

# I. BASIS FOR ENDORSING PROMISES

## 1. The Meaning of “Enforce”: A Brief Overview of Remedies

### Enforceable Promises

- Enforceable Promises: a promise is enforceable is decided via the reasonable person test, and if any reasonable person would have believed contract was real

### Three Protected Interests: Expectation, Reliance, Restitution

- Expectation
  - Putting you in the position that you would have been in if the contract were performed as stipulated
    - Where you EXPECTED to be after the promise
    - How to calculate: Promised value - what the P received
  - Example: Hawkins v. McGee
    - Doctor promised perfect hand, returned hand in worse condition
    - The Supreme Court overruled the trial court’s decision to give reliance damages and said it should be expectation damages
      - Supreme Court explained that the default remedy in breach of contract cases is expectation
        - “The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work”
- Reliance
  - Putting you in the position that you would been in if the contract was never made
    - Restoring the promisee to the position he was in before he changed his position out of reliance on the promise
      - Where you were before you RELIED on the promise
        - Includes not only what plaintiff lost to defendant but all other fees/damages incurred
      - How to calculate: Original value- value post contract
  - Example: Sullivan v. O’Connor
    - Plaintiff’s rhinoplasty did not go as promised and plaintiff had to undergo an extra surgery and her condition was still worsened
    - Court argued that expectation damages were too harsh and restitution was not enough so reliance damages were the Goldilocks option

- Pain and suffering is not normally considered in contract cases-normally only in torts-but since this is a non-commercial matter that could reasonably result in pain and suffering
      - Fair to include physical and psychological suffering in plaintiff's damages
        - Can include pain and suffering- just depends on subject matter and the background of the contract
    - Examples of when it is applied:
      - **Promissory estoppel is a common category where reliance damages are applied**
  - **Restitution**
    - Restoring the benefit conferred on the defendant
      - Any benefit that the defendant got, they should have to give that to the plaintiff
        - Focuses on the defendant's gain rather than the plaintiff's loss
      - Just paying back the benefit
        - How to calculate: Fair market value of any benefit conferred/any money paid
      - Not commonly employed - only used in specific situations
        - Sometimes given when expectation is too little
          - Losing Contract
        - When there is no enforceable contract at all

*Difference between **Hawkins** (which awarded expectation damages) and **Sullivan** (which awarded reliance damages):*

- The doctor solicited the plaintiff as a patient in **Hawkins**, a hand serves a more utilitarian function for an individual than a nose does, and the doctor in **Hawkins** was unqualified to perform the procedure which left Hawkins worse off than prior to the procedure

### **Why Expectation Damages**

- **Expectation damages is the default remedy**
- **Reliance damages can serve as alternative when:**
  - When there are qualms about legal liability, reliance can be used to split the difference (like in **Sullivan**)
  - Hard to calculate expectation damages
  - Expectation seems like too much so reliance does rough justice
- Why expectation damages?
  - Efficient breach theory is in favor of expectation damages
    - Maximizes utility if resources end up with those who value them most
  - Other arguments for expectation damages:

- Will theory- state should enforce intent of parties and what they intended is full value of the promise
- Moral argument- keep promises
- Administrative practicality- reliance is hard to measure especially lost opportunities
- Macroeconomic argument- future expectations have present value (but maybe doesn't apply to noncommercial situations)
- **Efficient Breach theory:**
  - the idea that parties should feel free to breach a contract and just pay damages because doing so is more economically efficient than performing under the contract
  - If someone comes along that values the good more, the seller should breach because the total gains will be greater and no one will be any worse off
  - Pareto Superior: states that everyone is either the same or better off with the new transaction (with at least one person being better off)
  - *Critiques of efficient breach theory*
    - Insufficient information, externalities not being taken into account, transaction/litigation costs, moral implications of no longer being able to rely on promises, Might not have information needed to properly assess, doesn't consider relative wealth impacting the amount people are willing to pay

### **Punitive Damages and “Bad Faith” Breach**

- Punitive damages: monetary damages that punish the breaching party
  - Meant to deter breach of contract because it threatens a worse outcome for the breaching party than compliance with the contract would have been in the first place
    - Might overdeter breach so that breaches that would be better than compliance don't occur (efficient breaches)
  - White v. Benkowski
    - Teaches that **there are no punitive damages in contract law- the law is meant just to put the non-breaching party back to the position they were in prior to the breach of contract**
      - Meaning expectation damages not punitive damages
    - Even if the breach of contract is willful and malicious, punitive damages cannot be provided
      - Only exception: if breach was so severe, it qualified as a tort of bad faith breach

## Specific Performance and Introducing the UCC

- Uniform Commercial Code

- Governing Law that must be followed in any sale of goods (unlike the Second Restatement)
- **1-305(a)**
  - Remedies to be liberally administered - no consequential or special or penal (punitive) damages except as specifically provided
- **2-104(1)**
  - *Merchant*: regularly deals in goods of the kind of hold themself out as having specialized knowledge
- **2-105(1)**
  - *Goods*: movable thing (the things do not have to be tangible, it excludes real estate and services-meaning actions not things)

- Specific performance

- **R2D 360 - Factors Affecting Adequacy of Damages:**
  - Can compel specific performance when damages are inadequate:
    - No substitute
      - No equivalent replacement available or would be costly and difficult to get it
    - Difficult/uncertain how to quantify damages
      - Like in **Sullivan** with the nose job, there was no simple calculation to determine what the loss of the employment opportunities would result to in terms of compensation
        - If she wanted another surgery, it would have made sense to request specific performance since it was hard to quantify damages
    - Likelihood damages cannot be collected
      - Unlikely to receive compensation due to financial status of the defendant so, in order to rectify, specific performance might be more beneficial
- **R2D 359(1) - Effect of Adequacy of Damages**
  - Specific performance or injunction will not be ordered if damages would be sufficient to protect/fulfill the expectation
- **UCC 2-716(1) - Buyer's Right to Specific Performance or Replevin (goods)**
  - Specific performance may be enforced when goods are “**unique**”
    - Goods are “*unique*” when they can't be covered
      - If it's not possible to get a substitute and sue for the difference in price of the substitute vs. the original

- Unique includes: land, heirlooms, artworks, items of sentimental value, non fungible items, a specially trained horse (*Morris v. Sparrow*)
  - Unique was further expanded to include dealings in *Laclede v. Amoco*
    - Since the terms of the contract were unique and could not reasonably be replaced, it was fair to compel specific performance
      - Also, in terms of externalities, there was a public interest in supplying the fuel to the public
- Specific Performance and Labor
  - Cannot compel personal service as specific performance because it would cause the servant to be degraded and demoralized and forced into a circumstance where the master would have a continual right of hand (*Mary Clark, a colored woman*)
    - Nowadays, if someone violates an employment contract and quits, they cannot be forced to work because that would be considered forced servitude
  - Lawful to have a promissory note that imposes penalties if employee terminates employment before end of the contract because it is compensatory damages for the employer's costs and lost revenue for the breach of contract (*Panwar v. Access Therapies*)
    - Expectation damages not punitive damages
    - Not forced labor
  - Negative injunction
    - Cannot “make them sing” aka make them perform the contract but can prevent them from performing for someone else
      - If an athlete leaves a team, the Court can prevent them from going and working for another team
        - Keeps them from going somewhere else to do the same work

| <u>Reasons to use Specific Performance</u>   | <u>Reasons not to use Specific Performance</u>   |
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| <ul style="list-style-type: none"> <li>- Various economic arguments for specific performance</li> <li>- Damages cannot compensate</li> <li>- Nothing else could be of equal value               <ul style="list-style-type: none"> <li>- No known replacement</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>- Efficient breach is pro-expectation which therefore would be against specific performance</li> <li>- Might be difficult to supervise and regulate the specific performance</li> <li>- Forced labor argument: cannot make</li> </ul> |