

PROFESSIONAL PRACTICE 544

INTERPRETATION OF CONTRACTS; BREACH OF CONTRACT; AND REMEDIES
FOR BREACH

January 31, 2025 |

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INTERPRETATION OF CONTRACTS

Goal: To Effectuate the Intent of the Parties

- ▶ The “trier of fact” looks to determine the actual bargain
- ▶ The court or arbitrator will not rewrite the contract

First Level of Analysis – The Objective Language of the Contract

- ▶ Clear and unambiguous language is always enforced as written
- ▶ No explanations or clarifications of the language is permitted
- ▶ Why this process of analysis? To resolve conflicts; To confirm the deal

Express and Implied Terms

- ▶ **Express terms** are spelled out either in writing or orally
- ▶ **Implied terms** are part of the agreement but not discussed or communicated
- ▶ Some commonly implied terms in construction contracts:
 - ▶ Neither party will hinder the other from performing the contract
 - ▶ Construction will be performed in a good and workmanlike manner
 - ▶ An architect will perform his duties in accordance with the appropriate standard of care



RESOLVING CONTRADICTIONS AND INCONSISTENCIES

Contradiction, Inconsistency, Contract Rules

Determine Whether There is an Actual Contradiction or Inconsistency

- ▶ Are the words contradictory? Is there an inconsistency?
- ▶ Is there an interpretation – a contract rule or judicial rule – that would allow the terms to be read consistently?

Rules Stated in the Terms of the Contract for Resolving Inconsistencies

- ▶ One document may supersede another, such as specifications superseding drawings
- ▶ Requiring the lengthier or more expensive procedure
- ▶ Identifying who has the duty of inquiring about the inconsistency

Contract Construction – Judicial Rules

Judicial Rules of Contract Construction

- ▶ Follow the specific rather than the general provision
- ▶ Construe the contract language against the party who drafted the contract
- ▶ Construe the contract as a whole, favoring the provision more consistent with the overall contract intent

Modification of Contracts - After the Execution of the Agreement

Modification by Agreement of the Parties

- ▶ The parties who sign a contract may **always** agree to modify that contract
- ▶ Even a contract that forbids modification can be modified
- ▶ There can even be oral modification of written contracts
- ▶ Timing of the modification is key

Modification of Contracts - After the Execution of the Agreement

Actions for “Reformation” of Contracts

- ▶ Reformation is when the written terms of the contract do not accurately reflect the actual agreement reached between the parties
- ▶ Requires a lawsuit seeking “reformation” making it the only time that a court may rewrite the contract
- ▶ The party seeking information must have a good reason
 - ▶ Mutual mistake of fact
 - ▶ Fraud
 - ▶ Unilateral mistake of fact, but need the other party's knowledge of the mistake



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

- ▶ Fees and costs are 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



QUESTIONS