**Alternate Case Problems**

*Chapter 10*

**Contract Performance,**

**Breach, and Remedies**

**10–1. Performance.** In May 1996, O’Brien-Shiepe Funeral Home, Inc., in Hempstead, New York, hired Teramo & Co. to build an addition to O’Brien’s funeral home. The parties’ contract did not specify a date for the completion of the work. The city of Hempstead issued a building permit for the project on June 14, and Teramo began work about two weeks later. There was some delay in construction because O’Brien asked that no construction be done during funeral services, but by the end of March 1997, the work was substantially complete. The city of Hempstead issued a “Certificate of Completion” on April 15. During the construction, O’Brien made periodic payments to Teramo, but there was a balance due of $14,950, which O’Brien did not pay. To recover this amount, Teramo filed a suit in a New York state court against O’Brien. O’Brien filed a counterclaim to recover lost profits for business allegedly lost due to the time Teramo took to build the addition and for $6,180 spent to correct problems caused by poor craftsmanship. Which, if any, party is entitled to an award in this case? Explain. [*Teramo & Co. v. O’Brien-Shiepe Funeral Home, Inc.,* \_\_ A.D.3d \_\_, 725 N.Y.S.2d 87 (2 Dept. 2001)]

**10–2. Substantial Performance.** Adolf and Ida Krueger contracted with Pisani Construction, Inc., to erect a metal building as an addition to an existing structure. The two structures were to share a common wall, and the frames and panel heights of the new building were to match those of the existing structure. Shortly before completion of the project, however, it was apparent that the roofline of the new building was approximately three inches higher than that of the existing structure. Pisani modified the ridge caps of the buildings to blend the rooflines. The discrepancy had other consequences, however, including misalignment of the gutters and windows of the two buildings, which resulted in an icing problem in the winter. The Kruegers occupied the new structure, but refused to make the last payment under the contract. Pisani filed a suit in a Connecticut state court to collect. Did Pisani substantially perform its obligations? Should the Kruegers be ordered to pay? Why or why not? [*Pisani Construction, Inc. v. Krueger,* 68 Conn.App. 361, 791 A.2d 634 (2002)]

**10-3. Liquidated Damages versus Penalties.** Every homeowner in the Putnam County, Indiana, subdivision of Stardust Hills must be a member of the Stardust Hills Owners Association, Inc., and must pay annual dues of $200 for the maintenance of common areas and other community services. Under the association’s rules, dues paid more than ten days late “shall bear a delinquent fee at a rate of $2.00 per day.” Phyllis Gaddis owned a Stardust Hills lot on which she failed to pay the dues. Late fees began to accrue. Nearly two months later, the association filed a suit in an Indiana state court to collect the unpaid dues and the late fees. Gaddis argued in response that the delinquent fee was an unenforceable penalty. What questions should be considered in determining the status of this fee? Should the association’s rule regarding assessment of the fee be enforced? Explain. [*Gaddis v. Stardust Hills Owners Association, Inc.,* 804 N.E.2d 231 (Ind.App. 2004)]

**10–4**. **Compensatory Damages.** Tyna Ek met Russell Peterson in Seattle, Washington. Peterson persuaded Ek to buy a boat that he had once owned, the *O’Hana Kai,* which was in Juneau, Alaska, for $43,000. Ek and Peterson then entered into a contract under which Peterson was to make the boat seaworthy so that it could be transported to Seattle within a month, where he would pay its moorage costs and renovate the boat at his own expense. In return, Peterson would receive a portion of the profit on its resale the following year. On the sale, Ek would recover her costs, and then Peterson would be reimbursed for his. Ek loaned Peterson her cell phone so that they could communicate while he prepared the vessel for the trip to Seattle. In March, Peterson, who was still in Alaska, borrowed $4,000 from Ek. Two months later, Ek began to receive unanticipated, unauthorized bills for vessel parts and moorage, the use of her phone, and charges on her credit card. She went to Juneau to take possession of the boat. Peterson moved it to Petersburg, Alaska, where he registered it under a false name, and then to Taku Harbor, where the police seized it. Ek filed a suit in an Alaska state court against Peterson, alleging breach of contract and seeking damages. If the court finds in Ek’s favor, what should her damages include? Discuss. [*Peterson v. Ek,* 93 P.3d 458 (Alaska 2004)]

**10–5.** **Assignments.** Senna Hills, Ltd., granted Southern Union Co. the right to distribute propane in a residential subdivision developed by Senna in exchange for a fee. Under their agreement, Senna’s “right to receive a Fee shall continue for so long as the Propane System is owned by Southern Union.” The agreement also allowed Southern Union to assign the distribution right. Later, Sonterra Energy Corp. bought the distribution system and was assigned the distribution right, but did not pay the fee to Senna. Did Sonterra breach the propane service agreement? Why or why not? [*Senna Hills, Ltd. v. Sonterra Energy Corp.,* 2010 WL 143408 (Tex.App.—Austin 2010)]

**10–6. Conditions of Performance.** James Maciel leased an apartment in Regent Village, a university-owned housing facility for Regent University (RU) students in Virginia Beach, Virginia. The lease ran until the end of the fall semester. Maciel had an option to renew the lease semester by semester as long as he maintained his status as an RU student. When Maciel completed his coursework for the spring semester, he told RU that he intended to withdraw. The university told him that he could stay in the apartment until May 31, the final day of the spring semester. Maciel asked for two additional weeks, but the university denied the request. On June 1, RU changed the locks on the apartment. Maciel entered through a window and e-mailed the university that he planned to stay “for another one or two weeks.” When he was charged with trespassing, Maciel argued that he had “legal authority” to occupy the apartment. Was Maciel correct? Explain. [*Maciel v. Commonwealth,* 2011 WL 65942 (Va.App. 2011)]

**10–7.** **Notice of Assignment.** Arnold Kazery was the owner of a hotel leased to George Wilkinson. The lease included renewal options of ten years each. When Arnold transferred his interest in the property to his son Sam, no one notified Wilkinson. For the next twenty years, Wilkinson paid the rent to Arnold and renewed the lease by notice to Arnold. When Wilkinson wrote to Arnold that he was exercising another option to renew, Sam filed a suit against him, claiming that the lease was void. Did Wilkinson give proper notice to renew? Discuss. [*Kazery v. Wilkinson,* 52 So.3d 1270 (Miss.App. 2011)]

**10–8. Consequential Damages.** After submitting the high bid at a foreclosure sale, David Simard entered into a contract to purchase real property in Maryland for $192,000. Simard defaulted (failed to pay) on the contract, so a state court ordered the property to be resold at Simard’s expense, as required by state law. The property was then resold for $163,000, but the second purchaser also defaulted on his contract. The court then ordered a second resale, resulting in a final price of $130,000. Assuming that Simard is liable for consequential damages, what is the extent of his liability? Is he liable for losses and expenses related to the first resale? If so, is he also liable for losses and expenses related to the second resale? Why or why not? [*Burson v. Simard,* 35 A.3d 1154 (Md. 2012)]

**10–9. Third Party Beneficiary.** David and Sandra Dess contracted with Sirva Relocation, LLC, to assist in selling their home. In their contract, the Desses agreed to disclose all information about the property on which Sirva “and other prospective buyers may rely in deciding whether and on what terms to purchase the Property.” The Kincaids contracted with Sirva to buy the house. After the closing, they discovered dampness in the walls, defective and rotten windows, mold, and other undisclosed problems. Can the Kincaids bring an action against the Desses for breach of their contract with Sirva? Why or why not? [*Kincaid v. Dess,* 298 P.3d 358 (Kan.App. 2013)]

**10-10. A Question of Ethics**

Russell’s weight varied between 280 and 305 pounds while she was enrolled in a nurs­ing program at Salve Regina College in Newport, Rhode Island. Her weight was never an is­sue until her sophomore year, at which time she began to be the target of cruel re­marks by school officials. In her junior year, she received a failing grade in a clinical nursing course—not on the basis of her performance but simply because she was obese. The normal consequence of failing a clinical nursing course was expulsion from the col­lege, but Russell was offered a deal: If she signed a “contract” in which she promised to attend Weight Watchers regularly and to submit proof of her attendance, and if she managed to lose two pounds a week steadily, she would remain in good standing. Russell attended Weight Watchers regularly but failed to lose the required two pounds a week, and the fol­lowing year the college requested that she withdraw from the nursing program. Russell sued the college for damages for breach of contract. The jury found that Russell’s rela­tionship to the college was essentially a contractual one in which she was required to abide by disciplinary rules, pay tuition, and maintain a good academic record (which she did—except for the course that she failed because of her obesity) and the college was re­quired to provide her with an education until graduation. The jury also found that Russell had “substantially performed” her side of the bargain and that the college’s ac­tions prevented Russell from rendering complete performance and consti­tuted a breach. [*Russell v. Salve Regina College,* 890 F.2d 484 (1st Cir. 1989)]

**1.** The college contended that it was inappropriate to apply the principle of sub­stan­tial performance to college-student contracts. From an ethical point of view, what arguments could you make in support of the college’s contention? That is, what would be some of the negative ethical ramifications of permitting such flexi­bility in the student-college relationship?

**2.** Do the circumstances of Sharon Russell’s situation justify the application of the principle of substantial performance in this case?