

**Contracts**  
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**Discharge, Breach, and Excuse**

**I. Basic Principles**

**A. Effect of (Non-)Performance**

1. **Discharge:** Full performance of a duty discharges the duty. R2 § 235(1).
2. **Breach:** *Any* nonperformance, when performance is due, is a breach. R2 § 235(2).

**B. Performance Not Due**

1. Performance is **not timely**. R2 § 235 cmt. b.
2. **Justified Nonperformance:** A party's performance is not "due," and therefore she has not breached by not performing, if her nonperformance is justified, due to
  - a. **Failure/Nonoccurrence of Condition Precedent** not due to the fault of the party seeking to excuse its nonperformance;
  - b. **Modification/Substitute Agreement/Novation** agreed to by the party now seeking to enforce the contract;
  - c. **Waiver/Estoppel** effective against the party now seeking to enforce the contract;
  - d. **Impossibility, Impracticability, Frustration of Purpose** known to or reasonably foreseeable by the party now seeking to enforce the contract;
  - e. **Anticipatory Repudiation** by the other party; or
  - f. **Material Breach** by the other party.

## II. Conditions

A. **R2 § 224:** A condition is an event, not certain to occur, which must occur, unless the non-occurrence is excused, before performance under a contract becomes due.

1. **Express Condition:** A condition set forth explicitly in the parties' agreement.

- ◆ The key words to look for in a contract to detect an express condition include unless/until/only if/not until. These words suggest that some condition has to happen before the parties are obligated to perform.

2. **Implied (or “Constructive”) Condition:** A condition implied into the agreement as a matter of fact, law, or equity.

### B. The Basics

1. The condition **must occur before a party's rights or obligations become enforceable** (before the promisor's duty to perform ripens).

- ◆ Example: X agrees to lease space from Y in Building A, subject to X's being released from his existing lease in Building B or finding a suitable sublessee for that space. Until one of the latter happens, X is not obligated to perform its contract with Y to rent space in Building A.

2. The non-occurrence of the condition, unless it fails to occur because of a party's fault, **deprives the promisee expecting to get performance, but does not give them a remedy.**

- ◆ Example: X agrees to lease space from Y in Building A, subject to X's being released from his existing lease in Building B or finding a suitable sublessee for that space. Until X gets out of his lease in Building B, he is not obligated to perform. It will not be X's or Y's fault. Y allowed X to condition X's performance and must live with the consequences if X can't get out of the existing lease.

3. **Is it a condition or a promise?** If a court can't tell whether it is a condition or a promise, the court will likely deem it a promise. Courts don't like conditions because they don't like promisees being deprived of a benefit without a remedy.

- a. Example: X agrees to lease space from Y in Building A, subject to X's being released from his existing lease in Building B or finding a suitable sublessee for that space. X never asks its Building B landlord to be let out of the lease early; nor does X make any effort

to locate a suitable sublessee or replacement tenant for Building B. If X failed to escape its Building B lease due to X's fault, then Y could have a remedy. If so, it is not a condition; it is a promise and X's failure may be a breach of contract.

- b. **Basic rule:** What was the party's intent? If they intended a condition, the court should find a condition existed; if they intended a promise, the court should find a promise.

### C. **Excusing the Nonoccurrence of a Condition**

1. A promisor who **prevents or hinders** fulfillment of a condition to his performance waives or excuses the condition.
  - ◆ The prevention doctrine does not require proof that the condition would have occurred "but for" the wrongful conduct of the promisor, instead it only requires that the conduct have "contributed materially" to the non-occurrence of the condition.
2. **Avoiding Forfeiture:** R2 § 229 excuses nonoccurrence if the occurrence was a non-material part of the exchange, and if giving effect to the condition would cause disproportionate loss to the party whose performance was not conditioned on the occurrence.

## III. **Modification**

### A. **Terminology**

1. **Modification:** An amendment to an existing agreement that addresses fewer than all of the issues governed by the existing agreement. R2 § 89.
2. **Substitute Agreement:** A new agreement, between the same parties as the existing agreement, which replaces the existing agreement in all respects. R2 § 279.
3. **Novation:** A new agreement that replaces one or more parties to the existing agreement with one or more new parties acceptable to any party to the existing agreement who continues to have rights or obligations under the new agreement. R2 § 280.
4. **Accord and Satisfaction:** A new agreement between the same parties as the existing agreement, or their successors in interest, that replaces part or all of the original agreement in order to resolve a dispute between or among the parties about their respective rights or duties under the original agreement (as modified). R2 § 281.

B. **Key Issue:** Is the modification/substitute agreement/novation/accord and satisfaction consensual or coerced?

1. If one party tries to **force** a modification, etc. on the other party, courts will generally not enforce it, even if the other party nominally assented.
2. If both parties – or all three, in the case of a novation – **freely consent** to the modification, etc., on the other hand, courts generally will enforce.

C. **Necessity of Consideration**

1. **R2 § 89:** Modification **must be supported by consideration** to be enforceable, just like any other contract. If one or both parties have not fully performed the original contract, its/their agreement to perform any remaining obligation may be consideration for the modification if taken by the other party as such.
2. **§ 2-209(1):** A modification **does not require separate consideration** to be enforceable.

D. **Statute of Frauds Issues**

1. **Common Law:** If the original contract required a signed writing to satisfy the statute of frauds, the modification will also require by a signed writing.
2. **§ 2-209(3):** If the contract *as modified* triggers the SOF, then there must be a signed writing evidencing the modified contract.
3. **§ 2-209(2):** If a written contract specifies that it cannot be modified without a writing signed by both parties, then the modification must be evidenced by a signed writing, even if it would otherwise be enforceable in the absence of a writing.

E. **Parol Evidence:** Because a modification, etc. occurs after the original contract is formed, the parol evidence rule does not bar extrinsic evidence regarding it, even if it is unenforceable because it lacks separate consideration or because it does not satisfy the applicable SOF.

IV. **Waiver:** A party's intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage that the party waiving it might at its option have demanded or insisted upon.

A. **Waiver vs. Modification:** Waiver does not require consideration, and only requires the actions of one party; no agreement is necessary. Amendment requires consideration (except under UCC § 2-209(1)), and requires both parties to consent to the change.

- B. **Waiver vs. Estoppel:** Waiver is the intentional relinquishment of a known right; estoppel is the ability of one party to preclude another party from asserting a right because the party claiming estoppel has justifiably relied to its detriment on statements or actions of the other party that indicated that it would not assert the right. Put another way, waiver does not require any reliance or injury; estoppel does.

V. **Changed Circumstances**

- A. **R2 § 261:** A party may avoid her contractual duties if,
1. after the contract is formed,
  2. the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made,
  3. through no fault of either party,
  4. renders her performance impossible or impracticable,
  5. unless she contractually assumed the risk of such a contingency.
- B. If the cause of her impracticability existed at the time the contract was formed, but she had no reason to know of it, the contract is **void**.
- C. The following will generally excuse performance as objectively impossible or impracticable:
1. **death or incapacitation** prior to performance of a personal services contract, R2 § 262;
  2. **destruction, deterioration, or nonexistence of the subject matter** of the contract, R2 § 263;
  3. a change in the applicable law which renders performance **illegal**, R2 § 264; and
  4. changing market conditions make performance **commercially impracticable**, UCC § 2-615.
- D. **Temporary Impossibility/Impracticability:** A change in circumstances that makes performance temporarily impossible or impracticable will act to **suspend**, but not excuse, performance. R2 § 269.

- E. **Partial Impossibility/Impracticability:** If only part of an obligor's performance is impracticable or impossible, his duty to render the remaining part is unaffected. R2 § 270.
- F. **Frustration of Purpose:** If, after the contract is made, a party's principal purpose is substantially frustrated, without his fault, by occurrence of an event the non-occurrence of which was a basic assumption on which contract was made, his remaining duties are discharged, unless the party contractually assumed the risk of frustration.
  - 1. If the cause of his frustration existed at the time the contract was formed, but he had no reason to know of it, the contract is **void**.
  - 2. **Temporary Frustration:** A change in circumstances that temporarily frustrates a party's principal purpose will **suspend**, but not excuse, his performance. R2 § 269.

## V. **Material Breach**

- A. A **material breach** deprives the nonbreaching party of its reasonable contractual expectations. It "is so dominant or pervasive as ... to frustrate the purpose of the contract." (*Jacobs & Young v. Kent*)
- B. **R2 § 241**'s five factors:
  - 1. the extent to which the nonbreaching party will be **deprived of the benefit** which he **reasonably expected**;
  - 2. the extent to which the nonbreaching party can be **adequately compensated** for the part of the benefit of which he is deprived;
  - 3. the extent to which **forfeiture** will result;
  - 4. the likelihood that the breaching party will **cure**, taking into account all of the circumstances, including any reasonable assurances by the breaching party; and
  - 5. the extent to which the breaching party's behavior comports with standards of **good faith and fair dealing**.
- C. **Total vs. Partial Breach**
  - 1. **Total Breach:** A material breach that the breaching party fails to cure
    - a. within a **reasonable time** or

- b. within the **time during which performance is possible**, but
- c. in any event, **before the time after which the nonbreaching party's duties are discharged as a matter of law** per R2 § 242.

## 2. **Effect of Total Breach**

- a. **Discharge:** A total breach discharges the nonbreaching party's remaining duties under the contract, R2 § 237, unless
  - i. the non-breaching party has already performed
  - ii. the non-breaching party elects to perform and then sue for damages.
- b. **Remedy:** A total breach entitles the nonbreaching party to recover
  - i. **actual damages** caused by the breach and
  - ii. **future damages** reasonably flowing from the breach, R2 §§ 236(1) & 243(1), unless
  - iii. the nonbreaching party has fully performed his obligations under the contract and the **breaching party's only obligation is to pay money in installments**, in which case the injured party is required to bring a series of actions to recover unpaid installments as they accrue. R2 § 243(3).
    - ◆ To avoid this exception, contracts for the installment payments usually contain an **acceleration clause**, making all unpaid installments due on default. R2 § 243 cmt. d.

3. **Partial Breach:** Any material breach that is not a total breach.

## 4. **Effect of Partial Breach**

- a. **Discharge:** A partial breach does not discharge the nonbreaching party's remaining duties under the contract.
- b. **Suspension:** However, a partial breach may suspend the nonbreaching party's duty to perform until the breaching party has cured its breach.
- c. **Remedy:** A partial breach entitles the nonbreaching party to recover only **actual damages** caused by the breach. R2 § 236(2).

- D. **Substantial Performance:** Performance that is sufficient to not deprive the nonbreaching party of its reasonable expectations.
1. The substantiality of the breaching party's performance may be judged by the same standards used to judge the materiality of a breach. *See* R2 § 237 cmt. d.
  2. Performance that is merely substantial does not discharge the substantially performing party's duty to fully perform.
  3. Substantial performance will prevent a partial breach from becoming a total breach.
- E. **Freedom of Contract:** The parties can agree at the time they enter into their contract what will constitute a material breach, what is a reasonable time to cure, what is a cure, what constitutes substantial performance, etc.
- F. **Divisibility**
1. While performance of only part of the contract is generally a breach of the entire contract, if the language of the contract and the actions of the parties suggest that the parties considered the contract to be divisible, then performance of one part by the breaching party should entitle her to payment for the part fully performed.
  2. **R2 § 240:** In order for a non-installment contract to be divisible,
    - a. it must be possible to apportion the performances of the parties into corresponding pairs of part performances, and
    - b. it must be proper to treat these pairs of part performance as "agreed equivalents."

## VI. **Anticipatory Repudiation**

- A. **The Concept:** While most actionable breaches of contract do not occur until all conditions precedent to the breaching party's performance have been satisfied and the time for the breaching party to perform has come or passed, *see* R2 § 235 cmt. b, contract law allows a promisee to sue her promisor if,
1. prior to the time his performance is due, the promisor
  2. **definitely and unconditionally** manifests to the promisee
    - a. his **inability** to perform as and when promised or

b. his **intention** not to perform as and when promised.

B. **The Rationale:** Suppose that, on May 1, X and Y agree that X will travel to Europe on Y's behalf on July 1 and that Y will pay X \$10,000 at the time of X's departure, plus expenses upon X's return. Although Y is not obligated to perform until July 1, Y's promise creates immediate duties, irrespective of the length of time between when he makes his promise and when he is obligated to perform. Y is required both to perform as promised on July 1 and to refrain from repudiating his promise to X at any time prior to July 1. If, at any time prior to July 1, Y definitely and unconditionally manifests to X his inability to, or his intent not to, perform as and when promised, then Y's repudiation constitutes an anticipatory breach of the contract – despite the fact that X has no right to expect Y to perform until July 1.

C. **The Means:** A promisor may repudiate either by word or by deed.

1. If a promisor tells his promisee that he either cannot or will not perform the contract at the time called for or in the manner called for, the promisor's statement will, unless justified or otherwise excused, operate as an anticipatory breach. R2 § 250(a).
2. Likewise, the promisor may anticipatorily breach if he commits some voluntary act making it impossible for him to perform the contract when and as promised. R2 § 250(a). And, to the extent that the promisor can exercise such dominion over the promisee, the promisor may anticipatorily breach by committing a voluntary act making it impossible for the promisee to perform her contractual obligations. *See* R2 § 250 illus. 7.
3. With one notable exception (failing to provide adequate assurances), a promisor cannot anticipatorily repudiate by mere silence or inaction.

D. **The Promisee's Recourse**

1. A promisee whose promisor has repudiated his obligation may elect to
  - a. do nothing, subject to the promisee's duty to mitigate damages, and await the promisor's performance at the appointed time,
  - b. seek assurances from the promisor that, his apparent repudiation notwithstanding, he will perform as and when promised, R2 § 251(1),
  - c. cancel the contract (with notice to the promisor),
  - d. bring suit against the promisor, R2 § 253(1), or
  - e. otherwise act in reliance on the repudiation.

2. A promisee who chooses to bring suit, to seek assurances, or to do nothing and await the promisor's performance may urge the promisor to retract his repudiation and perform as and when promised. R2 § 257.
3. In any event, the promisor's repudiation relieves the promisee from any further tender or performance that would otherwise be due under the contract. R2 § 253(2).

**E. Adequate Assurances**

1. R2 § 251(1) entitles an obligee
  - a. who has "reasonable grounds ... to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach"
  - b. to demand that the obligor give "adequate assurance of due performance"
  - c. before the obligee is required to perform any act "for which he has not already received the agreed exchange."
2. **R2 § 251(2):** A party receiving a proper demand for assurances must,
  - a. within a "reasonable time,"
  - b. provide the promisee "such assurance of due performance as is adequate in the circumstances of the particular case."
  - c. Failure to adequately assure within a reasonable time is itself a repudiation of the contract.

**F. The Promisor's Right to Retract**

1. **General Rule:** A repudiating promisor may retract or nullify his repudiation prior to the date his performance is due, as long as
  - a. the obligee receives notice of the retraction and
  - b. has not materially changed her position or otherwise indicated that she considers the repudiation to be final. R2 § 256(1).
2. Additionally, if the repudiation was triggered by something other than a statement of the obligor, the repudiation will be nullified if, before the obligee materially changed her position or otherwise indicated that she considers the repudiation to be final, the obligee knows that the event or circumstance triggering the repudiation no longer exists. R2 § 256(2).

3. The obligor may retract or nullify his repudiation by words or by conduct “adequate to convey the idea of retraction to the injured party.” R2 § 256 cmt. b.

**G. Limitations to the Doctrine**

1. The doctrine does not generally apply to unilateral contracts, including unilateral contracts to pay money.
2. Likewise, once one party to a bilateral contract has fully performed its obligations – and, thus, effectively converted the contract into a unilateral one – any repudiation by the party who has yet to perform will generally not support a claim of anticipatory breach.
3. A repudiating party is excused from paying damages if, after his repudiation, it appears that
  - a. “there would have been a total failure by the injured party to perform his return promise,” R2 § 254(1);
  - b. the duty that the obligor repudiated “would have been discharged by impracticability or frustration” before the time that the obligor’s performance would have been due, R2 § 254(2);
  - c. the obligee ratified the contract following the obligor’s repudiation; or
  - d. if some condition precedent to his obligation to perform fails to occur prior to the date its performance is due, R2 §§ 237 cmt. a & 255 cmt. a., unless the obligor’s repudiation “contributes materially” to the non-occurrence of the condition, R2 § 255.
    - ◆ In essence, the repudiating obligor cannot excuse his own repudiation by claiming the non-occurrence of a condition when his repudiation caused the non-occurrence.