

## Module 3: Enforcing Agreements

### Table of Contents

<b>Module 3: Enforcing Agreements.....</b>	<b>1</b>
<b>Lesson 3-1: Third-Party Beneficiaries.....</b>	<b>2</b>
Lesson 3-1.1 Third-Party Beneficiaries.....	2
Lesson 3-1.2 Interview with a Business Attorney .....	8
<b>Lesson 3-2: Assignment &amp; Delegation.....</b>	<b>13</b>
Lesson 3-2.1 Assignment & Delegation.....	13
<b>Lesson 3-3: Discharge: Mutual Agreement &amp; Conditions.....</b>	<b>26</b>
Lesson 3-3.1: Discharge: Mutual Agreement & Conditions .....	26
<b>Lesson 3-4: Discharge: Breach &amp; Operation of Law .....</b>	<b>30</b>
Lesson 3-4.1: Discharge: Breach & Operation of Law .....	30
<b>Lesson 3-5: Contract Performance: Common Law .....</b>	<b>36</b>
Lesson 3-5.1: Contract Performance: Common Law .....	36
<b>Lesson 3-6: Contract Performance: Sale of Goods.....</b>	<b>46</b>
Lesson 3-6.1: Contract Performance: Sale of Goods.....	46
<b>Lesson 3-7: Remedies for Breach: Common Law .....</b>	<b>55</b>
Lesson 3-7.1: Remedies for Breach: Common Law .....	55
<b>Lesson 3-8: Remedies for Breach: Sale of Goods .....</b>	<b>64</b>
Lesson 3-8.1: Remedies for Breach: Sale of Goods .....	64

## Lesson 3-1: Third-Party Beneficiaries

### Lesson 3-1.1 Third-Party Beneficiaries

## Third-Party Beneficiaries

**I**

Parties to a contract obviously receive benefits

But third parties do too

Big question: Can third parties enforce contracts?

In this lesson, we're going to discuss third party beneficiaries. A third party beneficiaries are people who receive benefits under a contract but aren't actually parties to a contract. So there are some important questions that we need to ask about these people. What is a third party beneficiary? Are there different types? Can they enforce contracts? If so, when? [MUSIC] Now, we already know that the parties to a contract receive various forms of benefits, right? You pay money to somebody, they receive a benefit. You obtain some good or some service, you receive a benefit. If you are one of the parties to a contract, we know that you receive benefits, but contracts don't only benefit the parties to the contract. What we call third-party beneficiaries, sometimes receive benefits from a contract. So, say for instance a company decides to build a factory in your town, and you operate a gas station or a restaurant in that town. That's great, right? You receive some benefits from that even though you are not a party to any of the contracts related to construction of that factory, you're not employed there or anything like that. So our question in this lesson is, what rights do third-party beneficiaries have? Specifically, can they enforce contracts?



Now the example we're going to use as we go through this little lesson is of a company that buys some cheap land from a city to build, say, a new headquarters, a factory, something like that. And the agreement between the company and the city, that's the contract. That agreement, though, say it requires the company to use part of that land, because they got a really good deal on it, to build a community center on the land for the local citizens. And maybe, in the community center, they're required to give some space to the local library to use rent-free. So that's our example. Now the library gets some benefit from this contract, right? They're not a party to the contract, the local citizens get a benefit from the contract. They're not parties to the contract. What rights do they have to enforce this contract? Now it really depends on what type of beneficiary each of these third parties is.

## Two Types of Third-Party Beneficiaries

**I**

Intended

Incidental

There are two types, intended beneficiaries and incidental beneficiaries. And depending on which type you are, you have different enforcement rights to a contract when you're not a party to that contract. So in our example, the library is what we call an intended beneficiary. They're specifically called out in the contract between the company and the city as receiving a benefit, right? So the library gets some space to use in this community center, they get to use it rent free. It's in the contract that they get this benefit. They are intended, by the parties to the contract to receive a benefit. They are an intended beneficiary. Now incidental beneficiaries are all other third parties who receive some benefits from a contract but is just kind of a coincidence. They're not specifically identified in the contract as receiving those benefits. So examples are, if you build a brand new headquarters building. If there are gas stations close by, restaurants in the neighborhood. I mean they all get benefits from the increased traffic, the increased business, the boost of the economy, but they are not intended beneficiaries.

## Intended Beneficiaries

**I**

Can enforce agreements

But, their rights must have vested

**Vesting** – Affirmative acceptance  
or material alteration of position in  
anticipation of benefit

So only intended beneficiaries can enforce agreements as third parties. Now when we say enforce agreements we mean, well, if one of the parties decides not to perform its obligations under that contract, an intended third party beneficiary can actually take that party to court and force them to perform their contractual obligations. But, the third party's rights must have vested. Now when we say rights must have vested, we mean the third party has to either have known about their intended benefits and taken some action to accept it. So in our example of the library receiving space rent free, the library has to have known that the contract between the company and the city called for this space to be given to the library, and the library has to have accepted it. It can be as simple as saying, that's great, we're looking forward to moving into this space once it's constructed. It could be as complicated as them signing some sort of document affirmatively accepting the offer of this rent free space. But the important thing that the intended beneficiary knew of the benefits and accepted that benefit. The other way an intended beneficiary's rights can vest is, if even if they don't make any sort of affirmative acceptance, if the beneficiary materially alters its position and anticipation of receiving the benefit.



So on our example, suppose the library never had any sort of formal acceptance of the offer of rent fee space. But, maybe the library bought a whole bunch of new books, or computers, or office equipment that it was intending to put into this new space. It materially altered its position, it spent money, it acquired capital, it hired employees. Whatever it did in anticipation of receiving the benefit. In that case, its rights have vested and it can enforce the agreement. Now with regards to incidental beneficiaries, they have no rights to enforce agreements to which they are not parties. So if you own a restaurant across the street from the new football stadium that's being built in your neighborhood, hey, that's great you're going to get a lot of business. But if they decide not to build it, tough luck, you can't enforce it. You're an incidental beneficiary, your benefit is not contemplated by the parties to the agreement. So you can only sit back and hope that they fulfill their obligations, because you have no right to enforce it. Now, frequently, the question arises of how do you determine who's an intended beneficiary, who's an incidental beneficiary? There are really two questions to ask in order to make this determination.

## Determining Intended v. Incidental Beneficiary



Did the parties specifically identify the benefit?

Did the parties specifically identify the third party?

First, in the contract, did the party specifically identify the benefit? So, in our example in the contract the company and the city specifically identified that there will be a community center built and that there would be space there that would be intended to benefit the community. Second question, did the party specifically identify the third party beneficiary? So in our contract, the company and the city specifically said the library would receive this benefit. Since the benefit was specifically identified, the third party was specifically identified, they are an intended beneficiary. And pretty much all other beneficiaries from this contract would be incidental beneficiaries. So those are the rights of third party beneficiaries. If you're an intended beneficiary, and one of the parties to the contract doesn't fulfill its obligations, you can take them to court and sue to enforce it even though you're not a party to that contract. If you're an incidental beneficiary, you can't, you basically have no rights, you have to hope and pray that everyone fulfills their obligations so that you can receive the benefit that you're hoping for. [MUSIC]

Lesson 3-1.2 Interview with a Business Attorney



All right, we're here with my friend, Brian Smith. Brian is an attorney. He's a partner at the law firm Heyl Royster here in Champaign. There a pretty big firm throughout Illinois, they have offices all over the place. Brian practices in the areas of commercial litigation, construction law, employment law, civil rights, so he has a lot of time in the courtroom. So, I thought to be really, really cool to just talk to Brian a little about his experiences, especially with contract disputes, because in this module, we're going to be talking all about contract disputes. What happens when people reach contracts? How do you get discharged from a contract? What happens when a third party tries to assert some rights in a contract? So, to start things off, I thought I talked to Brian. Now Brian, he's a really great guy. He went to the U of I for his undergrad. He got his law degree here in 2007, just like me. So, I'm super thankful that Brian is here. So, welcome Brian. Thanks for being a part of my class. Thank you. So, if you could just start off a little bit by telling us a little about your practice the kind of cases that you try the clients you represent. Absolutely. So, I have a pretty varied practice kind of as Michael mentioned. A lot of what I do and where it bleeds into a lot of commercial and contract disputes as often, I have a relationship with different employers in the employment law and contacts, defending employers in ADA claims, American Disabilities Act claims. It's Title 7, other things like that, and a lot of times those involve depending on the organization, contracts for employment. I do also a lot of commercial litigation, and increasingly more of that, and the commercial litigation that I do is mostly in agribusiness, and in construction law, and a little bit of collections too which often ends up carrying over and

crossing over with the agribusiness side of things. Then I do a lot of civil rights work. So, defending police officers, or sheriffs, or nurses, or doctors that work in prisons things that like. Right. Very cool. Great. If you're watching this video anything, what is agribusiness? Here in Central Illinois, agribusiness is huge. This is a farming community, and agribusiness is a big deal. So, disputes that arise in agribusiness are really, really common. So, imagine you do construction, agribusiness commercial litigation, a lot of that, obviously involves contracts. Where are some of the most common types of contractual disputes that you see come across your desk? Couple of ones that immediately jumped to mind are construction problems. An owner and the general contractor entered into an agreement to do whatever it might be, whether it's build a building, put on a new roof, or something bigger, and after or during the construction, either the owner isn't pleased with the end result, or the contractor isn't pleased. Typically, if the contractor isn't please, it means they haven't been paid or not paid sufficiently in their minds. That leads to a dispute. Then, on the agribusiness side, a lot of times that involves services that have been either provided, or that will be provided in payments that haven't been made.



Okay. Terrific. Now, let me ask you in the construction litigation, we all know that oftentimes an owner of a property will enter a new contract with a general contractor, but then that person will oftentimes hire other people to actually do the work and delegate it out to them. Do you run into disputes where that process of delegation caused the problem? That's one of the most frequent come occurrences in construction litigation, because often, what happens, I kind of joke that a lot of times a general contractor, the only tool that they carry is a cell phone, and they're not the one out there

putting on this new roof. Rather, they hire subcontractors to do that. So, if you're representing the owner, the interesting thing about that is, let's take the roof for example. You say you have an owner and they ask for a new roof to be put on and the roof leaks, and they're looking at to the general contractor, the person they have the contract with to say, "Fix our roof." Then, the general contractor is going to say, "Well, we appreciate that the roof is leaking, but we didn't put the roof on." So, the general contractor then sues whatever roofing company they subcontracted with in order to try and get it fixed. The problem that presents for the owner over here is their privity of contract is with the general contractor. So, their only recourse is against the general which is good and a bad thing. But oftentimes, the real party that is at fault is insulated from the owner. All right. Yeah.



So, keep that in mind as we talk about it in a lesson coming up. We talk about delegation of duties to third parties. If you are that general contractor and you delegate your duties to somebody else, we're going to talk about, when do you remain liable? Can you get out of liability for that? Because if you're the homeowner in that case, all you care about is getting a roof that works, right? Yeah. And from a justice perspective, maybe that's right. Maybe we should only care that the person gets what they expected out of the contract. So, pay attention to that, as we go through the future lesson on delegation. So, before we sat down, you and I, were talking a little bit about UCC Article 2, which we've learned about in our class a little bit, and how that sometimes comes into play. I know, you can't disclose much about individual cases sometimes and clients, but do you ever have a sale goods issue that becomes a contract dispute that you wind up in court with? You do. The UCC is largely misunderstood, and complicated, but at the

same time, heavily relied on. I think that in practice, in business practice, it's probably relied on and understood a lot of times better than the lawyers understand it, when it gets to litigation. So, I think that's one thing that's really interesting as you are from a lawyers perspective, if you get involved in a UCC case, a lot of times the lawyers that you're talking to really don't understand what is going on. But when it comes to contract formation, the UCC has a few things that deviate from standard common law, contract law, and one of those things is if a purchase order for example is sent out. You have an oral agreement for goods, and under normal contract law, that's over \$500. If it's not in writing, it's worthless. But under the UCC, if you send out a purchase order and the person is a merchant, and they don't send back anything saying, "No, that wasn't our deal. You have an agreement." But if comes to my desk, the chances are that something didn't play out as anticipated there. I think what I can say in the formation stage is, "Wow, that is what the UCC says." It's going to be a lot simpler and a lot cleaner if it's papered and signed and done as if the UCC didn't exist.



Okay. Yeah, that's great advice. So we learned about contract acceptance under the UCC can be different than common law contract acceptance, but maybe it's a good idea to go ahead, and take that extra step even though you don't have to, so that you don't have to end up paying. I mean, I would like for you to pay Brian a lot of money in legal fees, but you probably don't want to pay Brian a lot of money in legal fees. So, awesome. Well, Brian thanks so much for sitting down with us for a few minutes today, and for you guys viewing this video, you know this kind of stuff is real life. The things we talk about breach of contract, enforcing agreements, third party rights, the UCC contract formation, this doesn't exist in a vacuum. It happens in real life. If you get into trouble,

you're going to have to go see somebody like Brian. So, think about that and keep that in mind as you watch the rest of the lessons in this module.

## Lesson 3-2: Assignment & Delegation

### Lesson 3-2.1 Assignment & Delegation



This lesson deals with the concepts of assignment and delegation in a contractual setting. We need to understand what are your rights in a contract? What are your duties? How are they different? When can you transfer rights and duties to someone else? What are the rules surrounding those transfers? So, in a contract, each party has rights and they have duties, right? So your rights are the things you get, your duties are the things you have to do or give. So, take a very simple example of a contract. You and I have a contract for me to sell you my bicycle for a \$100. Your right is to receive my bicycle, your duty is to pay me a \$100.

## Rights v. Duties

**I**

**Transfer of rights** – Assignment

**Transfer of duties** – Delegation

Now, your rights and your duties in contracts can sometimes be assigned to other people, transferred to other people. Now, when you transfer a right, we call that an assignment. When you transfer a duty, we call that a delegation. In both instances, you're transferring something related to your role in the contract. When you transfer a right, something that you get, we call it an assignment of rights. When you transfer a duty, something you're supposed to do, we call it a delegation of your duties. So in this lesson, we're going to talk about what assignments and delegations are, when you can do them, and when you can't.

## Assignment

**I**

General Rule: Assignment of rights  
is permitted

Notice must be given

Assignor's rights are extinguished

So, let's start with assignments of rights. As a general rule, parties to a contract are usually free to assign their rights to other people. So for instance, we have a contract for me to sell you my bicycle for a \$100. My right is to receive a \$100 from you, but maybe I owe a \$100 to somebody else, and I want to assign my right to receive that \$100 to this other person. As a general rule, that's fine, I can assign my rights. Now, when you assign your rights, there's a couple of rules. First, you have to give notice to the other party the contract. If I assign my right to receive my money to somebody else, I've got to let you know that so that you know to pay this other person the \$100 instead of me. So, when you assign rights, you have to give notice to the other party to the contract so they know to whom to render their performance. When I assign my rights, my rights are extinguished. So, the right fully transfers to the assignee and I no longer have any rights with regards to whatever rights I transfer. Now, it can get complicated. Sometimes you can transfer all of your rights, you can transfer less than all of your rights to a contract. The rights you assign are extinguished in you and vested in another person. But if you retain other rights, you might still have some rights in the contract. Now, the general rule, as we just stated, is that rights are freely assignable, but there are some exceptions to that general rule.

# Assignment

**I**

## Exceptions to the general rule

Anti-assignment clause

Personal service contracts

Material alteration of duties

Future rights

Sometimes you will not be allowed to assign your rights under a contract. In the first instance of the exception to that general rule is what's called an anti-assignment clause. A lot of contracts have anti-assignment clauses in them for all sorts of reasons. But an anti-assignment clause is actually specific language in a contract between two parties that says you are not allowed to assign your rights under this contract to somebody else. A very common case is, say I lease some property, maybe an apartment to live in, some office space from my business, in the lease, there will almost always be an anti-assignment clause that says you are not allowed to assign your rights in this lease to another tenant without approval from the landlord. Why? Because the landlord vetted me as the tenants. I have the right to occupy the space, under the terms of our lease, but the landlord vetted me as a tenant not somebody else. How does he or she know that if I assign my rights and somebody else comes and takes that space they're not going to have a meth lab or do other crazy stuff there. So, anti-assignment clauses prohibit the assignment of that right without the approval of the other party to the contract. So, if you have an anti-assignment clause, you will not be allowed to assign your rights without the approval of the other party to the contract. Next example of when you won't be allowed to make an assignment is in the case of what's called the personal service contract. So for instance, if I have an employment contract to teach business law at the University of Illinois, the University has the right to receive my services. Now, the University can't just assign its right to receive my teaching services to any other school. Say they want to assign their right to receive my teaching services to some lesser school like Harvard or Princeton or one of those places. They can't do that because it's a personal service contract. It involves me giving my own personal service,

so employment contracts, things like art performances, sports contracts, haircuts, anything that involves a personal service, your right to receive personal services cannot be assigned without the consent of the other party to the contract. Okay, third exception is if the assignment would cause a material alteration of one party's duties, it's not assignable without the consent of the other party. So for example, if you buy a car insurance, the contract between you and the insurance company says, you give them money and they provide you with insurance against collisions and things like that. Your rights in that contract is the right to receive insurance, but they only provide you with that rights in the contract because of who you are. They take into account things like how risky of a driver are you, what kind of car do you drive, what color is your car, all these factors that go into determining the price of that policy. So, even though you have the right to receive that insurance, you can't assign it to somebody else because somebody else doesn't have the same profile as you. The insurance company wouldn't be willing to offer them the same deal as they offer you. So you can't just assign your rights because it would materially alter the duties of the other party to that contract. The last exception to the rule about free assignability of contract rights is future rights. Now, a future right isn't something that happens in the future, a future right is a right that has not yet vested, so you can have rights that occur in the future that you assign. But for instance, say you think that a contract will be signed and you think that you will be getting some rights in that contract, but it hasn't yet been signed, that's speculative, and that's the type of future right you can't assign because it hasn't vested yet. Now, once that contract gets signed that actually does give you some rights, now it's vested, and you can assign those rights to somebody else. But until they are firm and fully vested, you can't assign those rights.



Now, a corollary to our discussion of assignment of right, imagine this scenario. You own one share of stock in a publicly traded corporation. In the old days, they used to actually give you a paper that said share of stock. They don't really do that much anymore, but say they do. You have this share of stock, one share of stock in Apple or Microsoft or whoever. Now, you say, "I want to sell my stock to someone else." So, you take some money from person A and you give them a document that says, "I'm selling you my share of stock, assigning you my rights to this stock." When you have stock, you have the right to dividend and the right to vote and some other rights like that, but you don't give them the actual stock certificate. Now, say person B comes along and you say, "Oh, I'm going to sell you this same share of stock." They don't know you already sold it to person one, so you take some money from person B, you give them a paper that says, "I assign you my rights and the share of stock." But again, you don't give them the share of stock. The person C comes along and you do the same thing, they don't know about Person A or person B, so you take some money from person C you say, "Hey, I'm going to sell you my share of stock." This time you actually give them the share of stock. Now, imagine that person B, the second person to come along, doesn't have the share of stock, but they go and they tell the company, "Hey I'm the new stockholder here. I'm the person who has rights to this stock. So, next time you pay out a dividend or you have a voting notice, some shareholder meeting notice, make sure you send it to me because I bought the stock." This is a mess. So, a person A gave me some money and they were first in line. You gave them a signed document that says I sold you my stock. Person B also gave his some money for that same share stock you gave them a signed document they give you some money. They notified the company

that, "Hey I'm the new shareholder." Person C gave you some money and you gave them the actual stock certificate. Who do you think actually has the rights to that stock? Well, the answer is, it depends. The answer to a lot of things is it depends.

## Assignment



Successive assignments – whose right is it?

American Rule

But here in the United States, we generally follow what's called the American Rule. The American Rule states that, "The first assignment in time is the one that's effective." So, in that case person A would actually have true ownership rights to that share of stock because the first assignment and time effectively eliminates my rights in the share of stock, or your rights and the share of stock. So, once you make that first assignment, you don't have the right to assign it to anybody else. Person B and person C are out of luck. That's the American Rule. Now, the English Rule, which you can still find in some places is that the first person to give notice of an assignment is the person who actually has the right. So, in that case person B would have the true rights to the share of stock, because they gave notice to the other party to the contract, we'll assume that it's stock ownership as a contract is very similar. Person B gave notice to the other parties so they would be the true owners under the English Rule. And now there's this third exception to both the American Rule and the English Rule. We call it the Tangible Token Rule. The Tangible Token Rule says; "If a contract is represented by some sort of tangible token, say like a share of stock whoever actually has the tangible token is the true owner of the rights regardless of where they fall in the order of assignment." So, actually under the Tangible Token Rule, which has been adopted in most places, person C would be the true owner because they have the tangible token even though

person A was first, and person B notified the other party first, person C would have the vested rights in the assignment of the rights under that stock certificate. Let's move onto delegation of duties. Remember rights are things you receive under a contract, duties are things you do.

## Delegation



General rule: Delegation of duties  
is permitted

But, the general rule about transferring rights and duties is the same. Delegation of duties is generally permitted. So, let's go back to our simple example. I'm going to sell you my bike for \$100.



Your duty is to pay me \$100. Now, suppose somebody owes you \$100 and you say to your friend, "Oh, don't pay me. Just pay the \$100 in exchange for the bike." So, you can delegate your duty to pay the \$100. From my perspective, do I care where \$100 comes from, not really. I just want my money. So, if you delegate your duty to pay, I don't care. And that's the general rule. Delegation of duties is permitted.

## **D**elegation

**I**

General rule: Delegation of duties  
is permitted

Delegator remains liable for  
performance

Now, difference between rights and duties is that, if you delegate your duties as a

general rule you are still liable for the performance of those obligations.



So, you delegate your duty to pay \$100 to somebody else, if that person doesn't pay, you are still liable for it. I can still sue you. So, remember with rights once you assign it, they're gone. With duties once you delegate them, you're still on the hook. So, you've got to make sure the other person performs as expected. Now, as with rights, we have some exceptions to the general rule, and the first exception is actually the same.

## Delegation

**I**

### Exceptions to the general rule

Anti-delegation clause

Personal service contracts

You can have an anti-delegation clause, just as you can have an anti-assignment clause, same thing. And you can have an anti-delegation clause in your contract that prevents you from delegating your duties without the approval of the other party.

Personal service contracts again, are excepted from the general rule. If you are hired to perform a personal service, you can't just swap out somebody else to perform that personal service without the approval of the other party. So, say I'm a concert promoter and I want to bring in my favorite band in the world to come and play at my concert venue. So, I call up U2's manager, U2 is my favorite band in the world. I call it U2's manager and, "Hey, can the boys from Dublin come and play at my venue?" And he says, "Of course, they can. Anything for you." And so we have a contract for U2 come a play but at the last minute they decide, "We don't want to do it, we're going to delegate our duty under this contract to Justin Bieber." Do I want Justin Bieber to come to my concert? No of course not. They can't delegate that duty. It's a personal service contract. I hired them to perform a personal service, he can't delegate that duty.

## Delegation

**I**

### Exceptions to the general rule

- Anti-delegation clause
- Personal service contracts
- High-trust relationships
- Material alteration of the contract

Third exception to the general rule. Now, this is a new one. This is if you have a high trust relationship. Sometimes we call these fiduciary relationships things like that. For an example, suppose you hire a trustee to administer your charitable fund or something like that. Some sort of relationship that requires an extra level of trust and you have some sort of contractual or employee relationship between you and this other person. These relationships, fiduciary relationships, high trust relationships, the person who is being entrusted with funds or confidential information or things like that cannot delegate their duties under that contract, because you place your trust in them. So, they have to honor that. And then final exception to the general rule. If the delegation of your duty will materially alter some portion of the contract, then you cannot delegate the duty without permission. So, for example, say I'm a manufacturing company and I have a contract to manufacture and sell some products to you and I say well, I'm at capacity. I'm going to delegate my duty to manufacture the products to somebody else. They'll manufacture them and they'll deliver the products. But, maybe they're the same products but the quality isn't the same. That would materially alter the expectations of the other parties to the contract. So, in that case a delegation of duties would not be permitted. Now, last note about assignment of delegation.

## Delegation

**I**

**Novation** – The complete substitution of one party for another

There's this concept called novation. Novation is very similar to an assignment and delegation, except that it's the complete substitution of one party for another. So, for instance I can assign all my rights to you. I can delegate all my duties to you, but remember I said your duties you're still liable for your duties even if you delegate them to someone else. But, if you engage in what's called a novation, you actually are relieved from your duties. Now, in order to have a novation, all of the parties have to agree to it. So, all the parties to the contract plus the person being substituted in must all agree. But if you all agree, then basically you can have a little one page paper that says we all agree to substitute to this person in via a novation. Then, you are completely relieved from all of your rights and all of your duties and the new person takes your place in the contract. That's a novation. It differs a little bit from an assignment delegation, in that they take your place entirely and you are freed from all rights and all obligations under the contract. So, that's assignment and delegation. The quick and dirty of the rules about how to transfer your rights and duties under a contract.

## Lesson 3-3: Discharge: Mutual Agreement & Conditions

### Lesson 3-3.1: Discharge: Mutual Agreement & Conditions

## Discharge



What is discharge?

How is discharge different from termination of a contract?

Complete performance of duties → discharge

Discharge can arise in other ways, too

This is the first of two lessons about discharge from your contractual obligations. In this lesson, we're going to talk about discharge by mutual agreements and discharge through the occurrence of conditions that are identified in the contract. In a contractual setting, discharge means when you are relieved from any further liability under a contract. There's nothing left for you to do and all of your obligations are discharged. Now discharge in terminations of a contract or related concepts but not the same. So, sometimes when you're done or the other party breaches the contract or something like that, your duties could be discharged even though the contract is still in effect and there's more stuff to be done by other people or maybe you have to go to court and litigated. So, the contract hasn't been terminated but your duties are discharged. So, discharge is when you as an individual or one party to the contract has either fully performed or is no longer liable to perform any of your duties. Now, the best way to have your duties be discharged is just to perform them. I mean in an ideal world, all the parties to a contract would do what they're supposed to do and we'd all hold hands and sing Kumbaya and it would be terrific. People don't do that unfortunately. So, even though the best way to obtain discharge from a contract is to completely perform your duties, discharge can actually arise in a number of other ways. So, we're going to go through the four biggest ways in which you can be discharged from your contractual obligations without actual complete performance.

## Discharge by Mutual Agreement

**I**

Rescission

Substituted contract

Novation

Accord & satisfaction

So, in this lesson we're going to talk about what we call discharge by mutual agreement and then also conditions. Discharge by mutual agreement is pretty self-explanatory. The parties can agree in certain situations that well, maybe we didn't do everything we're supposed to do but we're just going to agree to discharge the remaining obligations. So, there are a few ways in which this can happen. The first is what's called rescission. Rescission is when the parties to a contract both get together and just say, "This isn't working, let's just call it off." Rescission is just the termination of a contract. There still might be stuff left to do but the parties decide that we're going to relieve each other from liability for doing that. So, for instance, maybe I have a contract that calls for you to ship goods to a seller once a month for the next five years and two years into the contract, you both decide this is not working for us. Let's call it off. Rescind the rest of the contract. In which case, both parties will be discharged from any further obligations. A similar concept is what's called a substituted contract. So, maybe same example, maybe you have a contract that calls for you to ship goods to the customer every month for the next five years and two years into it you say, "This is not working." The price of raw materials has gone up or demand for the product has gone down on the customer side or something like that. You say, "We still want to do business but just not under these same terms." You can substitute in a new contract and that substituted contract will now control and you'll be discharged from your obligations under the old contract. Now at a previous lesson we talked about a concept called novation. Novation is when one party is swapped into a contract for another party. In that case, the party that is swapped out of the contract is discharged from any future obligations. So, they receive

a discharge by mutual agreement. And then the last example under discharge by mutual agreement is what's called an accord and satisfaction. Now, in an accord and satisfaction, one party agrees to accept something less than what they were originally owed in a contract in order to move things along or have the other party do anything at all and usually, well, always when there's an accord and satisfaction, there is a dispute over what's owed. So, maybe you ship goods to somebody and they had originally agreed to pay you a million dollars for those goods and they get the goods and they say, "These goods don't work the way they're supposed to work. We only want to pay you \$750,000 instead of the million dollars that the contract calls for." And maybe you have a dispute. You say, "The goods work." They say, "The goods didn't work." They say, "We don't think they work but we'll give you \$750,000". And if you agree to accept it, that's an accorded satisfaction. It's less than what you originally owed but there's some dispute over the contract and you agree to accept it. They pay you, you're discharged. Both parties are discharged, even though there's still that \$250,000 still out there that the contract had called to be paid. Let's move on to conditions. Conditions can actually cause new obligations to arise under contract but also can discharge obligations in a contract.

## Conditions



Condition precedent

Condition subsequent

Concurrent condition

So, there are three types of conditions that we see in contracts that are important to know. The first one is what's called a condition precedent. In a contract, if you have a condition precedent what that means is that the contract states that, "The occurrence of some event will give rise to a duty." So, for example, maybe you have a contract

between an airline and a fuel supplier and in the contract maybe they have a long term ongoing contract and it says something like, "If the price of fuel falls below a certain amount, then the airline agrees to buy so many more gallons of fuel." This is a condition precedent. Once the price of fuel falls below amount, their duty to buy more arises. If the price never falls below that level, their duty never rises. That's condition precedent. Condition subsequent is the opposite of that. It's when the occurrence of some event relieves a party from a duty. So for example, the same example; you have airline and a fuel supplier. They have a contract. Maybe that contract now says, "If the price of oil rises above a certain amount, then the airline has no more duty to buy any fuel." So, if the condition is the price of oil rising above a certain amount, since it's a condition subsequent, if that occurs then they're relieved from a duty and they're actually discharged from their obligations under the contract. And then the third type of condition is what's called a concurrent condition. This means both parties have to fulfill their obligations at the same time. Now, you probably don't conceptualize it this way but every time you make a retail purchase, you're actually participating in a concurrent condition. If you take a pair of jeans to the counter at a department store, they don't say, "Here's your jeans please pay us in 30 days." Or you don't say, "Here's my money, please ship my jeans to me at your convenience." No. You both go with the understanding that, I will pay money in exchange for jeans at the same time. So, a concurrent condition in a contract calls for obligations to be performed at the same time and then they will be discharged. Now, conditions can be either express or implied. So, an express condition is something that's in the contract that says, "Here's a condition precedent." If the price of oil falls below a certain amount then the airline agrees to buy so much more fuel. That's expressly stated in the contract or as an example of a retail sale, it can be implied. Nowhere do you ever agree in writing or otherwise with the gap or whoever you go, whatever store you buy your jeans at nowhere do you agree that yes this is a concurrent condition. I agree that we will both exchange our performance of duties at the same time. No. You just know it. It's implied. So, conditions can be expressed or implied. So, discharge by mutual agreement, discharge through conditions, those are the first two types of discharge. In the next lesson, we're going to look at a couple of other forms of discharge.

## Lesson 3-4: Discharge: Breach & Operation of Law

### Lesson 3-4.1: Discharge: Breach & Operation of Law

#### Discharge



Material breach → discharge of other party

[SOUND] This lesson is part two of our two part series on discharge from contractual obligations. In this lesson we're going to talk about discharge when the other party breaches a contract. And also when the law states that because of some interesting sequence of events, parties are just discharged from their obligations under a contract. [MUSIC] If the other party to a contract breaches the contract in a material way, not just a minor way, in a material way that really frustrates the purpose of the contract. If the other party commits a breach, then you are discharged from any further obligations. This makes sense, right? You shouldn't be required to continue making payments, or continue performing some duty, if the other party hasn't done what they're supposed to do, in a significant and impactful way. So for example, suppose your company wants to hire a contractor to build them a new building for offices. The contractor builds a building, and says, hey, your building's done, come take a look at it. And it doesn't work for any of the purposes it's supposed to be used for. The foundation isn't strong enough to hold all your equipment you want to put in there. The conference rooms aren't big enough in accordance with the specifications. That's a material breach, they didn't do what they were supposed to do, so your duty to pay is discharged. So it would be ridiculous to make you pay for something when the other party didn't uphold their end of the contract. So a material breach will discharge the other party, the non-breaching party will be discharged.

## Discharge

**I**

Material breach → discharge of other party

Anticipatory repudiation counts as a breach

Now, sometimes a material breach might not even have occurred yet and you can be discharged, and this is what's called anticipatory repudiation. This is one of my favorite legal terms, I just like saying it, anticipatory repudiation, try saying it, it's fun, anticipatory repudiation. >> Very flattering, Mr Peterson. >> Now, anticipatory, sometimes I can't even say it. Anticipatory repudiation is when one party clearly tells the other party that they're not going to perform their obligations under the contract. And in that case as long as it's clear and unequivocal, then the non-breaching party will be discharged from their obligations. Now, it has to be clear and unequivocal. One party can't say, it's going to be really hard for me to perform, or gosh, I'm not sure if I'm going to be able to make the deadline. That's not anticipatory repudiation. It is anticipatory repudiation if one party says we are not able to do this, or we will not be performing, or something along those lines. In that case, the other party is relieved from their duties, even though the actual breach may not have occurred yet. Maybe their time for performance isn't due yet but if they tell you in advance, they're not going to do it, you can be discharged at the time of the repudiation. Okay, moving on to discharge by operation of law.

## Discharge by Operation of Law

I

Impossibility (not just extremely impractical)

Now, there are several instances in which the law just says, if this happens, then parties to a contract are released from their obligations. Now, the first one of those instances is what's called impossibility. If you have a contract and for some reason it becomes impossible for you to fulfill your obligations under the contract, you are discharged. Now, when we say impossible, it really means impossible. Not just really, really, really, really hard or extremely impractical, impossible means not physically possible. So say you have a contract to build a building on some land, and the land gets swallowed up by a sinkhole. That is impossible for a building to be built upon that land, because now it's a hole in the ground, discharge occurs. But say you have a contract to remodel a building and all of your equipment gets stolen and all of your employees quit. Is it impossible? No, it's just really, really impractical. So the difference between a possibility and an extreme impracticality can sometimes be pretty thin, but courts care a lot about that difference. Impossibility will discharge you, extreme impracticality will not. Now, a lot of contracts have what's called a force majeure clause in them, to kind of ease this burden a little bit. And force majeure clause and say, some sort of significant action beyond the control of the parties causes it to become extremely impractical for one party to fulfill its obligations, then they can be discharged. So force majeure clause is sometimes known as sort of act of God clauses. If a tornado comes along and sweeps up all of our equipment and we don't have any money or equipment to do our job anymore, the force majeure clause will relieve you from the liability there.

## Discharge by Operation of Law

I

Impossibility (not just extremely impractical)

Statute of limitations

Okay, next type of discharge by operation of law is what's called the statute of limitations. All contracts are governed by a statue of limitations, which depends on the state you're in, the type of contract it is sometimes. But in most states, a contract can't be enforced after some period of time, 5 years, 10 years something like that, depending on where you live. So if you signed a contract 13 years ago, and you haven't fulfilled your duties, you're discharged from those duties, because the statute of limitations has run and the other party is unable to enforce it.

## Discharge by Operation of Law

**I**

Impossibility (not just extremely impractical)

Statute of limitations

Material alteration of contract

Now, third type of operation of law, discharge, is if the other party materially alters the contract in some way. And this is pretty rare but you see it on occasion. So maybe the other party is just kind of sneaky and forges something on the contract, or changes one of the terms or something like that. If that happens you're discharged from the entire contract. It's not just that you have to go back to the way the contract originally was written. If one party is sneaky enough to materially alter the actual document, you're discharged from the entire thing. because who wants to do business with that person?

## Discharge by Operation of Law

**I**

Impossibility (not just extremely impractical)

Statute of limitations

Material alteration of contract

Bankruptcy filing

Nobody, and then finally, the bankruptcy filing of one of the parties to a contract will usually discharge the duties of the other party. So if you and I are in a contract for me to sell you my bicycle and you file for bankruptcy, I am not able to enforce that contract for you to purchase my bicycle. It will generally discharge your duties. So discharge by breach, discharge by operation of law, those are two ways besides actually performing your duties, which is what we like to do. Those are two ways that you can be discharged from your duties under a contract. [SOUND]

## Lesson 3-5: Contract Performance: Common Law

### Lesson 3-5.1: Contract Performance: Common Law

## Common Law Levels of Performance

**I**

Complete

Substantial

Inferior

*What are the consequences of each?*

[SOUND] In this lesson, we're going to begin discussing the idea of contract performance. Now, in this lesson, we're going to talk about contract performance under the common law rules, meaning what is required of you in terms of how you perform your duties under a contract. [MUSIC] So again, we're still deep in the weeds of our discussion of contracts. Contracts are really, really, really important, the most important topic in this course with regards to business. Now, contract performance is the idea of what are you responsible for in your contract? And what remedies does the other party have if you do everything you're supposed to do, if you do most of what you're supposed to do, or if you do almost none of what you're supposed to do, what are the consequences? So we're going to split this discussion of contract performance into two parts. This part, we're going to talk about common law contract performance. The rules that apply generally to most contracts. And in the second part of this discussion, we're going to talk about contract performance under UCC Article 2, with respect to the sale of goods. This is a really important concept, and Article 2 provides us with some unique rules in the context of sales of goods. But that's next lecture. This lesson we're going to talk about common law contract performance. And really, there are three levels of contract performance. Complete performance, substantial performance, and inferior performance. So we're going to talk about what those are, what are the consequences of each? Let's take an example that we'll use through out this lesson.



So say you own some land and you want to hire a contractor to build a building on your land for your new office space. And you give them some specifications. You say, it has to be able to support the weight of this many employees in the building. We have to have a conference room big enough to hold this many people. We really care about environmental friendliness and efficiencies, so we're going to require it to have solar panels on the roof and triple pane windows for efficiency, and all this kind of stuff. Now, what's the best case scenario? They do it. They do what they're supposed to do. And when parties do what they're supposed to do, it's so great, and that's called complete performance.

## Contract Performance

**I**

Complete performance = Happy  
parties, sad lawyers

Complete performance means the parties to the contract are very happy. Lawyers, not so happy. Happy parties, sad lawyers. That's generally good for society, probably. But lawyers love it when parties don't do what they're supposed to do, because that's how lawyers make money. So if you want to keep your lawyers employed, don't do what you're supposed to do under your contracts. If you want to put your lawyers out of business, do what you're supposed to do, it's easy. Complete performance, there's not really anything else to say about it, do what you're supposed to do, everyone will be happy.



Now, what if in your building, that was being built for your office space, the floors hold the number of people they're supposed to hold, the conference room is the size it's supposed to be, there are the solar panels on the roof, but maybe instead of triple pane windows your contractor put in double pane windows? Now, this is not a significant breach of the contract. This is what's called a minor breach. And in legal terms we call this substantial performance. They did most of what they were supposed to do. Was it complete performance? No. Was it a major material breach of the contract? No, it was substantial performance. Now, in the case of substantial performance, the non-breaching party has a couple of options for what they can do.

## **Substantial Performance (a.k.a. *Minor Breach*)**

**I**

Non-breaching party may

Deduct the cost to fix the breach

Option number one is deduct the cost of fixing the problem from the amount they pay. So in our example, the contractor delivers the double pane windows instead of the triple pane windows. Well, it's pretty easy to figure out, how much is it going to cost to replace those windows? Or how much extra will our utility bills be because of this? And just deduct that from the price that you pay them.

## **Substantial Performance (a.k.a. *Minor Breach*)**

**I**

Non-breaching party may

Deduct the cost to fix the breach, or

Pay entire contract price and then sue for damages

Now, the other option is to go ahead and pay the full contract price, and then sue the

other party for damages.

## **I** Substantial Performance (a.k.a. *Minor Breach*)

Non-breaching party may

Deduct the cost to fix the breach, or

Pay entire contract price and then sue for damages

Non-breaching party may not terminate agreement

You can do either one of those things, but what you cannot do, in the case of substantial performance, is just terminate the entire agreement. Because the other party did most of what they were supposed to do. I mean, the breach is minor, so you can't just terminate the contract.

## **I** Inferior Performance (a.k.a. *Material Breach*)

**I**

Now, in the case of what's called inferior performance, this is a material breach that frustrates the very heart and soul of the contract. In that case, you can terminate the contract.



So for example, in our scenario where you hire someone to build your office building for you. Maybe they used the wrong type of concrete for the foundation, so it's not strong enough to hold all your employees and your equipment. And maybe the conference room isn't big enough, and there's no solar panels on the roof, and they used single pane on the windows, and everything is wrong, that's inferior performance. It's a material breach of the contract, and in that case, the non-breaching party, again, has a couple of remedies, and they're different remedies.

## Inferior Performance (a.k.a. *Material Breach*)

**I**

Non-breaching party may

Accept the performance rendered & sue  
for damages

The first one is you can accept the performance that was rendered and sue for damages. Now, accepting the performance that was rendered might mean, I was supposed to get a building with these specifications that was worth \$10 million, what I really got was a totally different building with different specifications that's maybe only worth \$3 million. So you can sue for the difference if you say, look, we can still use this, not for what we intended to use it for, but we can use it for something. So we'll take it, but we'll sue for the damages and the difference. And not just difference in what you got and what you are supposed to get, but also some other types of damages. We'll talk about damages in different lesson.

## Inferior Performance (a.k.a. *Material Breach*)

**I**

Non-breaching party may

Accept the performance rendered & sue for damages, or

Rescind the contract and sue for restitution (this can be drastic)

Your other options, and this is the really drastic option, if you are the victim of inferior performance you can actually rescind the contract and sue the other party for something called restitution. Now, this is a big deal. Restitution means putting one party back in the place it was in if the contract had never been signed in the first place.



So in our example, if you rescind the contract, terminate the agreement, and sue for restitution, you would be demanding that the contractor who delivered a building that

was nowhere near what was required, restitution would mean they tear that building down the ground and give you your vacant lot back so you can hire somebody else to build the building you need. That's sort of drastic, right? But in the case of inferior performance, the victim, the non-breaching party actually has the right to do that. Because you shouldn't be held responsible for another party's breach, so if they have a material breach, it's their job to put you back in the position you were in before this whole mess, so that you can get what you really want and what you really bargained for.

[SOUND]

## Lesson 3-6: Contract Performance: Sale of Goods

### Lesson 3-6.1: Contract Performance: Sale of Goods

## Contract Performance

I

UCC Article 2 imposes specific duties of performance on sellers and buyers of goods

Common law performance rules usually still apply, but Article 2 supplements them

This is the second of our two part series on contract performance. Here we're going to talk about performing contracts dealing with the sale of goods. What are the rules that are specific to a buyer's and seller's obligations with respect to their duties under a sale of goods contract? Now in part one we talked about common law contract performance, in this part, we're going to talk about contract performance under UCC article two which you remember deals with the sale of goods. So UCC article two imposes some specific duties of performance on sellers and buyers of goods. Now, the common law performance rules still usually apply, but article two sort of supplements those rules with some specific rules targeted at sellers and buyers of goods.

## Seller Performance Obligations

Primary duty – Make tender of delivery

**I**

So let's take sellers first. If you're seller, what are your performance obligations? Now your main duty, as a seller of goods is to, what we call make tender of delivery. What this means is as a seller your job is to complete your delivery obligations. Whatever those are, it might be handing the goods over to a common carrier like the post office, or UPS, or whatever. It might be actually physically delivering the goods to the buyer. It might be just holding them for the buyer to come and pick up. Whatever your delivery obligations are, tender of delivery means your job is to fulfill those obligations as called for in the contract.

## Seller Performance Obligations

I

Primary duty – Make tender of delivery

Perfect tender rule

Now the UCC article two imposes what's called the perfect tender rule. The perfect tender rule means as a seller of goods, your job is to deliver the exact goods called for by the contract. So, for instance, suppose you have a contract with a bicycle manufacturer to purchase 100 blue bikes, you own a little bike shop you want to sell blue bikes your bike shop, you contact the manufacturer say, "I want to buy 100 blue bikes." The perfect tender rule requires the manufacturer to ship you 100 blue bikes. Not 99 blue bikes, not 50 blue bikes or 50 red bikes, but 100 blue bikes. That's the perfect tender rule. If they give you anything else, that's a breach of contract. Now say they give you 50 blue bags and 50 ride bikes.

## Seller Performance Obligations

I

Primary duty – Make tender of delivery

Perfect tender rule

Nonconforming goods

Those red bikes are what we call nonconforming goods. They violate the perfect tender rule, they're not what you ordered, they are nonconforming. Now if a seller provides nonconforming goods, they actually have the opportunity to cure. So, maybe it was an accident, maybe they sent you 99 blue bikes and one red bike and you call up and say, "Hey, you sent me nonconforming goods. This one red bike." They might say, "Oops! We just put the wrong thing in the package. We'll send you a new blue bike and will come pick up the red bike." Sellers have the opportunity to cure when they sell you nonconforming goods.

## Seller Performance Obligations

I

Primary duty – Make tender of delivery

Perfect tender rule

Nonconforming goods & opportunity to cure

Buyer options for nonconforming goods

Now, as the buyer, if the seller sends nonconforming goods, you actually have three options. Option number one is to reject the entire shipment, option number two is to accept the entire shipment. So maybe you order 100 blue bikes, you get the 100 red bikes and you think, "Gee whiz! These are great bikes. I'm just going to keep the 100 red bikes." You can do that. Option number three is you can actually accept part of the shipment and reject part of it. So say you have a bike shop and you have customers that are jumping at the beat for your bikes and you say, "I got these red bikes but I got to have some bikes to sell. So I'll keep 20 of these red bikes because I need to be able to sell them to my customers, but I'll reject the other 80 red bikes because I really wanted blue bikes." You can do that. Okay, the perfect to rule actually has a few exceptions.

## Exceptions to Perfect Tender Rule

**I**

Damaged or destroyed goods

So exception number one; if goods are damaged or destroyed through no fault of the seller so the bike company ships you the bikes and while they're in the hands of the shipping company, they're swept away by a tornado, it's not the seller's fault. In that case, the contract is actually voided. So all parties are relieved from their obligations.

## Exceptions to Perfect Tender Rule

**I**

Damaged or destroyed goods

Installment contracts

Second exception; in the case of installment contracts, each installment is treated separately with regards to the perfect tender rule. So for instance, say you have a

contract to ship a customer a thousand widgets a month for the next year. Every single widget shipment is its own separate entity for purposes of the perfect tender rule. So, say shipment number six has the wrong type of widgets in it. The customer can't terminate the entire contract because one shipment was incorrect. They can reject that shipments if it has nonconforming goods. But if shipments one through five were correct, they can't just say, "We'll terminate this whole contract because shipment six was incorrect."

## Exceptions to Perfect Tender Rule

**I**

Damaged or destroyed goods

Installment contracts

Industry norms

And then the third exception to the perfect tender rule is that, if your industry has some sort of industry norm that allows a degree of variance, or a degree of nonconformity in the goods, then that's an exception to the perfect tender rule. So going back our the example of the bikes. Say in the bicycle manufacturing industry, it's just commonly known that if you order blue bikes, and they ship you blue bikes, or seafoam colored bikes, or teal bikes, or whatever other colors that are so close to blue, that's generally accepted in the industry. Well, that's an exception to the perfect rule.

## Buyer Performance Obligations

I

Inspect goods

Accept or reject goods

Pay

Okay. Let's talk about buyer performance obligations. Buyer really has three obligations. First; inspect the goods, and then accept or reject the goods, and pay for the goods. So acceptance or rejection should be done within a reasonable time. You can't call up the seller of goods a year later say, "Oh, by the way you sent me nonconforming goods." Got to inspect the goods and accept or reject them in a reasonable time, and then your duty to pay actually doesn't arise until you verify, "Yes, these are conforming goods." Because until you have conforming goods, you don't have any duty to pay.

## A Note About Buyer's Duty to Pay

**I**

Duty to pay arises once conforming goods have been accepted

Duty to pay and time of payment can be different!

Now this actually gives rise to sort of an interesting twist in the sale of good scenarios. Sometimes your duty to pay will not arise until before or after the actual payment has been made. So let's consider this example. You have a contract for the sale of goods that calls for payment to be made at the time you placed the order. This is pretty common, right? You ever bought anything online? Payment is always made at the time you placed the order. So your contract calls for payment to be made at the time of the order. But, your actual duty to pay has not arisen at that time. Remember your duty to pay, doesn't arise until you confirm that you've got conforming goods. So the shipper ships you the goods, you inspect them, you say, "These are conforming," then your duty to pay arises. But if you get the goods they're nonconforming, your duty to pay has never arisen. So even though you may have already actually made the payment, your duty to pay hasn't arisen so the seller could be forced to refund you the payment for nonconforming goods because your duty to pay never arises. To sort of an interesting quirk. So next time you make an online order, know that even though you may have made payment, you might not have had the duty to pay just yet.

## Lesson 3-7: Remedies for Breach: Common Law

### Lesson 3-7.1: Remedies for Breach: Common Law

## Regardless of the Nature of the Breach

**I**

Non-breaching parties must  
mitigate their damages

When you're the victim of breach of contract, what are your remedies? In this lesson, we're going to talk about common law remedies for breach of contract; Money damages and equitable remedies. Before we get into the specific remedies available to a party who has been the victim of a breach of contract, there's a couple of just sort of general rules we need to talk about. First rule, the party that's not in breach of contract almost always has a duty to what's called mitigate their damages. This means that if you've been the victim of a breach of contract and you have a way to make your damages as small as possible, you're obligated to do that. So for instance, say you are a landlord and you rent some office space to a company. Maybe you sign a five year lease. After six months, the company says, "We're moving out, we don't want to be a tenant here anymore." And they breach the lease. Now that's a breach of a contract. You're entitled to some damages. But what you're not entitled to do, is just sit on that property for the next four and a half years and leave it empty without taking any steps to try and lease it to somebody else. You have a duty to mitigate your damages. So, as the landlord, you have a duty to advertise it again, to try and find another tenants. If you're unable to for the next four and a half years, then that's okay. You can sue the tenants for that four and a half years worth of rent. But if you are able to, through normal commercial means, to find another tenants, you have to do it. So maybe they breach after six months. Maybe it takes you another six months to find another tenant. But once you do, they

start paying you rent again. So your damages are now smaller. Right? You only have that extra six months of damages versus four and a half years of damages. So parties generally have the duty to mitigate their damages.

## Regardless of the Nature of the Breach



Non-breaching parties must mitigate their damages

Parties may agree to limit their liability

Now, parties also have the right to agree to limit their damages, called limitations of liability. This is really, really common in consumer transactions. So for instance say you buy tickets to go on a cruise around the Caribbean. Very exciting. In your contract of carriage, which you probably never read. No one ever does. But somewhere in there, it will say, you know, carnival cruise lines or whoever, princess cruises is only liable up to a certain amount for damages relating to breach of this contract. And as a general rule, parties to a contract are free to limit their damages to a certain amount. Okay. Now let's talk about the actual remedies available for a victim of a breach of contract.

## Two Categories of Remedies Available

**I**

Money damages

Equitable remedies

And there are generally two broad categories that we're going to be talking about here; Money damages and equitable remedies. Now, money damages are just exactly that. The payment of money. Equitable remedies are everything else besides the payment of money. Now, there are different forms of money damages. In a breach of contracts setting, the default in customary type of money damages is what's called compensatory damages.

## Forms of Money Damages

**I**

Compensatory damages (always)

You could always get compensatory damages if you're the victim of a breach of contract. Now, a compensatory damages, it's the amount of money that would put you in the place you expected to be in had this contract been fulfilled by the other party. So in the example of a landlord whose tenant breached the lease by moving out. Well, over that five year period, how much rent were you expecting to earn? A certain amount. How much rent do they actually pay you? Less than that. What are your damages? The difference between those two. Now again, if you're able to mitigate your damages by releasing it to somebody else, well that deducts from your damages the amount you get from your new tenant. But the damages are how much were you expecting to get versus how much did you actually get. The difference between those two, compensatory damages.

## Forms of Money Damages

**I**

Compensatory damages (always)

Consequential damages  
(sometimes)

You can always get compensatory damages. Now, sometimes you can get something called consequential damages. If the breaching party knew or should have known that their actions in breaching the contract would cause you further damages in the future, besides just your compensatory damages, if they knew or should have known about that, then you can get what's called consequential damages. So, say you operate a restaurant and you buy all of your food products from a vendor and they breach the contract and don't ship you what you're supposed to get, and that causes you to not be able to fulfill a catering order, and that causes you to miss out on future catering jobs because your reputational damage, those are Consequential damages. Those future jobs you lost out on. If the vendor knew or should have known that that was a likelihood of their breach of contract, you can actually sue them for those future losses. Those are Consequential damages.

## Forms of Money Damages

**I**

Compensatory damages (always)

Consequential damages  
(sometimes)

Liquidated damages (if reasonable  
and agreed-upon in advance)

Now the third type of damages, money damages are what's called Liquidated damages. And these are when the parties agree in advance of the amount of damages for a certain type of breach. Liquidated damages are allowed but you got to be careful that they're not too excessive or else a court might consider them a penalty.

## Forms of Money Damages

**I**

Compensatory damages (always)

Consequential damages  
(sometimes)

Liquidated damages (if reasonable  
and agreed-upon in advance)

Punitive damages (never)

Penalties are not allowed, liquidated damages are allowed. What's the difference? Let's look to an example. Say I hire you to build me a new house. I'm going to sell my old

house, and I'm going to close on my old house, on May 1st. So I need my new house to be ready by April 30th right? So I can move in. So we have a contract that says, you're going to build me a new house, and it's going to be ready by April 30th. And if it's not ready by April then our liquidated damages are going to be \$250 a day for every day past April 30th. So that's sort of reasonable, because if it's not done what happens? Well, I got to put my family up in a hotel every night until my new house is ready. I got to store all my stuff. Is \$250 a day a reasonable amount for that? Probably. Now, if the Liquidated damages clause said, everyday that my house isn't ready, it's a \$25,000 a day penalty, or Liquidated damages. Is that reasonable? Probably not. It doesn't cost \$25,000 a day to store my stuff, and put my family up in a hotel. I'm not Jeff Bezos. So a court would probably look at that \$25,000 liquidated damages clause and say, "That's a penalty, it's unenforceable. So be careful." Now one note about punitive damages. Punitive damages are damages that a court imposes to punish a wrongdoer for willful or malicious or even sometimes grossly negligent behavior. In a contract setting, you can never get punitive damages. So, just don't even try. Punitive damages are not available in breach of contract cases. Okay, the Equitable remedies. What are they?

## Equitable Remedies



### Rescission & restitution

First, we've already heard about this one, rescission and restitution. You can sue to just terminate the contract and have the other party put everything back how it was before you started the contract.

## Equitable Remedies

**I**

Rescission & restitution

Reformation

Next equitable remedy is called reformation. In reformation, a court actually reforms the contract. This usually happens if there's been a clerical error. So maybe the parties to a contract agreed on a price of a \$100,000, but somehow it accidentally got typed with an extra zero so it says a million dollars. Now the party that benefits from that says, "Hey that's great. Let's enforce the contract." You go to court, you tell the judge, the judge looks at the evidence says, "Yes we're going to reform this and make it back to \$100,000, because that's what you originally agreed to."

## Equitable Remedies

**I**

Rescission & restitution

Reformation

Injunction

Next form of an equitable remedy is called an injunction. An injunction can force someone to stop doing something. Sometimes actually force someone to continue doing something, but usually forces someone to stop doing something. So say for instance, you license the trademark of another company to brand your products with their trademark, but you breach the contract, and they don't want you to be able to use their trademark anymore, but you keep doing it. They can sue you for an injunction which will say, you are forced to stop using this trademark logo, or phrase, or whatever it is.

## Equitable Remedies

**I**

Rescission & restitution

Reformation

Injunction

Specific performance

In the final, equitable remedy is what's called Specific performance. Specific performance will require you to actually do what the contract calls for you to do. And this is a remedy when the subject matter of your contract is unique. So, in a legal sense all pieces of land in the world are unique. So real estate contracts are frequently the subject of specific performance lawsuits. So, if we have a contract for you to sell me a piece of land and you breach the contract and refuse to sell it to me, I can sue you for specific performance that says, that land, that square or whatever shape it is, is unique in the world. There's no other one exactly like it, and I could force you to sell me that specific piece of land, if you breach the contract. So those are the common law remedies for breach. In the next lesson, we're going to talk about UCC article two, specific remedies for breach of contract.

## Lesson 3-8: Remedies for Breach: Sale of Goods

### Lesson 3-8.1: Remedies for Breach: Sale of Goods

#### **Seller Remedies**



If buyer is in possession of goods

Sue for the purchase price (default)

Under contracts for the sale of goods, when one party breaches the contract, what are the other parties remedies? In this lesson, we'll talk about buyers and sellers, and what they can do when the other party breaches the contract. So let's talk about the sellers remedies when there's been a breach of a contract for the sale of goods. So let's use an example that we've used in lessons past, about buying a shipment of bikes from a factory. So a buyer contracts with a seller to buy 100 bikes from the factory. Now, if the buyer breaches that agreement by saying they're not going to pay or otherwise, the seller's remedies depend in part on where the goods are at the time the breach occurs. Now, if the buyer already has the goods, then the seller has a couple of options. The default rule in that case is that the seller will probably just sue for the purchase price. They made the goods, they provided the goods to the buyer, the buyer is not paying, what do you expect is going to happen? They can sue them for the purchase price, they're owed it. Now, what if the buyer just doesn't have the money? I mean, maybe they're in bankruptcy, otherwise insolvent.

## Seller Remedies



If buyer is in possession of goods

Sue for the purchase price (default)

Try to reclaim the actual goods (if buyer is insolvent)

In that case, if the buyer is insolvent, the seller does have the option to try and reclaim the actual goods themselves from the buyer. Now, usually, you're not going to want to do this on your own, going through court, getting a court order for the turnover of the goods is your best bet. But if the buyer is insolvent, the seller does have the option to try and get the actual goods back, so they can sell them to somebody else.

## Seller Remedies



If buyer is not in possession of goods:

Refrain from shipping goods

Sell to another buyer (to mitigate)

Stop delivery of goods in transit

Sue for money damages

Now, if the buyer doesn't have the goods, now what can a seller do if the buyer

breaches that contract? Well, if the seller still has the goods, they can obviously not ship them if the buyer calls up the seller and says, "By the way, we're not going to pay for the bikes," the seller clearly doesn't still have to ship the bikes. That's an anticipatory repudiation. Now, if the seller still has them, they could sell the bikes to another buyer. That's part of their obligation to mitigate their damages. If they're custom manufactured goods, maybe you can't do that. But if you can, you should. If the goods actually are in transit, whether the seller is transporting them themselves or via a common carrier, if they're able to stop the delivery of the goods in transit, they have the right to do that, that's one of their remedies. Then always you have the right to sue for money damages. So whatever your damages were, maybe you paid the shipping company, maybe you spend extra money to manufacture a custom product, whatever your actual damages are, you can always sue the other party for money damages. Now, on the buyer side, what are their remedies if the seller breaches the contract?

## Buyer Remedies



Sue for damages

Cover

Well, again, default remedy for everybody at all times, sue for money damages. Whatever their actual out-of-pocket damages were as a result of the breach, you can sue for that. Buyers also have the ability to do what's called cover. Obtaining cover means you buy substitute goods from a different seller. Now, if you're able to get the exact same goods at the exact same price, your damages are zero, right? Maybe it's some administrative work you had to do. But oftentimes, if you try to cover, you could get substitute goods. But maybe they're more expensive, or maybe they're less lower-quality, or maybe they're not exactly the same. So you can still sue for damages.

because you didn't get what you were expecting to get. Another buyer remedy if the seller is insolvent but they actually have the goods sitting in their warehouse.

## Buyer Remedies

**I**

Sue for damages

Cover

Obtain the actual goods from the seller (if seller is insolvent)

Specific performance (for unique goods)

So say the seller manufacturers the goods, but then files for bankruptcy and you know the goods are there in the warehouse, you could actually try to obtain the actual goods that the seller has if they're insolvent. Then finally, if the goods that are the subject matter of a contract are unique, specific performance is an available remedy for a buyer. So say, we have a contract to purchase a piece of original artwork, that's a unique good, there's nothing else like it in the world. The seller says, "No. I'm not going to sell it to you." Or we have a contract and they just say, "No. I'm not going to send it to you," they breach the contract. You can sue for specific performance because that's a unique good and no amount of money in the world is going to get you that exact same thing that you wanted. So instead of money damages, you can sue for specific performance. So those are the UCC Article 2 remedies for breach of contract.