

A businesswoman entered into a contract with a painter by the terms of which he was to paint the businesswoman's office for \$1,000 and was required to do all the work over the following weekend so as to avoid disruption of her business.

If the painter had started to paint on the following Saturday morning, he could have finished before Sunday evening. However, he stayed home that Saturday morning and did not start to paint until Saturday afternoon. By late Saturday afternoon, the painter realized that he had underestimated the time it would take to finish the job if he continued to work alone. The painter phoned the businesswoman at her home and accurately informed her that it was impossible to finish the work over the weekend unless he hired a helper. He also stated that to do so would require an additional charge of \$200 for the work. The businesswoman told the painter that she apparently had no choice but to pay "whatever it takes" to get the work done as scheduled.

The painter hired an assistant to help finish the painting and paid him \$200. The businesswoman has offered to pay the painter \$1,000. The painter is demanding \$1,200.

How much is the painter likely to recover?

- A. \$1,000 only, because the businesswoman received no consideration for her promise to pay the additional sum.
- B. \$1,000 only, because the businesswoman's promise to pay "whatever it takes" is too uncertain to be enforceable.
- C. \$1,200, because the impossibility of the painter's completing the work alone discharged the original contract and a new contract was formed
- D. \$1,200, in order to prevent the businesswoman's unjust enrichment.

## 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** must be supported by **new consideration**—ie, each party must alter its duties in some way—unless the modification is fair and equitable in light of unanticipated circumstances. But the promise to perform, or the performance of, a **preexisting duty is insufficient** for new consideration and cannot support a modification.

Here, the painter attempted to modify the \$1,000 contract by telling the businesswoman that he needed to hire a helper, which would require an additional charge of \$200. Although the businesswoman agreed to pay "whatever it takes," the painter had a preexisting duty to finish painting over the weekend. Therefore, the businesswoman received no consideration for her promise to pay the additional sum, and the painter is likely to recover \$1,000 only.

**(Choice B)** There is no consideration if either party makes an illusory promise—ie, one that essentially pledges nothing because it is too uncertain (or because the promising party can choose whether to honor it). But the businesswoman's promise to pay "whatever it takes" was not too uncertain since it was a response to the painter's statement that he needed an additional \$200 to finish the work.

**(Choice C)** Contractual duties can be discharged due to impossibility—eg, when an unanticipated or extraordinary event makes it impossible to perform. But here, the painter's inability to finish the work was due to his own delay—not an unanticipated or extraordinary event.

**(Choice D)** A party may recover restitution damages to prevent unjust enrichment if the party conferred a non-gratuitous benefit on another without a contractual obligation to do so. Here, the painter conferred a non-gratuitous benefit by paying the helper \$200 to finish

the work. However, since the painter was already obligated to paint the office for \$1,000, the businesswoman was not unjustly enriched by his expenditure.

**Educational objective:**

At common law, contract modifications generally must be supported by new consideration, which requires both parties to alter their duties in some way. Performing or promising to perform a preexisting duty is insufficient for consideration and will not support a modification.

**References**

Restatement (Second) of Contracts § 73 (Am. Law Inst. 1981) (explaining that performance of a preexisting legal duty is not consideration).

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).

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