

TYPES OF MONETARY DAMAGES

- A breach of contract entitles the non-breaching party to sue for *money damages*, including:
 - **Compensatory Damages:** Damages that compensate the non-breaching party for the **injuries or losses actually sustained** as a result of the breach.
 - **Incidental Damages:** Expenses or costs that are caused by the breach of contract, such as the costs incurred in obtaining performance from another source.
 - **Consequential Damages:** Damages resulting from a breach that were *reasonably foreseeable* to the breaching party when it breached.
- **Punitive Damages:** Damages designed to punish a wrongdoer and to deter similar conduct in the future. Such damages are generally not recoverable in breach of contract actions, unless the breaching party's actions give rise to a separate tort claim (*e.g.*, fraudulent misrepresentation).
- **Nominal Damages:** Damages awarded to the non-breaching party when only a “technical” injury occurred resulting in no actual damages.

COMPENSATORY DAMAGES

- Although there are special formulae for certain types of contracts, compensatory damages are generally calculated as follows:

The value of the **performance as promised**

- The value of the **performance actually rendered**
 - The value of any loss avoided, or **mitigated**, by the non-breaching party
 - + **Incidental** damages to the non-breaching party
-

= **Compensatory damages.**

- **“Market Value” Damages:** In cases involving contracts for the sale of goods or, in most states, land, compensatory damages generally equal the difference between the **contract price** of the goods or land and the fair **market price** at the time the goods or title to the land was to be delivered.
- **Construction Contracts:** Exhibit 18-1 describes the damages available to a building owner or contractor when the other party breaches at various stages before, during, and after the job.

MITIGATION, LIQUIDATED DAMAGES, AND PENALTIES

- **Mitigation of Damages:** In most situations, the non-breaching party has a **duty** to take whatever action is **reasonable** to **minimize** the damages caused by the breach.
 - For example, in most instances, people who are fired by their employer, regardless of the reason, must try to find a new job. Likewise, a thwarted house buyer must take reasonable steps to locate another house.
- **Liquidated Damages:** Contracts often contain provisions requiring the breaching party to pay a *sum certain* of money if he fails to perform as required. These provisions are enforceable as long as, *when the parties formed the contract*,
 - (1) damages from a party's breach were **difficult to estimate** and
 - (2) the amount of liquidated damages was a **reasonable estimate of the value of the promised performance**.
- **Penalty:** Courts generally will not enforce a liquidated damages clause that requires the breaching party to pay a sum that **bears no reasonable relationship to the value of the promised performance**.

EQUITABLE REMEDIES

- **Rescission:** Canceling a contract and returning the parties to their pre-contract position.
- **Restitution:** Returning goods, property, or money (or, in the case of goods or property, their value in money) previously transferred in order to restore the non-breaching party to his pre-contract position.
- **Specific Performance:** Requiring the breaching party to perform **exactly** as called for in the contract.
 - Courts usually order specific performance only when money **damages** are an **inadequate remedy** and the **subject matter** of the contract is **unique** (e.g., an original Picasso or a particular tract of land).
 - Courts almost never order specific performance of a personal services contract.
- **Reformation:** Allowing the contract to be re-written to reflect the parties' *true intent*.
 - Courts typically order reformation only in cases involving (1) **fraud** or **mutual mistake**, (2) a **clerical error** reducing an oral contract to writing, or (3) an overbroad **covenant not to compete**.

PREVENTING UNJUST ENRICHMENT

- **Unjust Enrichment:** As a general principle, equity requires that when one party confers something of value or other benefit, the other party must pay a reasonable value (in money or other valuable goods or services) for it.
- **Quasi-contractual recovery** is particularly useful when one party has partially performed under a contract that subsequently becomes unenforceable.
- The party seeking to recover must show that:
 - (1) he **conferred a benefit** on the other party
 - (2) **reasonably expecting to be paid** or otherwise compensated for the benefit conferred;
 - (3) he did not **voluntarily** confer a benefit for which he did not intend to be paid; and
 - (4) allowing the benefitted party to retain the benefit without paying for it would **unjustly enrich** the benefitted party.

ELECTION OF REMEDIES

- In many cases, a non-breaching party has many remedies available. However the *one satisfaction rule* prohibits an injured plaintiff from recovering more than the full measure of her damages or the full vindication of her rights at common law. As a consequence, a plaintiff who has succeeded at trial on more than one theory of remedy must **elect which remedy or remedies** she will receive.
- Article 2 of the Uniform Commercial Code expressly rejects the doctrine in cases regarding a contract for the sale of goods. Article 2 remedies are, thus, *cumulative*.
- **Pleading in the Alternative:** Modern court procedures allow plaintiffs to seek seemingly mutually exclusive remedies and then choose the best relief to which the jury or judge finds them entitled.

WAIVER OF BREACH

- Where the nonbreaching party **knowingly** accepts incomplete or defective performance from the breaching party, the nonbreaching party has *waived* her right to complete and proper performance.
- A waiving party **cannot sue for breach** as to the performance accepted.
- As a general rule, a waiving party's acceptance of subpar performance in one instance **does not waive** her right to demand full and proper performance thereafter.
- However, if a *reasonable person* would conclude that similar defective performance in the future will be acceptable, because of the nonbreaching party's *pattern of conduct*, successive breaches will be excused unless the nonbreaching party gives the breaching party notice that full and proper performance will be demanded in the future.

LIMITING REMEDIES

- A contract may include provisions stating that
 - (1) damages are unrecoverable for **certain types of breaches**, or
 - (2) damages will be limited to a **maximum amount**, or
 - (3) that any breach will result in damages in a **pre-determined amount**.

- **Limitation-of-Liability Clause:** A provision expressly **limiting** the damages recoverable for certain types of breaches to an agreed amount. If the non-breaching party's damages are *less than* the limit, then her actual damages, rather than the limit, will control.
 - Enforcement of limitation-of-liability clauses depends on the type of breach and the bargaining positions of the parties.

- **Exculpatory Clause:** A provision precluding damages for certain types of breaches.
 - A related type of clause provides that the only remedy for breach is replacement, repair, or refund of any consideration paid.