Solution and Answer Guide

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Chapter 17: Breach and Remedies

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# Critical Thinking Questions in Features

Cybersecurity and the Law—Critical Thinking

1. Suppose a court rules that Arby’s weak point-of-sale security system does constitute a breach of its contract. What might be some of the compensatory damages due to Arby’s customers who had their credit card information stolen by hackers?

Solution

The goal of compensatory damages is to “make whole” the party who has suffered a breach of contract. Therefore, in this case, the plaintiffs would attempt to be compensated for any economic hardship they suffered because of the breach. Such hardships could include (1) unauthorized charges to the hacked credit card that were not reimbursed by the credit card company; (2) losses arising from the theft of financial and personal information; (3) losses arising from the inability to use a suspended credit card account; (4) the loss of productivity and enjoyment caused by the time spent reporting and rectifying the data breach; and (5) the dollar amount of any Arby’s products that would not have been purchased using a credit card had the customer known about the unreasonably high possibility of a data breach.

# Critical Thinking Questions in Cases

Case 17.1—Legal Environment

1. What might explain the difference between Razack’s estimate and the district court’s award of Red Square’s lost profits for the delay in the delivery of the truck? Discuss.

Solution

The difference between Razack’s estimate of Red Square’s lost profits for the delay in the delivery of the truck and the district court’s award could be explained by a number of factors.

These might include the court’s estimation of the witness’s credibility, for example, or the reasonableness, in the court’s view, of the amount of the claim compared to the past profits of the company. Credibility or reasonableness could be based on the witness’s position within the company and personal knowledge of its business, as well as whatever documents, such as company invoices, are available under the circumstances. Evidence of unfulfilled ad contracts or service agreements for the period of the delay could also affect the amount of the award.

In this case, during the trial, Razack, Red Square’s sales manager, testified that the company lost $12,000 per month in profits from ad contracts that it was unable to execute because of HDAV’s “untimely” work. The court awarded Red Square $10,000 damages per month for lost profits (a total of $45,000 for the four and a half months between the promised and actual delivery dates).

On appeal, the state court of appeals affirmed the award of lost profits. As to the amount, the court acknowledged that the trial court reduced the amount of the plaintiff’s claim, but added that a court can “adjust past profits where appropriate in determining lost profits.” The appellate concluded, therefore, “The district court’s award of lost-profit damages in the amount of $45,000, or $10,000 per month for four and one-half months, was not an abuse of discretion.”

Economic

1. Instead of being awarded as consequential damages, should “lost profits” be considered a risk in the change of value to the object of a contract assumed by the non-breaching party? Why or why not?

Solution

No, instead of being awarded as consequential damages, “lost profits” should not be viewed as a risk in the change of value to the object of a contract assumed by the non-breaching party.

Of course, a change in the value of the object of a contract is a risk that any contracting party takes on entering into an agreement. An unfavorable drop in value, even to the point of affecting a loss of profit on the transaction, will not support a suit for breach by the disappointed, or “mistaken,” party.

That one of the parties to a contract will not perform their part of the deal is not a risk for which the non-breaching party should be held to account. On the contrary, the party that caused the breach should pay for the other party’s resulting damages. Profits lost as a consequence of the breach can be part of an award of the damages if the consequence was reasonably foreseeable at the time of the contract. To hold otherwise would be to support a breach of contract whenever a party could switch to a more profitable deal with the same subject matter, without regard to the effect on the non-breaching party. This would encourage breaking promises, not fulfilling them.

Case 17.2—Cultural

1. How does a college basketball team’s record of wins and losses, and its ranking in its conference, support the court’s decision in this case?

Solution

In this case, the court enforced a liquidated damages clause, determining that when the contract was entered into, ascertaining the damages resulting from the defendant’s breach was difficult, if not impossible. And the clause was not a penalty—the plaintiff was justified in seeking liquidated damages to compensate for its losses.

Among the factors that the court relied on to make its determination was the effect that the resignation of a head coach from a university’s basketball team can have on ticket sales and community and alumni support for the team. The coach’s resignation can also affect the team’s record of wins and losses, and consequent ranking in its conference. This effect lends support to the court’s reasoning and decision in this case.

Case 17.3— Legal Environment

1. Cipriano designated Nicholas Vassello to testify on its behalf. Vassello was unable to explain how the Munawars’ share of the property taxes was calculated. What effect might this testimony have had on the trial court’s decision?

Solution

The inability of Vassello to explain how the Munawars’ share of the property taxes was calculated would add to a perception that Cipriano had no interest in adjusting or remedying the excessive charges imposed on the Munawars. There would have been no basis to conclude that Cipriano would cure its breach.

In the case, the Munawars leased space in a shopping center owned by Cipriano. The lease obligated the Munawars to pay a pro rata share of the property taxes. They were assessed with the charges shortly after occupying the space. Asserting that the amount was excessive, they asked Cipriano to explain, as required by the lease. After repeated requests, the Munawars received a partial reduction but no explanation. In their suit, alleging breach, the court rescinded the deal. A state intermediate appellate court affirmed.

Cipriano breached its duties to the Munawars regarding payment of their pro rata share of the property taxes, the breach was material, and rescission restored the parties to their positions before the lease was signed.

Economic

1. The lease provided that any monetary judgment in favor of the tenant could be recovered only on the landlord’s sale of the shopping center. As a practical matter, how might this provision have affected the result in the Cipriano case?

Solution

The effect of the provision in the lease, and stated in the question, supported the result in the Cipriano case. Under that provision, the Munawars were essentially left without an adequate remedy at law. They would be unable to recover a money judgment in their favor until the landlord sold the shopping center. Such a judgment would not be enforceable as a practical matter. This situation would clearly support the court’s judgment in the Munawars’ favor to rescind the lease rather than to award damages, which would be virtually uncollectible.

# Chapter Review

Practice and Review

Kyle Bruno enters into a contract with X Entertainment to be a stuntman in a movie. Bruno is widely known as the best motorcycle stuntman in the business, and the movie, *Xtreme Riders*, has numerous scenes involving high-speed freestyle street-bike stunts. Filming is set to begin August 1 and end by December 1 so that the film can be released the following summer. Both parties to the contract have stipulated that the filming must end on time in order to capture the profits from the summer movie market.

The contract states that Bruno will be paid 10 percent of the net proceeds from the movie for his stunts. The contract also includes a liquidated damages provision, which specifies that if Bruno breaches the contract, he will owe X Entertainment $1 million. In addition, the contract includes a limitation-of-liability clause stating that if Bruno is injured during filming, X Entertainment’s liability is limited to nominal damages. Using the information presented in the chapter, answer the following questions.

1. One day, while Bruno is preparing for a difficult stunt, he gets into an argument with the director and refuses to perform any stunts. Can X Entertainment seek specific performance of the contract? Why or why not?

Solution

No. This is a personal-service contract, and courts are reluctant to grant specific performance of contracts for personal services. To order parties to perform personal services against their will amounts to a type of involuntary servitude, which is contrary to the public policy (expressed in the Thirteenth Amendment). Also, the courts do not want to monitor such contracts.

1. Suppose that while performing a high-speed wheelie on a motorcycle, Bruno is injured by an intentionally reckless act of an X Entertainment employee. Will a court be likely to enforce the limitation-of-liability clause? Why or why not?

Solution

In light of the status of Bruno in the stunt industry, the clause may be enforced. When an exculpatory clause for negligence is contained in a contract made between parties who have roughly equal bargaining positions, the clause usually will be enforced. Besides, his presumed experience and knowledge indicates that he likely carries his own insurance.

1. What factors would a court consider to determine if the $1 million liquidated damages clause is valid or is a penalty?

Solution

To determine whether a provision is for liquidated damages or for a penalty, a court asks (1) at the time the contract was formed, was it apparent that damages would be difficult to estimate in the event of a breach, and (2) was the amount set as damages a reasonable estimate of the potential damages and not excessive. If the answers to both questions are yes, the provision normally will be enforced. If either answer is no, the provision will normally not be enforced.

1. Suppose that there was no liquidated damages clause (or the court refused to enforce it) and X Entertainment breached the contract. The breach caused the release of the film to be delayed by many months. Could Bruno seek consequential (special) damages for lost profits from the summer movie market in that situation? Explain.

Solution

When damages are awarded, compensation is given only for those injuries that a defendant could reasonably have foreseen as a probable result of the usual course of events following a breach. If the injury complained of is outside the usual and foreseeable course of events, the plaintiff must show specifically that the defendant had reason to know the facts and foresee the injury. In other words, to recover consequential damages, a breaching party must know (or have reason to know) before the breach that special circumstances will cause the nonbreaching party to suffer an additional loss. Thus, if X Entertainment breached the contract with Bruno, knowing that it would delay the release of the film, Bruno may collect consequential damages.

Practice and Review: Debate This

1. Courts should always uphold limitation-of-liability clauses, whether or not the two parties to the contract had equal bargaining power.

Solution

One of the reasons that imitation-of-liability clauses are included in contracts is to allow sellers to predict the extent of their liabilities should something go wrong. Without such clauses, sellers would have a difficult time obtaining liability insurance and when such insurance could be obtained, it would be at higher prices. All consumers would suffer as a result. Moreover, certainly buyers and sellers with equal bargaining powers should be obligated to accept all clauses written into contracts. Nevertheless, even if one of the parties has less bargaining power than the other, the courts should still uphold limitation-of-liability clauses because there is enough competition in the marketplace so that contracts between buyers and sellers are the result of the interactions of supply and demand and are therefore efficient.

How can a judge or jury uphold all limitation-of-liability clauses when in so doing they often would be perpetuating gross injustices? After all, such clauses are usually contained in long contracts when printed out or presented on a website in small type. Most of the time, consumers do not read contracts because they are so long and so complicated. To enforce a limitation-of-liability clause when the consumer was not even aware of its existence would be unfair. Even if a consumer understands such a clause, that does not mean the consumer really has a choice. Most contracts are presented in an all-or-nothing manner. Take it or leave it, with nothing in the middle. Consumers with little or no bargaining power must sign or not obtain the good or service they need.

Issue Spotters

1. Greg contracts to build a storage shed for Haney. Haney pays Greg in advance, but Greg completes only half the work. Haney pays Ipswich $500 to finish the shed. If Haney sues Greg, what would be the measure of recovery?

Solution

Nonbreaching parties are entitled to their benefit of the bargain under the contract. Here, the innocent party is entitled to be put in the position she would have been in if the contract had been fully performed. The measure of the benefit is the cost to complete the work ($500). These are compensatory damages.

1. Lyle contracts to sell his ranch to Marley, who is to take possession on June 1. Lyle delays the transfer until August 1. Marley incurs expenses in providing for cattle that he bought for the ranch. When they made the contract, Lyle had no reason to know of the cattle. Is Lyle liable for Marley’s expenses in providing for the cattle? Why or why not?

Solution

No. To recover damages that flow from the consequences of a breach but that are caused by circumstances beyond the con­tract (consequential damages), the breaching party must know, or have reason to know, that special circum­stances will cause the nonbreaching party to suffer the additional loss. That was not the circumstance in this problem.

Business Scenarios and Case Problems

1. **Liquidated Damages.** Carnack contracts to sell his house and lot to Willard for $100,000. The terms of the contract call for Willard to make a deposit of 10 percent of the purchase price as a down payment. The terms further stipulate that if the buyer breaches the contract, Carnack will retain the deposit as liquidated damages. Willard makes the deposit, but because her expected financing of the $90,000 balance falls through, she breaches the contract. Two weeks later, Carnack sells the house and lot to Balkova for $105,000. Willard demands her $10,000 back, but Carnack refuses, claiming that Willard’s breach and the contract terms entitle him to keep the deposit. Discuss who is correct. (See *Damages*.)

Solution

The entire issue rests on whether the provision is an enforceable liquidated damages clause or a penalty. Generally, the courts will enforce liquidated damages clauses under the principle of freedom of contract if damages resulting from breach would have been difficult to estimate at the time the contract was entered into and, more importantly, if the amount set is a reasonable estimate of what such damages would be. If the amount is excessive, the court will declare the clause to be a penalty and unenforceable, and only the amount of actual damages proved will be allowed. If, however, the amount in the clause is a reasonable estimate, the court will enforce the clause, even if the actual damages proved to be less. A good discussion of this problem would go into the hindsight effect of the court in comparing actual damages proved to result from breach against those estimated at the time the contract was entered into. Should this influence the court’s decision? (Here, Carnack actually suffered no damage and instead profited from the breach.) If one believes that $10,000 (10 percent) is excessive, what about $1,000, given the same facts? These clauses are commonly placed in real estate purchase contracts, and the answer in either case depends on whether the clause is treated as a penalty.

1. **Measure of Damages.** Before buying a house, Dean and Donna Testa hired Ground Systems, Inc. (GSI), to inspect the sewage and water disposal system. GSI reported a split system with a watertight septic tank, a wastewater tank, a distribution box, and a leach field. The Testas bought the house. Later, Dean saw that the system was not as GSI described—there was no distribution box or leach field, and there was only one tank, which was not watertight. The Testas arranged for the installation of a new system and sold the house. Assuming that GSI is liable for breach of contract, what is the measure of damages? [*Testa v. Ground Systems, Inc.,* 206 N.J. 330, 20 A.3d 435 (App. Div. 2011)] (See *Damages*.)

Solution

The Testas may recover compensatory damages and consequential damages for the breach of their contract with GSI. Damages that compensate a nonbreaching party for the loss of the bargain are compensatory damages. These damages compensate the injured party for the damages actually sustained and proved to have arisen directly from the loss of the bargain caused by the breach. The standard measure of compensatory damages is the difference between the value of the breaching party’s performance under the contract and the value of the breaching party’s actual performance. A measure of the compensatory damages in this case could be the difference in the value of the property with and without a septic system.

Consequential damages are foreseeable damages that result from a party’s breach of contract. These damages are caused by special circumstances beyond the contract—they flow from the consequences of a breach. To recover consequential damages, the breaching party must know or have reason to know that special circumstances will cause an additional loss. For example, when a party fails to perform a service, knowing that the buyer is depending on that service to determine a further course of action, a court may award consequential damages for the loss of profits from or added costs to fulfill the planned action. In this problem, as consequential damages, the Testas might recover the costs to install the new septic system and the costs to maintain the house between the discovery of the erroneous report and the date that the house was finally sold.

In the actual case on which this problem is based, the court issued a judgment in the Testas’ favor on their claim.

1. **Consequential Damages.** After submitting the high bid at a foreclosure sale, David Simard entered into a contract to purchase real property in Maryland for $192,000. Simard defaulted (failed to pay) on the contract, so a state court ordered the property to be resold at Simard’s expense, as required by state law. The property was then resold for $163,000, but the second purchaser also defaulted on his contract. The court then ordered a second resale, resulting in a final price of $130,000. Assuming that Simard is liable for consequential damages, what is the extent of his liability? Is he liable for losses and expenses related to the first resale? If so, is he also liable for losses and expenses related to the second resale? Why or why not? [*Burson v. Simard,* 35 A.3d 1154 (Md. 2012)] (See *Damages*.)

Solution

Simard is liable only for the losses and expenses related to the first resale. Simard could reasonably anticipate that his breach would require another sale and that the sales price might be less than what he agreed to pay. Therefore, he should be liable for the difference between his sales price and the first resale price ($29,000), plus any expenses arising from the first resale. Simard is not liable, however, for any expenses and losses related to the second resale. After all, Simard did not cause the second purchaser’s default, and he could not reasonably foresee that default as a probable result of his breach.

1. **Liquidated Damages.** Cuesport Properties, LLC, sold a condominium in Anne Arundel County, Maryland, to Critical Developments, LLC. As part of the sale, Cuesport agreed to build a wall between Critical Developments’ unit and an adjacent unit within thirty days of closing. If Cuesport failed to do so, it was to pay $126 per day until completion. This was an estimate of the amount of rent that Critical Developments would lose until the wall was finished and the unit could be rented. Actual damages were otherwise difficult to estimate at the time of the contract. The wall was built on time, but without a county permit, and it did not comply with the county building code. Critical Developments did not modify the wall to comply with the code until 260 days after the date of the contract deadline for completion of the wall. Does Cuesport have to pay Critical Developments $126 for each of the 260 days? Explain. [*Cuesport Properties, LLC v. Critical Developments, LLC,* 209 Md.App. 607, 61 A.3d 91 (2013)] (See *Damages*.)

Solution

Yes. Cuesport has to pay Critical Developments $126 for each of the 260 days that elapsed between the contract deadline and the date of the completion of the wall. A liquidated damages provision in a contract specifies a certain dollar amount to be paid in the event of a future default or breach of contract. A penalty provision also specifies a certain amount to be paid in the event of a default or breach of contract but is designed to penalize the breaching party. Liquidated damages provisions are usually enforceable. A provision that calls for a penalty, however, will not be enforced—recovery will be limited to actual damages. To determine if a provision is for liquidated damages or a penalty, a court asks when the contract was agreed to (1) was it apparent that damages would be difficult to estimate in the event of a breach and (2) was the amount set as damages a reasonable estimate and not excessive? If the answers to both questions are yes, the provision normally will be enforced. If either answer is no, the provision usually will not be enforced.

In this problem, the contract that required the construction of the wall provided a $126 per-day payment for Cuesport’s failure to complete the wall within thirty days. This was a valid liquidated damages clause, rather than an invalid penalty. It was an estimate of the amount of rent that Critical Developments would lose until the wall was finished and the unit could be rented. Actual damages were otherwise difficult to estimate at the time of the contract. In other words, in these circumstances, the answers to both of the questions above are yes.

In the actual case on which this problem is based, Critical Developments filed a suit in a Maryland state court against Cuesport for breach. The court awarded the liquidated damages stipulated in the parties’ contract. On Cuesport’s appeal, a state intermediate appellate court affirmed.

1. **Business Case Problem with Sample Answer— Limitation-of-Liability Clauses.** Mia Eriksson was a seventeen-year-old competitor in horseback- riding events. Her riding coach was Kristi Nunnink. Eriksson signed an agreement that released Nunnink from all liability except for damages caused by Nunnink’s “direct, willful and wanton negligence.” During an event at Galway Downs in Temecula, California, Eriksson’s horse struck a hurdle. She fell from the horse and the horse fell on her, causing her death. Her parents, Karan and Stan Eriksson, filed a suit in a California state court against Nunnink for wrongful death. Is the limitation-of-liability agreement that Eriksson signed likely to be enforced in her parents’ case? If so, how would it affect their claim? Explain. [*Eriksson v. Nunnink,* 233 Cal.App.4th 708, 183 Cal. Rptr.3d 234 (4 Dist. 2015)] (See *Contract Provisions Limiting Remedies*.)

Solution

Yes, the limitation-of-liability agreement that Eriksson signed is likely to be enforced in her parents’ suit against Nunnink, their daughter’s riding coach. And this would likely result in a judgment against them unless they can establish Nunnink's “direct, willful and wanton negligence.” A limitation-of-liability clause affects the availability of certain remedies. Under basic contract principles, to be enforceable, these clauses must be clear and unambiguous.

In this problem, Eriksson, a young equestrian event competitor, signed an agreement that released Nunnink from all liability except for damages caused by Nunnink's “direct, willful and wanton negligence.” During an event, Eriksson’s horse struck a hurdle, causing her to fall from the horse. The horse fell on her, resulting in her death. Her parents filed a suit against Nunnink for wrongful death. The limitation-of-liability clause expressly released Nunnink from liability for all of Eriksson’s equestrian activities related to Nunnink's services except for those caused by Nunnink's “direct, willful and wanton negligence.” The clause is straightforward, clear, and unambiguous, and therefore enforceable. Nunnink would be liable only if Eriksson’s death was caused by Nunnink's gross negligence. The facts do not state that Eriksson’s parents proved Nunnink was grossly negligent.

In the actual case on which this problem is based, the court issued a judgment in Nunnink’s favor. A state intermediate appellate court affirmed the judgment, on the basis expressed here.

1. **Damages.** Robert Morris was a licensed insurance agent working for his father’s independent insurance agency when he contacted Farmers Insurance Exchange in Alabama about becoming a Farmers agent. According to Farmers’ company policy, Morris was an unsuitable candidate due to his relationship with his father’s agency. But no Farmers representative told Morris of this policy, and none of the documents that he signed expressed it. Farmers trained Morris and appointed him its agent. About three years later, however, Farmers terminated the appointment for “a conflict of interest because his father was in the insurance business.” Morris filed a suit in an Alabama state court against Farmers, claiming that he had been fraudulently induced to leave his father’s agency to work for Farmers. If Morris was successful, what type of damages was he most likely awarded? What was the measure of damages? Discuss. [*Farmers Insurance Exchange v. Morris,* 228 So.3d 971 (Ala. 2016)] (See *Damages*.)

Solution

If Morris succeeds in the action against his former employer for fraudulently inducement, he is most likely to be awarded compensatory damages. Plaintiffs are awarded compensatory damages to compensate for actual losses. The goal is to make the plaintiffs whole and place them in the same positions that they would have been in if the damage had not occurred.

In this problem, Morris was working for his father’s insurance agency when he contacted Farmers Insurance Exchange about becoming its agent. Farmers trained Morris and gave him an appointment as an agent. But three years later, Farmers terminated the appointment for “a conflict of interest because his father was in the insurance business.” Farmers had never informed Morris that according to its company policy he was unsuitable to serve as its agent due to his relationship with his father’s agency. These circumstances constitute a case of fraud—the company’s silence on its policy was an intentional misrepresentation of a material fact on which Morris reasonably relied to his detriment.

Morris’s injury consisted of the “opportunities” that he had lost by becoming an agent for Farmers—selling insurance policies out of his father’s agency—and this would be the measure of the damages to which he is entitled. He might prove the amount of the lost commissions on those sales by showing what he sold during that same period for Farmers.

In the actual case on which this problem is based, a jury awarded Morris $600,000 in compensatory damages, and the court entered a judgment on the verdict. The Alabama Supreme Court affirmed. Morris’s measure of damages was based on “the opportunities he had lost by becoming a Farmers agent.”

1. **Reformation.** Dr. John Holm signed a two-year employment agreement with Gateway Anesthesia Associates PLLC. During negotiations for the agreement, Gateway’s president, Dr. Jon Nottingham, told Holm that on completion of the contract he would become a partner in the firm, and during the term he would be paid “like a partner.” The written agreement did not reflect this promise—the contract read that Holm would be paid based on “net collections” for his services and did not state that at the end of the term he would become a partner. Later, Gateway told Holm that it did not intend to make him a partner. Holm filed a complaint in an Arizona state court against Gateway, alleging breach. Before the trial, Holm filed a motion to reform the contract to express what he had been told. Nottingham did not dispute Holm’s account. What is the basis for the reformation of a contract? Is it appropriate in this case? Why or why not? [*Holm v. Gateway Anesthesia Associates PLLC,* 2018 WL 770503 (Ariz. Div. 1 2018)] (See *Equitable Remedies*.)

Solution

Yes, reformation is appropriate in the circumstances of this case. Reformation is an equitable remedy used when the parties to an agreement have imperfectly expressed it in writing. A court applies this remedy to rewrite the contract to reflect the parties’ true intentions. Courts often order reformation when a mutual mistake exists.

In this problem, during negotiations for an employment agreement, the employer’s president Nottingham told the potential employee Holm that at the end of the contract’s term Holm would become a partner in the firm. Nottingham also told Holm that during the term he would be paid “like a partner.” The written expression did not reflect this exchange—it explained that Holm’s compensation would be based on “net collections” for his services and did not state that he would become a partner. When the firm refused to offer Holm a partnership, he filed a suit for breach and sought to reform the contract.

Nottingham’s telling Holm that during the term of the deal Holm would be paid “like a partner” supports a conclusion that he would be compensated as he was told. And Nottingham did not dispute that this is what he told Holm. Thus, there does not appear to be a genuine issue of material fact regarding a mistake in the written expression of the parties’ agreement. The purpose of reformation is to correct a mistake that occurs when, as here, the parties’ intent does not accord with its written expression.

In the actual case on which this problem is based, the court granted Holm’s motion for reformation. A state intermediate appellate court affirmed. Holm did “not seek to alter the agreement in the sense of changing what the parties agreed to, but rather to bring it in conformity with what the parties actually agreed.”

1. **A Question of Ethics—The IDDR Approach and Damages.** Dr. John Braun conceived a cutting- edge device to treat adolescent scoliosis, a severe deformity of the spine. As consideration for the assignment of his intellectual property in the invention, Medtronic Sofamor Danek, Inc., a medical device manufacturer, offered Braun a higher-than-typical royalty and upfront payment. Medtronic also promised to fund expensive human trials for the device to obtain Food and Drug Administration (FDA) approval. But Medtronic never applied for permission to conduct human clinical studies. Finally, frustrated with the lack of performance on the contract, Braun filed a suit in a federal district court against Medtronic, seeking damages for breach. [*Braun v. Medtronic Sofamor Danek, Inc*. 2017 WL 6388810 (10th Cir. 2017)] (See *Damages*.)
2. Why would Medtronic make expensive promises and fail to perform? Is this ethical? Discuss, using the IDDR approach.

Solution

In answering this question, it should be assumed that Medtronic did not enter into the contract with Braun recklessly. Medtronic must have felt confident that Braun’s device would obtain the approval of the Food and Drug Administration and be successfully marketed. Perhaps the company’s actions were chiefly motivated by a desire to keep the device out of the hands of its competitors.

The first step of the IDDR approach is an Inquiry—a statement of the ethical issue, its stakeholders, and the applicable standards. Here, the question was whether Medtronic would perform its contract with Braun. The stakeholders would include the parties to the contract, Medtronic’s personnel, the company’s owners, its competitors, scoliosis patients and the medical personnel who treat them, and others with a stake in the healthcare field—insurers, consumers, the federal and state governments, and taxpayers. The standards would include the legal prescription that a contract must be performed, and the legal and ethical principle to act truthfully and in good faith.

The next steps of the IDDR approach, a Discussion and a Decision, focus on actions to resolve the issue, their strengths and weaknesses, their consequences and effects, and a choice among the options. With respect to its deal with Braun, Medtronic could fully perform, perform substantially, comply in part, or breach the contract. Complete performance would satisfy the company’s duties to Braun and all stakeholders. This may have been a costly deal, but this sophisticated, business-wise, medical-device maker must calculate the expense into its offer to Braun. Substantial performance might also have met most of the company’s legal and ethical duties. Part performance would have been less satisfactory and would not have likely prevented Braun’s suit. But it might have represented a defensible good faith effort. Instead, Medtronic committed to developing Braun’s invention and then chose not to.

The last step of the IDDR approach is a Review of the success or failure of the chosen action to resolve the issue and satisfy the stakeholders. Medtronic’s choice was clearly a legal breach of the contract and an ethical transgression. This exposed the company to the ensuing litigation, making the deal more expensive than the terms of the original agreement. None of the stakeholders would have been satisfied by this consequence. If Braun were to win the suit, he could attain at least partial gratification from an award of damages. If his invention were then to be developed and marketed, many of the other stakeholders might ultimately benefit.

In the actual case on which this problem is based, a jury found Medtronic liable and awarded Braun $37 million in damages, including $16 million for breach of contract. The U.S. Court of Appeals for the Tenth Circuit affirmed the award.

1. What would be the measure of damages that Braun seeks? Do the circumstances warrant an award of punitive damages? Explain.

Solution

The measure of damages that Braun seeks is lost profits. And yes, an award of punitive damages could be appropriate.

Damages are designed to compensate a nonbreaching party for the loss of a bargain. In other words, an innocent party is to be placed in the position that party would have been in if the contract had been performed. These damages compensate the injured party only for damages actually sustained and proved to have arisen directly from the loss of the bargain caused by the breach. The standard measure is the difference between the breaching party’s promised performance and the value of the actual performance.

In the deal between Braun and Medtronic, the company promised the doctor a high initial payment and a higher than typical royalty for the assignment of his medical device. The company also promised to pay for human trials so the device could obtain government approval. But Medtronic never applied for permission to conduct human clinical studies, effectively breaching the contract and prompting Braun’s suit.

To obtain damages representing the present value of the profits that Braun lost on the breach, he would have to show that his device was likely to gain government approval. This likelihood was evidenced by Medtronic’s confidence in the commercial value of the device as underscored by its promises of higher than normal royalties. Braun could have also testified as to the readiness of the device. Other experts might have opined on specific figures for the lost profits. A reasonable jury could base an award of damages on all of this evidence.

Punitive damages may be available when a party’s actions cause both a breach of contract and a tort. In the *Braun* case, Medtronic’s conduct could be interpreted as a basis for the tort of fraud. The company chose to induce Braun to enter into a contract for his device and not to perform its part of the deal. As a ground for an award of punitive damages, this misrepresentation could be perceived as having been undertaken in knowing and reckless disregard for any harm to Braun’s rights. A reasonable jury could infer that Medtronic chose to make this deal only to keep Braun’s invention out of the hands of the company’s competitors. The firm may have had no intention of keeping its promise to develop the device for the market. Clearly, this would deprive Braun of royalties and other benefits.

Critical Thinking and Writing Assignments

1. **Critical Legal Thinking**. Review the discussion of the doctrine of mitigation of damages in this chapter. What are some of the advantages and disadvantages of this doctrine? (See *Damages*.)

Solution

One advantage of the mitigation of damages doctrine is that it encourages the productive use of resources, whether they consist of vacant premises, idle employable workers, stored goods, or some other asset. One disadvantage of the doctrine is that it can reduce the amount a party who breached a contract can be required to pay a nonbreaching party, in effect rewarding the wrongdoer for the breach.

1. **Time-Limited Group Assignment—Remedies.** Frances Morelli agreed to sell Judith Bucklin a house in Rhode Island for $177,000. The sale was supposed to be closed by September 1. The contract included a provision that “if Seller is unable to convey good, clear, insurable, and marketable title, Buyer shall have the option to (a) accept such title as Seller is able to convey without reduction of the Purchase Price, or (b) cancel this Agreement and receive a return of all Deposits.”

An examination of the public records revealed that the house did not have marketable title. Bucklin offered Morelli additional time to resolve the problem, and the closing did not occur as scheduled. Morelli decided that “the deal was over” and offered to return the deposit. Bucklin refused and, in mid-October, decided to exercise her option to accept the house without marketable title. She notified Morelli, who did not respond. She then filed a lawsuit against Morelli in a state court. (See *Equitable Remedies*.)

1. One group will discuss whether Morelli has breached the contract and will decide in whose favor the court should rule.

Solution

The court should rule in Bucklin’s favor—Morelli was to convey the house with whatever title she had. In this problem, a valid agreement existed and Bucklin was ready to pay the price and obtain the property with its less than marketable title. Morelli’s effort to return Bucklin’s deposit should have no effect on the outcome. The option of a return of all deposits belonged to Bucklin, not Morelli.

1. A second group will assume that Morelli did breach the contract and will determine what the appropriate remedy is in this situation.

Solution

The court should order the remedy of specific performance. Specific performance is an available remedy when purchasers of real estate under written contracts demonstrate that they were at all times ready and willing to perform the contract or when a party unjustifiably refuses or fails to perform under the agreement. In this case, a valid agreement existed and Bucklin was ready, willing, and able to pay the price and accept the property with its title as is.

1. A third group will list some possible reasons why Bucklin wanted to go through with the transaction even when faced with not receiving marketable title.

Solution

Bucklin could have determined that the current market value of the property greatly exceeded the contract price of $177,000. Thus, even with the additional legal costs associated with converting the title into a marketable title, she would be better off than if she didn't buy the property.