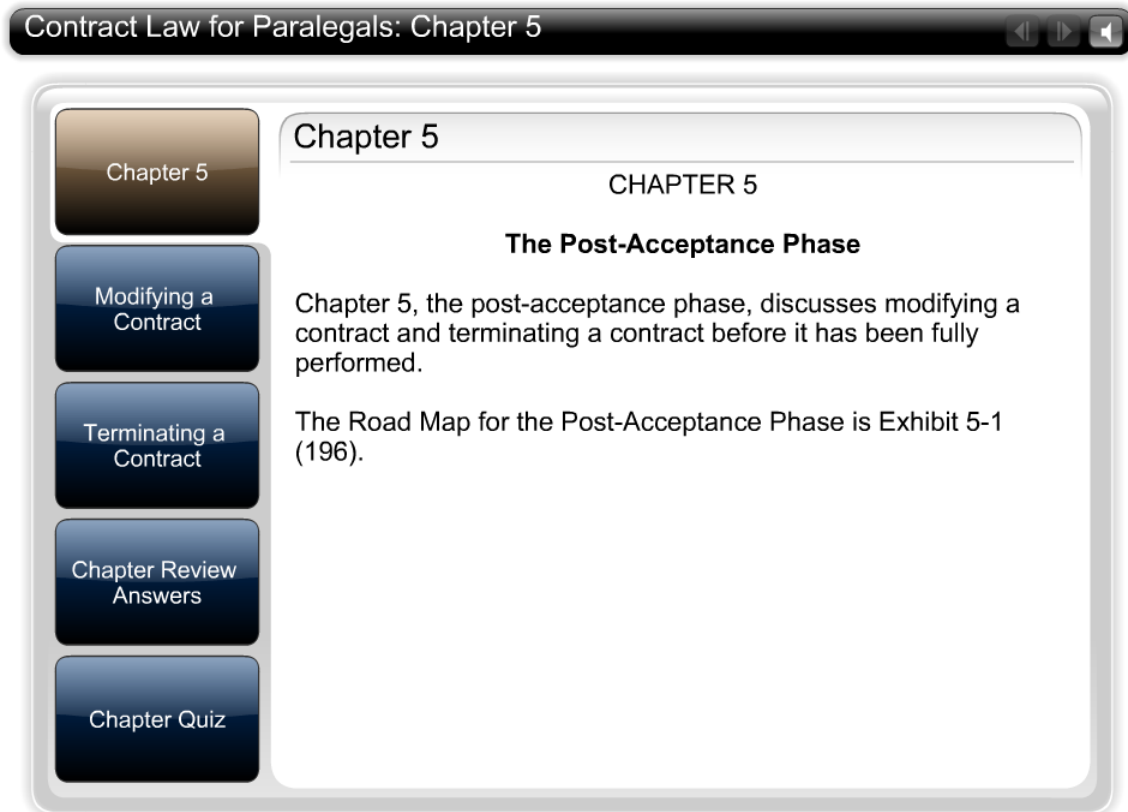


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CHAPTER 5

The Post-Acceptance Phase

Chapter 5, the post-acceptance phase, discusses modifying a contract and terminating a contract before it has been fully performed.

The Road Map for the Post-Acceptance Phase is Exhibit 5-1 (196).

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Modifying a Contract

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MODIFYING A CONTRACT (195)

This section deals with modifying the terms of the contract to keep pace with the parties' needs. A related topic, substituting a new party for one of the original contracting parties (the novation), is covered in Chapter 17.

Example 5-1 (196) discusses the pre-existing duty problem in an attempted modification. The point made is that consideration not subject to a pre-existing duty must exist in both the offer and acceptance in the modification.

PARALEGAL EXERCISE 5.1 (196) illustrates the pre-existing duty rule and is in four parts. The first is an attempted modification when Bon Appetit promises to pay \$250,000 for each episode (an increase of \$50,000) for Mills's promise to host fifteen episodes. Since Mills had a pre-existing duty to host fifteen episodes, there is no new consideration for Bon Appetit's promise to pay \$50,000 more. Without consideration for Bon Appetit's promise, the contract was not successfully

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a gift (a promise without consideration). Because the gift was executed (conferred), Bon Appetit cannot get it back.

The second changes the facts to have Mills promise to do an additional episode. Bon Appetit's offer in the attempted modification becomes "We promise to pay \$250,000 (\$50,000 more) per episode for Mills's promise to host sixteen episodes (one additional episode). With something added to the consideration on each side, there is an offer, an acceptance, and a modification contract. Bon Appetit must pay \$250,000 for the last episode.

The third changes the facts by reducing the number of episodes to fourteen, one below the fifteen in the original contract. The pre-existing duty was for fifteen which included fourteen so Bon Appetit would not be asking Mills to add something to her original promise. There would be no new consideration for Bon Appetit's promise to pay \$250,000 (\$50,000 more) and no modification contract. Mills would not be entitled to an additional \$50,000 for the last episode.

The fourth returns to the original facts and changes the location from Boston to southern France. The offer for the attempted modification could read "Bon Appetit promises to pay \$250,000 (\$50,000 more per episode for Mills's promise to host fifteen episodes in southern France (rather than in Boston). An addition to the consideration is in both the offer and acceptance so the modification is effective. Mills is entitled to the additional \$50,000.

The text following these Paralegal Exercises introduces the fact that the classical common law pre-existing duty rule for modifications is changing. The illustration is in the area of sale of goods.

PARALEGAL EXERCISE 5.2 (199) focuses on the UCC § 2-209(1) and modification. The situation posed is a one-year requirements contract in a sale of goods transaction. Under classical common law doctrine, the price modification would not be supported by consideration. Heirloom would not be asking Quality for additional consideration. Heirloom has already asked Quality to supply all of its requirements.

Under UCC § 2-209(1) "An agreement modifying a contract within this Article needs no consideration to be binding." Therefore, the price increase does create a modification contract if Heirloom agrees.

Terminating a Contract

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TERMINATING A CONTRACT BEFORE IT HAS BEEN FULLY PERFORMED (199)

This section deals with terminating a contractual duty when neither party has fully performed, terminating a contractual duty when one party has fully performed, terminating a noncontractual duty, and terminating a contractual or noncontractual duty with a “payment in full” check (the accord and satisfaction).

Terminating a Contractual Duty When Neither Party Has Fully Performed (199)

This subsection begins with the simplest situation-when neither party has fully performed his or her contractual duties. Both parties have something to give as consideration-a promise to release.

The introductory paragraph states the exchange of promises for a rescission contract (a release) and demonstrates the existence of consideration for the promises of both the offeror

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In PARALEGAL EXERCISE 5.3 (199), Tom could make a promise to release Village Theatre for Village's promise to release Tom. To be a contract, Tom's offer must be accepted. Acceptance requires Village to promise to release Tom for his promise to release Village. Because both had duties that were unperformed, the promise to release would be consideration for the other's promise. If, however, Village does not want to promise to release Tom, Village could reject Tom's offer and there would be no contract to rescind.

PARALEGAL EXERCISE 5.4 (200) complements Paralegal Exercise 5.3. In Paralegal Exercise 5.3 the offeree does not want to rescind while in Paralegal Exercise 5.4 the offeree does want to rescind. The offer could be "Susan promises to release Design from its obligations for the balance of the term for Design's promise to release Susan from her obligation to work for the balance of the term." The acceptance would be the mirror image of the offer. The offer could just as well have come from Design as from Susan.

Terminating a Contractual Duty When One Party Has Fully Performed (200)

In this subsection, one party has fully performed. The contract theory will not be available because consideration is lacking for one promise. The release becomes a gift.

In PARALEGAL EXERCISE 5.5 (200) Jim wants a release but wants Roberta to make the offer to release him. Jim prepares a statement for Roberta so she can be the offeror. The statement reads "I, Roberta, promise to release Jim from his duty to pay me \$500 for Jim's promise to release me from my duties to him." In Roberta's statement she is asking Jim to promise to do something that is nonexistent. Roberta has fulfilled her duties to Jim by delivering the sculpture. Thus she is asking Jim to promise to do nothing by asking him to promise to release her from her duties. Without consideration for Roberta's promise, she is not making an offer. Without an offer, a rescission contract cannot be formed. Roberta has not contracted to release Jim. The paragraph following Paralegal Exercise 5.5 explains that under a gift theory, the release might be effective.

PARALEGAL EXERCISE 5.6 (201) is an application of a gift theory to Paralegal Exercise 5.5.

Terminating a Noncontractual Duty (201)

This subsection takes the principles from the previous subsection and applies them to noncontractual claims. The same theory applies regardless of whether the duties arise from an existing contract or from another source such as tort.

Example 5-2 illustrates the contract format when the duties arise from a noncontractual setting.

In PARALEGAL EXERCISE 5.7 (202) the claim exists although the amount of the claim could be in dispute. Stephanie's promise to release is consideration for the

window washer's promise to pay \$3,000 and the window washer's promise to pay \$3,000 (to resolve the disputed amount) is consideration for Stephanie's promise to release. A contract is formed.

In PARALEGAL EXERCISE 5.8 (202) the claim might be based on either products liability (tort) or warranty (contract). The nature of the cause of action threatened is not disclosed. Erma knew that her own carelessness had caused the accident.

When the Pink Penguin promises to pay \$1,500 if Erma promises not to sue, the question becomes whether Erma's promise is consideration for the Pink Penguin's promise to pay. The existence or the amount of the claim must be in dispute. If both parties knew there was no basis for the claim, the consideration for the Pink Penguin's promise would be lacking. If, however, Erma knew there was no basis for the claim but the Pink Penguin believed there was some basis for the claim and if the Pink Penguin's belief was reasonable, then one could argue the existence of consideration for both promises and a contract has been formed.

Terminating a Contractual or Noncontractual Duty with a "Payment in Full" Check-The Accord and Satisfaction (202)

The accord and satisfaction is a special application of terminating contractual duties before the contract has been fully performed. The textual material spells out the theory.

The consideration problem in the check situations arises with the acceptance of the offer for an accord contract and not with the offer itself. Because the person sending the check (the drawer of the check) is the party making the offer for the accord contract, the offer takes the form: "I promise to pay \$ for your promise to take this amount as full payment of my obligation to you." The acceptance would be a promise implied from the performance of cashing the check. "I promise to take this amount as full payment of my obligation to you for your promise to pay \$." The pre-existing duty problem arises with the consideration for the attempted acceptance ("I promise to pay \$") if the amount owed is undisputed.

In Example 5-3 (203), the amount is in dispute so the pre-existing duty problem is avoided and an offer for an accord has been made.

In Example 5-4 (205), neither the obligation nor the amount of the obligation is in dispute. Therefore, Rainbow's promise to pay a lesser amount could not be consideration for Quality's promise to take \$18,000 as full payment and Quality could not accept Rainbow's offer for an accord contract. Even if Quality cashes the check, Quality is still entitled to the balance.

The paragraph following Example 5-3 makes the point that even if neither the obligation nor the amount of the obligation is in dispute, consideration can be

created by adding something to the duties to eliminate the pre-existing duty problem.

The Example 5-5 (207) illustrates this point. The promise to pay before the due date changes the obligation to pay the sum certain on the due date. The promise to pay a different amount earlier than the date to pay the stated amount is consideration for the promise to take less than the stated amount.

In PARALEGAL EXERCISE 5.9 (207), neither the existence of the obligation nor the amount of the obligation was in dispute. The promise to pay \$15,000 could not be consideration for the promise to accept \$15,000 because the undisputed obligation was for \$20,000. The promise to pay \$15,000 is a pre-existing duty and cashing the check would not be acceptance of the offer for the accord contract. Excel still has a claim for the \$5,000 balance.

In PARALEGAL EXERCISE 5.10 (207), the price is in dispute so Jones's promise to pay \$500 was consideration for Evertite's promise to take \$500 in full payment. Evertite's cashing the check was acceptance of Jones's offer for an accord contract.

The cashing of the check was also the satisfaction of the accord contract. Evertite no longer has a claim against Jones for \$300.

One final point with the accord and satisfaction that has not been mentioned in the text is the relationship between the accord and satisfaction and section 1-207 of the UCC. Section 1-207 provides:

A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.

UCC § 1-207 raised the question whether a party receiving a check with the notation "payment in full" could counter this notation by making the notation "without prejudice" on the check. Although courts were split whether this is what section 1-207 meant, the trend appeared to be that section 1-207 did not apply to "payment in full" checks but rather to ongoing contracts. For an excellent discussion of this problem see *Flambeau Products Corp. v. Honeywell Information Systems, Inc.*, 116 Wis. 2d 95, 341 N.W. 2d 655 (1984).

This problem has been clarified by the recent revision to Article 1 of the UCC. In the Revised 2001 Article 1, section 1-207 has become section 1-308(a) and a section 1-308(b) has been added that states section 1-308(a) does not apply to an accord and satisfaction. See also UCC § 2-311 (Accord and Satisfaction by Use of Instrument).

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TRUE/FALSE QUESTIONS

1. F
2. T
3. T
4. T
5. T
6. T
7. F
8. F
9. T
10. F
11. F
12. T
13. F
14. T

FILL-IN-THE-BLANK QUESTIONS

1. Modification
2. Release
3. Accord and satisfaction

Tab Text

TRUE/FALSE QUESTIONS

1. F
2. T
3. T
4. T
5. T
6. T
7. F
8. F
9. T
10. F
11. F
12. T
13. F
14. T

FILL-IN-THE-BLANK QUESTIONS

1. Modification
-

2. Release
3. Accord and satisfaction
4. The acceptance of this check constitutes payment in full

MULTIPLE-CHOICE QUESTION

1. a & c

SHORT-ANSWER QUESTION

1. Where one contracting party has fully performed and the other disputes either the existence of its obligation or the amount of its obligation, that party may tender an offer for an accord contract. This offer may be in traditional offer format-“I promise to pay you [a stated amount] for your promise to take this in full payment of my obligation to you.” If the offeree accepts this offer, an accord contract is formed. The offeror must tender the stated amount to the offeree. When the offeree accepts this tender, satisfaction occurs and the original contract duty to pay is terminated. The accord and satisfaction process is truncated when the offer for the accord contract is made by tendering a check with the notation “acceptance of this check constitutes full payment of my obligation to you.” The tendering the check implied the offer for the accord-“I promise to pay you [a stated amount] for your promise to take this in full payment of my obligation to you.” The depositing of the check implies a promise to take the tendered amount as full payment, thus forming an accord contract. The depositing of the check constitutes the performance of the accord contract, thus terminating offeror’s original duty to pay.
-

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[Click Here to take a quiz based on this chapter.](#)

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