A computer retail outlet contracted to service a bank's computer equipment for one year at a fixed monthly fee under a contract that was silent as to assignment or delegation by either party. Three months later, the retail outlet sold the service portion of its business to an experienced and well-financed computer service company. The only provision in the agreement between the retail outlet and the computer service company relating to the outlet's contract with the bank stated that the outlet "hereby assigns all of its computer service contracts to the computer service company."

The computer service company performed the monthly maintenance required under the service contract. Its performance was defective, however, and caused damage to the bank's operations.

Whom can the bank sue for damages arising from the computer service company's defective performance?

A. Either the retail outlet or the computer service company, because since each has the right to enforce the bank's performance of its contract with the retail outlet, mutuality of remedy renders either potentially liable for the defective performance.

B. Either the retail outlet or the computer service company, because the bank has not released the outlet and the bank is an intended beneficiary of the outlet's agreement with the computer service company.

C. The computer service company only, because it is a qualified and a financially responsible supplier of computer services.

D. The retail outlet only, because the computer service company made no promises to the bank.

Explanation:

Contractual duties can be delegated by a party (ie, the promisor) to a nonparty (ie, the delegatee). An **assignment of the *entire* contract** will be construed as an **assignment of rights** and a **delegation of duties**. But even after a delegation of duties, the **promisor remains liable** for breach if the delegatee fails to perform—unless the promisee agrees to release the promisor from his/her duties.

Here, the computer retail outlet and the bank entered a service contract that was silent as to assignment or delegation by either party. The retail outlet assigned the entire contract (ie, rights and duties) to a computer service company, but the bank did not release the retail outlet from its duties. So even though the computer service company was qualified and financially responsible, the bank can sue the retail outlet for damages arising from the computer service company's defective performance **(Choice C)**.

When, as here, the **promisor delegates** his/her duties by forming a **separate contract with the delegatee**, the **promisee** of the original contract becomes an intended beneficiary of that separate contract. This allows the promisee to **sue the delegatee** (in addition to the promisor) in the event of a breach. The bank, as the intended beneficiary of the agreement between the retail outlet and the computer service company, can therefore sue the computer service company for damages—even though it made no promises to the bank **(Choice D)**.

(Choice A) Under the mutuality-of-remedy doctrine, neither party to a contract can obtain *specific performance* unless that remedy is available to both parties. But this doctrine is irrelevant to determining whom the bank can sue for *damages*.

Educational objective:

A party to a contract (ie, the promisor) can delegate his/her duties to a nonparty (ie, the delegatee). But even after this occurs, the promisor remains liable for breach if the delegatee fails to perform—unless the promisee agrees to release the promisor from his/her duties.

References

- Restatement (Second) of Contracts § 318 (Am. Law Inst. 1981) (explaining that delegation of a contractual duty does not discharge the promisor's liability for breach).

Promisee's recovery for breach after promisor delegates duties

	Versus promisor	Versus delegatee
Informal delegation	✓	
Contractual delegation	✓	✓
Contractual delegation + release (ie, novation)		✓