

CONTRACTS

A Context and Practice Casebook

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Chapter 3

The Consideration Requirement for Contract Formation

Exercise 3-1: Chapter Problem

Your client, Daniela, Inc., has come to you for help and has handed you the complaint provided in Table 3-1. As you have learned by now, in civil cases, complaints are documents filed by plaintiffs to initiate lawsuits. Complaints state the facts and bases for legal relief which justify the courts' intervention and the enforcement of legal rights. In the contract law context, the contract at issue in a dispute is almost always attached to the complaint (as it is in Table 3-1).

After a quick review of Daniela's complaint, you determine that you have one month in which to file an answer. Your answer should allege that your client is not liable because he did not receive "*consideration*" and, therefore, did not enter into a contract. Accordingly, you need to learn the factual basis for asserting lack of consideration as a defense.

Your specific tasks in this exercise are to identify the consideration issue implicated by the contract attached to Daniela's complaint, accurately predict whether a court will conclude the contract lacks consideration, plan a strategy for handling the dispute, and draft an answer to the complaint. By the end of this chapter, you will be able to do so.

As you read this chapter, keep your client's case in mind. The materials at the end of this chapter will provide guidance for drafting an answer to the complaint. So, until the end of this chapter, you just need to focus on identifying and analyzing the consideration issue.

Finally, please note that in all jurisdictions, your signature on legal papers represents that you have engaged in a reasonable inquiry and are certifying that your allegations: (1) are not being presented for any improper purpose; (2) are warranted by either existing law or a non-frivolous argument for modification of existing law; and (3) have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation.¹

Consequently, we urge you to consider the signing of any document a serious matter that represents your level of credibility and reputation as an attorney. Now is the time to set a high professional standard for how you will conduct yourself and what type of attorney you will be. Thus, think about the importance of the standard you

1. For example, for cases filed in federal court, the applicable procedural rule provides that all papers filed by an attorney shall be signed and that unsigned papers will be stricken. The rule states that an attorney's signature provides a certification that the allegations being made are based on a reasonable inquiry and are appropriate. Finally, the rules provide for sanctions, such as fines, payment of attorneys' fees, the striking of pleadings, and other nonmonetary consequences, for papers filed in violation of the rule's requirement. FED. R. Civ. P. R. 11.

set for yourself as a legal professional as you draft the answer for your client at the end of this chapter.

Table 3-1: Breach of Contract Complaint

As you read this complaint, note that, for instructional purposes, we have added notes in the margins with explanations about the complaint. Obviously, a real complaint would not include such notes. Also, note that this complaint has been filed in a fictional state, Jefferson. Treat the complaint as if it were filed in the state in which you are in law school.

The heading of a legal document, which contains the names of the parties, the court, and the case number, is called a "caption."

A court must have "jurisdiction," the power to hear and determine a case, before adjudicating a case.

A "cause of action" states the facts that give rise to a particular legal claim, such as a claim for breach of contract. If a complaint fails to state a cause of action, it will be dismissed. Most complaints allege multiple causes of action.

In most states, a cause of action for a breach of contract must allege: (1) the parties had a contract; (2) the plaintiff performed all of his obligations; (3) the defendant breached the contract; and (4) the plaintiff suffered damages as a result.

You have probably already noticed that the language of legal pleadings, as you see in this complaint, is frequently stilted and overly formal. Don't be intimidated.

State of Jefferson, County of Lincoln	
Pietro Corp., Inc.,)
Plaintiff)
)
v.) Complaint for Breach of Contract
)
) Case No.: BC29783543
Daniela, Inc.,)
Defendant.)
Plaintiff, by and through its attorney, Lindsey Lawyer, hereby alleges as follows:	
Parties and Jurisdiction	
<ol style="list-style-type: none"> 1. This action is filed pursuant to Chapter 22 of the Jefferson Code Annotated. 2. Plaintiff Pietro Corp., Inc., is a resident of Madison City, Lincoln County, in Jefferson State. 3. Defendant Daniela, Inc., is also a resident of Madison City, Lincoln County, in Jefferson State. 4. All of the events described in this complaint occurred in Madison City, Lincoln County, in Jefferson State. 5. Accordingly, this court has jurisdiction of the above-captioned matter. 	
Cause of Action: Breach of Contract	
<ol style="list-style-type: none"> 6. On or about June 1, Plaintiff and Defendant entered into a contract whereby Defendant agreed to serve as a marketing consultant to Plaintiff, and Plaintiff agreed to pay \$175 per hour. A copy of the contract is attached hereto as Attachment A and incorporated by reference herein. 7. At all relevant times, Plaintiff has been ready, willing, and able to pay Defendant for Defendant's services. 8. On June 20 and continuously thereafter, Defendant breached the contract described in paragraph six by expressly and unequivocally denying that Plaintiff and Defendant entered into a valid and enforceable contract and by refusing to perform the contract or provide any marketing consulting services. 9. As a result, Plaintiff has suffered damages in the amount of \$250,000 for loss of the benefit of its bargain, for lost profits, and for other incidental expenses. 	

Wherefore, Plaintiff prays for judgment against Defendant as follows:

1. Damages in the amount of \$250,000.
2. Costs and such other relief as the court may deem proper.

This, the 1st day of August, 20__.

Lindsey Lawyer
 Law Offices of Lindsey Lawyer, LLC
 Attorneys for Plaintiff
 1111 State Street
 Madison, Jefferson 99999-0001
 (519) 677-8999
 State Bar No. 10985

A party's request for what he wants a court to do is called a "prayer for relief."

Procedural rules require attorneys to sign all papers filed with a court, and unsigned papers will be stricken. The rules also state that an attorney's signature provides a certification the allegations are based on a reasonable inquiry and are appropriate.

Attachment A
Consulting Agreement

This agreement made the first day of June by and between Pietro Corp, Inc, a corporation organized and existing under the laws of Jefferson State, with its principal place of business located at 2222 City Street, Madison City, Jefferson 99999 ("Company"), and Daniela, Inc., with its principal place of business located at 1112 State Street, Madison City, Jefferson 99999 ("Consultant").

Recitals

Company wishes to contract with Consultant for Consultant's marketing services. Consultant is willing and qualified to perform such services. In consideration of the matters described above, and of the mutual benefits and obligations set forth in this agreement, the parties agree as follows:

Services

Consultant agrees to perform such services as may be requested in writing by Company including, but not limited to, developing and implementing a marketing plan satisfactory to Company. It is understood that Company shall have the unrestricted, instantaneous right to cancel this agreement.

Compensation

Company shall compensate Consultant as follows: (1) \$175 per hour and (2) all actual expenses incurred by Consultant directly related to Consultant's performance of this agreement. Consultant shall provide Company with monthly invoices reflecting services rendered to Company. These invoices shall be due and payable within ten days of their making.

Confidentiality

Consultant agrees that: (1) all knowledge and information that Consultant may receive from Company or from its employees or by virtue of the performance of services under and pursuant to this agreement belongs to Company; and (2) all information pro-



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vided by Consultant to Company shall be regarded by Consultant as strictly confidential and shall be solely for Company's benefit and use. Consultant shall not use or disclose any such knowledge or information directly or indirectly to any person.

Consultant Representations

Consultant represents and warrants that Consultant has the right to perform the services required under this agreement.

Effective Date

This agreement shall become effective on the date stated above.

Entire Agreement

This agreement shall constitute the entire agreement between the parties and any prior understanding or representation of any kind preceding the date of this agreement shall not be binding upon either party.

Modification of Agreement

Any modification of this agreement or additional obligation assumed by either party in connection with this agreement shall be binding only if evidenced in writing signed by each party.

Notices

Any notice provided for or concerning this agreement shall be in writing and be deemed sufficiently given when sent by certified or registered mail if sent to the respective address of each party as set forth at the beginning of this agreement.

Governing Law

This agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Jefferson.

Signatures

Each party to this agreement has caused it to be executed at Madison, Jefferson.

This, the first day of April, 2009,

Pietro Peterberg
Pietro Peterberg, President
Pietro Corp, Inc.

Daniela Dubois
Daniela Dubois, President
Daniela, Inc.

2. "We will pay you \$5 per brick for all of the bricks our architect determines that we need for this construction project."
3. From a widget manufacturer to a widget retailer: "We will sell you at \$.50 per widget all the widgets we produce."
4. "If you give me one dollar, and if I draw your name from this fishbowl from among all of the names of others from whom I have collected a dollar, I will give you all of the money I have collected."
5. "Unless I accept the job offer I received to be a law clerk with the Law Offices of Darrow & Smith, I promise to tutor you in contracts."
6. "I covenant to pay you \$25 per hour to tutor me in contracts, but I may terminate this contract at any time."
7. "I will buy your home if I get a thirty-year, \$200,000 loan from the Bank of Trust at an 8% interest rate."
8. "We will pay you \$5 per brick for 50,000 used bricks. We may cancel this contract at any time without notice."
9. "We will pay you \$5 per brick for 50,000 used bricks. We may cancel this contract at any time."

Exercise 3-24: Recurring Illusory Promise Issues

One effective technique for preparing for your law school exams is to create issue checklists that match the information you have covered during your courses. Issue checklists make it easier for you to identify legal issues presented in problems on your exams.

This exercise is intended to help you create an issue checklist for illusory promises. You have now learned about eight recurring illusory promise issues. These eight issues arise in the context of eight specific fact patterns. Re-read all of the illusory promise problems in this chapter and make a list of those eight specific fact patterns.

Chapter Problem Revisited

You now know enough to fully analyze Exercise 3-1 which was introduced at the beginning of this chapter. The problem presented in Exercise 3-1 is similar to one you might be asked to analyze on a law school exam or in law practice. Here are a few hints for analyzing and completing the problem:

1. Re-read Exercise 3-1 and make sure you understand the exact tasks you were asked to accomplish.
2. Start by identifying the consideration law issue implicated by the contract attached to the complaint.
3. Because you are a novice in drafting pleadings, it is most important to make thoughtful decisions about what you write (and less important that you create



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a perfect answer to the complaint). Accordingly, as you draft your answer, also write comments which explain your thinking process (either within your answer or on a separate sheet of paper).

4. Before you try writing your answer, you may find it helpful to look at sample answers in a form book for the state in which your law school is located or for federal practice.
5. Table 3-4 is a sample answer to a complaint. Assume that the complaint asserted that the defendant committed the tort of battery. It is reproduced here to give you an idea as to how to draft an answer. There are text boxes added to provide explanations for different aspects of the sample answer. Note that the text boxes are only provided to assist your understanding and should not actually appear in any legal pleadings.

Table 3-4: Sample Answer to Battery Complaint

State of Jefferson, County of Lincoln	
Jane Smith,)
Plaintiff)
v.)
) Answer to Complaint
)
) Case No.: TB43434343
Tom Jones,)
Defendant.)
<p style="text-align: center;">Defendant Tom Jones, by and through his attorney, Alice Attorney, hereby responds to the complaint filed by Jane Smith in the above-captioned matter as follows:</p> <p style="text-align: center;">Responses to Allegations of the Complaint</p> <ol style="list-style-type: none"> 1. Defendant lacks sufficient information or belief to admit or deny the allegations contained in paragraphs 1-2 of the complaint and denies those allegations on that ground. 2. In answer to paragraph 3 of the complaint, defendant admits that defendant is a resident of the city of Madison, the County of Lincoln, state of Jefferson. 3. Defendant denies on information and belief the allegations contained in paragraph 4 of the complaint. 4. Defendant denies the allegations contained in paragraphs 5-10 of the complaint. 5. On information and belief, Defendant denies the allegations contained in paragraph 11 of the complaint. 	

An answer admits allegations known to be true, denies allegations known to be false, denies allegations believed to be false based "on information and belief," and denies allegations for which a party has a complete lack of relevant information.

Affirmative Defenses

As affirmative defenses, defendant alleges:

1. **Affirmative Defense 1: Statute of Limitations.** Even assuming, for argument's sake, all of the allegations of the complaint are true, all of the events described in the complaint occurred more than two years before the filing of the complaint and therefore the statute of limitations for this cause of action has run.
2. **Affirmative Defense 2: Self-Defense.** Even assuming, for argument's sake, all of the allegations of the complaint are true, defendant's actions were taken as a response to the plaintiff approaching the defendant with a loaded gun and pointing the gun at defendant and therefore the defendant reasonably believed in the need to act in self-defense and the defendant's actions were proportionate to the threat posed by the plaintiff.

Wherefore, defendant requests a judgment by the court:

1. Ordering that plaintiff take nothing by the complaint filed in the above-entitled matter, and that the same be dismissed with prejudice;
2. Awarding defendant costs; and
3. Granting defendant such other and further relief as the court deems just and proper.

September 28, 2008

Betty Barrister, Esq.

Betty Barrister, Esq.
Law Offices of Betty Barrister & Associates
1212 State Street
Madison, Jefferson 99999-0001
984-689-7979
State Bar No. 398760

An affirmative defense is a defense which serves as a basis for providing new facts which would allow a defendant to avoid a judgment against him, even assuming all the allegations of a complaint are true.

Just as plaintiffs include prayers for relief in their complaints, defendants include prayers for relief in their answers.

Professional Development Reflection Questions

1. Imagine that Carl Client asks you to draft a contract for him and include an illusory promise, which appears to bind both parties. Doing so is lawful, but should you engage in such a practice? Is it "good lawyering"? Would you want to represent Carl?
2. In Chapter 1, you were introduced to the three key components of being an expert learner (planning, implementing your plans with self-monitoring, and reflecting on your learning process). As you revisit this learning model with the questions that follow, focus on strengthening your expert learning skills.
3. In the planning phase, you should set mastery learning goals (for example, "By the end of the day, I'll be able to recite and explain the elements of promissory estoppel") and not task-completion goals (for example, "I will read pages 80-100



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