

# PROFESSIONAL PRACTICE 544

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

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# INTERPRETATION OF CONTRACTS

# 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

# 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

# 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

THEY BREACHED ...  
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 - Monetary

## ▶ **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

## ▶ **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

## ▶ **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

- ▶ **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

# Remedies for Breach of Contract - Equitable

- ▶ **Equitable Remedies for Breach of Contract**
  - ▶ 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

- ▶ 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

# Remedies for Breach of Contract - Other

- ▶ 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

## ▶ **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

- ▶ **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