

**5-1 Rights & Duties: Transfer of Contractual Rights**

*Hot Debate: June was an accomplished opera singer. She contracted to sing for the San Francisco Opera over Labor Day weekend for \$5,000. About a month before her performance, she was offered another role that paid twice as much. June offered to pay the \$5,000 to her friend Sara, an equally accomplished opera singer, to fill in for her on Labor Day weekend. Sara agreed. When June told the San Francisco Opera, they said they wouldn't pay the money. Why should the San Francisco Opera have to pay June? Why shouldn't they have to?*

**Assigning Contractual Rights**

*What's Your Verdict? Whippet bought a high-powered sports coupe from Oriental Motors for \$32,000. After a down payment of \$2,000, the balance, plus a finance charge, was to be paid in installments over the following 48 months. Oriental Motors needed cash to restore its inventory of new cars. Therefore, it immediately sold Whippet's contract to the finance company and told Whippet to make all installment payments to the finance company. Is such a transfer of contractual rights legal?*

People often have **contractual rights** (things they will receive under a contract) that they transfer to others. Such transfer is called an **assignment**. The party who transfers the contractual right to another is the assignor. The party who receives this contractual right is the assignee.

**Assignable Rights.** Generally, a party may assign contractual rights to another, provided performance will not be materially changed. Performance is the fulfillment of contractual promises as agreed. A right to collect a debt is assignable because performance remains the same after assignment. In *What's Your Verdict?* when Whippet was notified of the assignment, he became obligated to pay the finance company instead of Oriental Motors. Retailers and restaurants assign to issuers of credit cards the right to collect the amounts due from customers who have used the cards. In exchange, the credit card companies immediately pay the retailers and restaurants the face amount of the credit slips, less an agreed percentage.

**Non-Assignable Rights.** Contractual rights may not be assigned if performance would be materially changed (changed in an important way). Additionally, contractual rights may not be assigned if performance becomes substantially more difficult. For example, Chris has a claim against Ted for \$1,000. Chris may not assign that claim in 1,000 parts to the 1,000 students at Central High because such an assignment would make Ted's paying off the debt substantially more difficult. Rights that may NOT be transferred include:

- a right created under a contract that prohibits transfer of the contractual rights
- claims for damages for personal injuries
- claims against the United States
- rights to personal services, especially those of a skilled nature, or when personal trust/confidence are involved
- assignments of future wages.

While an assignment is usually valid whether oral or written, a written assignment is always wiser. No consideration is necessary to make a valid assignment.

*In This Case: Ford, a dentist, owed Bentin \$5,000 for office furniture. Bentin agreed to accept \$1,000 in cash and \$4,000 in orthodontic services for his children as payment for the debt. Soon after, Bentin needed the money, so he assigned his right to receive the dental services to Lakely. Unless Ford consented, this assignment would not be valid because it included rights to personal services of a skilled, professional nature.*

**Delegating Contractual Duties**

*What's Your Verdict? Ramirez hired Norton to come to her home and care for her two young children while she was at work. Could Norton legally delegate the child-care duties to a well-qualified third party?*

**Contractual duties** are legal obligations created by a contract. If you order a shirt and promise to pay \$60, you have the duty to pay and the seller has the right to collect. Routine duties can often be transferred to another party. This is known as **delegation** of duties.

A person cannot delegate to another any duty where performance requires unique personal skill or special qualifications. In *What's Your Verdict?* Norton cannot delegate the duty of caring for the children. The task involves special qualifications of trust and skill. Similarly, a contract creating a duty can prohibit delegation.

A person who delegates contractual duties remains legally obligated and responsible for proper performance even though someone else may actually do the required work. Thus, a general contractor who agrees to build a house is responsible for providing the finished structure as promised. However, general contractors typically delegate most of the work to independent subcontractors.

Subcontractors lay foundations and do masonry, carpentry, plumbing, electrical, painting, and other work. The general contractor makes individual contracts with them and pays them. The subcontractors are responsible to the general contractor for proper performance. But the general contractor remains responsible to the buyer for the finished job. Sometimes contracting parties will assign rights and delegate duties.

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***In This Case: Pyramid Builders, a ready-mix concrete company, received more orders than it could fill on schedule. Therefore it arranged to have a competitor, Gibraltar Inc., supply certain customers. Pyramid would bill the customers and turn over the proceeds to Gibraltar. If the concrete delivered was faulty, Pyramid remained liable to the customer for damages. In turn, Gibraltar would be liable to Pyramid if Gibraltar were at fault.***

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### **What Are The Obligations Of The Obligor?**

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***What's Your Verdict? Ginsburg, a concert violinist, purchased "a genuine Stradivarius" violin from Krone for \$250,000. Ginsburg paid \$50,000 down and agreed to pay the balance in 24 equal monthly installments. Krone knew the violin was not a Stradivarius. He immediately assigned his right to collect the balance of \$200,000 to Continental Finance for \$90,000 in cash. Continental notified Ginsburg of the assignment. Krone then disappeared. Shortly after, Ginsburg discovered the fraud. Can Ginsburg refuse to pay Continental if it tries to collect?***

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An obligor is the one who owes a duty under a contract. In *What's Your Verdict? Ginsburg* is the obligor who owes the duty to pay the balance of the money.

**Notice to Obligor.** Until notified that an assignment has occurred, the obligor may continue to pay the assignor. After notification, however, the obligor is liable to the assignee for performance. To protect newly acquired rights, the assignee should promptly notify the obligor of the assignment.

**Obligor's Liability.** Courts sometimes say that the assignee "stands in the shoes of the assignor." This means that the assignee receives exactly the same contractual rights and duties as the assignor had—no more and no less. If a contractual right is transferred, this does not change the legal rights of

**Obligor's Breach.** In all assignments, the assignor guarantees to the assignee that the assignor has a right to assign and that the assigned right is legally enforceable. However, the assignor typically does not promise that the obligor will perform as promised in the original contract. If the obligor breaches, the assignee, not the assignor, must sue for the breach. Of course the assignment may include specific language making the assignor liable for breach by the obligor.

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### **Think Critically About Evidence**

- 1. Your parents contract to have a new house built. Shortly thereafter, your father's employer promotes him. The new position requires a move to corporate headquarters in Atlanta, Georgia, which is 2,000 miles away. Can your parents transfer their rights and duties under the building contract to someone else for the construction of the same house in a different location?**
- 2. Tori operated a graphic design and printing shop. Gerov contracted to have Tori design and print 25,000 brochures in full color promoting a variety of international tours. Under their contract, Tori also agreed to address and mail envelopes containing the brochures to a select list of prospects. Tori delegated the addressing, stuffing, and mailing of the envelopes. Is this a valid delegation? Does Tori remain liable to Gerov for proper completion of the entire job?**
- 3. Zack bought an automobile insurance policy. The policy contained a clause prohibiting assignment of the policy without written consent of the insurer. Later, when his car was stolen, Zack notified the insurer. After six months, during which the car had not been recovered, Zack assigned to Pragg his claim for payment under the policy. The insurance company refused to pay because it had not given its written consent to the assignment. Must the insurance company pay? Was the insurance company ethical in refusing payment of Zack's claim?**
- 4. Your school orders 50 new uniforms for its marching band. The contract is with Quality Uniforms Inc., a firm with whom the school has done business for 12 years. A week before the first public performance by the band, Quality states that it has overbooked its business and has delegated the sewing to New Era Uniforms. Can the school cancel the contract or must it accept the uniforms from the new company?**

## 5-2 Rights & Duties: Performance of Duties

### How Are Contracts Usually Discharged?

*What's Your Verdict? Wesley promised to loan Hudson \$900 within three months in return for Hudson's promise to paint Wesley's home. Hudson did not paint the house as promised. She did offer to give Wesley an aquamarine ring that had a retail value of about \$1,000, and a wholesale value of \$500 instead of painting the house. Must Wesley accept the ring instead of the painting of his home?*

#### **Complete Performance**

When a contract is made, the parties take on certain duties. **Discharge** of a contract is a termination of duties that ordinarily occurs when the parties perform as promised. Most contracts are discharged by complete performance of the terms of the contract. Failure to provide complete performance is a **breach of contract**. When one party commits a major breach, the other party may regard her or his obligation as discharged. In *What's Your Verdict?* Wesley need not accept the ring. Hudson is in major breach of the contract. Because of Hudson's major breach, Wesley need not loan the money.

**Substantial Performance.** Occasionally, **substantial performance** occurs. This happens when substantially all the duties are performed but a minor duty under the contract remains. Then there has been only a **minor breach**. A minor breach does not discharge the duties of the non-breaching party the way a major breach does. The party who has substantially performed can sue and recover what is due, less the cost of completing the remaining work. If the failure to perform is deliberate, the victim may treat it as a major breach.

**Anticipatory Breach.** Sometimes a party who defaults (fails to perform) notifies the other party to a contract before the time of performance has arrived that he or she will not perform. This is called an **anticipatory breach**. The victim may wait until the promised time of performance, or the victim may treat the notice as evidence of a breach of contract and immediately sue for damages.

**Timing of Performance.** Contracts often identify a duty but don't say when it must be performed. In these cases, the duty must be performed within a reasonable time. If it is not performed within a reasonable time, this is a breach. A judge or jury determines a reasonable time after examining the circumstances in each case. Thus a contract to ship tomatoes (which rot quickly) might have a reasonable time for performance of several hours while a contract to ship used cars (which don't change in value quickly) might have a reasonable time of seven days. In other instances, the contract identifies a date for performance. Most courts will rule that performance shortly after the date is only a minor breach. Again, the circumstance in each case will influence how much time after the specified date will be allowed before the delay is treated as a major breach. When a contract states that performance is to occur by a specified date, and that "time is of the essence," failure to perform by that date is generally regarded as a major breach. If so, the duties of the non-breaching party are discharged.

*In This Case: On January 5, Graham Roofers contracted to remove the old shingles and to install a new fireproof roof on the home of the Sterlings. The job was to be completed "by March 30, at the latest," to be ready for anticipated heavy spring rains. Late in February, Graham notified the Sterlings that because of a rush of orders, his crews were "swamped" and he could not get to the job until late April or early May. This was an anticipatory breach. The Sterlings have the choice of waiting for performance or immediately proceeding as though Graham had breached the contract.*

### How Else Can Contracts Be Discharged?

*What's Your Verdict? Diaz was the owner of a landscape service. He contracted to maintain the yard of Reingold while she sailed around the world in a 45-foot yacht. Reingold planned to write and take photographs for a national magazine and had no fixed itinerary or schedule for the journey. When would the contract with Diaz terminate?*

In addition to complete performance, a contract may be discharged by: agreement; impossibility of performance; and operation of law.

#### **By Agreement**

When the parties prepare their contract, they may agree that it will terminate:

- on a specified date or upon the expiration of a specified period of time (for example, a fresh food supply contract with a school district to terminate on the last day of school)

- upon the happening of a specified event (in What's Your Verdict? the contract to maintain the yard would terminate when Reingold returned from her voyage around the world)
- upon the failure of a certain event to happen (for example, a construction loan contract upon failure to get a required building permit)
- at the free will of either party upon giving notice (for example, when one partner decides to retire from business and gives the required notice as specified in the partnership agreement with her associates).

The parties who have made a contract may later mutually agree to change either the terms of the contract or the nature of their relationship. They may do so without any liability for breach.

**Rescission.** By rescission the parties may agree to unmake or to undo their entire contract from its very beginning. Each party returns any consideration already received, and both are placed in their original positions in so far as possible.

**Accord and Satisfaction.** Parties may decide that the present contract is not what they want, and so replace it with a new contract. This discharges their original contract by substitution. The parties may also agree to change the obligation required by the original contract. An agreement to make such a change is an accord. Performance of the new obligation is called a satisfaction. A compromise of a disputed claim or a composition of creditors is an accord. Carrying out the new agreement is the satisfaction. Thus, an accord and satisfaction discharge the previous obligation.

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***In This Case: Vanvoor borrowed \$650 from Banta. Vanvoor could not repay the loan on schedule. The parties then agreed that Vanvoor would work off the debt by doing 30 hours of painting, electrical, and plumbing work in Banta's home during the next three months. The agreement to change the required performance was an accord. Vanvoor's completion of the agreed-upon work was the satisfaction. Together, this accord and satisfaction discharged Vanvoor's original obligation to pay \$650.***

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**Novation.** A party entitled to receive performance under a contract may release the other party from the duty of performance and accept a substitute party. This is a novation. In effect, a new contract is formed by agreement of the three parties who are involved.

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***In This Case: Revell had contracted to install a skylight in the roof of Sinclair's workshop. Because of pressures to complete other jobs before the rainy season began, Revell asked Sinclair if she would accept a qualified substitute carpenter named Lowry, who was willing to do the job for the same price. All three parties were agreeable. By novation, Lowry took Revell's place in the original contract, thus releasing him from all duties to perform and depriving him of all rights to be paid.***

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### **By Impossibility of Performance**

Impossibility of performance refers to external conditions rather than an obligor's personal inability to perform. For example, the fact that a borrower does not have the money to repay a debt does not make the contract impossible to perform. A contract is considered discharged by impossibility of performance in such cases as destruction of the subject matter of the contract through no fault of the parties or a change of law that makes a contract illegal to perform.

As a general rule, a contract is not discharged when unforeseen events make performance more costly or difficult. For example, increased prices of needed supplies, a strike of needed workers, difficulty in obtaining materials or equipment, or a natural disaster (such as a flood or earthquake) may delay performance. Generally, these events do not discharge the contractual obligations. These events should be anticipated as possibilities and be provided for in the contract when it is made. Otherwise a party who fails to perform because of such events could be held liable for major breach of contract.

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***In This Case: Sundstrum, a wholesaler, contracted to supply various airplane parts to Arcadia Airport at a price of \$17,686. However, Sundstrum later defaulted. He claimed that it was impossible to deliver at the contract price because the manufacturers had increased their prices to him by more than \$8,600. The court held him to the contract. The fact that the contract was no longer economically profitable did not mean that it was legally and physically impossible to perform.***

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**Destruction of the Subject Matter.** Sometimes performance depends on the continued existence of some specific thing. Destruction of that thing terminates the contract if the destruction was not the fault of the parties to the contract. The result of destruction of the subject matter is different if the seller has other sources of supply and the parties did not specify one and only one source as acceptable. For example, suppose that because of a fire, a wholesale lumber broker loses her main supply source. If the broker has access to other sources of lumber, and if her contract does not limit her to one particular source, she is legally bound to deliver the lumber. This is true even if the broker's resulting cost is much higher than she had anticipated.

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***In This Case: Blitz was a famous jockey. He contracted to ride the thoroughbred White Flash in the Kentucky Derby. A week before the race, the horse stumbled during a workout, broke a leg, and had to be destroyed. Blitz's employment contract was discharged. He was free to contract to ride another horse in the Derby.***

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Performance Declared Illegal. A contract that is legal when made is discharged if and when it later becomes illegal. A new statute, a court ruling, or an administrative decision might cause illegality.

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***In This Case: Tippner contracted with Barnell to build a warehouse on land owned by Barnell. Before construction began, the city council passed a zoning ordinance restricting the site to residential dwellings. The construction contract was thereby discharged.***

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Death or Disability. If the contract requires personal services, death or disability of the party who was to provide such services terminates the agreement. This rule does not apply when others are available to perform, as in partnerships or corporations that continue to do business. Likewise, it does not apply where the contract simply calls for payment of money, delivery of goods, or transfer of title to land by the decedent. In each of these cases, the decedent's personal representative can and is required to perform.

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***In This Case: The Daily Tribune contracted for the consulting services of Chi Liang, an expert in computer networks, at a rate of \$600 a day. Liang agreed to supervise the installation of a computer system with integrated software programs. The Tribune's newsroom, pressroom, circulation and advertising departments, and business office were all included. After Liang had completed his work linking the newsroom and pressroom, he suffered a stroke and was unable to continue. Liang's contractual obligation was discharged by impossibility.***

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### **By Operation of Law**

A contract may be discharged or the right to enforce it may be barred by operation of law. This happens when the promisor's debts are discharged in bankruptcy. It also happens when the time allowed for enforcement of the contract has elapsed because of the statute of limitations.

Bankruptcy. Years ago, a person who could not or did not pay debts as they came due could be jailed. Such punishment is costly for society, impractical, and unreasonable. A debtor cannot earn money to pay a debt while in prison. Moreover, the debtor's dependents may be forced to rely on public relief for support. Under the U.S. Constitution, Congress has established uniform laws on bankruptcies that permit the discharge of (excuse of) debts. Under these laws, debtors can get a fresh start, and creditors share fairly in whatever assets are available. Bankruptcy is a legal proceeding whereby a debtor's assets are distributed among his or her creditors to discharge the debts. In *What's Your Verdict?* Greene should file a proper voluntary petition with the bankruptcy court. If the petition were approved, he possibly would be permanently excused from paying all of the debts listed in *What's Your Verdict?* Note that if Greene had willfully and maliciously caused the automobile accident, or if the accident were caused by his intoxication, the judgment debt of \$155,000 would not be discharged.

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***What's Your Verdict? Greene had overextended himself financially by buying too many items on installment plans. Then he lost his job. His wife required major surgery and was hospitalized for almost two months. Soon after, Greene was found guilty of negligence in an automobile accident and was held liable for \$155,000 more than his insurance policy coverage. Greene can see no way of paying his creditors, yet bill collectors are at his door almost daily. Is there anything he can legally do to get rid of his debts?***

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Statute of Limitations. Statutes in all states deny any remedy if suit is not commenced within a certain time after a legal claim, such as breach of contract, arises. Such laws are called statutes of limitations. While the time period varies among the states, four years is a common time for contracts and three years is a common time for torts. About half of the states allow more time to sue on written contracts than on oral ones. In *What's Your Verdict?* Raley has probably waited too long to file his suit. The statute of limitations would bar Raley from suing Parr.

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***What's Your Verdict? Raley sold a used videocassette recorder to his friend and neighbor, Parr, for \$495 on credit. Over a six-year period, Parr always had some excuse for not paying when Raley tried to collect. Exasperated, Raley finally filed suit in small claims court. Will the court consider the claim even though it is six years old?***

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Alteration of Contract. Alteration of a written agreement also usually discharges the agreement by operation of law. **Alteration** is a material change in the terms of a written contract without consent of the other party. To discharge the contract, the alteration must be: material, thus changing the obligation in an important way; made intentionally, and not by accident or mistake; made by a party to the agreement, or by an authorized agent; and made without consent of the other party.

*In This Case: Carey's Complete Cleaners contracted to clean all rooms and public spaces of Dahl's office building. A contractual clause in small print allowed a 10 percent discount if the charges were paid in advance in one lump sum instead of in 12 monthly installments. After the contract had been signed by both parties, and before giving Dahl her copy, Carey secretly crossed out the clause referring to the discount. This material alteration discharged Dahl from any obligation under the contract. Dahl could thereupon insist on inclusion of the clause or seek damages through court action.*

### **Tender Of Performance**

An offer to perform an obligation is a **tender**. If the duty requires the doing of an act, a tender that is made in good faith but is rejected will discharge the obligation of the one offering to perform. In *What's Your Verdict?* Quincy refused Zamorsky's offer to perform as agreed. Thus, Zamorsky's obligation was discharged, and Quincy is liable for damages. If the obligation requires the payment of money, rejection of an offer to pay the money does not discharge the debt nor does it prevent the creditor from collecting later. It merely relieves the debtor of court costs or future interest charges that might otherwise become due.

**Legal Tender.** To be valid, the tender of money must consist of the exact amount due in legal tender. Legal tender is currency. A tender of only part of the debt is not a valid tender. If the debtor offers less than the amount due, the creditor may refuse it without losing the right to later collect the entire amount due.

*What's Your Verdict? Zamorsky, a professional artist, agreed to paint Quincy's portrait for \$5,000. Five sittings of two hours each were scheduled at times selected by Quincy, but he failed to appear for any of them. To accommodate her client, Zamorsky then offered to come to Quincy's home or office for rescheduled sittings at his convenience. Quincy rejected this proposal. Is Zamorsky's legal obligation discharged? Is Quincy liable for damages?*

### **Think Critically About Evidence**

1. Your school orders 50 new uniforms for its marching band. The contract states that "time is of the essence," and if the goods are not received in time for the first performance by the band on September 1, the old uniforms will be used for another year. The manufacturer does not deliver the uniforms until September 3. Can the school cancel the contract? Would it be ethical for the supplier to delay the delivery until October 10 because of a rush order from another school that provided a higher profit?
2. In January, Doolan Construction Company promised to remodel Kemper's kitchen during July when Kemper would be visiting relatives in Canada. Their written contract called for work to start on July 1, and to be completed before August 2. In April, Doolan phoned and said he could not start the job before July 20, if then. What can Kemper do?
3. Tina, age seven, was playing accountant at her father's desk in his absence. When she found a stack of interesting papers, she "corrected" all of them, adding zeros to numbers ("500" thus became "5000") and drawing lines through words. The "interesting papers" were promissory notes, owned by her father, representing claims against debtors totaling about \$17,000. Have these contractual claims been discharged by Tina's changes?
4. Ferrazzi, a distinguished Italian sculptor, contracted to create a large bronze abstract design for the lobby of the Martindale Mart. He was to receive \$75,000 upon completion and installation of the sculpture. Shortly thereafter, Ferrazzi was injured in an accident. Unable to fulfill his agreement, he asked his friend Drinano to do the work for him. Drinano was an equally competent sculptor. Must Martindale Mart accept Drinano's services?
5. Ohler Oil Company contracted to sell and to deliver 500 barrels of fuel oil on the first of each month for one year to the Monson Mushroom Factory (an indoor farm). Ohler delivered the oil for the first two months, but none during the third month. Ohler said there was unprecedented demand and it was allocating available supplies to all customers. Monson notified Ohler that it was canceling the contract because of Ohler's breach. Was Monson justified in its action?

## **5-3 Breach & Remedies: Types of Breach and Remedies**

*Hot Debate: Victoria needed her van repaired. The dealership estimated that the repairs to her transmission would take three days to complete. Because Victoria had a relative flying into town in four days, she asked the service manager if he was sure the work would be done within the three days. He replied, "Yes, for sure." Victoria left the van and went home. On the third day the dealership said it would take an additional two days. Victoria took two hours to arrange for a rental car to drive her relative around. She was angry and felt she'd been cheated out of the 2 hours and the cost of the rental car. Argue both sides.*

The law divides breaches of contract into two categories: the major (or material) breach and the minor breach. Different remedies are granted for injuries caused by minor and major breaches. A **remedy** means the action or procedure followed to enforce a right or to get damages for an injury to a right. The significance of any breach, and therefore its classification as major or minor, is an issue of fact to be decided by a judge or a jury. They will try to determine whether a reasonable person would, in light of the particular facts and circumstances, view the breach as major or minor.

Two guidelines help in classifying major versus minor breaches. The primary guideline is the significance of the breach in relation to the entire contract. For example, if a contractor builds a 12-room home for you but fails to paint four of the rooms, this would probably be a minor breach. The cost of painting the rooms is quite minor in comparison to the cost of building a house. On the other hand, if a painting contractor agrees to paint the inside of your 12-room house but fails to paint four of the rooms, this would probably be a major breach.

### **Minor Breach**

The party injured by a minor breach must generally continue to perform the duties defined by the contract. The only remedy generally available for a minor breach is money damages, to recover the cost of completing the minor duty. Thus, if a buyer paid cash to have a new home built and upon moving in discovered that 4 rooms were not painted, the buyer could sue and recover the cost of painting the rooms. If the purchase price had not been paid, the buyer could recover damages through offset (the buyer could deduct the cost of painting from money to be paid for the house).

### **Major Breach**

If the breach is classified as a major breach, then the injured party need not continue performing the duties defined by the contract. In addition, the victim can choose among the remedies of restitution, compensatory money damages, consequential money damages, liquidated money damages, and specific performance.

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The remedies for major breach of contract include the following:

- Rescission and restitution – canceling the contract and returning whatever has been received under it
- Money damages – the payment of money to compensate for injury
- Specific performance – a court order commanding the breaching party to perform what was promised in the contract
- Injunction – court may prohibit someone from benefiting from the breach
- Waiver – a party may voluntarily give up a contractual right ... by “waiving” it

### **Rescission and Restitution**

**Rescission and restitution** are intended to place the parties in the same legal position they were in before contracting. Rescission allows the parties to treat the contract as canceled. Restitution permits the injured party to recover money or property (or the value thereof) given to the defaulting party. Thus, if a seller of realty committed a major breach by failing to deliver the deed, the buyer could sue for restitution and recover any money paid for the property. When rescission is granted, all the contractual obligations of the parties are extinguished. Restitution also is usually available when the parties have attempted to contract, but failed, and in the process one party has delivered something of value to the other.

### **Money Damages**

Money damages may be compensatory, consequential, liquidated, punitive or nominal.

- **Compensatory Money Damages** (actual damages as compensation for injury/loss)
- **Consequential Money Damages** (foreseeable damages)
- **Liquidated Money Damages** (agreed-upon damages in the contract)
- **Punitive Damages** (courts may award to punish the breaching party, usually in situations of fraud, intentional tort, etc.)
- **Nominal Damages** (small amount to recognize rights have been violated)

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*In This Case: Rivera had the concession rights to sell food, drinks, and souvenirs at a big football post-season bowl game. Some 60,000 reserved seat tickets had been sold for the event. As part of her preparations, Rivera contracted with Ace High Novelty Company for 10,000 pennants, noisemakers, and other items imprinted with the emblems and in the colors of the two competing teams. Although Rivera had emphasized the absolute necessity of delivery at least eight hours before game time, the goods arrived two days after the game had been played. Rivera can recover lost profits from Ace because these consequential damages are generally foreseeable.*

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### **Specific Performance**

Sometimes money damages are not an adequate remedy for breach of contract. Therefore a court may give the injured party the special relief of specific performance. In a decree for **specific performance**, the court orders the defendant to do exactly what was promised in the contract.

- Money Damages Inadequate (must be unable to be compensated with money)
- Subject Matter Unique (rare items, real estate)
- Ability to Supervise (court must be able to supervise the specific performance)
- Clean Hands (party seeking specific performance must be blameless)

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*What's Your Verdict? Kelly contracted to buy 160 acres of land from McCall. She planned to build an amusement park on the land. When McCall learned of her plan, he refused to transfer the title. Did Kelly have any recourse?*

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### **Injunction**

A court may grant an **injunction** prohibiting the defaulting party, such as an athletic coach or a key laboratory scientist, from working for anyone else during the period of employment agreed to under the contract. The person who breached the contract would still be liable for any money damages suffered by the employer. Generally speaking, a court may prohibit someone from benefiting from the breach. This is usually used for employment contracts, since courts cannot force someone to work, but can stop them from benefiting by working for others.

### **Waiver**

Sometimes a party intentionally and explicitly gives up a contractual right. This is called a **waiver**. If a creditor says, "I will accept your late payment without a late charge," this is a waiver. Waivers also arise by implication from conduct. So if one party consistently sends late payments and is not charged the late fee specified in the contract, the rights to collect a late fee on future payments may be waived. In *What's Your Verdict?* Lister waived her rights under the warranty. Assume that you are a landlord and that you live in a state that does not require lessors to mitigate damages. You have a tenant leave 3 months before the end of a lease. Then you rent the apartment to a new tenant at a higher rental rate. Would you use the law to recover the unpaid rent? Do you think of yourself as a person who would do anything legal if it is in your self-interest? Or would you decline to exercise a legal right if you thought exercising this right was unfair?

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*What's Your Verdict? When Lister bought her new automobile, she received a customary limited warranty from the manufacturer. It provided protection against defects in materials or workmanship on most components of the car for one year or 12,000 miles, whichever came first. One door did not fit properly and a whistling of wind could be heard when Lister drove faster than 50 miles per hour. Also, in heavy rains, water leaked into the trunk. Because Lister drove only in town, at low speeds, in good weather, she never bothered to complain about the defects. Has her failure to act within one year been a waiver of her right to claim a breach of warranty?*

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### **Think Critically About Evidence**

1. A college football coach has directed his team to division championships five times. With two years remaining in his current three-year employment contract, he notifies the college president that he is resigning in order to coach a professional team at a higher salary. Is the coach legally free to change employers? Is the professional team legally free to hire him? What can the college do?
2. You were hired to work as an aide at a youth camp in Alaska for three months, beginning on June 10. Because of an increase in camp fees and airfares, enrollment drops sharply. After the first two-week session, the director no longer needs your help, and so she fires you. Is the director acting legally? Is she acting ethically? Do you have any legal remedy?
3. The Bethlehem Steel Company contracted with the city of Chicago to supply and erect the steelwork for a certain section of an interstate highway. The price agreed upon was \$1,734,200. The contract also provided that the steel company would pay as liquidated damages \$1,000 for each day the work was extended and uncompleted beyond a specified date. The work was completed 52 days after the date agreed upon. Is the company liable for \$52,000?
4. Stu bid \$122 million for a Picasso painting, and the seller accepted the bid. Then the seller received a higher bid, \$160 million. The seller told Stu the painting would not be delivered. What are Stu's remedies?
5. While under contract with the county, Pyramid Paving improperly applied asphalt to the public gravel road in front of your family's home. Soon after application, large cracks appear and your family complained. It took the city six years to file suit. What defense can Pyramid assert?
6. Fulton sold traffic-signal equipment to the city of Philadelphia. The city installed the equipment, put it to use, and found that it did not work satisfactorily. The equipment did not meet the contract specifications for being weatherproof. But the city used the lights and did not complain to Fulton for more than a year. Does Fulton have any defense to a lawsuit for breach of contract?

## **5-4 Breach & Remedies: Election of Remedies and Mitigation of Damages**

### **How Can Choosing One Remedy Bar Use of Another Remedy?**

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*What's Your Verdict? Jim "Fastball" Smoot, an unknown baseball pitcher, signed a 5-year contract to play for a major league team in Denver for \$120,000 a year. After 2 months, Smoot had won three and lost one in four starts, and had 37 strike outs and an ERA of 1.75. He then contracted with a competing team in Seattle for \$12 million a year, thereby breaching his contract with Denver. What remedies are available to the Denver team?*

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An injured party must elect, or choose, a remedy when suing. Specific performance and damages cannot be recovered for the same breach because specific performance is not available when damages are an adequate remedy. Giving the victim the actual benefit of the contract (specific performance) while also giving the benefit of the bargain (compensatory damages) would be double counting. So specific performance and compensatory damages cannot be combined.

Similarly, rescission and restitution places the victim in the pre-contract position. Damages places the victim in the same post-contract financial position, so combining these remedies is not permitted. Under the UCC however, these remedies can be combined for a breach of contract for the sale of goods.

Restitution and specific performance are essentially opposites, so you could not combine these remedies. In *What's Your Verdict?* the Denver team could recover the two months' wages (\$20,000) as restitution. But if the team elects this remedy, they would lose the ability to sue for damages and the ability to obtain an injunction prohibiting Smoot from playing for Seattle.

### How Can Failure to Mitigate Damages Eliminate Remedies?

*What's Your Verdict? In a valid written contract, Allente Associates, an advertising agency, employed DeChant to be its European representative based in Paris, France, for a three-year period. His salary was set at \$12,000 a month, plus a housing allowance, travel expenses, and other fringe benefits. After two years, Allente fired DeChant because it had decided to use local native talent to perform DeChant's customary duties. DeChant had similar employment opportunities but decided to "make lemonade out of lemons" as he put it. He immediately drove to a resort in Monaco, on the Mediterranean, for 12 months of the three R's (rest, recreation, and recuperation). Has DeChant's failure to seek comparable employment eliminated his ability to recover from Allente?*

The injured party must usually take reasonable steps to **mitigate damages**. This means one must act to minimize one's injury. If you contracted for a daily supply of 10-cent bolts used to assemble a car and the supplier breached, you could not recover the consequential damages associated with the production line's being halted unless you made a reasonable attempt to find substitute bolts. Similarly, in most states, a landlord must take reasonable steps to re-rent an apartment vacated in breach of a lease. In *What's Your Verdict?* DeChant's failure to mitigate by finding comparable employment will eliminate or dramatically reduce the available damages.

### Think Critically About Evidence

1. Hoglund reneged on his promise to sell his car to Elsen. Elsen went to a nearby town and found the same model with lower mileage, in better condition, and priced \$600 below Hoglund's. Nevertheless, Elsen was incensed by Hoglund's conduct and wanted to sue him. To what damages, if any, is Elsen entitled?
2. Taipei Yang ordered 900 solid brass bowls for indoor plants from the East-Meets-West Company, which imports such goods from Singapore. Yang had included the bowls as a special in his holiday gift catalog and expected to generate a net profit of at least \$9,000 from their sale. When the shipment arrived and was opened, Yang scratched the bottom of one bowl and determined that it was steel with a surface plating of brass. Yang complained to the supplier, who pleaded ignorance and apologized. Nothing further was said and Yang paid the full price. Three months later he thought he should get a reduction in price because of the defect. Will he succeed?
3. Bender was found guilty of manslaughter for causing the death of another driver in an automobile accident. Bender had been drinking and had been "showing off" his car to the passengers. At the trial, all of the passengers testified that they had tried to get him to stop, but he would not do so. In a separate civil action, judgment was rendered against Bender for a total of \$650,000 for willful and malicious battery. Although he had no liability insurance, Bender just laughed. He said that when he got out of jail, he would "go through bankruptcy and shake the debt off." Would Bender's conduct be legal? Would it be ethical?
4. Madison Unified High School District had plans to build a new high school. Madison awarded the contract for construction to Empire Builders Inc., which bid \$2.6 million. The contract contained a liquidated damage clause that provided for payment of \$1,500 a day for every day that completion was delayed beyond the expected 24-month construction period. Could the liquidated damage clause be enforced?
5. Good contracted to build a house for Stern according to Stern's plans. After the house was completed, there were several defects that Good refused to fix. Stern then contracted with Madden to do the necessary corrective work for \$8,000 and then sued Good for \$8,000 in compensatory damages. Stern also demanded \$10,000 in punitive damages "to punish Good and set an example for others." Is Stern entitled to compensatory damages? Is Stern legally or ethically entitled to punitive damages?
6. Gordon, a wholesaler of women's clothing, contracted to buy 6,000 woolen wrap-around robes from Shine. Shine, who used nonunion labor in her factory in New York City, had purchased the required bolts of cloth in several colors and her employees had almost completed cutting the cloth into proper pieces. Gordon then surprised and shocked Shine with a letter in which he said, "Let's cancel the deal. I got an offer I couldn't refuse from an outfit in Shanghai. Their price is about half of yours. What could I do? But you'll get my next order, I guarantee you that!" Does Shine have a cause of action (right to sue) against Gordon? How should Shine mitigate the damages? Did Gordon behave in an ethical manner?