CHAPTER FIFTEEN

And Let Slip the Dogs of Law

Breach of Contract and Remedies

A **breach of contract** -- also called a **default** -- is one party's failure, without a legally valid excuse, to live up to any of his or her responsibilities under a contract. A breach can occur by:

- failure to perform as promised;
- making it impossible for the other party to perform;
- repudiation of the contract (announcing an intent not to perform).

FAILURE TO PERFORM

Someone has Afailed to perform@ who has not performed a material part of the contract by a reasonable (or agreed-upon) deadline. Suppose your friend promised to buy your Edsel for $1,000, and to pay you "sometime early next week." It would be a material breach for your friend never to pay you, or to pay you six months later. If your friend paid you on Thursday of next week, however, it probably would not be a breach. You did not explicitly make time an essential part of the contract -- the source of the phrase "time is of the essence."

A breach doesn=t have to be so straightforward. Sometimes a party breaches by making performance impossible. Suppose you hire a cleaning service to clean your house on Sunday at a rate of $50 for the day. Early Sunday morning you go out for the day and lock the door behind you, neglecting to make arrangements to let the cleaning people into the house. You've breached by making performance impossible, and would owe the money since the cleaning service was ready and able to

clean your house and presumably turned down requests to clean for other clients.

Also, a breach can be **partial**. That happens when the contract has several parts, each of which can be treated as a separate contract. If one of those parts is breached, you could sue for damages even though there isn't a total breach. An example of this would be a landowner hiring a contractor to perform a construction project within certain deadlines. These deadlines have already been missed, but overall the project is going well. As long as the delay (the breach) is not material, the owner can continue the contractual relationship but sue for whatever damages were suffered as a result of the delay (for example, canceled leases). On the other hand, if the delay is material -- so damaging to the project that it seriously undermines its value -- the breach strikes at the heart of the contract and is total. The owner may terminate it and pursue remedies against the builder while hiring someone else to finish the job.

Another kind of breach is a **repudiation**. Repudiation is a clear statement made by one party before performance is due that states by words or circumstances or conduct that the party cannot or will not perform a material part of that party's contract obligations. Suppose that on the day before your friend was to pick up the Edsel you promised to sell to her, you sent her a message that you decided to sell the car to someone else or did sell it. That message or act would be a repudiation. In contrast, it's not repudiation if one party will not perform because of an honest disagreement over the contract's terms.

REMEDIES FOR BREACH OF CONTRACT

When someone breaches a contract with you , you are no longer obligated to keep your end of the bargain. You may proceed in several ways:

- urge the breaching party to reconsider the breach;
- if it's a contract with a merchant, get help from local, state, or federal consumer agencies;
- bring the breaching party to an agency for alternative dispute resolution;
- sue for damages or other remedies.

You may wonder what the point is of asking the breaching party to reconsider. One advantage is that it=s cheap. Often the only cost is the price of a telephone call and a little pride. The breaching party may have breached the contract because of a misunderstanding. Perhaps the breaching party just needs a little more time. Or maybe you could renegotiate. You may very well be able to come up with a solution that will leave both of you better off than if you went to court. If you do hire a lawyer, the first thing that lawyer is likely to do is try to persuade the breaching party to perform.

Starting with that offer to settle the matter, keep good records of all your communications with the other side. Once you see you're in for a struggle, make a file. Keep copies of any letters you send and move all receipts, serial numbers, warranty cards, and the like to this file.

If you get nowhere with personal communications, the next step before getting courts or lawyers involved may be to Ago over the other side=s head,@ so to speak. If the dispute is between you and a merchant, you might want to contact the manufacturer of the product. If it involves a large chain of stores, contact the management of the chain. This goes for services, too.

Assuming you=re still not getting satisfaction, try contacting a consumer protection agency, either

in your city or state. The Federal Trade Commission is less likely to get involved in small disputes. If, however, the FTC believes that what happened to you has occurred to many people nationwide, it might be interested. The FTC's involvement carries a lot of weight. The same goes with your state attorney general or local consumer agency. Another resource is your local post office, where you can report any shady business practices that took place through the mail.

OTHER SELF-HELP METHODS

Stopping Payment

If you=re involved in a transaction where you paid by check, and the other person refuses to refund your money, you may call your bank and **stop payment** on that check. That prevents the bank paying the check, assuming the check has not yet cleared your account. Remember, you're still liable for the purchase price until a court decides otherwise. You may be sued by the seller for the amount in dispute, and unless you have a legal excuse not to pay, you=ll end up writing another check. Also be aware that when you stop payment, you raise the stakes and diminish the chance of a settlement -- merchants and contractors don't take kindly to this technique.

Note that stopping payment on a check is not the same as having insufficient funds to cover the check, which may carry criminal penalties. Stopping payment on a check is your legal right if you have a valid claim.

To do it, call your bank and tell them the relevant information about the check. The bank will then send you a form to confirm your instructions in writing, which you must return within a certain

number of days for the bank to honor your request for very long. If you don't provide all the information your bank requires, your stop-payment order might not be good. The bank's charge for this service will usually be ten to thirty dollars or even more.

Don't try to avoid the fee by reducing your bank balance so the check won't clear. The bank can't read your mind, so other checks you've written may not be paid, or the bank might even pay the check you don't want paid, in an attempt to accommodate you. More important, you will have gone from exercising a legal right (stopping payment) to committing a legal wrong (passing a bad check).

Once you=ve done this, you should inform the seller of your action. Callinbg and writing to explain why you stopped the check asserts your claim and may avoid the seller's attempting to prosecute you. You also salvage a tiny bit of good will, which may help you eventually settle the matter -- especially since you=ve helped the other side avoid the fee their own bank charges on returned or uncollectable checks.

If your bank has paid the check, you'll have to try to void the contract and get your money back in other ways discussed here.

Credit-Card Purchases

These days, of course, many purchases are made with credit cards. Then the Fair Credit Billing Act may protect you. Under the Act, charges for products that you rightfully refuse to accept on delivery or that aren't delivered according to an agreement are regarded by the law as billing errors that the card issuer must investigate. During the investigation you don't have to pay. The issuer may resolve the matter

by granting you a permanent credit.

You may also avoid payment for shoddy or damaged goods or poor service, if you could refuse payment under state law and the merchant refuses to make an adjustment. In these cases, credit cards issuers usually will intercede, making an investigation of your claim. They often classify the charge as disputed and allow you to skip payment to them, without interest, during the investigation. If the merchant refuses to cooperate, or the card issuer confirms your version of the facts and agrees that you have been aggrieved, they will credit the amount of the purchase as appropriate.

Sidebar: Getting Out of a Contract

Sometimes you'll find yourself in a position where you have to breach a contract. Breaching a contract isn't always a bad thing to do, as long as you're ready to take your lumps. Sometimes the price you pay through a remedy for breach is less damaging than performing a contract that has just become a big mistake.

SUING FOR A BREACH OF CONTRACT

There are times when self-help will only take you so far, after which you need to consider your legal options. The most common legal remedy for breach of contract is a **suit** for damages, usually

compensatory damages. This is the amount of money it would take to put you in as good a position as if there had not been a breach of contract. The idea is to give you "the benefit of the bargain."

What=s an example of compensatory damages? Imagine that you hired a contractor to paint your house for $500. This job could cost as much as a $650, but you've negotiated a great deal. Now the contractor regrets agreeing to the $500 price and breaches. If you can prove all the facts just stated, you can recover $150, or whatever the difference is between $500 and what it ultimately cost you to have your house painted.

There are other kinds of contract damages. The most common ones are:

- **Consequential damages**, as discussed in the section on warranties. These may be available in a contract suit;; it depends on the language of the contract. (Usually contracts, especially warranties, are explicit in actually excluding these kinds of damages.)
- **Punitive damages**, available if the breaching party's behavior was offensive to the court. Punitive damages are virtually never recovered in a suit for breach of contract, but it may be possible to get punitive damages or some form of statutory damages (legal penalties) under a consumer fraud law or in a suit for fraud.
- **Liquidated damages**, an amount that is built into the contract. Although one or both parties have effectively breached the contract, this term will stand, as long as it fairly estimates the damages. In contrast, the courts will not enforce a penalty clause, an amount of liquidated damages that is way out of line with the actual loss. Liquidated damages clauses are usually found in consumer contracts, if at all, as something available *against* the consumer, however, and not in the consumer's favor.

- **Nominal damages**, awarded when you win your case but you have not proved much of a loss. The court may award you a token amount.

There are other remedies in a contract suit besides damages. The main one is **specific performance**, a court order requiring the breaching party to perform as promised in the contract. Courts have historically been reluctant to award this because it is awkward to enforce, but that reluctance has been ebbing. They will impose specific performance if there is no other remedy available because of the contract's subject matter, such as real estate or a unique piece of personal property. It will almost never be applied to personal services contracts, however--that is, to force a party to render the promised service.

A court may also **rescind** (cancel) a contract that one party has breached. The court may then order the breaching party to pay the other side any expenses incurred; it could also order the return of goods sold. Or, the court could **reform** the contract. That involves rewriting the contract according to what the court concludes, based on evidence at trial, the parties actually intended. Although these have traditionally been rare remedies, they are being used increasingly under the provisions of many states' consumer fraud laws.

Where to Sue

Most consumers will do best in **small claims court**. This is a special division of the courts set up in most jurisdictions. It cannot hear cases where the damages requested are above a set amount, usually a few thousand dollars. There are no juries. The procedures in small claims court are streamlined, with a

minimum of paperwork -- designed for the Ado-it-yourselfer.@ Indeed, judges are particularly solicitous of consumers who are not represented by counsel in these courts. Be prepared, however, for a hard press by the judge and his or her staff, perhaps even in the courthouse hallways on the day of trial, on both parties to compromise.

Larger cases cannot be heard in small claims court. At this point, you would be well advised to seek the advice of a lawyer. Do not try this at home: AReal@ court is not for amateurs. The procedural rules, knowledge of the law, and courtroom methods are much more complex than they seem on television. In these courtrooms, the judges have busy dockets and no time to assist sincere but overwhelmed non-lawyers. But the legal training necessary to make the case are well within the competence of an experienced attorney, whom you can find through references by friends, family or your local bar association.

Reasons Not to Sue

One reason not to sue, besides the obvious ones alluded to above, is an even more obvious one -- you could lose. The contract defenses discussed in the beginning of this book are a two-way street. Any one of them may be asserted as a defense to your suit for breach, including the defense that there was never a contract at all.

It is also possible that you could be **countersued**. That means the person or company you=re suing could sue you back, perhaps making a claim for back payments that it otherwise may have let go in light of your complaints. You might emerge from the courthouse, not only without satisfaction, but

with a judgment debt to pay.

That judgment debt could include attorneys= fees, too, if your contract provides for that. You must consider all the contract terms discussed, such as choice of law and choice of forum, that affect your right to sue. They may make your suit subject to instant dismissal, in which case you will have invested your time (and money -- filing fees can range from $20 or so for small claims court, to hundreds of dollars to sue for larger amounts) for nothing.

All in all, undertaking a lawsuit, especially in a court other than small claims, can be a very annoying, time-consuming, expensive and disappointing process. Think hard about whether suing is worth it in terms of both economic and spiritual cost. Then think again.

THE CONSUMER FRAUD ACTS

In addition to your traditional private right to sue, laws prohibiting unfair and deceptive trade practices in consumer transactions have been enacted in every state. These laws are sometimes known as the Alittle FTC acts,@ because they establish state-law prohibitions and penalties for a wide range of unfair and deceptive trade practices similar to those monitored by the Federal Trade Commission. For your purposes, the main difference is that these laws, more commonly called **consumer fraud acts**, allow the consumer to act as a Aprivate attorney general@. While allowing state authorities to take action against violators, like their federal counterparts, these laws also give powerful tools to consumers harmed by unfair and deceptive trade practices.

The consumer fraud acts apply to almost all consumer sales transactions. They are both

extremely flexible and very potent -- often providing for **treble (triple) damages** where a violation is found. Generally requiring lower legal hurdles than traditional fraud remedies -- for example, intent to deceive is usually not a requirement -- these laws usually provide both for action by state agencies and recovery by private lawsuits. These laws are the ultimate legal reaction to *caveat emptor*. Their use involves numerous technicalities, and competent legal advice is almost certainly necessary to take advantage of them. Nonetheless, their basic elements can be briefly explained.

Unfair conduct is that which, although not necessarily illegal,

- offends public policy as established by statute, common law, or other means;
- is immoral, unethical, troublesome, or corrupt; and
- substantially injures consumers (or competitors or other businesspeople).

Deceptive conduct is behavior, usually a statement or other **representation** (behavior amounting to a representation) that may have caused you to act differently than you otherwise would have. The representation does not have to involve the product's qualities, but it might include any aspect that could be an important factor in deciding whether to buy the goods. An example would be stating that the engine on that Edsel has eight cylinders when it really has six. The quality may be fine, but you may have been seeking a car with an eight-cylinder engine.

The unfair or deceptive act does *not* have to be intentional. In many states, the seller does not even have to know about the deception. Rather, the court considers the effect that the seller's conduct might possibly have on the general public or on the people to whom the seller advertised the product. It looks at the behavior in terms of what impression it would have had on a reasonable person.

In order to use an unfair and deceptive practices statute, you should make a written demand for relief before you sue. The law allows the seller one last chance to make good.

If you have to sue, many states require proof of "injury" before you may recover. Loss of money or property is enough to prove this. You should be able to show that the seller's actions actually caused the injury. For example, only if you were determined to buy the car no matter what the seller said, and the seller can prove this, would you have a hard time showing that the seller's conduct caused you injury or loss. If you based your decision to buy on what the seller told you, or if you were coerced into buying something that you didn't really want, then you may be able to use the statute.

If you win, many states permit you to recover double or triple damages, and lawyers' fees. The purpose of these harsh penalties is to discourage sellers from committing unfair or deceptive acts in the future, since the risk of being subject to the penalties is higher than the profit sellers stand to make by chicanery.

Sidebar: Ability to pay

Keep in mind that every lawsuit is ultimately as good as the defendant=s ability to pay. If the company you sue has gone through the bankruptcy process, your contract could legally be disavowed. If the company has ceased doing business, or is under the protection of the bankruptcy laws, your chances of recovering anything of value are small.

If you have a contract that still is in force with a troubled company, you may have to get the rest

of your contract needs filled by another company if the one you have a contract with can't come through. Then you may have a damages claim against the first company. If the company is in bankruptcy, you may be contacted by the bankruptcy court, or you may need a lawyer's help to put in your claim. If your claim isn't substantial, though, it's usually not worth the trouble.

Sidebar: More on Reasonableness

Earlier we discussed the "reasonable person." There are two principles that extend that fictional person's capacities into the practical realm. One is the concept of the "reasonable observer," a reasonable person who sets the standard of whether an action or statement would reasonably suggest, for example, an offer or acceptance, or a repudiation. This person is not an eagle-eyed expert, but stands for common sense.

Closely related is the concept of "knew or should have known." If parties to a contract are considered to know, or be "on notice" of something -- say, that their offer has been accepted -- it is not enough to ask whether they actually knew it. If it were, we would have only their word as really reliable evidence that they knew or didn't know. The law will not allow parties who should have known something through the reasonable exercise of their senses and intelligence to fail to use them. Thus it isn't enough to say, "I didn't know the Edsel I sold you had no engine." That's something that someone selling a car reasonably *should* know.

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