Chapter 10

**Contract Performance,**

**Breach, and Remedies**

Answers to Learning Objectives/

Learning Objectives Check Questions

at the Beginning and the End of the Chapter

**Note that your students can find the answers to the even-numbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.**

**1A.** ***What is an assignment?* What is the difference between an assignment and a delegation?** The transfer of contract *rights* to a third person is an assignment. The transfer of contract *duties* is a delegation. When rights are assigned unconditionally, the rights of the assignor are extinguished, and the assignee can demand per­formanc­e from the obligor*.* Normally, a delegation of dutiesdoes not relieve the delegator of the obligation to perform if the delegatee fails to do so.

**2A.** ***How are most contracts discharged?*** The most common way to discharge, or terminate, a contract is by the perform­ance of contractual duties.

**3A.** ***What is the standard measure of compensatory damages when a contract is breached? How are damages computed differently in construction contracts?*** In a contract for the sale of goods, the usual measure of compensatory damages is an amount equal to the difference between the contract price and the market price. When the buyer breaches and the seller has not yet produced the goods, compensatory dam­ages normally equal the lost profits on the sale rather than the difference between the contract price and the market price. On the breach of a contract for a sale of land, when specific performance is not available, the measure of damages is also the difference between the contract and the market price.

The measure on the breach of a construction contract depends on who breaches, and when. Recovery for an innocent contractor is generally based on funds expended or expected profit, or both; and for a nonbreaching owner, the cost to complete the project.

**4A.** ***Under what circumstances is the remedy of rescission and restitution available?*** When fraud, mistake, duress, or failure of consideration is present, rescission is available. The failure of one party to perform under a contract entitles the other party to rescind the contract.

**5A.** ***What is a limitation-of-liability clause, and when will courts enforce it?*** A limitation-of-liability clause is a contract provision that states damages recoverable for certain types of breaches will be limited to a maximum amount. The clause may further limit a remedy to replacement, repair, or refund of the purchase price. Courts enforce such clauses in contracts between parties of equal bargaining power, but not if liability for fraudulent or intentional injury or the consequences of illegal acts is excluded.

Answer to Critical Thinking Question

**in the Feature**

**Adapting the Law to the Online Environment—Critical Thinking**

***Instagram’s current terms of service state, “We may not always identify paid services, sponsored content, or commercial communications as such.” Is it ethical for Instagram to post advertisements without identifying them as advertisements? Discuss.*** Instagram was started as a free service and attained a large user base quickly. Facebook paid a significant sum to acquire Instagram and clearly wants to earn profits from the service. Charging for this service will not work in the competitive social media world, however. Consequently, Facebook, like other social media sites, is looking for a way to monetize its large user base. In the case of Instagram, it wishes to do so via paid advertising. Perhaps the only unethical aspect of this action is that Instagram does not necessarily want to reveal that a specific advertiser is paying for commercial messages. Finally, if Instagram’s users do not like its service, they always have the option of not using it.

Answers to Critical Thinking Questions

**in the Cases**

**Case 10.1—Critical Thinking—Economic Consideration**

***The repairs to the bus cost $1,341.50. Who should pay this amount? Why?***In the negotiations between Cipriani and Allie for the sale of the bus, the parties presumably offset the unpaid cost of the repairs against the market value of the bus to arrive at their agreed-on price. But in the course of the litigation among these parties and Bass-Fineberg, the trial court apparently did not consider the cost of the repairs to have been paid. Cipriani, who had defaulted on the cost for the repairs and the lease payments, was not likely to be able to make those payments. The court held that Bass-Fineberg should pay the amount of this cost to BVIP, and included this figure in the award of the refund to that defendant. The appellate court upheld this award.

**Case 10.2—Critical Thinking—Legal Environment Consideration**

***Should Kolodin’s role in bringing about the “no contact” stipulation through her request for a protection order have rendered the doctrine of impossibility inapplicable? Explain.*** No, Kolodin’s role in bringing about the “no contact” stipulation should not have rendered the impossibility doctrine inapplicable. Of course, as stated in the facts, Kolodin acted unilaterally in obtaining the temporary order of protection. But that is essentially irrelevant, because Valenti consented to the “no contact” stipulation. And Kolodin did not unilaterally control the means—the alleged domestic abuse, the court’s temporary order, and the parties’ agreed-to stipulation—that created the impossibility. Perhaps the most important factor here is that Kolodin, the party who initially sought the order that caused the impossibility, was compelled to seek that order by the alleged domestic abuse of her partner Valenti.

**Case 10.3—Critical Thinking—Cultural Consideration**

***How does a college basketball team’s record of wins and losses, and its ranking in its conference, support the court’s decision in this case?*** In this case, the court enforced a liquidated damages clause, determining that when the contract was entered into, ascertaining the damages resulting from the defendant’s breach was difficult, if not impossible. And the clause was not a penalty—the plaintiff was justified in seeking liquidated damages to compensate for its losses.

Among the factors that the court relied on to make its determination was the effect that the resignation of a head coach from a university’s basketball team can have on ticket sales and community and alumni support for the team. The coach’s resignation can also affect the team’s record of wins and losses, and consequent ranking in its conference. This effect lends support to the court’s reasoning and decision in this case.

Answers to Questions in the Reviewing Feature

at the End of the Chapter

**1A.** ***Condition***

The appropriate concept might be failure of a condition. Under the terms of the contract, Val’s does not have to perform (pay) unless the basil meets the stated condition (that it pass an independent inspection for chemical residue). Because the basil did not pass the inspection, Val’s is not obligated to perform.

**2A.** ***Destruction of the subject matter***

Because a hailstorm destroyed half of Sun Farms’ basil crop, it can claim that it is impossible for it to perform the entire contract. Also, Sun Farms at­tempted to procure the balance of the contracted amount from other sources, but discovered that the basil was extremely expensive. Therefore, Sun Farms can argue that its performance should be excused due to commercial impracticability.

**3A.** ***Substantial performance***

Substantial performance is good faith performance that does not vary greatly from the contract and confers the same benefits as promised in the contract. In this situation, Sun Farms acted in good faith and shipped as much chemical-free basic as it could obtain, which was only 25 pounds less than the contracted amount. Therefore, a court would likely find that it had substantially per­formed its obligation to Val’s.

**4A.** ***Novation***

This is a novation—an agreement between the contracting parties to substi­tute a third party for one of the original parties. This is the type of agreement described here. Under a novation, the new contract extinguishes the old con­tract and discharges the obligations of the prior party to the contract.

Answer to Debate This Question in the Reviewing Feature

at the End of the Chapter

***The doctrine of commercial impracticability should be abolished.*** Contracts are not made to be broken, even if that is a popular saying.  Contracts are made to be respected.  Those who seek to avoid their contractual obligations by using the excuse of commercial impracticability, if successful, reduce the certain of contractual obligations and end up hurting the commercial society in which we all live.

Sometimes, a contract cannot be fulfilled through no fault of one of the parties.  That is why the principle of commercial impracticability was created.  If one party, usual a seller of goods or services, cannot perform because in so doing, that party would lose large sums and maybe go out of business, the courts should step in an allow that party to avoid the contract.

Answers to Issue Spotters

at the End of the Chapter

**1A.** ***Eagle Company contracts to build a house for Frank. The contract states that “any assignment of this contract renders the contract void.” After Eagle builds the house, but before Frank pays, Eagle assigns its right to payment to Good Credit Company. Can Good Credit enforce the contract against Frank? Why or why not?*** Yes. Generally, if a contract clearly states that a right is not assignable, no assignment will be effec­tive, but there are exceptions. As­sign­ment of the right to receive monetary payment cannot be prohibited.

**2A.** ***Greg contracts to build a storage shed for Haney. Haney pays Greg in advance, but Greg completes only half the work. Haney pays Ipswich $500 to finish the shed. If Haney sues Greg, what would be the measure of recovery?*** A nonbreaching party is entitled to his or her benefit of the bargain under the contract. Here, the innocent party is en­ti­tled to be put in the position she would have been in if the contract had been fully per­formed. The measure of the benefit is the cost to complete the work ($500). These are compensatory damages.

Answers to Questions and Case Problems

**at the End of the Chapter**

**Business Scenarios and Case Problems**

**10–1A. *Mitigation of damages***

The question of whether a party has properly mitigated damages is a question of fact. Here, there is evidence to sup­port a finding that Barton attempted to mitigate her damages—she apparently made reasonable efforts to find, and did find, employment. Because the position paid a significantly lower salary, it was not unreasonable for her to refuse it. Thus, under the circumstances, it was not unreasonable for her to choose to move to London. A court should therefore award Barton $72,000 for the one year’s salary she would have been paid if VanHorn had not repudiated their contract and the costs to move to London.

**10–2A . *Assignment***

As a general rule, any rights flowing from a contract can be assigned. There are, however, exceptions, such as when the contract expressly prohibits or limits assignment. Under the principle of freedom of contract, such prohibitions are enforced—unless they are deemed contrary to public policy. For example, courts have held that a clause prohibiting assignment that restrains the alienation of property is invalid by virtue of be­ing against public policy.

Authorities differ on how a case like Aron’s should be decided. Some courts would enforce the prohibition and hold that Aron’s assignment to Erica is ineffective without the landlord’s consent. Others would permit the assignment to be effective and would limit the landlord’s remedies to the normal contract remedies ensuing from Aron’s breach.

**10–3A. Spotlight on Drug Testing—*Third party beneficiaries***

In most cases, it seems only fair that an employee who loses his or her job due to erroneous drug-testing results could successfully sue the drug-testing laboratory for negligence (where the lab’s negligence is the cause of those results). Unlike the requirements for re­covery as an intended third party beneficiary, there need not be a contract between the employee and the laboratory for the latter to owe a tort duty. Note, however, that there is a difference between testing that yields false results caused by negligence and testing that yields false positives caused by something outside the control of the laboratory (as al­leged in Devine’s case).

In this case, the trial court granted summary judgment for Roche and NorDx, and Devine appealed. The Supreme Judicial Court of Maine (the state’s highest court) held that Devine was not a third party beneficiary of the contract between BIW and the labo­ratories. The court “search[ed] the contract language and the circumstances surround­ing the formation of the contract for a clear indication that BIW intended to give Devine an enforceable benefit” and found none. The court explained that “[i]n assessing the rele­vant circumstances, courts must be careful to distinguish between the consequences to a third party of a contract breach and the intent of a promisee to give a third party who might be affected by that contract breach the right to enforce performance under the con­tract. If consequences become the focus of the analysis, the distinction between an inci­dental beneficiary and an intended beneficiary becomes obscured. Instead, the focus must be on the nature of the contract itself to determine if the contract necessarily implies an intent on the part of the promisee to give an enforceable benefit to a third party. The con­tract between BIW and NorDx does not meet that standard.” The reason for implement­ing the drug testing was an important factor “because it underscores why the nature of the contract itself does not imply an intent on the part of BIW to confer an enforceable benefit on an employee like Devine. BIW is not in the health care business. It engaged in drug testing of Devine and other employees to advance its economic objectives. Similarly, Devine did not submit to the drug testing at BIW to address his health concerns. He submitted only because the drug testing was a condition of employment. For both BIW and Devine, the drug testing was incidental to their employment relationship.”

**10–4A. Business Case Problem with Sample Answer—*Material breach***

Yes, STR breached the contract with NTI. A breach of contract is the nonperformance of a contractual duty. A breach is *material* when performance is not at least substantial. On a material breach, the nonbreaching party is excused from performance. If a breach is *minor*, the nonbreaching party's duty to perform can sometimes be suspended until the breach has been remedied, but the duty to perform is not entirely excused. Once a minor breach has been cured, the nonbreaching party must resume performance. Any breach—material or minor—entitles the nonbreaching party to sue for damages.

In this problem, NTI had to redo its work constantly because STR permitted its employees and the employees of other subcontractors to walk over and damage the newly installed tile. Furthermore, despite NTI’s requests for payment, STR remitted only half the amount due under their contract. Thus, NTI was deprived of at least half of the money it was owed under the contract. And STR terminated the contract, apparently wrongfully and without cause—the tile work would have been completed and satisfactorily if STR had not allowed other workers to trample the newly installed tile before it had cured.

In the actual case on which this problem is based, when STR refused to pay Newman and then terminated their contract, the subcontractor filed a suit in a Texas state court to recover. From a jury verdict in Newman’s favor, STR appealed. A state intermediate appellate court affirmed. “The evidence presented was legally sufficient for the jury to conclude that STR materially breached the contract.”

**10–5A. *Liquidated damages***

Yes, Cuesport has to pay Critical Developments $126 for each of the 260 days that elapsed between the contract deadline and the date of the completion of the wall. A liquidated damages provision in a contract specifies a certain dollar amount to be paid in the event of a future default or breach of contract. A penalty provision also specifies a certain amount to be paid in the event of a default or breach of contract but is designed to penalize the breaching party. Liquidated damages provisions are usually enforceable. A provision that calls for a penalty, however, will not be enforced—recovery will be limited to actual damages. To determine if a provision is for liquidated damages or a penalty, a court asks when the contract was agreed to (1) was it apparent that damages would be difficult to estimate in the event of a breach and (2) was the amount set as damages a reasonable estimate and not excessive? If the answers to both questions are yes, the provision normally will be enforced. If either answer is no, the provision usually will not be enforced.

In this problem, the contract that required the construction of the wall provided a $126 per-day payment for Cuesport’s failure to complete the wall within thirty days. This was a valid liquidated damages clause, rather than an invalid penalty. It was an estimate of the amount of rent that Critical Developments would lose until the wall was finished and the unit could be rented. Actual damages were otherwise difficult to estimate at the time of the contract. In other words, in these circumstances, the answers to both of the questions above are yes.

In the actual case on which this problem is based, Critical Developments filed a suit in a Maryland state court against Cuesport for breach. The court awarded the liquidated damages stipulated in the parties’ contract. On Cuesport’s appeal, a state intermediate appellate court affirmed.

**10–6A. *Conditions of performance***

No, Humble is not entitled to specific performance. The equitable remedy of specific performance calls for the performance of an act promised in a contract. In a case involving an interest in real property, specific performance can be the appropriate remedy when money damages would be inadequate.

In some situations, however, contractual promises are conditioned. A condition is a possible future event, the occurrence or nonoccurrence of which triggers the performance of a contractual obligation. If the condition is not satisfied, the obligations of the parties are discharged and cannot therefore be enforced. A condition that must be fulfilled before a party’s promise becomes absolute is called a condition precedent.

In this problem, Humble’s option had conditions—once it was exercised the parties had thirty days to enter into a purchase agreement, and Wyant could become Humble’s lender by matching the terms of the proposed financing. Humble exercised the option, tolling the two-year deadline. But the parties engaged in protracted negotiations. Humble did not respond to Wyant’s proposed purchase agreement and did not advise him of available financing terms before the option expired. In other words, none of the option’s conditions were satisfied before it expired.

In the actual case on which this problem is based, the court issued a judgment in Wyant’s favor. On Humble’s appeal, the South Dakota Supreme Court affirmed.

**10–7A. *Discharge by operation of law***

Lambert’s best defense to Baptist’s allegation of breach of contract is the doctrine of impossibility. Under this doctrine, if, after a contract has been made, a supervening event makes performance impossible in an objective sense, the contract is discharged. The doctrine applies only when the parties could not have reasonably foreseen the event that renders the performance impossible. One of the situations in *which this doctrine applies occurs* when a party whose personal performance is essential to the completion of the contract becomes incapacitated prior to performance.

In the facts of this problem, Baptist hired Lambert to provide certain surgical services to Baptist Memorial Hospital–North Mississippi. When complaints about his behavior arose, a team of doctors and psychologists conducted an evaluation, diagnosed him as suffering from obsessive-compulsive personality disorder, and concluded that he was unfit to practice medicine. The hospital suspended his staff privileges. Baptist terminated his employment and filed a suit against him for breach. The doctrine of impossibility discharges Lambert from the performance of his contract—his performance was made impossible through no fault of his own.

In the actual case on which this problem is based, in Baptist’s suit against Lambert, the court issued a judgment in the defendant’s favor. A state intermediate appellate court applied the doctrine of impossibility to affirm this judgment.

**10–8A. *Limitation-of-liability clauses***

Yes, the limitation-of-liability agreement that Eriksson signed is likely to be enforced in her parents’ suit against Nunnink, their daughter’s riding coach. And this would likely result in a judgment against them unless they can establish Nunnink's “direct, willful and wanton negligence.” A limitation-of-liability clause affects the availability of certain remedies. Under basic contract principles, to be enforceable, these clauses must be clear and unambiguous.

In this problem, Eriksson, a young equestrian event competitor, signed an agreement that released Nunnink from all liability except for damages caused by Nunnink's “direct, willful and wanton negligence.” During an event, Eriksson’s horse struck a hurdle, causing her to fall from the horse. The horse fell on her, resulting in her death. Her parents filed a suit against Nunnink for wrongful death. The limitation-of-liability clause expressly released Nunnink from liability for all of Eriksson’s equestrian activities related to Nunnink's services except for those caused by Nunnink's “direct, willful and wanton negligence.” The clause is straightforward, clear, and unambiguous, and therefore enforceable. Nunnink would be liable only if Eriksson’s death was caused by Nunnink's gross negligence. The facts do not state that Eriksson’s parents proved Nunnink was grossly negligent.

In the actual case on which this problem is based, the court issued a judgment in Nunnink’s favor. A state intermediate appellate court affirmed the judgment, on the basis expressed here.

**10–9A. A Question of Ethics—*Assignment and delegation***

**1.** Premier Building is not relieved of its contractual obligations. By its terms, the listing agreement said that it was binding on the parties and “their . . . assigns.” Nevertheless, duties are delegated, not assigned, and a delegation does not relieve a delegator of his or her contractual obligations. In this case, Premier Building could not avoid its obligation to pay Sunset Gold simply by delegating that duty to Cobblestone.

**2.** Cobblestone probably did behave unethically. Premier Building and Cobblestone were closely related, and Premier Building even established Cobblestone solely to secure financing for the commercial property at issue. Moreover, Cobblestone explicitly acknowledged its obligation to pay Sunset Gold for finding a tenant. It seems unethical for Cobblestone to shirk its duty to pay a commission despite enjoying the benefits of Sunset Gold’s services.

**Critical Thinking and Writing Assignments**

**10–10A. Critical Legal Thinking**

The fairness of the doctrine of substantial performance arises from human na­ture, which dictates that performance will not always fully satisfy all of the par­ties to a contract. Perfection is also impossible, given human nature, and thus, generally, something less than perfection is possible in the performance of a contract under the doctrine of substantial performance. The doctrine looks to the good faith of the parties in their efforts to perform. When disputes arise, a court may impose on the parties whatever is reasonable in the circum­stances. In part, the policy behind the doctrine is to enforce the contract that the parties made—that is, to prevent one party from using a minor deviation from the con­tract to avoid his or her own performance.

**10–11A. Business Law Critical Thinking Group Assignment**

**1.** The court should rule in Bucklin’s favor—Morelli was to convey the house with whatever title she had. In this problem, a valid agreement existed and Bucklin was ready to pay the price and obtain the property with its less than marketable title. Morelli’s effort to return Bucklin’s deposit should have no effect on the outcome. The option of a return of all deposits belonged to Bucklin, not Morelli.

**2.** The court should order the remedy of specific performance. Specific performance is an available remedy when a purchaser of real estate under a written contract demonstrates that he or she was at all times ready and willing to perform the contract or when a party unjustifiably refuses or fails to perform under the agreement. In this case, a valid agreement existed and Bucklin was ready, willing, and able to pay the price and accept the property with its title as is.