Instructor Manual

Miller, Business Law Today – Comprehensive Edition: Text and Cases 13e 2022, 9780357634783; Chapter 16: Performance and Discharge

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# Purpose and Perspective of the Chapter

Chapter 16 discusses contract performance, breach, and remedies for breach of contract. There are different measures of contract performance with substantial performance being the most common form of discharge.

This chapter discusses other methods of contract discharge, and when breach of contract will discharge the duty of the non-breaching party to perform.

Cengage Supplements

The following product-level supplements provide additional information that may help you in preparing your course. They are available in the Instructor Resource Center.

* Transition Guide (provides information about what’s new from edition to edition)
* Test Bank (contains assessment questions and problems)
* Solution and Answer Guide (offers textbook solutions and feedback)
* PowerPoint (provides text-based lectures and presentations)
* Guide to Teaching Online (provides technological and pedagogical considerations and resources for teaching online)
* MindTap Educator Guide (describes assets in the MindTap platform with a detailed breakdown of activities by chapter with seat time)

# Chapter Objectives

The following objectives are addressed in this chapter:

1. Discuss how contract conditions affect performance, and the possible grounds for discharging a contract.
2. Distinguish between partial performance and substantial performance.
3. List the various methods by which a contract may be discharged.
4. Discuss requirements of an accord and satisfaction.
5. List the elements of the doctrine of anticipatory repudiation, and the circumstances that permit non-performance by a contracting party.

# Key Terms

**Anticipatory repudiation:** an assertion or action by a party indicating that the party will not perform a contractual obligation.

**Breach of contract:** the failure (without legal excuse) of a promisor to perform the obligations of a contract.

**Commercial impracticability:** a doctrine that may excuse the duty to perform a contract when performance becomes much more difficult or costly due to forces that neither party could have controlled or foreseen at the time the contract was formed.

**Concurrent conditions:** conditions that must occur or be performed at the same time—they are mutually dependent; no obligations arise until these conditions are simultaneously performed.

**Condition:** a qualification, provision, or clause in a contractual agreement, the occurrence or nonoccurrence of which creates, suspends, or terminates the obligations of the contracting parties.

**Condition precedent:** a condition in a contract that must be met before a party’s promise becomes absolute.

**Condition subsequent:** a condition in a contract that operates to terminate a party’s absolute promise to perform, if it occurs.

**Discharge:** the termination of an obligation; in contract law, discharge occurs when the parties have fully performed their contractual obligations or when events, conduct of the parties, or operation of law releases the parties from performance.

**Frustration of purpose:** a court-created doctrine under which a party to a contract will be relieved of the duty to perform when the objective purpose of performance no longer exists due to reasons beyond that party’s control.

**Impossibility of performance:** a doctrine under which a party to a contract is relieved of the duty to perform when performance becomes objectively impossible or totally impracticable.

**Novation:** the substitution, by agreement, of a new contract for an old one, with the rights under the old one being terminated.

**Performance:** in contract law, the fulfillment of duties arising under a contract with another; the normal way of discharging contractual obligations.

**Tender:** an unconditional offer to perform an obligation by a person who is ready, willing, and able to do so.

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# What's New in This Chapter

The following elements are improvements in this chapter from the previous edition:

* **2 New Numbered Case Examples:**
	+ on substantial performance (2019)
	+ on material breach of contract (2019)
* **1 New Case:** *Chalk Supply, LLC v. Ribbe Real Estate, LLC* (2020) – The court had to determine whether a landlord’s refusal to perform a duty under a lease constituted a material breach, thus entitling the tenant to bring an action for damages.

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# Chapter Outline

*In the outline below, each element includes references (in parentheses) to related content. “PPT Slide #” refers to the slide number in the PowerPoint deck for this chapter (provided in the PowerPoints section of the Instructor Resource Center). Introduce the chapter and review objectives for Chapter 16 (PPT Slide 3).*

1. **16-1 Conditions of Performance** (PPT Slides 5-7)

The most common way to discharge contractual duties is by the performance of those duties. Most contractual promises of performance are not expressly conditioned or qualified, but instead are absolute promises. They must be performed, or the parties promising the acts will be in breach of contract (***see* Example 16.1**).

* 1. **Conditions Precedent**
		1. A condition that must be fulfilled before a party’s promise becomes absolute is called a **condition precedent**. The condition precedes the absolute duty to perform.
			1. ***See* Example 16.2**
	2. **Conditions Subsequent**
		1. When a condition operates to terminate a party’s absolute promise to perform, it is called a **condition subsequent**. The condition follows, or is subsequent to, the absolute duty to perform.
			1. ***See* Example 16.3**
	3. **Concurrent Conditions**
		1. When each party’s absolute duty to perform is conditioned on the other party’s absolute duty to perform, **concurrent conditions** are present.
			1. ***See* Example 16.4**
	4. ***Knowledge Check Activity (1) PPT Slide: 1 minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of absolute and conditioned contracts. After answer is provided, review with students the concept how a contract is either absolute or conditioned and what effect that has on them.*
1. **16-2 Discharge by Performance** (PPT Slides 8-12)

Performance can also be accomplished by tender. **Tender** is an unconditional offer to perform by a person who is ready, willing, and able to do so.

* 1. **Complete Performance**
		1. Conditions expressly stated in the contract must fully occur in all aspects for complete performance of the contract to take place.
	2. **Substantial Performance**
		1. A party who in good faith performs substantially all of the terms of a contract can enforce the contract against the other party under the doctrine of substantial performance.
			1. ***See* Case Example 16.5: *Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.***
			2. ***Effect on Duty to Perform.*** If one party’s performance is substantial, the other party’s duty to perform remains absolute.
			3. ***Damages.*** Because substantial performance is not perfect, the other party is entitled to damages to compensate for the failure to comply with the contract.
	3. **Performance to the Satisfaction of Another**
		1. When the subject matter of the contract is personal, the obligation is conditional, and performance must actually satisfy the party specified in the contract.
	4. **Material Breach of Contract**
		1. A **breach of contract** is the nonperformance of a contractual duty. A breach is material when performance is not at least substantial.
			1. If there is a material breach, the nonbreaching party is excused from the performance of contractual duties and can sue for damages caused by the breach.
			2. Any breach entitles the nonbreaching party to sue for damages, but only a material breach discharges the nonbreaching party from the contract.
				+ ***See Business Law Analysis – Determining When a Breach Is Material***
	5. **Anticipatory Repudiation of a Contract**
		1. **Anticipatory repudiation** occurs when parties to a contract have a duty to perform and one of the parties refuses to perform its contractual obligations.
		2. **Repudiation is a Material Breach –** When anticipatory repudiation occurs, it is treated as a material breach of the contract, and the nonbreaching party is permitted to bring an action for damages immediately.
			1. ***See* Case 16.1: *Chalk Supply LLC v. Ribbe Real Estate LLC***
		3. **Repudiation May Occur When Market Prices Fluctuate –** An anticipatory repudiation occurs when performance of the contract would be extremely unfavorable to one of the parties because of a sharp fluctuation in market prices.
			+ - ***See* Example 16.6**
1. **16-3 Discharge by Agreement** (PPT Slides 13-14)
	1. **Discharge by Mutual Rescission**
		1. Rescission occurs when the parties cancel their contract and are returned to the positions they occupied prior to the contract’s formation. For mutual rescission to take place, the parties must make another agreement that also satisfies the legal requirements for a contract.
	2. **Discharge by Novation**
		1. In a novation, one of the original parties is substituted by a third party. Essentially, the parties to the original contract and one (or more) new parties get together and agree to the substitution**.**
			1. **Example 16.7**
	3. **Discharge by Accord and Satisfaction**
		1. In an accord and satisfaction, the parties agree to accept performance different from the performance originally promised.
			1. An accord is a contract to perform some act to satisfy an existing contractual duty that has not yet been discharged.
			2. A satisfaction is the performance of the accord agreement. An accord and its satisfaction discharges the original contractual obligation.
				* ***See* Example 16.8**
				* ***See* Case 16.2: *DWB, LLC v. D&T Pure Trust***
2. **16-4 Discharge by Operation of Law** (PPT Slides 15-22)
	1. **Material Alteration of the Contract**
		1. If one party alters a material term of the contract—such as the quantity terms or the price terms—without the other party’s knowledge, the party who was unaware of the alteration can treat the contract as discharged or terminated.
	2. **Statute of Limitations**
		1. Statutes of limitations limit the period during which a party can sue on a particular cause of action. After the applicable limitations period has passed, a suit can no longer be brought.
	3. **Bankruptcy**
		1. A discharge in bankruptcy ordinarily prevents the creditors from enforcing most of the debtor’s contracts.
	4. **Impossibility of Performance**
		1. The doctrine of **impossibility of performance** is applied only when, at the time the contract was formed, the parties could not have reasonably foreseen the event (or events) that rendered performance impossible.
		2. **When Performance Is Impossible –** Three basic types of situations may qualify as grounds for the discharge of contractual obligations based on impossibility of performance:
			1. When a party whose personal performance is essential to the completion of the contract dies or becomes incapacitated prior to performance. ***See* Example 16.9**
			2. When the specific subject matter of the contract is destroyed. ***See* Example 16.10**
			3. When a change in the law renders performance illegal. ***See* Example 16.11**
				* ***See* Case Example 16.3: *Hampton Road Bankshares, Inc. v. Harvard***
		3. **Temporary Impossibility –** An occurrence or event that makes performance temporarily impossible operates to suspend performance until the impossibility ceases.
			1. ***See* Example 16.12**
			2. The lapse of time and the change in circumstances may make it substantially more burdensome for the parties to perform the promised acts.
			3. ***See* Classic Case Example 16.13: *Autry v. Republic Productions***
		4. **Commercial Impracticability –** For a contracting party to invoke the doctrine of **commercial impracticability** successfully, the anticipated performance must become extremely difficult or costly.
		5. **Frustration of Purpose –** Under the doctrine of **frustration of purpose** a contract will be discharged if supervening circumstances make it impossible to attain the purpose both parties had in mind when making the contract.
	5. ***Knowledge Check Activity (2) PPT Slide: 1 minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of impossibility in contracts. After answer is provided, review with students the concept of what events cause a contract to be discharged due to impossibility.*

* 1. ***Knowledge Check Video Activity (3) PPT Slide: 2 ½ minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of contract capacity. After answer is provided, review with students the elements that a court reviews to determine capacity in terms of a contract.*

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# Discussion Questions

You can assign these questions several ways: in a discussion forum in your LMS; as whole-class discussions in person; or as a partner or group activity in class.

1. **Discussion – Conditions, Degrees of Performance, Anticipatory Repudiation, and Accord and Satisfaction ([16-2 Conditions of Performance], PPT Slides 5-7). Duration 20 minutes.**
	1. **What is a condition?**
		1. A condition is part of a contract, either expressly by the parties or impliedly by courts. A condition is a possible future event, the occurrence or nonoccurrence of which will trigger the performance of a legal obligation or terminate an existing obligation under a contract.
			1. A purchase of land, for instance, may hinge on a neighbor’s willingness to sell his or her property—if the neighbor does not sell, the contract is not enforceable.
	2. **Discuss the degrees of performance.**
		1. Complete performance is performance within the bounds of reasonable expectations. Substantial performance is performance slightly below reasonable expectations.
			1. *Complete Performance.* Generally, express or implied conditions must be fully complied with for complete performance to occur.
				* Any deviation operates as a discharge (e.g., substituting for stipulated materials without a promisee’s required permission may discharge the promisee from the obligation to pay).
			2. *Substantial Performance.* As long as a party fulfills his or her obligation with substantial performance, the other party may be required to perform (less damages for the deviations).
				* To qualify as substantial, performance must not vary greatly from what was promised (i.e., substituting materials of similar quality for specified materials may not discharge the promisee’s obligation to pay).
				* The deviation must not involve gross negligence. Some courts require that it not be intentional.
	3. **What is the effect of an anticipatory repudiation on the nonbreaching party?**
		1. The nonbreaching party can treat an anticipatory repudiation as a material breach and sue for damages immediately—a nonbreaching party is not required to remain ready and willing to perform when another party repudiates the contract.
		2. Until the nonbreaching party treats an anticipatory repudiation as a breach, the breaching party can retract his or her repudiation by proper notice and restore the parties to their original obligations.
	4. **What is the difference between a rescission and a novation?**
		1. *Rescission.* By rescission a contract is canceled and the parties are returned to the positions they were in before the contract was formed.
			1. The parties may mutually rescind by making another contract.
			2. An oral rescission agreement is generally enforceable unless it falls subject to the Statute of Frauds, or the original contract was a contract for a sale of goods and required written rescission.
			3. Contracts that are executory on both sides can be rescinded solely by agreement.
			4. Contracts that are executed on one side can be rescinded only if the party who performed receives consideration for the promise to rescind.
		2. *Novation.* In a novation, an original party is substituted by a new party in agreement of all the parties. Novation requires:
			1. A previous valid obligation;
			2. An agreement of all the parties to a new contract;
			3. The extinguishment of the old obligation; and
			4. A new valid contract. Novation discharges the original contract and replaces it with a new contract.
	5. **How does an accord and satisfaction work?**
		1. An accord is an executory contract to perform an act to satisfy a contractual duty that has not been discharged. Satisfaction is performance of the accord.
			1. An accord suspends the original obligation; the accord’s performance discharges it. If the obligor refuses to perform the accord, the obligee can sue on the original obligation or on the accord.
			2. Agreeing that a judgment can be satisfied by a transfer of a car in lieu of cash is an accord; the transfer is the satisfaction, and the debt is discharged.
	6. **How does the impossibility of performance discharge a contract?**
		1. Situations that generally qualify to discharge contractual obligations under the doctrine of impossibility of performance include:
			1. One of the essential parties to a personal contract dies or becomes incapacitated before performing.
				* An actor’s death before fulfilling a contract to make a film discharges the contract;
			2. The specific subject matter of a contract is destroyed (a fire that destroys a building discharges a contract for its sale);
			3. A change in law renders performance illegal.
				* Lowering the usury rate renders contracts to loan money at higher rates illegal.
		2. *Commercial Impracticability.* To discharge a contract under the doctrine of impracticability, performance must become extremely difficult or costly (e.g., ten times more than the original estimate).
			1. Circumstances of which businesspersons at the time of contracting are or should be aware do not qualify (e.g., foreseeable, foreign political events).
		3. *Frustration of Purpose.* A contract will be discharged under the doctrine of frustration of purpose if circumstances make it impossible to attain the purpose the parties intended when contracting.
			1. When a parade is canceled, for instance, the purpose of contracts for hotel rooms en route—viewing the parade—is frustrated, and the would-be observers may be excused from payment.

* + 1. *Temporary Impossibility.* An event that makes it temporarily impossible to perform a contract (e.g., war) suspends performance until the impossibility ceases.
			1. If the lapse of time and any change in circumstances surrounding the contract make it substantially more burdensome to perform, the parties will be discharged.

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# Additional Activities and Assignments

1. **MindTap** – Why Does Performance Matter to Me?
	1. Online auto-graded activities connect the upcoming chapter to a real-world scenario designed to pick engagement and emphasize relevance. Consists of 1 multiple choice question in each.
2. **Mind Tap** – Learn It: Ideal Conditions for Achieving Accord and Satisfaction; Material Breach and Immaterial Breach; Strict Performance and Substantial Performance; Personal Satisfaction Contract
	1. Get familiar with one of the key concepts from the chapter.
3. **MindTap** – Check Your Understanding: Contract Performance
	1. Online auto-graded activity that assesses students’ foundational knowledge of the concepts presented in this chapter. Consists of 10 multiple choice questions.
4. **MindTap** – Case Problem Analysis: Material Breach
	1. Online auto-graded activity that first walks students through a fact pattern, and then asks them to answer similar questions with slight variations in the fact pattern. Consists of approximately 5 fill-in-the-blank questions.
5. **MindTap** – Brief Hypotheticals: Contract Performance and Discharge
	1. Online auto-graded activity that presents 5 fact patterns in which students are asked to apply the concepts of the chapter, and to come up with a legal conclusion. Consists of 5 multiple choice questions.

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# Additional Resources

## Cengage Video Resources

* MindTap Quick Lesson Videos:
	+ Contract Performance. 2:10 minutes.
	+ Mistakes. Duration 3:45 minutes.
	+ Quasi Contracts. Duration 2:59 minutes.
	+ Specific Performance. Duration 2:18 minutes.

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