Instructor Manual

Miller, Business Law Today – Comprehensive Edition: Text and Cases 13e 2022, 9780357634783; Chapter 12: Consideration

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# Purpose and Perspective of the Chapter

The first concept students should understand about consideration is that it means something of *legal* value. They may find it difficult to understand that a promise has legal value as consideration, distinct from the *economic* value (if any) of the thing promised.

The thing of legal value may be goods, money, performance, or a return promise. If it is performance, that performance may be an act (other than a promise), forbearance (refraining from doing something that one has a legal right to do), or the creation, modification, or destruction of a legal relation.

The second concept that should be explained is that consideration must be bargained for. Performance or a promise is bargained for if the promisor seeks it in exchange for his or her promise, and the promisee gives it in exchange for that promise. It is not enough that the promise induces the conduct of the promisee, or that the conduct of the promisee induces the making of the promise. They must induce each other, or the bargained-for exchange element does not exist.

Cengage Supplements

The following product-level supplements provide additional information that may help you in preparing your course. They are available in the Instructor Resource Center.

* Transition Guide (provides information about what’s new from edition to edition)
* Test Bank (contains assessment questions and problems)
* Solution and Answer Guide (offers textbook solutions and feedback)
* PowerPoint (provides text-based lectures and presentations)
* Guide to Teaching Online (provides technological and pedagogical considerations and resources for teaching online)
* MindTap Educator Guide (describes assets in the MindTap platform with a detailed breakdown of activities by chapter with seat time)

# Chapter Objectives

The following objectives are addressed in this chapter:

1. Define consideration.
2. Discuss the good-faith requirements for contracts.
3. Discuss the concept of sufficiency of consideration.
4. Identify the ideal conditions for achieving accord and satisfaction by use of an instrument.
5. Identify when an agreement is enforceable under the doctrine of promissory estoppel.

# Key Terms

**Accord and satisfaction:** a common means of settling a disputed claim, whereby a debtor offers to pay a lesser amount than the creditor purports to be owed.

**Consideration:** the value given in return for a promise or performance in a contractual agreement.

**Covenant not to sue:** an agreement to substitute a contractual obligation for another legal action based on a valid claim.

**Estopped:** barred, impeded, or precluded.

**Forbearance:** the act of refraining from an action that one has a legal right to undertake.

**Liquidated debt:** a debt the amount of which has been ascertained, fixed, agreed on, settled, or exactly determined.

**Past consideration:** something given or some act done in the past, which cannot ordinarily be consideration for a later bargain.

**Promissory estoppel:** a doctrine that can be used to enforce a promise when the promisee has justifiably relied on the promise, and when justice will be better served by enforcing the promise.

**Release:** an agreement in which one party gives up the right to pursue a legal claim against another party.

**Rescission:** a remedy whereby a contract is canceled and the parties are returned to the positions they occupied before the contract was made.

**Unliquidated debt:** a debt that is uncertain in amount.

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# What's New in This Chapter

The following elements are improvements in this chapter from the previous edition:

* **1 New Case:**
  + *Cincinnati Reds LLC v. Testa* (2018) – On whether a Major League Baseball team receives consideration from fans in exchange for promotional items that the fans are given because they attend a game.
* **Updated Managerial Strategy:** *Creating Liability Waivers That Are Not Unconscionable*, by adding new case example from 2020 and another from 2019

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# Chapter Outline

*In the outline below, each element includes references (in parentheses) to related content. “PPT Slide #” refers to the slide number in the PowerPoint deck for this chapter (provided in the PowerPoints section of the Instructor Resource Center). Introduce the chapter and review objectives for Chapter 12 (PPT Slide 3).*

1. **12-1 Elements of Consideration** (PPT Slides 5-10)
   1. **Legally Sufficient Value**
      1. **Consideration** usually is defined as the value given in return for a promise. Often, consideration is broken down into two parts:
         1. Something of *legally sufficient value* must be given in exchange for the promise, and
         2. There must be a *bargained-for exchange*.
      2. To be legally sufficient, consideration must be something of value in the eyes of the law. The “something of legally sufficient value” may consist of any of the following:
         1. A promise to do something that one has no prior legal duty to do.
         2. The performance of an action that one is otherwise not obligated to undertake (e.g., providing accounting services).
         3. The refraining from an action that one has a legal right to undertake (i.e., a **forbearance**).
            * ***See Landmark in the Law – Hamer v. Sidway (11291)***
      3. ***Knowledge Check Activity (1) PPT Slide: 1 minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of the elements of consideration. After answer is provided, review with students all of the required elements of consideration.*
      4. Consideration in bilateral contracts normally consists of a promise in return for a promise.
         1. In contrast, unilateral contracts involve a promise in return for a performance.
            * **Example 12.1**
   2. **Bargained-For Exchange**
      1. The second element of consideration is that it must provide the basis for the bargain struck between the contracting parties.
         1. The item of value must be given or promised by the promisor in return for the promisee’s promise or performance.
         2. This element of bargained-for exchange distinguishes contracts from gifts.
            * ***See* Case 12.1: *Cincinnati Reds, L.L.C. v. Testa***
            * ***See* Case Example 12.2: *Thomas v. Archer***
   3. **Adequacy of Consideration**
      1. Adequacy of consideration concerns the fairness of the bargain.
      2. **The General Rule –** Under the doctrine of freedom of contract, courts leave it up to the parties to decide what something is worth, and parties are usually free to bargain as they wish.
      3. **When Voluntary Consent May Be Lacking –** A large disparity in the amount or value of the consideration exchanged may raise a red flag for a court to look more closely at the bargain.
         1. Shockingly inadequate consideration can indicate that fraud, duress, or undue influence was involved.
         2. **Example 12.3**
2. **12-2 Agreements That Lack Consideration** (PPT Slides 11-15)
   1. **Pre-Existing Duty**
      1. A promise to do what one already has a legal duty to do does not constitute legally sufficient consideration.
         1. **Example 12.4**
      2. **Unforeseen Difficulties –** If during performance of a contract, extraordinary difficulties arise that were totally unforeseen at the time the contract was formed, a court may allow an exception to the rule.
      3. **Rescission and New Contract –** The law recognizes that two parties can mutually agree to rescind, or cancel, their contract, at least to the extent that it is executory.
         1. **Rescission** is the unmaking of a contract so as to return the parties to the positions they occupied before the contract was made.
   2. **Past Consideration**
      1. Promises made in return for actions or events that have already taken place are unenforceable.
         1. These promises lack consideration in that the element of bargained-for exchange is missing**. Past consideration** is no consideration.
            * **Spotlight Case Example 12.5: Blackmon v. Iverson**
            * **Case 12.2: Baugh v. Columbia Heart Clinic, P.A.**
   3. **Illusory Promises**
      1. If the terms of the contract express such uncertainty of performance that the promisor has not definitely promised to do anything, the promise is said to be illusory
         1. ***See* Examples 12.6 and 12.7**
         2. ***See* Exhibit 12-1 – Examples of Agreements That Lack Consideration**
3. **12-3 Settlement of Claims** (PPT Slides 16-21)
   1. **Accord and Satisfaction**
      1. In an **accord and satisfaction**, a debtor offers to pay and a creditor accepts a lesser amount than the creditor originally claimed was owed.
         1. The accord is the agreement. In the accord, one party undertakes to give or perform, and the other to accept, in satisfaction of a claim, something other than that on which the parties originally agreed.
         2. Satisfaction is the performance that takes place after the accord is executed.
      2. **Liquidated Debts –** If a debt is liquidated, accord and satisfaction cannot take place.
         1. A liquidated debt is one whose amount has been ascertained, fixed, agreed on, settled, or exactly determined.
            * **Example 12.8**
      3. **Unliquidated Debts – An unliquidated debt is the opposite of a liquidated debt.**
   2. **Release**
      1. A **release** is a contract in which one party forfeits the right to pursue a legal claim against the other party. It bars any further recovery beyond the terms stated in the release.
      2. **A release will generally be binding if it meets the following requirements:**
         1. The agreement is made in good faith.
         2. The release contract is in a signed writing (required in many states).
         3. The contract is accompanied by consideration.
            * **Example 12.9**
   3. ***Knowledge Check Activity (2) PPT Slide: 1 minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of the requirements of consideration and when a release is valid. After answer is provided, review with students the concepts of consideration, good faith, and when a release will be valid.*
   4. **Covenant Not to Sue**
      1. Unlike a release, a **covenant not to sue** does not always prevent further recovery. The parties simply substitute a contractual obligation for some other type of legal action based on a valid claim.
         1. **Spotlight on Nike: Case 12.3: Already, LLC v. Nike, Inc.**
4. **12-4 Promissory Estoppel (PPT Slides 22-27)**
   1. **Requirements to Establish Promissory Estoppel**
      1. Under the doctrine of **promissory estoppel**, a person who has reasonably and substantially relied on the promise of another can obtain some measure of recovery.
         1. Promissory estoppel allows a party to recover on a promise even though it was made *without consideration*.
         2. Under this doctrine, a court may enforce an otherwise unenforceable promise to avoid an injustice that would otherwise result.
      2. If the elements of promissory estoppel are satisfied, a promise may be enforced even though it is not supported by consideration. The promisor will be **estopped** from asserting lack of consideration as a defense.
   2. ***Knowledge Check Activity (3) PPT Slide: 1 minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of promissory estoppel. After answer is provided, review with students when promissory estoppel applies and the requirements necessary for it to apply.*

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# Discussion Questions

You can assign these questions several ways: in a discussion forum in your LMS; as whole-class discussions in person; or as a partner or group activity in class.

1. **Discussion – Legally Sufficient Value ([12-1 Elements of Consideration], PPT Slides 5-10). Duration 20 minutes.**
   1. **What is consideration?** 
      1. Consideration is the inducement exchanged to enter a contract. It must be (1) legally sufficient, and (2) part of a bargained-for exchange.
   2. **In most circumstances, parties are free to make whatever promises they wish, but only those promises made with consideration may be enforced as contracts. What is the purpose of this requirement?**
      1. Legal rules exist not for their own sake but to further justice and convenience in the business of life. Economic and commercial activities are encouraged by giving legal protection to such transactions (i.e., exchanges) and not to gratuitous promises, which may be made without deliberation and may not be relied on.
         1. Also, a gratuitous promise may be made improvidently or its promisee may even show ingratitude. There would not seem to be either a legal or an ethical basis for enforcing such promises.
   3. **The courts generally do not weigh the sufficiency of consideration according to the comparative economic value of what is exchanged. Should they? Why, or why not?** 
      1. The legal sufficiency of a consideration for a promise does not depend on the comparative economic value of the consideration and of what is promised in return, because the parties are deemed to be the best judges of their bargains. A party is presumed to contract for the performance of an act that will afford him or her pleasure, gratify an ambition, please a fancy, or express appreciation of a service another has rendered.
2. **Discussion – Pre-Existing Duties, Past Consideration, and Illusory Promises ([12-2 Agreements That Lack Consideration], PPT Slides 11-15). Duration 15 minutes**
   1. **Can a preexisting duty satisfy the requirements of consideration?** 
      1. Under most circumstances, a promise to do what one already has a legal duty to do is not legally sufficient consideration. Because the application of this rule can be harsh, courts are alert to finding any legal detriment or benefit that may exist, no matter how small or insignificant it may be, so that the promise will be enforceable.
   2. **What are some of the exceptions to the preexisting duty rule?**
      1. *Rescission and new contract.* Rescission is the unmaking of a contract, in which the parties are returned to the positions they held before the contract was made. Preexisting duties are discharged by rescission. Parties can agree to rescind a contract, at least to the extent that it is executory, and they can agree to make a new contract.
         1. In that situation, there are three separate agreements—the initial one, the rescission, and the later contract. When rescission and the making of the new contract occur simultaneously, some courts refuse to enforce the new promise under the preexisting duty rule.
         2. Some courts hold that the new agreement is unenforceable on the ground of insufficient consideration. Other courts consider the timing unimportant, as long as the rescission is express, and hold that the new promises furnish consideration for each other.
         3. Still other courts hold that the original consideration carries over into the new agreement.
      2. *Unforeseen difficulties*. Sometimes there are unforeseen and substantial difficulties that could not have been anticipated when the contract was agreed to. If the parties agree to pay extra compensation for overcoming these difficulties, a court may enforce the agreement. Unforeseen difficulties do not include ordinary business risks.
   3. **What is an illusory promise?** 
      1. If a contract calls for such uncertain performance that the promisor has not really promised to do anything, the promise is illusory. There is no bargained-for consideration.
         1. For example, promising that “I’ll buy from you, unless I buy from someone else” is an illusory promise, because performance is entirely at your discretion. Usually, whether a promise is illusory depends on all the facts, not only on the terms of the agreement.
3. **Discussion – Accord and Satisfaction and Covenant Not to Sue ([12-3 Settlement of Claims], PPT Slides 16-21). Duration 10 minutes.**
   1. **Discuss agreements to settle claims or discharge debts.**
      1. *Accord and satisfaction*. An accord occurs when a debtor offers to pay and a creditor agrees to accept a lesser sum than the creditor claims was originally owed; satisfaction occurs when the accord is executed. The amount of the debt must be unliquidated (i.e., unsettled).
         1. If so, accepting a check on which is written “payment in full” may discharge it. Consideration exists when the parties give up the right to contest the amount in dispute.
         2. In most states, if the debt is liquidated, acceptance of a lesser sum than is owed will not discharge the balance of the debt (because the debtor has a preexisting legal duty to pay the entire debt, and thus gives no consideration to satisfy the obligation of paying the balance to the creditor).
      2. *Release*. A release bars recovery beyond the terms stated in the release.

Generally, a release is binding if: (1) it is secured and given in good faith; (2) it is in a signed writing (not required in all states); and (3) consideration is given (not required under the UCC).

* + 1. *Covenant not to sue.* In a covenant not to sue, the parties substitute a contractual obligation for some other type of action (e.g., agreeing not to sue a tortfeasor if he or she will pay for all damages substitutes a contract for the tort action; if the victim sues in tort, he or she breaches the contract).
       1. Generally, a covenant not to sue is binding if: (a) it is secured and given in good faith; (b) it is in a signed writing (not required in all states); and (c) consideration is given (not required under the UCC).

1. **Discussion – Elements and Application of the Doctrine of Promissory Estoppel ([12-4 Promissory Estoppel], PPT Slides 22-27). Duration 15 minutes.**
   1. **Discuss the doctrine of promissory estoppel.**
      1. The doctrine of promissory estoppel (or detrimental reliance) involves a promise given by one party that induces another party to rely on it to his or her detriment.
      2. When the promisor can reasonably have expected the reliance, the promise will be enforced if injustice cannot otherwise be avoided.
      3. The promisee’s reliance must have been justified, and generally the act must have been of a substantial nature. The promisor is estopped from asserting the lack of consideration as a defense—that’s how the promise is enforced.

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# Additional Activities and Assignments

1. **MindTap** – Why Does Consideration Matter to Me?
   1. Online auto-graded activities connect the upcoming chapter to a real-world scenario designed to pick engagement and emphasize relevance. Consists of 1 multiple choice question in each.
2. **Mind Tap** – Learn It: Sufficiency of Consideration; Illusory Promises, and Settlement of Claims
   1. Get familiar with one of the key concepts from the chapter.
3. **MindTap** – Check Your Understanding: Agreement and Consideration in Contracts
   1. Online auto-graded activity that assesses students’ foundational knowledge of the concepts presented in this chapter. Consists of 10 multiple choice questions.
4. **MindTap** – Case Problem Analysis: Legally Sufficient Consideration
   1. Online auto-graded activity that first walks students through a fact pattern, and then asks them to answer similar questions with slight variations in the fact pattern. Consists of approximately 5 fill-in-the-blank questions.
5. **MindTap** – Brief Hypotheticals: Promissory Estoppel
   1. Online auto-graded activity that presents 5 fact patterns in which students are asked to apply the concepts of the chapter, and to come up with a legal conclusion. Consists of 5 multiple choice questions.

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# Additional Resources

## Cengage Video Resources

* MindTap Quick Lesson Videos:
  + Consideration. Duration 3:07 minutes.
  + Promissory Estoppel. Duration 3:05 minutes.
  + Quasi-Contracts. Duration 2:59 minutes.

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