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Chapter 15

Discharge of Obligations

LEARNING OBJECTIVES

After reading this chapter, you should understand the following:

1. What is meant by discharge of contract obligations
2. How contract obligations are discharged

15.1 Discharge of Contract Duties

LEARNING OBJECTIVES

1. Understand how performance, partial performance, or no performance may discharge contractual obligations.
2. Recognize what rights accrue to the nonbreaching party when the other side announces, before the time for performance, that performance will not be forthcoming—anticipatory breach.
3. Understand the concept of the right to adequate assurances, and the consequences if no such assurances are forthcoming.

A person is liable to perform agreed-to contract duties until or unless he or she is discharged. If the person fails to perform without being discharged, liability for damages arises. Here we deal with the second-to-the-last of the four broad themes of contract law: how contract duties are discharged.

Discharge by Performance (or Nonperformance) of the Duty

A contract can be discharged by complete performance or material nonperformance of the contractual duty. Note, in passing, that the modern trend at common law (and explicit under the Uniform Commercial Code [UCC], Section 1-203) is that the parties have a **good-faith duty**¹ to perform to each other. There is in every contract “an implied covenant of good faith” (honesty in fact in the transaction) that the parties will deal fairly, keep their promises, and not frustrate the other party’s reasonable expectations of what was given and what received.

Full Performance

Full performance of the contractual obligation discharges the duty. If Ralph does a fine job of plumbing Betty’s new bathroom, she pays him. Both are discharged.

Nonperformance, Material Breach

If Ralph doesn’t do any work at all on Betty’s bathroom, or almost none, then Betty owes him nothing. She—the nonbreaching party—is discharged, and Ralph is liable for breach of contract.

1. The duty to act with honesty in fact in commercial transactions.

Under UCC Section 2-106(4), a party that ends a contract breached by the other party is said to have effected a **cancellation**². The cancelling party retains the right to seek a remedy for breach of the whole contract or any unperformed obligation. The UCC distinguishes cancellation from **termination**³, which occurs when either party exercises a lawful right to end the contract other than for breach. When a contract is terminated, all executory duties are discharged on both sides, but if there has been a partial breach, the right to seek a remedy survives. Uniform Commercial Code, Section 2-106(3).

Substantial Performance

Logically, anything less than full performance, even a slight deviation from what is owed, is sufficient to prevent the duty from being discharged and can amount to a breach of contract. So if Ralph does all the plumbing for Betty's new bathroom *except* hook up the toilet feed, he has not really "plumbed the new bathroom." He has only plumbed part of it. At classic common law, that was it: either you did the thing you promised completely or you had materially breached. But under modern theories, an ameliorative doctrine has developed, called **substantial performance**⁴: if one side has substantially, but not completely, performed, so that the other side has received a benefit, the nonbreaching party owes something for the value received. The Restatement (Second) of Contracts puts it this way: Restatement (Second) of Contracts, Section 237(d).

Substantial Performance.

In an important category of disputes over failure of performance, one party asserts the right to payment on the ground that he has completed his performance, while the other party refuses to pay on the ground that there is an uncured material failure of performance....In such cases it is common to state the issue...in terms of whether there has been substantial performance....If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages. If there has not been substantial performance, the building contractor has no claim for the unpaid balance, although he may have a claim in restitution.

2. The termination of a contract by one party in response to its material breach by the other.
3. The lawful right to end the contract other than for breach.
4. At common law, the idea that a promisee should not be denied all payment under a contract when his or her performance was imperfect if significant benefit has been conferred on the promisor, who must pay for the value received.

The contest here is between the one who claims discharge by the other's material breach and the one who asserts there has been substantial performance. What constitutes substantial performance is a question of fact, as illustrated in Section 15.2.1 "Substantial Performance; Conditions Precedent", *TA Operating Corp. v. Solar Applications Engineering, Inc.* The doctrine has no applicability where the breaching party willfully failed to follow the contract, as where a plumber substitutes a

different faucet for the one ordered; installation of the incorrect faucet is a breach, even if it is of equal or greater value than the one ordered.

Under the UCC, there is no such thing as substantial performance. Section 2-601 requires that the goods delivered according to the contract be the exact things ordered—that there be a **perfect tender**⁵ (unless the parties agree otherwise).

Anticipatory Breach and Demand for Reasonable Assurances

When a promisor announces before the time his performance is due that he will not perform, he is said to have committed an **anticipatory breach (or repudiation)**⁶. Of course a person cannot fail to perform a duty before performance is due, but the law allows the promisee to treat the situation as a material breach that gives rise to a claim for damages and discharges the obligee from performing duties required of him under the contract. The common-law rule was first recognized in the well-known 1853 British case *Hochster v. De La Tour*. In April, De La Tour hired Hochster as his courier, the job to commence in June. In May, De La Tour changed his mind and told Hochster not to bother to report for duty. Before June, Hochster secured an appointment as courier to Lord Ashburton, but that job was not to begin until July. Also in May, Hochster sued De La Tour, who argued that he should not have to pay Hochster because Hochster had not stood ready and willing to begin work in June, having already agreed to work for Lord Ashburton. The court ruled for the plaintiff Hochster:

[I]t is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. *Hochster v. De La Tour*, 2 Ellis & Blackburn 678 (Q.B. 1853).

5. The precise performance of a contractual obligation.

6. A communication that informs a party that the obligations of the original contract will not be fulfilled when due; gives rise to an immediate right to sue.

Another type of anticipatory breach consists of any voluntary act by a party that destroys, or seriously impairs, that party's ability to perform the promise made to the other side. If a seller of land, having agreed to sell a lot to one person at a date certain, sells it instead to a third party before that time, there is an anticipatory breach. If Carpenter announces in May that instead of building Owner's deck in July, as agreed, he is going on a trip to Europe, there is an anticipatory breach. In the

first instance, there would be no point to showing up at the lawyer's office when the date arrives to await the deed, so the law gives a right to sue when the land is sold to the other person. In the second instance, there would be no point to waiting until July, when indeed Carpenter does not do the job, so the law gives the right to sue when the future nonperformance is announced.

These same general rules prevail for contracts for the sale of goods under UCC Section 2-610.

Related to the concept of anticipatory breach is the idea that the obligee has a right to demand reasonable assurances from the obligor that contractual duties will be performed. If the obligee makes such a **demand for reasonable assurances**⁷ and no adequate assurances are forthcoming, the obligee may assume that the obligor will commit an anticipatory breach, and consider it so. That is, after making the contract, the obligee may come upon the disquieting news that the obligor's ability to perform is shaky. A change in financial condition occurs, an unknown claimant to rights in land appears, a labor strike arises, or any of a number of situations may crop up that will interfere with the carrying out of contractual duties. Under such circumstances, the obligee has the right to a demand for reasonable assurance that the obligor will perform as contractually obligated. The general reason for such a rule is given in UCC Section 2-609(1), which states that a contract "imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired." Moreover, an obligee would be foolish not to make alternative arrangements, if possible, when it becomes obvious that his original obligor will be unable to perform. The obligee must have reasonable grounds to believe that the obligor will breach. The fear must be that of a failure of performance that would amount to a total breach; a minor defect that can be cured and that at most would give rise to an offset in price for damages will not generally support a demand for assurances.

Under UCC Section 2-609(1), the demand must be in writing, but at common law the demand may be oral if it is reasonable in view of the circumstances. If the obligor fails within a reasonable time to give adequate assurance, the obligee may treat the failure to do so as an anticipatory repudiation, or she may wait to see if the obligor might change his mind and perform.

7. A demand to be reassured that contractual performance will be forthcoming when reasonable grounds for insecurity arise with respect to the performance of the other party; failure to get such is an anticipatory breach.

KEY TAKEAWAY

Contracts can be discharged by performance: complete performance discharges both sides; material breach discharges the breaching party, who has a right to claim damages; substantial performance obligates the promisee to pay something for the benefit conferred but is a breach. A party may demand reasonable assurances of performance, which, if not forthcoming, may be treated as an anticipatory breach (or repudiation).

EXERCISES

1. What types of performance discharge a contractual obligation?
2. Under the UCC, what is the difference between cancellation and termination of a contract?
3. What is an anticipatory breach, and under what circumstances can a party claim it?

Discharge by Conditions

LEARNING OBJECTIVES

1. Understand the concept of conditions in a contract.
2. Recognize that conditions can be classified on the basis of how they are created, their effect on the duty to perform, the essentialness of timely performance, or performance to someone's satisfaction.

Usually contracts consist of an exchange of promises—a pledge or commitment by each party that somebody will or will not do something. Andy's promise to cut Anne's lawn "over the weekend" in return for Anne's promise to pay twenty-five dollars is a commitment to have the lawn mowed by Sunday night or Monday morning. Andy's promise "not to tell anyone what I saw you doing Saturday night" in return for Anne's promise to pay one hundred dollars is a commitment that an event (the revealing of a secret) will not occur. These promises are known as independent or absolute or unconditional, because their performance does not depend on any outside event. Such promises, if contractually binding, create a present duty to perform (or a duty to perform at the time stated).

However, it is common that the obligation to perform a contract is conditioned (or conditional). A **condition**⁸ is an event the happening or nonhappening of which gives rise to a duty to perform (or discharges a duty to perform). Conditions may be express or implied; they may also be precedent, concurrent, subsequent, or to the satisfaction of a party.

Conditions Classified Based on How They Are Created

Express conditions⁹ are stated in words in the contract, orally or written. Andy promises to mow Anne's lawn "provided it doesn't rain." "Provided it doesn't rain" is an express condition. If rain comes, there is no duty to cut the lawn, and Andy's failure to do so is not a breach of promise. Express conditions are usually introduced by language such as "provided that," "if," "when," "assuming that," "as soon as," "after," and the like. **Implied conditions**¹⁰ are unexpressed but understood to be part of the contract. If Mr. Olson guarantees Jack's used car for ninety days, it is implied that his obligation to fix any defects doesn't arise until Jack lets him know the car is defective. If Ralph is hired to plumb Betty's new bathroom, it is implied that Betty's duty to pay is conditioned on Ralph's completion of the job.

Conditions Classified Based on Their Effect on Duty to Perform

8. An uncertain future act or event whose occurrence or nonoccurrence determines the rights or obligations of a party under a legal instrument, especially a contract.
9. A condition in words, oral or in writing.
10. A provision not explicitly stated in an agreement but considered an important item.
11. A condition that is to be fulfilled by one party at the same time that a mutual condition is to be fulfilled by another party.
12. An event that terminates an existing duty of performance.
13. A clause asserting that any tardy performance is a material breach, discharging the nonbreaching party.

A condition precedent is a term in a contract (express or implied) that requires performance only in the event something else happens first. Jack will buy a car from Mr. Olson if Jack gets financing. "If Jack gets financing" is a condition precedent. A **concurrent condition**¹¹ arises when the duty to perform the contract is simultaneous: the promise of a landowner to transfer title to the purchaser and the purchaser to tender payment to the seller. The duty of each to perform is conditioned on the performance by the other. (As a practical matter, of course, somebody has to make the first move, proffering deed or tendering the check.) A condition that terminates an already existing duty of performance is known as a **condition subsequent**¹². Ralph agrees to do preventive plumbing maintenance on Deborah Dairy's milking equipment for as long as David Dairy, Deb's husband, is stationed overseas. When David returns, Ralph's obligation to do the maintenance (and Deb's duty to pay him) terminates.

Condition of Timeliness

If, as often occurs, it does not matter a great deal whether a contract is performed exactly on time, failure to do so is not a material breach, and the promisee has to accept the performance and deduct any losses caused by the delay. If, though, it makes a difference to the promisee whether the promisor acts on time, then it is said that "**time is of the essence**"¹³. Time as a condition can be made explicit in a

clause reciting that time is of the essence. If there is no express clause, the courts will read it in when the purpose of the contract was clearly to provide for performance at or by a certain time, and the promisee will gain little from late performance. But even express clauses are subject to a rule of reason, and if the promisor would suffer greatly by enforcement of the clause (and the promisee would suffer only slightly or not at all from a refusal to invoke it), the courts will generally excuse the untimely performance, as long as it was completed within a reasonable time. A builder's failure to finish a house by July 1 will not discharge the buyer's obligation to pay if the house is finished a week or even a month later, although the builder will be liable to the buyer for expenses incurred because of the lateness (storage charges for furniture, costs for housing during the interim, extra travel, and the like).

Condition That a Party Must Be Satisfied

"You must be satisfied or your money back" is a common advertisement. A party to a contract can require that he need not pay or otherwise carry out his undertaking unless satisfied by the obligor's performance, or unless a third party is satisfied by the performance.

Parties may contract to perform to one side's personal satisfaction. Andy tells Anne, a prospective client, that he will cut her hair better than her regular hairdresser, and that if she is not satisfied, she need not pay him. Andy cuts her hair, but Anne frowns and says, "I don't like it." Assume that Andy's work is excellent. Whether Anne must pay depends on the standard for judging to be employed—a standard of objective or subjective satisfaction. The objective standard is that which would satisfy the reasonable purchaser. Most courts apply this standard when the contract involves the performance of a mechanical job or the sale of a machine whose performance is capable of objective measurement. So even if the obligee requires performance to his "personal satisfaction," the courts will hold that the obligor has performed if the service performed or the goods produced are in fact satisfactory. By contrast, if the goods or services contracted for involve personal judgment and taste, the duty to pay will be discharged if the obligee states personal (subjective) dissatisfaction. No reason at all need be given, but it must be for a good-faith reason, not just to escape payment.

The duty to make a contract payment may be conditioned on the satisfaction of a third party. Building contracts frequently make the purchaser's duty to pay conditional on the builder's receipt of an architect's certificate of compliance with all contractual terms; road construction contracts often require that the work be done "to the satisfaction of the County Engineer." These conditions can be onerous. The builder has already erected the structure and cannot "return" what he has done. Nevertheless, because the purchaser wants assurance that the building

(obviously a major purchase) or road meets his specifications, the courts will hold the contractor to the condition unless it is impossible to provide a certificate (e.g., architect may have died) or the architect has acted in bad faith, or the purchaser has somehow prevented the certificate from issuing. The third party's refusal to issue a certificate needs to be reasonable.

KEY TAKEAWAY

Parties may, expressly or implicitly, condition the requirement for contractual performance on the happening or nonhappening of an event, or on timeliness. They may condition performance on satisfaction to one of the parties to the contract or to the satisfaction of a third party; in any event, dissatisfaction must be in good faith.

EXERCISES

1. What is “conditioned” by a condition in a contract?
2. What conditions are based on how they are made?
3. What conditions are based on their effect on the duty of performance?
4. What typical situations involve performance to a party's satisfaction?

Discharge by Agreement of the Parties

LEARNING OBJECTIVE

1. Recognize that there are various ways the parties may agree between themselves to terminate mutual obligations under the contract.

Parties are free to agree to almost any contract they want, and they are free to agree to end the contract whenever they want. There are several ways this is done.

Mutual Rescission

The parties may agree to give up the duties to perform, called **mutual rescission**¹⁴. This may be by a formal written **release**¹⁵ saying the obligor is discharged upon delivery of the writing or upon occurrence of a condition. Or an obligation may be discharged by a contract not to sue about it.

14. The giving up by both sides of the right to demand contract performance.

15. A contractual discharge of obligation by one side to another.

The Restatement terms this an agreement of rescission. Restatement (Second) of Contracts, Section 283. An agreement to rescind will be given effect even though partial performance has been made or one or both parties have a claim for partial breach. The agreement need not be in writing or even expressed in words. By their actions, such as failure to take steps to perform or enforce, the parties may signal their mutual intent to rescind. Andy starts to mow Anne's lawn as they agreed. He begins the job, but it is unbearably hot. She sees how uncomfortable he is and readily agrees with him when he says, "Why don't we just forget the whole thing?" Andy's duty to finish mowing is discharged, as is Anne's duty to pay Andy, either for the whole job or for the part he has done.

Business executives live by contracts, but they do not necessarily die by them. A sociologist who studied business behavior under contract discovered a generation ago—and it is still valid—that in the great majority of cases in which one party wishes to "cancel an order," the other party permits it without renegotiation, even though the cancellation amounts to a repudiation of a contract. As one lawyer was quoted as saying,

Often business[people] do not feel they have "a contract"—rather they have an "order." They speak of "cancelling the order" rather than "breaching our contract." When I began practice I referred to order cancellations as breaches of contract, but my clients objected since they do not think of cancellation as wrong. Most clients, in heavy industry at least, believe that there is a right to cancel as part of the buyer-seller relationship. There is a widespread attitude that one can back out of any deal within some very vague limits. Lawyers are often surprised by this attitude. Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28, no. 1 (1963): 55, 61.

This attitude is understandable. People who depend for their economic survival on continuing relationships will be loath to react to every change in plans with a lawsuit. The legal consequences of most of these cancellations are an agreement of rescission. Under UCC Section 2-720, the use of a word like "cancellation" or "rescission" does not by itself amount to a renunciation of the right to sue for breach of a provision that occurred before the rescission. If the parties mean to discharge each other fully from all duties owed, they must say so explicitly. Actions continue to speak more loudly than words, however, and in law, so can inactions. Legal rights under contracts may be lost by both parties if they fail to act; by abandoning their claims, they can affect rescission.

Waiver

A second means of discharge is by **waiver**¹⁶, whereby a party voluntarily gives up a right she has under a contract but doesn't give up the entire right to performance by the other side. Tenant is supposed to pay rent on the first of the month, but because his employer pays on the tenth, Tenant pays Landlady on that day. If Landlady accepts the late payment without objection, she has waived her right to insist on payment by the first of the month, unless the lease provides that no waiver occurs from the acceptance of any late payments. See Section 15.2.2 "Waiver of Contract Rights; Nonwaiver Provisions", *Minor v. Chase Auto Finance Corporation*. A "waiver" is permission to deviate from the contract; a "release" means to let go of the whole thing.

Substituted Agreement

Discharge by substituted agreement is a third way of mutual rescission. The parties may enter into a **novation**¹⁷, either a new contract or one whereby a new person is substituted for the original obligor, and the latter is discharged. If Mr. Olson is obligated to deliver a car to Jack, Jack and Mr. Olson may agree that Dewey Dealer should deliver the car to Jack instead of Mr. Olson; the latter is discharged by this novation. A **substituted agreement**¹⁸ may also simply replace the original one between the original parties.

Accord and Satisfaction

Discharge by **accord and satisfaction**¹⁹ is a fourth way of mutual rescission. Here the parties to a contract (usually a disputed one) agree to substitute some performance different from what was originally agreed, and once this new agreement is executed, the original contract (as well as the more recent accord) is satisfied. But before then, the original agreement is only suspended: if the obligor does not satisfy the accord, the other side can sue on the original obligation or on the accord.

- 16. The surrender of a legal right.
- 17. The replacement of one obligation by another by mutual agreement of both parties; usually the replacement of one of the original parties to a contract with the consent of the remaining party.
- 18. A new agreement between original parties who have given up rights under the old agreement.
- 19. The settlement of a dispute by offering up less consideration than demanded in exchange for extinguishing the obligation. The original obligation remains viable until the accord is performed.

KEY TAKEAWAY

Parties to a contract may agree to give it up. This may be by mutual rescission, release, waiver, novation, substituted agreement, or accord and satisfaction.

EXERCISES

1. How does mutual rescission discharge a common-law contract without apparent new consideration?
2. What is the difference between a substituted agreement and a novation?
3. What happens if the parties negotiate an accord and satisfaction and one side fails to perform it?
4. If an obligee accepts performance from the obligor that deviates from the contract, under what circumstances can the obligee nevertheless insist on strict compliance in the future?

Discharge When Performance Becomes Impossible or Very Difficult

LEARNING OBJECTIVE

1. Recognize that there are several circumstances when performance of the contract becomes variously impossible, very difficult, or useless, and that these may give rise to discharge.

There are at least five circumstances in which parties may be discharged from contractual obligations because performance is impossible, difficult, or useless.

Overview

Every contract contains some element of risk: the buyer may run out of money before he can pay; the seller may run out of goods before he can deliver; the cost of raw materials may skyrocket, throwing off the manufacturer's fine financial calculations. Should the obligor's luck run out, he is stuck with the consequences—or, in the legal phrase, his liability is strict: he must either perform or risk paying damages for breach of contract, even if his failure is due to events beyond his control. Of course, an obligor can always limit his liability through the contract itself. Instead of obligating himself to deliver one million units, he can restrict his obligation to “one million units or factory output, whichever is less.” Instead of guaranteeing to finish a job by a certain date, he can agree to use his “best efforts” to do so. Similarly, damages in the event of breach can be limited. A party can even include a clause canceling the contract in the event of an untoward happening. But if these provisions are absent, the obligor is generally held to the terms of his bargain.

Exceptions include the concepts of impossibility, impracticability, and frustration of purpose.

Impossibility

If performance is impossible, the duty is discharged. The categories here are death or incapacity of a personal services contractor, destruction of a thing necessary for performance, and performance prohibited by government order.

Death or Incapacity of a Personal Services Contractor

If Buyer makes a contract to purchase a car and dies before delivery, Buyer's estate could be held liable; it is not impossible (for the estate) to perform. The estate of a painter hired to do a portrait cannot be sued for damages because the painter died before she could complete the work.

Destruction or Deterioration of a Thing Necessary for Performance

When a specific object is necessary for the obligor's performance, its destruction or deterioration making its use impracticable (or its failure to come into existence) discharges the obligor's duty. Diane's Dyers contracts to buy the annual wool output of the Sheepish Ranch, but the sheep die of an epidemic disease before they can be shorn. Since the specific thing for which the contract was made has been destroyed, Sheepish is discharged from its duty to supply Diane's with wool, and Diane's has no claim against the Ranch. However, if the contract had called for a quantity of wool, without specifying that it was to be from Sheepish's flock, the duty would not be discharged; since wool is available on the open market, Sheepish could buy that and resell it to Diane's.

Performance Prohibited by Government Regulation or Order

When a government promulgates a rule after a contract is made, and the rule either bars performance or will make it impracticable, the obligor's duty is discharged. An obligor is not required to break the law and risk the consequences. Financier Bank contracts to sell World Mortgage Company certain collateralized loan instruments. The federal government, in a bank reform measure, prohibits such sales. The contract is discharged. If the Supreme Court later declared the prohibition unconstitutional, World Mortgage's duty to buy (or Financier Bank's to sell) would not revive.

Impracticability

Less entirely undoable than impossibility, but still grounds for discharge, are common-law impracticability and its relative, commercial impracticability.

Common-Law Impracticability

Impracticability²⁰ is said to exist when there is a radical departure from the circumstances that the parties reasonably contemplated would exist at the time they entered into the contract; on such facts, the courts might grant relief. They will do so when extraordinary circumstances (often called “acts of God” or “force majeure”) make it unjust to hold a party liable for performance. Although the justification for judicial relief could be found in an implied condition in all contracts that extraordinary events shall not occur, the Restatement eschews so obvious a bootstrap logic and adopts the language of UCC Section 2-615(a), which states that the crux of the analysis is whether the nonoccurrence of the extraordinary circumstance was “a basic assumption on which the contract was made.” Restatement (Second) of Contracts, Section 261. If it was—if, that is, the parties assumed that the circumstance would not occur—then the duty is discharged if the circumstance later does occur.

In one well-known case, *Autry v. Republic Productions*, the famous cowboy movie star Gene Autry had a contract to perform to the defendant. He was drafted into the army in 1942; it was temporarily, at least, impossible for him to perform his movie contractual obligations incurred prior to his service. When he was discharged in 1945, he sued to be relieved of the prewar obligations. The court took notice that there had been a long interruption in Autry’s career and of “the great decrease in the purchasing power of the dollar”—postwar inflation—and determined that to require him to perform under the old contract’s terms would work a “substantial hardship” on him. A world war is an extraordinary circumstance. The temporary impossibility had transformed into impracticability. *Autry v. Republic Productions*, 180 P.2d 144 (Calif. 1947).

Impracticability refers to the performance, not to the party doing it. Only if the performance is impracticable is the obligor discharged. The distinction is between “the thing cannot be done” and “I cannot do it.” The former refers to that which is **objectively impracticable**²¹, and the latter to that which is subjectively impracticable. That a duty is subjectively impracticable does not excuse it if the circumstances that made the duty difficult are not extraordinary. A buyer is liable for the purchase price of a house, and his inability to raise the money does not excuse him or allow him to escape from a suit for damages when the seller tenders the deed. *Christy v. Pilkinton*, 273 S.W.2d 533 (Ark. 1954). If Andy promises to transport Anne to the football stadium for ten dollars, he cannot wriggle out of his

20. An excuse for nonperformance of a duty where it has become unexpectedly difficult or expensive for the party who was to perform.

21. Impossible.

agreement because someone smashed into his car (rendering it inoperable) a half hour before he was due to pick her up. He could rent a car or take her in a taxi, even though that will cost considerably more than the sum she agreed to pay him. But if the agreement was that he would transport her in his car, then the circumstances make his performance **objectively impracticable**—the equivalent of impossible—and he is excused.

Commercial Impracticability

This common-law concept of impracticability has been adopted by the UCC. Uniform Commercial Code, Section 2-615. When performance cannot be undertaken except with extreme difficulty or at highly unreasonable expense, it might be excused on the theory of **commercial impracticability**²². However, “impracticable” (the action is impossible) is not the same as “impractical” (the action would yield an insufficient return or would have little practical value). The courts allow a considerable degree of fluctuation in market prices, inflation, weather, and other economic and natural conditions before holding that an extraordinary circumstance has occurred. A manufacturer that based its selling price on last year’s costs for raw materials could not avoid its contracts by claiming that inflation within the historical range had made it difficult or unprofitable to meet its commitments. Examples of circumstances that could excuse might be severe limitations of supply due to war, embargo, or a natural disaster. Thus a shipowner who contracted with a purchaser to carry goods to a foreign port would be excused if an earthquake destroyed the harbor or if war broke out and the military authorities threatened to sink all vessels that entered the harbor. But if the shipowner had planned to steam through a canal that is subsequently closed when a hostile government seizes it, his duty is not discharged if another route is available, even if the route is longer and consequently more expensive.

Frustration of Purpose

22. Relief from contract obligations may be granted when performance has been rendered excessively difficult, expensive, or harmful by an unforeseen contingency.

23. A defense to contractual nonperformance that occurs when an unforeseen event undermines a party’s principal purpose for entering into a contract, and both parties knew of this principal purpose at the time the contract was made.

If the parties made a basic assumption, express or implied, that certain circumstances would not arise, but they do arise, then a party is discharged from performing his duties if his principal purpose in making the contract has been “substantially frustrated.” This is not a rule of objective impossibility. It operates even though the parties easily might be able to carry out their contractual duties. The **frustration of purpose**²³ doctrine comes into play when circumstances make the value of one party’s performance virtually worthless to the other. This rule does not permit one party to escape a contract simply because he will make less money than he had planned or because one potential benefit of the contract has disappeared. The purpose that is frustrated must be the core of the contract, known and understood by both parties, and the level of frustration must be severe; that is,

the value of the contract to the party seeking to be discharged must be destroyed or nearly destroyed.

The classic illustration of frustration of purpose is the litigation that gave birth to the rule: the so-called coronation cases. In 1901, when King Edward VII was due to be crowned following the death of Queen Victoria, a parade route was announced for the coronation. Scores of people rented rooms in buildings that lined the streets of the route to watch the grand spectacle. But the king fell ill, and the procession was canceled. Many expectant viewers failed to pay, and the building owners took them to court; many lessees who had paid took the owners to court to seek refunds. The court declared that the lessees were not liable because the purpose of the contract had been frustrated by the king's illness.

Supervening government regulations (though here different from illegality), floods that destroy buildings in which an event was to take place, and business failures may all contribute to frustration of purpose. But there can be no general rule: the circumstances of each case are determinative. Suppose, for example, that a manufacturer agrees to supply a crucial circuit board to a computer maker who intends to sell his machine and software to the government for use in the international space station's ventilation systems. After the contract is made but before the circuit boards are delivered, the government decides to scrap that particular space station module. The computer manufacturer writes the circuit board maker, canceling the contract. Whether the manufacturer is discharged depends on the commercial prospects for the computer and the circuit board. If the circuit board can be used only in the particular computer, and it in turn is only of use on the space station, the duty to take the boards is discharged. But if the computer can be sold elsewhere, or the circuit boards can be used in other computers that the manufacturer makes, it is liable for breach of contract, since its principal purpose—selling computers—is not frustrated.

As before, the parties can provide in the contract that the duty is absolute and that no supervening event shall give rise to discharge by reason of frustration of purpose.

KEY TAKEAWAY

The obligations to perform under a contract cannot be dismissed lightly, but a person's duty to perform a contract duty may be discharged if it becomes impossible or very difficult to do it. This includes impossibility, common-law impracticability, commercial impracticability under the UCC, and frustration of purpose.

EXERCISES

1. If it is possible to perform a contract, why might a party be excused because of frustration of purpose?
2. What is the difference between impractical and impracticable?
3. How would supervening government regulation be different from supervening illegality?

Other Methods of Discharge

LEARNING OBJECTIVES

1. Recognize when alteration, power of avoidance, the statute of limitations, and bankruptcy discharge parties from contracts.
2. In addition to performance (or lack of it), agreement of the parties, the happening or nonhappening of conditions, and variations on the theme of impossibility, there are several other ways contract duties may be discharged.

Cancellation, Destruction, or Surrender

An obligee may unilaterally discharge the obligor's duty toward him by canceling, destroying, or surrendering the written document embodying the contract or other evidence of the duty. No consideration is necessary; in effect, the obligee is making a gift of the right that he possesses. No particular method of cancellation, destruction, or surrender is necessary, as long as the obligee manifests his intent that the effect of his act is to discharge the duty. The entire document can be handed over to the obligor with the words, "Here, you don't owe me anything." The obligee can tear the paper into pieces and tell the obligor that he has done so because he does not want anything more. Or he can mutilate the signatures or cross out the writing.

Power of Avoidance

A contractual duty can be discharged if the obligor can avoid the contract. As discussed in [Chapter 10 "Real Assent"](#), a contract is either void or can be avoided if one of the parties lacked capacity (infancy, insanity); if there has been duress, undue influence, misrepresentation, or mistake; or the contract is determined to be unconscionable. Where a party has a **power of avoidance**²⁴ and exercises it, that party is discharged from further obligation.

24. A party's right to terminate performance of a contract—to avoid it (e.g., a minor has power of avoidance).

Statute of Limitations

When an obligor has breached a contract, the obligee has the right to sue in court for a remedy. But that right does not last forever. Every state has statutes of limitations that establish time periods within which the suit must be brought (different time periods are spelled out for different types of legal wrongs: contract breach, various types of torts, and so on). The time period for contract actions under most statutes of limitations ranges between two and six years. The UCC has a four-year **statute of limitations**²⁵. Uniform Commercial Code, Section 2-725. The period begins to run from the day on which the suit could have been filed in court—for example, from the moment of contract breach. An obligee who waits until after the statute has run—that is, does not seek legal relief within the period prescribed by the statute of limitations—is barred from going to court thereafter (unless she is under some incapacity like infancy), but the obligor is not thereby discharged. The effect is simply that the obligee has no legal remedy. If the parties have a continuing relationship, the obligee might be able to recoup—for example, by applying a payment for another debt to the one barred by the statute, or by offsetting a debt the obligee owes to the obligor.

Bankruptcy

Under the federal bankruptcy laws as discussed in [Chapter 35 "Bankruptcy"](#), certain obligations are discharged once a court declares a debtor to be bankrupt. The law spells out the particular types of debts that are canceled upon bankruptcy.

KEY TAKEAWAY

Contract duties may be discharged by cancellation, destruction, or surrender of the written contract; by the running of the statute of limitations; or by bankruptcy.

25. The law stating how long people have to bring a lawsuit after the cause of action arises.

15.2 Cases

Substantial Performance; Conditions Precedent

TA Operating Corp. v. Solar Applications Engineering, Inc.

191 S.W.3d 173 (Tex. Ct. App. 2005)

TA Operating Corporation, a truck stop travel center company, contracted with Solar Applications Engineering, Inc. to construct a prototype multi-use truck stop in San Antonio for a fixed price of \$3,543,233....

[When the project was near] completion, TA sent Solar a “punch list” of items that needed to be finished to complete the building. Solar disputed several items on the list and delivered a response to TA listing the items Solar would correct....Solar began work on the punch list items and filed a lien affidavit [a property that carries a lien can be forced into sale by the creditor in order to collect what is owed] against the project on October 2, 2000 in the amount of \$472,392.77. TA understood the lien affidavit to be a request for final payment.

On October 18, 2000, TA sent notice to Solar that Solar was in default for not completing the punch list items, and for failing to keep the project free of liens. TA stated in the letter that Solar was not entitled to final payment until it completed the remainder of the punch list items and provided documentation that liens filed against the project had been paid....Solar acknowledged at least two items on the punch list had not been completed, and submitted a final application for payment in the amount of \$472,148,77....TA refused to make final payment, however, contending that Solar had not complied with section 14.07 of the contract, which expressly made submission of a [lien-release] affidavit a condition precedent to final payment:...

The final Application for Payment shall be accompanied by:...complete and legally effective releases or waivers...of all lien rights arising out of or liens filed in connection with the work.

Although Solar did not comply with this condition precedent to final payment, Solar sued TA for breach of contract under the theory of substantial performance....TA [asserts that] the doctrine of substantial performance does not

excuse Solar's failure to comply with an express condition precedent to final payment....

The first issue we must resolve is whether the doctrine of substantial performance excuses the breach of an express condition precedent to final payment that is unrelated to completion of the building. TA acknowledges that Solar substantially performed its work on the project, but contends its duty to pay was not triggered until Solar pleaded or proved it provided TA with documentation of complete and legally effective releases or waivers of all liens filed against the project....TA contends that when the parties have expressly conditioned final payment on submission of [a liens-release] affidavit, the owner's duty to pay is not triggered until the contractor pleads or proves it complied with the condition precedent.

Solar contends that although it did not submit [a liens-release] affidavit in accordance with the contract, it may still recover under the contract pursuant to the substantial performance doctrine. Solar argues that to hold otherwise would bring back the common law tradition that the only way for a contractor to recover under a contract is full, literal performance of the contract's terms....

While the common law did at one time require strict compliance with the terms of a contract, this rule has been modified for building or construction contracts by the doctrine of substantial performance. "Substantial performance" was defined by the Texas [court] in [Citation]:

To constitute substantial compliance the contractor must have in good faith intended to comply with the contract, and shall have substantially done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract and its purpose cannot without difficulty, be accomplished by remedying them. Such performance permits only such omissions or deviation from the contract as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, and are remediable without doing material damage to other parts of the building in tearing down and reconstructing.

...The doctrine of substantial performance recognizes that the contractor has not completed construction, and therefore is in breach of the contract. Under the doctrine, however, the owner cannot use the contractor's failure to complete the work as an excuse for non-payment. "By reason of this rule a contractor who has in good faith substantially performed a building contract is permitted to sue under the contract, substantial performance being regarded as full performance, so far as a condition precedent to a right to recover thereunder is concerned." [Citation]...

Solar argues that by agreeing substantial performance occurred, TA acknowledged that Solar was in “full compliance” with the contract and any express conditions to final payment did not have to be met. [Citation]: “[a] finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects.” Solar argues that TA may not expressly provide for substantial performance in its contract and also insist on strict compliance with the conditions precedent to final payment. We disagree. While the substantial performance doctrine permits contractors to sue under the contract, it does not ordinarily excuse the non-occurrence of an express condition precedent:

The general acceptance of the doctrine of substantial performance does not mean that the parties may not expressly contract for literal performance of the contract terms....Stated otherwise, if the terms of an agreement make full or strict performance an express condition precedent to recovery, then substantial performance will not be sufficient to enable recovery under the contract.

15 Williston on Contracts § 44.53 (4th Ed.2000) (citing Restatement (Second) of Contracts, § 237, cmt. d (1981))....

TA, seeking protection from double liability and title problems, expressly conditioned final payment on Solar’s submission of a [liens-release] affidavit. Solar did not dispute that it was contractually obligated to submit the affidavit as a condition precedent to final payment, and it was undisputed at trial that \$246,627.82 in liens had been filed against the project. Though the doctrine of substantial performance permitted Solar to sue under the contract, Solar did not plead or prove that it complied with the express condition precedent to final payment. Had Solar done so, it would have been proper to award Solar the contract balance minus the cost of remediable defects. While we recognize the harsh results occasioned from Solar’s failure to perform this express condition precedent, we recognize that parties are free to contract as they choose and may protect themselves from liability by requesting literal performance of their conditions for final payment....

[T]he trial court erred in awarding Solar the contract balance [as] damages, and we render judgment that Solar take nothing on its breach of contract claim.

CASE QUESTIONS

1. Why did Solar believe it was entitled to the contract balance here?
2. Why did the court determine that Solar should not have been awarded the contract damages that it claimed, even though it substantially complied?
3. How has the common law changed in regard to demanding strict compliance with a contract?

Waiver of Contract Rights; Nonwaiver Provisions

Minor v. Chase Auto Finance Corporation

—S.W.3d—, 2010 WL 2006401 (Ark. 2010)

Sheffield, J.

We have been asked to determine whether non-waiver and no-unwritten-modifications clauses in a [contract] preclude a creditor from waiving future strict compliance with the agreement by accepting late payments....

Appellant Mose Minor (Minor) entered into a Simple Interest Motor Vehicle Contract and Security Agreement with Appellee Chase Auto Finance Corporation (Chase) to finance the purchase of a 2003 Toyota Tundra. By the terms of the agreement, Minor was to make sixty-six payments of \$456.99 on the fourteenth of each month....The agreement also included the following relevant provisions:

G. Default: If you...default in the performance of any promise you make in this contract or any other contract you have with us, including, but not limited to, failing to make any payments when due, or become insolvent, or file any proceeding under the U.S. Bankruptcy Code,...we may at our option and without notice or demand (1) declare all unpaid sums immediately due and payable subject to any right of reinstatement as required by law (2) file suit against you for all unpaid sums (3) take immediate possession of the vehicle (4) exercise any other legal or equitable remedy....Our remedies are cumulative and taking of any action shall not be a waiver or prohibit us from pursuing any other remedy. You agree that upon your default we shall be entitled to recover from you our reasonable collection costs, including, but not limited to, any attorney's fee. In addition, if we repossess the vehicle, you grant to us and our agents permission to enter upon any

premises where the vehicle is located. Any repossession will be performed peacefully....

J. Other Agreements of Buyer:...(2) You agree that if we accept moneys in sums less than those due or make extensions of due dates of payments under this contract, doing so will not be a waiver of any later right to enforce the contract terms as written....(12) All of the agreements between us and you are set forth in this contract and no modification of this contract shall be valid unless it is made in writing and signed by you and us....

K. Delay in Enforcement: We can delay or waive enforcement of any of our rights under this contract without losing them.

Minor's first payment was late, as were several subsequent payments. At times he failed to make any payment for months. Chase charged a late fee for each late payment, and sent several letters requesting payment and offering to assist Minor with his account. Chase also warned Minor that continued failure to make payments would result in Chase exercising its legal options available under the agreement, including repossession of the vehicle....At one point, Minor fell so far behind in his payments that Chase was on the verge of repossessing the vehicle. However...the parties agreed to a two-month extension of the agreement....The extension agreement indicated that all other terms and conditions of the original contract would remain the same.

On November 2, 2004, Minor filed for Chapter 7 "Introduction to Tort Law" bankruptcy [after which] Chase sent Minor a letter acknowledging that Minor's debt to Chase had been discharged in bankruptcy. The letter further stated that Chase still had a valid lien on the vehicle, and if Minor wished to keep the vehicle, he would have to continue to make payments to Chase. Otherwise, Chase would repossess the vehicle....

On September 28, 2006, a repossession agent...arrived at Minor's home some time in the afternoon to repossess the vehicle....[Notwithstanding Minor's insistence that the agent stop] the agent removed Minor's possessions from the vehicle and towed it away. Chase sold the vehicle. The amount of the purchase price was reflected on Minor's account....

On January 7, 2008, Minor filed a complaint against Chase [alleging] that, during the course of the contract, the parties had altered the provisions of the contract regarding Chase's right to repossess the vehicle and Chase had waived the right to strictly enforce the repossession clause. Minor further claimed that the

repossession agent committed trespass and repossessed the vehicle forcibly, without Minor's permission, and through trickery and deceit, in violation of [state law]. Also, Minor asserted that he was not in default on his payments, pursuant to the repayment schedule, at the time Chase authorized repossession. Therefore, according to Minor, Chase committed conversion, and breached the Arkansas Deceptive Trade Practices Act [Citation], and enhanced by Arkansas Code Annotated section 4-88-202, because Minor is an elderly person. Minor sought compensatory and punitive damages....

After hearing these arguments, the circuit court ruled that Minor had presented no evidence that the conduct of Chase or the repossession agent constituted grounds for punitive damages; that by the express terms of the contract Chase's acceptance of late payments did not effect a waiver of its rights in the future; that at the time of repossession, Minor was behind in his payments and in breach of the contract; that Chase had the right under the contract to repossess the vehicle and did not commit conversion; and that there was no evidence to support a claim that Chase had violated the Arkansas Deceptive Trade Practices Act....

[W]e affirm our previous decisions that when a contract does not contain a non-waiver and a no-unwritten-modification provision and the creditor has established a course of dealing in accepting late payments from the debtor, the creditor waives its right to insist on strict compliance with the contract and must give notice to the debtor that it will no longer accept late payments before it can declare default of the debt. However, we announce today that, if a contract includes non-waiver and no-unwritten-modification clauses, the creditor, in accepting late payments, does not waive its right under the contract to declare default of the debt, and need not give notice that it will enforce that right in the event of future late payments....

In arriving at this conclusion, we adhere to the principle that "a [contract] is effective according to its terms between the parties."...We have long held that non-waiver clauses are legal and valid. *See* [Citations] Also, [the Arkansas UCC 2-209(2)] declares that no-unwritten-modification provisions are binding.

We acknowledge that there is a difference of opinion amongst the courts in other jurisdictions over the effect of non-waiver and no-unwritten-modification clauses....

We concur with the Supreme Court of Indiana's decision in [Citation], that a rule providing that non-waiver clauses could themselves be waived by the acceptance of late payments is "illogical, since the very conduct which the [non-waiver] clause is designed to permit[,] acceptance of late payment[,] is turned around to constitute waiver of the clause permitting the conduct." We also agree that the approach of jurisdictions that require creditors who have accepted late payments in the past to

notify debtors that they expect strict compliance in the future, despite the existence of a non-waiver provision in the contract, is not “sound.” Such a rule, we recognize, “begs the question of validity of the non-waiver clause.” Finally, our holding is in line with the Indiana Supreme Court’s ruling that it would enforce the provisions of the contract, since the parties had agreed to them, and that it would not require the creditor to give notice, because the non-waiver clause placed the [creditor] in the same position as one who had never accepted a late payment. [Citations]...

Certified question answered; remanded to court of appeals.

CASE QUESTIONS

1. What is a nonwaiver clause?
2. Why did Mose think his late payments were not grounds for repossession of his truck?
3. Why would a creditor accept late payments instead of immediately repossessing the collateral?
4. Why did Mose lose?

Impossibility as a Defense

Parker v. Arthur Murray, Inc.

295 N.E.2d 487 (Ill. Ct. App. 1973)

Stamos, J.

The operative facts are not in dispute. In November, 1959 plaintiff went to the Arthur Murray Studio in Oak Park to redeem a certificate entitling him to three free dancing lessons. At that time he was a 37 year-old college-educated bachelor who lived alone in a one-room attic apartment in Berwyn, Illinois. During the free lessons the instructor told plaintiff he had ‘exceptional potential to be a fine and accomplished dancer’ and generally encouraged further participation. Plaintiff thereupon signed a contract for 75 hours of lessons at a cost of \$1000. At the bottom of the contract were the bold-type words, ‘NON-CANCELABLE, NEGOTIABLE CONTRACT.’ This initial encounter set the pattern for the future relationship between the parties. Plaintiff attended lessons regularly. He was praised and encouraged regularly by the instructors, despite his lack of progress. Contract extensions and new contracts for additional instructional hours were executed.

Each written extension contained the bold-type words, 'NON-CANCELABLE CONTRACT,' and each written contract contained the bold-type words, 'NON-CANCELABLE NEGOTIABLE CONTRACT.' Some of the agreements also contained the bold-type statement, 'I UNDERSTAND THAT NO REFUNDS WILL BE MADE UNDER THE TERMS OF THIS CONTRACT.'

On September 24, 1961 plaintiff was severely injured in an automobile collision, rendering him incapable of continuing his dancing lessons. At that time he had contracted for a total of 2734 hours of lessons, for which he had paid \$24,812.80 [about \$176,000 in 2010 dollars]. Despite written demand defendants refused to return any of the money, and this suit in equity ensued. At the close of plaintiff's case the trial judge dismissed the fraud count (Count II), describing the instructors' sales techniques as merely 'a matter of pumping salesmanship.' At the close of all the evidence a decree was entered under Count I in favor of plaintiff for all prepaid sums, plus interest, but minus stipulated sums attributable to completed lessons.

Plaintiff was granted rescission on the ground of impossibility of performance. The applicable legal doctrine is expressed in the Restatement of Contracts, s 459, as follows:

A duty that requires for its performance action that can be rendered only by the promisor or some other particular person is discharged by his death or by such illness as makes the necessary action by him impossible or seriously injurious to his health, unless the contract indicates a contrary intention or there is contributing fault on the part of the person subject to the duty....

Defendants do not deny that the doctrine of impossibility of performance is generally applicable to the case at bar. Rather they assert that certain contract provisions bring this case within the Restatement's limitation that the doctrine is inapplicable if 'the contract indicates a contrary intention.' It is contended that such bold type phrases as 'NON-CANCELABLE CONTRACT,' 'NON-CANCELABLE NEGOTIABLE CONTRACT' and 'I UNDERSTAND THAT NO REFUNDS WILL BE MADE UNDER THE TERMS OF THIS CONTRACT' manifested the parties' mutual intent to waive their respective rights to invoke the doctrine of impossibility. This is a construction which we find unacceptable. Courts engage in the construction and interpretation of contracts with the sole aim of determining the intention of the parties. We need rely on no construction aids to conclude that plaintiff never contemplated that by signing a contract with such terms as 'NON-CANCELABLE' and 'NO REFUNDS' he was waiving a remedy expressly recognized by Illinois courts. Were we also to refer to established tenets of contractual construction, this conclusion would be equally compelled. An ambiguous contract will be construed most strongly against the party who drafted it. [Citation] Exceptions or reservations

in a contract will, in case of doubt or ambiguity, be construed least favorably to the party claiming the benefit of the exceptions or reservations. Although neither party to a contract should be relieved from performance on the ground that good business judgment was lacking, a court will not place upon language a ridiculous construction. We conclude that plaintiff did not waive his right to assert the doctrine of impossibility.

Plaintiff's Count II, which alleged fraud and sought punitive damages, was dismissed by the trial judge at the close of plaintiff's case. It is contended on appeal that representations to plaintiff that he had 'exceptional potential to be a fine and accomplished dancer,' that he had 'exceptional potential' and that he was a 'natural born dancer' and a 'terrific dancer' fraudulently induced plaintiff to enter into the contracts for dance lessons.

Generally, a mere expression of opinion will not support an action for fraud. [Citation] In addition, misrepresentations, in order to constitute actionable fraud, must pertain to present or pre-existing facts, rather than to future or contingent events, expectations or probabilities. [Citation] Whether particular language constitutes speculation, opinion or averment of fact depends upon all the attending facts and circumstances of the case. [Citation] Mindful of these rules, and after carefully considering the representations made to plaintiff, and taking into account the business relationship of the parties as well as the educational background of plaintiff, we conclude that the instructors' representations did not constitute fraud. The trial court correctly dismissed Count II. We affirm.

Affirmed.

CASE QUESTIONS

1. Why is it relevant that the plaintiff was "a bachelor who lived alone in a one-room attic apartment"?
2. The contract here contained a "no cancellation" clause; how did the court construe the contract to allow cancellation?
3. Plaintiff lost on his claim of fraud (unlike Mrs. Vokes in the similar case in [Chapter 10 "Real Assent"](#) against another franchisee of Arthur Murray, Inc.). What defense was successful?
4. What is the controlling rule of law here?

15.3 Summary and Exercises

Summary

The law of contracts has various rules to determine whether obligations have been discharged. Of course, if both parties have fully performed the contract, duties will have terminated. But many duties are subject to conditions, including conditions precedent and subsequent, conditions requiring approval of the promisee or someone else, and clauses that recite time to be of the essence.

A contract obligation may be discharged if the promisor has not received the benefit of the promisee's obligation. In some cases, failure to carry out the duty completely will discharge the corresponding obligation (material breach); in other cases, the substantial performance doctrine will require the other party to act.

A contract may have terminated because one of the parties tells the other in advance that he will not carry out his obligations; this is called anticipatory breach. The right to adequate assurance allows one party to determine whether the contract will be breached by the other party.

There are other events, too, that may excuse performance: impracticability (including the UCC rules governing impracticability in contracts for the sale of goods), death or incapacity of the obligor, destruction of the thing necessary for the performance, government prohibition, frustration of purpose, and power of avoidance.

Finally, note that not all obligations are created by contract, and the law has rules to deal with discharge of duties in general. Thus, in the appropriate cases, the obligee may cancel or surrender a written contract, may enter into an accord, may agree to rescind the agreement, or may release the obligor. Or the obligor may show a material alteration in the contract, may become bankrupt, or may plead the statute of limitations—that is, plead that the obligee waited too long to sue. Or the parties may, by word or deed, mutually abandon the agreement. In all these ways, duties may be discharged.

EXERCISES

1. Theresa hired Contractor to construct a large office building. Theresa's duty to pay Contractor was conditioned on receipt of a statement from her architect that the building complied with the terms of the contract. Contractor completed the building but used the wrong color fixtures in the bathrooms. The architect refused to approve the work, but under state law, Contractor was considered to have substantially performed the contract. Is he entitled to payment, less damages for the improper fixtures? Explain.
2. In early 1987, Larry McLanahan submitted a claim to Farmers Insurance for theft of his 1985 Lamborghini while it was on consignment for sale in the Los Angeles area. The car had sustained extensive damage, which McLanahan had his mechanic document. The insurance policy contained this language: "Allow us to inspect and appraise the damaged vehicle before its repair or disposal." But after considerable delay by Farmers, McLanahan sold the car to a cash buyer without notifying Farmers. He then sued Farmers for its refusal to pay for damages to his car. Upon what legal theory did Farmers get a summary judgment in its favor?
3. Plaintiff sold a tavern to Defendants. Several months later, Defendants began to experience severe problems with the septic tank system. They informed Plaintiff of the problem and demanded the return of their purchase money. Plaintiff refused. Defendants took no formal action against Plaintiff at that time, and they continued to operate the tavern and make their monthly payments under the contract. Some months later, Defendants met with state officials from the Departments of Environmental Quality, Health, and Liquor Control Commission. The officials warned Defendants that because of the health hazards posed by the septic tank problems, Defendants' licenses might not be renewed. As a result, Defendants decided to close the tavern and attempt to reopen when the septic tank was repaired. Defendants advertised a going-out-of-business sale. The purpose of the sale was to deplete the tavern's inventory before closing. Plaintiff learned about the sale and discovered that Defendants had removed certain personal property from the tavern. He sued the Defendants, claiming, among other things, that they had anticipatorily breached their contract with him, though he was receiving payments on time. Did the Defendants' actions amount to an anticipatory breach? *Crum v. Grant*, 692 P.2d 147 (Or. App., 1984).
4. Julius, a manufacturer of neckties, contracted to supply neckties to a wholesaler. When Julius's factory burned, he failed to supply any, and the wholesaler sued. Is Julius excused from performance by impossibility?

5. The Plaintiff (a development corporation) contracted to buy Defendant's property for \$1.8 million. A term in the contract read: "The sale...shall be closed at the office of Community Title Company on May 16th at 10:00 am....Time is of the essence in this contract." Defendant appeared at the office at 10:00 a.m. on the day designated, but the Plaintiff's agent was not there. Defendant waited for twenty minutes, then left. Plaintiff's agent arrived at 10:30 a.m. and announced that he would not have funds for payment until 1:30 p.m., but Defendant refused to return; she had already made other arrangements to finance her purchase of other real estate. Plaintiff sued Defendant for specific performance. Who wins, and why?
6. A contract between the Koles and Parker-Yale provided for completion of the Koles's condominium unit within 180 days. It also authorized the Koles to make written changes in the plans and specifications. Construction was not completed within the 180-day period, and the Koles, prior to completion, sent a letter to Parker-Yale rescinding the contract. Were the Koles within their rights to rescind the contract?
7. Plaintiff contracted to buy Defendant's commercial property for \$1,265,000. Under the terms of the agreement, Defendant paid \$126,000 as an earnest-money deposit, which would be retained by Plaintiff as liquidated damages if Defendant failed to close by the deadline. Tragically, Defendant's husband died four days before the closing deadline, and she was not able to close by the deadline. She was relying on her husband's business to assist her in obtaining the necessary financing to complete the purchase, and after his death, she was not able to obtain it. Plaintiff sued for the \$126,000; Defendant argued that the purpose of the contract was frustrated due to the untimely death of her husband. Is this a good argument?
8. Buyer contracted to buy Seller's house for \$290,000; the contract included a representation by Buyer "that he has sufficient cash available to complete this purchase." Buyer was a physician who practiced with his uncle. He had received assurances from his uncle of a loan of \$200,000 in order to finance the purchase. Shortly after the contract was executed, the uncle was examined by a cardiologist, who found his coronary arteries to be dangerously clogged. As a result, the uncle immediately had triple bypass surgery. After the operation, he told Buyer that his economic future was now uncertain and that therefore it was impossible for him to finance the house purchase. Meanwhile, Seller, who did not know of Buyer's problem, committed herself to buy a house in another state and accepted employment there as well. Buyer was unable to close; Seller sued. Buyer raised as a defense impossibility or impracticability of performance. Is the defense good?

9. Pursuant to a contract for the repair and renovation of a swimming pool owned by Defendant (City of Fort Lauderdale), Plaintiff commenced the work, which included resurfacing the inside of the pool, and had progressed almost to completion. Overnight, vandals damaged the work Plaintiff had done inside the pool, requiring that part of the work be redone. Plaintiff proceeded to redo the work and billed Defendant, who paid the contract price but refused to pay for the additional work required to repair the damage. Did the damage constitute destruction of subject matter discharging Plaintiff from his obligation to complete the job without getting paid extra?
10. Apache Plaza (the landlord) leased space to Midwest Savings to construct a bank building in Apache's shopping mall, based on a prototype approved by Apache. Midwest constructed the building and used it for twelve years until it was destroyed by a tornado. Midwest submitted plans for a new building to Apache, but Apache rejected the plans because the new building was larger and had less glass than the old building or the prototype. Midwest built it anyway. Its architect claimed that certain changes in the structure of the new building were required by new regulations and building codes, but he admitted that a building of the stipulated size could have been constructed in compliance with the applicable codes. Apache claimed \$210,000 in damages over the term of the lease because the new building consumed more square feet of mall space and required more parking. Midwest claimed it had substantially complied with the lease requirements. Is this a good defense? *Apache Plaza, Ltd. v. Midwest Sav. Ass'n*, 456 N.W.2d 729 (Minn. App. 1990).

SELF-TEST QUESTIONS

1. A condition precedent
 - a. is a condition that terminates a duty
 - b. is always within the control of one of the parties
 - c. is an event giving rise to performance
 - d. is a condition that follows performance

2. If Al and Betty have an executory contract, and if Betty tells Al that she will not be fulfilling her side of the bargain,
 - a. Al must wait until the date of performance to see if Betty in fact performs
 - b. Al can sue immediately for full contract damages
 - c. Al can never sue because the contract was executory when Betty notified him of nonperformance
 - d. none of the above

3. Jack contracts with Anne to drive her to the airport Wednesday afternoon in his specially designed stretch limousine. On Wednesday morning Jack's limousine is hit by a drunken driver, and Jack is unable to drive Anne. This is an example of
 - a. impossibility of performance
 - b. frustration of purpose
 - c. discharge by merger
 - d. none of the above

4. Jack is ready and willing to drive Anne to the airport. But Anne's flight is cancelled, and she refuses to pay. This is an example of
 - a. impracticability of performance
 - b. frustration of purpose
 - c. discharge of merger
 - d. none of the above

5. Rescission is

- a. the discharge of one party to a contract through substitution of a third person
- b. an agreement to settle for substitute performance
- c. a mutual agreement between parties to a contract to discharge each other's contractual duties
- d. none of the above

SELF-TEST ANSWERS

- 1. c
- 2. b
- 3. a
- 4. b
- 5. c