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# Contracts - Consideration - Effect of Option to Withdraw Government Surplus Property from Sale

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CONTRACTS—CONSIDERATION—EFFECT OF OPTION TO WITHDRAW GOVERNMENT SURPLUS PROPERTY FROM SALE—The Office of Surplus Property accepted defendant's bid for a quantity of sodium carbonate. Submitted on the appropriate government form, the bid was subject to a condition which gave the government " . . . the right to withdraw from sale any property prior to the removal thereof without incurring any liability except to refund to the purchaser any amount paid with respect to the said property." Although the sodium carbonate had not been withdrawn from sale, the defendant refused to perform his promise to buy it. The government brought an action for damages, and the defense was that no contract existed because there was no mutuality of obligation. *Held,* the contention that the contract lacked mutuality was without merit. *United States v. Weisbrod,* (7th Cir. 1953) 202 F. (2d) 629.

Although the opinion in the principal case contains the suggestion that contracts for the disposal of surplus defense property by the government present an atypical situation,[1] the defendant's liability is assumed for the purpose of this note to have been based solely on the conclusion that there was mutuality of obligation. "Mutuality of obligation" is a misleading way of referring to the need for enforceable promises as consideration in the usual bilateral contract.[2] Illusory promises do not curtail the promisor's freedom of action and for that reason cannot be enforced; they therefore do not constitute consideration.[3] If the promise of one of the parties to a bilateral contract is illusory, the contract lacks mutuality of obligation because both parties are

[1] Principal case at 632.

[2] GRISMORE, CONTRACTS §68 (1947); 1 CORBIN, CONTRACTS §152 (1950); 1 WILLISTON, CONTRACTS, rev. ed., §141 (1936).

[3] See Corbin, "The Effect of Options on Consideration," 34 YALE L.J. 571 (1925).

not bound by enforceable promises. Thus if *A* promises to sell a bushel of apples to *B* unless he changes his mind, *A* really has promised nothing; he can change his mind at any time and for any reason.[4] The same result obtains if *B* promises to buy an unspecified quantity of apples from *A*.[5] The promise is not illusory, however, if the exercise of *A's* option to change his mind is dependent upon the happening of some event over which he does not have complete control.[6] For example, if *A* promises to sell *B* a bushel of apples unless his car is struck by lightning, *A's* freedom of action is limited and his promise is enforceable; *A* must sell the apples unless lightning strikes his car. Nor is a promise illusory if *A* gives something of value for the option of changing his mind:[7] if *A* pays or promises to pay twenty-five cents for the option of deciding whether or not to sell *B* the bushel of apples which *B* has promised to buy, a contract results. Although an illusory promise does not constitute consideration, it is of course not necessary that a promise be equivalent in value to the consideration given by the other party in order to form a binding bilateral contract.[8] *A's* promise to give *B* a piece of paper would be consideration for *B's* promise to buy one bushel of apples.[9] A fortiori, *A's* promise either to sell the apples to *B* or, in the alternative, to give *B* a piece of paper containing notice of an election to exercise his option not to sell would constitute consideration. Accordingly, a contract is formed if *B* promises to buy the apples and if *A* combines a promise to sell unless he changes his mind with a promise to notify *B* of his change of mind.[10] The consideration is even more evident when *A's* promise to notify *B* must be performed within a stated period

[4] American Agricultural Chemical Co. v. Kennedy and Crawford, 103 Va. 171, 48 S.E. 868 (1904). See R. F. Baker Co. v. Ballentine and Sons, 127 Conn. 680, 20 A. (2d) 82 (1941); Bendix Home Appliances, Inc. v. Radio Accessories Co., (8th Cir. 1942) 129 F. (2d) 177; 1 CONTRACTS RESTATEMENT §79, comment *b*, illus. 1 (1932); 137 A.L.R. 919 (1942).

[5] Willard, Sutherland and Co. v. United States, 262 U.S. 489, 43 S.Ct. 592 (1923).

[6] Hunt v. Stimson, (6th Cir. 1928) 23 F. (2d) 447; Chevrolet Motor Co. v. Gladding, (4th Cir. 1930) 42 F. (2d) 440; Central Trust Co. of Illinois v. Chicago Auditorium Assn., 240 U.S. 581, 36 S.Ct. 412 (1916).

[7] Reech v. Caloy Corp., 329 Mich. 453, 45 N.W. (2d) 349 (1951); Phillips Petroleum Co. v. Rau Construction Co., (8th Cir. 1942) 130 F. (2d) 499. *Contra,* Velie Motor Car Co. v. Kopmeier Motor Car Co., (7th Cir. 1912) 194 F. 324.

[8] Meurer Steel Barrel Co. v. Martin, (3d Cir. 1924) 1 F. (2d) 687.

[9] Haigh v. Brooks, 10 Ad. & E. 309, 113 Eng. Rep. 119 (1839).

[10] Bushwick-Decatur Motors, Inc. v. Ford Motor Co., (2d Cir. 1940) 116 F. (2d) 675; Realty Advertising and Supply Co. v. Englebert Tyre Co., 89 Misc. 371, 151 N.Y.S. 885 (1915). The result would be the same as if both parties to the contract combined an option to cancel with a promise to notify. Fawcett v. Fawcett, 191 N.C. 679, 132 S.E. 796 (1926); J. R. Watkins v. Rich, 254 Mich. 82, 235 N.W. 845 (1931). Specific performance in equity, however, ordinarily will not be available when the contract gives one of the parties the right to cancel. Miami Coca-Cola Bottling Co. v. Orange Crush Co., (5th Cir. 1924) 296 F. 693 (1924). This is on the theory that since one of the parties can cancel the contract at his pleasure, there is no mutuality of remedy. Rust v. Conrad, 47 Mich. 449, 11 N.W. 265 (1882). Annotation, 22 A.L.R. (2d) 508 (1952). But see Cincinnati Exhibition Co. v. Marsans, (D.C. Mo. 1914) 216 F. 269.

of time.[11] *A's* promise to sell to *B* unless he changes his mind combined with a promise to sell the apples to no one other than *B* likewise limits his freedom of action and therefore satisfies the consideration requirement.[12]

The results indicated above seem clear when the promises are stated expressly in the contract. When they are not express, however, the courts sometimes will find that they are implied. Although the decisions are by no means uniform, the proper circumstances for such an implication seem to be where (1) the parties intended to obligate themselves by an enforceable agreement, and (2) they intended the implied promise to be a part of their contract.[13] In the situation presented by the principal case, consideration could be found to exist in an implied promise to give notice of an election to withdraw the sodium carbonate from sale.[14] The same result could be reached by finding an implied promise to sell to no one other than to the promisee;[15] this seems especially plausible since the terms of the contract required the government to withdraw the sodium carbonate from sale if it decided not to sell it to the defendant. A legal detriment also could be found in the fact that the government's option to withdraw had to be exercised before the defendant's removal of the property.[16] Since the parties probably intended to be bound when they entered into the agreement and since the seller's option to withdraw was a part of the bargained-for consideration,[17] the court's decision can be justified on both authority and principle.

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[11] Realty Advertising and Supply Co. v. Englebert Tyre Co., note 10 supra; Phalanx Air Freight, Inc. v. National Skyway Freight Corp., 104 Cal. App. (2d) 771, 232 P. (2d) 510 (1951).

[12] Brodsky v. George H. Morril Co., 237 Mass. 86, 129 N.E. 359 (1921).

[13] Sylvan Crest Sand and Gravel Co. v. United States, (2d Cir. 1945) 150 F. (2d) 642.

[14] Sylvan Crest Sand and Gravel Co. v. United States, note 13 supra; Gurfein v. Werbelovsky, 97 Conn. 703, 118 A. 32 (1922).

[15] Burgess Sulphite Fibre Co. v. Philip Broomfield, 180 Mass. 283, 62 N.E. 367 (1902); 1 WILLISTON, CONTRACTS, rev. ed., §104 (1936). *Contra,* Midland Steel Sales Co. v. Waterloo Gasoline Engine Co., (8th Cir. 1925) 9 F. (2d) 250.

[16] Gurfein v. Werbelovsky, note 14 supra; North and Judd Mfg. Co. v. United States, (Ct. Cl. 1949) 84 F. Supp. 649.

[17] See McCoy v. Pastorius, 125 Colo. 574, 246 P. (2d) 611 (1952).