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### Meaning of breach of contract

"Breach of contract" is a legal term that describes the violation of a contract or an agreement that occurs when one party fails to fulfill its promises according to the provisions of the agreement. Sometimes it involves interfering with the ability of another party to fulfill his duties. A contract can be breached in whole or in part.

Most contracts end when both parties have fulfilled their contractual obligations, but it's not uncommon for one party to fail to completely fulfill their end of the contract agreement. Breach of contract is the most common reason contract disputes are brought to court for resolution.

We can see this in the case of *Revelations Perfume and Cosmetics Inc. v. Prince Rogers Nelson*<sup>1</sup> or *Macy's v. Martha Stewart Living*.<sup>2</sup>

General Requirements for a breach of contract;

A breach of contract suit must meet four requirements before it will be upheld by a court.

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<sup>1</sup> 2012 NY Slip Op 50721(U)

<sup>2</sup> 2015 NY Slip Op 01728

- The contract must be valid. It must contain all essential contract elements by law. A contract isn't valid unless all these essential elements are present, so without them, there can be no lawsuit.
- The plaintiff or the party who's suing for breach of contract must show that the defendant did indeed breach the agreement's terms.
- The plaintiff must have done everything required of them in the contract.
- The plaintiff must have notified the defendant of the breach before proceeding with filing a lawsuit. A notification made in writing is better than a verbal notification because it offers more substantial proof.

### Types of Breach of Contract

Breach of contract can be minor, material, partial, fundamental, or anticipatory.

**A Minor Breach:** A minor breach of contract occurs when a party fails to perform a part of the contract, but does not violate the whole contract. To be considered a minor breach, the infraction must be so nonessential that all parties involved can otherwise fulfill any remaining contractual obligations. A minor breach is sometimes referred to as an impartial breach;

A **material breach** is one that is significant enough to excuse the aggrieved or injured party from fulfilling their part of the contract. A material breach of contract is a breach that is so substantial, it seriously impairs the contract as a whole; additionally, the purpose of the agreement must be rendered completely defeated by the breach. This is sometimes referred to as a total breach.

A **partial breach** is not as significant and does not normally excuse the aggrieved party from performing their duties.

An **anticipatory breach** is one where the plaintiff suspects that the offending party might breach a contract by doing or failing to do something that shows their intention not to complete their duties. This kind of breach occurs when one party lets the other party know, either verbally or in writing that, they will not be able to fulfill the terms of the contract. The other party is then able to immediately claim a breach of contract and pursue a remedy, such as payment. Anticipatory breaches can be very difficult to prove in court. If a party provides notice that the contract will not be completed, an anticipatory breach occurs.

**A Fundamental Breach:** A fundamental breach of contract is essentially the same as a material breach, in that the non-breaching party is allowed to terminate the contract and seek damages in the event of a breach. The difference is that a fundamental breach is considered to be much more egregious than a material breach; and

### Remedies of a Breach of Contract

In the United Kingdom, breach of contract is defined in the Unfair Contract Terms Act<sup>3</sup> as: [i] non-performance, [ii] poor performance, [iii] part-performance, or [iv] performance which is substantially different from what was reasonably expected. Innocent parties may repudiate (cancel) the contract only for a major breach (breach of condition), but they may always recover compensatory damages, provided that the breach has caused foreseeable loss.

It was not possible to sue the Crown in the UK for breach of contract before 1948. However, it was appreciated that contractors might be reluctant to deal on such a basis and claims were entertained under a petition of right that needed to be endorsed by the Home

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<sup>3</sup> Unfair Contract Terms Act 1977

Secretary and Attorney-General. S.1 of the Crown Proceedings Act,<sup>4</sup> opened the Crown to ordinary contractual claims through the courts as for any other person.

## **Damages**

There are several different types of damages.

- Compensatory damages: which are given to the party injured by the breach of contract.

With compensatory damages, there are two heads of loss, consequential damage and direct damage. In theory, compensatory damages are designed to put the injured party in his or her rightful position, usually through an award of expectation damages. Compensatory damages compensate the plaintiff for actual losses suffered as accurately as possible. They may be "expectation damages", "reliance damages" or "restitutionary damages". Expectation damages are awarded to put the party in as good of a position as the party would have been in had the contract been performed as promised. Reliance damages are usually awarded where no reasonably reliable estimate of expectation loss can be arrived at or at the option of the plaintiff. Reliance losses cover expense suffered in reliance to the promise. Examples where reliance damages have been awarded because profits are too speculative include the Australian case of *McRae v Commonwealth Disposals Commission*<sup>5</sup> which concerned a contract for the rights to salvage a ship. In *Anglia Television Ltd v. Reed*<sup>6</sup> the English Court of Appeal awarded the plaintiff expenditures incurred prior to the contract in preparation of performance.

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<sup>4</sup> S.1 Crown Proceedings Act 1947

<sup>5</sup> (1951) 84 CLR 377

<sup>6</sup> (1972) 1 QB 60

- Liquidated damages: are an estimate of loss agreed to in the contract, so that the court avoids calculating compensatory damages and the parties have greater certainty. Liquidated damages clauses may be called "penalty clauses" in ordinary language, but the law distinguishes between liquidated damages (legitimate) and penalties (invalid). A test for determining which category a clause falls into was established by the English House of Lords in *Donlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*.<sup>7</sup>
- Nominal damages: consist of a small cash amount where the court concludes that the defendant is in breach but the plaintiff has suffered no quantifiable pecuniary loss, and may be sought to obtain a legal record of who was at fault.
- Punitive or exemplary damages are used to punish the party at fault; but even though such damages are not intended primarily to compensate, nevertheless the claimant (and not the state) receives the award. Exemplary damages are not recognised nor permitted in some jurisdictions. In the UK, exemplary damages are not available for breach of contract, but are possible after fraud. Although vitiating factors (such as misrepresentation, mistake, undue influence and duress) relate to contracts, they are not contractual actions, and so, in a roundabout way, a claimant in contract may be able to get exemplary damages.
- General or Consequential Damages: General damages are those damages which naturally flow from a breach of contract. Consequential damages are those damages which, although not naturally flowing from a breach, are naturally supposed by both parties at the time of contract formation. An example would be when someone rents a car to get to a business meeting, but when that person arrives to pick up the car, it is not there. General damages

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<sup>7</sup> (1915) AC 79

would be the cost of renting a different car. Consequential damages would be the lost business if that person was unable to get to the meeting, if both parties knew the reason the party was renting the car. However, there is still a duty to mitigate the losses. The fact that the car was not there does not give the party a right to not attempt to rent another car.

To recover damages, a claimant must show that the breach of contract caused foreseeable loss. *Hadley v Baxendale*<sup>8</sup> established that the test of foreseeability is both objective or subjective. In other words, is it foreseeable to the objective bystander, or to the contracting parties, who may have special knowledge? On the facts of this case, where a miller lost production because a carrier delayed taking broken mill parts for repair, the court held that no damages were payable since the loss was foreseeable neither by the "reasonable man" nor by the carrier, both of whom would have expected the miller to have a spare part in store.

### **Specific performance**

There may be circumstances in which it would be unjust to permit the defaulting party simply to buy out the injured party with damages. For example, where an art collector purchases a rare painting and the vendor refuses to deliver, the collector's damages would be equal to the sum paid.

The court may make an order of what is called "specific performance", requiring that the contract be performed. In some circumstances a court will order a party to perform his or her promise (an order of "specific performance") or issue an order, known as an "injunction" that a party refrain from doing something that would breach the contract. A specific performance is obtainable for the breach of a contract to sell land or real estate on such grounds that the property has a unique value. In the United States by way of the 13th Amendment to the United States Constitution, specific

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<sup>8</sup> (1854) 9 EXCH 341

performance in personal service contracts is only legal "*as punishment for a crime whereof the criminal shall be dully convicted.*"<sup>9</sup>

Both an order for specific performance and an injunction are discretionary remedies, originating for the most part in equity. Neither is available as of right and in most jurisdictions and most circumstances a court will not normally order specific performance. A contract for the sale of real property is a notable exception. In most jurisdictions, the sale of real property is enforceable by specific performance. Even in this case the defenses to an action in equity (such as laches, the *bona fide* purchaser rule, or unclean hands) may act as a bar to specific performance.

Related to orders for specific performance, an injunction may be requested when the contract prohibits a certain action. Action for injunction would prohibit the person from performing the act specified in the contract.

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<sup>9</sup> United State Constitution 13<sup>th</sup> Amendment