Welcome to this podcast on Modifications and the Pre-existing Duty Rule brought to you by CALI. I am Professor Jennifer S. Martin.

The topic of this podcast is when contract modifications are not enforceable due to the pre-existing duty rule. Consideration is required to support enforcement of an agreement, including a modification to an agreement. In this podcast, we will look at when the pre-existing duty rule renders modifications unenforceable, but also when the modern common law rule and the rule of UCC § 2-209 permit enforcement of some modified agreements in the absence of new consideration.

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 is met. As such, we will focus on consideration. 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.

Let’s consider hypothetical #1. Suppose I say to Aaron, “Will you watch my dogs for $50 per day for 3 days?”, and Aaron replies, “Sure.” The consideration in this contract would be that I am seeking the promise of dog watching for three days from Aaron in exchange for my promise of $50 per day totaling $150. Aaron is seeking my promise of the $150 in exchange for his promise of watching the dogs for three days.

One of the issues that arises with consideration, though, is that of modification of contracts. With modifications, there is already a contract. Yet, the parties desire a change to the contract after formation, but while still executory, meaning the parties have not fully performed the contract. Modifications raise the issue of whether there is consideration for the modification and whether the modification is enforceable under the pre-existing duty rule.

The pre-existing duty rule provides that if the parties have a contract for which they owe a legal duty to each other, and presuming it is not doubtful or subject to any honest dispute, then we cannot enforce a modification to that contract without a change to the obligations of both parties. See Restatement (Second) of Contracts § 73. That is, performance of a legal duty already owed is not consideration for a new bargain. However, of course, if a similar, yet different, performance is agreed to or somehow we change the consideration of the parties in a way that is more than just a pretense, then of course, the promises are supported by consideration.

Let’s look at an illustration from the Restatement and how the presence of a legally existing duty may prevent enforcement of promises. Illustration 4. A, an architect, agrees with B to superintend a construction project for a fixed fee. During the course of the project, without excuse, A takes away his plans and refuses to continue, and B promises him an extra fee if work will resume. A’s resumption of work is not consideration for B’s promise of an extra fee. The reason for this result is that A’s already owed a legal duty to B to work for the set fee. As such, there is no consideration to support the modified agreement requiring B to pay the extra fee.

But, look at the same illustration, but slightly changed. A, an architect, agrees with B to superintend a construction project for a fixed fee. During the course of the project, B promises A an extra fee if A will superintend the project and revise the architectural plans. A’s work of superintending the project and revising the plans is consideration for B’s promise of an extra fee. The reason for this result is that A’s legal duty to work for the set fee has now changed. As such, there is consideration to support the modified agreement requiring B to pay the extra fee.

Why do we have this rule? In cases where there is already a legal duty to perform under the contract we might ask why parties would agree to a change whereby one party only would be subject to an increased or perhaps decreased burden or benefit. It creates a suspicion that the transaction is really a gift or a mistake or even unconscionable. Perhaps, there is duress or some type of hold-up game to get the other party to do something that they would not have otherwise done. Due to these suspicions, traditionally contract law has not enforced modifications to contracts, unless there is new consideration.

Let’s consider the well-known case of *Alaska Packers Association v. Domenico*, 117 F. 99 (1902). The owner of a salmon cannery had a contract with a group of sailors who were to operate fishing boats in remote northern waters. The cannery would pay the sailors $50 for the season plus 2 cents per fish caught. At some point later on, and when it was too late for Alaska Packers to hire other sailors, the sailors threatened to stop work unless the cannery agreed to pay them $100 plus the 2 cents per fish. The cannery agreed, but when it came to paying the sailors, the cannery didn’t pay the sailors the extra increased amount. In litigation, the court found the cannery’s promise to come through with the extra money for the sailors was given for no consideration, and, therefore, the cannery need not pay the increased amount. The pre-existing duty rule bars enforcement of the agreement as modified, so the sailors could only collect the original $50 plus the 2 cents per fish.

The consideration in the *Alaska Packers* case might be described something like this: the fishermen were seeking the promise of $50 per season and 2 cents per fish in exchange for their own promise of catching the fish. The cannery of course was seeking the promise of the sailors to catch the fish in exchange for the cannery’s promise of $50 per season and 2 cents per fish. Of course, as modified, the fishermen are still providing the same promise to catch the fish, but they want a promise for an increased sum of money. The cannery supposedly was seeking the promise of the same catching of the fish, but now for their own promise for the $100 per season plus 2 cents per fish. The problem with the pre-existing duty rule in this case arises because only the obligation of one party, the cannery, has been changed. This case is one where we have concerns that the sailors are employing a hold-up game to extract more money from the cannery for the same work. The pre-existing duty rule applies such that the modification of the contract is not enforceable.

Let’s consider hypothetical #2. Again, I ask Aaron, “Will you watch my dogs for $50 per day for 3 days?”, and Aaron says “Sure,” but then later, I tell Aaron I will be away longer than expected and ask him to watch the dogs for 5 days. Aaron says, “Sure.” Now presuming I am going to be paying the same price per day, I would now be seeking a promise of dog watching for 5 days in exchange for my return promise of $50 per day for a total of $250. Aaron would be seeking the promise from me of $250 in exchange for his promise of watching the dogs for 5 days. Notice in this case the consideration is changed on both sides. Aaron will now watch the dogs for 5 days, and he will receive $250. Aaron’s obligation has been changed, and my obligation has also been changed. This modification does not raise issues under the pre-existing duty rule.

But suppose we look at hypothetical #3. Again, I say, “Will you watch my dogs for $50 per day for 3 days?”, and Aaron replies, “Sure.” Later on, though, I say, “I will be away longer than expected. Will you watch the dogs for 5 days but still for $150 total?” Aaron says, “Sure.” In this case, Aaron is still going to get paid $150, but his obligation has now increased to watching the dogs for 5 days, but I am paying the same $150 in exchange for getting 5 days of dog watching. This would violate the pre-existing duty rule as Aaron is getting the same amount of money for more work. The contract as modified is not enforceable.

Sometimes, the concerns about threat or undue pressure might not be present, and a modification should be enforceable. Accordingly, the pre-existing duty rule has an exception, a modern rule which is stated in Restatement § 89. This rule validates some modifications in the absence of new consideration. In particular, modifications are enforceable where the modification is fair and equitable in light of circumstances not anticipated by the parties when the contract was made.

Illustration 1 to Restatement § 89 is helpful: By written contract, A agrees to excavate a cellar for B at a certain price, and solid rock is unexpectedly encountered. A notifies B, and they agree that A will remove the rock at a price which is reasonable but nine times the original price. A completes the job. Here, B would be bound to pay the increased amount because the modification is fair and equitable in light of some unforeseen circumstances -- the solid rock that was discovered in the excavation for the project.

The well-known case of *Angel v. Murray* applies the rule of Restatement § 89. In this case, there was a five-year contract for waste removal for a city for a specific price of $137,000 per year. There was an unexpectedly large increase in the number of dwelling units in the city -- 400 per year, as opposed to 20-25 each year in the past, making the waste collection costs much higher for the collector than contemplated. The city council granted an additional $10,000 per year for the final two years of the contract to compensate the waste collector for the extra work. Later there’s a lawsuit brought by a concerned citizen who didn’t think that the city council should be paying this amount. The court held that the first payment couldn’t be challenged for lack of consideration because the modification was completely executed, meaning the money was already paid. The second payment, though, was subject to challenge because at the time of the lawsuit, the contract was still in progress. Applying the pre-existing duty rule, consideration would be required for the city’s promise of an additional $10,000, as the city received nothing for its additional payment. The responsibilities of the trash collector remained exactly the same -- collecting all the trash from the city.

To avoid this result, the court applied the rule of Restatement § 89 in order to validate the modification to the contract. The court didn’t reject the pre-existing duty rule, but created an exception that permits enforcement if (i) the contract was not fully performed on either side (here there were 2 years still remaining on the contract); (ii) there were unanticipated circumstances that arose after the contract was performed (here, the additional 400 houses); and (iii) the resulting contract was fair and equitable in view of those circumstances (the $10,000 was a fair amount for the additional work). In such cases, the contract modification is fully enforceable even though it would not have been had the court applied the pre-existing duty rule.

Before we finish this podcast, let’s take a quick look at the exception that UCC § 2-209(1) creates to the pre-existing duty rule. Quite simply, under Article 2, an agreement modifying a contract within Article 2 needs no consideration in order to be binding, so long as the modification is done in good faith (meaning a legitimate commercial reason). Other parts of § 2-209 address writing and other requirements that are beyond the scope of this discussion.

Let’s look at hypothetical #4. Aaron says to me, “I’m selling organic dog biscuits for $20 per ½ pound bag. Would you like to order a bag for your dogs”?, and I reply, “Sure.” But later on, Aaron gets back to me and says, “The price of whole wheat flour in the biscuits has increased, so I would like $30 per bag now in order to cover my additional costs.” I say, “That’s fine. I agree.”

Is there consideration in this case? For the contract as modified, I’m still getting the same dog biscuits, but instead of paying $20, I’m going to pay $30. Aaron is providing the same dog biscuits, but instead of getting $20, he is going to receive $30 under the modified contract. Under the pre-existing duty rule, this modification is not enforceable and I could not be forced to pay more than $20. However, since the contract involves the sale of goods (dog biscuits), we would apply the rule of UCC § 2-209(1) and no consideration is needed in order for a modification to be binding. Notice also that the modification appears to be in good faith as a result of the increased cost for wheat flour. Accordingly, I will be obligated to pay Aaron $30 under the modified agreement. Of course, we would have a different outcome if Aaron did not seek the modification of the dog biscuit contract in good faith, such as if he wanted to raise prices so he could go on vacation.

At this point, you should be able to explain that a modification of a contract has to be agreed to by the parties, and modifications follow the same rules of assent as apply to formation of contracts. You should be able to identify and apply the pre-existing duty rule that requires modifications to be supported by new consideration in order to be binding. You should be able to explain and apply the modern common law rule that permits a modification without new consideration if there are unforeseen circumstances and the modification is fair and equitable. Finally, you should be able to explain and apply the rule of UCC § 2-209, which also validates contracts as modified without new consideration.

I hope you’ve enjoyed this podcast on Modifications and the Pre-existing Duty Rule.

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