Instructor Manual

Miller, Business Law Today – Comprehensive Edition: Text & Cases 13e 2022, 9780357634783; Chapter 17: Breach and Remedies

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# Purpose and Perspective of the Chapter

Chapter 17 is concerned with the remedies available to the non-breaching party when the other party breaches the contract between them. A breach of contract is a failure to perform what a contracting party is under an absolute duty to perform. When a party fails to perform adequately, the wronged party can sue to obtain a remedy. A remedy is the means employed to enforce a right or to redress an injury.

The most common remedies available in contract law include damages, rescission, restitution, spe­cific performance, and reformation. An award of damages is a remedy at law. The others are equitable reme­dies.

The basic remedy is damages. The most common type are compensatory damages, which are designed to put an innocent party in the same position he or she would have been in, if the contract had been fully per­formed (that is, if no breach had occurred). An understanding of this concept is essential to an understanding of what a nonbreaching party is normally entitled to on a breach of contract. Your students should realize that there is ordinarily no penalty for breaching a contract over and above restoring a nonbreaching party to the position he or she would have been in, if the contract had been fully performed.

Cengage Supplements

The following product-level supplements provide additional information that may help you in preparing your course. They are available in the Instructor Resource Center.

* Transition Guide (provides information about what’s new from edition to edition)
* Test Bank (contains assessment questions and problems)
* Solution and Answer Guide (offers textbook solutions and feedback)
* PowerPoint (provides text-based lectures and presentations)
* Guide to Teaching Online (provides technological and pedagogical considerations and resources for teaching online)
* MindTap Educator Guide (describes assets in the MindTap platform with a detailed breakdown of activities by chapter with seat time)

# Chapter Objectives

The following objectives are addressed in this chapter:

1. Distinguish among the different types of damages for breach of contract.
2. Compare legal remedies, and equitable remedies for breach of contract.
3. Understand the mitigation of damages doctrine, and when it applies.
4. Explain when a liquidated damages provision will be upheld.
5. Describe the measure of recovery on a quasi-contract theory.
6. Describe the remedy of specific performance as it applies to contract law.

# Key Terms

**Consequential damages**: foreseeable damages that result from a party’s breach of contract but are caused by special circumstances beyond the contract itself.

**Incidental damages**: damages that compensate for expenses directly incurred because of a breach of contract, such as those incurred to obtain performance from another source.

**Liquidated damages**: an amount stipulated in a contract that the parties to the contract believe to be a reasonable estimation of the damages that will occur in the event of a breach.

**Mitigation of damages**: the requirement that a plaintiff do whatever is reasonable to minimize the damages caused by the defendant’s breach.

**Nominal damages**: a small monetary award (often one dollar) granted to a plaintiff when there is no actual damage suffered.

**Penalty**: a sum specified in a contract not as a measure of compensation for its breach, but rather as a punishment for default; the agreement as to the amount will not be enforced and recovery will be limited to the actual damages.

**Restitution**: an equitable remedy under which persons are restored to their original position prior to loss or injury, or placed in the position they would have been in had the breach not occurred.

**Specific performance**: an equitable remedy in which a court orders the parties to perform as promised in the contract; this remedy normally is granted only when the legal remedy (monetary damages) is inadequate.

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# What's New in This Chapter

The following elements are improvements in this chapter from the previous edition:

* 2 New Numbered Case Examples:
  + on compensatory damages (2020)
  + on specific performance/sale of land (2020)
* 1 New Numbered Example:
  + on compensatory damages
* New Cybersecurity and the Law: Arby’s Data Breach
* 1 New Case:
  + *HDAV Outdoor, LLC v. Red Square Holdings, LLC* (2019)—an ad company sought to recover consequential damages consisting of lost profits that the company claimed was caused by a delay in the delivery of a customized truck.

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# Chapter Outline

*In the outline below, each element includes references (in parentheses) to related content. “PPT Slide #” refers to the slide number in the PowerPoint deck for this chapter (provided in the PowerPoints section of the Instructor Resource Center). Introduce the chapter and review objectives for Chapter 17 (PPT Slide 3).*

1. **17-1 Damages** (PPT Slides 5-12)
   1. **Types of Damages – Four Major Categories** 
      1. **Compensatory Damages –** Compensatory damages compensate the injured party for the loss of the bargain ( i.e., for injuries proved to have arisen directly from the loss). The actual measure varies by type of contract.
         1. **Example 17.1**
         2. **Case Example 17.2: *Baird v. Owen***
         3. **Cyber Security and the Law: Arby’s Restaurant Group Litigation**
         4. **Standard Measure –** The standard measure of compensatory damages is the difference between the value of the breaching party’s promised performance, and the value of the actual performance reduced by any loss the injured party avoided.
            * **Example 17.3**
            * ***Incidental damages*** are expenses incurred as a direct result of the other party’s breach.
         5. ***Sale of Goods* –**The usual measure is the difference between the contract price and the market price. When a buyer breaches and the seller has not yet produced the goods, the measure is lost profits on the sale, not the difference between the contract and market prices.
            * **Example 17.4**
         6. ***Sale of Land* –** Courts consider the sale of land unique, thus, the remedy for a seller’s breach of a land sale contract is typically a specific performance, at least to the extent such a remedy is possible.
         7. ***Construction Contracts* –** The measure of damages for breach of a construction contract depends on which party breaches.
            * *Breach by owner –* If the owner breaches before construction, normally the contractor may recover only the profit that would have been made on the contract. If the owner breaches during construction, normally the contractor may re­cover the profit plus costs incurred to that point. If the owner breaches after construction, normally the con­tractor may recover the contract price plus interest.
            * *Breach by contractor* – If contractor breaches by stopping in mid-project, the owner may recover the cost of completion, in­cluding compensation for any delay. If the contractor finishes late, the owner may recover the loss of use.

**Case Example 17.5: *Viola v. J.S. Benson***

* + - * + *Breach by both owner and contractor –* If the contractor substantially performs, the owner may recover the cost of completion, if completion would in­volve no economic waste.

***See* Exhibit 17-1 – Measure of Damages—Breach of Construction Contracts**

* + 1. **Consequential Damages –** Foreseeable damages that result from a party’s breach of contract (called **consequential damages**, or *special damages)*.
       1. **Case 17.1:** ***HDAV Outdoor, LLC v. Red Square Holdings, LLC***.
       2. **Landmark in the Law**: ***Hadley v. Baxendale***
    2. **Punitive Damages –** Punitive damages do not have a legitimate place in contract law and lawsuits for breach of contract, because these damages are designed to punish the wrongdoer and deter similar conduct in the future.
    3. **Nominal Damages –** A court will award nominal damages when only a technical injury is involved, and there is no actual damage or financial loss that results from the breach of contract.
       1. **Example 17.6**
  1. **Mitigation of Damages**
     1. Under the doctrine of **mitigation of damages**, when breach of contract occurs, the injured party has a duty to take reasonable measures to reduce the amount of damages incurred.
     2. **Employment Contracts –** A majority of states require a person’s whose employment has been wrongfully terminated to mitigate damages incurred as a result of the employer’s breach of the employment contract.
        1. **Example 17.7**
     3. **Rental Agreements –** Some states require landlords to use reasonable means to find a new tenant when the existing tenant abandons the premises and fails to pay rent. The former tenant is still liable for the difference between the rent owed under the original lease, and the rent received from the new tenant.
  2. ***Knowledge Check Activity (1) PPT Slide: 1 minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of categories of damages. After answer is provided, review with students the categories of damages and the definition of each category.*
  3. **Liquidated Damages versus Penalties** 
     1. **Liquidated Damages –** Liquidated means determined, settled, or fixed. The parties include a contractual provision that stipulates the amount the parties believe will be a reasonable estimation of the damages, that will occur in the event of a breach.
     2. **Penalty –** A penalty specifies a certain amount to be paid in the event of default or breach, but the purpose of the amount specified is designed to penalize the breaching party rather than make the non-breaching party whole.
     3. **Enforceability –** To determine whether liquidated damages and penalty provisions in a contract are enforceable, the court must answer two questions in the affirmative:
        1. At the time the contract was formed, was it apparent that damages would be difficult to estimate in the event of a breach?
        2. Was the amount set as damages a reasonable estimate, and not excessive?
           + **Spotlight on Liquidated Damages: Case 17.2: *Kent State University v. Ford***
     4. **Common Uses of Liquidated Damages Provisions**
        1. Liquidated damages provisions are frequently used in construction contracts, contracts for the sale of goods, and certain loan contracts.
        2. **Business Law Analysis – Enforceability of Liquidated Damages Provisions**

1. **17-2 Equitable Remedies** (PPT Slides 13-17)
   1. **Rescission and Restitution** 
      1. Rescission is essentially an action to cancel (rescind) a contract. When fraud, mistake, duress, undue in­fluence, misrepresentation, or lack of capacity to contract is present, a contract may be re­scinded unilaterally. A failure to perform enti­tles the nonbreaching party to rescind. A rescind­ing party must give prompt notice to the breaching party.
         1. **17.3: *Cipriano Square Plaza Corp. v. Munawar***
      2. **Restitution –** Generally, to rescind, the parties must make **restitution** by returning goods, property, or money conveyed. If the actual goods or property can be returned, they must be returned. If they cannot be re­turned, restitution must be made in an equiva­lent amount of money.
         1. **Example 17.8**
      3. **Restitution is Not Limited to Rescission Cases – Available in Various Actions**
         1. *Breach of contract and tort actions –* When money or property is transferred through a mistake or fraud or incapacity, or misconduct within a special relationship.
         2. *Criminal cases –* Embezzlement, conversion, theft, or copyright infringement.
            * **Case Example 17.9: *Clara Wonjung Lee, DDS, Ltd. v. Robles***
   2. **Specific Performance**
      1. Specific performance provides the exact bargain promised in the contract—performance of the promised act. This remedy is not granted unless the legal remedy (damages) is inadequate. Contracts for the sale of goods rarely qualify—the legal remedy is ordinarily adequate because substantially identical goods can be bought or sold in the market. If goods are unique, specific performance will be ordered.
      2. **Sale of Land –** Because each parcel of land is unique, specific performance of a contract to buy land will likely be ordered.
         1. **Case Example 17.10: *Davis v. Harmony Development, LLC***
      3. **Contracts for Personal Services –** Generally, specific performance of personal service contracts is refused because the law and public policy discourage involuntary servi­tude. Also, courts do not want to monitor a continuing service con­tract if supervision would be diffi­cult.
         1. **Example 17.11**
   3. **Reformation**
      1. *Reformation* is an equitable remedy used when parties have imperfectly expressed their agreement in writing. Reformation allows the court to re-write the contract to reflect the parties’ true intent.
      2. **Fraud or Mutual Mistake –** Courts order reformation most often when fraud or mutual mistake is present.
         1. **Example 17.12**
      3. **Incorrect Written Statement of the Parties’ Oral Agreement –** A court will reform a contract when two parties enter a binding oral contract, but later make an error when they attempt to put the terms in writing.
      4. **Covenants Not to Compete –** Courts may also reform contracts involving written covenants not to compete, or restrictive covenants.
         1. **Case Example 17.13: *Emerick v. Cardiac Study Center, Inc***.
   4. **Knowledge Check Activity (2) PPT Slide: 1 minute(s) total (5 minutes with discussion and review of answer).** Tests students’ knowledge of recission. After answer is provided, review with students the concept of recission and when it is applied in terms of a contract.
2. **17-3 Recovery Based on Quasi-Contract** (PPT Slide 18)
   1. **When Quasi Contract is Used**
      1. Quasi contract allows a court to act as if a contract exists, when there is no actual contract or agreement between the parties.
      2. Quasi-contractual recovery may be awarded when a party has partially performed under a contract that is unenforceable.
         1. **Example 17.14**
   2. **Requirements of a Quasi Contract**
      1. To recover on a quasi-contract theory, the party seeking recovery must show the following:
         1. He or she conferred a benefit on an­other.
         2. He or she conferred the benefit with the reasonable expectation of being paid.
         3. He or she did not act as a volunteer in conferring the benefit.
         4. The party receiving the benefit would be unjustly enriched by retaining it without paying.
3. **17-4 Contract Provisions Limiting Remedies** (PPT Slide 19)

Provisions that affect the availability of certain remedies may be enforced, depending on the type of breach excused by the provision.

* 1. **Sales Contract –** Under the UCC, remedies can be limited, but different rules apply.
  2. **Enforceability of Limitation-of-Liability Clauses**
     1. Whether a limitation-of-liability clause in a contract will be enforced depends on the type of breach that is excused by the provision.
     2. *Unenforceable – Clauses that exclude liability for injuries that are inflicted intentionally, that occur as a result of fraud, or that result from illegal acts.*
     3. *Enforceable* – A clause excluding liability for negligence provided the contracting parties are in relatively equal bargaining positions
     4. **Case Example 17.17: *2010-1 SFG Venture, LLC v. Lee Bank & Trust Co.***
  3. ***Knowledge Check Video Activity (3) PPT Slide: 2 ½ minute(s) total (5 minutes with discussion and review of answer).*** *Tests students’ knowledge of specific performance. After answer is provided, review with students the remedy of specific performance and when it applies.*

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# Discussion Questions

You can assign these questions several ways: in a discussion forum in your LMS; as whole-class discussions in person; or as a partner or group activity in class.

1. **Discussion: Four categories of damages and the duty to mitigate ([17-1 Damages], PPT Slides 5-12) Duration 20 minutes**
   1. **When do courts award compensatory damages?**
      1. Compensatory damages compensate a non­breach­ing party for the loss of a bargain (for injuries proved to have arisen directly from the loss). On an em­ployer’s breach of an employment contract, for instance, the employee would be entitled to the salary that was promised.
   2. **What are consequential damages?** 
      1. Consequential damages are foreseeable damages that flow from the consequences of a breach but that are caused by circumstances beyond the contract (for instance, a loss of profit from a planned, immediate resale of undelivered goods).
      2. The breaching party must know, or have rea­son to know, of the circumstances that will cause the nonbreaching party to suffer an additional loss. Consequential damages give the innocent party the whole benefit of the bargain.
   3. **What are punitive damages?** 
      1. Punitive damages are essentially penalties—designed to punish a wrongdoer and to deter similar conduct in the future. Generally, punitive damages are not awarded in a breach of contract action, because a breach of contract is not unlawful in a criminal sense.
      2. If a party’s acts cause both a breach of contract and a tort (for instance, not adhering to a contract’s express standard of care, which could amount to negligence), punitive damages may be assessed for the tort, and compensatory and consequential damages for the breach.
      3. Some states recognize a breach of the implied covenant of good faith and fair dealing as an actionable tort that may warrant an award of punitive damages.
   4. **Does an injured party have a duty to mitigate damages?** 
      1. Generally, an injured party has a duty to miti­gate (reduce) the damages that he or she suffers. The duty owed depends on the nature of the breached con­tract.
      2. On breach of a lease, a landlord may be required to take reasonable steps to find a new tenant, and thereby mitigate damages recoverable from the tenant who breached the lease. An award of damages may be reduced by the amount that could have been mitigated.
      3. A wrongfully terminated employee who fails unjusti­fi­ably to use reasonable means to obtain a similar job, may receive an award reduced by the amount of income that he or she might have received.
   5. **In deciding whether a clause is a liquidated damages clause or a penalty clause, should the courts ever consider the circumstances that caused the nonperforming party to breach the contract?**
      1. It is not the function of the court to consider how a liquidated damages clause might affect the breaching party, when they are determining whether the clause is enforceable.
      2. There are countless reasons why breaching parties do not perform their contracts. If the courts took these reasons into account when deciding on the enforceability of liquidated damages clauses, it would undermine one of the basic assumptions of contract law—that contracts will be enforced as written.
      3. Freedom of contract means that parties may make whatever contractual agreements they wish to make, so long as the contracts are not illegal. The parties can anticipate that these agreements will be enforced. Of course, there are exceptions.
      4. If a party can convince the court that a contract was objectively impossible to perform, performance may be excused.
      5. With respect to liquidated damages clauses, if such a clause is unreasonable or effectively amounts to a penalty, a court will not enforce it.
   6. **What is the differ­ence between a liquidated damages provision, and a penalty provision in a contract?**
      1. Liquidated damages provi­sions are enforceable; penalty provi­sions are not enforceable if:
         1. When a contract was made, it was apparent that damages would be difficult to estimate if a breach occurred; and
         2. The amount set as damages is reasonable, then the provision will be enforced (at common law and under the UCC).
2. **Discussion: Rescission, Restitution, and Specific Performance ([17-2 Equitable Remedies], PPT Slides 13-17) Duration 15 minutes.**
   1. **Discuss rescission and restitution.** 
      1. Rescission is an action to cancel a contract, to return the par­ties to the positions they were in before the transaction. A contract may be rescinded unilaterally if fraud, mistake, duress, undue influence, misrepresentation, or lack of capacity to contract is present.
      2. A failure to perform enti­tles the nonbreaching party to rescind. A rescinding party must give prompt notice to the breaching party.
      3. Generally, to rescind, the parties must make restitution by returning goods, property, or money con­veyed. Restitution is a party’s recapture of a benefit conferred on another through which the other has been unjustly enriched. If the goods or property conveyed can be returned, they must be returned. If they cannot be re­turned, restitu­tion must be made in an equivalent amount of money.
   2. **Will specific per­for­mance be granted on a breach of contract for a sale of land?**
      1. Specific performance is granted to a buyer on breach of a contract for the sale of land. The legal remedy is inadequate because every piece of land is con­sid­ered unique. Only when specific performance is unavailable (for example, if the seller has sold the property to someone else) are damages awarded.
   3. **Will specific performance be granted on a breach of contract for per­sonal serv­ices?** 
      1. Ordinarily, specific performance of personal service contracts is refused, because public pol­icy strongly discourages involuntary servitude.
      2. Courts do not want to monitor a continuing service con­tract if supervision would be difficult, as it would be if a contract required the exercise of personal judgment or talent.
3. **Discussion: Topic ([15-3 Recovery Based on Quasi Contract], PPT Slide 18) Duration 10 minutes**
   1. **When may recovery be based on quasi contract?** 
      1. Recovery may be based onquasi contract when a party has partially performed under a contract that is unenforceable. To recover under a quasi-contract theory, a party must show that:
         1. A benefit was conferred on the other party;
         2. The bene­fit was conferred with the reasonable expectation of being paid;
         3. He did not voluntarily confer the benefit; and
         4. The opposing party would be unjustly enriched by retaining the benefit without paying for it.
      2. For in­stance, an oral agreement for the sale of land is unenforceable under the Statute of Frauds, but an amount given as a down payment at the seller’s request would be recoverable in a quasi con­tract:
         1. A benefit (the down payment) was conferred on the seller;
         2. The down payment was made with the reasonable expectation of get­ting the land;
         3. The buyer made the payment at the seller’s request; and
         4. Allowing the seller to keep the down payment would enrich the seller unjustly.

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# Additional Activities and Assignments

1. **MindTap** – Why Do Equitable Remedies Matter to Me?
   1. Consider your perspective on key legal concepts.
2. **MindTap** – Learn It: Legal and Equitable Remedies for Breach of Contract; Specific Performance; Reformation of a Contract.
   1. Become familiar with one of the key concepts from the chapter.
3. **MindTap** – Check Your Understanding: Breach of Contract and Remedies.
   1. Test your understanding of the facts, themes, and concepts covered in the chapter.
4. **MindTap** – Case Problem Analysis: Liquidated Damages.
   1. Read a short scenario case, analyze fact patterns, and answer questions to gain a deeper level of critical analysis and understanding.
5. **MindTap** – Brief Hypotheticals: Breach of Contract and Remedies.
   1. Assess your ability to apply legal concepts to hypothetical scenarios.
6. **MindTap** –Business Cases: Contracts (auto-graded)
   1. Advocate, evaluate, and make decisions relating to a legal-focused business situation.
7. **Open Response** –Equitable Remedies (pairs with auto-graded MindTap Business Case: Rescission assignment).
   1. The following content can be used as supplemental in-class work, test prep, or for assessments alongside the Business Case fact pattern presented to students in the MindTap Business Case. This assignment ties to all objectives.
   2. Discussion Questions –

                                               i.     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 have had on the trial court’s decision?

                                              ii.     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 results in the Cipriano case?

* 1. Group Work – Divide the class into three groups. One group will discuss whether Morelli has breached the contract and will decide in whose favor the court should rule. A second group will assume that Morelli did breach the contract and determine what the appropriate remedy is in this situation. The third group will list possible reasons why Bucklin wanted to go through with the transaction despite the disposition of the title being unmarketable.
  2. Short Answer Essay – In 7-10 sentences, answer the following: What are some of the advantages and disadvantages of the doctrine of mitigation?
  3. Ethics Question – 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 Sofamar Danek, Inc., a medical-device manufacturer, offered Braun an above average royalty fee and an upfront lump-sum payment. Medtronic also promised to fund expensive huma trials for the device to obtain approval from the Food & Drug Administration (FDA). Medtronic never applied for permission to conduct human clinical studies. Frustrated with the lack of performance, Dr. Braun sued Medtronic in federal district court seeking damages for breach of contract.
     1. Why would Medtronic make expensive promises and then fail to perform? Using the IDDR approach, discuss the ethical implications of Medtronics failure to perform.
     2. What would be the measure of damages that Braun would seek to recover from Medtronics?
     3. Explain why or why not Medtronics’ breach might warrant an award of punitive damages.

1. **Research Project**:
   1. Have students research the standard required for courts in their state to allow an award of punitive damages.
   2. Have students research local cases involving breach of a construction contract, and/or breach of a land sale contract.

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# Additional Resources

## Cengage Video Resources

* MindTap Quick Lesson Videos:
  + Specific Performance. Duration 2:18 minutes.
  + Quasi Contracts. Duration 2:59 minutes.

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