

# STOP TEACHING CONSIDERATION

Alan M. White\*

## TABLE OF CONTENTS

INTRODUCTION.....	504
I. CONSIDERATION: THE FAILED UNIFIED THEORY OF CONTRACT.....	505
II. THE CORE AND THE COROLLARIES—TACKLING THE ISSUES.....	507
A. <i>The Non-Exchange Economy—Charitable Subscriptions, Free Services, and Gift Promises</i> .....	508
1. <i>The Problem and the Values at Stake</i> .....	508
2. <i>Choice of Rules</i> .....	509
3. <i>The State of the Law</i> .....	511
B. <i>The Post-Contract Modification</i> .....	513
1. <i>The Problem and the Values at Stake</i> .....	513
2. <i>Choice of Rules</i> .....	518
3. <i>The State of the Law</i> .....	519
C. <i>The Firm Offer or Option Contract</i> .....	521
1. <i>The Problem and Competing Values</i> .....	521
2. <i>Choice of Rules</i> .....	521
3. <i>The State of the Law</i> .....	522
D. <i>Discharged Past Debts and Promises Recognizing Past Benefits</i> .....	523
1. <i>The Problem</i> .....	523
2. <i>Choice of Rules</i> .....	525
3. <i>The State of the Law</i> .....	525
E. <i>The “Illusory Promise” and the Very One-Sided Deal</i> .....	526
1. <i>The Problem and Competing Values</i> .....	526
2. <i>Choice of Rules</i> .....	527
3. <i>The State of the Law</i> .....	528
F. <i>The Third-Party Guarantee</i> .....	529
1. <i>The Problem and Values</i> .....	529
2. <i>Choice of Rules</i> .....	529
3. <i>The State of the Law</i> .....	530
III. CONSIDERATION IN THE COURTS.....	530
A. <i>Many Cases Referring to “Consideration” Did Not Turn on True Consideration Issues</i> .....	530

B. Cases Denying Enforcement for Want of Consideration Mostly Involve Indefinite Promises or Consideration Corollaries .....	531
1. Gratuitous Promise Cases .....	533
2. Indefinite Promise Cases .....	534
C. Many Cases Invoke and Apply Consideration Doctrine but Did Not Apply It (or Misapplied It).....	536
D. Cases Describing Material Breach as a “Failure of Consideration” .....	538
E. Cases Referring to “Adequacy of Consideration” When Applying Unconscionability Analysis, or When Refusing to Judge the Fairness of a Bargain .....	539
F. Cases Referring to Presence or Adequacy of Consideration When Evaluating the Reasonableness of Covenants Not to Compete as a Matter of Public Policy .....	540
IV. THE CONSIDERATION-FREE CONTRACTS LAW SYLLABUS .....	542
CONCLUSION .....	545

*“Law students should be dispensed from the accomplishment of antiquarian exercises in and about the theory of consideration.”<sup>1</sup>*

#### INTRODUCTION

A contract, every first-year law student learns, is a promise that will be enforced in a court of law.<sup>2</sup> How do we distinguish the casual social promise,<sup>3</sup> or the promise made in jest<sup>4</sup>, from those behind which we should throw the awesome power of the state? Simple, the law professor responds, we look for “consideration.” To be legally enforceable, a promise must be given in return for a reciprocal promise or performance. The bargained-for exchange is the touchstone of consideration, and therefore of contract. Elaboration of this concept requires sorting out subtle distinctions, for example, between a true exchange and a gift with strings attached.<sup>5</sup> What, for example, is the difference between

\* Professor, CUNY School of Law. My thanks to Mudassar Topa for excellent research assistance, to the participants at the KCON9 annual conference on contract law, and to Jeremy Telman and Deborah Zalesne for helpful comments and conversations (which in no way imply endorsement of the views expressed here).

<sup>1</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 3 (1974).

<sup>2</sup> RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

<sup>3</sup> *Stood Up for Prom, She Files a Lawsuit*, N.Y. TIMES, May 12, 1989, at A12.

<sup>4</sup> Compare *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999), with *Lucy v. Zehmer*, 84 S.E. 2d 516, 518 (Va. Ct. App. 1954).

<sup>5</sup> Compare *Gottlieb v. Tropicana Hotel & Casino*, 109 F. Supp. 2d 324, 330 (E.D. Pa. 2000) (holding that plaintiff’s traveling to casino was consideration for casino’s promise of a prize), with *Tomeczak v. Koochiching Cty. Highway Dep’t*, No. C4-98-991, 1999 WL 55501,

Mr. Story's legally enforceable promise to his nephew<sup>6</sup> and Mrs. Salt's legally unenforceable promise to her nephew?<sup>7</sup>

Once this is accomplished, students will then learn various exceptions: the half-dozen or more categories of promises where the bargained-for exchange seems absent, but that will nevertheless be legally enforceable, perhaps because of reasonable reliance by the promisee,<sup>8</sup> the promisor's moral obligation,<sup>9</sup> or various other reasons.<sup>10</sup> The result is several weeks of confusion and needless study of musty old cases. Worse, generations of present and future lawyers and judges continue to infect the practice of contract law with the same confusion.

It is not my aim to re-engage the scholarly debate concerning competing theories of contract.<sup>11</sup> Instead, my approach is pragmatic. Consideration doctrine is riddled with exceptions, is largely unhelpful or even counterproductive in deciding contract disputes and has lost its explanatory power. The time has come to abandon this fruitless pedagogical exercise once and for all. We should stop teaching consideration as an element of contract law to new generations of law students.

This article will present a survey of contemporary case law to demonstrate the incoherence of, and in some contexts the harm being done by, consideration doctrine, and to propose a consideration-free contracts syllabus to free us from this chore. A brief review of the theoretical landscape is followed by a review of the problems that consideration and its corollaries purport to solve, the different possible rules for each problem and the present state of the law, and a comprehensive survey of recent court decisions applying and misapplying consideration doctrine and its corollaries. Finally, I propose a consideration-free syllabus for teaching contracts law.

## I. CONSIDERATION: THE FAILED UNIFIED THEORY OF CONTRACT

More than fifty years ago, Grant Gilmore pronounced the death of classical theory of contract centered on consideration as its unified theory.<sup>12</sup> He pointed to the growing importance of reliance, restitution, and other competing theories of promise enforcement, as fundamentally undermining consideration as the

---

at \*3 (Minn. Ct. App. Feb. 9, 1999) (holding that homeowner's release of claims and promise to maintain town equipment was not consideration for town's promise to lend the equipment), and SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 112 (3d ed. 1957), and see *infra* text accompanying notes 88–109 (the discussion of mortgage modification cases).

<sup>6</sup> *Hamer v. Sidway*, 27 N.E. 256, 258–59 (N.Y. 1891).

<sup>7</sup> *Dougherty v. Salt*, 125 N.E. 94, 94–95 (N.Y. 1919).

<sup>8</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

<sup>9</sup> *Id.* § 86 cmt. a.

<sup>10</sup> *Id.* §§ 82–88.

<sup>11</sup> See Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915, 917 (2012).

<sup>12</sup> GILMORE, *supra* note 1, at 3.

cornerstone of contract.<sup>13</sup> Other scholars following Professor Gilmore have taken up the cause. Professor Mark Wessman, for example, argued for abandoning consideration doctrine convincingly in three articles in 1993,<sup>14</sup> 1996,<sup>15</sup> and 2008.<sup>16</sup> The search for a unified theory of contract founded on consideration has been discredited by a number of other scholars.<sup>17</sup> The better view is that there is no single unifying theory of contract enforcement, and that pluralistic values necessarily inform court decisions on whether to enforce promises.<sup>18</sup> Some, like Professor Randy Barnett, have disputed the idea that reliance, rather than commercial exchange, is or ought to be, a basis of contract enforcement.<sup>19</sup> On the other hand, Professor Charles Knapp surveyed the territory in 1998, and concluded that reliance retains an important, if not exclusive, role in identifying promises the law may enforce.<sup>20</sup> The Second Restatement implicitly acknowledges the contradiction: a contract requires assent and consideration;<sup>21</sup> however, whether or not there is a bargain, a contract may be formed under the special rules in sections 82–94, under the heading “Contracts without Consideration.”<sup>22</sup>

Consideration doctrine, as Professor Gilmore pointed out, did not evolve organically from the common law. Professors Christopher Columbus Langdell and Samuel Williston and Judge Oliver Wendell Holmes invented it.<sup>23</sup> The edifice that law professors erected can and ought to be dismantled when its failure has become evident. More than forty years have passed since Professor Gilmore announced the death of classical Holmesian consideration. The central argument in *The Death of Contract* (that every rule and corollary of consideration doctrine coexists with one or more contrary rules) has lost none of its vitality.<sup>24</sup> Still, first-year law students waste precious class time and brainpower parsing this obscurantism. Consideration remains a tedious centerpiece of the

<sup>13</sup> *Id.* at 70–85.

<sup>14</sup> Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 117 (1993) [hereinafter Wessman, *Should We Fire the Gatekeeper?*].

<sup>15</sup> Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOYOLA L.A. L. REV. 713, 845 (1996).

<sup>16</sup> Mark B. Wessman, *Recent Defenses of Consideration: Commodification and Collaboration*, 41 IND. L. REV. 9, 10, 53 (2008).

<sup>17</sup> BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY, AND CONTEXT* 161–62 (2012); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2119 (2014).

<sup>18</sup> Kreitner, *supra* note 11, at 917, 921; Daniel Markovits & Alan Schwartz, *Plural Values in Contract Law: Theory and Implementation*, 20 THEORETICAL INQUIRIES L. 571, 573, 576 (2019) (citing competing values of efficiency, autonomy, equality and community); Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1485 (2005).

<sup>19</sup> Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 527 (1996).

<sup>20</sup> Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1331–32 (1998).

<sup>21</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981).

<sup>22</sup> *Id.* § 17(2).

<sup>23</sup> GILMORE, *supra* note 1, at 20–21.

<sup>24</sup> *Id.* at 33.

law school curriculum. Every year students are taught first that the bargained-for exchange is the *sine qua non* for legal enforcement of promises, and then taught a series of completely inconsistent rules, often in a confusing stew of common law rule, Restatement (First or Second) rule, U.C.C. rule, majority rule, and minority rule.

The consideration rules are unnecessary and occasionally harmful. They are unnecessary when sounder contract principles explain and justify the same results, and even more so when they are ritualistically incanted in cases not raising consideration issues at all. They are harmful when they produce unfair and unsound results, or when courts and lawyers simply misunderstand them so that they interfere with just and equitable resolution of disputes. As future lawyers and judges, law students should not be confused and biased by learning abstruse consideration rules riddled with exceptions and contradictions. The libertarian strain of consideration doctrine, which resists evaluating the fairness of bargains, subtly gives primacy to one among the many plural and competing values at the heart of contract disputes. Consideration doctrine, and the courts' dogged refusal to abandon it, causes confusion, undermines good contract analysis, and subverts the values that should drive the resolution of contract disputes.

Especially troublesome, and arguably indefensible, are the set of corollaries consideration doctrine has spawned.<sup>25</sup> Judges continue applying the consideration corollaries to the discrete problems where it does more harm than good.<sup>26</sup> Promises in return for past services or benefits, reaffirmation of discharged promises, contract modifications, illusory promises, third-party guarantees, and binding firm offers are contract problems better dealt with on their own terms, rather than by continuing to invoke the confusing and unhelpful language of consideration. For most of these problems the Restatement (Second) of Contracts, adopted in 1981, proposed to abandon consideration or to establish new rules to deal with the unique values and issues that each discrete problem poses. Many courts have been reluctant to accept the Second Restatement's invitations, perhaps because of the indoctrination in consideration that judges received in their law school contracts class.<sup>27</sup>

## II. THE CORE AND THE COROLLARIES—TACKLING THE ISSUES

The consideration doctrine at its core is about the issue of gift promises, that is, promises not part of a bargained-for exchange, but consideration has al-

---

<sup>25</sup> Knapp, *supra* note 20, at 1195; Wessman, *Should We Fire the Gatekeeper?*, *supra* note 14, at 49.

<sup>26</sup> See *infra* notes 244–67 and accompanying text.

<sup>27</sup> See, e.g., Knapp, *supra* note 20, at 1192–93; *infra* notes 36, 58–59, 120–28, 140–41 and accompanying text.

so spawned a set of corollaries about a variety of distinct contract problems.<sup>28</sup> Each of the corollaries has been, or ought to be, replaced by modern rules more appropriate to the problem at hand. The corollaries include (1) the pre-existing duty rule making some post-contract modifications unenforceable; (2) the requirement of payment to enforce binding offers as options; (3) the non-enforceability of promises recognizing past services, moral obligations or discharged debts; (4) the illusory promise doctrine negating contracts that give one party unrestricted discretion in how to perform, or discretion to cancel or modify promises; and (5) difficulties in enforcing third-party guarantees. For the core issue of gift promises, and for each of the corollaries, consideration doctrine does a poor job of advancing the competing values at stake, and for each problem, better doctrinal solutions exist.

*A. The Non-Exchange Economy—Charitable Subscriptions, Free Services, and Gift Promises*

*1. The Problem and the Values at Stake*

The non-profit economy is huge.<sup>29</sup> Tax-exempt public charities in the United States have assets of more than \$3 trillion, and spend \$1.6 trillion each year.<sup>30</sup> Charities of all types rely not only on present gifts from donors but also on promises of future and structured gifts to plan their activities.<sup>31</sup> A wide variety of nonprofit service providers, including free legal aid and health care providers, make promises and commitments on which their clients rely.<sup>32</sup> When a donor (or donor's estate) reneges on a charitable pledge, or a free service provider dishonors promises to its clients, real and recognizable harm results.<sup>33</sup> In family and business relationships, promises inducing expectations and reliance may not be based on a bargained-for exchange.<sup>34</sup> Whether and when society and the state should step in to enforce non-exchange promises is the first problem that consideration doctrine fails to solve.

<sup>28</sup> See Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 935 (1958); B.J. Reiter, *Courts, Consideration, and Common Sense*, 27 U. TORONTO L.J. 439, 441 (1977).

<sup>29</sup> Burton A. Weisbrod, *The Future of the Nonprofit Sector: Its Entwining with Private Enterprise and Government*, 16 J. POL'Y ANALYSIS & MGMT. 541, 541–42 (1997).

<sup>30</sup> BRICE S. MCKEEVER, *THE NONPROFIT SECTOR IN BRIEF 2015: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING 1* (2015).

<sup>31</sup> See RONALD R. JORDAN & KATELYN L. QUINN, *PLANNED GIVING: A GUIDE TO FUNDRAISING AND PHILANTHROPY* 6–7 (4th ed. 2009).

<sup>32</sup> *E.g.*, *Lawrence v. Ingham Cty. Health Dep't Family Planning/Pre-Natal Clinic*, 408 N.W.2d 461, 463 (Mich. Ct. App. 1987).

<sup>33</sup> *Maryland Nat'l Bank v. United Jewish Appeal Fed'n of Greater Wash., Inc.*, 407 A.2d 1130, 1138 (Md. Ct. App. 1979) (denying enforcement of charitable pledge); *Lawrence*, 408 N.W.2d at 462; *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 176–77 (N.Y. 1927) (enforcing charitable pledge).

<sup>34</sup> *E.g.*, *Conrad v. Fields*, No. A06-1387, 2007 WL 2106302, at \*1 (Minn. Ct. App. July 24, 2007).

Arguments cited for not enforcing gift promises include the possibility of fabrication, the greater risk of nondeliberative or improvident promises, the difficulty of determining the promise maker's seriousness of intention, the possibility that the promise maker's circumstances will change making enforcement unfair or oppressive, and the possibility that legal enforcement would discourage some promises from being made.<sup>35</sup> There is also the argument that gift promises are made in the shadow of the law, so that a donee's reliance on a non-exchange promise cannot be viewed as reasonable, or at least that the reasonableness of reliance, and the foreseeability of legal enforcement, is hopelessly indeterminate.<sup>36</sup>

On the other hand, many legal scholars have argued that many or all gift promises ought to be legally enforced.<sup>37</sup> Gift promises may reduce economic inequality by encouraging transfers from the wealthy to the indigent. Even requiring proof of reliance to enforce gift promises reinforces the economic power of donors, who are generally wealthy, over donees, who tend to be less so.<sup>38</sup> Feminists and other scholars have highlighted the important role of household and caretaking work as well as other intra-family commitments to the functioning of the economy and broader society.<sup>39</sup> Ascribing legal power to market-based exchanges over other promissory commitments leaves out, in gendered ways, equally important spheres of vital economic activity.<sup>40</sup> The problem for law students and courts is to evaluate the possible rules in light of these competing arguments and values.

## 2. Choice of Rules

Consideration doctrine is one of several possible rules to distinguish gift promises that should be legally enforceable from those that should not. The

<sup>35</sup> William A. Drennan, *Charitable Pledges: Contracts of Confusion*, 120 PENN ST. L. REV. 477, 484 (2015); Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 823 (1997); George S. Geis, *Gift Promises and the Edge of Contract Law*, 2014 U. ILL. L. REV. 663, 684 (2014).

<sup>36</sup> See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275 (1986) [hereinafter Barnett, *A Consent Theory*] (critiquing promissory estoppel and reliance theory because only "reasonable" or justifiable reliance is rewarded with enforcement, begging the question of which promises are sufficiently reliable to result in legal enforcement).

<sup>37</sup> See Geis, *supra* note 35, at 688; Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 40 (1992); Robert A. Prentice, "Law &" *Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 937 (2007); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401, 419–20 (1991); Sabine Tsuruda, *Contract, Power, and the Value of Donative Promises*, 69 S.C. L. REV. 479, 482 (2017).

<sup>38</sup> Tsuruda, *supra* note 37, at 481–82.

<sup>39</sup> See BEYOND THE MARKETPLACE: RETHINKING ECONOMY AND SOCIETY 13–14 (Roger Friedland & A.F. Robinson eds., 1990).

<sup>40</sup> See Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1251–52 (1999); Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1031 (2015) (arguing that commitments of unmarried partners should be contractually enforceable).

competing possibilities include: (1) require that the donor receive something in exchange (consideration), (2) require the donee to demonstrate substantial and reasonable reliance on the promise, (3) require a writing or other formality to make a promise enforceable, or (4) simply make all gift promises legally enforceable unless the donor has a standard contract law defense, such as incapacity, unconscionability, or impracticability.<sup>41</sup> The consideration rule is that a donor's promise, albeit formal, in writing, witnessed and sealed, is unenforceable if the donor dies or changes her mind, when the donee or charitable institution has not provided or promised goods or services of some sort in return.<sup>42</sup> Consideration doctrine would also make the nonprofit hospital's or legal aid office's promises of free services to its clients unenforceable in most cases.<sup>43</sup>

The second alternative rule has come to be known as promissory estoppel. Restatement (Second) section 90 makes promises enforceable when there is a clear promise made, the promisee has reasonably and foreseeably relied on the promise, and justice requires enforcement.<sup>44</sup> Pennsylvania is apparently the only state to have adopted the third option, namely to grant legal enforcement to all donative promises made in a formal signed writing.<sup>45</sup> Restatement (Second) section 90(2) adopts the fourth option for charitable pledges, making them enforceable without any additional showing of exchange or reliance.<sup>46</sup>

The three alternatives to consideration (reliance, the signed writing, and unrestricted enforcement) can each be adapted to address some of the concerns motivating the consideration rule. For example, the concern that gift promises are too easily fabricated is allayed either by requiring a formal writing, or some heightened standard of proof (including but not limited to evidence of reasonable reliance) that the donor intends to be legally bound.<sup>47</sup> Donors who make rash promises or whose circumstances change may invoke contract law defenses including undue influence, mistake and impracticability.<sup>48</sup> The fourth element of promissory estoppel, that "injustice can be avoided only by enforcement," also gives courts latitude to deny enforcement of gift promises when the values counseling against enforcement come into play.<sup>49</sup>

<sup>41</sup> See Geis, *supra* note 35, at 668–72; Kull, *supra* note 37, at 64–65; Shavell, *supra* note 37, at 419–20; Tsuruda, *supra* note 37, at 482–84.

<sup>42</sup> Eisenberg, *supra* note 35, at 821–22.

<sup>43</sup> See *Lawrence v. Ingham Cty. Health Dep't Family Planning/Pre-Natal Clinic*, 408 N.W.2d 461, 463–64 (Mich. Ct. App. 1987) (dismissing breach of contract claims by patient against free health clinic based on absence of consideration).

<sup>44</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

<sup>45</sup> 33 PA. STAT. AND CONS. STAT. ANN. § 6 (West 2019); see also Geis, *supra* note 35, at 672.

<sup>46</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. LAW INST. 1981).

<sup>47</sup> Drennan, *supra* note 35, at 519.

<sup>48</sup> See, e.g., *Love v. Love*, 182 B.R. 161, 171 (Bankr. W.D. Ky. 1995) (gift set aside based on undue influence).

<sup>49</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).



### 3. *The State of the Law*

The exceptions to the consideration rule have led observers to conclude that a charitable pledge is more likely than not to be enforced in U.S. courts.<sup>50</sup> Most state courts are able to discern either a bargained-for exchange<sup>51</sup> or some form of reliance by the charity, such as committing to large expenditures, to enforce the pledge, while a few states justify enforcement as a matter of public policy to encourage charitable pledges, regardless of reliance.<sup>52</sup> A promise of a future gift of any category may be found legally enforceable because of reasonable and foreseeable reliance,<sup>53</sup> or if it is made in recognition of some past benefit conferred by the donee on the donor,<sup>54</sup> or in some states, so long as it is made in writing with or without a seal,<sup>55</sup> or was made using an irrevocable trust or other commitment devices.<sup>56</sup>

On the other hand, the blanket enforceability rule advocated by Restatement (Second) section 90(2) making all charitable pledges enforceable regardless of reliance or formality has been explicitly adopted in only one state (Iowa).<sup>57</sup> An honest appraisal of the state of the law regarding charitable pledges is that most courts will look for either the bargained-for exchange or reliance by the charity in planning projects, using the pledge to solicit others, or offering naming rights or other intangible benefits to the donor.<sup>58</sup> On this particular problem, the Restatement (Second)'s proposed solution, to simply make charitable pledges enforceable subject to ordinary contract defenses, remains an aspiration.

As for gift promises generally, state courts have universally adopted promissory estoppel as an alternative to the bargained-for exchange.<sup>59</sup> The West classification system still treats “promissory estoppel” or “detrimental reliance” as an equitable rule wholly outside of contracts doctrine.<sup>60</sup> During the three

<sup>50</sup> Mary Frances Budig et al., *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced?*, 27 U. S.F. L. REV. 47, 50 (1992).

<sup>51</sup> See *Allegheny Coll. v. Nat'l. Chautauqua Cty. Bank*, 159 N.E. 173, 174 (N.Y. 1927).

<sup>52</sup> E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 404 n.105 (2000).

<sup>53</sup> Charles Calleros, *Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What Our Students Should Know About Enforcement of Promises in a Historical and International Context*, 13 CHI.-KENT J. INT'L & COMP. L. 83, 108 (2013).

<sup>54</sup> See *infra* Sections II.D.1–3.

<sup>55</sup> *The Uniform Written Obligations Act*, 29 COLUM. L. REV. 206, 206 (1929).

<sup>56</sup> Geis, *supra* note 35, at 673.

<sup>57</sup> CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 234–35 (6th ed. 2007).

<sup>58</sup> *E.g.*, *Maryland Nat'l Bank v. United Jewish Appeal Fed'n of Greater Wash., Inc.*, 407 A.2d 1130, 1137 (Md. Ct. App. 1979); see also Barnett, *A Consent Theory*, *supra* note 36, at 275.

<sup>59</sup> Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 47–48 (1996); see also Knapp, *supra* note 20, at 1192 (surveying scholarly debate as to whether case law based on promissory estoppel is truly founded on the reliance interest).

<sup>60</sup> West Estoppel Key number 85 Future Events; Promissory Estoppel, WESTLAW, <https://>

years between July 2015 and June 2018, there were 127 federal and state court case headings identified by West as promissory estoppel cases from thirty-five states and the District of Columbia, all approving (or at least not rejecting) the rule.<sup>61</sup> In thirty-five of those cases, courts enforced a promise based on reasonable reliance.<sup>62</sup> Courts have enforced non-exchange promises made by land-owners,<sup>63</sup> a father's promise to pay his daughter's private college tuition,<sup>64</sup> promises by mortgagees to modify loan repayment terms,<sup>65</sup> and promises made during the negotiation of commercial contracts.<sup>66</sup> Thus, rather than being a deviation from the core of contract doctrine, promissory estoppel, with its elements of foreseeable reliance and the needs of justice, has come into its own as an alternative test for whether promises should be legally enforced.

The classic gratuitous family promise, on which contracts casebooks and first-year students spend so much time, is litigated rarely. Among the cases comprising a three-year case review of consideration keynotes,<sup>67</sup> there was only one case that clearly fits this paradigm, a case where a court rejected a son's allegation of a promise to inherit the family ranch because the promise was too indefinite to enforce, either as contract or based on promissory estoppel.<sup>68</sup> The rules of promissory estoppel were quite adequate to resolve this family dispute, so even in this most paradigmatic case, consideration doctrine was of little use. In short, a description of contemporary contract law's approach to the donative promise should begin with promissory estoppel and reliance, while also mentioning the options of enforcing all written charitable promises or even all charitable promises. The ill-fitting bargain theory of consideration doctrine deserves little more than passing historical mention.

---

l.next.westlaw.com [<https://perma.cc/KUV9-25PU>] (follow "Key Numbers" hyperlink; then follow "Estoppel" hyperlink and select key number 85).

<sup>61</sup> See Appendix II, on file with author (a spreadsheet with the complete list and classification of these 127 cases).

<sup>62</sup> See *id.* (cases coded as promise enforced).

<sup>63</sup> Zwart v. Penning, 912 N.W.2d 833, 839 (S.D. 2018); Hayes v. Mountain View Estates Homeowners Ass'n, 188 A.3d 678, 690 (Vt. 2018).

<sup>64</sup> Manfrede v. Harris, 80 N.Y.S.3d 138, 140 (N.Y. App. Div. 2018) (enforcing father's promise to pay daughter's private college tuition based on reliance).

<sup>65</sup> Ryan-Beedy v. Bank of New York Mellon, 293 F. Supp. 3d 1101, 1112 (E.D. Cal. 2018); Traut v. Quantum Servicing Corp., 299 F. Supp. 3d 235, 240 (D. Mass. 2018); Zhong v. PNC Bank, N.A., 812 S.E.2d 514, 525 (Ga. Ct. App. 2018).

<sup>66</sup> Mission Measurement Corp. v. Blackbaud, Inc., 287 F. Supp. 3d 691, 717 (N.D. Ill. 2017).

<sup>67</sup> See *infra* Part III.

<sup>68</sup> Willey v. Willey, 385 P.3d 290, 302 (Wyo. 2016).

*B. The Post-Contract Modification*

*1. The Problem and the Values at Stake*

The first consideration corollary, the pre-existing duty rule, holds that a mutual agreement to amend contract duties is not supported by consideration, and therefore unenforceable, when only one party receives additional benefits or is relieved of some obligations.<sup>69</sup> This rule may have arisen from courts' intuition that no contract party would agree to accept less than originally bargained for, or to pay or perform more, without a quid pro quo, unless the other party had gained unfair power in the transaction.<sup>70</sup> On the other hand, the autonomy values behind a consent theory of contract would counsel that modifications ought to be enforced so long as they are truly voluntary, and that courts ought to address issues of unfair power directly, for example using the doctrine of economic duress.<sup>71</sup>

Consideration doctrine is not especially helpful in resolving post-contract modification issues. Just as parties may dispute the formation of a contract, they may dispute the existence or validity of a later agreement to modify the original contract. Assuming the proponent of the modification can prove mutual assent to a change in terms, the issue becomes whether the courts should enforce the modified terms or the original contract terms. Because legal remedies for breach may be insufficient and untimely, some one-sided contract modifications may be the result of the "hold-up game," that is, one party's threat to breach unless the other party agrees to increased payment or performance.<sup>72</sup> The contract modification problem becomes an enforceability problem, raising questions of duress and unequal bargaining power, and of the substantive fairness of the modified terms.

Many critics have pointed out that consideration is an unsatisfactory test for whether mutually agreed modifications should be enforced.<sup>73</sup> The pre-

<sup>69</sup> JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 4.9 (6th ed. 2009).

<sup>70</sup> Varouj A. Aivazian et al., *The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability*, 22 OSGOODE HALL L.J. 173, 174 (1984).

<sup>71</sup> *Id.*; Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and its Persistent Survival*, 47 ALA. L. REV. 387, 429 (1996); cf. Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 233–34 (1997) (arguing that contract autonomy should include enforcement of agreements not to modify contracts as economically efficient).

<sup>72</sup> Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335, 338 (1993).

<sup>73</sup> See, e.g., 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.22 n.3 (3d ed. 2004) (listing law review articles and case law questioning the rule); 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 7.1 (rev. ed. 1995) ("The pre-existing duty rule is undergoing a slow erosion and, as a general rule, is destined to be overturned."); Reiter, *supra* note 28, at 439–41; Corneill A. Stephens, *Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary*, 8 HOUS. BUS. & TAX L.J. 355, 389 (2008)

existing duty rule can be both over- and underinclusive.<sup>74</sup> A modification that is fully voluntary, and does not reflect any abuse of bargaining power, may still be denied enforcement because only one party's rights or obligations change.<sup>75</sup> Conversely, a modification that is the product of economic duress may be enforced under the consideration rule, so long as some minimum changes are made to both parties' duties.<sup>76</sup>

The common law draws a clear line between parties' duties before and after making a contract. Pre-contract, parties bargain at "arm's length," each concerned only with their own self-interest, and therefore owing no duty to bargain in good faith or any other duty, other than not to engage in fraud. After making a contract, each party owes the other party "a duty of good faith."<sup>77</sup> That duty is often described as including the duty not to deprive the other party of the expected benefit of the bargain.<sup>78</sup> When unanticipated problems arise, it is entirely consistent with good faith that parties may renegotiate their mutual obligations, or the obligations of only one party.<sup>79</sup> Conversely, both parties should refrain from exploiting the other party's vulnerability that results from the contract itself, in other words, the difficulty of obtaining a substitute counterparty when projects are underway, to extract favorable changes or concessions in contract promises.<sup>80</sup> Thus, the real issues in evaluating contract modifications revolve around good faith and economic duress, and not whether there is a new bargained-for exchange. Nevertheless, courts have adhered stubbornly to the consideration requirement for post-contract modifications, sometimes with regrettable results.<sup>81</sup>

Consideration analysis can lead to unjust results in some applications to at-will employment contracts. Courts often struggle with the problem that in a true at-will employment contract, either party may cease performance at any time, subject only to the employer's duty to pay for work previously performed.<sup>82</sup> As a result, an employer's promise of additional compensation or benefits after

---

(labeling preexisting-duty rule as unnecessary in view of modern contract doctrines such as duress).

<sup>74</sup> Johnston, *supra* note 72, at 375.

<sup>75</sup> *E.g.*, Barrett-O'Neill v. Lalo, LLC, 171 F. Supp. 3d 725, 744 (S.D. Ohio 2016) (denying enforcement of modification agreed at the request of elderly consumer, but also finding the merchant's performance unconscionable under state consumer protection law).

<sup>76</sup> *See* Stephens, *supra* note 73, at 364.

<sup>77</sup> Market St. Assoc. Ltd. P'ship v. Frey, 941 F.2d 588, 594–95 (7th Cir. 1991); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

<sup>78</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (AM. LAW INST. 1981); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 379–80 (1980).

<sup>79</sup> *See* U.C.C. § 2-209 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2018); RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (AM. LAW INST. 1981).

<sup>80</sup> U.C.C. § 2-209 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2018).

<sup>81</sup> *See infra* text accompanying notes 89–112.

<sup>82</sup> Jimenez v. Cintas Corp., 475 S.W.3d 679, 684–85 (Mo. Ct. App. 2015).

work was performed,<sup>83</sup> or an employee's post-employment promise not to compete or to preserve confidentiality,<sup>84</sup> appears to be unsupported by any new consideration. In reality, these are post-contract modification cases, where courts should apply principles of economic duress, public policy, and unconscionability. Instead, courts must go through doctrinal gymnastics to enforce reasonable changes to relational employment contracts, or instead arbitrarily refuse to enforce reasonable changes.

The mortgage foreclosure crisis that began in 2008 gave new relevance to the post-contract modification problem. As a result of the unanticipated nationwide 30 percent decline in home values, and the very high loan-to-value ratios of many pre-crisis mortgage loans, foreclosures reached unprecedented levels.<sup>85</sup> At the same time, mortgage lenders and investors faced unprecedented losses on foreclosure sales, and thus had a real economic incentive to renegotiate the loan terms with homeowners.<sup>86</sup> Investors and eventually the federal government encouraged mortgage servicers to extend payment due dates, temporarily accept reduced interest rates, and even reduce principal balances, when such modifications could produce a better recovery than a foreclosure sale.<sup>87</sup> It could not be said that the beneficiaries of these modifications, the delinquent homeowners, had unfair leverage or bargaining power over the banks and giant financial institutions agreeing to modify their loan terms. Public policy strongly favored these contract modifications where homeowners had the ability to repay more of their debt than banks could recover in depressed market foreclosure sales.

The federal government intervened in 2009 with the voluntary Home Affordable Modification Program, which provided taxpayer-funded incentive payments to mortgage servicers to encourage modifications.<sup>88</sup> HAMP prescribed eligibility, application procedures, and terms for mortgage modifications.<sup>89</sup> The key economic test for these modifications was that they be net present value positive; that is, that the likely repayment by the homeowner, after rescheduling payments and reduction of interest or principal, would yield a

---

<sup>83</sup> See *Boswell v. Panera Bread Co.*, 879 F.3d 296, 302 (8th Cir. 2018) (finding employer's offer of a bonus based on performance enforceable using unilateral contract analysis).

<sup>84</sup> See *Allied Waste Servs. of N. Am., LLC v. Tibble*, 177 F. Supp. 3d 1103, 1107, 1109 (N.D. Ill. 2016).

<sup>85</sup> Vicki Been et al., *Decoding the Foreclosure Crisis: Causes, Responses, and Consequences*, 30 J. POL'Y ANALYSIS & MGMT. 388, 388–90 (2011).

<sup>86</sup> See Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 CONN. L. REV. 1107, 1119 (2009).

<sup>87</sup> Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 732 (2010).

<sup>88</sup> *Id.* at 729.

<sup>89</sup> *Id.* at 749–52.

greater present value than a foreclosure sale of the property.<sup>90</sup> The HAMP program, which served as a template for most mortgage modifications during the period, called for the mortgage servicer and borrower to enter first into a temporary modification agreement, whose terms promised a permanent modification if the borrower met all the performance conditions of the temporary modification.<sup>91</sup> Between 2009 and 2016, more than six million mortgage loans were modified, including roughly two million HAMP modifications.<sup>92</sup>

Many homeowners who signed temporary modification agreements and believed they had met the conditions to the servicers' promise of a permanent modification had difficulty obtaining the permanent modifications they had been promised.<sup>93</sup> Others who signed permanent modifications were told by servicers that their permanent modifications had been canceled or revoked. Litigation,<sup>94</sup> including class actions,<sup>95</sup> ensued.

Mortgage servicers raised two arguments to defend their refusal or cancellation of permanent modifications. First, they argued that homeowners had not met all the conditions precedent in the temporary modification agreements.<sup>96</sup> Those issues were largely factual. Second, servicers argued the pre-existing duty rule: they argued that mortgage modification agreements, temporary or permanent, lacked consideration.<sup>97</sup> The servicer and investor were agreeing to accept less interest, less principal, or at least later repayment, than the original mortgage note called for, without any quid pro quo from the homeowner.<sup>98</sup> Homeowners responded by pointing out that the HAMP temporary modification agreements required them to submit updated financial information, open tax and insurance escrow accounts in some cases, and to consent to credit

<sup>90</sup> Steve Holden et al., *The HAMP NPV Model: Development and Early Performance*, 40 REAL EST. ECON. S32, S33–34 (2012).

<sup>91</sup> Braucher, *supra* note 87, at 752–53.

<sup>92</sup> *Making Home Affordable*, U.S. DEP'T OF THE TREASURY, <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/default.aspx> [<https://perma.cc/8WPL-LSWV>] (last visited Dec. 30, 2019).

<sup>93</sup> Braucher, *supra* note 87, at 754–56, 760; Jonathan A. Marcantel, *Enforcing the Home Affordable Modification Program*, 70 N.Y.U. ANN. SURV. AM. L. 121, 126 (2014).

<sup>94</sup> *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 564 (7th Cir. 2012) (assuming consideration required to enforce modification and finding there was consideration for a TPP in borrower's promise to provide information); *Goodman v. Wells Fargo Bank, N.A.*, B243614, 2014 WL 334222, at \*12 (Cal. Ct. App. Jan. 30, 2014) (same); *Palacio v. HSBC Bank U.S.A., N.A.*, No. 10-01937, 2012 WL 4928878, at \*6 (Mass. Super. Ct. Oct. 4, 2012) (finding HAMP TPP not enforceable because it lacked consideration); *Anilus v. OneWest Bank, FSB*, No. NOCV201001774, 2011 WL 2735052, at \*1 (Mass. Super. Ct. May 03, 2011); Tammy J. Raduege, *Enforceability of Trial Period Plans (TPP) Under the Home Affordable Modification Program (HAMP)*, 88 A.L.R. Fed. 2d 331 (2014).

<sup>95</sup> *E.g.*, *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013); *Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1345 (S.D. Fla. 2011).

<sup>96</sup> *E.g.*, *Corvello*, 728 F.3d at 882.

<sup>97</sup> *E.g.*, *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 351–52 (D. Mass. 2011).

<sup>98</sup> *Id.* at 347–48.

checks, all forms of “legal detriment” that amounted to consideration for the amended loan terms.<sup>99</sup>

Courts divided over whether the requirements imposed on homeowners by the HAMP program were inducements for the modification, or simply conditions on the mortgage servicers’ essentially gratuitous promise to reduce their payments.<sup>100</sup> In order to obtain permanent modifications, homeowners were required to submit financial information, including verification of income and assets, to open new escrow accounts for taxes and insurance, and to participate in credit counseling.<sup>101</sup> Courts finding no consideration implicitly or explicitly held that these steps were akin to conditions for receiving a gift, rather than inducements for the servicers’ promise to reduce or recast payments.<sup>102</sup>

Oddly, few if any courts deciding these mortgage modification cases referred to the Restatement (Second) section 89 approach, permitting enforcement of a modification based on changed circumstances.<sup>103</sup> The 2008 real estate crash and the nationwide decline in home values was widely regarded as unforeseen.<sup>104</sup> Certainly there was no historical precedent for a circumstance in which millions of homeowners had mortgage debt exceeding their home value, making it impossible to sell.<sup>105</sup> The typical post-crisis mortgage modification agreement would seem to fit squarely within section 89(a), as a modification that is fair and equitable in view of circumstances not anticipated by the parties when the contract was made. The failure of courts deciding the mortgage modification cases to consider the Restatement rule is regrettable.

Promissory estoppel claims by mortgage borrowers attempting to enforce modification agreements were met with similarly inconsistent results.<sup>106</sup> Ulti-

<sup>99</sup> *Id.* at 352 (finding consideration because homeowners agreed to provide financial information in return for modified payments).

<sup>100</sup> Compare *id.* (finding consideration), and *Healey v. Wells Fargo, N.A.*, No. 11 CV 3340, 2012 WL 994564, at \*10 (Pa. Ct. Com. Pl. Mar. 20, 2012) (same), with *Senter*, 810 F. Supp. 2d at 1348 (finding no consideration).

<sup>101</sup> *Wigod v. Wells Fargo Bank, NA*, 673 F.3d 547, 564 (7th Cir. 2012) (applying Illinois law); *Bosque v. Wells Fargo Bank, NA*, 762 F. Supp. 2d 342, 348, 352 (D. Mass. 2011).

<sup>102</sup> *Senter*, 810 F. Supp. 2d at 1349.

<sup>103</sup> See, e.g., *id.* at 1339.

<sup>104</sup> Bruce Bartlett, *Who Saw the Housing Bubble Coming?*, FORBES (Jan. 2, 2009), [https://www.forbes.com/2008/12/31/housing-bubble-crash-oped-cx\\_bb\\_0102bartlett.html#63e2cfec5a43](https://www.forbes.com/2008/12/31/housing-bubble-crash-oped-cx_bb_0102bartlett.html#63e2cfec5a43) [<https://perma.cc/8EXR-JMGV>]; *The Unofficial List of Pundits/Experts Who Were Wrong on the Housing Bubble*, ECON. CONTEMPT (July 16, 2008, 1:15 PM), <http://economicsofcontempt.blogspot.com/2008/07/official-list-of-punditsexperts-who.html> [<https://perma.cc/Z85A-2RPB>].

<sup>105</sup> E. RAY CANTERBERY, *THE GLOBAL GREAT RECESSION* 164–65 (2011).

<sup>106</sup> *Orcilla v. Big Sur, Inc.*, 198 Cal. Rptr. 3d 715, 735 (Cal. Ct. App. 2016) (finding no reliance); *Zhong v. PNC Bank, N.A.*, 812 S.E.2d 514, 525 (Ga. Ct. App. 2018) (holding that homeowner sufficiently alleged elements of promissory estoppel); *Sparra v. Deutsche Bank Nat’l Tr. Co.*, 785 S.E.2d 78, 83 (Ga. Ct. App. 2016) (finding alleged promise too indefinite); *Mbigi v. Wells Fargo Home Mortg.*, 785 S.E.2d 8, 20–21 (Ga. Ct. App. 2016) (finding homeowner adequately alleged detrimental reliance on servicer’s promise to modify mort-

mately it appeared that the broad issues raised, potentially involving thousands if not millions of homeowners, were resolved piecemeal when class certification motions were denied in various cases.<sup>107</sup>

The values motivating the pre-existing duty rule were not advanced by denying enforcement of these mortgage debt modifications. First, it is hard to see how homeowners facing foreclosure could be engaging in a hold-up game against the financial behemoths servicing their mortgage loans; the bargaining power was clearly on the side of the banks.<sup>108</sup> It was the homeowners, not the banks, who were facing severe economic duress. Second, the modified contracts were in no way unfair to the mortgage investors. The whole point of HAMP modifications was to yield a greater net return to investors from the modified loan than would result from a foreclosure sale. There was thus ample “benefit to the promisee,” given the dramatic changes in the housing market.<sup>109</sup> Finally, the quid pro quo requirement for modifications does not allow for any consideration of public policy, that is, the effect the contract modifications would have on other parties. Mortgage loan modifications were motivated not only by solicitude for the plight of homeowners in foreclosure, but also to prevent further deterioration of the general housing market caused by the glut of distressed foreclosure sales. The foreclosure crisis mortgage modification cases illustrate how poorly consideration doctrine advances the values of contract law.

## 2. *Choice of Rules*

Article 2 of the U.C.C. has abandoned the pre-existing duty rule. Section 2-209 of the U.C.C. explicitly abrogates the consideration requirement to enforce contract modifications for sales of goods.<sup>110</sup> The Official Comment notes that the duty of good faith permits courts to police abusive modifications extorted without commercial justification.<sup>111</sup> The Restatement (Second), while incorporating the pre-existing duty rule in section 73, separately provides in section 89 that modifications are binding if the modified promises are “fair and equitable in view of circumstances not anticipated by the parties when the contract was made,” or “to the extent that justice requires enforcement in view of [a] material change of position in reliance on the [modified] promise,” or as provided by

---

gage loan); *Mitchell v. ReconTrust Co. N.A.*, 373 P.3d 189, 204 (Utah Ct. App. 2016) (finding alleged promise to modify too indefinite).

<sup>107</sup> *E.g.*, Memorandum of Decision at 31, *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, MDL No. 10-2193 RWZ (D. Mass. 2013) (order denying class certification).

<sup>108</sup> NEIL BAROFKY, *BALLOUT: HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET* 148–49 (2012).

<sup>109</sup> *Id.* at 157.

<sup>110</sup> U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM'N 2018).

<sup>111</sup> *Id.* § 2-209 cmt. 2.



statute, for example, U.C.C. section 2-209.<sup>112</sup> Thus, the three prominent alternatives to the pre-existing duty rule are the U.C.C.'s full enforcement of agreed modifications, subject to scrutiny for good faith and duress, enforcement based on estoppel and reliance, and the Restatement's change in circumstances test.

### 3. *The State of the Law*

While all fifty states have adopted Article 2 of the U.C.C. in whole or in part, including section 2-209, Restatement (Second) section 89 has been less widely adopted.<sup>113</sup> In Professor Magg's survey published in 1998, he found twenty-one cases citing section 89 seemingly with approval, and only one expressing a negative view.<sup>114</sup> On closer examination, since the Restatement (Second)'s final adoption in 1981, only seven state courts have expressly adopted section 89.<sup>115</sup> At least three state courts have expressly declined to adopt the Restatement and have reaffirmed the pre-existing duty rule.<sup>116</sup> Several courts have made a passing nod to section 89 without going so far as to expressly adopt it.<sup>117</sup> California, New York, Michigan, and South Dakota have abrogated the pre-existing duty rule by statute, at least for written modifications of written contracts,<sup>118</sup> and Alabama, Minnesota, and Nebraska courts have

<sup>112</sup> RESTATEMENT (SECOND) OF CONTRACTS § 89 (AM. LAW INST. 1981).

<sup>113</sup> See sources cited *infra* notes 114 and 115.

<sup>114</sup> Gregory E. Maggs, *Ipsa Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 522 (1998).

<sup>115</sup> *New Eng. Rock Servs. v. Empire Paving, Inc.*, 731 A.2d 784, 789 (Conn. Ct. App. 1999); *Nooney Krombach Co. v. Blue Cross & Blue Shield*, 929 S.W.2d 888, 897 (Mo. Ct. App. 1996) (citing § 89 “we do not believe that the court was obliged to deny enforcement of the defendant’s promise, made to induce reliance on the part of the plaintiff, because of any absence of consideration.”); *Gintzler v. Melnick*, 364 A.2d 637, 640 (N.H. 1976); *Smaldino v. Larsick*, 630 N.E.2d 408, 412–13 (Ohio Ct. App. 1993); *Angel v. Murray*, 322 A.2d 630, 636 (R.I. 1974); *Guesthouse Int’l, LLC v. Shoney’s N. Am. Corp.*, 330 S.W.3d 166, 192 (Tenn. Ct. App. 2010) (adopting § 89 but also finding consideration for the modification); *Roussalis v. Wyoming Med. Ctr, Inc.*, 4 P.3d 209, 240 (Wyo. 2000).

<sup>116</sup> *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, C.A. No. CV 9742-VCL, 2015 WL 6455367, at \*19 (Del. Ch. Oct. 26, 2015), *reargument granted in part*, No. 9742-VCL, 2015 WL 7302187 (Del. Ch. Nov. 18, 2015), and *judgment entered*, No. 9742-VCL, 2016 WL 297808 (Del. Ch. Jan. 22, 2016), and *aff’d in part, rev’d in part*, 151 A.3d 450 (Del. 2016) (assuming the traditional rule continues to govern under Delaware law); *Margeson v. Artis*, 776 N.W.2d 652, 657 n.5 (Iowa 2009); *Zhang v. Eighth Jud. Dist. Ct.*, 103 P.3d 20, 23 (Nev. 2004).

<sup>117</sup> *Greenberg v. Mallick Mgmt., Inc.*, 527 N.E.2d 943, 948–49 (Ill. App. Ct. 1998) (discussing preexisting duty rule, U.C.C. and section 89 at length, concluding that whether to adopt modern rule is “not for this court to say” and finding consideration present); *Bernetich, Hatzell & Pascu, LLC v. Med. Records Online, Inc.*, 136 A.3d 955, 961 (N.J. Super. Ct. 2016); *Mikkelsen v. Pub. Util. Dist. No. 1*, 380 P.3d 1260, 1272 (Wash. Ct. App. 2016) (citing but not explicitly adopting § 89 and finding the modification too indefinite to enforce) *aff’d in part, rev’d in part* 404 P.3d 464, 479 (Wash. 2017) (finding genuine issue of fact whether definite modification was offered without discussing consideration or § 89).

<sup>118</sup> CAL. CIV. CODE § 1698 (West 2019) (retains the consideration requirement for oral modifications); MICH. COMP. LAWS § 566.1 (2019); N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney

held that consideration is not necessary to enforce modifications, without referring to the Restatement.<sup>119</sup> On the other hand, a surprising number of courts in many other states continue to invoke the pre-existing duty rule, without reference to section 89, U.C.C. section 2-209, or any criticism of the rule.<sup>120</sup> A number of states have expressed uncertainty or have conflicting appellate decisions.<sup>121</sup>

The pre-existing duty rule has little to recommend as a tool to resolve issues around enforcement of contract modifications that are largely issues of economic duress and good faith.<sup>122</sup> While contracts law teachers must recognize the persistence of the old consideration-based rule, a full discussion of the topic ought to make the clear distinction between initial contract formation and contract modifications, and to normalize the modern approach. It is past time to relegate the pre-existing duty rule to its true place as a regrettably persistent vestige.

---

2019); Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 517 (S.D. 1996) (citations omitted).

<sup>119</sup> Cavalier Mfg., Inc. v. Clarke, 862 So. 2d 634, 640–41 (Ala. 2003); Brooksbank v. Anderson, 586 N.W.2d 789, 793 (Minn. Ct. App. 1998); Pennfield Oil Co. v. Winstrom, 720 N.W.2d 886, 896 (Neb. 2006).

<sup>120</sup> Worden v. Crow, 427 S.W.3d 143, 147 (Ark. Ct. App. 2013); Asmus v. Pac. Bell, 999 P.2d 71, 78 (Cal. 2000); Rinck v. Ass'n of Reserve City Bankers, 676 A.2d 12, 17 (D.C. Ct. App. 1996); Davidpur v. Counne, 972 So. 2d 891, 892 (Fla. Dist. Ct. App. 2007); Carroll v. Bd. of Regents, 751 S.E.2d 421, 425 (Ga. Ct. App. 2013); Great Plains Equip., Inc. v. N.W. Pipeline Corp., 979 P.2d 627, 639 (Idaho 1999); AM Gen. LLC v. Armour, 46 N.E.3d 436, 443 (Ind. 2015); Augusta Med. Complex, Inc. v. Blue Cross of Kansas, Inc., 608 P.2d 890, 894 (Kan. 1980); Panasonic Commc'ns & Sys. Co. v. State, Dep't of Admin., Bureau of Purchases, 691 A.2d 190, 194 (Me. 1997); Palacio v. HSBC USA, N.A., No. 10-01937, 2012 WL 4928878, at \*6 (Mass. Super. Ct. Oct. 4, 2012); Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1372 (Miss. 1995); Clifford v. River Bend Plantation, Inc., 323 S.E.2d 23, 27 (N.C. 1984); Burley v. U.S. Foods, Inc., 756 S.E.2d 84, 89 (N.C. Ct. App. 2014), *rev'd on other grounds*, 776 S.E.2d 832, 836 (N.C. 2015); James v. Clackamas Cty., 299 P.3d 526, 533 (Or. 2013); Shedden v. Anadarko E. & P. Co., L.P., 136 A.3d 485, 490 (Pa. 2016) ("A contract, either oral or written, may be modified by a subsequent agreement which is supported by legally sufficient consideration, or a substitute therefor, and meets the requirements for contract formation."); Cardinal Dev. Co. v. Stanley Const. Co., Inc., 497 S.E.2d 847, 851 (Va. 1998).

<sup>121</sup> Compare Finger Lakes Capital Partners, LLC, C.A. No. 9742-VCL, 2015 WL 6455367, at \*19 (Del. Ch. Oct. 26, 2015) (noting section 89 but assuming consideration still required under Delaware law for modification), with Camden Fitness, LLC v. Wandless Enters., Inc., No. C.A. CPU5-12-000295, 2013 WL 8854873, at \*2–3 (Del. Ct. Com. Pl. Feb. 11, 2013) (citing and applying section 89); cf. e.g., Greenberg, 527 N.E.2d at 948 (Ill. App. Ct. 1988), *app. denied*, 535 N.E.2d 401 (Ill. 1988) (discussing section 89 and U.C.C. § 2-209 in a mixed contract, and declining to adopt section 89 by finding consideration).

<sup>122</sup> Stephens, *supra* note 73, at 357.

*C. The Firm Offer or Option Contract**1. The Problem and Competing Values*

The unenforceability of firm offers is another problematic corollary of consideration doctrine. One who proposes a contract offer may freely withdraw the offer at any time before it has been accepted.<sup>123</sup> In a variety of contexts, the offeree might wish for the offeror to agree not to exercise that power of withdrawal for a fixed time period, so that the offeree might engage in due diligence, line up related contracts, or obtain financing.<sup>124</sup> When the offeror promises not to withdraw the offer for a period of time, the promise is an option if the offeree pays for the promise, and is otherwise known as a firm offer.<sup>125</sup> While it is true that the promise not to withdraw a binding offer is a species of promise, it almost invariably arises in a commercial context where parties probably expect legal enforceability.<sup>126</sup>

The values that would support a rule permitting an offer to be revoked, despite a promise not to, are obscure. Yet that is the result of the binding offer corollary to consideration doctrine. While the idea that the offeror is “master of the offer” may advance basic notions of autonomy and freedom of contract, holding the offeror to a promise not to revoke an offer seems entirely consistent with offeror autonomy. Moreover, in a business environment such as commercial real estate, or large construction projects, parties often must rely on the durability of contract offers in order to negotiate other related contracts. For example, the real estate buyer relies on loan and title insurance commitments in order to proceed with a purchase. The general contractor relies on bids by subcontractors to price its main contract offer. Even in the absence of reliance in the sense of a change in position, there is no obvious reason an offeror should not be free to make an offer irrevocable for a reasonable time.

*2. Choice of Rules*

A corollary to the consideration doctrine makes firm offers legally unenforceable. The corollary is that that a promise not to withdraw an offer, no matter how formally made, is a separate promise, and is not enforceable, unless the offeree has paid money or otherwise exchanged value for the promise, in other words, purchased an option.<sup>127</sup> In contrast, the rule adopted in the Restatement (Second) is to enforce any firm offer that is in a signed writing and “recites a

<sup>123</sup> RESTATEMENT (SECOND) OF CONTRACTS, § 22 cmt. a (AM. LAW INST. 1981).

<sup>124</sup> Melvin A. Eisenberg, *The Revocation of Offers*, 2004 WIS. L. REV. 271, 282–91 (2004).

<sup>125</sup> *Id.* at 279.

<sup>126</sup> *Id.* at 291.

<sup>127</sup> *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933); Eisenberg *supra* note 124, at 281 (contending that the common law rule is the product of indefensible formal legal reasoning).

purported consideration.”<sup>128</sup> For sales of goods, the U.C.C. Article Two makes binding any firm offer made by a merchant in writing.<sup>129</sup> Various state statutes also make written binding offers enforceable without proof of actual consideration.<sup>130</sup> Even offers that are not expressly made irrevocable for a period of time may be treated as binding when the offeree reasonably and foreseeably relies on the offer, as in the case of a general contractor who uses a subcontractor’s bid to price a general contract bid.<sup>131</sup> Professor Eisenberg has advocated going further by removing the remaining obstacles (the signed writing, the recital of consideration) and making all promises not to withdraw or revoke an offer binding.<sup>132</sup>

### 3. *The State of the Law*

The U.C.C. is of course the law in all fifty states. Consideration is thus irrelevant in deciding whether to enforce binding offers for sales of goods. As for contracts outside of Article Two, state courts appear to remain divided. Some courts have adopted the Restatement (Second) section 87(1) and accept a simple written recital of consideration, to support a firm offer.<sup>133</sup> However, the majority of state courts continue to apply the rule that separate consideration is required to support an option contract.<sup>134</sup> Opinions applying the consideration rule rarely if ever offer any values promoted by the rule, and in some cases even cite Restatement (Second) section 87 without explaining why they are not following it.<sup>135</sup>

The reliance prong of the Restatement section 87 rule seems to have gained broader acceptance.<sup>136</sup> For example, the Iowa Supreme Court recently held that

<sup>128</sup> RESTATEMENT (SECOND) OF CONTRACTS, § 87(1) (AM. LAW INST. 1981).

<sup>129</sup> U.C.C. § 2-205 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

<sup>130</sup> *E.g.*, N.Y. GEN. OBLIG. LAW § 5-1109 (McKinney 2019).

<sup>131</sup> *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958); RESTATEMENT (SECOND) OF CONTRACTS, § 87(2).

<sup>132</sup> Eisenberg, *supra* note 124, at 288–89.

<sup>133</sup> *Knott v. Racicot*, 812 N.E.2d 1207, 1214 (Mass. 2004); *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 110 (Tex. 2004); *see also Smith v. Wheeler*, 210 S.E.2d 702, 704 (Ga. 1974) (enforcing an option reciting a one dollar nominal consideration).

<sup>134</sup> *Fru-Con Constr. Corp. v. KFX, Inc.*, 153 F.3d 1150, 1158 (10th Cir. 1998) (applying Missouri law); *Polk v. BHRGU Avon Props., LLC*, 946 So. 2d 1120, 1122 (Fla. Dist. Ct. App. 2006); *Lewis v. Fletcher*, 617 P.2d 834, 835–36 (Idaho 1980) (explicitly rejecting the Restatement (Second) of Contracts § 87(1) and holding that a written option agreement that contains a fictional recital of a nominal consideration is unenforceable for lack of consideration); *see also Berryman v. Kmoch*, 559 P.2d 790, 793 (Kan. 1977) (same); *Country Club Oil Co. v. Lee*, 58 N.W.2d 247, 250 (Minn. 1953); *McLellan v. Charly*, 758 N.W.2d 94, 101 (Wis. Ct. App. 2008) (citing *Foy v. Foy*, 484 So. 2d 439, 442–43 (Ala.1986)).

<sup>135</sup> *Polk*, 946 So. 2d at 1122; *Sun Ref. & Mktg. Co. v. Spelman*, No. 63164, 1992 WL 390216, at \*4 (Ohio Ct. App. 1992).

<sup>136</sup> *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 384 N.E.2d 176, 179–81 (Mass. 1978); *Strata Prod. Co. v. Mercury Expl. Co.*, 916 P.2d 822, 829 (N.M. 1996); *e.g.*, *Pavel Enters. v. A.S. Johnson Co., Inc.*, 674 A.2d 521, 529 (Md. Ct. App. 1996).

an oral option for the sale of a farm to a tenant could be enforced based on promissory estoppel, in the absence of either a writing or consideration.<sup>137</sup> It is therefore difficult to synthesize a rule for law students to accurately describe the state of the law regarding binding offers. The best appraisal may be this: that there is a modern approach upholding offers expressing an intent not to withdraw with requisite written formality; that an offer may be found irrevocable because of reasonable and foreseeable pre-acceptance reliance; but that many states cling to an older rule limiting binding offers to those supported by a separate payment or exchange.

#### *D. Discharged Past Debts and Promises Recognizing Past Benefits*

##### *1. The Problem*

Consideration doctrine can also be an obstacle to enforcing promises to reaffirm past debts or honor moral obligations. One example is an employer's promise of payments in recognition of past services that had been rendered gratuitously.<sup>138</sup> These promises often advance equity values when a wealthy promisor recognizes past failure to compensate a less wealthy promisee. On the other hand, enforcing a distressed debtor's promise to reaffirm a debt discharged in bankruptcy or by the statute of limitations may further impoverish an indigent worker. For that reason, the Bankruptcy Code requires attorney or court review of any agreement to reaffirm a discharged debt principally to guard against economic duress.<sup>139</sup>

In a relational contract setting, parties working together on numerous commercial projects may at some point feel that a prior contract has been breached, and agree to wipe the slate clean, as it were, in exchange for a new promise.<sup>140</sup> In these cases, admittedly, it seems less clear that enforcement advances justice by protecting reliance by the promisee, although certainly reliance may result from these revived promises. In many cases, however, courts and parties may feel that a promise to pay for past services really reflects the

<sup>137</sup> *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 805, 812 (Iowa 2018).

<sup>138</sup> *Watkins v. Watkins*, 402 P.3d 1053, 1060 (Idaho 2017) (holding that a father's promise to compensate his son for past services and injuries was unenforceable for lack of consideration, without reference to the Second Restatement § 86).

<sup>139</sup> 11 U.S.C. § 524(k)(3)(I) (2018); see also Marianne B. Culhane and Michaela M. White, *Debt after Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 715 (1999).

<sup>140</sup> *Loper v. Weather Shield Mfg., Inc.*, 203 So. 3d 898, 904–05 (Fla. Dist. Ct. App. 2015) (holding contractor's post-contract promise to replace windows and extend warranty was enforceable because homeowner's agreement not to sue for defective work was valid consideration); *c.f.* *Cityscapes Dev., LLC v. Scheffler*, 866 N.W.2d 66, 70 (Minn. Ct. App. 2015) (holding promise to pay broker commission on expired listing agreement unenforceable, mostly to effectuate statutory restriction on broker override clauses, essentially on grounds of public policy, although broker might have argued resolution of bona fide dispute).

resolution of what would otherwise be a restitution claim (hence the occasional use of the phrase “promissory restitution”).<sup>141</sup>

An interesting case illustrating the unhelpfulness of consideration doctrine involved a seemingly one-sided (and badly written) letter agreement between a lawyer and his client.<sup>142</sup> In the letter agreement, the lawyer referred to unpaid legal bills owed to his firm (and not him personally) as well as a “50-50 partnership” that “[a]t least one of us had in mind . . . .”<sup>143</sup> These recitals were followed by the client’s promise to pay \$25,000 monthly towards the legal bills, \$500,000 with interest, and 5 percent of the gross receipts of a real estate development.<sup>144</sup> Viewed in the light most favorable to the attorney, he and his client had apparently worked on several commercial real estate projects, the attorney believed he had a bona fide claim to a partnership share that the client had promised but never delivered, and this letter agreement was a bona fide resolution of his claims.<sup>145</sup>

The court rejected the plaintiff attorney’s argument that the client’s promises were in return for settlement of past disputes, because the letter did not include any release of claims, or promise not to sue, by the attorney.<sup>146</sup> The court spent a considerable part of its analysis on the New York statute that makes promises to pay for past services rendered enforceable if the promise is in writing and recites the “past consideration.”<sup>147</sup> Dividing the letter agreement into three separate promises by the client, the court found that only the agreement to pay past legal bills to the attorney’s firm sufficiently recited the “past consideration.”<sup>148</sup> The second and third promises to pay \$500,000 and a percentage of future receipts to the lawyer were not supported by any written recital describing the past services for which this money was to be paid, and the vague reference to a “50-50 partnership” was held not to be sufficient description of past consideration.<sup>149</sup>

One suspects that the heart of the matter here was an attorney overreaching in a contract with someone who was both a client and a business partner. The court makes no mention of the attorney’s fiduciary duty, or of the rules of professional conduct governing the establishment and collection of attorney fees, but one suspects the skepticism with which the court viewed this contract stemmed in part from the fact that an attorney was exacting generous terms from a former client. Had the two parties both been real estate investors, the

---

<sup>141</sup> See Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1118 (1971).

<sup>142</sup> *Korff v. Corbett*, 65 N.Y.S.3d 498, 500 (N.Y. App. Div. 2017).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 500–01.

<sup>146</sup> *Id.* at 503–04.

<sup>147</sup> *Id.* at 502–03.

<sup>148</sup> *Id.* at 503.

<sup>149</sup> *Id.* at 503–04.

court might have overlooked the informality of the letter and simply invoked the principle that courts will not look behind a voluntary bargain. Applying either unconscionability or undue influence doctrine would have permitted the court to examine why the client agreed to this arrangement, rather than applying formalistic rules in a search for consideration, past or present.

### 2. *Choice of Rules*

The traditional consideration rule is that a promise made in recognition of past services not rendered in exchange for the promise, or a promise to reaffirm a discharged debt, would be unenforceable.<sup>150</sup> A promise that appears to reaffirm a discharged or unenforceable debt may, however, be supported by valid consideration if the past debt may be characterized as disputed, rather than unenforceable, so that the new promise is in settlement of a bona fide dispute.<sup>151</sup> Similarly, the promise to reward past services given gratuitously could be recast as a resolution of a potential restitution claim, assuming the promisee agrees to accept the new promise in lieu of restitution. On the other hand, the Restatement (Second) dispenses with consideration in both instances.<sup>152</sup> It makes promises to reaffirm discharged debts enforceable despite the absence of a new exchange<sup>153</sup> and makes promises in recognition of past benefits or services enforceable without consideration “to the extent necessary to prevent injustice.”<sup>154</sup> The Restatement section 86 principle permitting enforcement of promises recognizing past benefits extends only to past benefits or services originally provided gratuitously. If the new promise is one to make additional payments for services that were the subject of a prior contract, it is not enforceable, even if the promisor is recognizing the inadequacy or injustice of the prior contract.<sup>155</sup> A promise to make such a bonus payment might in some cases be characterized as a modification, if the contract is still executory, enforceable based on an unexpected change in circumstances.<sup>156</sup>

### 3. *The State of the Law*

Cases raising these issues are infrequent, giving rise to the question whether they need to be covered in an introductory contracts law course at all. Only thirteen cases from eleven state and federal courts and the federal court of claims even cite section 86.<sup>157</sup> Of those, only four adopt section 86 or at least

<sup>150</sup> PERILLO, *supra* note 69, at § 5.2.

<sup>151</sup> RESTATEMENT (SECOND) OF CONTRACTS § 74 (AM. LAW INST. 1981).

<sup>152</sup> *Id.* §§ 82–94.

<sup>153</sup> *Id.* §§ 82–85.

<sup>154</sup> *Id.* § 86.

<sup>155</sup> *Id.* § 86 cmt. f.

<sup>156</sup> See *supra* text accompanying note 103.

<sup>157</sup> *Jennings v. United States*, 126 Fed. Cl. 764, 771 (Fed. Cl. 2016); *First Nat’l Bankshares of Beloit, Inc. v. Geisel*, 853 F. Supp. 1344, 1357 (D. Kan. 1994); *In re Nat’l Audit Def.*

cite it approvingly.<sup>158</sup> The Tennessee Supreme Court held explicitly that “past consideration” will never support promise enforcement, in a case where the dissent cited section 86.<sup>159</sup> Even among the cases in the three-year survey of consideration headnotes, only six cases not referencing the Restatement could be said to raise “past consideration” issues.<sup>160</sup> New York and California have essentially codified section 86 by statute.<sup>161</sup> However, treatises continue to refer to section 86 as a minority rule.<sup>162</sup> These rare cases still have value as illustrations to help students differentiate bargained-for exchange theory from reliance and restitution as alternative bases to enforce promises. Given that they often arise in family contexts,<sup>163</sup> the cases also offer an occasion to discuss feminist and other critical perspectives on contract law and theory.

### E. *The “Illusory Promise” and the Very One-Sided Deal*

#### 1. *The Problem and Competing Values*

If a contract gives one party the discretionary authority to cancel the contract, to determine what goods or services it will provide or purchase, or to change any or all terms at will, is it a contract at all? The illusory promise doctrine makes the other party’s promises unenforceable if one party’s duties are truly optional, for want of a true exchange.<sup>164</sup> The problem of one-sided discretion in most cases is not so much about whether a contract has been formed, but rather whether through an abuse of bargaining power or otherwise, one party

---

Network, 332 B.R. 896, 920 (Bankr. D. Nev. 2005); *Edelson v. Cheung*, No. 13-5870 (JLL), 2015 WL 5316651, at \*5 (D.N.J. Sept. 10, 2015); *Starr v. Katz*, No. 91-3365, 1994 WL 548209, at \*13 (D.N.J. Oct. 5, 1994); *Realty Assoc. v. Valley Nat’l Bank*, 738 P.2d 1121, 1124 (Ariz. Ct. App. 1986); *Knight v. Bd. of Admin. of Pub. Emp.’s Ret. Sys.*, 273 Cal. Rptr. 120, 145 n.10 (Cal. Ct. App. 1990); *Ketterle v. Ketterle*, 814 N.E.2d 385, 390 (Mass. Ct. App. 2004); *McMurry v. Magnusson*, 849 S.W.2d 619, 623 n.1 (Mo. Ct. App. 1993); *Salas v. Mafnas*, No. 2008-SCC-0037-CIV, 2010 WL 2332075, at \*15 n.11 (N. Mar. I. June 8, 2010); *Meadows v. Langlais Constr. Co.*, No. C.A. 80-2966, 1984 WL 560340, at \*2 (R.I. Super. Ct. 1984); *Bratton v. Bratton*, 136 S.W.3d 595, 607 (Tenn. 2004); *Dulany Foods, Inc. v. Ayers*, 260 S.E.2d 196, 203 (Va. 1979) (Poff, J., dissenting).

<sup>158</sup> *Geisel*, 853 F. Supp. 1344 at 1357; *Realty Assoc.*, 738 P.2d at 1125; *McMurry*, 849 S.W.2d at 622–23; *Meadows*, 1984 WL 560340, at \*3.

<sup>159</sup> *Bratton*, 136 S.W.3d at 600, 607.

<sup>160</sup> *Stemcells, Inc. v. Neuralstem, Inc.*, 115 F. Supp. 3d 623, 637–38 (D. Md. 2015); *Watkins v. Watkins*, 402 P.3d 1053, 1060 (Idaho 2017); *Chandra v. Chandra*, 53 N.E.3d 186, 191 (Ill. App. Ct. 2016); *Cityscapes Dev., LLC v. Scheffler*, 866 N.W.2d 66, 72 (Minn. Ct. App. 2015); *Korff v. Corbett*, 65 N.Y.S.3d 498, 502 (N.Y. App. Div. 2017); *Nicholas v. Hofmann*, 158 A.3d 675, 687 (Pa. Super. Ct. 2017).

<sup>161</sup> CAL. CIV. CODE § 1606 (West 2019); N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 2019).

<sup>162</sup> PERILLO, *supra* note 69, at § 5.4.

<sup>163</sup> *See, e.g., Bratton*, 136 S.W.3d at 595 (postnuptial agreement); *see also Chandra*, 53 N.E.3d at 186.

<sup>164</sup> *Bowers v. Asbury St. Louis Lex, LLC*, 478 S.W.3d 423, 426–27 (Mo. Ct. App. 2015); RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (AM. LAW INST. 1981).



has secured an unfairly one-sided deal. Courts and scholars attached to the bargain theory of contract have rescued seemingly illusory contracts using interpretation devices, for example the duty of good faith famously invoked by Judge Cardozo in *Wood v. Lucy*, to cabin the apparent unfettered discretion.<sup>165</sup> Professor Eisenberg argues sensibly that a contract in which one party makes truly nonbinding promises may reflect sensible business judgments, and that when they are the product of deception or unfair bargaining, unconscionability and other defenses can handle the problem.<sup>166</sup>

This problem arises frequently in two categories of contemporary cases: the at-will employment contract and mandatory arbitration clauses in consumer contracts. In an at-will employment contract, the employee is free to quit, and the employer free to fire the employee, at any time.<sup>167</sup> Courts have struggled with the question whether an at-will employment contract contains any meaningful promises exchanged for an employee's promise not to compete.<sup>168</sup> Consumers have also challenged a variety of standardized form contracts that permit a merchant to change terms or opt out of promises essentially at will.<sup>169</sup>

## 2. Choice of Rules

Traditional consideration doctrine on the one hand denies enforcement to a party making only illusory promises, but on the other hand finds a variety of stratagems to avoid holding a promise truly illusory.<sup>170</sup> The duty of good faith may be called upon to constrain the party's apparently unfettered discretion, as in the case of exclusive dealings or requirements contracts.<sup>171</sup> If the party with discretion must provide any advance notice before withdrawing from the contract, that promise is usually found sufficient to overcome the illusory promise

<sup>165</sup> *Wood v. Lucy*, 118 N.E. 214, 214–15 (N.Y. 1917).

<sup>166</sup> Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 649–52 (1982).

<sup>167</sup> See Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 433 (2016).

<sup>168</sup> *Id.* at 442–43.

<sup>169</sup> See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649–51 n.93, 98, 103–04 (2005). Compare *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1057–58, 1064–66, 1071, 1075 (S.D. Cal. 2015), *aff'd sub nom.*, 709 F. App'x 862 (9th Cir. 2017) (finding credit card agreement not illusory despite change-in-terms provision by invoking duty of good faith), with *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 204–06, 209 (5th Cir. 2012) (finding employment contract illusory because of employer's change-in-terms provision).

<sup>170</sup> PERILLO, *supra* note 69, at § 4.12.

<sup>171</sup> U.C.C. § 2-306 (AM. LAW INST. & UNIF. LAW COMM'N 2018); see also *id.* § 2-311 (discretion to specify particulars of performance must be exercised in good faith). But see *Office Pavilion S. Florida, Inc. v. ASAL Prods., Inc.*, 849 So. 2d 367, 367–71 (Fla. Dist. Ct. App. 2003) (holding that a requirements contract lacked consideration, without reference to § 2-306 of the U.C.C.).

problem.<sup>172</sup> Courts are divided as to whether an employer's promise of at-will employment is illusory, and therefore whether employee noncompete promises are enforceable.<sup>173</sup>

### 3. *The State of the Law*

The illusory promise theory has recently emerged in challenges to arbitration clauses in consumer contracts and noncompete and confidentiality agreements in at-will employment contracts.<sup>174</sup> The consumer and employment cases highlight the fact that unconscionability is a far superior doctrinal solution to the problem of excessive discretion than the illusory contract doctrine. The consideration-based illusory contract rule is so easily circumvented that one wonders why merchants and employers still occasionally fail to overcome it. Courts may refuse to enforce contracts found to be procedurally and substantively unconscionable, weighing not only the imbalance in the parties' duties and obligations, but also their relative bargaining power and the process by which the contract was negotiated, or adhered to. The employee noncompete cases discussed below<sup>175</sup> also show that public policy approaches, that frankly assess the fairness of these troublesome contracts, are what is really going on even when courts invoke an absence of consideration as the reason to deny enforcement. If a purely illusory promise can be "fixed" by requiring some good faith or notice period in exercising the discretion, it can still be separately evaluated for unconscionability. Among the 186 cases decided in the past three years classified as consideration cases only two invalidated a contract on the grounds that one party's promises were illusory, and both could have been better analyzed as unconscionability or public policy cases.<sup>176</sup> Given this, it is unclear what useful work the illusory promise consideration corollary is still doing. In any event, the discussion of the illusory promise concept in contracts class could better be incorporated in the discussion of unconscionability and public policy defenses.

---

<sup>172</sup> *La Frontera Ctr., Inc. v. United Behavioral Health, Inc.*, 268 F. Supp. 3d 1167, 1177–78, 1226 (D.N.M. 2017); *Neurodiagnostic Tex, L.L.C. v. Pierce*, 506 S.W.3d 153, 159, 163–64 (Tex. Ct. App. 2016).

<sup>173</sup> Compare *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 576–78, 584 (5th Cir. 2015) (holding employee non-compete agreement invalid under Texas law), with *Horter Inv. Mgmt., LLC v. Cutter*, 257 F. Supp. 3d 892, 897, 901–02 (S.D. Ohio 2017) (continued at-will employment was sufficient consideration to support employee confidentiality agreement under Ohio law).

<sup>174</sup> See *infra* text accompanying notes 268–78.

<sup>175</sup> See *infra* text accompanying notes 268–78.

<sup>176</sup> *Hunn*, 789 F.3d at 576–78, 584; *Bowers v. Asbury St. Louis Lex, LLC*, 478 S.W.3d 423, 426–28 (Mo. Ct. App. 2015).

### F. *The Third-Party Guarantee*

#### 1. *The Problem and Values*

A lender seeking additional protection for its loan will often ask officers or owners of a corporate borrower to provide personal guarantees. The question whether the guarantors' promise to pay is supported by consideration has often masked issues of economic duress or unconscionability.<sup>177</sup> In the classic scenario, a corporate owner or officer brings in a spouse who is not involved in the business as guarantor, and when the business defaults, the spouse is faced with the perhaps unexpected duty to repay the business loan. In another scenario, a business about to default or having already defaulted on a loan is required to obtain personal guarantees in return for forbearance from foreclosure or other drastic collection action. In both scenarios, the underlying issues are the availability of small business credit on the one hand, and issues of informed assent, economic duress, and unconscionable overreaching by lenders on the other hand.

#### 2. *Choice of Rules*

Consideration doctrine is not particularly helpful in sorting enforceable guarantees from unenforceable guarantees. In the initial loan guarantee scenario, and in the post-default scenario with forbearance, the lender obviously suffers a detriment (an advance of loan money), so the consideration question is whether that detriment (loan or forbearance) was induced by the guarantee. Guarantors seeking to void their promise must attempt to prove that the lender would have made the loan (or the forbearance or workout) even without the guarantee.<sup>178</sup> Except in the rare case where there is a written loan approval without the guarantee, and the guarantor is brought in as an afterthought,<sup>179</sup> the absence of inducement is difficult to prove. Courts occasionally still confuse the issues, focusing on the benefit/detriment aspect, which is not at issue, rather than the inducement issue.<sup>180</sup> The Restatement (Second) section 88 rules for guarantees depart from consideration, making a guaranty promise enforceable, similar to firm offers, so long as it is in writing and "recites a purported consideration," or if the promise induces reasonable and foreseeable reliance.<sup>181</sup>

<sup>177</sup> See *United States v. Meadors*, 753 F.2d 590, 594, 598–99 (7th Cir. 1985) (finding wife's guarantee unenforceable without reference to possible duress or unconscionability).

<sup>178</sup> E.g., *Kansas City Live Block 125 Retail, LLC v. Bhakta*, 476 S.W.3d 326, 328–30, 332 (Mo. Ct. App. 2015) (upholding trial court finding that guarantee was required to induce the loan, and therefore supported by sufficient consideration).

<sup>179</sup> See *Meadors*, 753 F.2d at 597–98.

<sup>180</sup> *In re Floyd*, 540 B.R. 747, 751, 753–54 (Bankr. D. Idaho 2015), *aff'd sub nom.*, No. 1:13-bk-02134-TLM, 2016 WL 1733433 (D. Idaho Apr. 29, 2016) (court finds there was consideration for a post-default guarantee, without addressing whether any new advance or forbearance was given at the time of the guarantee).

<sup>181</sup> RESTATEMENT (SECOND) OF CONTRACTS § 88 (AM. LAW INST. 1981).

More importantly, the real issues of duress and overreaching are better addressed by explicitly relying on the defense doctrines (fraud, mistake, unconscionability, duress, undue influence). The gender bias that historically plagued loan guarantees was addressed to some extent in provisions of the Equal Credit Opportunity Act and implementing regulations, which restrict lenders from imposing unnecessary guarantee requirements on spouses.<sup>182</sup>

### 3. *The State of the Law*

The Restatement (Second) provides that third-party guarantees are enforceable without regard to consideration, if they are signed and in writing.<sup>183</sup> Our survey of recent cases did not uncover a single case invalidating a third-party guaranty for want of consideration.<sup>184</sup> Federal law now includes two statutory rules to protect consumers from improvident guarantees. The Federal Trade Commission's 1976 Credit Practices Rule makes it an illegal unfair trade practice to misrepresent the nature or extent of cosigner liability in a consumer credit transaction.<sup>185</sup> The rule requires merchants to provide cosigners with a specified written disclosure warning the cosigners of their potential liability.<sup>186</sup> Regulations under the Equal Credit Opportunity Act are also intended to protect guarantors from creditor overreaching, taking aim at a once-common practice that discriminates against female applicants.<sup>187</sup> A creditor may not require a spouse to cosign an extension of credit when the applicant meets the creditor's credit standards.<sup>188</sup> The subject of third-party guarantees is also extensively regulated by the law of sureties and U.C.C. Article 3,<sup>189</sup> and thus is perhaps best omitted from introductory contracts law classes.

## III. CONSIDERATION IN THE COURTS

### A. *Many Cases Referring to "Consideration" Did Not Turn on True Consideration Issues*

Although contemporary state and federal court opinions continue to invoke the doctrine of consideration, the cases often involve issues better analyzed with other contract law principles, and sometimes reveal that judges may be as confused as law students about the meaning of consideration. The Westlaw key

<sup>182</sup> 12 C.F.R. § 202.7(d) (2019).

<sup>183</sup> RESTATEMENT (SECOND) OF CONTRACTS § 88 (AM. LAW INST. 1981).

<sup>184</sup> Cf. *Martin Printing, Inc. v. Sone*, 873 A.2d 232, 234, 238–39 (Conn. App. Ct. 2005) (rejecting an argument that guarantee lacked consideration and also applying Restatement (Second) § 88).

<sup>185</sup> 16 C.F.R. § 444.3(a)(1) (2019).

<sup>186</sup> *Id.* § 444.3(c).

<sup>187</sup> 12 C.F.R. § 202.7(d).

<sup>188</sup> *Id.*

<sup>189</sup> RESTATEMENT (THIRD) OF SECURITY AND SURETYSHIP AND GUARANTY (AM. LAW INST. 1996); U.C.C. § 3-419 (AM. LAW INST. & UNIF. LAW COMM'N 2018).

number system includes no fewer than forty-four different topics under the rubric of consideration,<sup>190</sup> including all of the corollaries, as well as topics like “adequacy of consideration” and “failure of consideration”, which as we shall see, are misnomers for other contract law doctrines (unconscionability and material breach, respectively). A Westlaw search for cases coded by West under these forty-four different headings in state and federal courts for a recent three-year period (June 2015 to June 2018) produces citations to a surprising 181 cases.<sup>191</sup> On closer examination, however, few if any of these cases turned on true consideration issues. Although forty cases resulted in denial of enforcement, most of these could have been decided on other grounds, or would have come out differently had the courts applied Restatement rules.<sup>192</sup> One hundred and sixty-eight of the 181 cases discussing consideration involved business or commercial exchange transactions, and even the ten family disputes mostly involved either negotiated pre- or post-marital agreements or estate disputes.<sup>193</sup> No reported cases resembled the casual, social, or family promises that are the grist of casebooks and law school classrooms, and that consideration theory is supposed to help filter out of the judicial system.

*B. Cases Denying Enforcement for Want of Consideration Mostly Involve Indefinite Promises or Consideration Corollaries*

Of the forty cases where courts denied enforcement of a promise while invoking consideration, thirty-four involved business transactions, including employment, insurance, loans, and real estate contracts.<sup>194</sup> These were promises that scholars advocating for a commercial exchange test would find enforceable (setting aside indefiniteness and contract defense issues).<sup>195</sup> Four of the forty

<sup>190</sup> West Key Number System, 95(I)(D), Nos. 47–91 (accessible through Westlaw.com by selecting “Key Numbers” under the “Content types” tab, then selecting No. 95 “Contracts” where subsection “(D) Consideration” can be found).

<sup>191</sup> Westlaw search conducted June 11, 2018, all Federal and all state cases, Key numbers 47 to 91, filtered for cases in past 3 years. The search produced 353 headnotes to 181 unique cases. See Appendix I, on file with author. A similar search for Key numbers 1 to 46 (capacity, offer and acceptance) for the past three years yielded 801 headnotes, and 1,780 headnotes for all Contracts key number topics. By this rough measure about 20 percent (353/1780) of contracts headnotes were classified as “consideration” issues by West in state and federal cases decided in this three-year period.

<sup>192</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 82–90 (AM. LAW. INST. 1981).

<sup>193</sup> See Appendix I, on file with author.

<sup>194</sup> E.g., *Cityscapes Dev., LLC v. Scheffler*, 866 N.W.2d 66, 67 (Minn. Ct. App. 2015) (real estate); *Roller v. Am. Modern Home Ins. Co.*, 484 S.W.3d 110, 112–13 (Mo. Ct. App. 2015) (insurance). See Appendix I, on file with author.

<sup>195</sup> Barnett, *A Consent Theory*, *supra* note 36, at 271; see also Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake”*, 52 U. CHI. L. REV. 903, 904–05 (1985); James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283, 286 (1991).

cases involved family promises<sup>196</sup> and two arose in disputes between parents and schools around their child's education.<sup>197</sup> From this perspective, the gate-keeping function of consideration doctrine appears to be missing the mark.

Of these forty cases denying enforcement, seven denied enforcement of seemingly gratuitous promises.<sup>198</sup> Of the seven gratuitous promise cases, two raised post-contract issues: a promise to forbear enforcement of a debt,<sup>199</sup> and an insurer's promise to pay a claim.<sup>200</sup> One case involving a gratuitous assignment of contract rights was reversed on appeal.<sup>201</sup> Of the remaining four cases, three were family promises,<sup>202</sup> and one found that a school's individualized education plan was not an enforceable contract.<sup>203</sup>

The cases not involving gratuitous promises denied enforcement based on consideration corollaries. Four cases purported to find reciprocal promises illusory.<sup>204</sup> Ten were based on the pre-existing duty rule denying effect to post-contract modifications.<sup>205</sup> Three cases involved firm offers,<sup>206</sup> three turned on past consideration,<sup>207</sup> and one involved a third-party guarantee and release.<sup>208</sup>

<sup>196</sup> *Watkins v. Watkins*, 402 P.3d 1053, 1056 (Idaho 2017); *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 406 P.3d 1199, 1216 (Wash. Ct. App. 2017); *Young v. Young*, 808 S.E.2d 631, 642 (W. Va. 2017); *Willey v. Willey*, 385 P.3d 290, 293 (Wyo. 2016).

<sup>197</sup> *Mulvey v. Carl Sandburg High Sch.*, 66 N.E.3d 507, 513–15 (Ill. App. Ct. 2016) (finding no real promise and no consideration); *SH v. Campbell Cty. Sch. Dist.*, 409 P.3d 1231, 1231–32 (Wyo. 2018) (finding that individualized education program was not a contract).

<sup>198</sup> *Wallach v. Eaton Corp.*, 125 F. Supp. 3d 487, 494 (D. De. 2015), *rev'd*, 837 F.3d 356 (3d Cir. 2016); *Orcilla v. Big Sur, Inc.*, 198 Cal. Rptr. 3d 715, 735 (Cal. Ct. App. 2016); *Roller*, 484 S.W.3d at 114–15; *Voccola v. Forte*, 139 A.3d 404, 414–15 (R.I. 2016); *Haines-Marchel*, 406 P.3d at 1216; *SH*, 409 P.3d at 1233–34; *Willey*, 385 P.3d at 301.

<sup>199</sup> *Orcilla*, 198 Cal. Rptr. 3d at 734.

<sup>200</sup> *Roller*, 484 S.W.3d at 113.

<sup>201</sup> *Wallach*, 125 F. Supp. 3d at 488.

<sup>202</sup> *Haines-Marchel*, 406 P.3d at 1216; *Young*, 808 S.E.2d at 642; *Willey*, 385 P.3d at 293.

<sup>203</sup> *SH*, 409 P.3d at 1233.

<sup>204</sup> *Hunn v. Dan Wilson Homes, Inc.*, 789 F. 3d 573, 584 (5th Cir. 2015) (employee non-compete unenforceable because employment was at will); *DiCosola v. Ryan*, 44 N.E.3d 556, 561–62 (Ill. App. Ct. 2015) (finding stock grant unenforceable because officer's promise of future services was illusory); *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 435 (Mo. 2015) (describing the issue as unconscionability rather than an illusory promise); *Bowers v. Asbury St. Louis Lex, LLC*, 478 S.W.3d 423, 428 (Mo. Ct. App. 2015) (finding arbitration clause unenforceable when employer retained unilateral right to modify or terminate); *Motormax Fin. Servs. Corp. v. Knight*, 474 S.W.3d 164, 171 (Mo. Ct. App. 2015) (invalidating arbitration clause for lack of mutuality, citing a Missouri supreme court case).

<sup>205</sup> *Michael Shane Enters., LLC v. Courtroom Connect Corp.*, 664 F. App'x. 850, 852–53 (11th Cir. 2016); *Barrett-O'Neill v. Lalo, LLC*, 171 F. Supp. 3d 725, 740 (S.D. Ohio 2016); *McInnis v. OAG Motorcycle Ventures, Inc.*, 35 N.E.3d 1076, 1087 (Ill. App. Ct. 2015); *AM Gen. LLC v. Armour*, 46 N.E.3d 436, 443 (Ind. 2015); *Yoches v. City of Dearborn*, 904 N.W.2d 887, 899 (Mich. Ct. App. 2017), *appeal denied*, 911 N.W.2d 189 (Mich. 2018); *Safety Ctr., Inc. v. Stier*, 903 N.W.2d 896, 900 (Minn. Ct. App. 2017); *Barclay Petroleum, Inc., v. Bailey*, 96 N.E.3d 811, 821 (Ohio Ct. App. 2017), *appeal allowed*, 92 N.E.3d 878 (Ohio 2018), *appeal dismissed as improvidently allowed*, 123 N.E.3d 947 (Ohio 2018); *Cuspide Props., Ltd. v. Earl Mech. Servs.*, 53 N.E.3d 818, 830 (Ohio Ct. App. 2015); *Socket*

The remaining cases, while described by courts and coded by West as denying enforcement based on “consideration,” involved other contract law rules. Four cases denied enforcement on public policy grounds,<sup>209</sup> one referred to a breach as a failure of consideration,<sup>210</sup> and seven found promises too indefinite to enforce.<sup>211</sup>

Apart from the cases resting on the problematic consideration corollaries, the remainder either involved seemingly gratuitous promises or were cases readily explainable without resort to consideration doctrine.

### 1. *Gratuitous Promise Cases*

Some promises found to lack consideration were made in the context of prior bargained-for exchanges. For example, an insurer’s promise to settle a fire loss claim under an existing insurance contract was found both too indefinite and unsupported by consideration (in the absence of a release from the policyholder).<sup>212</sup> A mortgagee’s promise to postpone a foreclosure sale (arising from the mortgagor’s default on an existing loan transaction) was found unenforceable for want of consideration.<sup>213</sup> Because the homeowners did not allege any conduct that would amount to detrimental reliance, the promise was also not enforceable based on promissory estoppel.<sup>214</sup> The homeowner and lender al-

---

v. Mid-Atlantic Sys. of CPA, Inc., 126 A.3d 1266, 1278 (Pa. 2015); Eurecat US, Inc. v. Marklund, 527 S.W.3d 367, 387, 390 (Tex. Ct. App. 2017).

<sup>206</sup> *In re First Phoenix-Weston, LLC*, 575 B.R. 828, 847 (Bankr. W.D. Wis. 2017); Young v. Young, 808 S.E.2d 631, 633, 636 (W. Va. 2017); Chesapeake Appalachia, LLC v. Hickman, 781 S.E.2d 198, 208, 216 (W. Va. 2015).

<sup>207</sup> *Watkins v. Watkins*, 402 P.3d 1053, 1060 (Idaho 2017); *Cityscapes Dev., LLC v. Scheffler*, 866 N.W.2d 66, 71 (Minn. Ct. App. 2015); *Korff v. Corbett*, 65 N.Y.S.3d 498, 502 (N.Y. App. Div. 2017).

<sup>208</sup> *New v. T3 Invs. Corp.*, 55 N.E.3d 870, 878–79 (Ind. Ct. App. 2016).

<sup>209</sup> *Marque Medicos Fullerton, LLC v. Zurich Am. Ins. Co.*, 83 N.E.3d 1027, 1043 (Ill. App. Ct. 2017), *appeal denied*, 93 N.E.3d 1043 (Ill. 2017); *Bernetich, Hatzell & Pascu, LLC v. Med. Records Online, Inc.*, 136 A.3d 955, 961–62 (N.J. Super. Ct. App. Div. 2016); *Amerigas Propane, LP v. Coffey*, No. 14 CVS 376, 2015 WL 60903207, at \*7 (N.C. Super. Ct. Oct. 15, 2015); *Wharton Physician Servs, PA v. Signature Gulf Coast Hosp., LP*, No. 13-14-00437-CV, 2016 WL 192069, at \*4 (Tex. Ct. App. Jan. 14, 2016).

<sup>210</sup> *Wolffington v. Reconstructive Orthopaedic Assocs. II, PC*, 275 F. Supp. 3d 584, 600 (E.D. Pa. 2017), *rev’d sub nom.*, 935 F.3d 187 (3d Cir. 2019).

<sup>211</sup> *Ingham Reg’l Med. Ctr. v. United States*, 126 Fed. Cl. 1, 26 (Fed. Cl. 2016), *aff’d in part, rev’d in part*, 874 F.3d 1341 (Fed. Cir. 2017); *Summerhill, LLC v. City of Meriden*, 131 A.3d 1225, 1229 (Conn. App. Ct. 2016); *Mulvey v. Carl Sandburg High Sch.*, 66 N.E.3d 507, 515 (Ill. App. Ct. 2016); *Sara v. Saint Joseph Healthcare Sys., Inc.*, 480 S.W.3d 286, 290–91 (Ky. Ct. App. 2015); *Vista Food Exch., Inc. v. BenefitMall*, 138 A.D.3d 535, 536 (N.Y. App. Div. 2016); *Dittman v. UPMC*, 154 A.3d 318, 326 (Pa. Super. Ct. 2017), *vacated on other grounds*, 196 A.3d 1036, 1056 (Pa. 2018); *Andoscia v. Town of N. Smithfield*, 159 A.3d 79, 82 (R.I. 2017).

<sup>212</sup> *Roller v. Am. Modern Home Ins. Co.*, 484 S.W.3d 110, 113, 115 (Mo. Ct. App. 2015).

<sup>213</sup> *Orcilla v. Big Sur, Inc.*, 198 Cal. Rptr. 3d 715, 734 (Cal. Ct. App. 2016).

<sup>214</sup> *Id.* at 735.

ready had an enforceable contract, so this case could have been better analyzed as involving questions of material breach, waiver and modification. In any event, the same court found the homeowners adequately alleged that the original mortgage loan was unconscionable, so that they might set aside the foreclosure sale on that basis.<sup>215</sup>

Of the remaining four gratuitous promise cases, three were family promises<sup>216</sup> and one found that a school's individualized education plan was not an enforceable contract.<sup>217</sup> In a classic "dad-promised-me-the-farm" case, a son's claim of a father's oral promise to convey the family ranch was rejected on multiple grounds, including the absence of any definite promise, any exchange of services or detrimental reliance, or any written evidence of a promise.<sup>218</sup> The absence of bargained-for exchange was unnecessary to the result, because the father had clearly expressed his intention to leave the property to his wife, rather than to his son, in various trust documents.<sup>219</sup> It was not only consideration that was missing, but the promise itself. One family dispute involved an allegedly gratuitous binding option,<sup>220</sup> while another held unenforceable a unilateral promise to relinquish a spouse's claim to equitable distribution of marital property.<sup>221</sup>

## 2. Indefinite Promise Cases

Courts may refer to a lack of consideration when they are simply finding the absence of any clear and definite promise, applying a basic rule of offer and acceptance.<sup>222</sup> For example, a town was found not to have promised its part-time zoning inspector a two-year employment contract when an appointment letter referred to a term "expiring" after two years, but the town ordinance said the position in question would serve at the pleasure of the town administrator.<sup>223</sup> The court held the employee failed to demonstrate a bargained-for exchange.<sup>224</sup> The court did not explain why a promise to work for two years would not support a reciprocal promise not to fire the employee without cause.<sup>225</sup> The true shortcoming in the employee's claim was either a public policy against long-term employment in this position (perhaps to preserve town

<sup>215</sup> *Id.* at 728–29.

<sup>216</sup> *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 406 P.3d 1199, 1204 (Wash. Ct. App. 2017); *Young v. Young*, 808 S.E.2d 631, 633 (W. Va. 2017); *Willey v. Willey*, 385 P.3d 290, 293 (Wyo. 2016).

<sup>217</sup> *SH v. Campbell Cty. Sch. Dist.*, 409 P.3d 1231, 1232 (Wyo. 2018).

<sup>218</sup> *Willey*, 385 P.3d at 301.

<sup>219</sup> *See id.* at 295, 302.

<sup>220</sup> *Young*, 808 S.E.2d at 633.

<sup>221</sup> *Haines-Marchel*, 406 P.3d at 1204, 1216.

<sup>222</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 33 (AM. LAW. INST. 1981).

<sup>223</sup> *Andoscia v. Town of N. Smithfield*, 159 A.3d 79, 80, 82 (R.I. 2017).

<sup>224</sup> *Id.* at 82.

<sup>225</sup> *See id.*



budget flexibility), or simply a failure to prove that a true promise of long-term employment was even made (the indefinite offer problem).

Another example of an indefinite promise arose in an action by employees suing their hospital employer for breach of an implied promise to safeguard personal data lost in a computer data breach. The court held that the employees did not allege that the hospital ever objectively manifested an intent to enter into a contract, that is, no implied promise was even alleged.<sup>226</sup> As a makeweight, the court added that the employees “did not give their information to [the employer] for the consideration of its safe keeping, but instead, for employment purposes,” and therefore consideration was lacking.<sup>227</sup> This reasoning was both unnecessary and incorrect. If there had been a clear employer promise to safeguard employee information, it would clearly have been induced by the employee’s work or promise to work. If the result in this case was correct, offer and acceptance doctrine was fully adequate to reach it.

Similarly, an Illinois court denied enforcement of an alleged implied contract between worker’s compensation insurers and health-care providers relying on backwards application of consideration doctrine, rather than a straightforward analysis of offer and acceptance and third-party beneficiary doctrine.<sup>228</sup> The insurers contracted with employers to pay for the health care of injured employees.<sup>229</sup> The medical provider plaintiffs asserted in the alternative that they were either third-party beneficiaries of the employer insurance policies or had an implied contract directly with the insurers.<sup>230</sup> Applicable state law required insurers to pay providers promptly and to pay interest on late payments.<sup>231</sup> The dispute could properly be viewed as either an attempt to assert a private right of action under the state law or as a claim to enforce the insured employees’ claims as third-party beneficiaries. The court rejected the implied right of action claim and the third-party beneficiary claim for similar reasons, finding that health care providers were incidental beneficiaries, not intended beneficiaries, of the worker’s compensation statute and insurance policies.<sup>232</sup> In other words, what was missing was a promise, not a bargained-for exchange.

Turning to the implied-in-fact contract argument, the court reasoned that because the insurance companies owed a legal duty to pay benefits promptly, any implied promise to pay benefits promptly would not amount to consideration, invoking the pre-existing duty rule.<sup>233</sup> The flaw in the analysis, of course,

---

<sup>226</sup> *Dittman v. UPMC* 154 A.3d 318, 326 (Pa. Super. Ct. 2017), *rev’d on other grounds*, 196 A.3d 1036, 1056 (Pa. 2018).

<sup>227</sup> *Id.*

<sup>228</sup> *Marque Medicos Fullerton, LLC v. Zurich Am. Ins. Co.*, 83 N.E.3d 1027, 1044 (Ill. App. Ct. 2017).

<sup>229</sup> *Id.* at 1033.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 1042–43.

<sup>233</sup> *Id.* at 1044.

is that the consideration required to enforce the insurance company's implied promise would flow from the health care providers, not from the insurance companies. The health care providers' claim was that they impliedly promised (as required by state law) not to bill the employee or the employer in return for the insurers' promise to pay promptly, and to pay interest on late payments.<sup>234</sup> The providers' promise to forbear from collecting from workers was the consideration for the insurers' promise the providers sought to enforce. The true flaw in the implied contract argument was not the absence of an exchange of promises, it was the absence of any implied promise, because the court consistently found the insurance companies were promising to pay workers and employers, not medical providers.

Thus, many judges invoke consideration as requisite for promise enforcement, sometimes misapplying the doctrine, but the results in nearly every case can be fully explained without resort to consideration doctrine.

C. *Many Cases Invoke and Apply Consideration Doctrine but Did Not Apply It (or Misapplied It)*

Looking at the broader set of cases discussing consideration doctrine while not denying enforcement, many (twenty-eight) simply recite consideration as one of the elements of contract formation, along with offer and acceptance, in cases not presenting consideration issues.<sup>235</sup> Other cases mention consideration in non-contract disputes, including property,<sup>236</sup> criminal law<sup>237</sup> and local government law cases.<sup>238</sup> Many (nineteen) of the cases involve the enforceability of covenants not to compete, with rule statements containing some variation of an element of valuable or reasonable consideration, along with the other reasonableness elements.<sup>239</sup> Apart from the noncompete cases, other employment disputes grappled with whether at-will employment or one-sided mandatory arbitration clauses<sup>240</sup> involve illusory promises. These are all fundamentally economic exchanges, so courts are discussing "consideration" when the real issues are those of public competition policy, unequal bargaining power, economic duress, or unfair terms.<sup>241</sup>

<sup>234</sup> *Id.*

<sup>235</sup> *E.g.*, *Mecum v. Weilert Custom Homes, LLC*, 239 F. Supp. 3d 1093, 1095 (N.D. Ill. 2017); *Bank of Am., NA v. First Am. Title Ins. Co.*, 878 N.W.2d 816, 830 (Mich. 2016).

<sup>236</sup> *E.g.*, *Behrens v. United States*, 132 Fed. Cl. 663, 670 (Fed. Cl. 2017).

<sup>237</sup> *E.g.*, *State v. Villagomez*, 412 P.3d 183, 184 (Or. 2018).

<sup>238</sup> *E.g.*, *EP Hotel Partners, LP v. City of El Paso*, 527 S.W.3d 646, 651 (Tex. Ct. App. 2017).

<sup>239</sup> *See e.g.*, *Fay v. Total Quality Logistics, LLC*, 799 S.E.2d 318, 323 (S.C. Ct. App. 2017).

<sup>240</sup> *E.g.*, *Reed v Darden Rests., Inc.*, 213 F. Supp. 3d 813, 816 (S.D.W. Va. 2016); *Shatteen v. Omni Hotels Mgmt. Corp.*, 113 F. Supp. 3d 176, 178, 180–81 (D.D.C. 2015).

<sup>241</sup> *Fay*, 799 S.E.2d at 327 (Geathers, J., concurring) (finding employee noncompete agreement invalid as an excessive restraint of trade); *Motormax Fin. Servs. Corp. v. Knight*, 474

In the following cases, the application of consideration doctrine served no useful purpose, or confused the application of other recognized contract law rules concerning formation, defenses, or performance and breach.

Consideration doctrine needlessly confused the issues in a Mississippi worker's compensation dispute.<sup>242</sup> The employer sought to avoid payment of benefits on the grounds that the purported employee had not been hired yet.<sup>243</sup> The employee was injured during a road test, which was a condition for the offer of a job as truck driver.<sup>244</sup> If, as the driver contended, the employer had promised him a salary and benefits in return for his attending the road test and then beginning work, there was no true consideration problem. The employer's promise to pay salary and benefits (including the legally required worker's compensation) was supported by the employee's reciprocal promise to drive the employer's trucks.<sup>245</sup> The real issue was whether the employer's invitation to a road test was a definite offer subject to a condition, or just an invitation to apply for a job. The language of the employer's letter, the court found, left no doubt that there was a definite offer, because if the driver passed the test, he was hired.<sup>246</sup> The court then discussed whether the driver's participation in the road test was a benefit to the employer sufficient to provide consideration for the employer's promise of a job.<sup>247</sup> There are two distinct errors in this analysis. First, a benefit to the promisor is not essential to finding consideration; a detriment to the promisee will do just as well. Second, a benefit to the promisor can come in the form of either present performance, or a promise of future performance. In this case, the employee's implied acceptance of the job offer (by doing the road test) and his promise of future services obviously constituted consideration, either as benefit to the employer or detriment to the employee, in exchange for promised salary and benefits. The time spent by lawyers briefing, and the court deciding, the non-issue of consideration merely added to the transaction costs of this case.

Another example of a confused consideration argument involved an employer attempting to evade its own promise to hire noncitizen guest workers and pay them the legal minimum wage.<sup>248</sup> The employer asserted that its legal obligation to pay the minimum wage was a pre-existing duty that could not

---

S.W.3d 164, 171 (Mo. Ct. App. 2015) (invalidating arbitration clause in auto title loan because only consumer was bound).

<sup>242</sup> *Averitt Exp., Inc. v. Collins*, 172 So. 3d 1252, 1254 (Miss. Ct. App. 2015).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 1254–55.

<sup>245</sup> *See id.* at 1257.

<sup>246</sup> *Id.* at 1256.

<sup>247</sup> *Id.* at 1257.

<sup>248</sup> *Cordova v. R&A Oysters, Inc.*, 169 F. Supp. 3d 1288, 1290 (S.D. Ala. 2016); *Moodie v. Kiawah Island Inn Co., LLC*, 124 F. Supp. 3d 711, 714 (D.S.C. 2015).

amount to consideration.<sup>249</sup> This argument (rejected by the court,<sup>250</sup> fortunately) made no sense. The promise to be enforced was the employer's; it was therefore the employees who furnished the consideration needed to enforce the promise, by working, or promising to work. Here, an appellate court was called upon to correct the attorneys' confusion as to whether consideration is something provided by the promisor or the promisee.

The promisor/promisee confusion arose in another employment dispute, involving employees suing an employer for failure to protect their personal data from a data breach.<sup>251</sup> The court found there was no implied promise by the employer, but also found, weirdly, that the employees' act of providing personal data was not induced by any employer promise to safeguard the data.<sup>252</sup> Of course, the promise to be enforced was the employer's, so if there was a consideration issue, it would be whether the promise to safeguard data was induced by either the employees' services generally, or the employees' act of providing personal data specifically.<sup>253</sup> The heart of this emerging and important issue is whether protection of personal data should be an implied term in every employment contract, better analyzed either as a public policy issue or a negligence/duty issue.

Thus, in many instances it would be simpler for courts to address directly whether the parties actually offered and accepted an exchange of promises, or promises for performances, rather than couching formation analysis in the language of consideration and confusing the analysis in the process.<sup>254</sup>

#### *D. Cases Describing Material Breach as a "Failure of Consideration"*

Unnecessary confusion also results from using consideration terminology to describe rules having nothing to do with contract identification or formation. For example, courts will refer to a material breach as a "failure of consideration," excusing the other party's performance.<sup>255</sup> Other courts may refer to the failure of a condition as a violation of the mutuality required for consideration. Of course, in these cases the original exchange of promises was fully supported by consideration on both sides. For example, the Alabama Supreme Court

<sup>249</sup> Cordova, 169 F. Supp. at 1292; *see also* Moodie, 124 F. Supp. 3d at 727 (rejecting similar bizarre employer argument that legal duty to pay minimum wage is a pre-existing duty vitiating consideration for promise to pay wages).

<sup>250</sup> Cordova, 169 F. Supp. at 1292; *see also* Moodie, 124 F. Supp. 3d at 727.

<sup>251</sup> Dittman v UPMC, 154 A.3d 318, 321 (Pa. Super. Ct. 2018), *rev'd on other grounds*, 196 A.3d 1036, 1056 (Pa. 2018).

<sup>252</sup> *Id.* at 326.

<sup>253</sup> *See id.* at 321.

<sup>254</sup> *See* Mulvey v. Carl Sandburg High Sch., 66 N.E.3d 507, 515 (Ill. App. Ct. 2016) (holding that student handbook was not a contract between high school and student and absent any student promises there was no consideration); New v. T3 Investments Corp., 55 N.E. 3d 870 (Ind. Ct. App. 2016).

<sup>255</sup> Altercare of Mayfield Vill., Inc. v. Berner, 86 N.E.3d 649, 658 (Ohio Ct. App. 2017); KIT Projects, LLC v. PLT P'ship, 479 S.W.3d 519, 527 (Tex. Ct. App. 2015).

found that a promise not to sue for breach of a prior contract, given in exchange for a promised payment, was not enforceable because timely payment was an express condition of the release of the breach of contract claim.<sup>256</sup> Although the court described this holding as based on the rule that promises must be enforceable to constitute consideration, there was obviously no consideration problem with the original settlement agreement: the plaintiff promised not to sue and the defendant promised to pay a sum of money.<sup>257</sup> The reference to mutuality of promises, duly coded by West as a consideration holding, was in fact a holding based on the rule that the failure of an express condition excuses the reciprocal promise. Modern courts would do better to dispense with the reference to consideration when applying the rules of conditions, performance, and breach.

*E. Cases Referring to “Adequacy of Consideration” When Applying Unconscionability Analysis, or When Refusing to Judge the Fairness of a Bargain*

One set of cases invoke the rule that courts will not judge the adequacy of consideration, or in other words, the fairness of the contractual exchange, except when a party establishes an accepted enforceability defense, such as fraud, unconscionability, or duress.<sup>258</sup> In the context of one-sided bargains, consideration doctrine achieves little except to bias courts against applying enforceability defenses intended to curb abuses of bargaining power.

Mandatory arbitration clauses are often challenged as unconscionable or violating some public policy, using the language of consideration.<sup>259</sup> For example, a patient sought to avoid an arbitration clause inserted in an invoice for medical records, and to dispute the reasonableness of the medical records provider’s fee.<sup>260</sup> The court found the arbitration clause unenforceable for lack of consideration, on the grounds that a statute entitled the patient to obtain the records for a “reasonable, cost-based fee” and thus created a pre-existing duty that could not constitute consideration for the patient’s promise to arbitrate disputes.<sup>261</sup> The court was really saying that the statute’s regulation of the contract content not only barred unreasonable fees, but also any other condition or promise imposed on the patient.<sup>262</sup> In other words, public policy essentially barred the inclusion of an arbitration agreement.

<sup>256</sup> *Cherry v. Pinson Termite & Pest Control, LLC*, 206 So. 3d 557, 565–66 (Ala. 2016).

<sup>257</sup> *See id.* at 560.

<sup>258</sup> *159 MP Corp. v Redbridge Bedford, LLC*, 71 N.Y.S.3d 87, 97 (N.Y. App. Div. 2018).

<sup>259</sup> *See, e.g., Hudson v. BAH Shoney’s Corp.*, 263 F. Supp. 3d 661, 668–71 (M.D. Tenn. 2017) (finding restaurant employee’s arbitration agreement unenforceable as not a knowing and voluntary waiver of jury trial, although consideration was present).

<sup>260</sup> *Bernetich, Hatzell & Pascu, LLC v. Med. Records Online, Inc.*, 136 A.3d 955, 958 (N.J. Super. Ct. App. Div. 2016).

<sup>261</sup> *Id.* at 959–61.

<sup>262</sup> *Id.* at 962.

Similarly, an employee successfully challenged an arbitration provision in an initial employment contract because the employer had the right to unilaterally change all terms of the agreement, rendering the employers' promises illusory.<sup>263</sup> Here again, the court invoked consideration doctrine to undo an arbitration agreement, when the true basis for the decision was unconscionability (extreme one-sidedness) rather than absence of a bargained-for exchange.

A federal judge in New Mexico found an employer's post-employment arbitration program enforceable because the employee's continued employment under new ownership constituted sufficient consideration for the change in employment terms.<sup>264</sup> The court, rather unconvincingly, distinguished New Mexico state court decisions finding that continued at-will employment is not a legal detriment to the employer and therefore not sufficient consideration to support a post-hiring arbitration clause.<sup>265</sup>

Another case in which one suspects the court found a one-sided bargain unjust, and misapplied consideration doctrine, involved three promoters of a to-be-formed corporation, one of whom promised to provide all the capital (\$1 million) while the other two promised to perform as managers, with the managers each receiving 45 percent and the investor receiving 10 percent of the shares.<sup>266</sup> Clearly, the mutual promises (to allocate shares in the new venture) were a form of consideration that each gave the other. Nevertheless, the Illinois court found the future managers' promise illusory, and denied enforcement of the investor's promise of \$1 million.<sup>267</sup> The real problem with this business transaction was not an absence of mutual exchange, but the court's apparent perception that the exchange was extremely lopsided. Unconscionability doctrine is better suited to evaluate such claims.

*F. Cases Referring to Presence or Adequacy of Consideration When Evaluating the Reasonableness of Covenants Not to Compete as a Matter of Public Policy*

Consideration language appears frequently in employment cases revolving around the enforceability of non-compete agreements.<sup>268</sup> In these cases the usual issue is either the public policy enforceability defense that disfavors enforcing unreasonable restraints on trade, or a problem of a post-contract modification when an employer adds a non-compete agreement to an existing

<sup>263</sup> *Bowers v. Asbury St. Louis Lex, LLC*, 478 S.W.3d 423, 427 (Mo. Ct. App. 2015).

<sup>264</sup> *Laurich v. Red Lobster Rests., LLC*, 295 F. Supp. 3d 1186, 1217–18 (D.N.M. 2017).

<sup>265</sup> *Id.* at 1217 (citing *Piano v. Premier Distrib. Co.*, 107 P.3d 11, 14 (N.M. Ct. App. 2004) and *Dumais v. Am. Golf Corp.*, 150 F. Supp. 2d 1182 (D.N.M. 2001)).

<sup>266</sup> *DiCosola v. Ryan*, 44 N.E.3d 556, 560–62 (Ill. App. Ct. 2015).

<sup>267</sup> *Id.* at 562.

<sup>268</sup> *E.g.*, *Horter Inv. Mgmt., LLC v. Cutter*, 257 F. Supp. 3d 892, 901–02 (S.D. Ohio 2017); *Socko v. Mid-Atl. Sys. of CPA, Inc.*, 126 A.3d 1266, 1275 (Pa. 2015); *Eurecat U.S., Inc. v. Marklund*, 527 S.W.3d 367, 387–88 (Tex. Ct. App. 2017).

employment contract.<sup>269</sup> When courts identify consideration as an element for the enforceability of a non-compete agreement as part of an initial employment contract, consideration adds nothing to the analysis. The employee gets a promise of a salary in exchange for services provided and the promise not to compete after termination.<sup>270</sup> These are essentially “incantation” cases, when the consideration element is superfluous and the real analysis is reasonableness of, and hence the willingness of courts to enforce, an agreement in restraint of trade. Some courts have held that at-will employment is essentially an illusory promise, and therefore fails as consideration for an employee promise not to compete.<sup>271</sup> The existence or adequacy of consideration is sometimes invoked as a test of whether a restrictive covenant should be enforced,<sup>272</sup> but what is really going on in these cases is an evaluation of the reasonableness of a restraint of trade.

When the issue presented is whether to enforce a covenant not to compete obtained by an employer after the initial employment contract was made, the court is faced with a post-contract modification issue, where consideration doctrine masks the real issues.<sup>273</sup> Courts are not consistent in treatment of these “afterthought agreement” cases.<sup>274</sup> For example, when an employee signed a modified confidentiality agreement eleven years after his initial employment (when he had signed an earlier version of the confidentiality promise) the Texas Appeals Court found the modified confidentiality agreement unenforceable for lack of consideration.<sup>275</sup> The court held that a promise of continued employment was illusory because the employment was at-will.<sup>276</sup> That reasoning, of course, would prevent any modification of an ongoing employment contract by the employer, regardless of changes in circumstances, at least in the absence of a cash payment, salary increase, or other new promise by the employer. An Ohio court, on the other hand, found that a promise of continued at-will em-

<sup>269</sup> See Michael J. Garrison & John T. Wendt, *Employee Non-Competes and Consideration: A Proposed Good Faith Standard for the “Afterthought” Agreement*, 64 U. KAN. L. REV. 409, 412–17 (2015).

<sup>270</sup> Some state courts have ruled that at-will employment is consideration for an employee’s promise not to compete. *Horter Inv. Mgmt.*, 257 F. Supp. 3d at 902; *Metalico Pittsburgh Inc. v. Newman*, 160 A.3d 205, 211 (Pa. Super. Ct. 2017). While others hold that at-will employment is not consideration. *Boswell v Panera Bread Co.*, 879 F.3d 296, 301 (8th Cir. 2018) (applying Missouri law).

<sup>271</sup> *Boswell*, 879 F.3d at 301.

<sup>272</sup> E.g., *Liberty Mut. Ins. Co. v. Gemma*, 301 F. Supp. 3d 523, 534 (W.D. Pa. 2018) (applying Pennsylvania law); *Brinton Bus. Ventures, Inc. v. Searle*, 248 F. Supp. 3d 1029, 1035–36 (D. Or. 2017) (applying Oregon law); *ATC Healthcare Servs., Inc. v. RCM Techs., Inc.*, 192 F. Supp. 3d 943, 960 n.8 (N.D. Ill. 2016) (applying Illinois law).

<sup>273</sup> See *supra* text accompanying notes 72–126.

<sup>274</sup> *Alph C. Kaufman, Inc. v. Cornerstone Indus. Corp.*, 540 S.W.3d 803, 814 (Ky. Ct. App. 2017); *Amerigas Propane, LP v. Coffey*, No. 14 CVS 376, 2015 WL 6093207, at \*9 (N.C. Super. Ct. Oct. 15, 2015).

<sup>275</sup> *Eurecat U.S., Inc. v. Marklund*, 527 S.W.3d 367, 388–89 (Tex. Ct. App. 2017); *accord Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 584 (5th Cir. 2015).

<sup>276</sup> *Eurecat U.S., Inc.*, 527 S.W.3d at 389.

ployment would be consideration for a post-hire non-compete agreement.<sup>277</sup> This area of the law could be made more coherent by abandoning references to consideration and instead evaluating issues of economic duress and the reasonableness of particular non-compete arrangements, balancing the employee's ability to earn a living with legitimate employer interests.

The irony of the covenant not to compete cases and the mandatory arbitration cases is that consideration language is used to do precisely what consideration doctrine eschews, namely to evaluate the fairness of a contractual exchange.<sup>278</sup>

This survey of contemporary case law confirms the observation that the core consideration principle, that a promise not supported by a bargained-for exchange is not enforceable, is often recited, often invoked mistakenly when other contract rules are at issue, frequently misunderstood or misapplied, and does little or no independent work to filter out promises not meriting judicial enforcement.

#### IV. THE CONSIDERATION-FREE CONTRACTS LAW SYLLABUS

To begin with, we should abandon the archaic usage of the word "consideration" to refer to the bargained-for exchange, and allow it to join assumpsit, chattel mortgage, and trespass on the case in the museum of disused legal terms. To teach contemporary contract law, the more familiar terms "bargain theory" or "exchange theory" will serve just as well. Legal historians may wish to recount the origins of the term "consideration" in the common law and the writings of Holmes, Williston and Langdell, perhaps comparing it with its civil law cousin "causa."<sup>279</sup>

More importantly, the syllabus should be organized around the most common problems contract rules must solve. The problem of donative promises does not merit the central role that the traditional syllabus allots it. Let us bid farewell to *Hamer v. Sidway*<sup>280</sup> and *Dougherty v Salt*.<sup>281</sup> The need to discuss bargain theory, in conjunction with reliance and other alternatives, will arise at various points throughout the syllabus, and may be taken up in the context of each discrete contracting problem. For example, non-exchange promises (donative promises, promises recognizing past benefits, and reaffirmations) may be covered as a group to introduce reliance and restitution. Bargain theory, reli-

<sup>277</sup> *Horter Inv. Mgmt., LLC v. Cutter*, 257 F. Supp. 3d 892, 901–02 (S.D. Ohio 2017).

<sup>278</sup> See *Moezinia v. Ashkenazi*, 26 N.Y.S.3d 192, 193 (N.Y. App. Div. 2016) (noting that courts do not inquire into the adequacy or fairness of consideration exchanged).

<sup>279</sup> Kevin J. Fandl, *Cross-Border Commercial Contracts and Consideration*, 34 BERKELEY J. INT'L L. 1, 11 (2016); see generally GILMORE, *supra* note 1.

<sup>280</sup> *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891) (holding uncle's promise of money enforceable based on the consideration of nephew's promise to refrain from drinking, smoking, swearing or gambling).

<sup>281</sup> *Dougherty v. Salt*, 125 N.E. 94, 94–95 (N.Y. 1919) (holding aunt's written promissory note to nephew unenforceable for want of consideration).



ance, and restitution will be discussed in presenting the alternative theories of remedies; indeed, this is an argument for beginning the contracts syllabus with remedies.

Contracts law professors commonly use one of two structures for their syllabi, with, of course, many variations. Some begin with contract remedies, then follow with the topics of formation, defenses, interpretation, performance, and breach. Others begin with contract formation, and save remedies for the end, following a chronological sequence in the life of a contract dispute. The core of bargain theory, consideration, is usually covered as part of the contract formation topic, along with offer and acceptance, and perhaps capacity. The consideration corollaries are sometimes included in the formation chapter, and sometimes covered later, particularly in the case of the pre-existing duty rule and contract modifications.

It is also customary to present consideration doctrine in three steps.<sup>282</sup> First, casebooks present a case applying the “traditional” consideration-based rule.<sup>283</sup> Students will then read a contrasting case either rejecting consideration or applying some exception<sup>284</sup>. Finally, the Restatement or U.C.C. approach to the issue will be presented.<sup>285</sup> Students are then left wondering what the “rule” actually is.

I advocate a simpler approach. The contract formation topic, whether at the beginning of the syllabus or after remedies, ought to cover the rules for discerning a sufficiently definite offer and a timely and clear acceptance. The formation topic may also include the need for a writing under the statute of frauds. Once that is accomplished, the professor may consider the exceptional question of unenforceable promises: are there any clear promises, although properly and timely accepted, that the law nevertheless ought not to enforce? In lieu of “consideration” as the answer to the question, the professor (and casebook) may cover the alternative and complementary bases for enforcing promises: the bargained-for exchange, the promise recognizing past obligations, or promises inducing reasonable and foreseeable reliance. This is essentially what Restatement (Second) section 17(2) instructs. Neither the case law nor contemporary theory would justify giving primacy to the bargained-for exchange. The topic of restitution may usefully be presented at this point.

After presenting examples of promises enforced on each of these three bases, the class might take a brief detour to consider examples of unserious or otherwise unreasonable-to-rely-on promises that courts have properly refused to enforce.<sup>286</sup> These examples are sufficiently rare that one need not detain the

---

<sup>282</sup> Maggs, *supra* note 114, at 508 (citing E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS (5th ed. 1995)).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> The classics of the genre include *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 132 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88, 89 (2d Cir. 2000), and *Lucy v. Zehmer*, 84 S.E.2d 516,

class too long for this discussion of the outer limits of contract. Most useful examples are cases in which the promise was insufficiently serious or definite, so that courts could just as well have relied on offer and acceptance rules to deny enforcement.<sup>287</sup> The issue of enforcing donative promises, including charitable subscriptions, merits fuller discussion; it should include formality, reliance, and the bargained-for exchange as alternative rules, and describe the present state of the law as looking primarily to reliance as the touchstone for enforcement.<sup>288</sup>

As for the doctrinal corollaries to consideration, each can be taken up at the appropriate point in the syllabus. The revocability of firm offers is an issue about the termination of offers, appropriately discussed under the rubric of offer and acceptance. Modification can be discussed with other post-formation issues, including impracticability, waiver, and breach. So-called illusory promises and absence of mutuality fit better in discussions of the duty of good faith, unconscionability, and other enforceability defenses. Third-party guarantees are a separate topic, perhaps to accompany assignment, delegation, and third-party beneficiaries, if those are even covered in a basic contract law class.

Certainly, a conscientious professor ought to acknowledge the persistence of historical consideration doctrine in court decisions, when taking up each of these discrete problems. But one ought also to give prominent place to the modern trend, reflected in the Restatement (Second) and the Uniform Commercial Code, which is to replace consideration doctrine, or at least to riddle it with exceptions, at the formation stage and with respect to each of the corollaries. For each problem, the three steps<sup>289</sup> ought to be reversed, presenting first the modern approach taken by the Restatement (Second) and the U.C.C., followed by cases adopting the modern approach, and relegating to the third step cases stubbornly adhering to the historical consideration approach.

So, for example, the law of contract modification requires the professor to confront the divided case law. However, there is no reason to begin with the old “pre-existing duty” rule, nor does it make any sense to teach contract modification in a chapter on initial contract formation. One could, and I would argue ought to, begin by presenting the problem, with an old case like *Alaska Packers*<sup>290</sup> or a contemporary case like *Angel v. Murray*.<sup>291</sup> If the U.C.C. and Restatement approaches are the modern and better trend, teach those first. Casebooks often present two cases to illustrate two opposing rules to resolve an issue. The pre-existing duty rule can be explained as a relic of classic contract

522 (Va. 1954). For a recent case, see *Willey v. Willey*, 385 P.3d 290, 301 (Wyo. 2016) (father’s promise to leave son the family ranch too indefinite and not relied upon).

<sup>287</sup> *E.g.*, *Willey*, 385 P.3d at 301.

<sup>288</sup> *See supra* text accompanying notes 50–58.

<sup>289</sup> *See Maggs, supra* note 114, at 509.

<sup>290</sup> *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99, 102 (9th Cir. 1902) (refusing to enforce employer’s promise to increase wages originally promised to sailors, for want of consideration).

<sup>291</sup> *Angel v. Murray*, 322 A.2d 630, 636, 638 (R.I. 1974) (adopting Restatement section 89 and enforcing a contract modification based on changed circumstances).

theory, which attempts but fails to protect contracting parties from economic duress or abuse of leverage in the contract relationship.

Leading casebooks take a variety of approaches to the pre-existing duty rule and modifications.<sup>292</sup> Professor Calamari includes the topic in a second chapter devoted to consideration, following the first chapter on offer and acceptance.<sup>293</sup> A case relying on the pre-existing duty rule is followed by *Angel v. Murray*, the Rhode Island Supreme Court decision adopting Restatement section 89.<sup>294</sup> Professor Barnett also includes modification cases in a chapter on consideration, but notes that the pre-existing duty rule has been heavily criticized, and abandoned by the U.C.C.<sup>295</sup> Professor Ayres similarly includes contract modifications in the formation chapter on consideration, while also noting that the traditional rule is one of the most criticized in the common law.<sup>296</sup> Professor Farnsworth and colleagues, who appear to take a more skeptical view of the pre-existing duty rule, cover it in a chapter on duress as an enforceability defense.<sup>297</sup> Professor Knapp and colleagues discuss modification in a chapter on excuses for nonperformance, including mistake, impracticability and modification, telling the student that consideration is one of a number of doctrines that may be brought to bear on the post-contract modification problem.<sup>298</sup> These latter two are clearly better approaches.

#### CONCLUSION

The doctrine of consideration and its corollaries are outmoded rules whose persistence in the classroom and the courtroom have long ago outlived their usefulness in resolving a discrete set of contract problems. Each of these problems, the charitable pledge or donative promise, the post-contract modification, the firm offer, the illusory promise, the promise to compensate past services and the third-party guarantee, deserves its separate place in the contracts class syllabus. Each can be presented as a problem with different legal solutions that may advance values of autonomy, utilitarian wealth maximization, moral obligation or equity. Each problem can be shown to have a historic and formalistic rule derived from bargain theory and a number of modern alternatives. In the fifty years that have elapsed since the Second Restatement, consideration doctrine has lost its descriptive and normative powers, and as this survey of contemporary cases shows, confused new generations of lawyers and judges. The time has come to retire this doctrinal relic in our teaching of contracts law.

<sup>292</sup> See Maggs, *supra* note 114, at 509.

<sup>293</sup> JOHN D. CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS 194 (6th ed. 2011).

<sup>294</sup> *Id.* at 196–97.

<sup>295</sup> RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 634, 647 (3d ed. 2003).

<sup>296</sup> IAN AYRES ET AL., STUDIES IN CONTRACT LAW 110 (8th ed. 2012).

<sup>297</sup> E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS, 359–71 (8th ed. 2013).

<sup>298</sup> CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 701 (8th ed. 2016).

[THIS PAGE INTENTIONALLY LEFT BLANK]