Contract Law for Paralegals: Chapter 2

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Chapter 2
The Classical Offer
An Offer Begins With a Promise
Alternatives to Classical Consi...
Alternative Causes of Action
Chapter Review Answers
Chapter Quiz

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The Offer Phase

Chapter 2 is in three parts: (1) the classical offer-the promisor's promise and consideration for that promise; (2) alternatives to classical consideration so an offer is created; and (3) alternative causes of action (reliance cause of action and restitution cause of action) when no offer is created.

Chapter 2 begins with a definition of offer-the promisor's creation of power in the promisee so the promisee can accept and thereby form a contract. Whether this power is created depends on whether the promisor manifests a willingness to enter into a contract by inviting the promisee to agree to the promisor's terms. Whether the promisor's manifestation creates this willingness is evaluated on an objective rather than a subjective basis. Offer vs. No Offer Using a Subjective or an Objective Standard is Exhibit 2-1 (50).

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The Road Map for the Offer Phase is Exhibit 2-2 (52) and can be downloaded from the Online Companion to this text.

The Classical Offer

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THE CLASSICAL OFFER-THE PROMISOR'S PROMISE AND CONSIDERATION FOR THAT PROMISE

The two components of the classical offer are the promisor's promise and the consideration for the promisor's promise. The text clearly differentiates the promisor's promise from the consideration for that promise. Without a promisor's promise there can be no offer. Without consideration for the promisor's promise there can be no offer. Students are forced to dissect the offer into its components rather than use a macro approach.

The text distinguishes an offer for a bilateral contract (promise for a promise) and an offer for a unilateral contract (promise for a performance). At this stage of contract formation, the emphasis is on offer-offer for a bilateral contract or offer for a unilateral contract-and not on the contract since contract formation has yet to occur. The significance of whether an offer is for a bilateral or a unilateral contract is discussed.

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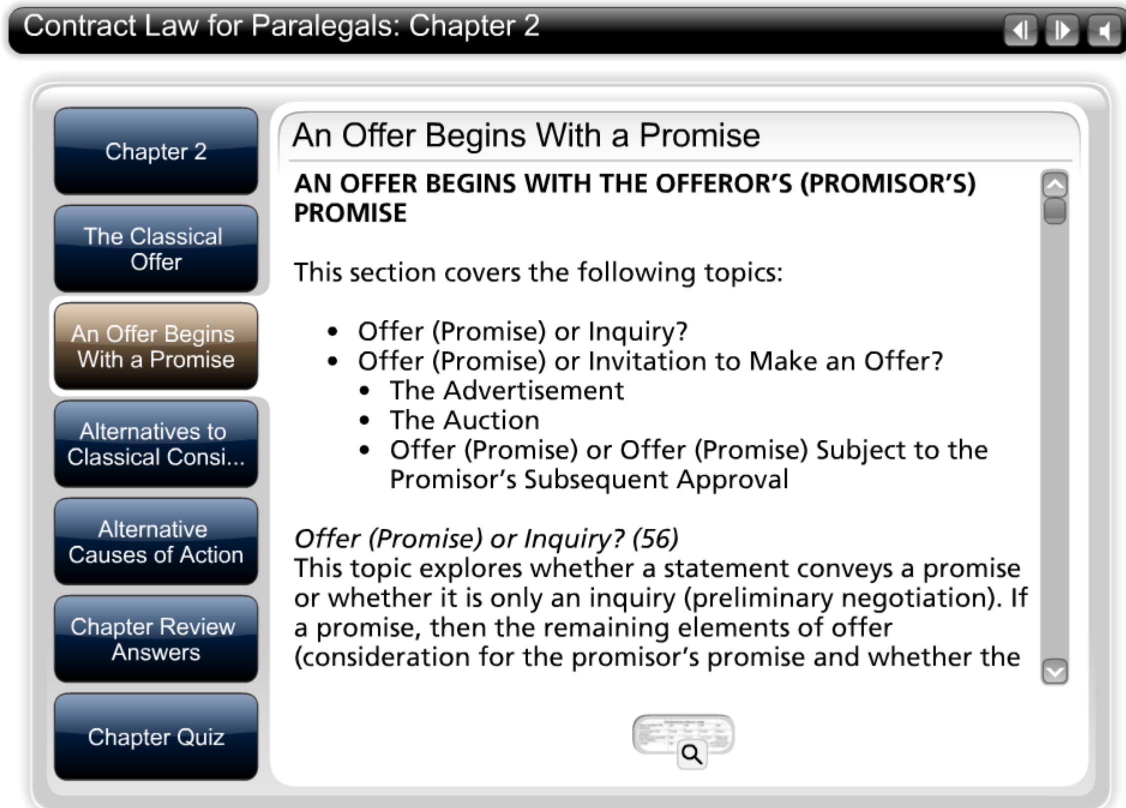
- An Offer for a Bilateral Contract is Exhibit 2-3 (53)

- Timing of Acceptance of an Offer for a Bilateral Contract is Exhibit 2-4 (53)
- An Offer for a Unilateral Contract is Exhibit 2-5 (54)
- Timing of Acceptance of an Offer for a Unilateral Contract is Exhibit 2-6 (54)
- The Bargained-For Exchange is Exhibit 2-7 (56)

Once the distinction between an offer for a bilateral contract and an offer for a unilateral contract has been made, the dissection begins with the promisor's promise.

Some care needs to be taken here because the problems are "promisor's promise" problems although they are couched in "offer" language. It is true that if a promisor's promise does not exist, there is no offer. The nonexistence of an offer, however, does not necessarily need to be the lack of a promisor's promise. The lack of consideration for the promisor's promise or the fact that the promisor's promise was not made to induce the promisee's promise or performance could also result in the nonexistence of an offer. We have chosen to use "Offer (Promise)" to signal that although the issue is couched in terms of "offer," the focus is limited to whether the promisor made a promise.

An Offer Begins With a Promise



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AN OFFER BEGINS WITH THE OFFEROR'S (PROMISOR'S) PROMISE

This section covers the following topics:

- Offer (Promise) or Inquiry?
- Offer (Promise) or Invitation to Make an Offer?
  - The Advertisement
  - The Auction
  - Offer (Promise) or Offer (Promise) Subject to the Promisor's Subsequent Approval

Offer (Promise) or Inquiry? (56)
This topic explores whether a statement conveys a promise or whether it is only an inquiry (preliminary negotiation). If a promise, then the remaining elements of offer (consideration for the promisor's promise and whether the promisor's promise was made to induce the promisee to promise to perform) must be found. If the statement does not amount to a promise, then the

next statement must be evaluated to determine whether it contains a promisor's promise.

Fairmount Glass Works v. Grunden-Martin Woodenware Co. (57) provides an excellent set of facts upon which to evaluate whether a communication is a promise or an inquiry. We suggest that each communication be located along a timeline, beginning with the first communication. Evaluate the first communication for being a promise or inquiry. Does the first communication unequivocally assure that something will or will not be done? Under modern contract law, this evaluation is based on the reasonable person's perception of the communication, i.e., an objective standard.

Check whether Fairmont Glass Works applies an objective or a subjective standard to the promise/inquiry issue.

1. Grunden-Martin's letter of April 20th
   - inquiry
     -please advise us the lowest price

2. Fairmount's letter of April 23rd
   - promisor's promise
     -replying to your favor
     -we quote you $
     -for immediate acceptance

Note that the last paragraph of the opinion involves trade terms. This material can be used now to show that "nothing was left to be negotiated." It can also be used later when the focus is on trade terms and indefinite promises.

Offer (Promise) or Invitation to Make an Offer (Promise)? (59)
When a "promise" is really a promise begins with a definition of promise:

> *A promise is an unequivocal assurance that something will or not be done.*

Whether a statement is a promise or merely an invitation to make a promise may be an issue in several situations: (1) the advertisement, (2) the auction, and (3) the "promise" subject to approval.

The Advertisement. The advertisement material begins by asking students to use the same test for promise in an advertisement situation as they would for any other potential promise.

PARALEGAL EXERCISE 2.1 (59) asks students to determine whether the two advertisements are offers. The examples come from the next case *Lefkowitz v.*

Great Minneapolis Surplus Store, Inc. (60) Although the first advertisement has a quantity (3) and price ($1), it is somewhat vague as to the subject matter. “Brand New Fur Coats, Worth to $100” neither specifies which coats nor their exact worth. The court held this advertisement not to be an offer.

The second advertisement has a quantity (1), a price ($1), a value (worth $139.50), and a description (Black Lapin Stole). The court held this advertisement to be an offer (therefore, a promise).

PARALEGAL EXERCISE 2.2 (62) asks students to find three different types of advertisements in their local newspaper and to determine whether each is an offer or only preliminary negotiation. This requires students to transfer what they learn in the cases to actual materials found in daily life.

The Auction. The material on auction discusses both the auction “with reserve” and the auction “without reserve.”

PARALEGAL EXERCISE 2.3 (63) raises the question whether the auction was with or without reserve. Although the owner of the clock had told the auctioneer not to sell the clock for less than $5,000, the question is how the clock was presented to those bidding. If the auctioneer had announced that the auction of the clock was with reserve, then the bidders were the offerors and the clock could be withdrawn. If, on the other hand, the auction was without reserve, the auctioneer would be the offeror and the bidders the offerees. The auctioneer could not withdraw the property if a bid was made within a reasonable time. An auction is with reserve unless a contrary intention is apparent. Therefore, unless the auctioneer had stated that the auction of the clock was without reserve, he could withdraw the clock at any time.

Cuba v. Hudson & Marshall (64) considers whether the auction was with or without reserve. Cuba explores whether the auctioneer or the seller has the power to accept the bidder’s offer.

“Offer” (Promise) or “Offer” (Promise) Subject to the Promisor’s Subsequent Approval.

The “subject to approval” clause attached to a statement that may at first appear to be a promise, requires students to read and evaluate carefully since the "subject to approval" clause takes that statement out of the realm of promise. A person could not be both promisor and promisee for the same promise.

A search of the Internet for “offer subject to approval” produced this gem: “To avoid payment problems, make the offer subject to approval, so you can use creditscreening techniques.” It clearly demonstrates the shifting of the making of the promise from seller to buyer so the seller would have an opportunity to check the buyer’s credit before entering into a contract.

When Is an Offer (Promise) Really an Offer (Promise)? (66)
The promise or inquiry and the promise or invitation to make a promise (advertisement, auction, and promise subject to approval) have the potential of ultimately leading to an offer and subsequently to a contract. The statements in the “promise really a promise?” category (i.e., joke, illusory promise and indefinite promise) have no such potential.

Offer (Promise) or Joke. *Lucy v. Zehmer* (67) develops the promise vs. joke analysis and the objective theory of contracts. The question posed is “whether the Zehmers’ in their writing of December 20th made a promise to sell or whether their statement in their writing was merely a joke.” [If the Zehmers’ statement was a promise and if they stated the consideration for this promise, they made an offer that could be accepted by Lucy, thus forming a contract. If the Zehmers’ statement was not a promise, their statement was a joke and Lucy could not accept and form a contract.]

To develop an objective theory analysis, we ask students to identify the Zehmers’ perception of their statement-promise or joke-and what facts supported this conclusion.

We then ask whether Lucy’s perception of the Zehmers’ statement was a promise or joke and what facts supported this conclusion. Finally, we ask whether the reasonable person’s perception of the Zehmers’ statement would be a promise or joke and what facts support this conclusion. This leads to a useful discussion of the facts. In the process, the following chart is developed. (Click below.)

Promise or Illusory Promise? The illusory promise is the negative of the definition for a promise.

> *An illusory promise is not an unequivocal assurance that something will or will not be done.*

PARALEGAL EXERCISE 2.4 (71) asks students to identify whether the term in *Rosenberg v. Lawrence* is a promise or an illusory promise. In Rosenberg, the divorced parents entered into an agreement to provide for the support of their sons. The agreement provided that the parents promised each other to share, on an equal basis, the expenses of educating their sons, and must consult one another before incurring a material expense. This agreement was amended to state that neither parent would be obligated for any material expense to which he or she did not consent. The Florida District Court of Appeals held that the agreement, as amended, was an illusory promise because payment was contingent on each parent’s consent to undertake an obligation.

Neither parent was obligated to act.

Promise or Indefinite Promise? An indefinite promise omits terms essential in enabling the court to determine an appropriate remedy in the event the promise is breached.

PARALEGAL EXERCISE 2.5 (74) gives students an opportunity to apply the definition of indefinite promise to a set of facts. The term “reasonable sum” would not enable a court to determine an appropriate remedy in the event the employer did not pay. Therefore, the “promise” is an indefinite promise and not a promise at all.

Rounding out this subsection is a short discussion of indefiniteness under Article 2 of the UCC and the Article 2 gap fillers. UCC § 2-305 (Open Price Term) is used as an example in PARALEGAL EXERCISE 2.6 (75). The Paralegal Exercise is based on *Novelly Oil Co. v. Mathy Construction Co.,* 147 Wis. 2d 613, 433 N.W.2d 628 (Wis. Ct. App. 1988). The question facing the court was whether “the contract fails for indefiniteness.” This translates into whether Mathy made a promise or whether its promise was indefinite. An indefinite promise would be so incomplete that the court could not determine an appropriate remedy in the event of Mathy’s breach. The court gets some help from UCC § 2-204(3) which states that a contract does not fail for indefiniteness even though one or more terms are left open. The court, using “meeting of the minds” language, discusses whether the parties intended to contract. It appears that the seller intended to contract but the buyer did not. If an objective approach were used, the reasonable person could find that since both parties were reasonable in their perception of whether a contract was formed, there would be no contract. Novelly is helpful in establishing that the parties must intend to contract for section 2-204(3) to be useful.

Consideration for the Offeror’s (Promisor’s) Promise (76)
This subsection begins with a brief discussion of consideration-the “price” that the offeror (promisor) demands for his or her promise. The text emphasizes that every contract has two considerations: one in the offer and the other in the acceptance. Students are urged to specify which consideration they are referring to-consideration for the offeror’s promise, or consideration for the offeree’s promise (if bilateral) or performance (if unilateral).

We choose to speak about a contract as being an offer and acceptance and not an offer, an acceptance, and consideration. Both the offer and the acceptance include consideration (offer-consideration for the promisor’s promise; acceptance-consideration for the promisee’s promise, if the promisor demanded a promise) for the promisee’s performance (if the promisor demanded a performance). By discussing consideration in both the offer and acceptance, discussion of consideration after the conclusions offer and acceptance have been made is irrelevant (and redundant). Care must be taken in the cases, however, since consideration may be discussed at times as independent of offer and acceptance.

Although the phrase “mutuality of obligation” will appear in many judicial opinions, it has no significance. All that is important is that there be consideration for the promisor’s promise and consideration for the promisee’s promise or performance.

The introductory material is followed by two sections: (1) The Consideration for the Promisor’s Promise Must Be at Least a Peppercorn (Adequacy of Consideration Is Irrelevant); and (2) The Promisor’s Promise Must Be Made to Induce the Promisee to Promise.

The Consideration for the Promisor’s Promise Must Be at Least a Peppercorn (Adequacy of Consideration Is Irrelevant) (77)
Under the peppercorn theory of contracts, the adequacy of the consideration is irrelevant and will not be evaluated by the court. All that is important is that the promisor demands a “price” for his or her promise. A gift promise (a promise without consideration) is therefore distinguishable from a contractual offer (a promise with consideration).

An executory gift promise never matures into a contract and carries none of the attributes that a contract has. A contractual offer, if accepted, matures into a contract with all the attributes associated with a contract.

This section discusses six consideration issues:

1. the price for the promisor’s promise or a joke?
2. the price for the promisor’s promise or an illusory promise?
3. the price for the promisor’s promise or an indefinite promise?
4. the price for the promisor’s promise or the motive for making the promise?
5. the price for the promisor’s promise or the satisfaction of a moral obligation?
6. the price for the promisor’s promise or a sham?

The Price for the Promisor’s Promise or a Joke? (79) The “promise or joke” issue is not limited to the promisor’s promise. The same issue may arise when evaluating the consideration for the promisor’s promise (i.e., the promisee’s promise).

- Offer: The promisor’s promise for the promisee’s promise (i.e., the consideration for the promisor’s promise).
- No offer, no promisor’s promise: The promisor’s joke for the promisee’s promise.
- No offer, no consideration for the promisor’s promise: The promisor’s promise for the promisee’s joke.

PARALEGAL EXERCISE 2.7 (79) illustrates that if the parties were reversed in Lucy v. Zehmer (67), the joke issue would be one of consideration for the

promisor's promise rather than the promisor's promise itself. The same analysis would apply- promise or joke.

The Price for the Promisor's Promise or an Illusory Promise? (79) Since a promise is an unequivocal assurance that something will or will not occur, an illusory promise equivocates. Thus the "I promise to sell you my 2004 Lincoln Town Car for your promise to pay me $10,000, if you feel like it." As with the promise or joke, the illusory promise issue may apply to the promisor's promise or the consideration for the promisor's promise (i.e., the promisee's promise).

The Price for the Promisor's Promise or an Indefinite Promise? (80) As with the joke and the illusory promise issues, the indefinite promise may appear as an issue of the promisor's promise or of the consideration for the promisor's promise (i.e., the promisee's promise). Note that trade practice, as in Fairmont Glass (57) or the UCC Article 2 gap fillers may make the promise definite.

The Price for the Promisor's Promise or the Motive for Making the Promise? (80) The offeror's motive must be separated from the consideration for his or her promise. Motive cannot be consideration for a promise. At times, however, the motive and consideration may be the same.

In PARALEGAL EXERCISES 2.8, 2.9, and 2.10 (81), the students may perceive the motive to be different from that given below. The purpose of the exercise is not to agree on the motive but to explore whether the motive and consideration are different.

In PARALEGAL EXERCISE 2.8 the sculptor's motive may be public exposure that could lead to fame and fortune. The consideration for his promise to lend is the Bank's promise to exhibit the sculpture in its foyer for one year.

In PARALEGAL EXERCISE 2.9 the grandmother's motive may be to get her granddaughter educated (or to get her into a different environment). The consideration for her promise to pay tuition is the granddaughter's promise to go to college.

In PARALEGAL EXERCISE 2.10 Mary's motive for making her promise to pay $400 may be to recover something that is irreplaceable. The consideration for Mary's promise to pay $400 is the finding and returning of the ring.

The Price for the Promisor's Promise or the Promisor's Satisfaction of a Moral Obligation? (81) Moral obligation is not consideration. In PARALEGAL EXERCISE 2.11 (82), Wyman's motive in making his promise to pay Mills was based on his gratitude toward Mills for Mills's actions in caring for Wyman's emancipated son. Wyman did not want Mills to promise to do anything in the future. Mills had already done

what he intended to do. This Paralegal Exercise is based on *Mills v. Wyman*, 2 Pick. 207 (Mass. 1825).

The Price for the Promisor's Promise or a Sham? (82) Sham consideration is feigned or pretended consideration and will not be consideration if the ruse is discovered. Although the court will not investigate whether the stated consideration is adequate, it may investigate whether the stated consideration is a sham and therefore not consideration.

The Promisor's Promise Must Be Made to Induce the Consideration (83) The offer must contain the offeror's promise and consideration for the offeror's promise (the "price" for the offeror's promise). In addition, the offeror's promise must be made to induce the consideration. Three concepts are discussed in this subsection (past consideration, pre-existing duty, and conditions vs. consideration).

Past Consideration. (83) The past consideration problem is a timing problem. The offeror does not make his or her promise to induce the offeree to promise or perform because the offeree has either already promised or performed.

In PARALEGAL EXERCISE 2.12 (83) Stan promised to pay Mary $2,000 for saving his life. Stan was not making his promise to induce Mary to save his life. She had already saved his life.

In PARALEGAL EXERCISE 2.13 (84) Granddad promised to pay his granddaughter $5,000 for graduating with honors. Granddad was not making his promise to induce his granddaughter to graduate with honors. She had already earned the grades that made her eligible for graduating with honors.

Pre-Existing Duty. (84) The pre-existing duty material begins by defining the problem and giving an Example. The Example outlines the offeror's promise and the consideration for that promise in the original offer and the offeree's promise and the consideration for that promise in the original acceptance. The Example then outlines the offer and acceptance in the renegotiated contract and isolates the pre-existing duty.

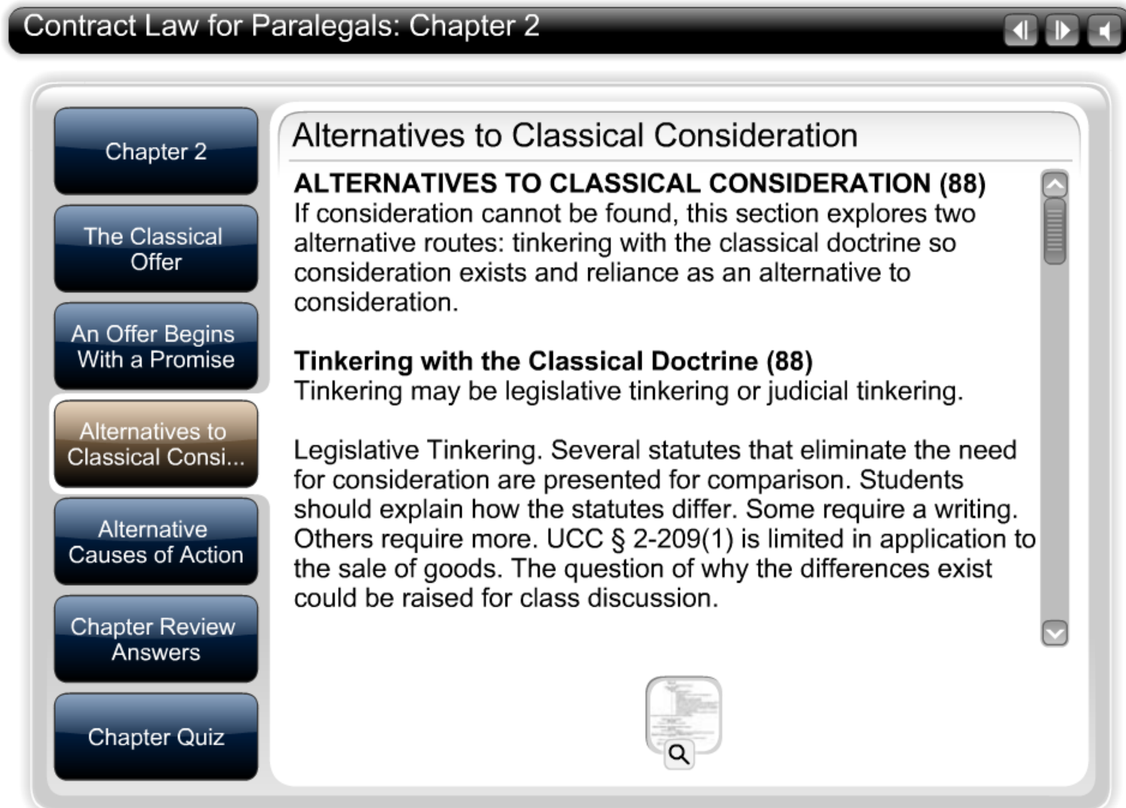
PARALEGAL EXERCISES 2.14 and 2.15 (85-86) ask the students to follow the same technique as developed in the previous Example.

Conditions vs. Consideration. (86) The condition vs. consideration material begins with a discussion of the topic, followed by two Paralegal Exercises. PARALEGAL EXERCISE 2.16 (87) at first appears to be an offer for a unilateral contract. The question is whether "If you go around the corner" is consideration for the promise to purchase or merely a condition. The question may be resolved by defining the promisor's motive. Was the promisor seeking an exchange-getting the tramp to walk-or was the promisor more likely interested in his own

promise? The answer clearly appears that the promisor was more interested in his own promise and not attempting to make a bargained for exchange and therefore “If you go around the corner” is a condition and not consideration. There was, therefore, no offer.

In PARALEGAL EXERCISE 2.17 (87) was “if the son would move back to town” consideration for the father’s promise to start him in business or was it merely a condition? Was the father using his promise to start his son in business the carrot to entice his son back to town or was the father’s motive starting his son in business?

Alternatives to Classical Consideration



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ALTERNATIVES TO CLASSICAL CONSIDERATION (88)
If consideration cannot be found, this section explores two alternative routes: tinkering with the classical doctrine so consideration exists and reliance as an alternative to consideration.

Tinkering with the Classical Doctrine (88)
Tinkering may be legislative tinkering or judicial tinkering.

Legislative Tinkering. Several statutes that eliminate the need for consideration are presented for comparison. Students should explain how the statutes differ. Some require a writing. Others require more. UCC § 2-209(1) is limited in application to the sale of goods. The question of why the differences exist could be raised for class discussion.

PARALEGAL EXERCISE 2.18 (89) focuses attention on a statute that varies the consideration requirement. A writing is required. The writing implies consideration.

PARALEGAL EXERCISE 2.19 (89) focuses attention on legislative tinkering.

The statute selected is UCC § 2-205. This legislative tinkering only pertains to a transaction for the sale of goods. Note that the offer must be made by a "merchant." Under UCC § 2-104(1) and comment 2, the merchant is one with special knowledge about the practice. By this we assume knowledge about the practice of firm offers and not knowledge about some other practice. Note that if "a signed writing which by its terms gives assurance that [the offer to buy or sell goods] will be held open," the offer is not revocable for lack of consideration.

Judicial Tinkering. Students are asked to read Webb v. McGowin (90) and identify how the court is tinkering. Basically the court is eliminating an inducement problem by implying a pre-existing promise. The pre-existing promise now corrects the timing problem. McGowin's promise to pay is now made before Webb rides the block and saves McGowin's life-a total fiction.

Reliance as an Alternative to Consideration (92)
The second alternative to consideration takes the form of reliance. The discussion begins with section 90 of the Restatement (Second) of Contracts. Example 2-18 (93) presents the situation of a gift promise (a promise without consideration) with reliance on the promise.

Two cases are included here to develop the theory. The first, *Ricketts v. Scothorn,* (Neb. 1898) (94) predates the Restatement (First) of Contracts (1932) and is an early case in the development of the reliance theory. Care must be taken to develop why the grandfather's promise was not an offer. He did not mandate that his granddaughter not work. His promise only made it possible for her to have the choice not to work.

Therefore, his promise was not made to induce her to quit. At this point, the granddaughter's reliance can be explored. Ricketts also illustrates the way law evolves. A noncontract theory (equitable estoppel) is being adjusted and assimilated into contract law (promissory estoppel). Estoppel means preclusion. The defendant is being precluded from asserting the lack of consideration for the grandfather's promise. With the consideration, a contract is formed. The granddaughter was then entitled to the full amount of the note and not just her loss due to reliance. Her expectation and not her reliance interest is being protected.

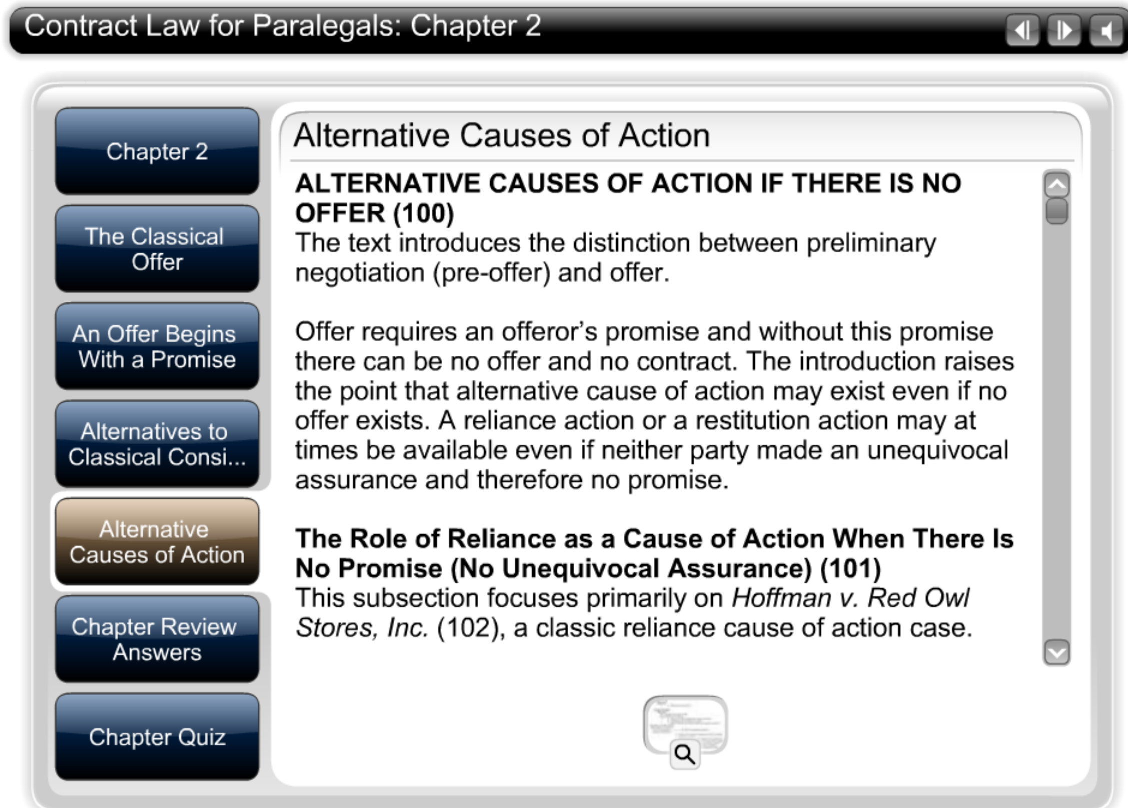
Feinberg v. Pfeiffer Co. (Mo. Ct. App. 1959) (97) is a more modern case. It occurred after the Restatement (First) but before the Restatement (Second) of Contracts.

Therefore, the language used is that of the Restatement (First) and not the Restatement (Second). Again it is important to note why there was no offer. The Pfeiffer Company promised to pay when Mrs. Feinberg retired. The Company

was not asking her to retire which means there was no consideration for the Company's promise. Note that although the court is using section 90, it uses estoppel language. Section 90 only states that a promise is enforceable. Note also that Mrs. Feinberg does not claim future losses so the case looks more like a protection of reliance rather than expectation interest. Because Mrs. Feinberg can no longer not rely, she could come back to court at a later date if the company fails to pay.

PARALEGAL EXERCISE 2.20 (100) rounds out the discussion of reliance as an alternative to consideration. Students are first asked to define the offer. Utopia may well have promised the scholarship for Marylou's promise to attend. (Or is this an offer for a unilateral contract-Promise to pay the scholarship for attending?) If the promise of the scholarship was only a gift promise, then focus on Marylou's reliance. Run the elements from Restatement (Second) of Contracts § 90.

Alternative Causes of Action



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ALTERNATIVE CAUSES OF ACTION IF THERE IS NO OFFER (100)
The text introduces the distinction between preliminary negotiation (pre-offer) and offer.

Offer requires an offeror’s promise and without this promise there can be no offer and no contract. The introduction raises the point that alternative cause of action may exist even if no offer exists. A reliance action or a restitution action may at times be available even if neither party made an unequivocal assurance and therefore no promise.

The Role of Reliance as a Cause of Action When There Is No Promise (No Unequivocal Assurance) (101)
This subsection focuses primarily on *Hoffman v. Red Owl Stores, Inc.* (102), a classic reliance cause of action case. Although the Hoffman opinion is long, it reads reasonably fast. The first half of the opinion chronicles the negotiations between Hoffman and various Red Owl representatives. Students are encouraged to locate these events on a time line. The key question here is whether either party made an offer.

The second half of the Hoffman opinion discusses whether Hoffman will recover and how much. Students should probe whether recovery was based on breach of contract or on a different theory. The court uses the phrase “a cause of action grounded on promissory estoppel.” The term “estoppel” should be explored. Estoppel precludes a party from asserting a contradiction. But is Red Owl contradicting something it said or did? Note that this case is based on the Restatement (First) because it predates the Restatement (Second) of Contracts. Because the court relies on section 90 of the Restatement, we have an opportunity to raise the question whether section 90 uses the term “estoppel.” “Detrimental reliance” is a more accurate term. Section 90 states “A promise . . . is binding . . . .” This is not estoppel but detrimental reliance.

Also important is the fact that the promise standard for detrimental reliance need not meet the promise standard for offer. *Hoffman v. Red Owl* provides students an opportunity to apply the facts to elements of detrimental reliance:

1. Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
2. Did the promise induce such action or forbearance?
3. Can injustice be avoided only by enforcement of the promise?

Finally, damages should be explored item by item so students understand that the recovery is for reliance and not for expectation. Hoffman is being placed back to the time before reliance.

1. $2,000 loss incurred by the sale of the bakery building at Wautoma
2. $1,000 loss on the down payment of the Chilton lot
3. $125 for one month’s rent of a home in Chilton
4. $140 in moving expenses to Neenah
5. Loss in the sale of the Wautoma grocery business. (Note that the court will not permit profits because profits are inconsistent with reliance damages.) How much was Hoffman’s reliance loss in the sale of the Wautoma grocery business? (His actual loss was the difference between the sale price and the fair market price.)

A promise which the promisor should reasonably expect to induce action or forbearance [of a definite and substantial character] on the part of the promisee OR A THIRD PERSON and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. THE REMEDY GRANTED FOR BREACH MAY BE LIMITED AS JUSTICE REQUIRES.

The first element of detrimental reliance changed so the action or forbearance need not be “of a definite and substantial character.” Therefore, more situations

will qualify for detrimental reliance under the Restatement (Second). The counter adjustment is made by the new last sentence that controls the remedy. The smaller the action or forbearance, the smaller the remedy.

PARALEGAL EXERCISE 2.21 (110) gives students an opportunity to test the reliance cause of action. The text suggests that they use the Restatement (Second) version of section 90.

1. Was the promise one which the promisor should reasonably expect to induce action or forbearance on the part of promisee?-Although Burst was the only applicant asked to Coors' headquarters for an in-house interview, Coors made no promise. There was nothing upon which Burst should reasonably have been expected to rely. Therefore, no detrimental reliance ensued.
2. Did the promise induce such action or forbearance?
3. Can injustice be avoided only by enforcement of the promise?

Burst v. Adolph Coors Co., 650 F.2d 930 (8th Cir. 1981), held Coors made no promise which Burst could reasonably interpret as an offer and on which he could reasonably rely.

The Role of Restitution as a Cause of Action When There Is No Promise (111)

After a brief historical summary, the text presents the two elements of a restitution cause of action:

1. a benefit conferred by one party on another (the enrichment)
2. the retention of the benefit without compensating the party conferring the benefit would be unjust

The conferring of the benefit cannot be officious (meddlesome).

In *Gould v. American Water Works Service Co.* (112), Gould drilled for water to show the Water Company that his land could produce the water flow needed. The Water Company, now knowing that this particular area could produce the requisite water flow, purchased land adjacent to Gould's land. Gould was denied a restitution cause of action. Gould conferred a benefit on the Water Company (knowledge was the enrichment) but permitting the Water Company to retain this benefit without compensating Gould was not unjust. Gould conferred the benefit officiously.

Gould's drilling occurred before an offer was made. Would the court's decision be the same had the drilling occurred after an offer was made? Should the answer depend on who made the offer-the party conferring the benefit or the party receiving the benefit?

The offeror, by making an offer, creates a bit of a problem for himself or herself.

By being the offeror, he or she cannot claim reliance on his or her own offer. Therefore, any possibility of a reliance cause of action is out of the question. The purpose of the offer is to give the offeree the power to accept and form a contract. The offeree may or may not choose to exercise this power. Acceptance cannot be thrust upon the offeree, thereby negating the offeree's power not to accept the offer.

PARALEGAL EXERCISES 2.22 through 2.28 (115-116) give students an opportunity to apply the concepts of "enrichment" (benefit conferred) and "unjust."

In PARALEGAL EXERCISES 2.22 and 2.23 there are enrichments which are not "unjust," thereby permitting the recipient to retain the benefit without compensating the party conferring the benefit. In neither case was there a contract. Students can develop policy arguments against compensation.

In PARALEGAL EXERCISE 2.24, the father had a statutory duty and breached that duty. Did the neighbor have an intent
to charge?

In PARALEGAL EXERCISE 2.25, the store would have an intent to charge for food and clothing. Should the fact that the store normally charges for such items make it unjust for the store not to be compensated by the father?

In PARALEGAL EXERCISE 2.26, must the father have knowledge that the minors are in need for the enrichment to be unjust if there is no compensation?

In PARALEGAL EXERCISE 2.27, is a common law or statutory duty on the part of the party who will be held liable essential for the enrichment to be unjust if there is no compensation?

In PARALEGAL EXERCISE 2.28 has Harrison been unjustly enriched? What is the enrichment and why should retaining this enrichment without compensating Dr. Wisdom result in a cause of action for Dr. Wisdom? If Dr. Wisdom could successfully maintain a restitution cause of action, how should compensation be determined? Note that the remedy in restitution moves the injured party back to the position he or she would have been in prior to the conferring of the benefit. Move Dr. Wisdom back in time before he came upon Harrison unconscious on the sidewalk. Note that the measure of damages is the reasonable value of the benefit conferred to the recipient (i.e., Harrison). Students could be asked to list the factors the court should consider for calculating damages. This problem is taken from *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907).

Chapter Review Answers

Contract Law for Paralegals: Chapter 2

Chapter 2
The Classical Offer
An Offer Begins With a Promise
Alternatives to Classical Consi...
Alternative Causes of Action
Chapter Review Answers
Chapter Quiz

Chapter Review Answers

TRUE/FALSE QUESTIONS

1. T
2. F
3. T
4. T
5. T
6. T
7. T
8. T
9. T
10.F
11.T
12.T
13.F
14.F
15.T
16.T
17.F
18.F

Tab Text

TRUE/FALSE QUESTIONS

1. T
2. F
3. T
4. T
5. T
6. T
7. T
8. T
9. T
10. F
11. T
12. T
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55. F
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58. T
59. T
60. F
61. T

FILL-IN-THE-BLANK QUESTIONS
1. The reasonable person
2. Objective standard
3. Subjective standard
4. Auction without reserve
5. Auction with reserve
6. Unilateral contract
7. Bilateral contract
8. Consideration (consideration for the promisor’s promise)
9. Reliance
10. Promise
11. Illusory promise (not unequivocal)
12. Illusory promise
13. Indefinite promise
14. Sham consideration
15. Pre-existing duty
16. Restitution cause of action
17. Estoppel
18. Judicial construct (constructive, implied by law, or quasi)
19. Quantum meruit
20. Unjust enrichment (restitution)
21. Promise implied by law
22. Promise implied in fact

MULTIPLE-CHOICE QUESTIONS
1. a, c, d, & e
2. c
3. b, d, & e
4. b
5. b & c
6. a & b
7. a, b, d, & e
8. b
9. b & d
10. c

SHORT-ANSWER QUESTIONS
1. A subjective standard evaluates a communication in light of how the party making the communication would evaluate it. An objective standard evaluates a communication in light of how a reasonable person would interpret it. A subjective standard is the “meeting of the minds” standard. An objective standard is the “manifestation of assent” standard.

2. If the offer is for a unilateral contract (a promise for a performance), the offeree’s full performance is acceptance of the offeror’s offer. If the offer is for

a bilateral contract (a promise for a promise), the offeree's promise is acceptance of the offeror's offer.

3. The problem of past services is timing. The promisor must make his or her promise to induce the promisee to either promise or perform. If the promisee has already performed services, the promisor would not be making his or her promise to induce the promisee to perform. There would be no "bargained-for-exchange."

4. To evaluate whether the son's moving back to town is consideration for the father's promise or only a condition is a question of inducement. Did the father make his promise to induce his son to move back to town? If not, then moving back to town would be only a condition to receiving the performance of the father's promise.

5. Some legislatures have enacted statutes to eliminate the need for consideration if the promise is in writing. Others require a writing with an additional express statement in which the promisor promises to be legally bound. Still others shift the presumption so the promise is presumed to have been made at an earlier time so the promise would be made for consideration.

6. Some courts may imply a previously existing promise if timing is a problem. Courts may also use detrimental reliance (promissory estoppel) as an alternative for consideration.

7. The four elements of reliance required to circumvent the lack of consideration are:

   (1) promise by the promisor;
   (2) promisor should reasonably expect the promisee to rely on his or her promise;
   (3) promisee does rely; and
   (4) injustice would occur if the promise were not enforced.

8. The four elements of reliance required for a reliance cause of action are:

   (1) promise by the promisor;
   (2) promisor should reasonably expect the promisee to rely on his or her promise;
   (3) promisee does rely; and
   (4) injustice would occur if the promise were not enforced.

9. Rickett's promise to his granddaughter lacks consideration since he is not demanding that she do something in return. She could stop working if she so desired. The letter only placed her in the position to have the choice.

Therefore, Katie could not maintain a breach of contract action under classical contract law.

She could maintain a breach of contract action using the doctrine of reliance as an alternative to consideration. Grandfather promised to give her $10,000. He reasonably expected her to rely on his promise by his statement that she could stop work. His giving of the promise was intended to afford her this opportunity. She did rely by quitting work. Injustice would occur if his promise were not enforced because she has lost not only her employment position but also the income while she relied. Therefore, detrimental reliance as found in the Restatement (Second) of Contracts § 90 could be used as an alternative to consideration. Thus a contract without consideration would be formed. Grandfather’s estate breached by not paying, and Katie would be entitled to a remedy.

10. Because a contract is not formed in a pre-offer phase of the transactions, neither party has expectations based on a contract. Therefore, if the parties walk away without a contract being formed, neither could successfully claim injury to an expectation interest.

11. In the pre-offer phase, if one party acts or refrains from acting because he or she is relying on the other party’s encouragement, a reliance interest that courts may protect comes into being even though no offer has been made. The reliance interest is protected by means of a reliance cause of action and not by means of a breach of contract cause of action.

12. If one party confers a benefit on another, the courts may recognize a restitution cause of action, separate and apart from an action for breach of contract, to compensate the party who conferred the benefit. This action is based on unjust enrichment.

13. An implied by law contract is the same as an implied contract and both are judicial constructs (i.e., figments of the courts’ imagination). An implied by law contract and an implied contract are other names for a restitution cause of action. An implied in fact contract is in fact a contract and forms the basis for a breach of contract cause of action.

14. A person is officious when he or she interferes in the affairs of another by conferring an unnecessary or unwanted benefit.

Chapter Quiz

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