
Performance, Breach, and Discharge

1. Which of the following will the court probably decide?

Shortly after making the contract, and before the pastry company had tendered any buns, the baked goods retailer decided that the contract had become undesirable because of a sudden, sharp decline in its customers' demand for baked buns. It renounced the agreement and the pastry company sues for breach of contract. Under a written agreement, a pastry company promised to sell its entire output of baked buns at a specified unit price to a baked goods retailer for one year. The baked goods retailer promised not to sell any other supplier's baked buns.

- The baked goods retailer wins, because mutuality of obligation was lacking in that the baked goods retailer made no express promise to buy any of the pastry company's baked buns
- The baked goods retailer wins, because the agreement was void for indefiniteness of quantity and total price for the year involved
- **The pastry company wins, because the baked goods retailer's promise to sell at retail the pastry company's baked buns exclusively, if it sold any such buns at all, implied a promise to use its best efforts to sell the pastry company's one-year output of baked buns**
- The pastry company wins, because under applicable law both parties to a sale-of-goods contract impliedly assume the risk of price and demand fluctuations

Note:
Output contracts are a special type of contract that concern the sale and purchase of goods. Specifically, in an output contract, the buyer agrees to purchase all of a supplier's output. Generally speaking, the buyer will buy all of an item that the seller can produce. Requirement contracts are agreements for the seller to sell as much of an item as the buyer requires. The Uniform Commercial Code (UCC) explicitly validates requirements and output contracts in § 2-306(2).

Requirements and output contracts do not lack mutuality of obligation because the seller will determine quantity as required to operate his plant and conduct his business in good faith and according to the commercial standard of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure.

C is correct. Under the UCC, a contract for exclusive dealing in a good imposes on the part of the seller an obligation to use best efforts to supply the good and an obligation on the part of the buyer to use its best efforts to promote the good's sale. Therefore, the baked goods retailer was under an implied obligation to use its best efforts to promote the sale of the pastry company's buns for the duration of the contract.

A is incorrect. Courts often look to the history of dealings between the parties and to the standards within the industry to determine if the buyer is acting in bad faith for breach of contract actions on requirements contracts. Here, the contract implied an obligation on the part of the baked goods retailer to use its best efforts to promote the sale of the buns.

B is incorrect. A proposed agreement that has terms too vague to form a contract is said to be void for indefiniteness. However, not every term needs to be ironclad for a contract to remain enforceable. The UCC states that even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. See UCC § 2-204(3). Output contracts are explicitly allowed by the UCC.

D is incorrect. Buyers and sellers share risk in a requirements contract. The seller assumes the risk of a buyer's business changing in such a way that the cost of fulfilling the requirements becomes unduly costly. The buyer runs the risk of changes in its financial situation. Unexpected price fluctuations may drive these risks.

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2. Which of the following should the court rule?

The parties' contract included a provision for termination by either party at any time upon reasonable notice. After six months of performance on both sides, the pastry company, claiming that its old bun-baker had become uneconomical and that it could not afford a new one, dismantled the bun-baker and began using the space for making dog biscuits. The pastry company's output of baked buns having ceased, the baked goods retailer sued for breach of contract. The baked goods retailer moves for summary judgment on liability, and the pastry company moves for summary judgment of dismissal. Under a written agreement, a pastry company promised to sell its entire output of baked buns at a specified unit price to a baked goods retailer for one year. The baked goods retailer promised not to sell any other supplier's baked buns.

- Summary judgment for the baked goods retailer, because as a matter of law the pastry company could not discontinue production of baked buns merely because it was losing money on that product
- Summary judgment for the pastry company, because its cessation of baked-bun production and the baked goods retailer's awareness thereof amounted as a matter of law to valid notice of termination as permitted by the contract
- **Both motions denied, because there are triable issues of fact as to whether the pastry company gave reasonable notice of termination or whether its losses from continued production of baked buns were sufficiently substantial to justify cessation of production**
- Both motions denied because the pastry company may legally cease production of baked buns, but under the circumstances it must share with the baked goods retailer its profits from the manufacture of dog biscuits until the end of the first year

Note:
C is correct. Under the Uniform Commercial Code (UCC), a quantity term in a contract that is measured by the output of the seller means such actual output as may occur in good faith. The pastry company is permitted under the contract to reduce its output of buns, even to discontinue bun-making entirely, but only if the reason for doing so was made in good faith rather than to avoid its obligation under the contract. Therefore there is a question of fact as to whether the pastry company's decision to discontinue bun-making was made in good faith.

A is incorrect. Summary judgment would not be appropriate for these facts because the question of whether the pastry company has breached the output contract involves an issue of material fact.

B is incorrect. Again, summary judgment would not be appropriate here. Whether the pastry company breached the contract is not an issue of law.

D is incorrect. While this answer correctly identifies that both motions should be denied, there is nothing in the contract or facts that suggest the pastry company is obligated to share the dog biscuit profits.

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3. If the landscape architect now sues the owner for damages for breach of contract, which of the following concepts best supports the landscape architect's claim?

At the owner's insistence, the written owner-architect agreement contained a provision that neither party would be bound unless the owner's law partner, an avid student of landscaping, should approve the landscape architect's design. Before the landscape architect commenced the work, the owner's law partner, in the presence of both the owner and the landscape architect, expressly disapproved the landscaping design. Nevertheless, the owner ordered the landscape architect to proceed with the work, and the landscape architect reluctantly did so. When the landscape architect's performance was 40% complete, the owner repudiated his duty, if any, to pay the contract price or any part thereof. A property owner and a landscape architect signed a detailed writing in which the landscape architect agreed to landscape the owner's residential property in accordance with a design prepared by the landscape architect and incorporated in the writing. The owner agreed to pay $10,000 for the work upon its completion. The owner's spouse was not a party to the agreement, and had no ownership interest in the premises.

- Substantial performance
- Promissory estoppel
- **Irrevocable waiver of condition**
- Unjust enrichment

Note:
Normally, if a party's duty under a contract is conditional, there is no duty to perform unless the condition occurs. However, there are a number of situations where, even though the condition does not occur, the party must nonetheless perform the duty. In such situations, the condition or its non-occurrence is said to be "excused."

A party who owes a conditional duty may indicate that he will not insist upon the occurrence of the condition before performing. In some circumstances, this willingness to forego the benefit of the condition will excuse the condition. When this occurs, the promisor is often said to have "waived" the condition.

If the party's willingness to forego the benefit of a condition occurs after the contract is formed, but before the condition fails to occur, consideration will usually be required to effectuate a valid waiver. If the condition was not a material part of the bargain, courts will usually find that a party's subsequent waiver of the condition was binding even without consideration. If the party's manifestation of waiver induces the other party to change his position in reliance on the waiver, the courts will also hold the waiver binding without consideration.

After a condition has failed to occur, the party whom the condition was intended to benefit may choose to ignore the non-occurrence and continue with their performance. Such a waiver after non-occurrence is not really a promise and therefore does not need consideration or detrimental reliance to be binding. In addition to expressly waiving a condition, a waiver will be implied by: (i) the continuation of performance by the person who would have benefitted from the condition; and (ii) the acceptance of benefits under the contract by that person.

Once a waiver has been given, it cannot be revoked if it was made after the time for the fulfillment of the condition has passed or if the other party has relied on the waiver.

Substantial performance is the standard used under common law to evaluate the performance of contracts. The parties performing the contract must meet the standard of substantial performance of the contract only, and performance does not have to be perfect. The standard of substantial performance is not met if there is a material breach by either of the parties. Substantial performance is not applicable where performance is subject to an express condition. The doctrine of substantial performance only applies to a constructive condition.

Promissory estoppel arises when a promise is made that the promisor should reasonably expect to induce action or forbearance on the part of the promise. When the promisee then relies on such a promise, a court may bind the promisor to the promise he made if injustice can only be avoided by the enforcement of the promise. The promissory estoppel doctrine requires actual reliance on the promise, and the reliance must have been foreseeable. Promissory estoppel is intended to stop the promisor from arguing that an underlying promise should not be legally upheld or enforced.

Recovery on a theory of unjust enrichment typically occurs where there was no contract between the parties, or a contract turns out to be invalid.

C is correct. Although the express condition to the owner-architect agreement never occurred (the necessary approval was not given), the owner waived the condition by ordering the work to proceed. Because the waiver occurred after the non-occurrence of the condition and the landscape architect relied on the waiver by completing 40% of the work, the owner may not revoke the waiver.

A is incorrect. This case involves an express, rather than a constructive condition, and subsequently, the doctrine of substantial performance does not apply.

B is incorrect. Promissory estoppel would not be the best theory to support the landscape architect given that it constitutes an alternative form of contract, and the architect can sue for breach of an actual contract.

D is incorrect. Unjust enrichment would not be the best theory for the landscape architect, because there was a valid contract here.

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4. Does the new count state a claim upon which relief can be granted?

Assume that on January 2 of the following year the friend's suit has not come to trial, the man has not paid the note, the friend has retained a lawyer, and the lawyer, with leave of court, amends the complaint to add a second count to enforce the promise the man made in the April 1 agreement. A man owed his friend $1,000, plus interest at 8% until paid, on a long-overdue promissory note, collection of which would become barred by the statute of limitations on June 30. On the preceding April 1, the man and his friend both signed a writing in which the man promised to pay the note in full on the following December 31, plus interest at 8% until that date, and the friend promised not to sue on the note in the meantime. The friend, having received some advice from his nonlawyer brother-in-law, became concerned about the legal effect of the April 1 agreement. On May 1, acting pro se as permitted by the rules of the local small claims court, he filed suit to collect the note.

- Yes, because the man's failure to pay the note, plus interest, on December 31 makes the friend's breach of promise not to sue before that date no longer material
- Yes, because the man's April 1 promise is enforceable by reason of his moral obligation to pay the debt
- No, because such relief would undermine the policy of the statute of limitations against enforcement of stale claims
- **No, because the man's April 1 promise was lawfully conditioned upon the friend's forbearing to sue prior to December 31**

Note:
A constructive condition is not one that is agreed on by the parties, but that courts impose as a matter of law in order to ensure fairness. The distinction between an express and a constructive condition is extremely important in relation to performance. Strict compliance with express conditions is ordinarily required. However, constructive conditions will only require substantial compliance to be satisfied.

The principal use of constructive conditions is in bilateral contracts. In a bilateral contract, each party makes one or more promises to each other, and each party's substantial performance of his promise is generally a constructive condition to the performance of any subsequent duties by the other party. The parties to a bilateral contract do not always make clear the order in which performance is to occur.

If each party's promised performance can occur at the same time as the other's, the court will normally require that the two occur simultaneously. In this situation, the two performances are concurrent conditions, which means that each party's duty to perform is constructively conditioned upon the other's manifestation of an ability and willingness to perform. The main use of concurrent conditions is in the sale of goods and land.

D is correct. The friend's suit on May 1 was a material breach of the obligation and had the effect of discharging the man's obligation to pay the note. Therefore, the man's obligation is no longer enforceable.

A is incorrect. The materiality of the breach is determined at the time that it occurs, not based on subsequent circumstances. This is because the party who first materially breaches his obligation is liable for that breach and loses the right to sue the other party, whose obligation is discharged.

B is incorrect. While the UCC does impose an obligation of good faith on the performance of every contract or duty under its purview, moral obligation is not sufficient to enforce a promise.

C is incorrect. This claim would not have been barred by any statutes of limitations because it is a wholly new claim. The friend's claim against the man was based upon the April 1 agreement, a newly-created obligation.

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5. On January 15, the lender is entitled to a judgment against the borrower for which of the following amounts?

The borrower did not pay the installments due on October 31, November 30, or December 31, and has informed the lender that she will be unable to make repayments in the foreseeable future. A borrower asked a lender to lend her $1,000. The lender replied that he would do so only if the borrower's father would guarantee the loan. At the borrower's request, the father mailed a signed letter to the lender: "If you lend $1,000 to my daughter, I will repay it if she doesn't." On September 15, the lender, having read the father's letter, lent $1,000 to the borrower, which the borrower agreed to repay in installments of $100 plus accrued interest on the last day of each month beginning October 31. The father died on September 16. Later that same day, unaware of the father's death, the lender mailed a letter to the father advising that he had made the $1,000 loan to the borrower on September 15.

- Nothing, because if he sues before the entire amount is due, he will be splitting his cause of action
- **$300 plus the accrued interest, because the borrower's breach is only a partial breach**
- $1,000 plus the accrued interest, because the borrower's unexcused failure to pay three installments is a material breach
- $1,000 plus the accrued interest, because the failure to pay her debts as they come due indicates that the borrower is insolvent and the lender is thereby entitled to accelerate payment of the debt

Note:
When a party who owes a present duty under a contract fails to perform that duty, that party has breached the contract. If this breach is severe, it will have the effect of suspending or discharging the other party's obligation to perform under the contract. This is called a total breach. A partial breach is where the breach is not material and does not relieve the aggrieved party from continuing to perform under the contract. The aggrieved party does have an immediate right to sue for damages stemming from the partial breach.

A party may make it unmistakably clear, even before his performance under a contract is due, that he does not intend to perform. When he does so, he is said to have anticipatorily repudiated the contract. Such a repudiation allows the other party to suspend and perhaps cancel his own performance.

Modern courts have held that a repudiation does not have to be expressly stated or clear to qualify as an effective repudiation. A repudiation is any possible statement by the obligor to mean that he will not or cannot perform his contractual duty. This can be through: (i) a statement by the promisor that he intends not to perform; (ii) an action by the promisor making his performance under the contract impossible; or (iii) an indication by the promisor or via some other means that the promisor will be unable to perform, although he desires to perform.

Under the doctrine of anticipatory repudiation, an unequivocal statement of unwillingness or inability to perform a future contractual obligation, if material, may be treated as a total breach of that obligation and give rise to a right to immediately recover damages for that breach. A repudiation of a duty will not operate as a total breach, however, if it occurs after the repudiating party has received all of the agreed exchange for that duty. In such a case, the non-repudiating party must wait until the obligation becomes due before enforcing it.

B is correct. The borrower failed to make three debt repayments and expressed her inability to repay the debt in the future. However, the lender cannot accelerate the debt unless the contract specified otherwise. Therefore, the lender can only recover for the three months of unpaid debt that is due and outstanding as of January 15.

A is incorrect. This is not a legally correct statement on how anticipatory repudiation works with regard to how damages will be measured. The lender can recover the amount that is due as of January 15.

C is incorrect. The breach is a minor, rather than a material breach because the lender's damages are less than a third of the total loan as of January 15. The lender may thus sue immediately for the unpaid debt from September through December.

D is incorrect. The right to accelerate debt is a material part of a contract that must be expressly contracted for by the parties in order to be enforceable and effective. The debt may not be accelerated unless the contract expressly so provides.

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6. Which of the following defenses would best serve the retailer?

Assume the following facts. When the retailer returned the 25 radios in question, it included with the shipment a check payable to the manufacturer for the balance admittedly due on all <u>other</u> merchandise sold and delivered to the retailer. The check was conspicuously marked, "Payment in full for all goods sold to the retailer to date." The manufacturer's credit manager, reading this check notation and knowing that the retailer had also returned the 25 radios for full credit, deposited the check without protest in the manufacturer's local bank account. The canceled check was returned to the retailer a week later. In an action by the manufacturer against the retailer for damages due to return of the 25 radios, the manufacturer introduces the written agreement, which expressly permitted the buyer to return defective radios for credit but was silent as to the return of undefective radios for credit. The retailer seeks to introduce evidence that during the three years of the agreement it had returned, for various reasons, 125 undefective radios, for which the manufacturer had granted full credit. The manufacturer objects to the admissibility of this evidence. A radio manufacturer and a retailer, after extensive negotiations, entered into a final written agreement in which the manufacturer agreed to sell and the retailer agreed to buy all of its requirements of radios, estimated at 20 units per month, during the period January 1, 1988, and December 31, 1990, at a price of $50 per unit. A dispute arose in later December, 1990, when the retailer returned 25 undefective radios to the manufacturer for full credit after the manufacturer had refused to extend the contract for a second three-year period.

- The manufacturer's deposit of the check and its return to the retailer after payment estopped the manufacturer thereafter from asserting that the retailer owed any additional amount
- **By depositing the check without protest and with knowledge of its wording, the manufacturer discharged any remaining duty to pay on the part of the retailer**
- By depositing the check without protest and with knowledge of its wording, the manufacturer entered into a novation discharging any remaining duty to pay on the part of the retailer
- The parties' good faith dispute over return of the radios suspended the duty of the retailer, if any, to pay any balance due

Note:
One way a contract may be discharged is by an accord and satisfaction. An "accord" is an agreement in which one party to an existing contract agrees to accept, in lieu of the performance that she is supposed to receive from the other party to the existing contract, some other, different performance. “Satisfaction” is the performance of the accord agreement. Its effect is to discharge not only the original contract, but also the accord contract.

In general, an accord must be supported by consideration. Where the consideration is of a lesser value than the originally bargained-for consideration in the prior contract, it will be sufficient if the new consideration is of a different type or if the claim is to be paid to a third party. A frequently-encountered problem involves the offer of a smaller amount than the amount due under an existing obligation in satisfaction of the claim, i.e., partial payment of an original debt. The majority view is that this will suffice for an accord and satisfaction if there is a “bona fide dispute” as to the claim or there is otherwise some alteration, even if slight, in the debtor’s consideration. The accord, taken alone, will not discharge the prior contract. It merely suspends the right to enforce it in accordance with the terms of the accord contract.

With an accord, the parties to an existing obligation agree to accept a different future performance in satisfaction of the obligation. If the performance is carried out (satisfaction), the duty under the original contract is discharged; but if it is not carried out, the original contract remains enforceable. By contrast, in a modification, the parties to an existing obligation agree to a different agreement. The duties of the parties change immediately, and the original terms are no longer in effect. An accord and satisfaction most often arises when payment or performance is overdue or there is a dispute as to the performance that is due. A modification typically occurs before performance is due.

If a monetary claim is uncertain or is subject to a bona fide dispute, an accord and satisfaction may be accomplished by a good faith tender and acceptance of a check when that check (or an accompanying document) conspicuously states that the check is tendered in full satisfaction of the debt. UCC § 3-311.

The consideration doctrine is designed to enforce promises that are “bargained for.” There are some promise which, although the promisor makes them without bargaining for anything in return, nonetheless induce the promise to rely to his legal detriment. This situation is known as promissory estoppel, which arises when a promise is made that the promisor should reasonably expect to induce action or forbearance on the part of the promise. When the promisee then relies on such a promise, a court may bind the promisor to the promise he made if injustice can only be avoided by the enforcement of the promise. The promissory estoppel doctrine requires actual reliance on the promise, and the reliance must have been foreseeable.

If one of the parties seeks to transfer her rights and/or duties under a contract to a third party, this is called an “assignment.” In the event that the party makes the same assignment to another third party, a question arises regarding which third party will prevail. The second assignee will prevail and have priority if she obtains a novation (which is an agreement between the two original contracting parties allowing for the substitution of a new party for an existing one), which supersedes the obligation running to the assignor in favor of the new one running to her.

B is correct. The retailer would be best served by arguing that the manufacturer's deposit of the check discharged the retailer's remaining duty to pay, amounting to an accord and satisfaction. Under the rules of accord and satisfaction, a debtor may make an offer to settle a dispute by offering a check marked "payment in full." If the notation was sufficiently plain that the creditor should have understood it, and if the amount owed to the creditor is an unliquidated sum, then cashing the check without protest amounts to an acceptance of the offer of an accord and satisfaction of the debt. Although mere payment of a lesser sum would not be sufficient consideration to support the accord, consideration is furnished where the amount owed to the creditor is genuinely in dispute. Because there was a good faith dispute between the retailer and the manufacturer relating to the amount that the retailer owed, the check that was sent to settle the dispute furnished sufficient consideration to support the manufacturer's implicit promise to discharge the debt.

A is incorrect. This is not a case involving estoppel because there was a successful accord and satisfaction, which fully discharged any remaining duty under the contract. As such, when the manufacturer cashed the retailer's check without protest, it accepted the accord and satisfaction and fully discharged the debt.

C is incorrect. There is no evidence of a novation here, which requires the assignment of one party's contractual rights or obligations to a third party and a dispute as to a successive assignment. This is not the case here, where the contractual dispute is between two contracting parties - the retailer and the manufacturer.

D is incorrect. As explained above, no duty was suspended here because the manufacturer accepted the accord and satisfaction, and the debt (i.e., the remaining duty under the contract) was fully discharged.

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7. If the man sues distributor on February 2 for breach of contract, which of the following is the distributor's best defense?

The man did not give the distributor notice of the resale until January 25, and the distributor received it by mail on January 26. In the meantime, the value of the engine had unexpectedly increased about 75% since December 1, and the distributor renounced the agreement. In a writing signed by both parties on December 1, a man agreed to buy from a distributor a gasoline engine for $1,000, delivery to be made on the following February 1. Through a secretarial error, the writing called for delivery on March 1, but neither party noticed the error until February 1. Before signing the agreement, the man and the distributor orally agreed that the contract of sale would be effective only if the man notified the distributor in writing no later than January 2 that the man had arranged to resell the engine to a third person. Otherwise, they agreed orally, "There is no deal." On December 15, the man entered into a contract with a mechanic to resell the engine to the mechanic at a profit.

- The secretarial error in the written delivery-term was a mutual mistake concerning a basic fact, and the agreement is voidable by either party
- **The man's not giving written notice by January 2 of his resale was a failure of a condition precedent to the existence of a contract**
- In view of the unexpected 75% increase in value of the engine after December 1, the distributor's performance is excused by the doctrine of commercial frustration
- The agreement, if any, is unenforceable because a material term was not included in the writing

Note:
B is correct. A condition is an event that is not certain to occur, which must occur, unless excused, before performance under a contract becomes due. The man and the distributor agreed that each party's obligation under the contract of sale was expressly conditioned upon the man giving written notice of resale to the distributor on or before January 2. Since such notice was not given until January 26, any obligation that the distributor undertook under the contract of sale was excused due to the nonoccurrence of the condition. Although the express condition was not written into the contract, it was orally agreed to by both parties as being a condition upon which the contract was made. Thus, although it was not included in writing, it is still an express condition that was waived.

A is incorrect. The facts do not suggest that the delivery date relates to a basic assumption of the contract, and therefore the contract does not appear to be voidable on grounds of mistake.

C is incorrect. Even a dramatic increase in the value of the gasoline engine would not provide a basis for excuse on grounds of frustration (in any event, frustration of purpose is a defense available to buyers rather than sellers).

D is incorrect. A writing may be enforceable even if it omits a material term.

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8. If the man sues the distributor on February 2 for breach of contract, which of the following concepts best supports the man's claim?

On December 16, the man notified the distributor by telephone of the man's resale agreement with the mechanic, and explained that a written notice was not feasible because the man's secretary was ill. The distributor replied, "That's okay. I'll get the engine to you on February 1, as we agreed." Having learned, however, that the engine had increased in value about 75% since December 1, the distributor renounced the agreement on February 1. In a writing signed by both parties on December 1, a man agreed to buy from a distributor a gasoline engine for $1,000, delivery to be made on the following February 1. Through a secretarial error, the writing called for delivery on March 1, but neither party noticed the error until February 1. Before signing the agreement, the man and the distributor orally agreed that the contract of sale would be effective only if the man notified the distributor in writing no later than January 2 that the man had arranged to resell the engine to a third person. Otherwise, they agreed orally, "There is no deal." On December 15, the man entered into a contract with a mechanic to resell the engine to the mechanic at a profit.

- Substantial performance
- Nonoccurrence of a condition subsequent
- **Waiver of condition**
- Novation of buyers

Note:
A condition is an event that must occur before a party is required to perform under a contract. A condition may be express, meaning the parties agreed to it, or constructive, meaning the court supplied it. Rest. 2d. § 226. When the parties have agreed to an express condition, it will normally be necessary to strictly comply with that condition before performance will be due. However, in some situations, even though a condition has not occurred, a party must nonetheless perform their duty. The condition or its non-occurrence is said to be "excused" when this happens.

A party who is only required to perform a duty after a condition has been satisfied may nevertheless indicate that he will perform without the condition being satisfied. This decision to forego the benefit of a condition operates as an excuse of that condition, also known as "waiver." If a contract has already been formed and a party excuses an unperformed condition through waiver, consideration will be necessary for the waiver to be valid. However, there are several exceptions to this requirement for consideration:

(i) If the condition was not material to the original bargain, a party's waiver of the condition will typically be valid even without consideration.

(ii) If a party indicates that he will waive a condition and the other party relies on that purported waiver, the waiver will be valid without consideration.

(iii) When a condition does not occur, if the party owed the conditional duty ignores this fact and performs anyway, it will be a binding waiver without consideration or reliance.

Aside from expressly waiving a condition, a party may imply a waiver by: (i) continuing performance even though the condition has not occurred; and (ii) accepting benefits from the contract.

C is correct. This question is asking which basis will allow the man to win and enforce the contract against the distributor. The agreement between the man and the distributor was subject to an express condition. They agreed that the contract of sale would not come into effect unless the man provided written notice of re-sale on or before January 2. This condition, in fact, did not occur. Although non-occurrence of such an express condition would normally discharge each party's obligation under the contract, this may not be the case if the condition was excused through waiver. Here, the distributor waived the non-occurrence of the condition when she verbally agreed on December 16 to send the engine without written notice, which excused the requirement that the man provide written notice per the condition.

A is incorrect. As a general rule, an express condition must be strictly satisfied before performance will be due. As such, substantial performance of a condition is insufficient when a condition is express.

B is incorrect. This answer is incorrect for multiple reasons. First, the condition at issue is a condition precedent (meaning it must occur prior to performance due) as opposed to a condition subsequent (which is required after performance). Second, when "non-occurrence" alone operates to excuse a condition precedent, it is typically because a condition has already failed to occur and the party who would have benefitted from the condition simply ignores the non-occurrence and continues performing. This is not the fact pattern here, where the condition was waived prior to performance.

D is incorrect. There are no facts provided that indicate the existence of a novation, so this would not be an effective basis for the man to prevail.

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9. In an action against the petroleum dealer for breach of contract, the wife probably will

During the first month of the contract, the taxi fleet owner purchased substantial amounts of his gasoline from a supplier other than the petroleum dealer, and the petroleum dealer thereupon notified the wife that he would no longer place his advertising with her agency. The owner of a fleet of taxis contracted with a dealer in petroleum products for the purchase and sale of the taxi fleet owner's total requirements of gasoline and oil for one year. As part of that agreement, the petroleum dealer also agreed with the taxi fleet owner that for one year the petroleum dealer would place all his advertising with the taxi fleet owner's wife who owned her own small advertising agency. When the wife was informed of the owner-dealer contract, she declined to accept an advertising account from the soap company because she could not handle both the petroleum dealer and the soap company accounts during the same year.

- Succeed, because she is a third-party beneficiary of the owner-dealer contract
- Succeed, because the taxi fleet owner was acting as the wife's agent when he contracted with the petroleum dealer
- **Not succeed, because the failure of a constructive condition precedent excused the petroleum dealer's duty to place his advertising with the wife**
- Not succeed, because the wife did not provide any consideration to support the petroleum dealer's promise to place his advertising with her

Note:
A constructive condition is one not agreed on by the parties even by implication, but which courts impose as a matter of law, in order to ensure fairness. The distinction between an express and a constructive condition is extremely important in relation to performance. Strict compliance with express conditions is ordinarily required. However, constructive conditions will only require substantial compliance to be satisfied.

The principal use of constructive conditions is in bilateral contracts. In a bilateral contract, each party makes one or more promises to each other, and each party's substantial performance of his promise is generally a constructive condition to the performance of any subsequent duties by the other party. The parties to a bilateral contract do not always make clear the order in which performance is to occur.

In the normal bilateral contract, a court will presume that the promises are in exchange for each other and will treat the promises as being mutually dependent, meaning each party's duty of performance is constructively conditional upon the other's substantial performance of all previous duties.

For purposes of a constructive condition, where one performance will take a period of time to complete while the other can be completed in an instant, completion of the longer performance is a condition precedent to the shorter performance. A party's obligation to perform a contractual duty is excused if the other party fails to satisfy a condition precedent.

Implicit in a requirements contract for the purchase and sale of a good is the buyer's obligation to purchase all of its requirements for the good exclusively from the seller for the duration of the contract.

An intended beneficiary benefits from a contract by acquiring rights under the contract. Intended beneficiaries also have the ability to enforce the contract once those rights have vested.

A promise is supported by consideration if two things are true: (i) the promisee is giving up something of value, or circumscribes his liberty in some way to suffer a legal detriment; and (ii) the promisor makes his promise as part of a bargained-for exchange for the promisee's legal detriment.

C is correct. The taxi fleet owner's agreement to purchase its total requirements for gasoline and oil from the petroleum dealer for one year rendered its purchase of substantial amounts of gasoline from a competitor a material breach. This material breach justified the petroleum dealer's repudiation of its obligation to place advertising with the wife.

A is incorrect. Even if the wife was considered an intended third party beneficiary, the petroleum dealer can raise any defense against her that he can raise against the taxi fleet owner (i.e., that the taxi fleet owner committed a material breach).

B is incorrect. The facts show that only the taxi fleet owner was party to the contract with the petroleum dealer; the wife was, if anything, only an incidental beneficiary. An intended beneficiary benefits from a contract by acquiring rights under the contract. Intended beneficiaries also have the ability to enforce the contract once those rights have vested.

D is incorrect. The consideration supporting the petroleum dealer's obligation to the wife was the taxi fleet owner's promise pursuant to the requirements contract.

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10. Which of the following is an accurate statement?

On May 15 at 1 a.m., the Coast Guard had issued offshore "heavy weather" warnings and prohibited all small vessels the size of the woman's from leaving the harbor. This prohibition remained in effect throughout the day. The father did not appear at all on May 15, because he had heard the weather warnings on his radio. A woman owns an exceptionally seaworthy boat that she charters for sport fishing at a $500 daily rate. The fee includes the use of the boat with the woman as the captain, and one other crew member, as well as fishing tackle and bait. On May 1, a father agreed with the woman that the father would have the full-day use of the boat on May 15 for himself and his family for $500. The father paid an advance deposit of $200 and signed an agreement that the deposit could be retained by the woman as liquidated damages in the event the father canceled or failed to appear.

- **The contract is discharged because of impossibility, and the father is entitled to return of his deposit**
- The contract is discharged because of mutual mistake concerning an essential fact, and the father is entitled to return of his deposit
- The contract is not discharged, because its performance was possible in view of the exceptional seaworthiness of the woman's boat, and the father is not entitled to return of his deposit
- The contract is not discharged and the father is not entitled to return of his deposit because the liquidated-damage clause in effect allocated the risk of bad weather to the father

Note:
A is correct. A contract may be rescinded on grounds of supervening impossibility where a party's performance is made impossible without his fault due to the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. Where a contract has been rescinded on grounds of supervening impossibility, a party may obtain restitution of any benefit conferred by way of part performance of the contract. Because the Coast Guard prohibited vessels such as the woman's from leaving the harbor on the afternoon of May 15 as a consequence of bad weather, performance of the woman-father contract was rendered impossible, and the father should successfully obtain restitution of the $200 deposit.

B is incorrect. The impossibility of performance was due to a supervening event (the occurrence of inclement weather on May 15) and not a mistake of the parties at the time of the contract (May 1).

C is incorrect. The Coast Guard's prohibition effectively prevents the woman from performing the contract.

D is incorrect. The liquidated damages clause cannot be construed as an allocation of risk of bad weather, as it specifies that the deposit is to be retained by the woman only in the event of breach by the father.
