

The owner of a fleet of taxis contracted with a dealer in petroleum products for the purchase and sale of the fleet owner's total requirements of gasoline and oil for one year. As part of that agreement, the petroleum dealer also agreed with the fleet owner that for one year the petroleum dealer would place all his advertising with the fleet owner's wife, who owned her own small advertising agency. When the wife was informed of the contract, she declined to accept an advertising account from another company because she could not handle both accounts during the same year. During the first month of the contract, the fleet owner purchased substantial amounts of his gasoline from a supplier other than the petroleum dealer, and the petroleum dealer thereupon notified the wife that he would no longer place his advertising with her agency.

In an action by the wife against the petroleum dealer for breach of contract, will the wife succeed?

- A. No, because the failure of a constructive condition precedent excused the petroleum dealer's duty to place his advertising with the wife.
- B. No, because the wife did not provide any consideration to support the petroleum dealer's promise to place his advertising with her.
- C. Yes, because she is a third-party beneficiary of the contract.
- D. Yes, because the fleet owner was acting as the wife's agent when he contracted with the petroleum dealer.

## Explanation:

### Common examples of constructive (ie, implied) conditions

<b>Condition of performance</b>	Each party's performance is conditioned on other party's performance
<b>Condition of cooperation</b>	Each party's performance is conditioned on other party's cooperation with that performance
<b>Order of performance</b>	Simultaneous performance possible – each party's performance is condition <i>concurrent</i> to other party's duty to perform (ie, performance due simultaneously) One party's performance takes time – party's completion of longer performance is condition <i>precedent</i> to other party's duty to perform

The wife is an **intended beneficiary**—ie, a nonparty to a contract whom the contracting parties intended to benefit directly—of the contract between the fleet owner and the petroleum dealer. As a result, she has contractual rights and may sue to enforce them **(Choice C)**. However, when the original contracting parties each make a promise to the other, **each party's performance** of its own promise is a **constructive condition precedent** to the other party's duty to perform. If either party **fails to substantially perform**, the other party's **duty is excused**.\*

Here, the fleet owner promised to purchase its total gasoline and oil requirements from the petroleum dealer, and the petroleum dealer promised to use the wife's advertising agency in return. It is implied that each party's performance is a constructive condition precedent to the other party's duty to perform. And since the fleet owner failed to substantially perform his end of the bargain by purchasing substantial amounts of gasoline from *another* supplier, the petroleum dealer's duty to use the wife's agency was excused. Therefore, she will not succeed.

\*In contrast, express conditions (ie, ones that appear in the contract) require strict compliance.

**(Choice B)** Although the petroleum dealer received no **consideration** from the *wife*, his agreement with the *fleet owner* was supported by consideration. That is because the petroleum dealer's promise was induced by the fleet owner's promise to purchase gasoline and oil (and vice versa). And the wife, as an intended beneficiary, could sue to enforce her rights. But she will not succeed, because the petroleum dealer's duty was excused.

**(Choice D)** The fleet owner was *not* acting as an agent for the wife because she did not direct him to enter into the contract on her behalf. Instead, she was an intended third-party beneficiary of the contract.

**Educational objective:**

Each party's performance of its own promise is a constructive (ie, implied) condition precedent to the other party's duty to perform. If either party fails to substantially perform, the other party's duty is excused.

**References**

Restatement (Second) of Contracts § 234 (Am. Law Inst. 1981) (order of performances).

Restatement (Second) of Contracts § 302 (Am. Law Inst. 1981) (intended and incidental beneficiaries).

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