

An Impressionist painting valued at \$400,000 was stolen from an art collector's home. The collector, who had insured the painting for \$300,000 with an insurance company, promised to pay \$25,000 to a full-time investigator for the insurance company if he effected the return of the painting to her in good condition. The insurance company's rules permit its investigators to accept and retain rewards from policyholders for the recovery of insured property. The investigator, by long and skillful detective work, recovered the picture and returned it undamaged to the collector.

If the collector refuses to pay the investigator anything, and he sues her for \$25,000, what is the probable result under the prevailing modern rule?

- A. The collector wins, because the insurance company, the investigator's employer, had a preexisting duty to return the recovered painting to the collector.
- B. The collector wins, because the investigator owed the insurance company a preexisting duty to recover the picture if possible.
- C. The investigator wins, because the collector will benefit more from return of the \$400,000 painting than from receiving the \$300,000 policy proceeds.
- D. The investigator wins, because the preexisting duty rule does not apply if the promisee's (the investigator's) duty was owed to a third person.

## Explanation:

### Preexisting duty rule

<b>Traditional common law rule</b>	Promise to perform, or performance of, preexisting duty does not constitute consideration
<b>Modern exception</b>	Consideration exists if preexisting duty owed to third person (ie, nonparty to contract)

An **enforceable contract** must be supported by **consideration**—ie, a bargained-for exchange of promises or performance. Under the **preexisting duty rule**, the promise to perform, or the performance of, a legal duty that is already owed generally does not qualify as consideration. But under the **modern exception** to this rule, such a promise or performance *is* **consideration** if the preexisting duty is **owed to a third person**—ie, someone who is not a party to the contract in question.

Here, the art collector promised to pay the investigator \$25,000 to find and return her stolen painting. Although the investigator owed his employer (the insurance company) a preexisting duty to recover that painting if possible, the insurance company was a third person with respect to the investigator's agreement with the collector (**Choice B**). This means that the traditional preexisting duty rule does not apply, and the investigator's recovery of the painting is sufficient consideration for the collector's promise. Therefore, the investigator will probably win.

**(Choice A)** Had the collector promised to pay the reward to the *insurance company*, then its preexisting duty under the insurance policy would make the collector's promise unenforceable. But since the collector promised to pay the *investigator*, the insurance company's preexisting duty is irrelevant.

**(Choice C)** The fact that the collector will benefit more from the return of the painting than from receiving the policy proceeds has no effect on the outcome of this dispute.

### Educational objective:

The promise to perform, or the performance of, a preexisting duty is not consideration unless the preexisting duty is owed to a third person (ie, someone who is not a party to the contract in question).

### References

Restatement (Second) of Contracts § 73 cmt. d (Am. Law Inst. 1981) (explaining that the performance of a preexisting contractual duty can be consideration if the duty is not owed to the promisor).

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