Contract Law for Paralegals: Chapter 15

Chapter 15

Tab Text

CHAPTER 15

**The Plaintiff's Common
Law Remedies**

Chapter 15 explores the plaintiff's expectation, reliance, and restitution remedies for breach of contract. Although an expectation remedy generally produces the highest measure of damages (assuming the remedy is damages and not something else), in a few situations, reliance or restitution remedies may produce a better result for the plaintiff.

Note that since the discussion focuses on plaintiff's remedies for the defendant's breach of contract, the plaintiff has established a breach of contract cause of action and therefore a restitution cause of action (as distinguished from a restitution remedy for breach of contract) is not available. A reliance cause of action is also not available.

The three categories of remedies-expectation, reliance, and restitution, have been discussed earlier in this text and therefore this topic is not new. What is new is the discussion of each remedy in terms of a damage formula and damage diagrams. The road map for the plaintiff's common law remedies is Exhibit 15-1 (456).

Expectation Remedy

Chapter 15

Expectation Remedy

Reliance Remedy

Restitution Remedy

Restitution as Cause of Action?

Chapter Review Answers

Chapter Quiz

Expectation Remedy

EXPECTATION REMEDY FOR BREACH OF CONTRACT (455)

The expectation remedy moves the nonbreaching party forward to the position he or she would have been in had the contract been fully performed. The expectation calculation requires both the nonbreaching and the breaching parties to be moved forward to full performance. This is basically an offer for a bilateral contract all over again.

The offeror promises to do A, B, and C for the offeree's promise to do D, E, and F. If the offeror completes A and B and the offeree completes D before breaching the contract, the offeree owes the offeror E and F and the offeror owes the offeree C for there to be full performance of the contract. The expectation remedy is reduced to a diagram in Exhibit 15-2

Tab Text

EXPECTATION REMEDY FOR BREACH OF CONTRACT (455)

The expectation remedy moves the nonbreaching party forward to the position he or she would have been in had the contract been fully performed. The expectation calculation requires both the nonbreaching and the breaching parties to be moved forward to full performance. This is basically an offer for a bilateral contract all over again.

The offeror promises to do A, B, and C for the offeree's promise to do D, E, and F. If the offeror completes A and B and the offeree completes D before breaching the contract, the offeree owes the offeror E and F and the offeror owes the offeree C for there to be full performance of the contract. The expectation remedy is reduced to a diagram in Exhibit 15-2 (457). Example 5-2 (text pp. 457-459) adds facts to the expectation formula.

PARALEGAL EXERCISE 15.1 (459) presents a sequence of calculations to illustrate the application of the expectation formula.

Compensatory Damages (460)
The nonbreaching party's expectation damages are compensatory since they compensate the nonbreaching party for not receiving his or her expectations under the contract.

Punitive damages are not awarded in a breach of contract action. At times, it may appear that a court is giving punitive damages in a breach of contract action but a closer look will reveal that the case is one in tort and not for breach of contract.

Example 15-3 (460) illustrates the theory of economics of breach. Since expectation damages may not be punitive and can only put the nonbreaching party in the position he or she would have been in had the contract been fully performed (on both sides), contracting parties may, from time to time, view this limitation as encouraging breach. In the example, the ABC Painting Company gains by breaching the contract with Smith, paying Smith expectation damages ($500) (the additional cost for replacing ABC with Quality-$3,500 - $3,000), and pocketing the profit on the First Bank contract ($12,000 less costs), a contract ABC could not have made had it continued performance of its contract with Smith.

Example 15-4 (461) illustrates a nonbreaching homeowner's dilemma when a contractor breaches a construction contract. Should the homeowner receive the cost of replacement (or repair) or only the diminished value of the property? In Example 15-4, the contractor mislocated an interior wall by one foot. The mislocation does not change the value of the house, although the contractor has breached by not building according to the blueprints. The test is one based on "economic waste." Tearing out the wall and rebuilding it according to the blueprint would be economically wasteful since doing so would not enhance the value of the house.

PARALEGAL EXERCISE 15.2 (461) is a land reclamation contract where the lessee has strip mined coal but has not reclaimed the land as required by the contract.

The issue is whether the landowner's expectation damages should be the diminished value of the land since the land was not reclaimed or the cost to reclaim the land. The landowner could assert reclamation was one of the bases for the bargain while the lessee could argue reclamation would not improve the value of the land and therefore damages based on reclamation would create no "economic benefit" (the flip side of economic waste).

Expectation damages must be foreseeable and to be foreseeable they are either general damages (naturally arising from a breach of this kind) or special damages (within the contemplation of the parties at the time of contracting). In the latter case, if the special damages were contemplated, they were then foreseeable.

PARALEGAL EXERCISE 15.3 (462) raises the question of whether the damages associated with the hotel's loss of the convention if the schedule was not kept were contemplated by the parties at the time of contracting and therefore were foreseeable.

As a general proposition, a nonbreaching party cannot recover breach of contract damages for pain and suffering and emotion distress. They are not the natural result of a breach and therefore not general damages. They are also not completed by the parties at the time of contracting and therefore are not special damages. A few situations, however, present opportunities for pain and suffering and emotional distress.

PARALEGAL EXERCISE 15.4 (462) changes the facts in Paralegal Exercise 15.3 so the damages become special damages. The question becomes whether the amount of damages could be shown with reasonable certainty. If not, they are not recoverable.

Reasonable certainty does not require mathematical exactness. This exercise demonstrates that the proof of damages in some situations is inherently more difficult than in others.

The material before Example 15-5 (463) develops the calculation of damages for an employee's breach of an employment contract. The contract must be for a term or its equivalence (e.g., for the completion of a specific task) since a cause of action for breach of contract must be found before the employer is entitled to a remedy for the breach. If the contract were an employment contract at will, there may not be a breach since the employee can leave at any time without being in breach.

Exhibit 15-3 (463) diagrams the calculation of the employer's damages.

Example 15-5 (463) illustrates the calculation of the employer's damages.

The paragraph after Example 15-5 develops the concept of mitigation.

PARALEGAL EXERCISE 15.5 (464) applies mitigation to a construction contract. The contractor is entitled to its expected profits regardless of when the School District breached. The contractor is also entitled to recoup what it has spent on labor and material prior to the School District's breach.

1. [What the contractor expected to receive
(the contract price)
($8,500,000)
less
What the contractor did receive

($0)]
less
[What the contractor expected to give
(the building costing $8,000,000 to build)
less
What the contractor did give
($0)]
= $500,000.

2. [What the contractor expected to receive
(the contract price)
($8,500,000)
less
What the contractor did receive
($0)]
less
[What the contractor expected to give
(the building costing $8,250,000 to build ($1,500,000 + $6,750,000))
less
What the contractor did give
($1,500,000)]
= $750,000

3. If the School Board breached before the contractor began work, then the answer is the same as #1. The contractor had a duty to mitigate and cannot recover its costs after receiving notice of the breach.

If the School Board breached after the contractor began work, then the formula would be the same as #2. Again, the contractor had a duty to mitigate and cannot recover its costs after receiving notice of the breach.

The paragraph after Paralegal Exercise 15.5 discusses the employee's duty to mitigation when the employer breaches. This presents the "saved time" concept. If the employee is released from working a term contract, the employee now has the time that he or she would have devoted to working for the employer. The employee must use that time or attempt to use that time. Money earned using that time, or money that could have been earned using that time, must be subtracted from the nonbreaching employee's expectation recovery.

PARALEGAL EXERCISE 15.6 (464) applies the saved-time concept. If Brenda accepts the Chronicle's offer, her damages for the nine months of saved time would be reduced by 90%, her salary at the Chronicle. If Brenda does not accept the Chronicle's offer, her damages would still be reduced by 90% since the Chronicle job was not dissimilar to her job at the Daily News, and therefore she should have accepted this offer and so used her saved time.

Liquidated Damages (465)
A damage provision that does not qualify as a liquidated damage provision will be considered a penalty and therefore unenforceable. The criteria for a liquidated damage provision are listed on page 465.

PARALEGAL EXERCISE 15.7 (465) requires an application of the criteria for a liquidated damage provision. The contract states that Felix has five days from the date of notice of vacancy to paint an apartment. He will receive $300 an apartment but will lose $30 for each day beyond five (10% of the contract price) for each day late. Is this provision enforceable?

1. At the time of contract formation, would the damages in the event of a breach be impossible or very difficult to estimate accurately?
2. Was there a reasonable endeavor by the parties to fix a fair compensation?
3. Does the stipulated amount bear a reasonable relation to the probable damages and is not disproportionate to any damages reasonably anticipated? Are any of the following factors anticipated?
    a. The apartment rents for $400 a month. Considering a 30-day month, the rent per day is $13.33. Ten dollars per day is less than the daily rental rate and takes into consideration the fact that an apartment may not be rented immediately after being painted.
    b. The apartment complex has an 85% occupancy rate. Was the occupancy rate 85% at the time of contract formation? Whether an apartment will be occupied immediately after being painted is impossible to tell.
    c. The apartment was ready by the first of the month. Whether a provision is liquidated damages or a penalty is determined at the time of contract formation so whether this particular apartment was ready by the first of the month is irrelevant.

Incidental damages are discussed in the last paragraph of the text page 465. Exhibit 15-4 (466) shows where to locate incidental damages in the expectation formula.

Nominal damages are discussed on text page 466.

Injunction and Specific Performance (466)
Example 15-6 (466) illustrates an injunction.

PARALEGAL EXERCISE 15.8 (467) explores whether something is unique and therefore not easily replaceable in the market so specific performance should be an available remedy.

PARALEGAL EXERCISE 15.9 (467) could be viewed as a personal services or a payment of money situation. Woodstock would need to provide the appropriate

venue for Sylvia to perform and would need to pay Sylvia at the end of its performance.

Therefore, specific performance would not be available and Sylvia should seek expectation damages.

Costs and Attorney Fees (467)
This section distinguishes costs from attorney fees and emphasizes why the allocation of costs and attorney fees should be drafted into the contract.

Reliance Remedy

Chapter 15	**Reliance Remedy**

Chapter 15

Expectation Remedy

Reliance Remedy

Restitution Remedy

Restitution as Cause of Action?

Chapter Review Answers

Chapter Quiz

Reliance Remedy

RELIANCE REMEDY FOR BREACH OF CONTRACT (468)

While the expectation remedy moves the nonbreaching party forward to the time of full performance, the reliance remedy moves the nonbreaching party back to the time before the nonbreaching party relied on the breaching party's promise. Some cases and treatises speak about moving the nonbreaching party back to the time of contract formation, but since the reliance remedy is an attempt to compensate the nonbreaching party for relying on the breaching party's promise, it would seem that all that needs to be done is to move the nonbreaching party back to the time before he or she relied.

Since the reliance remedy moves the nonbreaching party back in time, what the nonbreaching party expected to receive and what the nonbreaching party expected to give become irrelevant. What is left of the formula is "what the nonbreaching party did give in reliance on the breaching party's promise" and "what the nonbreaching party did receive in reliance on the

Tab Text

RELIANCE REMEDY FOR BREACH OF CONTRACT (468)

While the expectation remedy moves the nonbreaching party forward to the time of full performance, the reliance remedy moves the nonbreaching party back to the time before the nonbreaching party relied on the breaching party's promise. Some cases and treatises speak about moving the nonbreaching party back to the time of contract formation, but since the reliance remedy is an attempt to compensate the nonbreaching party for relying on the breaching party's promise, it would seem that all that needs to be done is to move the nonbreaching party back to the time before he or she relied.

Since the reliance remedy moves the nonbreaching party back in time, what the nonbreaching party expected to receive and what the nonbreaching party expected to give become irrelevant. What is left of the formula is "what the nonbreaching party did give in reliance on the breaching party's promise" and "what the nonbreaching party did receive in reliance on the breaching party's promise." Example 15-7 (468) applies the reliance formula to a set of facts.

PARALEGAL EXERCISE 15.10 (469) gives students an opportunity to apply the expectation and reliance formulas to a set of facts. Mary had an enforceable contract with Golden Gate, and since Golden Gate breached by firing her before she began to work, Mary has a breach of contract action against Golden Gate.

Under the expectation formula, what Mary expected to receive was $80,000 a year for 3 years less what she received which was $78,000 a year (the money earned at her old job. What Mary expected to give was 3 years and what she gave was 3 years (but at her old job). Therefore, her expectation damages would be $6,000 ($2,000 × 3 years).

Under the reliance formula, what Mary give in reliance on Golden Gate's promise was her travel to and from San Francisco, her expenses for a week in San Francisco while looking for a place to live, any expenses connected with renting a place in San Francisco, her moving expenses to and from San Francisco ($5,000 each way), and any loss in pay while absent from her New York City job. What Mary received in reliance on Golden Gate's promise was nothing. Therefore, her reliance damages would be $10,000 plus the other out-of-pocket expenses that were not quantified in the facts.

Restitution Remedy

Chapter 15

Expectation Remedy

Reliance Remedy

Restitution Remedy

Restitution as Cause of Action?

Chapter Review Answers

Chapter Quiz

Restitution Remedy

RESTITUTION REMEDY FOR BREACH OF CONTRACT (469)

The restitution remedy is more similar to the reliance remedy than the expectation remedy because the restitution remedy moves back in time rather than forward to the time of full performance. The restitution remedy differs from the reliance remedy in that the restitution remedy focuses on the breaching party and the reliance remedy focuses on the nonbreaching party. The restitution remedy is calculated by what the breaching party received from the nonbreaching party and the reasonable value of this benefit (enrichment) to the breaching party (less what the breaching party already gave the nonbreaching party for the benefit received). The reliance remedy is calculated by what the nonbreaching party "spent" in reliance on the breaching party's promise and what the nonbreaching party received. Exhibit 15-6 (470) diagrams the restitution formula.

Example 15-8 (470) gives two applications of the restitution

Tab Text

RESTITUTION REMEDY FOR BREACH OF CONTRACT (469)

The restitution remedy is more similar to the reliance remedy than the expectation remedy because the restitution remedy moves back in time rather than forward to the time of full performance. The restitution remedy differs from the reliance remedy in that the restitution remedy focuses on the breaching party and the reliance remedy focuses on the nonbreaching party. The restitution remedy is calculated by what the breaching party received from the nonbreaching party and the reasonable value of this benefit (enrichment) to the breaching party (less what the breaching party already gave the nonbreaching party for the benefit received). The reliance remedy is calculated by what the nonbreaching party "spent" in reliance on the breaching party's promise and what the nonbreaching party received. Exhibit 15-6 (470) diagrams the restitution formula.

Example 15-8 (470) gives two applications of the restitution formula.

Example 15-9 (470) compares expectation damages with restitution damages in a situation where the restitution remedy yields a higher recovery than the expectation remedy.

PARALEGAL EXERCISE 15.11 (471) compares an expectation remedy with a restitution remedy. Under expectation, the plaintiff is entitled to $10,000 [($100,000 -$15,000) - ($75,000 - $0)]. Under restitution, the plaintiff is entitled to a minus $15,000 [(-$15,000) - (- $0)].

Example 15-10 (471) illustrates the restitution doctrine where the nonbreaching party partially performs services. Restitution damages will permit the nonbreaching party to recover the reasonable value of his or her services to the breaching party even though the reasonable value to the breaching party exceeds the contract price (and that is even without full performance).

Example 15-11 (472) illustrates the anomaly inherent in the rule used in Example 15-10. If the nonbreaching party fully performs rather than only partially performs, the nonbreaching party is limited to the contract price. If the nonbreaching party had stopped short of full performance, the nonbreaching party would not have been limited to the contract price.

PARALEGAL EXERCISE 15.12 (472) asks students to apply the anomaly to a set of facts. The exercise also compares expectation damages with restitution damages in such a situation.

For expectation, the nonbreaching party will recover [($2,500 - $0) - (the value to a reasonable person of all the work required by the contract - the value to a reasonable person of the work done (i.e., $4,000))].

For restitution, the nonbreaching party will recover [(-$0) - (- the value to the breaching party of the work done)] or $4,000.

The last paragraph on text page 472 asks a series of questions concerning Sullivan v. O'Connor (474-78).

1. A contract was formed between Dr. O'Connor and Ms. Sullivan (contract to perform plastic surgery on Ms. Sullivan's nose).
2. The contract was enforceable (no problems such as Statute of Frauds, unconscionability, or illegality).
3. Ms. Sullivan alleged that Dr. O'Connor did not give her the nose he promised.
4. Dr. O'Connor answered with a no breach-compliance response (i.e., he asserted that he made no promise and therefore was complying with the terms of the contract).
5. Answers to questions (a)-(d) (see diagrams in Exhibit 15-7) (473)
   a. What Ms. Sullivan expected to give-
      • Doctor's fees for the first two operations

- Clinic fees for the first two operations
    b. What Ms. Sullivan did give-
- Doctor's fees for the first two operations
- Clinic fees for the first two operations
    c. What Ms. Sullivan expected to receive-
- A beautiful nose (the nose the Doctor promised)
- Pain and suffering for the first two operations
- Emotional distress due to the first two operations
- Loss of income due to the first two operations
    d. What Ms. Sullivan did receive-
- A misshapen nose (not the nose the Doctor promised)
- Pain and suffering for the three operations
- Emotional distress due to the three operations
- Loss of income due to the three operations

6. Ms. Sullivan's expectation damages-
[(What Ms. Sullivan expected to receive (i.e., a beautiful nose (the nose the Doctor promised) + pain and suffering for the first two operations + emotional distress due to the first two operations + loss of income due to the first two operations)) less (What Ms. Sullivan did receive (i.e., a misshapen nose (not the nose the Doctor promised) + pain and suffering for the three operations + emotional distress due to the three operations + loss of income due to the three operations))] less [(What Ms. Sullivan expected to give (i.e., Doctor's fees for the first two operations + clinic fees for the first two operations) less (what Ms. Sullivan did give (i.e., Doctor's fees for the first two operations + clinic fees for the first two operations))]
or
The expectation damages were (the value of the nose the Doctor promised less the value of the nose she received) + pain and suffering for the third operation + emotional distress due to the third operation + loss of income due to the third operation.

7. Ms. Sullivan's reliance damages-
(What Ms. Sullivan did give in reliance on the Doctor's promise (i.e., Doctor's fees for the first two operations + clinic fees for the first two operations) less (What Ms. Sullivan did receive for her reliance on the Doctor's promise (i.e., a misshapen nose (not the nose the Doctor promised) + pain and suffering for the three operations + emotional distress due to the three operations + loss of income due to the three operations).) Since pain and suffering, emotional distress, and loss of income are negative numbers, they become positives when computing damages since a negative of a negative number is a positive number. Therefore, Ms. Sullivan's reliance damages are the Doctor's fees for the first two operations + clinic fees for the first two operations + the difference in value between her misshapen nose (not the nose the Doctor promised) and her nose before he made his promise (not the value of the nose she was promised but only the value of her nose before the Doctor made his promise) + pain and suffering for the three operations + emotional distress due to the three operations + loss of income due to the three operations.

8. Ms. Sullivan's restitution damages-
(What Ms. Sullivan did receive for conferring the benefit on the Doctor (i.e., zero) less (What Ms. Sullivan did give the Doctor (i.e., Doctor's fees for the first two operations and clinic fees for the first two operations). Ms. Sullivan's restitution damages would be the Doctor's fees for the first two operations and the clinic fees for the first two operations.

9. The expectation, reliance, and restitution damages were not the same. Reliance damages could substantially exceed expectation damages, and restitution damages were minimal. Theory is one thing; practice is another. Ms. Sullivan has the burden of proving value of the noses, pain and suffering, emotional distress, and loss of income by a preponderance of the evidence.

10. Ms. Sullivan's attorney did not ask for all the damages to which she was entitled-
   • The difference between the values of the noses was waived.
   • Loss of income was not argued.
   • The damages associated with pain and suffering for the third operation were waived.
   • The damages associated with emotional distress for the third operation were waived.

Restitution as Cause of Action?

Chapter 15	**Restitution as Cause of Action?**
Expectation Remedy	COULD RESTITUTION BE A CAUSE OF ACTION FOR THE PLAINTIFF WHEN THE DEFENDANT HAS BREACHED THE CONTRACT? (478)
Reliance Remedy	A party who has a breach of contract cause of action cannot maintain a restitution cause of action. That party may have a restitution remedy for breach of contract but not a restitution cause of action.
Restitution Remedy	
Restitution as Cause of Action?	Example 15-12 (478) illustrates that a restitution cause of action can only be maintained when a breach of contract cause of action cannot be maintained.
Chapter Review Answers	
Chapter Quiz	

Tab Text

COULD RESTITUTION BE A CAUSE OF ACTION FOR THE PLAINTIFF WHEN THE DEFENDANT HAS BREACHED THE CONTRACT? (478)

A party who has a breach of contract cause of action cannot maintain a restitution cause of action. That party may have a restitution remedy for breach of contract but not a restitution cause of action.

Example 15-12 (478) illustrates that a restitution cause of action can only be maintained when a breach of contract cause of action cannot be maintained.

Chapter Review Answers

Contract Law for Paralegals: Chapter 15

	Chapter Review Answers
Chapter 15	**TRUE/FALSE QUESTIONS**
Expectation Remedy	1. T
	2. T
Reliance Remedy	3. F
	4. T
	5. F
Restitution Remedy	6. F
	7. T
	8. F
Restitution as Cause of Action?	9. T
	10.T
	11.T
Chapter Review Answers	12.T
	13.F
	14.F
	15.T
Chapter Quiz	16.F
	17.F

Tab Text

TRUE/FALSE QUESTIONS

1. T
2. T
3. F
4. T
5. F
6. F
7. T
8. F
9. T
10. T
11. T
12. T
13. F
14. F
15. T

16. F
17. F
18. T
19. T
20. F
21. T
22. F
23. T
24. T
25. F
26. T
27. F
28. T
29. T
30. F
31. T
32. T
33. F
34. T
35. F
36. T
37. F
38. T
39. F
40. T
41. F
42. F
43. F
44. F

FILL-IN-THE-BLANK QUESTIONS

1. Expectation damages
2. Reliance damages
3. Restitution damages
4. Compensatory damages
5. Foreseeable damages
6. General damages
7. Special damages
8. Mitigation
9. Nominal damages
10. Injunction
11. Specific performance
12. Liquidated damages
13. Costs

MULTIPLE CHOICE QUESTION

1. c
2. e
3. b
4. c
5. d

SHORT ANSWER QUESTIONS

1.

What the nonbreaching party expected
to receive
less
What the nonbreaching party did receive

<u>less</u>

What the nonbreaching party expected
to give
less
What the nonbreaching party did give

2.

What the nonbreaching party did receive
based on reliance

<u>less</u>

What the nonbreaching party did give
in reliance

3.

What the nonbreaching party did
receive for conferring the benefit on the
defendant

<u>less</u>

What the nonbreaching party did give
for conferring the benefit on the
defendant

Chapter Quiz

Chapter 15

Expectation Remedy

Reliance Remedy

Restitution Remedy

Restitution as Cause of Action?

Chapter Review Answers

Chapter Quiz

Chapter Quiz

Click Here to take a quiz based on this chapter.

Tab Text

Click Here to take a quiz based on this chapter.