

I. INTRODUCTION to Contracts

A. What is a contract (K)?

1. A K is a legally enforceable voluntary obligation or promise
2. Ks are distinct from obligations imposed by law and obligations imposed without the consent of both parties (the former being criminal, the latter being tortious)
3. Ks are traditionally based on common law, but increasingly we see K law codified in statutes (such as the UCC) or quasi-statutes (such as the Restatements)

B. The four essential questions in K law

1. Formation – is there an enforceable K?
2. Interpretation – what is the scope of the obligation?
3. Breach – did one or more parties fail to perform as promised?
4. Remedy – if a breach occurs, what (if anything) should the law do about it?

IV. REMEDIES for Breach of Contract / Enforcing Contractual Obligations [Dawson text, chapter 1]

i. Three types of remedies

1. Expectation interest – when at all possible, K law gives the injured party the benefit of his bargain

- a. Consequential damages are recoverable if they are reasonably foreseeable at the time of agreement

b. Cost of performance, or diminution in value?

- i. If value lies in having the K performed, then award the cost of performance
- ii. If it is unclear, injured party may choose, subject to the caveat that cost of performance will not be given if economic waste is involved. This usually requires destroying already-built structures (e.g., pipes in completed house were wrong type – we don't destroy the house)

c. Expectation interest is reduced by any cost that was avoided by breach

d. Cases

- i. *Hawkins v. McGee* – the hand surgeon case. When the surgery on Hawkins' had did not produce a 100% perfect hand as promised, Hawkins was entitled to his expectation interest, which the court called 'what injury he has sustained over and above the injury he had before.' The purpose of awarding damages for breach of K is to put the P in as good a position as he would have been had the D performed faithfully.
- ii. *Groves v. John Wunder Co* – D was permitted to remove gravel from P's property for a fee. The K provided that when removal was complete, D would level the land. D removed the gravel, but did not level the property. The trial court awarded P only the diminution in value due to the lack of leveling (i.e., trial

court found that property was worth \$12,000 less unlevelled than it was levelled, and awarded that amount). Problem is, it would cost \$60,000 to level the land. Held, when a construction K is defectively performed, the measure of damages is the cost of remedying the defect—that is, the cost of completion rather than the diminution in value.

2. **Reliance interest** – recovery for cost incurred acting in belief that the contract would be performed faithfully

- a. Reliance interest is usually sought when profits (part of expectation interest) are hard to determine
- b. Usually applies only to post-K expenses (because pre-K expenses are usually accounted for in expected profit). Sometimes pre-K expenses are recoverable under the reasonably foreseeable consequential damages theory.
- c. Reliance interest is reduced by any cost avoided
- d. Cases
 - i. *Sullivan v. O'Connor* – the nose job case. P, an entertainer, alleged that D, a plastic surgeon, promised a nose job that would improve beauty and appearance. Court awarded the reliance interest—damages to put the P in the position she occupied before the surgeries. The court evidently did not believe that the doctor guaranteed to improve beauty and appearance—if he had, the court probably would have awarded expectation interest.

ii.

3. **Restitution interest** – return by a breaching party to the non-breacher of any any benefit conferred upon the breacher by the non-breacher (i.e., if Party A breaches the contract, he must return to Party B anything which Party B had previously given to Party A)

- a. This is rarely sought, and is often more appropriately addressed through reliance interest or quantum meruit

ii. **Mitigation of damages**

1. Avoidable post-breach costs are not recoverable
 - a. Overhead is not avoidable, as it must be paid anyway
2. Must accept offer of replacement work or goods
 - a. Replacement must be “substantially similar” or “comparable” (see, e.g., *The Shirley MacLaine Case*)
 - b. Work which could have been done in addition to the K work is not replacement work
 - c. Replacement work of similar/comparable nature that results in higher pay means that you were not injured by the breach

iii. **Quantum meruit** – literally means “what he deserves.” It is “an implied promise to pay for what has been done in part performance, including continual performance contracts where one party receives benefits over time,

rather than all at once.” Quantum meruit is a form of restitution interest. It is similar to quasi-contract in that denial of recovery would be an unjust enrichment.

1. Used to cover expenses/costs incurred in reliance on a contract that was otherwise invalid
 2. Recover in QM requires that a benefit be given to the other party
 - a. If a benefit was to be given to the other party, but his actions precluded it, the injured party can recover in QM (e.g., a party who repaints a house at the request of a buyer who later repudiates the home-sale K can recover in QM – see *Kearns v. Andre*)
 3. Compensation is made based on fair market value rather than on terms of K (because the K was never or is no longer valid)
 4. A breacher cannot recover his own losses through QM
- iv. **Liquidated damages** – only enforceable if not in the nature of a penalty (because K law does not permit punitive damages).
1. Two-pronged test:
 - a. Liquidated damages must be a reasonable forecast of the actual damages at the time of the making of the K, or at the time of the injury
 - b. Actual damages must be hard to determine
 2. Liquidated damages are distinct from limited liability clauses, which are acceptable (though Ohio seems to be confused on this point)
- v. **Enforcement in equity** – reserved for cases in which there is no remedy in law. Enforcement in equity is given through specific performance (SP) of the contract or through an injunction
1. Damages are appropriate, not SP, when replacement can be purchased on market
 - a. “unique” goods (art, antique, custom-made) usually can’t be replaced
 - b. Real estate usually can’t be replaced satisfactorily
 2. Can be through either positive or negative injunction
 - a. Negative favored because they’re less burdensome
 3. Rarely given for personal services
 - a. Exception is if person has exceptional talent/skill that would cause additional damage if used elsewhere (e.g., *Dallas Cowboys* case)
 4. Non-compete agreements are usually only enforceable if they’re reasonable
 - a. If unreasonable, most courts void them entirely, some “blue-pencil” them
 5. Contractual provisions for SP
 - a. Contract can’t give jurisdiction
 - b. Arbitration clauses are OK where permitted by state law