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COURSE: LAW OF CONTRACT

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**BREACH OF CONTRACT**

Breach of a contract is a legal cause of action and a type of civil wrong, 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.

If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.

To determine whether or not a contract has been breached, a judge needs to examine the contract. To do this, they must examine: the existence of a contract, the requirements of the contract, and if any modifications were made to the contract. Only after this can a judge make a ruling on the existence and classifications of a breach. Additionally, for the contract to be breached and the judge to deem it worth of a breach, the plaintiff must prove that there was a breach in the first place, and that the plaintiff held up his side of the contract by completing everything required of him. Additionally, the plaintiff must notify the defendant of the breach prior to fling the lawsuit.  A breach of contract may take place when a party to the contract:

* fails to perform their obligations under the contract in whole or in part
* behaves in a manner which shows an intention not to perform their obligations under contract in the future or
* the contract becomes impossible to perform as a result of the defaulting party's own act.

These classifications only describe *how* a contract can be breached, not how serious the breach is. A judge will make a decision on whether a contract was breached based on the claims of both parties.

The first type above is an *actual* breach of contract. The second two types are breaches as to the future performance of the contract, and technically known as *renunciatory* breaches. The defaulting party enunciates the contract in advance of the time they are required to performs their obligations. Renunciatory breach is more commonly known as “anticipatory breach”.

The general law has three categories of breaches of contract. These are measures of the seriousness of the breach. In the absence of a contractual or statutory provision any breach of contract is categorized as a:

* breach of warranty;
* breach of condition; or
* breach of an innominate term, otherwise known as an *intermediate* term.

In terms of priority of classification of these terms, a term of a contract is an innominate term unless it is clear that it is intended to be a condition or a warranty.

A right to terminate a contract arises for:

1. *breach of a condition* of the contract, no matter how trivial the breach of the condition may be;
2. *repudiatory breach*, that is an actual breach of an innominate term, where the consequence of the breach is sufficiently serious to give rise to a right to terminate; or
3. *renunciatory breach* (anticipatory breach), where the other party makes clear to the innocent party that it:
   1. is not going to perform the contract at all, or
   2. is going to commit a breach of a condition, or
   3. is going to commit a breach of an innominate term,

and the consequences will be such as to entitle the innocent party to treat the contract as at an end.

An innocent party is therefore entitled to elect to terminate a contract only for breach of a condition of the contract, repudiatory breach or renunciatory breach. Nothing less.

To terminate a contract for repudiatory breach, the innocent party must tell the defaulting party. Many commercial contracts include clauses which set out a process whereby notice must be given and in what form. Consequently, where there is a written contract, care should be taken to check the contract terms and to ensure compliance notwithstanding that the other party may, on the face of it, have committed a clear and repudiatory breach. It is only when the defaulting party is told that a repudiatory breach has been "accepted" that the contract is terminated. If the defaulting party is not told the repudiatory breach has been accepted, the contract continues in force. An innocent party is not compelled to exercise their right to terminate, and accept a repudiatory breach. When they don't the contract continues in force.

**Repudiatory breaches**

Conduct is repudiatory if it deprives the innocent party of *substantially the whole of the benefit* intended received as consideration for performance of its future obligations under the contract.

Different forms of words are used by courts to express this central concept. The most prominent is whether the breach goes to *the root of the contract*. These forms of words are simply different ways of expressing the "substantially the whole benefit" test.

### **Renunciatory breaches**

Conduct is renunciatory if shows an intention to commit a repudiatory breach. The conduct would lead a reasonable person to conclude that the party does not intend to perform its future obligations when they felt due.

Showing an intention to perform a contract in a manner which is *inconsistent* with the terms of the contract also shows an intention not to perform the contract. Whether such conduct is so severe so as to amount to a renunciatory breached depends upon whether the threatened difference in performance is repudiatory

In the event of a renunciatory breach, the innocent party may:

* choose to accept the breach at once and to terminate the contract, without waiting for the due date of performance, or
* wait for the time for performance of the contract.

If the defaulting party does not perform when the time for performance arrives, the contract may be terminated. However, if the defaulting party does perform, the right to terminate is lost forever.

Conduct comprising a breach for performance of contractual obligations which have fallen due may be insufficient to be a repudiation. However:

* It may nevertheless be conduct which is a renunciation because it would lead the reasonable observer to conclude that there was an intention not to perform in the future, and
* the past and threatened future breaches taken together would be repudiatory.

The reason why a defaulting party commits an actual breach is generally irrelevant to whether it constitutes a breach, or whether the breach is a repudiation (this is an incident of *strict liability* for the performance of contractual obligations). But the reason may be highly relevant to what such breach would lead the reasonable observer to conclude about the defaulting party's intentions in relation to future performance, and therefore to the issue of renunciation. Often the question whether conduct is a renunciation falls to be judged by reference to the defaulting party's intention which is objectively evinced both by past breaches and by other words and conduct.

Question 2

The types of legal remedies available for breach of contract depends largely on the severity

of the breach. Generally, damages awarded are categorized into four groups:

**Compensatory Damages**: Compensatory damages are those that compensate the non-breaching party for their losses. This is the most common legal remedy, and a court can order the breaching party to pay the non-breaching party enough money to get what they were promised by the terms of the contract; The term “compensatory damages” involves two types of damages awards: General damages and Specific damages. General damages usually cover losses that are directly related to the subject matter of the contract, such as failing to meet a number of shipments. Specific damages compensate the plaintiff for losses related to the breach, but not resulting directly from the breach, such as damage to a business’ reputation. In most contract lawsuits, the plaintiff must specifically state that they are requesting compensatory damages when they file the claim. This is especially

true for special damages, since those involve losses that are not addressed in the contract. Failing to request compensatory damages can make the party ineligible for monetary damages.

Some of the other requirements for proving compensatory damages include:

• **Causation**: The defendant’s breach must have caused the plaintiff’s economic losses.  These may either be directly caused (as in general damages) or indirectly caused (special damages)

**• Foreseeability**: The losses must be foreseeable at the time of contract formation.  If the losses were not foreseeable, a compensatory damages award will not be issued

• **Calculable**: The losses must be capable of being calculated into specific monetary amounts. This is usually done using fair market values at the time of contract formation. Losses that cannot be quantified or reduced to dollar amounts will not be considered

• **Unavoidable**: The losses must have been unavoidable. If the non-breaching party could have prevented the losses but failed to do so, it will disqualify them from receiving compensatory damages. This is known as “the doctrine of avoidable consequences”

In order to prove each of these requirements, it may be necessary for the non-breaching party to provide additional evidence in support of their claims. For example, the victim of the breach may need to provide evidence that the parties engaged in discussion regarding the risks involved with the contract. The victim might then submit transcripts or records of negotiations showing that the parties discussed potential losses. This would help prove the element of “foreseeability” mentioned above.

Compensatory damages may not always be awarded in every case. State statutes might limit the amount of compensation that a plaintiff can receive in a contract claim.  Also, it is common for the parties to waive their rights to compensatory damages in a provision in the contract. If compensatory damages are unavailable for whatever reason, there still may be other remedies available

**Restitution**: If the non-breaching party is able to prove that their loss is due directly to the actions of

the breaching party, a judge may order restitution, which could include lost wages, medical bills, and property repair and/or replacement; if you incurred out of pocket expenses as a result of the other party’s breach of contract you may be entitled to restitution. Expenses could have been incurred as a result of preparing for the contract or in anticipation of the contract and then the other party failed to go through with the contract. Expenses can also be incurred when the other party fails to perform the contract. These are the general requirements to successful receive a restitution order.

1. In both civil and criminal cases, the defendant must be found liable or guilty before restitution will be ordered. The exception to this requirement is if the defendant and plaintiff or state reach an agreement for the defendant to reimburse the person instead of pursuing the case.

2. Once the defendant is found liable or guilty of the violation then the plaintiff or victim needs to prove the specific value lost; guesses of value lost are not sufficient. This value must also be proven to a certainty; not just the victim’s or plaintiff’s belief in the property’s or service’s value.

a. Sometimes it is required to use an expert witness to demonstrate the loss. For example, if a

defendant’s conduct caused a small business owner to lose business, then it may be required to have a professional evaluator or economist evaluate the case to determine the actual dollar amount lost to the plaintiff.

3. The restitution requested must reflect out of pocket expenses only. If you could not work as a result of an injury sustained by the defendant’s actions you may compensated for that lost income.

4. You must show sufficient and accurate documentation of your expenses. If your case involves an injury or property damage, it is important to bring all receipts and bills to court to prove you are out of pocket expenses.

**Punitive Damages**: Punitive damages are generally awarded alongside compensatory damages. The purpose of punitive damages is to punish the breaching party when they have engaged in particularly egregious behaviour in order to breach the contract, such as being intentionally negligent;

**Specific Performance**: Specific performance is utilized as a legal remedy for breach of contract, and it requires the breaching party to perform their part of the contract. Specific performance is not always available.

**Quantum Meruit**

The Latin phrase “quantum meruit” refers to monetary damages that are awarded to a party for any performance prior to the other party’s breach of contract. For example, if painters begin painting a house and complete the first three rooms, but the homeowner decides that she does not want the painters to finish painting the rest of the house, the court could order the homeowner to pay for the work that was completed.

**Remedies in Equity**

“Remedies in equity” refer to when the court orders a party to do something, rather than pay

monetary damages. This could take many different forms, from cancelling the contract and releasing the parties from their responsibilities under the agreement, to specific performance

Contract rescission cancels the contract, which allows the parties to form a new contract that better suits the needs and desires of both parties.

Mandatory arbitration or a liquidated damages clause are two examples of such instructions. Second, you should let the other party know that there has been a breach. If you committed the breach, it is better to own up to it before it is found out, which could lead to more serious consequences. If the other party committed the breach, it is best to give them an opportunity to rectify the situation before taking legal action. It is highly important that you maintain any documentation related to the contract.

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