

CHAPTER 24

NOVATION

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Library References:

C.J.S. Accord and Satisfaction § 1; Novation §§ 1-3, 8.
West's Key No. Digests, Novation ⇐1.

§ 24.1 In General

A novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished.¹ The word *novation* has been used in a variety of senses. It is commonly restricted today to describe a substituted contract which involves at least three parties.² A novation involves at least one new or additional party who replaces in whole or in part one of the original parties to the contract,

§ 24.1

1. C.J.S. Novation § 1. See Restatement, Second, Contracts § 280 (1981) which reads:

A novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.

2. See Restatement, Second, Contracts § 279 (1981) regarding "substituted contracts." Comment a to § 279 states:

Nature and Effect of a Substituted Contract. A substituted contract is one that is

itself accepted by the obligee in satisfaction of the original duty and thereby discharges it. A common type of substituted contract is one that contains a term that is inconsistent with a term of an earlier contract between the parties. If the parties intend the new contract to replace all of the provisions of the earlier contract, the contract is a substituted contract. If a substituted contract brings in a new party it is called a "novation" (§ 280).

as where it is agreed that a new debtor or obligor shall be substituted for a former debtor or obligor, whom the creditor or obligee releases.³

A novation like any other contract requires consideration. However since consideration need not be given to the promisor and need not be given by the promisee, consideration to support the discharge or the original duty can usually be found in the promise to undertake a new duty.⁴

The agreement need not be in writing since a novation is the promise of the new or substituted party and is not the promise to answer for the debt of another which is within the Statute of Frauds.⁵ It is the intention of all the parties that determines whether or not a novation has taken place. Although a novation may not be required to be in writing, a written agreement should be used so that the parties may manifest their intentions to execute a novation and declare their consent to the provisions of the novation.

When referring to the three parties to the novation, the following forms will use the term "original" to describe the party to the prior contract who is being discharged or released from such contract, and the term "substituted" to describe the new or additional party to the contract.

§ 24.2 Novation Between an Original Contractor, a Substituted Contractor, and a Contractee

Agreement made this _____ day of _____, 19____, between _____, of _____, and _____ of _____, and _____, of _____.

(Original contractor) (Address, City, State, Zip) (Substituted contractor)
(Address, City, State, Zip) (Contractee) (Address, City, State, Zip)

Whereas, an agreement dated the _____ day of _____, 19____, was made between _____ and _____, and _____ desires to be released and discharged from the contract contained in said agreement, and _____ has agreed to release and discharge _____ therefrom upon the terms of _____ undertaking to perform the said contract and to be bound by its terms;

(Original contractor) (Contractee) (Original contractor) (Substituted contractor)

It is agreed as follows:

1. **Undertaking of Substituted Contractor.** _____ undertakes to perform said contract and to be bound by the terms

(Substituted contractor)

3. Id.

5. Restatement, Second, Contracts § 115 (1981).

4. Restatement, Second, Contracts § 280 Comment c (1981).

thereof in all respects as if _____ were a party to said agreement in lieu of _____.

(Substituted contractor)
(Original contractor)

2. Release of Original Contractor and Agreement for Acceptance of Substituted Contractor. _____ releases and discharges _____ from all claims and demands in respect to said agreement, and accepts the liability of _____ upon the said agreement in lieu of the liability of _____, and agrees to be bound by the terms of the said agreement in all respects as if _____ were named therein in place of _____.

(Contractor)
(Original contractor)
(Substituted contractor)
(Original contractor)
(Substituted contractor)
(Original contractor)

In Witness Whereof, the parties have signed this agreement on the day and year first above written.

[Signatures]

§ 24.3 Novation Between Personal Representative of Deceased (Original) Partner, Continuing and New (Substituted) Partner and a Creditor

Agreement made this _____ day of _____, 19____, between _____ of _____ Personal Representative of the will of _____ deceased, and _____ and _____, carrying on business under the firm name of _____, and _____.

(Name)
(Deceased original partner)
(Continuing partner)
(Substituted partner)
(Firm name)
(Creditor)

Whereas, the _____, deceased, herein referred to as the decedent, entered into an agreement dated the _____ day of _____, 19____, with _____, to carry on business under the firm name of _____, herein referred to as the old firm; and

(Deceased original partner)
(Continuing partner)
(Firm name)

Whereas, the decedent died on _____ day of 19____, and his [her] will was duly proved and admitted to probate by the Circuit Court of _____, and _____ is the Personal Representative of the will, duly appointed by said court; and

Whereas, the _____ entered into an agreement dated the _____ day of _____, 19____, with _____ to carry on business under the firm name of _____, herein referred to as the new firm; and

(Continuing partner)
(Substituted partner)
(Firm name)

Whereas, _____
(Creditor) has had dealings with the old firm, and the old firm is or may be indebted to _____
(Creditor) upon the balance of such dealings;

It is hereby agreed as follows:

1. **Undertaking of New Firm to Discharge Liability of Old Firm.** The new firm accepts the liability, if any, of the old firm to _____
(Creditor) in respect to the said dealings, and undertakes to duly discharge the same.

2. **Release of Estate of Deceased Original Partner and Agreement for Acceptance of New Firm.** _____
(Creditor) releases and discharges the Personal Representative, _____, and the estate of the decedent from all the claims and demands whatsoever in respect to dealings of the old firm and accepts the liability of the new firm in lieu of the liability to him [*her*] of _____ Personal Representative, and the estate of decedent.

In Witness Whereof the parties have signed this agreement on the day and year first above written.

[Signatures]

§ 24.4 Novation Between Partners Who Were the Original Debtors, a Corporation Who Is the Substituted Debtor, and a Creditor

Agreement made this _____ day of _____, 19____, between _____
(Partner/original debtor) and _____
(Partner/original debtor) carrying on business as partners under the firm name of _____ of _____,
(Firm name) (Address, City, State, Zip), and _____
(Corporation/substituted debtor) of _____, and _____
(Address, City, State, Zip) (Creditor) of _____,
(Address, City, State, Zip), witnesseth:

It is agreed that _____ and _____
(Partner/original debtor) (Partner/original debtor) having sold and transferred said business heretofore carried on by them to _____,
(Corporation/substituted debtor) (Corporation/substituted debtor) shall alone be liable to _____
(Creditor) for all debts and liabilities of _____
(Partner/original debtor) and _____ to _____ heretofore contracted, and
(Partner/original debtor) (Creditor) _____ accepts _____ as his sole debtor, and
(Creditor) (Corporation/substituted debtor) hereby releases and discharges _____ and _____
(Partner/original debtor) (Partner/original debtor) from all claims and demands for or on account of the said debts and liabilities.

In Witness Whereof, the parties have signed this agreement on the day and year first above written.

[Signatures]

§ 24.5 Novation Between an Original Debtor, a Substituted Debtor, and a Creditor

Agreement made this _____ day of _____, 19____, between _____, of _____, and _____ of _____, _____ and _____ of _____.

(Creditor) (Address, City, State, Zip) (Original debtor) (Address, City, State, Zip) (Substituted debtor) (Address, City, State, Zip)

Whereas, an agreement dated the _____ day of _____, 19____, herein referred to as the original contract, was entered into between _____ and _____; and under the original contract _____ is entitled to payment of _____ (\$_____) with interest at a rate of _____ percent (_____%) per _____ from _____ in consideration of _____ provided by _____; and

(Creditor) (Original debtor) (Creditor) (Period of time) (Original debtor) (Goods or services) (Creditor)

Whereas, _____ desires to be released and discharged from the obligation contained in the original contract, and _____ has agreed to release and discharge _____ therefrom, on the condition that _____ undertakes to perform and be bound by the terms of the original contract;

(Original debtor) (Creditor) (Original debtor)

It is hereby agreed as follows:

1. Undertaking of Substituted Debtor. _____ agrees to perform and be bound by the terms of the original contract in all respects as if he were an original party to said contract in lieu of _____ . _____ shall pay the sum of _____ (\$_____) now due from _____ to _____ according to the provisions of the original contract; and such payments shall commence on or before _____, 19____.

(Substituted debtor) (Original debtor) (Substituted debtor) (Original debtor) (Creditor)

2. Release of Original Debtor and Agreement for Acceptance of Substituted Debtor. _____ releases and discharges _____ from all claims and demands whatsoever in connection with the original contract and accepts the liability of _____ in lieu of the liability of _____ . _____ hereby agrees with _____ to be bound by the terms of the original contract.

(Creditor) (Original debtor) (Substituted debtor) (Original debtor) (Creditor) (Substituted debtor)

In Witness Whereof the parties have signed this agreement on the day and year first above written.

[Signatures]

COMMENT

Note 26 U.S.C.A. § 61(a)(12) (Internal Revenue Code) which states: "Gross Income" means "all income from whatever source derived * * * including * * * [i]ncome from discharge of indebtedness."

§ 24.6 Novation Between an Original Creditor, a Substituted Creditor, and a Debtor

Agreement made this _____ day of _____, 19____, between _____ (Debtor), of _____ (Address, City, State, Zip), and _____ (Original creditor), of _____ (Address, City, State, Zip) and _____ (Substituted creditor), of _____ (Address, City, State, Zip).

Whereas, an agreement dated the _____ day of _____, 19____, herein referred to as the original contract, was entered into between _____ (Debtor) and _____ (Original creditor); and under the original contract _____ (Debtor) was obligated to pay _____ (\$_____) with interest at a rate of _____ percent (_____%) per _____ (Period of time) to _____ (Original creditor) in consideration of _____ (Services or goods), provided by _____ (Original creditor); and

Whereas, _____ (Original creditor), desires that the obligation of the original contract owed by _____ (Debtor) be performed for the benefit of _____ (Substituted creditor); and

Whereas, _____ (Debtor) and _____ (Substituted creditor) desire that the obligation of the original contract owed by _____ (Debtor) be performed for the benefit of _____ (Substituted creditor):

It is agreed as follows:

- 1. Undertaking of Debtor. _____ (Debtor) hereby agrees with _____ (Substituted creditor) to be bound by the terms of the original contract in all respects as if _____ (Substituted creditor) were an original party to said contract in lieu of _____ (Original creditor); _____ (Substituted creditor), shall receive the sum of _____ (\$_____) now due from _____ (Debtor) to _____ (Original

_____ according to the provisions of the original contract, and such
creditor payments shall commence on or before _____, 19__.

2. **Release of Debtor by Original Creditor.** _____
(Original creditor) releases and discharges _____
(Debtor) from all claims and demands whatsoever in connection with the original contract. _____ agrees
(Substituted creditor) to perform and be bound by the terms of the original contract in all respects as if he were an original party to said contract in lieu of

(Original creditor)

In Witness Whereof, the parties have signed this agreement on the day and year first above written.

[Signatures]

COMMENT

For a discussion of how a substitution of a new creditor may be brought about by an assignment, see 6 Corbin, Contracts § 1297 at 216.

§ 24.7 Compound Novation

Agreement made this _____ day of _____, 19__, between _____
(Party A) of _____, and _____ of _____, and
(Address, City, State, Zip) (Party B) (Address, City, State, Zip) and
 _____ of _____
(Party C) (Address, City, State, Zip)

Whereas, an agreement dated the _____ day of _____, 19__, herein referred to as Contract Number One, was entered into between _____ and _____; and under Contract Number One _____ is
(Party A) (Party B) (Party B) entitled to payment of _____ (\$_____) with interest at a rate of _____ percent (_____%) per _____ from _____ in
(Period of time) (Party A) consideration of _____ provided by _____; and
(Goods and services) (Party B)

Whereas, an agreement dated the _____ day of _____, 19__, herein referred to as Contract Number Two, was entered into between _____ and _____; and under Contract Number Two _____ is
(Party B) (Party C) (Party C) entitled to payment of _____ (\$_____) with interest at a rate of _____ percent (_____%) per _____ from _____ in consid-
(Period of time) (Party B) eration of _____ provided by _____; and
(Goods and services) (Party C)

Whereas, _____ desires to be released and discharged from the
(Party B) obligation contained in Contract Number Two and _____ has agreed
(Party C) to release and discharge _____ therefrom, on condition that _____
(Party B) (Party C)

____ promises _____ and _____ that _____ will undertake to
 (A) (Party B) (Party C) (Party A)
 perform and be bound by the terms of Contract Number Two, and if
 _____ agrees to release and discharge _____ from the obligation
 (Party B) (Party A)
 contained in Contract Number One;

It is hereby agreed as follows:

1. **Undertakings of** _____ and _____. _____ agrees
 (Party A) (Party B) (Party A)
 to perform and be bound by the terms of Contract Number Two in all
 respects as if _____ were an original party to said contract.
 (Party A)

_____ shall pay the sum of _____ (\$_____) now due from
 (Party A)
 _____ to _____ according to the provisions of Contract Number
 (Party B) (Party C)
 Two; and such payments shall commence on or before _____, 19____.
 (Party B) releases and discharges _____ from all claims and de-
 (Party A)
 mands whatsoever in connection with Contract Number One.

2. **Release of** _____ and **Agreement for Acceptance of**
 (Party B)
 _____ releases and discharges _____ from all claims
 (Party A) (Party C) (Party B)
 and demands whatsoever in connection with Contract Number Two and
 accepts the liability of _____ in lieu of the liability of _____.
 (Party A) (Party B)
 _____ hereby agrees with _____ to be bound by the terms of
 (Party C) (Party A)
 Contract Number Two.

In Witness Whereof the Parties have signed this agreement on the
 day and year first above written.

[Signatures]

COMMENT

A compound novation is a more complex transaction in which the substituted party may be both an obligor and an obligee. Where, for example, there are two duties and the obligee of the first is the obligor of the second, the three parties may agree that one party shall drop out altogether. Restatement, Second, Contracts § 280 Comment f (1981).

§ 24.8 Clause Providing for Substitution

This contract contains the full and complete agreement between the parties and shall supersede and take the place of all prior contracts entered into by and between the parties hereto or their predecessors.