Welcome to this podcast on Discharge of Duties brought to you by CALI. I am Professor Jennifer S. Martin.

The topic of this podcast is when there is a discharge of duties such that parties do not have to perform their contractual obligations and cannot demand performance under the contract from the other party. Consideration is required to support enforcement of an agreement, including a modification of a contract resulting in a discharge of duties. In this podcast, we will look at discharge by rescission, substituted performance, substituted contract, novation, and accord and satisfaction. We will also look at when a discharge is enforceable where it is supported by consideration, including where there is use of an instrument under U.C.C. § 3-311. Specific state laws on settlement of debts are not within the scope of this podcast, but may provide additional methods to discharge duties when the parties follow the state law.

Recall that in forming a contract we require a bargain comprised of a manifestation of mutual assent and consideration or some other justification for enforcing the promises. For purposes of this podcast, presume that mutual assent and consideration to form a contract are present. In order for a discharge of a contract properly formed to be effective, however, the pre-existing duty rule applies, and the discharge must be supported by consideration. Meaning, the obligee (the person who is owed a duty under the contract) must receive something different or additional from the obligor (the person who owes a duty under the contract). Recall that in order to constitute consideration, a performance or return promise has to be bargained for. In order to satisfy the bargained-for element, each party must seek something from the other in exchange for their own promise.

There are several ways whereby changes to contracts result in a discharge of duties. These include rescission, substituted performance, substituted contract, novation, and accord and satisfaction. *See* Restatement (Second) of Contracts §§ 273-283. Let’s take a quick look at these concepts before turning to some examples. First, an agreement for mutual recession is when both parties agree to rescind a contract by making some kind of promise-for-promise agreement to discharge their obligations. *See* Restatement (Second) of Contracts § 283. Second, a substituted performance is where we have a promise of a different performance in satisfaction of an existing duty. *See* Restatement (Second) of Contracts
§ 278. Third, a substituted contract is where the parties replace the existing contract with a completely new one in satisfaction of the existing duties. *See* Restatement (Second) of Contracts § 279. Fourth, a novation is a substituted contract where we have a new party included in the substituted contract. *See* Restatement (Second) of Contracts § 280. Finally, an accord and satisfaction is where the obligee agrees to a substituted performance by the obligor in satisfaction of an existing duty; we refer to the agreement as the accord, with the satisfaction being the performance of the accord. With accord and satisfaction, the original duty is suspended and not discharged until the accord is performed. If the accord is not performed, the obligee can bring suit on the original duty or the accord. *See* Restatement (Second) of Contracts § 281. Let’s now look at each of these in turn.

First, let’s begin with an agreement for mutual rescission. Again, this is where both parties agree to discharge all remaining duties under a contract. The consideration for a rescission is present simply due to each party providing the discharge to the other. As such, if the parties so agree, all remaining duties under the contract are in most cases discharged. Let’s look at three examples.

Hypothetical #1. Sara and Marshall make a contract whereby Sara promises to provide clarinet lessons to Marshall and Marshall promises to pay $60 per lesson. After making the contract, Sara gets an offer to play with an orchestra out of town and makes an offer to Marshall to rescind the contract. Marshall accepts. This is an agreement of mutual rescission. Here, both parties are seeking the discharge of the other in exchange for their own discharge, so there is consideration. The duties of both parties are discharged.

Hypothetical #2. Sara and Marshall make a contract whereby Sara promises to provide clarinet lessons to Marshall and Marshall promises to pay $60 per lesson. After making the contract, Sara provides a lesson, but Marshall discovers he cannot pay. Sara tells Marshall, “Don’t worry about it, you don’t need to pay me the $60.” Here, this is not an agreement of mutual rescission because Marshall has not provided any consideration to Sara, so the duties of both parties are not discharged. It is possible that this might be construed as a gift by Sara to Marshall, but this does not change the result and the duty is not discharged.

Hypothetical #3. Andy and Bart make a contract under which Andy promises to paint Bart’s house and Bart promises to pay Andy $1,000. After starting the painting, Andy finds that he will lose money by finishing than by giving it up, and Andy makes an offer to rescind the contract and Bart accepts. This is an agreement of mutual rescission because the parties have given up and abandoned their contract.

Let’s turn to substituted performance, which is where the parties agree that the obligee will accept a different *performance* (not a promise) from the obligor than the one due under the contract in full or partial satisfaction of the duty under the contract. The consideration for the substituted performance arises from the party getting the substituted performance and the other party providing the substituted performance, so long as there really is a change in the performance. As such, if the parties so agree, all duties under the original contract are discharged. Let’s look at two examples.

Hypothetical #4. Marshall owes Sara $60 for clarinet lessons. Marshall offers to Sara that he will give her his music books in full satisfaction of the $60 debt, and Sara accepts. Here, both parties have agreed to accept the new performance of the music books in exchange for the $60, so there is consideration. Marshall’s debt to Sara is discharged.

Hypothetical #5. Marshall owes Sara $60 for clarinet lessons. Marshall offers to pay Sara $30 in full satisfaction of the $60 debt, and Sara accepts. While there is a change in the obligation of Marshall here, there is no consideration where the amount due to Sara is liquidated (meaning fixed by the parties) and owing. Even though Sara agreed to take $30 on a $60 debt, this is not a substituted performance because Marshal had a pre-existing duty to pay the $30. Marshall’s debt to Sara is only discharged to the extent of $30.

Let’s now turn to substituted contracts, which is where there is a new contract given in satisfaction of an obligor’s existing duty. The distinguishing feature of a substituted contract is that it is a new contract in replacement of an earlier contract of the parties. The parties are now bound by the new contractual obligations and are answerable for breach of the new contract if they do not perform. Here, again, the substituted contract results in a discharge of the prior contractual obligations of the parties. Let’s look at three examples.

Hypothetical #6. Emma agrees to lease a studio apartment for eleven months from Overlook for $1100 per month. Emma gets a dog and needs a larger apartment. Emma offers to Overlook to lease a one bedroom apartment for the eleven months for $1200 per month in satisfaction of Emma’s duty to lease the studio apartment. Overlook accepts. The contract is a substituted contract and Emma’s duty to lease the studio apartment is discharged. There is not a problem with consideration here as the new bargain consists of the promise by Emma for $1200 monthly in exchange for the one bedroom apartment. Emma is bound to pay the $1200 for the lease of the one bedroom apartment, but has no obligations for the studio apartment.

Hypothetical #7. Emma owes Overlook $1200 for rent that is undisputed. Emma promises to pay Overlook $700 in two weeks if Overlook will accept her promise in full satisfaction of the debt, and Overlook accepts. This is not a true substituted contract as it does not provide new consideration for a new bargain; Overlook is simply accepting a promise of a lesser sum of money on a liquidated debt. Emma’s debt is not discharged.

Hypothetical #8. Andy and Bart make a contract under which Andy promises to paint Bart’s house in Minnesota by July 1, and Bart promises to pay Andy $1000. On April 1, Andy offers to paint Bart’s summer home in Florida if Bart will accept his promise in satisfaction of Andy’s promise to paint Bart’s Minnesota home and Bart accepts. This is a substituted contract and the duty to paint the home in Minnesota is discharged. Andy is bound to paint the home in Florida and Bart is bound to pay the $1000.

Let’s look at novation. Remember that a novation is like a substituted contract, but includes a party who was not a party to the original contract. The parties are bound by the new contract and the obligations under the prior contract are discharged. Let’s look at two examples.

Hypothetical #9. Emma agrees to lease a studio apartment for eleven months from Overlook for $1100 per month. Emma decides to get a roommate, Matty, so they will need a larger apartment. Emma offers to Overlook that she and Matty will agree to lease a two bedroom apartment for the eleven months for $1400 per month in satisfaction of Emma’s duty to lease the studio apartment. Overlook accepts. The contract is a novation and Emma’s duty to lease the studio apartment is discharged. There is not a problem with consideration here as the new bargain consists of the promise by Emma and Matty for $1400 monthly in exchange for the two bedroom apartment. Emma and Matty are bound to pay the $1400 for the lease of the two bedroom apartment, but Emma has no obligations for the studio apartment.

Hypothetical #10. Andy and Bart make a contract under which Andy promises to paint Bart’s house and Bart promises to pay $1000. Andy sells the painting business to Clara, who promises Andy that she will paint the home for Bart if Bart agrees to accept the painting by Clara in substitution for Andy’s duty. Bart accepts the new arrangement with Clara. This is a novation. Notice that now instead of having Andy and Bart as part of the contractual obligations, we have a substituted contract involving a new party, Clara.

We have one more method of discharge to look at -- accord and satisfaction. An *“accord”* is a contract in which a party promises to accept a different performance in exchange for an existing duty. In a substituted contract, the *promise* discharges the original duty, but in an accord only the *performance* of the accord discharges the original duty. The making of the accord suspends the original obligation until the new performance is rendered, at which point the original obligation is discharged. The performance of the new obligation is called the *“satisfaction.”* If the obligor does not perform the new obligation as promised, then the obligee can bring suit on either the original promise or on the accord. Let’s look at some examples.

Hypothetical #11: I owe Aaron $60 for dog biscuit purchases, and I tell Aaron, “Sorry I haven’t enough money. Would you take $40 to fully satisfy the debt”? Aaron says, “Yes.” Now if we think about this, it might seem that we have an accord, meaning we made an agreement, and I suppose we might even have the satisfaction if I pay him the $40. The question, however, is whether the payment of $40 on a $60 debt can discharge the debt in light of the pre-existing duty rule. After all, Aaron has still given up the same dog biscuits and now he’s only obtained $40 in satisfaction of the debt. Moreover, we don’t have any reason for the change, other than the fact that I simply don’t have the money. This is not an accord and satisfaction because there is no consideration.

Hypothetical #12. Let’s presume the same facts as in Hypothetical #11 and that I still owe Aaron $60 for dog biscuit purchases, but now I say “Sorry I don’t have enough money, but would you take $40 and a pound of fresh blueberries from my garden to fully satisfy the debt?” Aaron agrees. Now we have a different situation entirely because now I have received the dog biscuits and Aaron, instead of getting $60, is going to get my promise of $40 and the fresh blueberries from my garden. This is an accord. When I give Aaron the $40 and the blueberries, there has been satisfaction, and the $60 debt is discharged. Of course, if I fail to pay the $40 and provide the blueberries, Aaron can bring suit for the $60 or on the accord.

Hypothetical #13. Andy owes Bart $1,000. They make an agreement that Andy will paint Bart’s house in satisfaction of the debt. Andy paint’s Bart’s house. There is an accord when the agreement for the painting is made and a satisfaction when Andy paints the house. Andy’s obligation to pay Bart $1000 is now discharged due to the accord and satisfaction.

Before we conclude, let’s take a quick look at accord and satisfaction by use of an instrument under U.C.C. § 3-311. This rule permits an accord and satisfaction by an instrument (most often a check) tendered by the obligor in good faith where the claim is unliquidated or subject to dispute and the obligee obtains payment on the instrument (most often by cashing the check). There are some specific rules for these accords, though. First, the accord and satisfaction is only effective if the obligor provides a conspicuous notice to the obligee that the instrument is in full satisfaction of the debt. Second, a “repayment” rule provides that an obligee that accepts payment can avoid the accord and satisfaction by tendering repayment in 90 days after payment by the instrument. Third, an “organizational” rule provides that an obligee that is an organization can avoid an unexpected accord and satisfaction under this provision by prior conspicuous notice to the obligor requiring such accords to be sent to a particular person, office or place, but in such cases, the organization cannot use the repayment method already mentioned. Finally, irrespective of the repayment or organizational rules, a claim is still discharged in most cases where the obligor proves that the obligee knew the instrument was tendered in full satisfaction of the claim and the obligee received payment (typically by cashing the check). Let’s look at two examples.

Hypothetical #14. Marshall owes Sara $60 for clarinet lessons. Marshall writes a check to pay Sara $30 with a note that the payment is in full satisfaction of the $60 debt, and Sara cashes the check. This is not an accord and satisfaction under § 3-311 because the amount was not unliquidated. Even though Sara cashed the check, Marshall’s debt to Sara is only discharged to the extent of $30.

Hypothetical #15. Bart claims Andy owes him $1,000 for the painting of Andy’s home, but there is a dispute about the amount owed due to the quality of the work done by Bart. Andy writes a check to pay Bart $750 with a note that the payment of the $750 is in full satisfaction of the $1000 debt and Bart cashes the check. Here, there is an accord and a satisfaction when Bart cashes the check as the amount due was unliquidated and subject to dispute. Andy’s obligation to pay Bart is now discharged due to the accord and satisfaction.

At this point, you should be able to explain, identify, and apply each of the methods by which parties may seek discharge to contractual duties: rescission, substituted performance, substituted contract, novation, and accord and satisfaction. You should be able to explain when attempts to discharge duties using one of these methods are not enforceable due to lack of consideration for the discharge.

I hope you’ve enjoyed this podcast on Discharge of Duties.

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