There is consideration for the exchange here as Alum has sought the naming of the garden in exchange for the $50,000 and School has sought the $50,000 in exchange for the naming of the garden. It does not matter if the values exchanged are unequal or unknown. There is consideration here.

Compare this outcome with hypothetical #6. Alum promises to pay School $50,000 if School writes a thank you letter to Alum. It is doubtful that there’s consideration here in the absence of some indication that the letter was actually bargained for, rather than being a sham or nominal consideration. While it does not matter if the values exchanged are unequal or unknown, the facts indicate that the parties did not bargain for the supposed consideration, the letter, in this case.

Before we conclude, let’s look at one last well-known case, *Schnell v. Nell*, 17 Ind. 29 (1861). In *Schnell*, Theresa Schnell died without individual property because all her property was jointly owned with her husband, Zach. Despite having no assets, her will promised to pay three named beneficiaries, including Nell, $200 each. Zach signed an agreement in which he agreed to pay each of the three beneficiaries the $200. As consideration for Zach’s promise, the agreement recited: (i) that Theresa was a “dutiful and loving wife” and the “love and respect” he had for his wife; (ii) the promise of the beneficiaries to pay 1 cent to Zach and (iii) the beneficiaries’ promise not to bring a claim against Theresa’s estate. The court ruled that there was no consideration for Zach’s promise to pay Nell and the others the $200. First, the love and affection and contributions of Theresa were, at most, past consideration and not given in exchange for the $200 promises. Second, while courts don’t traditionally inquire into the adequacy of consideration, the promise of 1 cent cannot be consideration for Zach’s promise to pay $200 as the doctrine of adequacy does not apply to exchanges of money that are fixed in value. Third, the beneficiaries’ promise to abstain from bringing suit against Theresa’s estate is not consideration where the estate had no property, so any claim against the estate would be worthless.

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 that traditionally courts employed a benefit-detriment test to evaluate whether promises were supported by consideration, but most modern courts evaluate whether there is a bargained-for exchange. 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 present on a reciprocal basis. You should be able to identify situations where there is no consideration because there is a promise for a gift, past consideration, or nominal or sham consideration. Finally, you should be able to recognize that courts do not typically inquire into the adequacy of consideration, so bargains of unequal value are enforceable and not lacking consideration.

I hope you’ve enjoyed this podcast on The Basics of Consideration and the Bargain Theory.

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