

A construction company contracted with a regional distributor to construct for \$500,000 a warehouse and a driveway at highway level. Shortly after commencing work on the driveway, which required for the specified level some excavation and removal of surface material, the construction company unexpectedly encountered a large mass of solid rock.

The construction company informed the distributor (accurately) that because of the rock, the driveway as specified would cost at least \$20,000 more than figured and demanded for that reason a total contract price of \$520,000. Since the distributor was expecting warehousing customers immediately after the agreed completion date, he signed a writing promising to pay the additional \$20,000. Following timely completion of the warehouse and driveway, which conformed to the contract in all respects, the distributor refused to pay the construction company more than \$500,000.

What is the maximum amount to which the construction company is entitled?

- A. \$500,000, because the distributor's promise to pay the additional \$20,000 was exacted under duress.
- B. \$500,000, because there was no consideration for the distributor's promise to pay the additional \$20,000.
- C. \$520,000, because the modification was fair and was made in the light of circumstances not anticipated by the parties when the original contract was made.
- D. \$520,000, provided that the reasonable value of the construction company's total performance was that much or more.

## Explanation:

### Modifying existing contracts

Governing law		Requirements
Common law	Traditional view	Parties' agreement New consideration
	Modern view	Parties' agreement New consideration <i>unless</i> modification is fair & equitable due to unanticipated circumstances
UCC		Parties' agreement Good faith (ie, honesty & observance of reasonable commercial standards of fair dealing) New consideration <i>not</i> required

UCC = Uniform Commercial Code.

At common law, **contract modifications** generally must be supported by new consideration to be enforceable. This requires both parties to alter their duties in some way. However, modifications are enforceable **without new consideration** if the modification:

rests on **circumstances not anticipated** by the parties when the contract was made\* *and* is **fair and equitable** in light of those circumstances.

Here, the construction company and the distributor originally agreed on a contract price of \$500,000. During excavations, the construction company *unexpectedly* encountered a large mass of solid rock. This unanticipated circumstance was going to increase construction costs by *at least* \$20,000, so increasing the contract price by \$20,000 was fair and equitable. Therefore, the modification was effective even though the construction company provided no new consideration, and the construction company is entitled to \$520,000 **(Choice B)**.

\*Circumstances prompting the modification must have been unanticipated by the parties, but they need not have been completely unforeseeable.

**(Choice A)** A contract modification is voidable if it was induced by **duress**—ie, physical force or improper threat. But here, even though the distributor was expecting warehousing customers immediately after the agreed completion date, there is no indication that his promise to pay the \$20,000 was exacted under duress.

**(Choice D)** Contract law does not require the value of a party's performance to be equal to or greater than the contract price. Therefore, the reasonable value of the construction company's performance need not be \$520,000 or more for the distributor to owe it.

**Educational objective:**

Under common law, contract modifications generally must be supported by new consideration—ie, each party must alter its duties in some way. But new consideration is not required if the modification is fair and equitable in light of unanticipated circumstances.

**References**

Restatement (Second) of Contracts § 89 (Am. Law Inst. 1981) (explaining that modification of a contract without new consideration is binding if it is fair and equitable in view of unanticipated circumstances).

Copyright © 1997 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.