

Contracts
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Common Law & Equitable Remedies

I. Theories of Contract Remedies

- A. **“Expectations” Remedies:** putting the aggrieved party in as good a position (*ex post*) as it would have reasonably expected to be in had both parties fully performed as promised.
- B. **“Reliance” Remedies:** putting the aggrieved party in as good a position (*ex ante*) as it would have been in had it never contracted with the breaching party.
- C. **“Restitutionary” Remedies:** restoring to the aggrieved party any unpaid-for/unearned benefit it conferred to the breaching party prior to the latter’s breach; or, put another way, forcing the breaching party to disgorge any unpaid-for/unearned benefit it received from the aggrieved party.

II. Non-Monetary Remedies

- A. **Rescission:** Undoing the contract.
 - 1. The idea is to return the parties to the positions (*ex ante*) they were in before they entered into the contract.
 - 2. It is of no use if the non-breaching party has fully performed or if the effect of the breaching party’s performance cannot be undone.
 - 3. Think of *Hawkins v. McGee* (the “hairy hand” case). Hawkins having already subjected himself to the operation and Dr. McGee being unable to undo his handiwork (pun intended), rescission would be a meaningless remedy for Hawkins because there is no way to put the parties back into the position they were in before they entered into the contract.
- B. **Specific Performance:** Doing the contract. Make the breaching party perform.
 - 1. The idea is to put the parties in the positions (*ex post*) they would be in if they had performed the contract.
 - 2. This remedy holds the parties to the contract they made – and, therefore, seems to most fully vindicate their expectations interest. Nonetheless, courts generally will not award specific performance in

- a. contracts for **personal services** (although some courts recognize an exception when the breaching party's skills are so rare that she may be the only one to perform the contract as bargained), and
 - b. contracts for the **payment of money** (this is the same as awarding damages, and thus would be redundant).
3. Courts also frown upon **forcing buyers to buy things that they do not want**. For example, you contract for a sculpture of your wife, but before it is finished, she leaves you for another. The buyer may not have to buy the sculpture, but may be liable to the sculptor for damages.
4. Courts are more willing to award specific performance of
- a. contracts to **sell** – though generally not buy – **real property** (on the theory that no two pieces of realty are the same),
 - b. contracts for **very unique personal property**, and
 - c. contracts for **specially manufactured goods**.
5. Specific performance is a matter of **judicial discretion**. R2 § 357(1).
6. A court should not grant specific performance unless the terms of the contract are clear enough to enable a court to fashion an appropriate order. R2 § 362.
7. A court should not grant specific performance where there exists an **adequate remedy at law**. R2 § 359.
8. The party seeking specific performance must show an **attempt to tender** its own full performance, unless such tender would be futile.
9. Ordering specific performance must not be **fundamentally unfair** to the breaching party. R2 § 364.
- C. **Injunctive Relief** (“Specific *Non*performance”): Order from the court telling someone to refrain from doing something. Only makes sense if this remedy is sought before breach or if it's sought to compel someone to perform a condition precedent. R2 § 357(2).
- D. **Declaratory Judgment**: Asking a court to declare the rights and responsibilities of the parties.

III. Monetary Remedies

A. **Liquidated Damages:** Damages that are agreed to the parties ahead of time in their contract R2 § 356.

1. Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.
2. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.
3. Three criteria often used to determine the reasonableness of a liquidated damages clause are
 - a. anticipated or actual harm caused by the breach;
 - b. difficulty of proving loss; and
 - c. difficulty of obtaining an adequate remedy.
4. Under this analysis the liquidated damages clause is *enforceable* if actual damages, at the time of contracting, would be difficult to determine and the amount fixed is not out of all proportion to the probable loss.
5. On the other hand, the clause is *unenforceable* if the damage resulting from a breach is susceptible of definite measurement; or where the stipulated amount would be grossly in excess of actual damages.

B. **Expectation Damages:** Giving the P the *benefit of his bargain*, by putting him in as good as position as he would have been had D performed as promised.

1. **Measuring Expectation Damages:**

Expectation damages = Loss in Value + Other Loss - Cost Avoided - Loss Avoided.

- a. **Loss in Value:** the difference between the value the P expected to receive from the D's promised performance and the value P received from D's actual (non-)performance (*e.g.*, Painter fails to paint house for \$500 as promised. No out-of-pocket loss by the owner of the house. Actual damages = owner's expectation damages. If owner hires someone else to paint for \$600, he is entitled to the difference between the contract price and the actual price).

- b. **Other Loss** includes
 - i. **Incidental Damages:** expenses P incurred attempting to mitigate the actual and consequential damages caused by the D's breach (*e.g.*, if the owner ran a newspaper ad to find a replacement painter, the expense for the ad would be incidental damages), plus
 - ii. **Consequential Damages:** damages – other than actual or incidental – caused by from the breach (*e.g.*, if owner was unable to sell house for the same price he could have received if it had been repainted, he may be able to recover the lost profit, subject to the limitations discussed below). Consequential damages must be *reasonably foreseeable* to the D **at the time they entered into the contract**, either because
 - A). They **flow logically** from the breach, or
 - B). The P **described** them to the D.
 - c. **Cost Avoided:** costs that the breach enables the non-breaching party to avoid (*e.g.*, the contract required the owner to supply a ladder or scaffolding, now he doesn't have to)
 - d. **Loss Avoided:** the extent to which the non-breaching party has mitigated their damages.
- 2. While the foregoing is the standard measure of expectancy damages, others include
 - a. lost **profits**,
 - b. the cost of **repair or replacement**, and
 - c. the cost of **completion**.

C. **Limitations on Expectation Damages**

- 1. **Mitigation:** A plaintiff cannot recover damages that it could have avoided, after receiving notice of the defendant's breach, without undue risk, burden, or humiliation. R2 § 350(1).
- 2. **Foreseeability (per *Hadley v. Baxendale*):** The defendant must have been able to **foresee**, when making the contract, that a breach by it might cause damages of the kind the plaintiff seeks to recover.

- a. When the **special circumstances are known and communicated**, the measure of damages is the amount of injury that would ordinarily follow from a breach of contract.
 - b. If such **special circumstances are not known**, then damages must be limited to those foreseeable at the time of formation, since it is presumed that the parties factored only the general measure into their negotiations (and the price to be paid).
 - c. The *type* of loss must be reasonably foreseeable, not the **manner** in which it occurs nor the **extent** of the loss.
3. **Causation:** The defendant's breach must proximately cause the damages the plaintiff seeks to recover; that is, the damages must be directly traceable to the breach, not remote or the result of other intervening causes.
 4. **Certainty:** The damages must be reasonably ascertainable following the breach.
 - a. Although the aggrieved party's damages need not be susceptible to exact calculation, they must be provable with reasonable certainty.
 - b. When expectations damages are not sufficiently ascertainable, a court should permit recovery of reliance damages or restitutionary damages as an alternative.
 - c. If the breaching party can show that her breach did not cause *any* damages, she should not be liable for the reliance expenses. In which case, the aggrieved party should be entitled to seek restitutionary damages, provided it can show that it conferred some benefit on the breaching party.
- D. **Reliance Damages:** Reimbursing the P his *out-of-pocket loss* caused by reliance on the contract (or even the prospect of a contract), thus putting P in as good a position as he would have been in had he never made the contract.
- E. **Restitutionary Damages:** Restoring to the P any benefit that he has conferred on D, so as to avoid *unjustly enriching* D.
1. **Key:** The purpose of restitutionary damages is preventing unjust enrichment *of either the nonbreaching party or the breaching party*.
 2. Parties resort to restitutionary damages in one of three basic cases:

- a. the other party has breached, but expectations damages are too hard to prove or would result in a losing contract for the party seeking relief, R2 § 373(1);
 - ◆ Restitution is unavailable in this case if the party seeking restitution has already fully performed and all the breaching party has to do is pay a definite sum of money. *See* R2 § 373(2).
- b. the breach is not actionable as a breach (*e.g.*, promissory estoppel) or there's a defense to the breach (*e.g.*, changed circumstances), R2 §§ 375-377; or
- c. the party seeking relief is, itself, in breach of the contract, but nonetheless conferred a benefit on the nonbreaching party that it wants to recover or at least receive an offset for, R2 § 374.

3. Mechanics

- a. R2 § 344 recognizes the “restitutionary interest” as one worth protecting by giving a remedy to restore to the aggrieved party any (uncompensated) benefit he has conferred on the other party.
- b. R2 § 345 empowers courts to prevent unjust enrichment by
 - i. requiring **restoration** of a specific thing, R2 § 345(c); or
 - ii. if the P has conferred on D a **measurable benefit**,
 - A). requiring D to pay P the **fair market value** of the benefit that P conferred, R2 §§ 345(d) & 371(a), or
 - B). requiring D to **disgorge** any **increase in the value of his interests** as a result of P's (partial) performance, R2 §§ 345(d) & 371(b).
- c. R2 § 370: In order to be eligible for restitutionary relief, the aggrieved party must have “conferred a benefit on the other party by way of part performance or reliance.”

F. **Expectation, Reliance, and Restitutionary Damages Compared**

Hypo: A agrees to build a building for B for \$500,000. A calculates that its costs will be \$450,000, so that it expects to make a \$50,000 profit on the project. After A has completed 10% of the work, B repudiates, not having paid A anything. At the time of the repudiation, A's labor and materials expenditures totaled \$75,000, including \$30,000 worth of unused materials, which A can resell for \$20,000. So,

Contract price = \$500,000

Expected cost = \$450,000

Expected profit = \$50,000

10% into completion when B repudiates

Unreimbursed expenses for work performed and materials purchased = \$75,000

Salvage value of unused materials = \$20,000

1. Expectation Damages = \$105,000

a. Basic Formula

loss in value + other losses - cost avoided - loss avoided

\$500,000 + \$0 - \$375,000 - \$20,000

b. Lost Profits Formula = \$105,000

expected profit + unreimbursed expenses - loss avoided

\$50,000 + \$75,000 - \$20,000

2. Reliance Damages = \$55,000

Unreimbursed expenses = \$75,000

- Salvage = \$20,000

Reliance Damages = \$55,000

3. Restitutionary Damages = \$50,000

value of 10% of the job - amount already paid by other party

(10% x \$500,000) - \$0 = \$50K

G. **Additional Remedies:** Whatever type of damages the P seeks (except liquidated damages, where the contract may explicitly disallow some of the following), a court may also award one or more of the following to a prevailing P:

1. **Interest**

- a. **Prejudgment Interest:** Accrued interest on damages awarded, generally calculated **from the time of the breach** to the date of the judgment.
- b. **Postjudgment Interest:** Interest on damages from the date of judgment until D pays the P all he is due.
- c. Both interest rates are typically set by statute, though the parties can substitute an agreed (nonusurious) rate for the statutory one.

2. **Attorneys' Fees and Costs**

- a. must be **provided by contract or statute**; and, generally,
- b. must be **reasonable** (and necessary).

H. Notice what is not here: **punitive damages**. Contract law's purpose is to enforce the parties' intent, not to punish breachers. So, in the absence of a "bad faith" breach in those few jurisdictions that recognize such a claim, no punitives.

IV. **Election of Remedies:** The plaintiff is allowed to seek as many remedies that are possible, and may choose the remedy proven to be the most beneficial.