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Treat Your Customers with Consideration

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Consideration is, generally, an admirable trait. Treating others with consideration provides much of the lubricant that makes civilization work. Consideration for your customers will probably reward you with money in your pocket. But that's not the sort of consideration this article is about.

In my law school Contracts class, we learned that consideration means something different from making nice. Consideration is a requirement for the formation of a contract. Consideration exists when a party to a contract does something he was not otherwise required to do or refrains from doing something he was otherwise entitled to do. The consideration necessary to support the formation of a contract does not have to amount to much, and it isn't necessary that the consideration of one contracting party equal that of the other contracting party. But, if there is no consideration, there is no contract.

It's no surprise that consumer lawyers frequently argue that there is no consideration to support a consumer's contractual obligation. Here's how that argument fared when the lawyer's objective was to avoid having to arbitrate his client's claim.

Willie Rutledge bought a vehicle from Asbury Automotive Group, Inc. After the vehicle was involved in an accident, the repair shop discovered that the vehicle had prior damage that allegedly was not disclosed to Rutledge.

Rutledge sued Asbury for breach of contract, fraud, negligent misrepresentation, and violation of the Tennessee Consumer Protection Act. Asbury moved to compel arbitration under an arbitration agreement in the vehicle buyer's order.

The U.S. District Court for the Eastern District of Tennessee granted the motion. Rutledge argued that a valid agreement to arbitrate did not exist because the arbitration agreement was not supported by consideration and was a contract of adhesion. The buyer's order stated: "Either you or we may choose to have any dispute between us decided by arbitration - and not in court or by jury trial."

The court found that this language created a mutual promise that either party could require arbitration and that both parties would give up their right to litigate in court if either party elected arbitration. The court explained that mutual promises to arbitrate are sufficient consideration. The court noted that if a party offers an illusory promise, a

court will find inadequate consideration, but the fact that Rutledge now does not agree to arbitrate does not make the arbitration agreement in the buyer's order illusory.

In addition, the arbitration agreement provided that Asbury would pay the filing, administration, case management, or arbitrator fee, and the court reasoned that those promises to pay also constituted bargained-for consideration.

Finally, the court noted that even if the arbitration agreement itself did not provide consideration, when the agreement to arbitrate is integrated into a larger unitary contract, the consideration for the contract as a whole (in this case, the vehicle) covers the arbitration agreement.

Turning to Rutledge's other argument - that the arbitration agreement is an adhesion contract - the court noted that evidence of a contract of adhesion does not, by itself, render the contract unenforceable. Courts look to additional evidence of procedural and substantive unconscionability (a lawyer's $10 word for "unfairness") to determine whether to enforce the contract. The court concluded that the arbitration agreement was not unconscionable, finding, among other things, that the arbitration agreement was separate from the other provisions in the buyer's order, the arbitration agreement's heading was in all capital letters, and the arbitration agreement was described in layman's terms.

The dealer in this case successfully defended the "no consideration" challenge, providing other dealers with a bit of valuable precedent in the process. But don't automatically conclude that a court in your state would come out the way this court did. Courts can be fickle, and consumer lawyers are endlessly inventive, so you might want to clip this article to your arbitration agreement and send it to your lawyer with a note asking if he or she is confident that this sort of attack on your documents would fail.

Rutledge v. Asbury Automotive Group, Inc., 2017 U.S. Dist. LEXIS 204079 (E.D. Tenn. December 12, 2017).

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