

Part I: Short Answer

1) Nominal Consideration is consideration that is a "sham on the court." It is an element of adequate consideration and even though courts don't tend to look into adequacy of consideration they analyze the adequacy if it the consideration was thought of being nominal, unbalanced, or just recited to meet the consideration even though there was no true consideration given. This was seen in In re Green when the mistress gave \$1 in consideration for an offer of many thousands of dollars. ✓

2) A subjective interpretation occurs when you analyze a communication from the point of view of the actual person who received the communication. Misunderstanding can be subjective because it looks into what the parties themselves actually understood. The doctrine (section 20) allows the courts to determine what the receiver of the information actually understood. ✓

3) Third party reliance can be seen in family situations. For instance a couple who moved to another state b/c the husband was supposed to have a new job in LA. The wife and the children in this instance relied on the father/husband's job even though it was not directly offered to them. ✓

4) This ad was not an offer b/c it was clearly a joke. This ad fit into the general rule that ads are not offers b/c it was a joke and it was clear to a reasonable person that it was a joke (a teacher's clothes being blown off, parking the jet next to the bike rack, etc.). ✓

5) Maybe when two business men are friends and one approaches the other in re mortar for in between bricks. The seller tells his friend the buyer that he will discount the bricks as a favor. The buyer thinks that this is an enforceable promise and agrees to buy the mortar at a later date. A few days later the two run into each other on the street and the seller reminds the buyer that the mortar is ready to be picked up at the discounted price. ✓

6) Implied in fact is when parties agree through their actions to have a K although they do not expressly state their intentions. This can be seen when a person has a tab at a local grocer and the person walks out of the store with some groceries after showing the groceries to the grocer. ✓

Implied in law is a remedy; the courts impose a contract even though the parties didn't intend to contract to avoid unjust enrichment. This happened in Sceva. ✓

7) These jobs may be considered new contracts for each day that they are used. The workers are day-laborers and only expect to work for one day at a time. The terms of the conditions can change on a daily basis as each new day brings about a new K. ✓

X 8) Per 2-104 a merchant is someone whose job gives them special knowledge of the subject matter of the transaction. Since lawyers probably don't deal with chairs a lot due to their job, they are probably not considered merchants under the UCC.

✓ 9) Unless stated explicitly otherwise, the offeree may accept the offer in any reasonable manner (UCC 2-204, R2K 30). Signing on the dotted line is an acceptable mode of acceptance b/c it is reasonable, but it is not the only way that the offer can be accepted.

✓ 10) Death of the offeror, rejection (counter-offer), revocation, lapse of the offer due to time.

✓ 11) R2K 45 deals with the irrevocation of offers for UNI-lateral contracts. Since unilateral K's can only be accepted by full performance, 45 only deals with situations where the full performance has begun. The rule in Drennan and R2K 87 deals with reliance on an offer for bi-

lateral K. In these cases, the offer cannot be revoked once they have been relied on.

Long Question I

M wants the agreement to be enforced.
Brothers (B) do not want the agreement to be enforced.

Offer and Acceptance

The parties in this instance probably will not dispute whether or not there was an offer and acceptance b/c the letters demonstrate that the two parties did have an agreement. The only issue that might be brought up is the lapse of time b/t the offer letter from A and the acceptance letter to A from M. There was a lapse of 9 days. Given that offers lapse in 2-3 weeks, this argument will not hold up.

The parties will most likely focus their attention on the enforceability of the agreement b/c A and M. For an agreement to be enforceable there must be consideration, promise in recognition of a past benefit, promissory estoppel and reliance, or restitution.

Consideration

Consideration is a promise or performance that is bargained for (Rest 2 71). The promise/performance is given to get another promise or performance in return.

The parties will first probably dispute the promise / performance:

M: My performance of moving to a whole new state 1/2 way across the country and A's promise to pay for my expenses and assure that I am well provided for after her death are sufficient to establish consideration.

B: Your consideration is insufficient and inadequate.

M: Moving is a sufficient type of consideration b/c it is a big issue, one needs to think a lot before they get up and move. People don't do this on a whim. If not smoking is sufficient than moving to a new state is sufficient (Hammer). My consideration is also adequate, even though most courts do not look into the adequacy, as most classical K courts do not want to impose their own personal values on those who are litigating.

B: Courts will now look into adequacy to make sure that a vulnerable party isn't being taken advantage of. Surely, Annie in her old age and poor health would be considered a vulnerable party.

M: Ok, I stand by my consideration and say that it is adequate b/c it was highly valued not only to me, but to A. A greatly appreciated my help around the house as shown in her letter of 8-5-04--"great gratitude" and I gave up value by quitting my job in CA.

B: Your consideration was nominal. You didn't like your job; you wanted to quit and move to a place with a lower standard of living.

M: Nominal consideration is consideration that is fake and totally out of balance with the return promise / performance. My moving was not a sham on the court and cannot qualify as nominal consideration. (In re green)

(On the issue of bargained for the parties will agree that it was / was not bargained for.)

B: Regardless, your move was not bargained for b/c your motive was impure--you just wanted to take advantage of A who was recently widowed.

M: This is an insult and anyway courts do not look into motives when they are determining consideration issues. However, I did benefit from the move. I didn't want to keep my job and didn't b/c of A's promise

B: Benefit or detriment is not a requirement to consideration (71); so your benefitting doesn't matter.

M: My benefit is not determinative, but it does suggest that there was a bargained for consideration b/c people are selfish and tend to act in the interest of their own well-being/comfort. Her promise to pay my keep and provide for me induced my move and my promise to do the shopping and the cooking and to be her companion induced her promise. Therefore the promises induced each other and are meet the requirements for consideration.

B: Since her promise outlining your exact compensation was made 10 years after you moved out, that agreement could not have induced your action. (Wyman)

M: The exact terms were outlined after the fact, but the agreement was still arranged before I moved and therefore the agreement had valid consideration.

B: Your move was a conditional gift (Kirksey). You wanted her gift of taking care of you, but to get it you had to move.

M: This wasn't a conditional gift. There was consideration. Even if there wasn't consideration, modern courts tend not to rely heavily on consideration.

B: Consideration is very important to our judicial system. It serves the following functions: Evidentiary--evidence of an agreement; Channeling / Cautionary--demonstrates that the agreement is serious; Judicial economy--assures that only economically beneficial transactions and not gifts take up the courts resources.

M: Consideration is outdated b/c... Courts should use real evidence not consideration as the evidentiary requirement; Trust and honesty should be upheld and people should be held accountable for their promises; gifts are important economically and socially and warrant the courts resources.

B: There wasn't mutuality of obligation b/c A's promise was illusory in that she promised to pay you but b/c she didn't say how much she could have revoked. She was just going through the motions of making a promise and 77 79

The court will probably find that moving to another state is valid consideration for A's promise to pay for all M's expenses and provide for M after A's death. However, if consideration is not found, there are other ways that the courts can enforce past promises. Even if there is consideration, the courts may have a problem in determining how to compensate M.

If there was no consideration the court will look to the following...

Promise in recognition of a Past Benefit*2nd time?*

B: The Moral consideration doctrine allows for promises in recognition of past benefits so long as the the original agreement could stand alone and be enforceable, but the enforceability failed or lapsed due to a technicality such as a SOL or an age requiriment. The original agreement can be an enforceable contractual, restitutionary, or promissory liability. Regardless of A and M's intetions, there is no enforceable agreement b/c moral consideration does not apply to agreements that do not have consideration. (Wyman)

M: Your agruemnt is short sighted. R2K 86 expands on the moral consideration doctrine and does allow the enforcement even if the original agreement could not be enforced; therefore, my agreement with A should be enforced based on the terms that she promised me in her Aug. 5 letter. (Webb).

B: 86 is a very weak restatement. Lots of states, including TX, have not adopted this restatement. Even if this jurisdiction has accepted 86, subsection 2 says that gifts don't count and I think you helping A was a gift, as you are a very kind and caring nephew.

M: Well, then also per subsection 2, the promise should be enforced b/c her gain was unequal to my gain and I thereofre should be abel to get fair compensation. Anyway, the restators are thinking of rewriting section 86 so that it has some teeth by leaving out subsection 2.

B: It doesn't matter that thay might change their interpretation of the law b/c they haven't yet and there is no evidence that the court in our jurisdiction would follow the rstmt.

PRomissory Estoppel and Reliance*I know*

M: Well then, I clearly relied on A's promise. A's foreseeably knew taht I would rely on her promise, I relied on the promise, I was faced with a substantial change b/c of this reliance (couple moving to LA from Hawaii), this reliance left me hanging out there (Ricketts), and the court could remedy my hardships suffered. (90)

B: Your reliance was unwarranted. The promise was too vague to reasonably rely on (Neiss-- part on dangers of allowing for vague promises to be relied on). ✓

M: The promise was sufficiently definate. Being family members, I trusted that A wasn't going to try to cheat me in the details of our agreement. Anyway, promises do not have to be totally certain to carry foreseeable reliance with them. (Bank of Standish.) Anyway, A and I agreed to agree and these agreements are enforceable so long as the courts can find a breach and a remedy. Per A's letter of aug. 8, the court does have a reasonable remedy and the agreement should be enforced.

B: Many states have not yet determined how definate a promise must be before it can be reasoanbly relied upon, including TX. This issue is still being determined in the courts so you cannot take it as a given. Anyway, your position did not change substantially b/c you wanted to quit your job. You had nine years to work until you qualified for the pension. Since you were ready to quit, it is unlikely that you could have continued working for another nine years. You wouldn't have qualified for the pension so you didn't loose out. ✓

M: I could have stuck it out for another 9 years--I lost out on the pension. But regardless, I moved to a totally different state. There is a big differenc b/t CA and TX--the difference is substantial. If the promise is not enforced, I will be left in another state empty handed with no ✓

job and only a few thousand dollars. (Ricketts)

B: If the move was such a big change, you'd probably want to go back to CA. I don't think that you have a substantial change.

As a final effort, M can try to argue restitution. Restitution is an unjust enrichment that is not officious and not a gift.

Restitution

M: A was unjustly enriched by my helping her out. I was at her side constantly and taking all the responsibilities of cooking and shopping. It is unjust that she reap all the benefits of my hard work w/o compensating me justly.

B: Your help can't count for restitution b/c if it was not a gift (which we think it was b/c you are a good nephew who wanted to take care of his aging aunt after you lost your own parents) it was officious. (Bailey)

M: It wasn't a gift b/c I expected compensation. It was not an unenforceable gratuitous promise. Additionally, it was not officious b/c we had an agreement that I was going to get paid. It's not like I snuck into her driveway at night, fixed her car and demanded payment. She saw me working hard for her and expected that I should be justly compensated for it. Had we not made an agreement, she wouldn't have made her aug. 5 letter nor the appointment to make a will with an attorney. And even if it was officious, it would be blameworthy for A to sit back and watch me work so hard and then claim that she didn't owe me anything b/c my work was officious. Such behavior would trump the officiousness and I would deserve just compensation anyhow (Dews v. Halliburton).

The court could find that there was an implied in law or an implied in fact agreement... M could say that there is an implied in fact agreement here b/c regardless of what the letters say, he was working for A and A knew that he was expecting compensation. B's would probably argue against this saying that there was no agreement b/t the two so there could not be an implied in fact K (Weak--Bailey). M could then go for an implied in law K--Sceva. This would probably be a strong argument b/c He did work for A for so long and when A died, M was left jobless and only had a few thousand dollars in his bank account

Remedies

If the court decides to compensate M based on the aforementioned arguments they will likely choose one of the following methods.

Restitution Measure: Find out how much A's unjust enrichment was and give that amount to M.

Reliance Measure: If M relied, he will be compensated for his damages up until the point that he realized that his reliance was unwarranted.

Expectation Measure: this is the most common for courts to use. M will be given what he thought he should have gotten. This will probably be a lot since M worked for A for so long and b/c M knew that A had a lot of money (M knew that A had the resources to pay him a reasonable amount for his efforts). Even though the promise for the exact amounts (the house and \$100k) were given at a later date, the court might allow for this. The B's will argue against giving M the house and the money b/c that would only leave \$50k for them.

Long Question II

S want there to be a K for the full order, but it is in her best interest to accept any degree of the K that the courts would be likely to enforce.

B want there to be no K for any of the cigars

Offer

An offer is the manifestation of willingness to enter into a K (rest 24). Is the June 1 an offer?

S: The June 1 letter is an offer b/c it is very specific and used promissory words: "we are making you a special introductory offer". It gave a very detailed description of what was for sale.

B: It was not an offer b/c I didn't think that it was an offer

S: Courts don't really look into your subjective interpretation of my letter. They instead use a reasonable person, objective perspective interpretation (Embry).

B: Objective theory is outdated. OT was created in 19th c. New England so that the Bostonian elite could make prejudice immigrants, rural folk, and people of color who didn't act and interpret situations the same as the elite.

S: Now the OT is used to protect people from hidden intentions (crossing fingers behind the back when making a deal) and b/c subjective interpretations are too difficult to discern in a court.

B: Ok. Per the OT then, your letter is not an offer b/c it was sent to over 600 people. It was an ad and ads generally are not considered offers (Pepsi).

S: Yes, most ads aren't considered offers, but there are exceptions to the rule that apply to this letter. The letter implicitly allowed for more than one acceptance as it said that the offer was open for 30 days. A reasonable person would read this and think that anyone who wanted the deal could respond within 30 days and get it. Therefore it was an offer.

S's argument for the ad being an offer are probably more persuasive than B's

If S's letter isn't an offer, the second letter would definitely be an offer

It is only sent to one person (S), it is detailed (400), probably follows local business custom since S also conducted business by letters, and is promissory in that it lays out all the terms.

Acceptance

An acceptance is Manifestation of willingness to enter into the K that the offer proposes. These can be in any reasonable manner so long as it is reasonable and is not otherwise expressly stated (goods--> 2-204, 2-06, and CL rest 30)

If the June 1 letter is an offer...

S: You accepted my letter with your June 12 letter.

B: This letter is not a valid acceptance b/c it is not the mirror image of yours (specific delivery time requirement) (Panhandle)

S: The MI could work here b/c your addition is just a request and requests (just as grumbling acceptances, making something explicit that was implicit, and insignificant changes) do not make an acceptance invalid under the MI.

B: This was not a request it was a condition to my purchase.

S: Since we are dealing with cigars and cigars a moveable Karl Lewellyn's Uniform Commercial code would apply. (UCC 1-102 applies to goods and 2-105 def of goods)

B: Ok, still my letter will not make for a K on the terms that you want b/c my letter was a conditional acceptance.

S: 2-207 states that additional and different terms are just proposals to the K and that when there is an expression of acceptance there is a K whether or not the terms are definite (2-206, rest 33).

B: We are both merchants since we deal with cigars in our work (2-104) so 2-207 part 2 would apply. It says that when two people are merchants additional terms, not different, are included only when they are not material (surprises), they are not conditional to the making of a K, and there is not a prior or seasonable rejection of the proposed term. My letter is clear that my acceptance is conditioned on receiving the goods by mid-July.

S: I disagree. ANYway, per my offer, you were responsible for paying me in advance. I demand my money for the K.

B: I will not pay b/c I don't believe that there was an offer.

If the June 12 letter is the offer, S's fax on the 17th is an acceptance...

S: Per 2-206, I told you that I was sending out the cigars. You cannot say that your offer lapsed b/c of time b/c I told you that I was going to ship as you indicated in your offer.

B: My offer was conditional on the terms of receipt of the cigars by mid July though.

S: We could get you 300 sets out by that time, so there is a K with 300.

B: My offer explicitly stated that I wanted 400 sets. I was not interested in only having half of my order filled. Your acceptance letter was thus an acceptance and a breach so I should not be held to the K since you had already breached it.

S: If that is the case, my letter on the 17th was an accommodation. It wasn't a breach b/c I acknowledged that you wanted something other than what I could provide.

B: Well, if that is the case, I notified you seasonably that I wasn't interested in your accommodation. I cannot be held to an offer that I didn't accept.

S: Whatever, your fax wasn't seasonable. It took you two weeks to fax me back a response. It would have been an acceptable measure of time had we been dealing with letters, but faxes can be sent much faster and you don't have to give time for the letter to travel to the sender. Since you took too long to reject my accommodation, my terms will rule the K and you will be held liable for the K.

B: It was seasonable and I will not be liable to you for anything!

S: We had already shipped the goods out before you rejected. After you are notified of shipment, you cannot reject an offer (2-206). Since this is a bilateral agreement, we relied on your offer and you now can't reject it (87). Even though the offeror is the maker of the offer (Normile), you cannot revoke and offer after it has been accepted.

B: Even if that is the case, you breached it. You said that you'd be sending 300, not 100. You breached the K so I am not liable to you.

In re the shipping costs regardless of what letter was an offer...

S: you pay the shipping costs b/c that is how our industry works. ANYway, now-a-days, especially after the advent of the internet, people expect to pay their own shipping costs. Your proposal was a suggestion. The suggestion did not become part of the K b/c it was material. The court will use the knock out rule to find out who will pay. This will work in my favor b/c the gap fillers that the court will use will say that you pay your own shipping b/c that is the norm.

B: No way. My letter was conditioned on the terms that I set forth...

S: In my letter to you, it explicitly stated that you would be responsible for the shipping costs. Your request that I pay the shipment was just a different, not an additional term. There are three ways of dealing with additional terms: they are the same as different ones and they are treated as proposals to the K; they are not the same and do not have an effect on the K, thus the original terms rules, use the knock-out rule and cancel out both our terms and fill in the gap with a gap filler. The gap filler will be a reasonable term and for shipping the reasonable term is that the buyer pay.

Indefiniteness

S: The agreement was very clear and per Rest 33 and 2-204 indefiniteness is ok so long as the courts can tell where there is a breach and have some way of remedying the breach if it

not an "express" "accept"

n.c.

AKL

AKL

occurs. (Community Design)

B: The agreement wasn't clear and cannot be enforced b/c you changed the amount of cigars that I was going to receive and the date that I was going to receive them so often that this confusing mess doesn't give the courts a reasonable way to remedy it. (33) The K was too vague to be enforced (Varney)

Misunderstanding Rest 20

B: Even if we did have a K, there is no way that the courts can enforce it b/c we misunderstood each other. I wanted the cigars from Jamaica not the DR. We both just misunderstood each other on the terms of the K so the courts will not be able to enforce with one b/c we were both reasonable. (Peerless, Swiss coins, Konic) ✓

S: What that never came up in our discussions. That is an unreasonable interpretation of the offer. Had the country of origin mattered you would have mentioned it. Since it was unreasonable on your behalf to think that I was talking about specific Macanudo cigars. Since it is unreasonable the court will enforce my interpretation of the K (Acedo).

B: It is not unreasonable, as in the cigar business country of origin is very important. You knew this b/c you learn from other suppliers who were trying to get Cubans. You should have known that I was expecting cigars from a certain country and you snatched up on my reasonable unilateral misunderstanding (Jay's trucking, Izadi). Since you tried to snatch up on me the court will enforce the K on my terms or say that there is no K at all. (weak argument) ✓

END OF EXAM