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Occasionally, parties will try to avoid consideration by drafting one-sided contracts that obligate one party but allow the other party to escape performance. Such clever drafting may backfire. A court may determine that a onesided contract is *illusory* because one party is not truly bound. Case 8.3 is an example of a contract that initially appears to include consideration by both parties but, on closer examination, obligates only one.



case 8.3

VASSILKOVSKA V. WOODFIELD NISSAN, INC. 830 N.E.2d 619 (Ill. App. 2005)

Nadejda Vassilkovska purchased used car from Woodfield Nissan. In an agreement separate from the purchase contract, Vassilkovska promised to arbitrate any claim against Woodfield instead of suing in court. Woodfield promised to arbitrate claims against Vassilkovska as well, but excluded several different types of claims from the agreement. In fact, the excluded claims were the only circumstances in which Woodfield would ever be likely to sue a customer. Subsequently, Vassilkovska sued Woodfield for misrepresenting the price of the car in a financing agreement. Woodfield argued that Vassilkovska was required to arbitrate the claim. The court had to address whether the arbitration agreement was valid.

JUSTICE GARCIA DELIVERED THE OPINION OF THE COURT.: An agreement to arbitrate is treated like any other contract. . . . However, without a contract to arbitrate, there can be no forced arbitration. . . .

The plaintiff contends that the Arbitration Agreement is not a contract at all because any promise to arbitrate by Woodfield was illusory and, therefore, the Arbitration Agreement is unenforceable because of the absence of the essential requirement of consideration to make out an enforceable contract. . . .

Woodfield asserts that the parties' Arbitration Agreement was supported by consideration and argues its retention of certain rights does not invalidate that consideration.

The plaintiff, on the other hand, contends that Woodfield's promise to arbitrate was "illusory" and there was no consideration because Woodfield "made sure that as to every conceivable right that it might want to press, the arbitration provision did not stand as a bar to [Woodfield's] going to court."

We agree with the plaintiff. A legally enforceable contract is an exchange, and the elements of a contract include offer, acceptance, and consideration. . . . "It is a basic tenet of contract law that in order for a promise to be enforceable against the promisor, the promisee must have given some consideration for the promise." *Gibson*, 121 F.3d at 1130. Consideration is defined as a bargained-for exchange, whereby the promisor, here, the plaintiff, receives some benefit, or the promisee, here, Woodfield, suffers detriment. . . . Thus, in order for the plaintiff's agreement to arbitrate, rather than to litigate, any claim against Woodfield, there must be some detriment to Woodfield, or some benefit to the

plaintiff, that was bargained for in exchange for the plaintiff's promise to arbitrate all disputes. Clearly, what is required is consideration, as with any contract

. . . Woodfield cannot point to its own promise to arbitrate in order to make enforceable the plaintiff's promise to do likewise. . . . The Arbitration Agreement contains no promise on Woodfield's part to submit claims to arbitration. . . . In fact, the Arbitration Agreement, by virtue of the exceptions outlined in it, leaves no claim that Woodfield would be required to submit to arbitration. . . . The language of the Arbitration Agreement makes clear that its purpose is to force the plaintiff to arbitrate any claim she may assert against Woodfield, while excluding Woodfield from that same promise. There is nothing in the Arbitration Agreement to suggest that Woodfield was required to forgo a judicial forum in favor of arbitration. Therefore, we conclude that the Arbitration Agreement itself did not contain consideration for the plaintiff's promise in the form of a promise by Woodfield to submit disputes to arbitration. . . .

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We further note that Woodfield is correct in asserting that, often, consideration for one party's promise to arbitrate is the other party's promise to do the same. A *mutual* promise to arbitrate would be sufficient consideration to support an independent arbitration agreement. . . . Mutuality of obligation is required only to the extent that both parties to an agreement are bound or neither is bound; that is, if the requirement of consideration has been met, mutuality of obligation is not essential. The converse, of course, is where there is no consideration independent of the mutuality of obligation, then both parties to an agreement are bound or neither is bound. If there is no consideration and no mutuality of obligation, then neither party is bound.

Although both parties signed the Arbitration Agreement in which they "waived all rights to pursue any legal action in a court of law," Woodfield exempted itself from arbitration by specifically securing its right to seek assistance in a court of law for a host of issues, primarily those dealing with the recoupment of money from the plaintiff. Specifically, Woodfield retained the right to pursue the following claims: (1) the plaintiff's failure to pay according to the purchase contract; (2) a check not being honored by the plaintiff's bank; (3) the plaintiff's failure to provide good title on a trade-in vehicle; (4) the plaintiff's misrepresentation concerning the loan amount due on any trade-in vehicle; (5) any claim relating to possession, repossession, or replevin of the automobile; and (6) any action to enforce any retail installment contract executed by the purchaser. Thus, the plaintiff, as purchaser, waives any right to sue Woodfield in a court of law, but Woodfield, as seller, retains the right to sue the plaintiff for a laundry list of reasons. . . .

Accordingly, we hold that where the agreement to arbitrate is itself a separate document, purporting to bind each party to the arbitration agreement, but subsequently creates a total exclusion of one party's obligation to arbitrate, the obligation to arbitrate is illusory and unenforceable. . . . At the time the Arbitration Agreement in this case was signed, there was no consideration on the part of Woodfield to support the plaintiff's promise to arbitrate and "waive any and all rights to pursue any legal action in a court of law."

While we agree with Woodfield that "parties do not have to agree to identical obligations to nonetheless have a valid and enforceable arbitration agreement," in this case, Woodfield's promise to arbitrate was an empty one because Woodfield completely exempted issues that could arise from its sale of the automobile to the plaintiff. Effectively, in its Arbitration Agreement with the plaintiff, Woodfield enumerated all the reasons it would have to sue the plaintiff and, thus, exempted itself from the parties' Arbitration Agreement. What claims, other than those related to the purchase of the plaintiff's vehicle, would Woodfield pursue? We can think of no specific claim, and Woodfield was unable to provide us with a specific example, either in its brief or during questioning in oral argument, of a claim that it would be compelled to submit to arbitration pursuant to the Arbitration Agreement. . . .

We find that the Arbitration Agreement, as a separate and distinct contract between the parties, lacked consideration from Woodfield as it exempted itself from arbitrating all conceivable claims against the plaintiff. It is Woodfield that, by virtue of excluding every conceivable claim it may have had against the plaintiff from the arbitration process, has made the Arbitration Agreement a nullity, which, in effect, goes against Illinois's public policy favoring arbitration. . . .

We therefore affirm the trial court's denial of Woodfield's motion to dismiss and compel arbitration.