



Breach of contract is a cause of action at law whereby a binding agreement is not honoured. If a party to a contract fails to fulfill a binding contractual promise or indicates (expressly or implicitly) that the binding contractual promise will be unfilled, the party is said to breach the contract.

Minor Breaches

A minor breach of a contract can occur as a partial or immaterial breach or when the contract is substantially performed. In such cases, the non-breaching party is without a right to sue for specific performance. Only a right to sue for actual damages exists.

As an example of a minor breach, consider a homeowner that hires a plumbing contractor to install water pipes and states that the pipes must be red despite the fact that the pipes will be hidden within walls. Instead of complying with the 'red' specification, the contractor installs blue pipes that are equally functional. Although the literal terms of the contract were breached by the contractor, the homeowner is unable to take legal action that seeks a court order instructing the contractor to replace the blue pipes with red pipes. The only form of remedy available to the homeowner is damages, if any actually occurred. In this example involving colour of pipes, there is no difference between the value of red pipes and blue pipes; therefore, no damages were suffered by the homeowner and any legal action brought would yield nothing. This example is one of, "no harm, no foul".

Material Breach

A material breach occurs if there is a failure to perform that enables the non-breaching party to seek a court order for specific performance or compensatory damages. Continuing to use the example above, had the contractor agreed to install copper pipes and installed iron pipes instead and whereas the copper pipes have a longer expected lifespan and thus a greater value, the homeowner may sue for corrective costs such as tear-out of the iron pipes and replacement with copper

pipes. However, as follows there are exceptions to this principle whereas the homeowner is unable to recover the tear-out cost and replacement for the following reasons:

1. Economic Waste

The law wishes to avoid destroying something with value. In the 'pipes' example, destruction of walls would be necessary to replace the pipes. The law discourages such waste. In such case, the remedy available is compensatory damages for the difference between the value of the home with the iron pipes and the value the home would have if the copper pipes been properly installed according to the contract. It is also important to bear in mind that this 'exception' to the specific performance remedy involves a variety of considerations. In our pipes example, if the difference in value of the home exceeds the cost of tear-out and correction, the 'tear-out' solution is actually the less costly solution and must be sought. Additionally, if a significant risk of future harm is present, the 'tear-out' solution may be reasonably necessary.

2. Pricing In

In most breach of contract situations, a party has simply failed to perform one or more of the contract terms. In these situations, the party in breach will reasonably have intended or expected to save costs by failing to perform. While the party should be without entitlement to the savings, in the above pipe example the contractor never considered corrective tear-out costs. It is therefore unreasonable to expect the contractor to pay for the tear-out costs.

Reflecting on the pipes example, most homeowners would be unable to collect tear-out and replacement damages but instead would be entitled to compensation for the reduced value of the house. If the house is worth \$250,000 with copper pipes but only \$240,000 with iron pipes, the homeowner would collect the \$10,000 difference. Again, as above, if the cost of tear-out and replacement is less than this difference (i.e. less than \$10,000 in this example) then tear-out and replacement is actually preferred by the law.

Fundamental Breach

A fundamental breach of contract is a breach so significant that the non-breaching party may terminate performance of the contract and sue for damages. In our pipes example, had the homeowner discovered the contractor installing iron pipes early on in the work project (and with the contractor showing obvious intent to continue with the iron pipes), the homeowner may rightly deem the contract at an end and seek another plumbing contractor to correct and complete the work. In such circumstances, so long as the corrective tear-out is less costly than the reduction in value to the house, this remedy is acceptable.

Anticipatory Breach

An anticipatory breach of contract occurs when a clear indication is shown that a party will fail to properly perform in accordance to the contract when the performance is due. Upon an anticipatory breach of contract, the non-breaching party has the option to treat the contract as immediately breached rather than having to wait until the contract is indeed actually breached. For example, continuing to use our pipes case above, if the contract between homeowner and contractor stated that the work of installing the copper pipes is to begin on May 1st and the contractor sends an email to the homeowner on April 15th to inform that work will not begin until June 1st and iron pipes will be installed, the homeowner can immediately treat the contract as breached without waiting for May 1st to pass and the breach to actually occur. The homeowner is at right to promptly seek another contractor to 'step into the shoes' of the original contractor and also immediately sue the original contractor for resulting damages.