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Professional Practice 544

Interpretation of Contracts Breach of Contract Remedies for Breach

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INTERPRETATION OF CONTRACTS

Goal: To Effectuate the Intent of the Parties

- Determining what the actual bargain was
- The court will not rewrite the contract

Objective Language of the Contract – First Level of Analysis

- Clear and unambiguous language always enforced as written
- No explanations or clarifications permitted
- Why this process? – To resolve conflicts – confirm the deal

Parol Evidence – A Second Level of Analysis

- Parol evidence is explanation of facts, communications or circumstances to help explain what the agreement was
- Parol evidence only considered when the contract is silent, ambiguous or unclear
 - Never permitted to alter clear unambiguous contract terms
 - Is allowed if the contract is silent on an issue
 - May be considered if the contract is unclear or ambiguous

Express and Implied Terms

- Express terms are spelled out either in writing or orally
- Implied terms are part of the agreement but not discussed or communicated
- Some common implied terms in construction contracts:
 - neither party will hinder the other from performing the contract
 - construction will be performed in a good and workmanlike manner
 - an architect will perform his duties in accordance with the appropriate standard of care

RESOLVING CONTRADICTIONS AND INCONSISTENCIES

Contradiction or Inconsistency?

Determine Whether There is an Actual Contradiction or Inconsistency

- Are the words contradictory is there an inconsistency?
- Is there an interpretation – a contract rule or judicial rule – that would allow the terms to be read consistently?

Rules Stated in the Terms of the Contract for Resolving Inconsistencies

- One document may supersede another, such as specifications superseding drawings
- Requiring the lengthier or more expensive procedure to apply
- Identifying who has the duty of inquiring about the inconsistency

Resolving Contradictions And Inconsistencies In A Contract

Judicial Rules of Contract Construction

- Following the specific rather than the general provision
- Construing the contract against the party who drafted it
- Construing the contract as a whole, favoring the provision more consistent with overall contract intent

Modification of Contracts - After the Agreement

Modification by Agreement of the Parties

- The parties who sign a contract may always agree modify that contract
- Even a contract that forbids modification can be modified
- There can even be oral modification of written contracts
- Timing of the modification

Modification of Contracts - After the Agreement

Actions for “Reformation” of Contracts

- Reformation is when the written terms of the contract do not accurately reflect the actual agreement reached between the parties
- Requires a lawsuit seeking “reformation” making it the only time that a court may rewrite the contract
- The party seeking information must have a good reason
 - Mutual mistake of fact
 - Fraud
 - Unilateral mistake of fact, coupled with the other party’s awareness of the mistake

BREACH OF CONTRACT AND REMEDIES FOR BREACH

Remedies for Breach of Contract

Purpose of Contract Remedies

- To put the innocent party in the position he would have been in had the contract been fully performed
- Purpose is not to punish the contract breaker

Money Damages for Breach of Contract

- Expectation damages (making innocent party whole as if contract performed) this is the most common
 - Recover the difference to complete the contract by others and the cost if the original party had performed.

Remedies for Breach of Contract

Money Damages for Breach of Contract

- Reliance damages (receiving one's money back – put the injured party in same position had the contract not been performed)
 - This is an “I want my money back” remedy
 - You get what you deserve
- Restitution damages (receiving the contract breacher's windfall – unjust enrichment – contract cannot be performed)
 - Looking to get what you could have recovered if the contract was performed

Remedies for Breach of Contract

Equitable Remedies for Breach of Contract

- Injunction (court order requiring or forbidding an action)
- Specific performance (court order requiring performance of the contract)
 - Not for services; often only for something unique; land is “legally” unique
- Rescission (undoing the contract and returning both parties to the pre-contract status quo)
 - Essentially resulting a resolution as if the contract never existed.

Remedies for Breach of Contract

Other types of Damages for Breach of Contract

- Consequential damages (indirect damages remotely caused by the breach, recoverable only if *reasonably foreseeable* when the contract was formed)
 - Often disclaimed in construction contracts
 - Purpose is to cover consequences not in the original agreement
- Liquidated damages (usually per-day delay costs stipulated in the contract, where the parties anticipated that actual losses would be difficult to calculate)
 - Cannot be a penalty
 - Must bear some reasonable relationship to the likely actual damage
 - Must be calculated at the beginning of the deal

Remedies for Breach of Contract

Other types of Damages for Breach of Contract

- Punitive damages
 - Almost never awarded for breach of contract (possibly fraud)
 - Similar to a criminal fine, but paid to the other side and not the State
- Legal fees
 - Generally not in breach of contract
 - Awardable only if the contract says so

Remedies for Breach of Contract

Innocent Party's Duty to Mitigate Damages (must act "reasonably")

- A breach by one party does not "guarantee protection to the other party"
 - Non-breaching party must take steps to minimize its own damages
 - Often a significant issue in construction cases.