

PROFESSIONAL PRACTICE 544

BREACH OF CONTRACT AND REMEDIES; TORT LAW; INDEMNITY

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Breach of Contract and Remedies, Construction Insurance



WHEN THERE IS A BREACH –
WHAT ARE YOUR REMEDIES?

What is a Breach of Contract?

- ▶ A breach of contract means the failure of a party to perform or fulfill its promise and/or obligations under a contract.

Remedies for Breach of Contract

▶ **Purpose of Contract Remedies**

- ▶ To put the innocent party in the position he would have been in had the contract been fully performed
- ▶ Purpose is not about punishing the party who breached

▶ **Types of Remedies and Damages**

- ▶ Legal (monetary damages)
- ▶ Equitable (an action and not monetary)
- ▶ Consequential, Liquidated, and Punitive Damages

Remedies for Breach of Contract

▶ **Monetary Damages for Breach of Contract**

- ▶ Expectation Damages (making an innocent party whole as if the contract was performed)
 - ▶ The most common type of damage recover theory
 - ▶ The injured party recovers the difference between the cost to complete the contract by another and the agreed-on cost if the original party had performed
 - ▶ The result – you get what you expected for the value to which you agreed

Remedies for Breach of Contract

▶ **Monetary Damages for Breach of Contract**

- ▶ Reliance Damage (awarded to an injured party who foreseeably relied on a promise – sometimes even an unenforceable promise)
 - ▶ You acted because you relied on a promise by the other party
 - ▶ You get what you deserve based on the promise (e.g., I'll pay for the car you buy)
 - ▶ Also is “I want my money back” remedy – as if the contract was never performed
- ▶ Restitution Damages (awarded where one party has provided a benefit to another, and the first party is compensated for providing that benefit)
 - ▶ Unjust enrichment
 - ▶ Recovery for providing a benefit if the contract was actually performed (e.g., house burned down mid-project)

Remedies for Breach of Contract

▶ **Equitable Remedies for Breach of Contract**

- ▶ Injunction (court order requiring or forbidding an action)
- ▶ Rescission (undoing the contract and returning both parties to the pre-contract status quo)
 - ▶ Essentially resulting in a resolution “as if the contract never existed”
 - ▶ Rarely sought and/or awarded
- ▶ Specific Performance (court order requiring the performance of the contract)
 - ▶ Often only for something unique – land is considered unique
 - ▶ Cannot have specific performance for services

Remedies for Breach of Contract

▶ Other Types of Damages for Breach of Contract

- ▶ Consequential Damages (indirect damages remotely caused by the breach – they must be reasonably foreseeable when the contract was performed)
 - ▶ Purpose is to cover damages that are the consequences of the breach but that are not identified in the original agreement – e.g., lost profits, loss of business
 - ▶ Often disclaimed in construction contracts
- ▶ Liquidated Damages (typically a per-day \$ value where actual damage later would be difficult to calculate)
 - ▶ Cannot be a penalty
 - ▶ Must bear some reasonable relationship to the likely/potential actual damages
 - ▶ Must be calculated at the beginning of the deal

Remedies for Breach of Contract

▶ **Other Types of Damages for Breach of Contract**

▶ Punitive Damages

- ▶ Almost never awarded for breach of contract (sometimes for fraud)
- ▶ Punitive damages are similar to paying a criminal fine – however, it is paid to the other party to the contract and not to the State

▶ Legal Fees and Costs

- ▶ Generally not awarded in a breach of contract claim
- ▶ Awardable only if the contract specifically states it is allowable/reasonable

Remedies for Breach of Contract

▶ **Mitigation of Damages – The Innocent Party’s Duty to Act “Reasonably”**

- ▶ A breach by one party does not guarantee recovery for or protection to the other party
 - ▶ Non-breaching party must take steps to minimize its own damages
 - ▶ Often a significant issue in construction cases
 - ▶ Cannot not take advantage of the fact that the other party breached the contract



NEGLIGENCE AND TORT LAW

WHAT IS A TORT?

Definition of a Tort

- ▶ A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability
- ▶ Includes a duty owed to society and imposed by law to act in an acceptable manner

What is the difference between a loss from a breach of contract and a loss due to a tort?

- ▶ Loss due to breach of contract is defined by the obligations agreed to between two parties
- ▶ Loss due to a tort is not contractually based
 - Did you act negligently
- ▶ Overlap between negligence in contract and tort
 - The Economic Loss Rule

WHAT IS A TORT?

Purposes of Tort Law

- ▶ To promote safety
- ▶ To promote predictability of behavior
- ▶ To allocate the risk of loss or injury

WHAT IS A TORT?

Types of Torts – Negligence and Intentional Torts

Intentional Torts – May be Civil or Criminal

- ▶ Battery – e.g., striking another person
- ▶ Assault – e.g., putting another person in fear of immediate harmful contact
- ▶ Trespass – e.g., invasion of someone's real property
- ▶ Conversion – e.g., taking or destroying another's personal property
- ▶ Others
 - False Imprisonment
 - Intentional infliction of emotional distress
 - Defamation and libel

WHAT IS NEGLIGENCE?

Negligence – What is it?

- ▶ Causing a loss or injury by failing to act in accordance with the applicable level of care and caution
 - Different standards for different people/professions
 - Society driven in many respects
 - Case law also at times has helped to establish the standard of care
 - Often the question of whether there is negligence is left to the “trier of fact,” which may be a judge or jury (Different from the “trier of law” which is the judge.)

WHAT IS NEGLIGENCE?

Situations in which negligence is automatically found

- ▶ Violation of a law or valid regulation is considered to be automatically negligent
 - Purpose: to ensure compliance with the law
 - Relevant in court of law
- ▶ Negligent acts of an Agent automatically tied to the Principal.
 - If an agent acts negligently toward a third party in the scope of his authority, that negligence is automatically attributed to the principal
 - Agency and apparent authority – in either instance

ELEMENTS OF NEGLIGENCE

Elements for a negligence claim

- ▶ DUTY - Existence of a standard of care or a duty of care owed to others
- ▶ BREACH - Breach of the standard of care (breach of that duty)
- ▶ CAUSATION - Causal link between the breach and specific consequences (the “injury”) – this is also sometimes referred to as the “proximate cause”
- ▶ DAMAGES - The claimant suffered an injury (typically monetary damages) from the consequences of the breach

DUTY – STANDARD OF CARE

1. Duty - The Standard of Care in General

- ▶ A legal duty to act as an ordinary, prudent and reasonable person would
 - Applicable to everyone
 - Different standards for different people and different professions
- ▶ People with mental or physical handicaps are still required to act in accordance with the standard of care which a reasonable person who is not handicapped would observe
 - Purpose: so that society can rely on people adhering to a certain minimal level of skill and care
- ▶ People with greater than average levels of ability or skill are held to a higher standard of care, that possessed by the reasonable person with that level of ability or skill
 - Purpose: society relies on highly skilled people acting in accordance with their level of skill

DUTY – STANDARD OF CARE

The reasonableness of a person's actions is a matter of proof, usually determined by a jury

- ▶ Jury or a judge (“trier of fact”) determines how the ordinary reasonable person should behave and if the defendant lived up to that standard of care
- ▶ Jurors may not be aware of the appropriate standard of care
 - Juror may need to be educated on what is the applicable standard of care
 - The standard of care often is often established using proof from “expert” witnesses in the subject matter of the case, who then testify about how the defendant should operate in comparison to others practicing the same profession (e.g., a civil engineer, an accountant, a farmer, professor, or other knowledgeable party)

DUTY – STANDARD OF CARE

The reasonableness of a person's actions is a matter of proof, usually determined by a jury

- ▶ Sometimes a plaintiff can avoid proving which defendants were negligent through the doctrine of res ipsa loquitur (“the thing speaks for itself”)
 - Generally, a plaintiff must prove all elements of negligence – but not with R.I.L.
 - Duty, breach and causation are all inferred from the injury that would not ordinarily occur without negligence
 - Must show defendant had exclusive control over the situation that caused the injury, and the injury was more likely than not to have been caused by negligence
 - The plaintiff must show that something happened which ordinarily does not happen unless one of the defendants were negligent – (the scalpel was left behind, or the hammer fell on my head)

PROFESSIONAL STANDARD OF CARE

The Professional Standard of Care

- ▶ A professional is a person whose occupation requires sufficient skill and judgment that it would not be fair to require him to guarantee results
 - Doctor, lawyer, architect
 - Doctors cannot guarantee cures; lawyers cannot guarantee acquittals, architect does not guarantee its design is 100% perfect
 - Contrast the situation to a contractor, who warrant the performance of the building to the owner
- ▶ The professional standard of care is the level of skill and care which an ordinary person of the profession would observe under similar circumstances at the same time and location

PROFESSIONAL STANDARD OF CARE

The Professional Standard of Care

- ▶ Typically, the expert witnesses are from the same profession and are required to prove the applicable standard of care
 - A professional's appropriate standard of care is generally beyond the ken of the jury
 - Occasionally, however, even laymen can determine that certain professional conduct violates appropriate standards, such as a doctor accidentally injecting poison into a patient's vein
 - Qualification of the "expert" is an issue to determine whether she/he may opine on the relevant standard of care

BREACH OF DUTY

2. Breach or Dereliction of the Duty

- ▶ Defendant's conduct violated his/her duty
 - Conduct fell short of, or falls below the standard of care
 - "Reasonable Person Test" Conduct was such that the individual/defendant did not act as a reasonable person would have / should have acted
 - Conduct was in dereliction of the duty imposed on the individual/defendant

- ▶ If the Defendant is an expert or professional, the standard of care that was breached by the Defendant is related to what is expected from such an expert or professional
 - This requires a different level of the standard of care to which the expert/professional (the "reasonable architect" or the "reasonable engineer") is held, and whether that standard was breached

CAUSATION

3. Causation

- ▶ Plaintiff must prove defendant's breach of the standard of care was a "proximate cause" of his injuries
 - Proximate cause is both an actual cause and not too distant in the casual chain
 - A plaintiff does not have to show that the defendant's conduct was the only cause of his injuries
 - The plaintiff's claim is sufficient if one of the causes results in the injury
 - Remember – "a" proximate cause and not "the only" proximate cause – more than one person/entity may be liable
- ▶ The test of whether or not a cause is proximate is whether the results were "reasonably foreseeable"
 - The courts interpret the requirement of reasonable foreseeability quite broadly
 - What is "reasonably foreseeable" is based on many factors taken into consideration

CAUSATION

3. Causation

- ▶ The “but for” test
 - “But for” the defendant’s negligent act, would the plaintiff have suffered injury/damage/loss?
- ▶ The causal chain may be broken by a superseding or intervening cause of the injury
 - Act by someone else, after the defendant’s breach, which is so extraordinary or unforeseeable as to break the causal chain
 - Criminal acts or intentional tort of third persons will break the chain, unless they are reasonably foreseeable to occur as a result of the defendant’s actions
 - Unforeseeable acts of God

DAMAGES

4. Damages

- ▶ Damages are intended to compensate an injured party for all injuries suffered
- ▶ Examples of categories of damage in traditional tort claim
 - Lost wages
 - Cost of repair or replacement of damage to property
 - Pain and suffering
- ▶ Particularly in personal injury cases, damages can be many millions of dollars
- ▶ Similarly, design defects in major buildings can cost hundreds of thousands or millions of dollars to repair
 - Cannot recover “betterment” (e.g. – design missed code requirements – cannot get the additional \$ to cover what you always were required to provide, only the costs to “correct” the situation)

DEFENSE AND SHARING OF FAULT

The Plaintiff's Own Negligence – Possible Defense

- ▶ Contributory or comparative negligence occurs when the plaintiff's own negligence is also a proximate cause of his injuries – Allocation of responsibility
- ▶ The old rule: Contributory Negligence
 - A plaintiff used to be (and still is in some states) barred from recovery on a negligence claim if the plaintiff also negligently contributed to his own injuries – by any percentage or amount – even just 1% (AL, MD, NC, VA, and D.C.)
 - Harsh rule, but several exceptions to allow recovery even if the plaintiff “contributed” to his/her injuries. (last clear chance rule – defendant could have avoided causing injury; gross negligence)
- ▶ Modern rule: Comparative Negligence
 - Under comparative negligence, the plaintiff's recovery in a negligence claim is reduced by the percentage by which her/his own negligence contributed to his injuries
 - This is the modern rule employed in most states today
 - Pure comparative or the 50% (or 51% HI, IA) Rule

NEGLIGENCE AND TORT LAW





CONTRIBUTION AND INDEMNITY

INDEMNITY

Definition of Indemnity

- ▶ Indemnity is a contractual obligation of one party (the indemnitor or indemnifier) to compensate the loss incurred to the other party (the indemnitee) due to acts of the indemnitor or another party
 - Security against hurt, loss, or damage
 - Compensation for damage or loss sustained
 - Deals with third-party claims and not first-party claims
 - In construction, is a hold harmless clause defining the responsibility of losses or damages during the project
 - A risk-allocation or risk shifting tool

INDEMNITY AND CONTRIBUTION

Indemnity and Contribution

- ▶ Contribution is a method by which a defendant brings a third party into the trial to reimburse the defendant for that percentage of the plaintiff's damages which were really the fault of the third party
 - Generally, contribution obligation arises out of a statute
- ▶ Indemnity is the same as contribution, except that the third party becomes liable to reimburse the defendant for all of the plaintiff's damages
 - Generally, indemnity obligation arises out of a contractual obligation, but there is common law indemnity
 - Example - Owner (plaintiff) sues architect for construction defects based upon the architect's negligent inspection of the construction. The architect brings the contractor who actually built the defective work into the trial to indemnify the architect against the plaintiff's losses
 - Example- Owner sues a contractor for a construction defect, and the contractor seeks contribution from the architect for vagueness in the plans

INDEMNITY AND CONTRIBUTION

Contractual Indemnity

- ▶ Any party can make a promise in a contract to indemnify another party from certain specified consequences
 - Subcontractors ordinarily promise to indemnify general contractors if a claim arises resulting from the subcontractor's work
 - Contractors often promise to indemnify owners and architects against any claims filed against owners and architects arising out of the general contractor's work
- ▶ Some states, including Illinois, have passed statutes which forbid one party from promising to indemnify another party for the consequences of the second party's own negligence

INDEMNITY AND CONTRIBUTION

Indemnity ordinarily is only available when liability is derivative

- ▶ When the only reason that one party is negligent is the negligent acts of another party for whom the first party was responsible, the first party can obtain indemnity from the second party
 - Employer/employee
 - Contractor/subcontractor
 - Inspecting architect/contractor



QUESTIONS