



## Weekly Information Sheet 09

# Contractual Breach and Remedies

### **Definition of Contract:**

*“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”*

### **Elements of a Contract include:**

- *Agreement,*
- *Between Competent Parties,*
- *Based on Genuine Assent,*
- *Supported by Consideration,*
- *for Lawful Purpose Subject Matter,*
- *in Legal Form.*

### **Contract Fulfillment:**

**Contractual Discharge:** *To conclude a contract, there are three methods of contractual discharge. These include a discharge by performance, a discharge by action, and a discharge by external causes.*

**Contractual Discharge Defined:** *Black’s Law Dictionary defines the term discharge to mean, “Any method by which a legal duty is extinguished”, which with respect to contracts means performance, action or external causes.*

### **Breach of Contract:**

**Defined:** *Blacks Law Dictionary defines a Breach of Contract as:*

*“A violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance.”*

**What constitutes a Breach of Contract:** *A breach of contract is the failure to act or perform in the manner called for by the contract. When the contract calls for performance, such as painting an owner’s home, the failure to paint or to paint properly is a breach of contract. If the contract calls for a creditor’s forbearance, the creditor’s action in bringing a lawsuit is a breach of the contract.*

**Meaning:** *Breach of contract is a legal cause of action, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract, by non-performance or interference with the other party’s performance.*

**What Constitutes Breach:** *To determine whether or not a contract has been breached, the contract needs to be examined. This examination must consider: the existence of a contract, the requirements of the contract, and if any modifications were made to the contract.*

**When a Breach Occurs:** *A breach of contract occurs when:*

- *A party to a contract fails to fulfill its obligation, whether partially or wholly, in the contract, or*
- *Communicates an intent to fail the obligation, or*
- *Appears not to be able to perform its obligation under the contract.*

# Contractual Breach and Remedies Cont

## **Breach of Contract Continued:**

**Notice:** The plaintiff must notify the defendant of the breach prior to filing a lawsuit.

**Damages:** Where a breach of contract has occurred, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party.

**Rescission:** If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.

## **Waiver of Breach:**

**Defined:** A Waiver of Breach is defined as:

**“When a party to a contract, that is injured by the other party’s breach, voluntarily waives or excuses the breach of contract.”**

**Meaning:** The meaning of a waiver of breach means the breach of a contract may have no importance because the injured party to the contract waives or excuses the breach in question.

**Cure of Breach by Waiver:** The fact that one party has breached a contract does not necessarily mean that there will be a lawsuit or a forfeiture of the contract. For practical business reasons, one party may be willing to ignore, excuse or waive the breach.

## **Contract Fulfillment:**

**Contractual Discharge:** To conclude a contract, there are three methods of contractual discharge. These include a discharge by performance, a discharge by action, and a discharge by external causes.

**Contractual Discharge Defined:** Black’s Law Dictionary defines the term discharge to mean, **“Any method by which a legal duty is extinguished”, which with respect to contracts means performance, action or external causes.**

**Conditions Relating to Fulfillment:** The ordinary method of discharging obligations under a contract is by performance. Certain promises, however, may be less than absolute and instead come into effect only upon the occurrence of a specified event, or an existing obligation may be extinguished when an event happens.

## **Discharge by Performance:**

**Normal Discharge of Contracts:** A contract is usually discharged by the performance of the terms of the agreement. In most cases, the parties perform their promises, and the contract is fulfilled and is thereby discharged. A contract may also be discharged by the expiration of the time period specified in the contract.

**Nature of Performance:** Performance may be the doing of an act or the making of payment.

# Contractual Breach and Remedies Cont

## **Discharge by Performance Continued:**

**Tender:** An offer to perform is known as a tender. If performance of the contract requires the doing of an act, the refusal of a tender discharges the party offering to perform and is a basis for that party to bring a lawsuit. A valid tender of payment consists of an unconditional offer of the exact amount due on the date when due. A tender of payment is not just an expression of willingness to pay, it must be an actual offer to perform by making payment of the amount owed.

**Payment:** When the contract requires payment, performance consists of the making of the payment.

**Time of Performance:** When the date or period of time for performance is specified in the contract, performance should be made on that date or within that time period.

**No Time Specified:** When the time for performance is not specified in the contract, an obligation to perform within a reasonable time is implied. The fact that no time is specified neither impairs the contract on the ground that it is indefinite nor allows an endless time in which to perform. What constitutes a reasonable time is determined by the nature of the subject matter of the contract and the facts and circumstances surrounding the making of the contract.

**When Time Is Essential:** When a contract fixes by unambiguous language a time for performance and where there is no evidence showing that the parties did not intend that time should be of the essence, failure to perform within the specified time is a breach of contract entitling the innocent party to damages.

**When Time Is Not Essential:** Unless a contract so provides, time is ordinarily not of the essence, and performance within a reasonable time is sufficient.

**Adequacy of Performance:** When a party renders exactly the performance called for in the contract, no question arises as to whether the contract has been performed. In other cases, there may not have been a perfect performance, or a question arises as to whether the performance satisfies the standard set in contract. Questions can arise concerning substantial performance or performance of a third party.

## **Discharge by Action:**

**Discharge by Action Defined:** A contract may be discharged by the joint action of both contracting parties or, in some cases, by the action of one party alone.

**Discharge by Unilateral Action:** Ordinarily, a contract cannot be discharged by the action of either party alone. In some cases, however, the contract does give one of either party the right to cancel the contract by unilateral action, such as by notice to the other party.

**Consumer Protection Rescission:** Certain consumer protection statutes provide consumers a chance to think things over and to rescind certain consumer based contracts. The New York State General Business Law and the Federal Consumer Credit Protection Act (CCPA) give the debtor the right to rescind a credit transaction within three business days when the transaction would impose a lien on the debtor's home.

**Discharge by Agreement:** A contract may be discharged by the operation of its provisions or by a subsequent agreement.

# Contractual Breach and Remedies Cont

## **Discharge by External Causes:**

**Discharge by External Causes Defined:** Circumstances beyond the control of the contracting parties may discharge the contract.

**Discharge by Impossibility:** The party asserting the defense of impossibility bears the burden of proving “a real impossibility and not a mere inconvenience or unexpected difficulty.” Courts will generally only excuse nonperformance where performance is objectively impossible, and only in extreme circumstances. Financial inability to perform a contract that a party voluntarily entered is not an impossibility.

## **Causes of Impossibility:**

- Destruction of Particular Subject Matter;
- Change of Law;
- Death or Disability;
- Unforeseen Act of Third Party;
- Force Majeure (Uncontrollable Event);
- Natural or Man Caused Disaster (Weather/Volcano/War/Terrorism).

**Discharge by Operation of Law:** A contract is discharged by operation of law by:

- An alteration or a material change made by a party;
- The destruction of the written contract with intent to discharge it;
- Bankruptcy;
- The operation of a statute of limitations; or
- A contractual limitation.

## **Remedies – Definitions:**

**Defined:** Blacks Law Dictionary defines a Remedy as:

**“The means of enforcing a right or preventing or redressing a wrong, by means of providing legal or equitable relief.”**

**What Remedies are Available for a Breach of Contract:** There are two principle remedies for a breach of contract. They are as follows:

**Damages:** The principle remedy for a breach of contract is monetary damages. These monetary damages are generally categorized into three separate areas.

- **Expectation Damages:** These damages attempt to put the plaintiff in the position they would have been had the defendant performed, awarding the injured party their out-of-pocket costs incurred, together with whatever profit they would have made had the contract been completed;
- **Reliance Damages:** These damages attempt to put the plaintiff in as good a position as they were in prior to the making of the contract, by allowing them to recover their out-of-pocket expenditures incurred in performing the contract; and
- **Restitution:** These damages attempt to prevent the unjust enrichment of the defendant by returning to a plaintiff who has partially performed the value of the performance they have rendered to the defendant.

**Equitable relief:** Another possible remedy that a party who has been injured by a breach of contract may pursue is equitable relief. Equitable relief is awarded when a plaintiff can demonstrate that money damages would not prove an adequate remedy. This relief is generally categorized into two separate areas:

- **Rescission:** This remedy is an order to effectively cancel the contract, so as to place the parties in the position as if the contract had never occurred.
- **Specific Performance:** This remedy is an order to of the breaching party to actually render the promised performance of the contract;
- **Injunction:** This remedy is an order to direct the breaching party to refrain from doing something relating to the contract provisions; or
- **Reformation:** This remedy is where the court will actually re-write the contract or a provision that is inequitable.

# Contractual Breach and Remedies Cont

## **Monetary Damages:**

**Generally:** The principle remedy for a breach of contract is monetary damages. Monetary damages are commonly classified as compensatory damages, nominal damages, and punitive damages.

**Compensatory Damages:** The most prominent form of damages for breach of contract are compensatory damages. These damages compensate a plaintiff for the injury incurred as a result of the breach of contract. Compensatory damages have two classifications within their scope, as follows:

- **Direct Damages:** These are monetary damages (sometimes called general damages), that the law presumes directly follow the type of wrong complained of, and which are awarded to compensate the plaintiff for a proven injury or loss, that directly flow from the breach of contract. These damages, as aforementioned, include expectation, reliance and restitution damages; and
- **Consequential Damages:** These are monetary damages that do not flow directly and immediately from the breach of contract, but rather flow as a “consequence” of the breach. Consequential damages may be recovered only if it was reasonably foreseeable to the defendant that the kind of loss in question could be sustained by the non breaching party if the contract were broken.

**Nominal Damages:** These are compensatory damages which represent a trifling or trivial sum (such as \$1) which indicate an actual but extremely small amount of loss by the plaintiff; and

**Punitive Damages:** These are damages in excess of actual loss, imposed for the purpose of punishing or making an example of the defendant, are known as punitive damages or exemplary damages. These damages are very seldom awarded in contract actions.

**Mitigation of Damages:** The injured party is under the duty to mitigate damages if reasonably possible. This means that the injured party is obligated under the law to take all reasonable efforts possible to prevent any increase possible in the amount of damages that occurs as a result of the other party’s breach of the contract.

## **Examples of Mitigation:**

- **Cessation of Further Damages:** The duty to mitigate applies so that the injured party must generally stop any performance under the contract which would avoid any further damages resulting from the breach;
- **Replacement of Items:** The duty to mitigate damages may further require an injured party to buy or rent elsewhere the goods that the wrongdoer was obligated to deliver under the contract; or
- **Seeking Alternative Contract:** In the case of breach of an employment contract by the employer, the employee is required to seek other similar employment, so that the wages earned from other employment must be deducted from the damages claimed, but the discharged employee, is not required to take employment of less-than-comparable work.

**Effect of Failure to Mitigate Damages:** The effect of the requirement of mitigating damages is to limit recovery by the non-breaching party to the damages that would have been sustained had this party mitigated the damages where it was possible to do so.

# Contractual Breach and Remedies Cont

## **Non Monetary Damages:**

**Generally:** Although the principle remedy for a breach of contract is monetary damages, there are certain instances when monetary damages will prove an inadequate or insufficient remedy. In such cases, equitable remedies can be employed, including recession, specific performance and injunction.

**Rescission:** When one party commits a material breach of the contract, and monetary damages prove insufficient, the injured party may seek rescission (cancellation) of the contract.

- **Purpose:** The purpose of rescission is to restore the injured party to the position occupied before the contract was made.
- **Restitution:** An injured party who rescinds a contract after having performed services may recover the reasonable value of the performance rendered, however, the party seeking such restitutionary damages must also return what this party has received from the party in default.
- **Materiality:** A breach must be material (meaning that it is so substantial that it defeats the object of the parties in making the contract) in order to attain rescission.

**Specific Performance:** Under special circumstances, an injured party may obtain the equitable remedy of specific performance, which compels the other party to carry out the terms of a contract.

- **Limitation:** Specific performance is, however, only granted if the subject matter of the contract is “unique,” thereby making an award of money damages an inadequate remedy. Contracts for the purchase and sale of land, for example, will be specifically enforced, whereas specific performance of a contract to sell personal property can be obtained only if the article is of unusual age, beauty, unique history, or other distinction.

**Injunction:** When a breach of contract results from a party performing an act prohibited by the contract, a possible remedy is an injunction by a court, ordering the breaching party from doing the act.

**Reformation:** At times, a written contract does not correctly state the agreement already made by the parties. When this occurs, either party may seek to have the court reform or correct the writing to state the agreement actually made.

- **Rare Action, Requiring High, Clear Burden of Proof:** This is a rare action awarded by courts, and a party seeking reformation of a contract must clearly prove both the grounds for the reformation, and what the agreement actually was. This burden is particularly great when the contract to be reformed is written.
- **Unconscionability:** This action is sometimes taken when the court finds the contract is unconscionable as written, thereby requiring the court to reform the contract.

# Contractual Breach and Remedies Cont

## **Liquidated Damages:**

**Generally:** The contract itself may contain provisions that affect the remedies available to the parties or their recovery of damages.

**Liquidated Damages:** The parties may stipulate in their contract that a certain amount should be paid in case of a breach. This amount is known as liquidated damages and may be variously measured by the parties. When delay is possible, liquidated damages may be a fixed sum, such as \$1,000 for each day of delay. When there is a total default, damages may be a percentage of the contract price or the amount of the down payment.

## **Attorney's Fees:**

**Attorney's Fees:** The American rule provide that each party is responsible to pay for their own attorneys' fees in the absence of an express contractual or statutory provision to the contrary. Even in the event of a valid contractual provision for attorneys' fees, a trial court has the discretion to exercise its equitable control to allow only such sum as is reasonable, or the court may properly disallow attorneys' fees altogether on the basis that such recovery would be inequitable.

- **Contractual Exception:** The parties may, by contractual provision, specify that the losing party shall be responsible to pay for the reasonable attorney's fees of the prevailing party.
- **Statutory Exception:** Certain statutes also provide that the prevailing party may make an application to the court to have the losing party pay for the reasonable attorney's fees of the prevailing party. Federal and state civil rights statutes and many federal and state consumer protection statutes are examples of this exception.

**Court Costs and Fees:** Although Attorney's Fees are not generally awarded without a contractual or statutory exception, court costs and fees (which are generally vastly less than attorney's fees) are generally awarded to the prevailing party. These include items such as court filing and motion fees.

## **Limitation on Liability:**

**Limitation of Liability Clause:** While contracts that exculpate persons from liability are generally not favored by the courts, because they encourage lack of care, and are therefore strictly construed against the person or entity seeking to escape liability, nevertheless when the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld. This principle arises out of the broad policy of the law, which accords to contracting parties' freedom to bind themselves, as they themselves best see fit.

**Releases:** Release forms signed by participants in athletic and sporting events declaring that the sponsor, proprietor, or operator of the event shall not be liable for injuries sustained by participants because of its negligence are generally binding.