

CONTRACT REMEDIES

Contracts casebooks are typically constructed in one of two ways. Some casebooks will begin with contract formation, move through breach and defenses, and conclude with a discussion of remedies. This is the order of litigation – remedies are ordered only if the non-breaching party (the promisee) can establish that the breaching party (the promisor) made and breached an enforceable promise that isn't otherwise excused.

Other casebooks will begin with the end in mind, focusing first on the remedies available for breach, and then consider formation, breach, etc. The theory for the latter construction is that one best understands the contours of contract law by understanding the end goal – to put the promisee in the position it would have been in if the promisor had fulfilled the contract.

The remedies modules presented here can be used either at the beginning or end of the course. We edited the cases with an emphasis on remedies and related issues, while retaining sufficient detail for the reader to understand the parties' claims. For the student reader, whether you are coming to these materials at the beginning or the end of your course, you may generally assume that despite any (potentially well-justified) misgivings, the promisee has established the promisor's breach. All that remains is awarding the promisee an appropriate remedy. Reading these cases with that approach in mind will help focus your attention. Nonetheless, if these cases provide your introduction to contracts, ask yourself whether and why the plaintiff should prevail. That reflection will prepare you for important questions to come. If you read these cases at the end of the course, take a moment to reflect on the doctrines of consideration, formation, interpretation, performance, breach, and defenses that you have already learned. You may identify weaknesses in the court's analysis or problems with the jury's conclusions about contractual liability.

In the remedies portion of a Contracts course, the goal is to understand what it means when we say that a promise is legally enforceable. The following issues are presented in the available remedies modules. Your instructor may focus on a few of these issues or try to cover the waterfront. In either case, these are issues that may be relevant as you negotiate and/or litigate contracts in your legal career.

- As the court opines in one frequently taught case, the purpose of the law of contracts is “to put plaintiff[s] in as good a position as [they] would have been in had defendant[s] kept [their] contract.” *Hawkins v. McGee*, 84 N.H. 114 (1929). That goal is typically

vindicated by awarding the prevailing plaintiff expectation damages – an amount sufficient to give the non-breaching party the benefit of their bargain.

- Calculating expectation damages is simple in some cases, and complicated in others. Complications include
 - Whether the promisee is entitled to the amount it would need to pay to complete the contract (cost of completion), or only the amount by which the value of its investment, goods or property were reduced by the promisor's breach (diminution in market value);
 - Whether the promisee is a volume seller (or buyer) and thus might be entitled to lost profits from the sale;
 - Whether the promisee should have done something to mitigate its losses;
 - Whether the promisee's losses were foreseeable to the promisor and thus fall within the expected benefit of the bargain;
 - Whether there is sufficient evidence of the promisee's likely profits if the promisor had not breached.
- Your teacher may take you through some or all of these issues surrounding expectation damages. Yet sometimes expectation damages cannot be calculated. Courts often consider two other measures.
 - Reliance damages instead attempt to put the promisee in as good a position as they were in before the promise was made. Reliance damages generally count the promisee's expenditures made in reliance on the contract.
 - Restitution seeks instead to return to the promisee any benefit they have conferred on another party by which the recipient would be unjustly enriched.
- Sometimes parties will decide in advance the remedy for breach as part of the contract, "liquidating" the damages. Courts don't always let the parties set the damage amount, if the amount selected penalizes breach, rather than serving as a reasonable estimate of the promisee's expectancy.
- In rare cases, courts will order promisors to complete the performance, or not to do something else that they implicitly promised not to do when they entered the contract.

Such orders of “specific performance” are rarely issued, but it is important to understand the exceptional cases.

The materials that follow address all of these issues in some detail and your professor might wish to cover some or all of these modules in the weeks to come.