Solution and Answer Guide

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Chapter 12: Consideration

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# Critical Thinking Questions in Cases

Case 12.1

1. Fans sometimes catch and keep baseballs hit into the stands. How do these actions differ from the situation described in this case, in which fans were promised and received promotional items for attending games? Does this distinction support or undercut the court’s ruling?

Solution

The difference between the promise and receipt of a promotional item for attending a game and a fan’s catching and keeping a ball hit into the stands is the unexpected, gratuitous nature of the catch of a ball.

The promotional items at issue in this case are distinct from unanticipated, generally “free” items that fans might receive when attending a game. When a fan catches and brings home a ball hit by a player—or a t-shirt or other personal item tossed into the stands—the fan has no expectation of receiving the item, nor did the fan buy a ticket assuming that such an item would be provided by the team.

In the *Cincinnati Reds* case, the fans did not receive the promotional items unexpectedly or by chance. Instead, the items were an explicit part of the bargain, along with the right to attend the game, the fans obtained in exchange for buying the ticket.

1. What effect does the decision in this case have the state’s collection of revenue? Discuss.

Solution

Obviously, the decision in the *Cincinnati Reds* case affects the state of Ohio’s collection of revenue on the distribution of promotional items at the Reds’ baseball games. If the decision serves as precedent for other sports events for which tickets are sold and promotional items are advertised and distributed, then of course the state could be prevented rom collecting revenue on any of those items.

Depending on the number of such events, the amount of lost revenue could be significant. The state legislature might change this situation by amending the tax code. Sports teams might react to such a change by increasing ticket prices to cover the cost of the tax. This might affect attendance at sports events, and if the tax is large enough and well publicized, the members of the legislature who favored it might be voted out.

Case 12.2

1. When a noncompete agreement is entered into after employment has begun, is continued employment sufficient consideration for the agreement? Explain.

Solution

No. Continued employment does not constitute consideration for a noncompete agreement entered into after employment has begun. The employee who is asked to sign such an agreement is already employed. The agreement requires new consideration for its support. This might consist of, for example, a change to the employment relationship such as a term of duration imposed on previously at-will employment, or additional compensation or another benefit.

In the words of the court in the *Baugh* case, “When a covenant not to compete is entered into after the inception of employment, separate consideration, in addition to continue at-will employment, is necessary in order for the covenant to be enforceable. There is no consideration when the contract containing the covenant is exacted after several years' employment and the employee's duties and position are left unchanged.”

Case 12.3

1. Why would any party agree to a covenant not to sue?

Solution

The simple answer is money. When a party believes it to be an advantage to agree to a covenant not to sue, that party is most likely to agree. In the example in the text, the party whose car was damaged in the accident agrees not to sue if the other party will pay for the damage. This agreement saves the time and money that a suit for damages might require for both parties.

In the *Already* case, the covenant not to sue has similar advantages for the parties—both can continue to do business without changing their product lines and without the costs of trademark infringement or invalid trademark litigation.

1. Which type of contracts are similar to covenants not to sue? Explain.

Solution

Types of contracts that are similar to a covenant not to sue include an accord and satisfaction, and a release. In a *covenant not to sue*, the parties substitute a contractual obligation for some other type of legal action based on a valid claim.In an *accord and satisfaction*, a debtor offers to pay, and a creditor accepts, a lesser amount than the creditor originally claimed was owed. When the amount of a debt is not certain, and reasonable persons differ over the amount owed, acceptance of payment of a lesser sum operates as satisfaction of the debt because there is valid consideration—the parties give up a legal right to contest the amount in dispute.

A *release* is a contract in which one party forfeits the right to pursue a legal claim against the other party. The consideration for a release is the legal right that the party forfeits in exchange for the other’s promise to pay a stipulated amount.

# Chapter Review

Practice and Review

John operates a motorcycle repair shop from his home but finds that his business is limited by the small size of his garage. Driving by a neighbor’s property, he notices a for-sale sign on a large, metal-sided garage. John contacts the neighbor and offers to buy the building, hoping that it can be dismantled and moved to his own property. The neighbor accepts John’s payment and makes a generous offer in return. If John will help him dismantle the garage, which will take a substantial amount of time, he will help John reassemble it after it has been transported to John’s property. They agree to have the entire job completed within two weeks.

John then spends every day for a week working with his neighbor to disassemble the building. In his rush to acquire a larger workspace, he turns down several lucrative repair jobs. Once the disassembled building has been moved to John’s property, however, the neighbor refuses to help John reassemble it as he originally promised. Using the information presented in the chapter, answer the following questions.

1. Are the basic elements of consideration present in the neighbor’s promise to help John reassemble the garage? Why or why not?

Solution

Yes, there was an offer that was accepted with consideration. The parties agreed to the terms of the deal, which included cash for the building and the labor to take the building down and put it back together.

1. Suppose that the neighbor starts to help John but then realizes that putting the building back together will take much more work than dismantling it. Under which principle might the neighbor be allowed to ask for additional compensation?

Solution

Under the rule of unforeseen difficulties, a change in the terms may be allowed because of unforeseen difficulties, although that rule is not easy to have applied.

1. What if John’s neighbor made his promise to help reassemble the garage at the time he and John were moving it? Suppose he said, “Since you helped me take it down, I will help you put it back up.” Would John be able to enforce this promise? Why or why not?

Solution

No. John cannot enforce the promise because it is a gift being offered. At this point in their dealings, the neighbor is making a promise with no consideration from John, so it is a gift, not a bargained-for exchange.

1. Under what doctrine might John seek to recover the profits he lost when he turned down repair jobs for one week?

Solution

Assuming the neighbor knew about the income John was losing by counting on the deal as discussed, John might recover under the doctrine of promissory estoppel, which is when one has reasonably relied on the promise of another.

Practice and Review: Debate This

1. Courts should not be able to rule on the adequacy of consideration.  A deal is a deal.

Solution

Courts should not accept to rule on the adequacy of consideration because in so doing, they create a moral hazard situation for anyone who, after the fact, doesn’t think they “got a good deal.”  In other words, if those who enter into agreements know that they can later avoid their contractual obligations by claiming that the consideration was inadequate, they will take less time and resources to determine if the agreement is correct, appropriate, and fair.

Sometimes people are tricked into entering into agreements for which they receive grossly unfair consideration.  Fraud might be involved.  Undue influence (duress) could be another reason.  In such situations, these individuals should have access to the court system to redress their grievances.  To deny them this access would be unfair.

Issue Spotters

1. In September, Sharyn agrees to work for Totem Productions, Inc., at $500 a week for a year beginning January 1. In October, Sharyn is offered the same work at $600 a week by Umber Shows, Ltd. When Sharyn tells Totem about the other offer, they tear up their contract and agree that Sharyn will be paid $575. Is the new contract binding? Explain.

Solution

Yes. The original contract was executory. The parties rescinded it and agreed to a new contract. If Sharyn had broken the contract to accept a contract with another employer, she might have been held liable for damages for the breach.

1. Before Maria starts her first year of college, Fred promises to pay her $5,000 when she graduates. She goes to college, borrowing and spending far more than $5,000. At the beginning of the spring semester of her senior year, she reminds Fred of the promise. Fred sends her a note that says, “I revoke the promise.” Is Fred’s promise binding? Explain.

Solution

Yes. Under the doctrine of detrimental reliance, or promissory estoppel, the promisee is entitled to payment of $5,000 from the promisor on graduation. There was a promise, on which the promisee relied, the reliance was substantial and definite (the promisee went to college for the full term, incurring considerable expenses, and will likely graduate), and it would only be fair to enforce the promise.

Business Scenarios and Case Problems

1. **Preexisting Duty.** Ben hired Lewis to drive his racing car in a race. Tuan, a friend of Lewis, promised to pay Lewis $3,000 if he won the race. Lewis won the race, but Tuan refused to pay the $3,000. Tuan contended that no legally binding contract had been formed because he had received no consideration from Lewis for his promise to pay the $3,000. Lewis sued Tuan for breach of contract, arguing that winning the race was the consideration given in exchange for Tuan’s promise to pay the $3,000. What rule of law discussed in this chapter supports Tuan’s claim? Explain. (See *Agreements That Lack Consideration*.)

Solution

Tuan’s claim that no contract existed because Lewis had given no consideration for Tuan’s promise is supported by the preexisting duty rule. Lewis was already obligated to Ben to do his best to win the race, and the same consideration (attempting to win the race) could not be used in a second contract with Tuan. Because Lewis had a preexisting duty to try to win the race, a majority of courts would likely hold that Tuan was correct in arguing that no contract existed because Lewis gave no consideration.

1. **Accord and Satisfaction.** Merrick grows and sells blueberries. Maine Wild Blueberry Co. agreed to buy all of Merrick’s crop under a contract that left the price unliquidated. Merrick delivered the berries, but a dispute arose over the price. Maine Wild sent Merrick a check with a letter stating that the check was the “final settlement.” Merrick cashed the check but filed a suit for breach of contract, claiming that he was owed more. What will the court likely decide in this case, and why? (See *Settlement of Claims*.)

Solution

The accord and satisfaction created by Merrick’s cashing the check would bar any recovery. An accord and satisfaction is created by cashing a check that is accompanied by a letter with restrictive language. In this case, the language in the letter is unambiguous. The check was the “final settlement.” There is no doubt as to what Maine Wild intended or what should reasonably have been understood by Merrick. Merrick had the choice of accepting the check on these terms or of returning it—he chose to accept it.

1. **Rescission.** Farrokh and Scheherezade Sharabianlou agreed to buy a building owned by Berenstein Associates for $2 million. They deposited $115,000 toward the purchase. Before the deal closed, an environmental assessment of the property indicated the presence of chemicals used in dry cleaning. This substantially reduced the property’s value. Do the Sharabianlous have a good argument for the return of their deposit and rescission of the contract? Explain. [*Sharabianlou v. Karp*, 181 Cal.App.4th 1133, 105 Cal.Rptr.3d 300 (2010)] (See *Agreements That Lack Consideration*.)

Solution

The reviewing court concluded that “Rescission is intended to restore the parties as nearly as possible to their former positions and ‘to bring about substantial justice by adjusting the equities between the parties’.” Rescission does not occur if a contract is affirmed; it means the contract is repudiated. Here, rescission is appropriate because the contracting parties were mutually mistaken as to the condition of the property. The environmental contamination substantially reduced its value. When an agreement to purchase property is subject to rescission, “the seller must refund all payments received in connection with the sale.” Hence, the award of damages to the Berensteins was reversed and the Sharabianlous were refunded their deposit.

1. **Spotlight on Kansas City Chiefs—Consideration.** On Brenda Sniezek’s first day of work for the Kansas City Chiefs Football Club, she signed a document that purported to compel arbitration of any disputes that she might have with the Chiefs. In the document, Sniezek agreed to comply at all times with and be bound by the constitution and bylaws of the National Football League (NFL). She agreed to refer all disputes to the NFL commissioner for a binding decision and to release the Chiefs and others from any related claims. Nowhere in the document did the Chiefs agree to do anything. Was there consideration for the arbitration provision? Explain. [*Sniezek v. Kansas City Chiefs Football Club*, 402 S.W.3d 580 (Mo.App. W.D. 2013)] (See *Consideration*.)

Solution

No. There was no consideration for the arbitration provision. Consideration is required to create a bilateral contract. Consideration is something of legally sufficient value given in return for a promise. The “something of legally sufficient value” may consist of either a promise to do or refrain from doing something or a transfer of something of value.

In this problem, the arbitration “agreement” contains promises made only by Sniezek. Only Sniezek agrees to comply at all times with and be bound by the constitution and bylaws of the National Football League (NFL). Only Sniezek agrees to refer all disputes to the NFL Commissioner for a binding decision. Only Sniezek agrees to release the Chiefs from any related claims on the Commissioner's decision. Nowhere in the document do the Chiefs agree to do anything. Thus, the document does not contain any promises by the Chiefs to constitute sufficient consideration for Sniezek's promise to forgo her right of access to the courts and arbitrate her claims against them.

The Chiefs might argue that the “agreement” was a condition of Sniezek's keeping her employment, which the Chiefs had already offered her, and she had already accepted. But the document did not alter the nature of her employment relationship—no employment contract was created; no additional compensation or other benefit was offered. Consequently, allowing Sniezek to stay on the job was not sufficient consideration to support a promise to arbitrate.

In the actual case on which this problem is based, Sniezek filed a charge of age discrimination against the Chiefs in a Missouri state court, and the Chiefs filed a motion to compel arbitration. The court denied the motion, and a state intermediate appellate court affirmed the denial for the reasons stated above.

1. **Consideration.** Citynet, LLC, established an employee incentive plan “to enable the Company to attract and retain experienced individuals.” The plan provided that a participant who left Citynet’s employment was entitled to “cash out” his or her entire vested balance. (When an employee’s rights to a particular benefit become *vested*, they belong to that employee and cannot be taken away. The vested balance refers to the part of an account that goes with the employee if he or she leaves the company.)

When Citynet employee Ray Toney terminated his employment, he asked to redeem his $87,000.48 vested balance. Citynet refused, citing a provision of the plan that limited redemptions to no more than 20 percent annually. Toney filed a suit in a West Virginia state court against Citynet, alleging breach of contract. Citynet argued that the plan was not a contract but a discretionary bonus over which Citynet had sole discretion. Was the plan a contract? If so, was it bilateral or unilateral, and what was the consideration? [*Citynet, LLC v. Toney*, 235 W.Va.79, 772 S.E.2d 36 (2015)] (See *Consideration*.)

Solution

Citynet’s employee incentive plan was an offer for a unilateral contract. A Citynet employee who stayed on the job while was under no obligation to do so could be considered to have accepted Citynet's offer and to have provided sufficient consideration to make the offer a binding and enforceable promise. Consideration has two elements—it must consist of something of legal value and must provide the basis for the bargain between the parties. A unilateral contract involves a promise in return for performance. The promisor becomes bound to the contract when the promisee performs, or in many cases begins to perform, the act. Both the promise and the performance have legal value.

Here, Citynet set up an employee incentive plan“to attract and retain experienced individuals.” The plan provided that participants who left Citynet’s employ could “cash out” their entire vested balances. When Ray Toney terminated his employment and asked to redeem his vested balance, however, Citynet refused. But Toney had long stayed on the job when he did not have to. This was sufficient consideration to make Citynet’s offer under the incentive plan a binding and enforceable contract with Toney.

In the actual case on which this problem is based, a West Virginia state court issued a judgment in Toney’s favor. The West Virginia Supreme Court of Appeals affirmed, on the reasoning and principles stated above.

1. **Business Case Problem with Sample Answer— Agreements That Lack Consideration.** Arkansas-Missouri Forest Products, LLC (Ark-Mo), sells supplies to make wood pallets. Blue Chip Manufacturing (BCM) makes pallets. Mark Garnett, an owner of Ark-Mo, and Stuart Lerner, an owner of BCM, went into business together. Garnett and Lerner agreed that Ark-Mo would have a 30-percent ownership interest in their future projects. When Lerner formed Blue Chip Recycling, LLC (BCR), to manage a pallet repair facility in California, however, he allocated only a 5 percent interest to Ark-Mo. Garnett objected.

In a “Telephone Deal,” Lerner then promised Garnett that Ark-Mo would receive a 30 percent interest in their future projects in the Midwest, and Garnett agreed to forgo an ownership interest in BCR. But when Blue Chip III, LLC (BC III), was formed to operate a repair facility in the Midwest, Lerner told Garnett that he “was not getting anything.” Ark-Mo filed a suit in a Missouri state court against Lerner, alleging breach of contract. Was there consideration to support the Telephone Deal? Explain. [*Arkansas-Missouri Forest Products, LLC v. Lerner*, 486 S.W.3d 438 (Mo.App. E.D. 2016)] (See *Consideration*.)
**—For a sample answer to Problem 12–6, go to Appendix E.**

Solution

Yes. There was consideration to support the Telephone Deal. Consideration can consist of a promise, a performance, or forbearance (refraining from an action that one has a legal right to undertake).

In this problem, Mark Garnett, an owner of Arkansas–Missouri Forest Products, LLC (Ark-Mo), and Stuart Lerner, an owner of Blue Chip Manufacturing (BCM), agreed to go into wood-pallet enterprises together, withArk-Mo to have a 30-percent ownership interest in their future projects. When Lerner formed Blue Chip Recycling, LLC (BCR) to manage a pallet repair facility in California, however, he allocated only a 5-percent interest to Ark-Mo. Garnett objected. In a “Telephone Deal,” Lerner promised thatArk-Mo would receive a 30-percent interest in their future projects in the Midwest. Garnett then agreed to forego an ownership interest in BCR.

Acting on Ark-Mo’s behalf, Garnett could have accepted the 5-percent allocation in BCR, but he refrained from doing so. Instead, he accepted Lerner’s promise of a 30-percent share in their future projects in the Midwest and made no more demand regarding BCR. In other words, Garnett forwent the opportunity to have an ownership interest in BCR in exchange for Lerner’s agreement that Ark–Mo would have a 30-percent ownership interest in certain future projects.

In the actual case on which this problem is based, Ark-Mo filed a suit in a Missouri state court against Lerner, alleging breach of contract. The court issued a judgment in Lerner’s favor. A state intermediate appellate court reversed, in part on the reasoning stated here. “Valid legal consideration supported the Telephone Deal.”

1. **Elements of Consideration.** Carmen White signed a lease with Sienna Ridge Apartments in San Antonio, Texas. The lease required White to reimburse Sienna Ridge for any damage to the apartment not caused by the landlord’s negligence or fault. After moving in, White received a new washer and dryer from her parents. She did not read the instruction manual before overloading the dryer with bedding, including an unwashed pillow, which started a fire. Sienna Ridge filed a claim for the resulting damage with Philadelphia Indemnity Insurance Company. Philadelphia paid the claim and filed a suit in a Texas state court against White, alleging that she had breached the lease by failing to reimburse Sienna Ridge for the damage. White argued that the lease was unenforceable for lack of consideration. Is White correct? Discuss. [*Philadelphia Indemnity Insurance Co. v. White*, 2017 WL 32899 (Tex.App.— San Antonio 2017)] (See *Consideration*.)

Solution

White is not correct. Her lease with Sienna Ridge does not lack consideration and is therefore enforceable. Consideration is a requirement for every valid contract. Consideration consists of a bargained-for exchange of something of legal value, which can include promises and performance.

In this problem, Carmen White signed a lease with Sienna Ridge Apartments. The lease presumably contained a number of obligations owed by each party to the other. These would include the tenant’s payment of a deposit and rent and the landlord’s permission to live on the premises. The landlord would owe a duty to keep the common areas free of hazards and to maintain the apartment’s heating and water. The lease expressly required White to reimburse Sienna Ridge for damage not due to the landlord’s negligence or fault. These obligations and duties constituted consideration.

White overloaded a dryer in her apartment, causing a fire. She failed to pay Sienna Ridge for the resulting damage. This is a clear breach of the lease. Arguably, even in the absence of a clause that required her to pay for the damage, White would have acted unethically by resisting payment. An ethical person would face the consequences of the conduct and act to resolve those that harm others.

In the actual case on which this problem is based, a jury found in favor of Philadelphia but the court issued a judgment notwithstanding the verdict in favor of White. On appeal, the Texas Supreme Court reversed this judgment, and the case was remanded to the lower court for the entry of a judgment in accord with the jury’s verdict.

1. **A Question of Ethics—Promissory Estoppel.** *Claudia Aceves borrowed $845,000 from U.S. Bank to buy a home. Less than two years into the loan, she could no longer afford the monthly payments. The bank notified her that it planned to foreclose on her home. (Foreclosure is a process that allows a lender to repossess and sell the property that secures a loan.) The bank offered to modify Aceves’s mortgage if she would forgo bankruptcy. In reliance on the bank’s promise, she agreed. Once she withdrew the filing, however, the bank foreclosed and began eviction proceedings. Aceves filed a suit against the bank for promissory estoppel. [*Aceves v. U.S. Bank, N.A., *192 Cal.App.4th 218, 120 Cal.Rptr.3d 507 (2011)] (See* Promissory Estoppel*.)*
2. Could Aceves succeed in her claim of promissory estoppel? Why or why not?

Solution

The elements of promissory estoppel are (1) a promise, (2) the promisee’s justifiable reliance on the promise, (3) reliance of a substantial and definite character, and (4) justice better served by the enforcement of the promise. In the facts of this problem, under a theory of promissory estoppel, Aceves’s best strategy is to argue that the bank’s promise to work with her in modifying the loan was enforceable, that she relied on the promise by forgoing bankruptcy protection, that the bank breached its promise by foreclosing on her home, and that justice would be better served by allowing her to stay in her home and work out a modified schedule of payments with the bank.

In the actual case on which this problem is based, the court concluded that the bank promised to work on a loan modification if Aceves did not seek relief in bankruptcy, Aceves reasonably relied on this promise when she withdrew her filing, and this decision allowed the bank to foreclose on the property.

1. Did Aceves or U.S. Bank behave unethically? Discuss.

Solution

As for unethical behavior, U.S. Bank clearly misrepresented it was willing to forgo foreclosure while expediting foreclosure proceedings. The bank apparently never intended to work with Aceves to modify her loan. It promised to do this only to convince her to forgo bankruptcy proceedings so that the bank could foreclose on the property. The elements of fraud are similar to the elements of promissory estoppel, with the additional requirements that a false promise be made and that the promisor know of the falsity when making the promise. It is easy to view this conduct as unethical. Acts that support claims for promissory estoppel and fraud, as occurred in these facts, are patently unethical.

A lapse of ethics in Aceves’s conduct is less clear. She may have overextended herself in taking on this mortgage to buy this house. That the mortgage payments became unaffordable for her less than two years into the loan indicates that she may have fooled herself at the inception of the loan into thinking that she could afford it at all. If that was the circumstance, she may have been motivated by greed or she may have fallen victim to self-deception, either of which are arguably unethical. She might have been better situated if she had bought a less expensive home under a more affordable loan.

Critical Thinking and Writing Assignments

1. **Time-Limited Group Assignment—Preexisting Duty.** Melissa Faraj owns a lot and wants to build a house according to a particular set of plans and specifications. She solicits bids from building contractors and receives three bids: one from Carlton for $160,000, one from Feldberg for $158,000, and one from Siegel for $153,000. She accepts Siegel’s bid. One month after beginning construction of the house, Siegel contacts Faraj and tells her that because of inflation and a recent price hike for materials, his costs have gone up. He says he will not finish the house unless Faraj agrees to pay an extra $13,000. Faraj reluctantly agrees to pay the additional sum. (See *Agreements That Lack Consideration*.)
2. One group will evaluate whether a contractor can ever raise the price of completing construction based on inflation and the rising cost of materials.

Solution

The legal issue deals with the preexisting duty rule, which basically states that a promise to do what one already has a legal or contractual duty to do does not constitute consideration, and thus a promise based on a preexisting duty is unenforceable. One of the purposes of this general rule is to prevent commercial blackmail. There are four basic exceptions to this rule. If any of these applied, a contractor might successfully raise the price of completing construction based on inflation and the rising cost of materials.

* + 1. If the duties of Siegel are modified, for example, by changes made by Faraj in the specifications, these changes can constitute consideration and bind Faraj to pay the additional $13,000.
		2. Rescission and new contract theory could be applied, by which the old contract of $153,000 would mutually be canceled and a new contract for $166,000 would be made. Most courts would not apply this theory unless there was a clear intent to cancel the original contract. It appears here that the intent to cancel the $153,000 contract is lacking (there is merely an intent to modify), so this exception would not apply.
		3. A few states have statutes that allow any modification to be enforceable if it is in writing. The facts stated give no evidence that Faraj’s agreement to the additional $13,000 is in writing, but, if it is, Faraj is bound in those states.
		4. The unforeseen difficulty or hardship rule could be argued. This rule, however, applies only to unknown risks not ordinarily assumed in business transactions. Because inflation and price rises are risks ordinarily assumed in business, this exception cannot be used by Siegel.
1. A second group will assume that after the house is finished, Faraj refuses to pay the extra $13,000. The group will decide whether Faraj is legally required to pay this additional amount.

Solution

In this problem, Siegel was required contractually to build a house according to a specific set of plans for $153,000, and Faraj’s later agreed to pay an additional $13,000 for exactly what Siegel was required to do for $153,000. Under the preexisting duty rule, this agreement is without consideration and unenforceable. Thus, Faraj is not legally required to pay this additional amount.

1. A third group will determine what types of extraordinary difficulties could arise during construction that would justify a contractor’s charging more than the original bid.

Solution

The preexisting duty rule states that a promise to do what one already has a legal or contractual duty to do does not constitute consideration, and thus a promise based on a preexisting duty is unenforceable. One of the purposes of this general rule is to prevent commercial blackmail. One of the exceptions to this rule concerns an unforeseen difficulty or hardship. This exception applies only to unknown risks not ordinarily assumed in business transactions. Because inflation and price rises are risks ordinarily assumed in business, this exception cannot be used by Siegel in this problem. The types of extraordinary difficulties that could arise during construction to justify a contractor charging more than an original bid include unexpected infrastructure and subsurface problems.

1. A fourth group will consider what would happen if Faraj and Siegel had rescinded the initial contract and entered a new construction contract that included the extra $13,000. Would a court be likely to find that there was no consideration because of a preexisting duty? Explain.

Solution

If Faraj and Siegel had rescinded the initial contract and entered into a new contract that included the extra $13,000, a court could be likely to find that there was no consideration for the new deal—i.e., that it could not be enforced for lack of consideration because of a preexisting duty.

A promise to do what one has a legal duty to do is not legally sufficient consideration for a new contract. But two parties can mutually agree to rescind their contract, at least the extent that it is executory. By rescinding the deal, they return to the positions they were in before they made it. They are then free to enter into a new contract.

If rescission and the new agreement occur at the same time, as was the circumstance indicated in the facts of this question, it may not be clear that there was consideration for the new contract. Thus, if Faraj were to refuse to comply with the new terms, a court might determine that there was no consideration for it because of a preexisting duty, and the new contract would be adjudged invalid.