

7.3: Remedies

Learning Objectives

By the end of this section, you will be able to:

- Know the types of damages: compensatory and punitive.
- Understand specific performance as a remedy.
- Understand restitution as a remedy.
- Recognize the interplay between contract and tort as a cause of action.

Monetary awards (called “damages”), specific performance, and restitution are the three principle remedies.

In view of the importance given to the intention of the parties in forming and interpreting contracts, it may seem surprising that the remedy for every breach is not a judicial order that the obligor carry out his undertakings. But it is not. Of course, some duties cannot be performed after a breach: time and circumstances will have altered their purpose and rendered many worthless. Still, although there are numerous occasions on which it would be theoretically possible for courts to order the parties to carry out their contracts, the courts will not do it. In 1897, Justice Oliver Wendell Holmes, Jr., declared in a famous line that “the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it.” By that he meant simply that the common law looks more toward compensating the promisee for his loss than toward compelling the promisor to perform—a person always has the power, though not the right, to breach a contract. Indeed, the law of remedies often provides the parties with an incentive to break the contract. In short, the promisor has a choice: to perform or pay. The purpose of contract remedies is, for the most part, to compensate the non-breaching party for the losses suffered—to put the non-breaching party in the position he, she, or it would have been in had there been no breach.

Compensatory Damages

One party has the right to damages (money) when the other party has breached the contract unless, of course, the contract itself or other circumstances suspend or discharge that right. Compensatory damages is the general category of damages awarded to make the non-breaching party whole.

Consequential Damages

A basic principle of contract law is that a person injured by breach of contract is not entitled to compensation unless the breaching party, at the time the contract was made, had reason to foresee the loss as a probable result of the breach. The leading case, perhaps the most studied case in all the common law, is *Hadley v. Baxendale*, decided in England in 1854. Joseph and Jonah Hadley were proprietors of a flour mill in Gloucester. In May 1853, the shaft of the milling engine broke, stopping all milling. An employee went to Pickford and Company, a common carrier, and asked that the shaft be sent as quickly as possible to a Greenwich foundry that would use the shaft as a model to construct a new one. The carrier’s agent promised delivery within two days. But through an error the shaft was shipped by canal rather than by rail and did not arrive in Greenwich for seven days. The Hadleys sued Joseph Baxendale, managing director of Pickford, for the profits they lost because of the delay. In ordering a new trial, the Court of Exchequer ruled that Baxendale was not liable because he had had no notice that the mill was stopped:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. *Hadley v. Baxendale* (1854), 9 Ex. 341, 354, 156 Eng.Rep. 145, 151.

This rule, it has been argued, was a subtle change from the earlier rule that permitted damages for any consequences as long as the breach caused the injury and the plaintiff did not exacerbate it. But the change was evidently rationalized, at least in part, by the observation that in the “usual course of things,” a mill would have on hand a spare shaft, so that its operations would not cease. R. J. Danzig, “Hadley v. Baxendale: A Study in the Industrialization of the Law,” *Journal of Legal Studies* 4, no. 249 (1975): 249.

This sub-set of compensatory damages is called consequential damages—damages that flow as a foreseeable consequence of the breach. For example, if you hire a roofer to fix a leak in your roof, and he does a bad job so that the interior of your house suffers

water damage, the roofer is liable not only for the poor roofing job, but also for the ruined drapes, damaged flooring and walls, and so on.

Nominal Damages

If the breach caused no loss, the plaintiff is nevertheless entitled to a minor sum, perhaps one dollar, called nominal damages. When, for example, a buyer could purchase the same commodity at the same price as that contracted for, without spending any extra time or money, there can be no real damages in the event of breach.

Incidental Damages

Suppose City College hires Prof. Blake on a two-year contract, after an extensive search. After one year the professor quits to take a job elsewhere, in breach of her contract. If City College has to pay \$5000 more to find a replacement for year, Blake is liable for that amount—that's compensatory damages. But what if it costs City College \$1200 to search for, bring to campus and interview a replacement? City College can claim that, too, as incidental damages which include additional costs incurred by the non-breaching party after the breach in a reasonable attempt to avoid further loss, even if the attempt is unsuccessful.

Punitive Damages

Punitive damages are those awarded for the purpose of punishing a defendant in a civil action, in which criminal sanctions may be unavailable. They are not part of the compensation for the loss suffered; they are proper in cases in which the defendant has acted willfully and maliciously and are thought to deter others from acting similarly. Since the purpose of contract law is compensation, not punishment, punitive damages have not traditionally been awarded, with one exception: when the breach of contract is also a tort for which punitive damages may be recovered. Punitive damages are permitted in the law of torts (in most states) when the behavior is malicious or willful (reckless conduct causing physical harm, deliberate defamation of one's character, a knowingly unlawful taking of someone's property), and some kinds of contract breach are also tortious—for example, when a creditor holding collateral as security under a contract for a loan sells the collateral to a good-faith purchaser for value even though the debtor was not in default, he has breached the contract and committed the tort of conversion. Punitive damages may be awarded, assuming the behavior was willful and not merely mistaken.

Punitive damages are not fixed by law. The judge or jury may award at its discretion whatever sum is believed necessary to redress the wrong or deter like conduct in the future. This means that a richer person may be slapped with much heavier punitive damages than a poorer one in the appropriate case. But the judge in all cases may remit (lower) some or all of a punitive damage award if he or she considers it excessive.

Punitive damage claims have been made in cases dealing with the refusal by insurance companies to honor their contracts. Many of these cases involve disability payments, and among the elements are charges of tortious conduct by the company's agents or employees. California has been the leader among the state courts in their growing willingness to uphold punitive damage awards despite insurer complaints that the concept of punitive damages is but a device to permit plaintiffs to extort settlements from hapless companies. Courts have also awarded punitive damages against other types of companies for breach of contract.

Specific Performance

Specific performance is a judicial order to the promisor that he undertake the performance to which he obligated himself in a contract. Specific performance is an alternative remedy to damages and may be issued at the discretion of the court, subject to a number of exceptions. (When the promisee is seeking enforcement of a contractual provision for forbearance—a promise that the promisor will refrain from doing something—an injunction, a judicial order not to act in a specified manner, may be the appropriate remedy.) Emily signs a contract to sell Charlotte a gold samovar, a Russian antique of great sentimental value because it once belonged to Charlotte's mother. Emily then repudiates the contract while still executory. A court may properly grant Charlotte an order of specific performance against Emily. Specific performance is an attractive but *limited* remedy: it is only available for breach of contract to sell a unique item (real estate is always unique).

Restitution

As the word implies, restitution is a restoring to one party of what he gave to the other. Therefore, only to the extent that the injured party conferred a benefit on the other party may the injured party be awarded restitution.

If the claimant has given the other party a sum of money, there can be no dispute over the amount of the restitution interest. Tom gives Tim \$100 to chop his tree into firewood. Tim repudiates. Tom's restitution interest is \$100. But serious difficulties can arise when the benefit conferred was performance. The courts have considerable discretion to award either the cost of hiring someone else to do the work that the injured party performed (generally, the market price of the service) or the value that was added to the property of the party in breach by virtue of the claimant's performance. Mellors, a gardener, agrees to construct ten fences around Lady Chatterley's flower gardens at the market price of \$2,500. After erecting three, Mellors has performed services that would cost \$750, market value. Assume that he has increased the value of the Lady's grounds by \$800. If the contract is repudiated, there are two measures of Mellors's restitution interest: \$800, the value by which the property was enhanced; or \$750, the amount it would have cost Lady Chatterley to hire someone else to do the work. Which measure to use depends on who repudiated the contract and for what reason.

Tort vs. Contract Remedies

Frequently a contract breach may also amount to tortious conduct. A physician warrants her treatment as perfectly safe but performs the operation negligently, scarring the patient for life. The patient could sue for malpractice (tort) or for breach of warranty (contract). The choice involves at least four considerations:

1. *Statute of limitations.* Most statutes of limitations prescribe longer periods for contract than for tort actions.
2. *Allowable damages.* Punitive damages are more often permitted in tort actions, and certain kinds of injuries are compensable in tort but not in contract suits—for example, pain and suffering.
3. *Expert testimony.* In most cases, the use of experts would be the same in either tort or contract suits, but in certain contract cases, the expert witness could be dispensed with, as, for example, in a contract case charging that the physician abandoned the patient.
4. *Insurance coverage.* Most policies do not cover intentional torts, so a contract theory that avoids the element of willfulness would provide the plaintiff with a surer chance of recovering money damages.

Key Takeaways

The purpose of remedies in contract is, usually, to put the non-breaching party in the position he or she would have been in had there been no breach. The remedies are: compensatory damages (money paid to compensate the non-breaching party for the losses caused by the breach), which also include sub-categories of incidental and nominal damages; punitive damages (to punish the breaching party) are sometimes allowed where the breach is egregious and intentional.

Exercises

1. What are compensatory damages?
2. When is specific performance an appropriate remedy? Will it be used to require a person to perform a service (such as properly repair a leaky roof)?
3. When is restitution used?
4. How could a breach of contract also be a tort, and when is one cause of action chosen over the other?
5. What is the purpose of punitive damages?

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