

## Chapter 2: Enforcing Promises

### A. Introduction

### B. The Consideration Doctrine

#### 1. Bargain Versus Gift

##### a. Hypos

i. After student S performs exceptionally well in class, I say to student S: "As your reward for today's performance, I will give you a copy of my Contracts treatise. Come to my office tomorrow at noon to get it." S shows up the following day, but I refuse to give S the book. Can S enforce the promise?

ii. Assume that the Dean told me that I was insufficiently open to students. Knowing that he would be coming to see me the next day around noon and trying to impress him with my new openness, I make the prior offer. Different result?

iii. What if S had intended to come by the following day at noon to ask a question? That is, S would have come by even if I had not promised her anything?

b. *Hamerv. Sidway* (p. 43): Uncle promises nephew that uncle will pay \$5,000 when nephew turns 21 if nephew refrains from drinking, smoking, swearing, and playing cards and pool for money. Nephew agrees and fully performs. When nephew turns 21, uncle reaffirms the promise but says he will hold the money on account. Uncle dies without making payment, and nephew sues uncle's executor. *Held*, for nephew.

c. *Kirksey v. Kirksey* (p. 132): Brother promises sister that if she will move to his land, he will give her a place to live with her family. She moves, but eventually he makes her leave. She sues to enforce the promise. *Held*, for brother because there was no consideration for brother's promise.

d. RESTATEMENT OF CONTRACTS (2D) §71 (Supplement at 10): This provision emphasizes the "bargain" theory of contract, providing that there is consideration if the promisee gives up a legal right and that relinquishment is bargained for (i.e., desired) by the promisor.

##### e. Essay: Theories of Contract Law (p. 23):

i. The distributive effect of a court's decision is its effect on the relative wealth of the parties to the current law suit. In addition, there can be a distributive effect on nonparties to the extent that new rules are inconsistent with settled expectations.

ii. The instrumental effect of a court's decision is its impact on the behavior of people who modify their future behavior to exploit (or avoid) the court's ruling.

iii. For example, consider someone who is injured by the negligence of a church bus, arguing that the traditional immunity for charitable organizations should be abolished. Note that a legislature can minimize the distributive effect of its decisions by making them prospective only; normally, a court cannot do this.

f. *In Re Greene* (p. 135): A married man agreed to pay \$1,000 per month, rent for four years on an apartment, and transfer an insurance policy to a woman with whom he had had an adulterous relationship. Ultimately he defaulted on the promise, and she sues to enforce. In exchange, she agreed to release him from any claims she might have against him. *Held*, no consideration for the promise because she had no rights against him.

i. The court observed that if the promise had been in exchange for future illegal cohabitation, there would be consideration but the contract would be unenforceable as immoral.

ii. Under *Hamer v. Sidway*, what is the relevant question? Answer: did the promisee believe he was getting a valid release. Is that the focus of RESTATEMENT OF CONTRACTS (2D) §74? No: see §74(1)(b).

iii. Assume that state law provides that one can bring a civil suit against anyone without violating the law. I tell you that I am about to file a suit against you for \$100,000, alleging that you injured me in a car accident. We both know there was no car accident. I offer to save you the cost of a lawyer by settling the suit for \$500, and you agree to pay me in one week. Can I enforce that promise? What if I believe such an accident occurred, though you know that it was some other driver?

iv. What is the role of RESTATEMENT OF CONTRACTS (2D) §74(2)? What is a quit-claim deed?

v. Why is blackmail illegal? Is it fair to say that while individual blackmail contracts are mutually beneficial, the world would be a richer place when blackmail is illegal because it will not encourage nonproductive spying behavior?

2. Adequacy of Consideration:

a. *Batsakis v. Demotsis* (p. 143):

i. Was the defendant's behavior immoral? Should he have given the plaintiff 500,000 drachmae as a gift? Should he have charged her a "fair" price? What is a "fair" price? Other than the market mechanism, can a "fair" price be determined?

(A) Explain that price is used to allocate a scarce resource. Who should get my 500,000 drachme?

(B) Consider the instrumental effect of a decision refusing to enforce the contract.

ii. I am sitting on the beach about to enjoy my McDonald's happy meal when a shipwrecked sailor washes up. She tells me that she has been without food and water for days. I tell her that there is a McDonald's restaurant just up the beach, but she has no money and no strength. I offer to give her my meal in exchange for \$5,000 when she is stronger, and she accepts. Can I enforce the contract? Is this case significantly different from *Batsakis*?

Hypo: A start-up company is formed to improve the web access for government agencies. Just as its initial capital is running out, it gets a major contract conditional on hosting its web site using Windows Advanced Server software (cost = \$200,000) and using Oracle software as the back-end database (cost = \$800,000). In each case all that is provided by the software company is a cd with the software on it (marginal cost to each software company = \$10). The start-up is out of money. If start-up gets the software in exchange for a promise to pay retail in 90 days, is start-up's promise enforceable?

b. *Wolford v. Powers* (p. 145): Defendant is the executor of the estate of Charles Lehman. Lehman asked the plaintiff to name her son after Lehman, in exchange for a note with face value of \$10,000. Plaintiff agreed, and he named his son Charles Lehman Wolford. Is the note enforceable? *Held*, the note is enforceable because Lehman received what he bargained for. Should the court have held that the bargain was an unfair one to Lehman? What does this case say about respecting the autonomy of individuals? The right to be free includes the freedom to make mistakes.

c. Problem 6 (p. 150): See *Haase v. Cardoza* (p. 164).

d. Problem 7 (p. 151):

i. Problem a: Assuming Williams identified the murderer only because she thought she was dying and wanted to punish her attacker, should she therefore not collect the reward. How can you accept an offer you do not know about? But what instrumental consequences might flow from nonenforcement?

ii. Problem b: Answer the final question: under *Hamer v. Sidway* and *Kirksey v. Kirksey*, he got what he bargained for and she (presumably) believed he might be the father. Is more required? Recall Restatement of Contracts §74(1).

C. Promissory Estoppel

1. Introduction

a. Hypos

i. After graduation, you seek employment with a law firm. They offer you \$50,000 per year plus a bonus of \$10,000 after the second year. When the bonus comes due, they refuse to pay. You sue for the bonus. What result?

ii. Same situation except no bonus is promised. After one year, you tell your employer that you intend to leave. They offer a bonus after one more year if you stay. You stay, but they refuse to pay you the bonus. You sue. What result?

iii. Same situation, but you do not threaten to leave. However, after one year they offer you a bonus to be paid the following year, telling you that they know you will be getting other offers. You continue in your employment, but the bonus is not paid. You sue for the bonus. What result?

b. Following the RESTATEMENT OF CONTRACTS 2D, one does not say that reliance is a form of contract but rather that promissory estoppel is a consideration substitute. Do not confuse promissory estoppel with equitable estoppel: the first is a part of the substantive law of contracts while the second is a rule of evidence; i.e., a way to prove something in court.

i. Equitable estoppel is the doctrine that a party, having once asserted a fact to be true, if the other party reasonably relied on that fact, may not subsequently prove the falsity of the fact.

ii. For example, suppose I offer to sell some land that I own, land that has a small building on it. I tell the prospective purchaser that the building lies entirely on the parcel I am trying to sell, so that if she buys the parcel, she will get the building. She buys the parcel, and I subsequently sue her, alleging that the building encroaches on my adjoining parcel. I will not be permitted to prove in court that the parcel encroaches because of my prior representation to the contrary.

iii. The definition of promissory estoppel is in RESTATEMENT OF CONTRACTS 2D §90. Look at each provision.

2. Charitable Subscriptions [omitted]

3. Intrafamilial Promises

a. *Haase v. Cardoza* (p. 164): Husband and Wife put all of their property into a trust, with each having a right of survivorship. When Husband died, his will provided several specific bequests that could not be executed for want of property. Wife partially made good on those specific bequests, but she subsequently admitted they had been greater than she had said and offered to make up the difference at \$50.00 per month. She made 8 payments on this promise and then stopped, and the promisee's assignor sues for full payment. *Held*, no consideration and so the debt is unenforceable.

a. *Ricketts v. Scotharn* (p. 166): Grandfather agreed to pay plaintiff \$2,000 on demand so that she could quit her job. She did so, although she subsequently took other employment with the consent of her grandfather. Grandfather paid interest on the note for many years prior to his death, and he expressed regret that he had been unable to pay more interest. Grandfather's executor refuses to honor the obligation. *Held*, for the plaintiff, that her material and intended reliance on the promise makes the promise enforceable.

b. *In Ricketts*, could we enforce the theory using traditional consideration doctrine? That is, because the grandfather wanted her to quit her job, he got what he bargained for? No: the grandfather did not condition his promise on her agreeing to quit her job or on anything else, so no bargain.

c. This court treats promissory estoppel as a form of equitable estoppel. That is no longer the case. Why does the court confuse the two? How does the law slowly change? See Lon Fuller, *Legal Fictions* (1967).

d. We have seen many cases in a family setting. Is there any thread that helps tie them together? Recall that *In re Green* was a bankruptcy proceeding while most of the others were suits against the promisor's estate. Why was the executor fighting these cases? Why might a court care more about the promisor's desire in a suit against his estate than in a suit against his assets in connection with a bankruptcy proceeding?

e. Problem 7(a) (p. 172): If this promise were enforced, the statute of wills would be gone. No enforcement.

f. A Reconsideration of the Intrafamilial Cases:

| Case                          | Promisor Is Defendant? | Promise Enforced |
|-------------------------------|------------------------|------------------|
| Hamer v. Sidway (p. 43)       | N                      | Y                |
| Kirksey v. Kirksey (p. 132)   | Y                      | N                |
| In re Green (p. 135)          | N                      | N                |
| Wolford v. Powers (p. 145)    | N                      | Y                |
| Haase v. Cardoza (p. 164)     | Y                      | N                |
| Ricketts v. Scothorn (p. 166) | N                      | Y                |

Note that the only exceptional case is *In re Green*, and in that case the defendant was the promisor's estate because the promisor was in bankruptcy. Should such a case be likened to a case in which the promisor decided not to pay?

Note further that *Kirksey* might well come out differently today under the doctrine of promissory estoppel.

#### 4. Employment Promises

a. *Feinberg v. Pfeiffer Co.* (p. 173): Mrs. Feinberg worked for the defendant from 1910 until 1947 at which time she was granted by the Board of Directors a pension of \$200 per month upon retirement. This pension was not conditioned upon future services by Mrs. Feinberg although she continued to work for the company until 1949. Payments were made until 1953 and then were discontinued, and Mrs. Feinberg sued for continued payments.

i. The court found as a fact that the board did not condition the promise of the pension upon any future work of Mrs. Feinberg. Despite that finding, might a court have held that there was in fact consideration for the promise? If Mrs. Feinberg in fact would not have continued to work but for the pension, what should she have done? That is, could she have protected herself?

ii. Despite an absence of consideration, the court held the promise enforceable on the grounds of promissory estoppel. Note that Mrs. Feinberg stated that she would have continued to work for the company even absent the promise of the pension. What was the reliance? Might there have been reliance *after* retirement?

iii. The court discusses example 2 of section 90 of the First Restatement (at p. 177). Is the court persuasive in its analysis of that example?

b. *Hayes v. Plantations Steel Co.* (p. 177): Plaintiff was told shortly before he retired from defendant's employ that he would receive a pension. Plaintiff had announced his retirement six months earlier. After sending plaintiff \$5,000 per year for 5 years, defendant

terminated the pension. *Held*, for the defendant, that no consideration supported the promise and no detrimental reliance occurred.

i. The Court held that the plaintiff's retirement one week after receiving the promise of a pension was not detrimental reliance because plaintiff had already announced his intention to retire. Because plaintiff could have changed his mind, why was not his retirement valid consideration?

ii. Was there any other argument that the plaintiff should be able to enforce the promise without a showing of promissory estoppel? Was continuing to work for one week sufficient consideration?

d. A Typology of Promissory Estoppel Cases: Let us consider the various types of promises that might be enforced. At one extreme is a promise given in exchange for some valuable consideration: a bargained for promise is almost always enforced. At the other extreme is a gratuitous promise made in a nonbusiness setting that induced no reliance: such promises are rarely enforced. What sort of promises are in the middle?

i. Consider a gratuitous promise made in a business setting. For example, suppose you rent some storage space from one of these little self-storage places. After signing the agreement, you realize that you will need insurance for the goods you will store. You tell the rental agent that it will take you some time to obtain insurance, and the rental agent says that they offer insurance by the month. The rental agent generously offers to provide you with one month's free insurance to give you time to obtain your own. If the agent fails to provide you with insurance and your goods are destroyed, you likely will be compensated. Why?

ii. Consider a promise made in exchange for a return promise that has not yet been made; i.e., an offer that has not yet been accepted. For example, I say to you that if you agree to paint my house, I will pay you \$500. You have not yet accepted my offer, and you purchase paint to match my specifications. When I next see you, I tell you I have changed my mind. Should your reliance be protected? Why not?

5. Promises to Insure [omitted]