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## Third-Party Rights

**1. If the builder refuses to accept the man's services, which of the following clauses in the expert-builder contract will best support the builder's contention that the expert's duties under the contract were not delegable without the builder's consent?**

*With ample time remaining under the contract for commencement and completion of his performance, the expert notified the builder that he was selling his business to a man who was equally expert in lifting and emplacing equipment atop tall buildings, and that the man had agreed to "take over the expert-builder contract." An expert in lifting and emplacing equipment atop tall buildings, contracted in a signed writing to lift and emplace certain air-conditioning equipment atop a builder's building. An exculpatory clause in the contract provided that the expert would not be liable for any physical damage to the builder's building occurring during installation of the air-conditioning equipment. There was also a clause providing for per diem damages if the expert did not complete performance by a specified date and a clause providing that "time is of the essence." Another clause provided that any subsequent agreement for extra work under the contract must be in writing and signed by both parties.*

- **The exculpatory clause**
- The liquidated-damage clause
- The "time is of the essence" clause
- The extra-work clause

Note:

*"Delegation" refers to duties (not rights) under a contract. A party who wishes to have another person perform his duties under a contract delegates them. However, when performance of a duty is delegated, the delegator remains liable for the duty. The obligee can but is not required to explicitly agree to accept the delegate's performance in substitution for that of the delegator. This is known as a "novation," and the obligee must expressly agree to accept the delegate's performance in lieu of the delegator's and release the delegator from liability. Consent to the delegation is not enough to insulate the delegator from liability.*

*Generally, all contractual duties may be delegated by the party with the duty to perform the obligation (called the delegator) to a third person (known as the delegate). However, some duties are considered non-delegable, including where: (i) the other party has a substantial interest in having his original promisor perform the acts required by the contract; (ii) the contract involves special judgment or particular skills; (iii) the delegatee is a competitor of the obligee or there is a special trust or relationship between the delegator and obligee; or (iv) there is a contractual restriction on delegation.*

*A is correct. The exculpatory clause holds the builder responsible for any physical damage caused by the installation of the air conditioner. It gives the builder a substantial interest in who is performing the work; the builder chose to hire the expert based on his skillset when it comes to carrying out these types of duties. Even though the expert assured the builder that the man has an equal level of expertise, the builder did not hire the man himself and has no other reason to believe that the man is equally skilled. As such, the builder would have a substantial interest in this delegation given that the man could end up causing more damage than the expert would have if he had been the one to perform. This would cause the builder to face greater liability for damage than he had expected when hiring the expert.*

*B is incorrect. The builder has no substantial interest in which party is responsible for paying the liquidated damages clause; the man taking over the duty to pay liquidated damages instead of the expert does not materially change anything about the contract for the builder. This clause does also not fall under any of the other non-delegable duties exceptions.*

*C is incorrect. The "time is of the essence" clause also does not meet any exceptions to the general rule of delegation. Furthermore, the liquidated damages clause in the contract already protects the builder if the installation is late, so the builder's expectations under the contract remain the same.*

*D is incorrect. The purpose of the extra work clause is to ensure that any subsequent agreement to extra work would have to be in a signed writing. This clause is not a basis for supporting the builder's argument that the duties were non-delegable without his consent.*

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## 2. Will the builder succeed in an action against the expert for damages for breach of contract?

Assume that the builder orally agreed with the expert to accept the man's services and that the man performed on time but negligently installed the wrong air-conditioning equipment. With ample time remaining under the contract for commencement and completion of his performance, the expert notified the builder that he was selling his business to a man who was equally expert in lifting and emplacing equipment atop tall buildings, and that the man had agreed to "take over the expert-builder contract." An expert in lifting and emplacing equipment atop tall buildings, contracted in a signed writing to lift and emplace certain air-conditioning equipment atop a builder's building. An exculpatory clause in the contract provided that the expert would not be liable for any physical damage to the builder's building occurring during installation of the air-conditioning equipment. There was also a clause providing for per diem damages if the expert did not complete performance by a specified date and a clause providing that "time is of the essence." Another clause provided that any subsequent agreement for extra work under the contract must be in writing and signed by both parties.

- **Yes, because the builder did not agree to release the expert from liability under the expert-builder contract**
- Yes, because the builder received no consideration for the substitution of the man for the expert
- No, because by accepting the substitution of the man for the expert, the builder effected a novation, and the expert was thereby discharged of his duties under the expert-builder contract
- No, because the liquidated-damage clause in the expert-builder contract provided only for damages caused by delay in performance

Note:

"Delegation" refers to duties (not rights) under a contract. A party who wishes to have another person perform his duties under a contract delegates them, and may do so without additional consideration. Generally, all contractual duties may be delegated by the party with the duty to perform the obligation (the delegator) to a third person (known as the delegate). When performance of a duty is delegated, the delegator remains liable for the delegate's performance of that duty. The obligee can but is not required to explicitly agree to accept the delegate's performance in full substitution for that of the delegator. This is known as a "novation," and the obligee must expressly agree to accept the delegate's performance in lieu of the delegator's and release the delegator from liability. Consent to the delegation is not enough to insulate the delegator from liability.

The parties to a contract may stipulate what damages are to be paid in the event of a specific type of breach, which is called a "liquidated damages" clause.

A is correct. It is true that the builder orally agreed to accept the delegation of the expert's duties to lift and install the equipment on the building to the man. However, the builder's mere consent to the delegation did not release the expert from liability in the event of a breach. In order to fully delegate duties and be released from liability, the parties would have had to execute a novation, which acts as a full substitution of the parties. A novation would have required both the builder's consent to the delegation to the man AND the builder's release of the expert from liability under the original contract.

B is incorrect. This answer reaches the correct answer with the wrong reasoning. The builder will succeed in recovering damages against the expert for negligence, but not for lack of consideration. A delegation, as a transfer of duties under a contract, does not require separate consideration to be effective. When the expert notified the builder that he was selling his business to the man, who would take over the expert-builder contract, this was an effective delegation. However, the delegation did not release the expert from liability because no novation was executed, as stated above.

C is incorrect. This is an incorrect application of the rules for executing novations. As previously explained, when the builder accepted the delegation of duties from the expert to the man, this alone was not enough to be a novation. The builder would have had to also release the expert from liability under their original contract, which did not occur. As such, this was an effective delegation, not a novation.

D is incorrect. The liquidated damages clause was included in the contract to stipulate to damages in the event of a breach as to the timing because time was "of the essence." However, this clause did not preclude recovery for other breaches. The man negligently installed the air conditioner, albeit on time, and the builder retained the right to sue any liable parties for that breach. As such, the builder may sue the expert, who remains liable, for the negligent actions of the man.

### 3. Will their mother succeed in an action for \$500 brought against the brother after April 30?

The siblings made the agreed payments in January, February, and March. In April, however, the brother refused to make any payment and notified his sister and mother that he would make no further payments. The aged mother of a sister and brother, both adults, wished to employ a live-in companion so that she might continue to live in her own home. Their mother, however, had only enough income to pay one-half of the companion's \$2,000 monthly salary. Learning of their mother's plight, the siblings agreed with each other in a signed writing that on the last day of January and each succeeding month during their mother's lifetime, each would give their mother \$500. Their mother then hired the companion.

- Yes, because by making his first three payments, the brother confirmed his intent to contract
- **Yes, because the mother is an intended beneficiary of a contract between the siblings**
- No, because a parent cannot sue her child for breach of a promise for support
- No, because the siblings intended their payment to their mother to be gifts

Note:

*B is correct. The mother was not a party to the contract between the sister and the brother, so the only way for her to have contractual rights is if she was the intended beneficiary of the contract. For the mother to be an intended beneficiary, she must be the person to whom performance is to be given. In this case, several factors indicate that the mother is an intended beneficiary: the mother is named in the contract, the mother directly receives the payments, and the mother has a close familial relationship with the parties. Therefore, the mother is an intended beneficiary and will prevail in a suit against the brother for the \$500 payment.*

*A is incorrect. Modern contract law is based upon the objective test, which does not consider a party's private intent. The brother's intent is irrelevant. Further, whether a contract was formed is not at issue. The issue is whether the mother has contractual rights that may be asserted.*

*C is incorrect. The mother is simply asserting her rights as an intended beneficiary to the contract; her claim is not solely based on her relationship to the son. Furthermore, there is no rule of contract law which states that a parent may not sue a child.*

*D is incorrect. The promise to pay \$500 was made in exchange for a mutual promise to pay the other \$500. Because consideration was present, a contract was formed, and the \$500 payments will not be considered gifts.*

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### 4. Will the niece succeed in an action for \$1,000 against the debtor?

A debtor's \$1,000 contractual obligation to a creditor was due on July 1. On the preceding June 15, the creditor called her niece and said, "As my birthday gift to you, you may collect on July 1 the \$1,000 the debtor owes me." The creditor also called the debtor and told him to pay the \$1,000 to the niece on July 1. On July 1, the debtor, saying that he did not like the niece and wouldn't pay anything to her, paid the \$1,000 to the creditor, who accepted it without objection.

- Yes, because the creditor had effectively assigned the \$1,000 debt to her
- Yes, because the creditor's calls to the niece and the debtor effected a novation
- **No, because the creditor's acceptance of the \$1,000, without objection, was in effect the revocation of a gratuitous assignment**
- No, because the debtor cannot be compelled to render performance to an assignee whom he finds personally objectionable

Note:

*C is correct. Although contract rights generally are freely assignable, when a contract right is assigned to a party gratuitously (i.e., without receiving anything in exchange), the assignor retains the power to revoke the assignment unless and until the assignee obtains performance from the obligor. On June 15, the creditor made a gratuitous assignment to the niece of her right to collect \$1,000 from the debtor. Because the assignment was a gift, the creditor retained the power to revoke the assignment, which she did when she accepted without objection the \$1,000 payment from the debtor.*

*A is incorrect. The assignment was revocable.*

*B is incorrect. A novation did not occur on these facts.*

*D is incorrect. Contract rights are freely assignable except in very limited circumstances, such as where assignment would materially change the duty of the obligor.*

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**5. If the collector immediately sues the broker for his breach of the broker-hoarder contract, which of the following will the court probably decide?**

*Later that day, after learning by chance of the broker's dealing with the collector, the hoarder telephoned the collector and said: "Listen, the broker probably owes me at least \$2,000 in damages for refusing wrongfully to buy my coin for \$10,000 on February 1 when the market was down to \$8,000. But I'm in good shape in view of the market's recovery since then, and I think you ought to get after the so-and-so." On February 25, the market in such coins suddenly reversed and had stabilized at \$12,000 on March 1. The broker, however, had failed to obtain a specimen of the coin and repudiated his agreement with the collector when she tendered the \$12,000 agreed price on March 1. On December 1, a broker contracted with a collector to sell her one of a certain type of rare coin for \$12,000, delivery and payment to occur on the next March 1. To fulfill that contract, and without the collector's knowledge, the broker contracted on January 1 to purchase for \$10,000 a specimen of that type of coin from a hoarder, delivery and payment to occur on February 1. The market price of such coins had unexpectedly fallen to \$8,000 by February 1, when the hoarder tendered the coin and the broker repudiated.*

- **The broker wins, because the collector, if a beneficiary at all of the broker-hoarder contract, was only an incidental beneficiary**
- The broker wins, because as of March 1 neither the hoarder nor the collector had sustained any damage from the broker's repudiation of both contracts
- The collector wins, because she was an intended beneficiary of the broker-hoarder contract, under which damages for the broker's repudiation became fixed on February 1
- The collector wins, because she took an effective assignment of the hoarder's claim for damages against the broker when the hoarder suggested that the collector "get after the so-and-so."

Note:

*A contract generally only confers rights and imposes duties on the parties to the contract, not anyone else. However, two exceptions exist: (i) where the original contract confers rights and duties on a "third-party beneficiary"; or (ii) when a party seeks to transfer rights or duties under a contract to a third party, usually in the form of an assignment of rights or a delegation of duties.*

*Incidental third-party beneficiaries are those who may benefit from the contract, but that is not the primary purpose of the contract. They unintentionally or inadvertently benefit from the contract, but they have no standing to enforce contract rights.*

*When one of the parties to a contract seeks to transfer his rights and/or duties under the contract to a third party, this is called an "assignment." To be effective, an assignment requires at least an oral agreement, although some circumstances require a writing to be effective. A valid assignment requires the assignor to manifest an intent to transfer his rights under the contract completely and immediately to the assignee. This intent may be determined by examining the terms or language used to effectuate the assignment. Using the word "assign" is not necessary, and alternative words such as convey, sell, or transfer will suffice.*

*A is correct. The collector will lose because he was nothing more than an incidental third-party beneficiary of the contract between the hoarder and the broker. When the hoarder initially agreed to sell the specimen to the broker for \$10,000, the hoarder had no knowledge of the collector's interest in the deal. The primary purpose of the contract between the hoarder and the broker had nothing to do with the collector, who would have only benefitted incidentally.*

*B is incorrect. This answer reaches the correct answer with the wrong reasoning. The broker will win, but not because based on the amount of damages incurred (or not incurred) as of March 1. Not only is the collector an incidental beneficiary and therefore will lose, but the UCC dictates that damages would be calculated from the time the hoarder learned of the broker's repudiation on February 1, when the market price had fallen below the contract price.*

*C is incorrect. This is an incorrect application of the law to these facts. An intended beneficiary is a third party who is conferred rights or duties under a contract or when a party officially transfers rights or duties to a third party via assignment or delegation. These circumstances do not apply here, where the collector's interest was irrelevant to the contract between the hoarder and the broker, and he would have been merely an incidental beneficiary.*

*D is incorrect. The collector did not receive an official assignment of any rights. In order to be effective, an assignment of contract rights requires language of present transfer, which must manifest the intent to assign rights completely and immediately. This is determined by looking at the language used by the supposed assignor. Here, the phrase "I think you ought to get after the so-and-so" was insufficient to establish manifest intent by the hoarder to assign any rights under the hoarder-broker contract.*