

A debtor's liquidated and undisputed \$1,000 debt to a creditor was due on March 1. When the debt was still unpaid on March 15, the creditor told the debtor that if the debtor promised to pay the \$1,000 on or before December 1, the creditor would then not sue to collect the debt. The debtor orally agreed. On April 1, the creditor sued the debtor to collect the debt that had become due on March 1. The debtor moved to dismiss the creditor's complaint.

Should the court grant the debtor's motion?

- A. No, because there was no consideration to support the creditor's promise not to sue.
- B. No, because there was no consideration to support the debtor's promise to pay \$1,000 on December 1.
- C. Yes, because a promise to allow a debtor to delay payment on a past debt is enforceable without consideration.
- D. Yes, because the debtor bargained for the creditor's forbearance.

Explanation:

Consideration problems that prevent contract formation

Gift	No bargained-for exchange
Token consideration	No inducement to bargain if performance entirely devoid of value
Sham consideration	No legal detriment & no inducement to bargain if recited performance not intended to be completed
Preexisting duty / past consideration	No legal detriment if performance already owed or completed
Illusory promise	No legal detriment if apparent promise imposes no obligation

For any agreement to be enforceable, there must be **consideration**—ie, a bargained-for exchange of promises or performance. The promise to perform, or the performance of, a **preexisting duty does not qualify** as consideration. Under this preexisting duty rule, a debtor's **promise to pay** all or part of a **liquidated debt** (ie, one that is certain and undisputed) is **not sufficient consideration** to support a creditor's return promise.

Here, the debtor owed the creditor a liquidated and undisputed \$1,000 debt that was due on March 1. When the debtor failed to pay, the creditor promised not to sue if the debtor promised to pay \$1,000 by December 1. But there was no consideration to support the creditor's promise because the debtor had a preexisting duty to pay the \$1,000 and promised to do nothing more than he was already obligated to do. Therefore, the parties' agreement was invalid for lack of consideration, and the court should *not* grant the debtor's motion to dismiss.

(Choices B & D) The creditor's promise not to sue (ie, forbearance) *was* sufficient consideration to support the debtor's promise to pay \$1,000 on December 1. But there was no bargained-for consideration for the creditor's promise not to sue because the debtor promised to perform only a preexisting duty in return.

(Choice C) Under the preexisting duty rule, a promise to allow a debtor to delay payment on an undisputed debt is *not* enforceable without consideration.

Educational objective:

Under the preexisting duty rule, a debtor's promise to pay a liquidated debt (ie, one that is certain and undisputed in amount) is not consideration for a creditor's return promise.

References

- Restatement (Second) of Contracts § 74 cmt. c (Am. Law Inst. 1981) (explaining that payment of a liquidated and undisputed obligation is not consideration).

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