

FAILURE OF CONSIDERATION 6/16/17 (FINAL DRAFT)

Failure of consideration may be total or partial. There is a total failure of consideration when a party has failed or refused to perform a substantial part of his or her **contractual obligation** thereby defeating the purpose of the contract. A total failure of consideration excuses the **other** party from his or her own duty to perform under the contract.

A partial failure of consideration exists when the failure to perform is not substantial and sufficient consideration remains to support the contract.

When there is a partial failure of consideration, the **other** party is not excused from performance of the contract but is, instead, entitled **to damages**.

Notes:

“The determination that consideration has failed is a question of fact[.]” *First Nat’l Bank of Belfield v. Burich*, 367 N.W.2d 148, 153 (N.D. 1985). “Parol evidence is admissible to prove failure of consideration.” *Id.* at 152.

“There is a difference between lack of consideration and failure of consideration. A lack of consideration means no contract is ever formed. In contrast, a failure of consideration means the contract is valid when formed but becomes unenforceable because the performance bargained for has not been rendered.” *Johnson v. Dodgen*, 451 N.W. 2d 168, 172 (Iowa 1990). Failure of consideration

covers every case where a contractual obligation is not performed irrespective of the fault of the breaching party. Thus, a failure of consideration may describe nonperformance which does not constitute a breach. A failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but is nonetheless a failure of consideration discharging the other party from his duty to perform under the contract, giving him the right to the restitution of payments already made or other benefits conferred.

Id. (quoting *Burich*, 367 N.W.2d at 153 n.3 (citation omitted)).

Vermont cases:

Kneebinding, Inc. v. Howell, 2014 VT 51, ¶ 16, 99A.3d 612, 618 (rejecting failure of consideration defense based on argument that there was no benefit received in exchange for a release, noting “[t]he ‘definition of a benefit is extremely broad,’ and requires simply that the promisor ‘receive something desired for his or her own advantage’ to constitute consideration.”).

N. Aircraft, Inc. v. Reed, 572 A.2d 1382, 1388 (Vt. 1990) (“[W]e do not see how defendant’s position is advanced by labeling his theory as failure of consideration rather than breach of contract.”).

Stone v. Peake, 16 Vt. 213, 215, 1844 WL 3364 (Vt. 1844) (“This is not a case that comes within the principles that have been applied to a class of cases where the purchaser has received some benefit, has had the possession, or has disposed of the property purchased, or where there has been only a partial failure of consideration, or where it is necessary that an apportionment of the losses sustained be made. In that class of cases there are many decisions against admitting such a defen[s]e as is offered in this case. But this is a case where the consideration has totally failed, and one in which no question can arise as to the apportionment of the damage sustained. The defen[s]e goes to the whole amount of the [contract]. In such cases, and especially where fraud has been practi[c]ed, the principle is well settled that there can be no recovery on the [contract].”).

Treatises:

Restatement (Second) of Contracts § 237 (1981) (Except as stated in § 240, it is condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.”)

Comment:

a. Effect of non-occurrence of condition. Under the rule stated in this Section, a material failure of performance, including defective performance as well as an absence of performance, operates as the non-occurrence of a condition. Under § 225, the non-occurrence of a condition has two possible effects on the duty subject to that condition. *See* Comment *a* to § 225. The first is that of preventing performance of the duty from becoming due, at least temporarily (§ 225(1)). The second is that of discharging the duty when the condition can no longer occur (§ 225(2)). A material failure of performance has, under this Section, these effects on the other party’s remaining duties of performance with respect to the exchange. It prevents performance of those duties from becoming due, at least temporarily, and it discharges those duties if it has not been cured during the time in which performance can occur. The occurrence of conditions of the type dealt with in this Section is required out of a sense of fairness rather than as a result of the agreement of the parties. Such conditions are therefore sometimes referred to as “constructive conditions of exchange.” *Cf.* § 204. What is sometimes referred to as “failure of consideration” by courts and statutes (e.g., Uniform Commercial Code § 3-408) is referred to in this Restatement as “failure of performance” to avoid confusion with the absence of consideration. Circumstances significant in

determining whether a failure is material are set out in § 241. Circumstances significant in determining the period of time after which remaining duties are discharged, if a material failure has not been cured, are set out in § 242. The rules stated in this Section and the one following apply without regard to whether or not the failure of performance is a breach. They apply, for example, even though the failure is justified on the ground of impracticability of performance (Chapter 11).