

# So What, Exactly, is a Pledge?

10.29.14 | Linda J. Rosenthal, JD



Pledge Week on PBS is exciting: There's the new season of *Downton Abbey* (season premiere in January – we can't wait!!), lots of your old favorite programs, and those great gifts if you make a monthly pledge.

But are those offers of books, CDs, concert tickets, and other goodies just a way to entice you to pick up the phone? Certainly, that's part of it, but there's also another reason – a legal reason, of course!

By giving you these items of monetary value, PBS is turning what otherwise might be your unenforceable promise to pay the pledged amount each month into a legally enforceable contract.

## *Is It An Enforceable Promise?*

A promise to a 501(c)(3) charity to give money in the future may be legally enforceable, depending on all of the circumstances and also on the law of the state that governs the contemplated payment.

Not all 50 states have the same rules.

Often there's no issue about which state's laws apply. But if the donor is from State X and the donee is incorporated and operates in State Y, there are complicated rules to determine which law governs.

Let's make it simple here: Assume that California law governs. When is a pledge something that the charitable organization can be sure about collecting when the time comes?

## *Pledge as Contract*

In California, as in other U.S. jurisdictions, a charitable pledge is analyzed as a matter of contract law. Can the so-called contract (the pledge) be legally enforced?

To be legally binding, a contract must include (1) an offer, (2) an acceptance, and (3) “consideration.”

“Consideration” is a term of art that means mutual promises and exchanges of value.

In California, a “pledge” is enforceable as a binding contract only if there is consideration. In certain other states, the rules are less strict: Even a promise to make a payment to a charitable organization without anything given in return may be enforceable as a matter of public policy.

In 2010, a bill was proposed in the California Legislature to change this state’s rule – that is, to make any written pledge to a section 501(c)(3) organization enforceable with or without consideration. But the bill was never enacted into law.

So the law remains the way California judges have ruled on this issue consistently over the years: There must be a legally sufficient amount of consideration. How much is enough? That depends – on each situation.

If you pledge \$5 million for a college library in exchange for a promise to name the building after you, that’s likely to be enforceable.

Apparently, if you receive the promised book, the DVD, the exclusive recipe collection, and the special meal journal when you pledge \$10 a month during that doctor’s diet program, that’s going to be enforceable, too.

Some other situations may not be as clear-cut, and a court will have to decide if the donor must honor the commitment.

### *Promissory Estoppel*

There’s a long-recognized exception to the general rule that consideration is necessary to make a contract enforceable. It’s called “promissory estoppel” or “detrimental reliance.” If a person makes a pledge, and knows or reasonably should have known, that the 501(c)(3) organization will act on that promise and make commitments, the pledge will likely be enforced. It’s a doctrine based on basic principles of fairness and good faith.

Here’s an example. You pledge \$5 million for that college library, payable \$500,000 now, and the remainder in two installments. You weren’t given any promises in return. The library will be called “The Library.” But you know (or should realize, anyway) that the college will be breaking ground immediately, hiring the architect and contractor, and incurring large expenses to begin the building project. Your pledge will probably be enforceable.

### *More Issues and Questions*

The matter of enforceability isn’t the only issue when it comes to charitable pledges. Here are just a few of the many and varied questions that may arise: on changed circumstances?

- Is the donee-organization required to try to collect on the pledge? Is a board of directors in breach of its duties if it doesn’t authorize legal action – that is, if it fails to act to

preserve the charity's assets?

- What if the donor makes certain payments, but then dies before the pledge is completed? Is the donor's estate bound to honor the pledge? Does the executor have a duty to the heirs to resist payment?
- What if the organization's mission or activities change before the entire pledge is paid. Can the donor revoke the pledge based on changed circumstances?

### ***Conclusion***

A charitable pledge is an important part of a fundraising program, but care must be taken to make sure that it's clearly defined and properly documented.

– *Linda J. Rosenthal, J.D., FPLG Information & Research Director*