

## BREACH OF CONTRACT IN CALIFORNIA



### Basic Elements of A Breach Of Contract Action

To make out a cause of action for breach of contract requires a pleading of (a) the contract; (b) plaintiff's performance or excuse for nonperformance; (c) defendant's breach; and (d) damage to plaintiff. It is necessary to specify that the contract is written, oral, or implied by conduct. (C.C.P. 430.10(g), infra, §930.)\*[pg.575]

#### The Contract:

Written Contracts: A written contract is usually pleaded by setting it out in its entirety in the body of the complaint or by attaching a copy. The other method of pleading is by alleging the making of the contract, and then alleging the substance of its relevant terms.

“A written instrument is presumptive evidence of a consideration.” (C.C. 1614.) Therefore, it is not necessary to plead the existence of consideration to support the contract.

Oral Contracts: If oral, the exact words used can seldom be correctly alleged, and are evidentiary in nature. Hence, the oral contract is pleaded according to its legal effect.

But the complaint is subject to a general demurrer if the allegations fail to show the nature of the contract with certainty.

Implied Contract: An implied in fact contract arises from conduct, without express words of agreement. Accordingly, “only the facts from which the promise is implied must be alleged.”

#### Plaintiff's Performance of The Contract

The plaintiff cannot enforce the defendant's obligation unless the plaintiff has performed the conditions precedent imposed on him. (C.C. 1439) Accordingly, the allegation of performance is an essential part of the Plaintiff's cause of action.

The rule calls for plaintiff's allegation of performance or an excuse. Performance of conditions precedent may be alleged generally, but excuses must be pleaded specifically. Where the defendant's conduct amounts to a prevention of the plaintiff's performance, the plaintiff cannot allege due performance and may plead the breach as an excuse. The general rule, followed in California, treats the excuses of prevention and defendant's waiver of the right to performance in the same way, and requires specific pleading of the facts of waiver.

## Defendant's Breach

The facts constituting the defendant's breach must be stated in a complaint for breach of contract with certainty.

Where the obligation of the contract is to pay money, the breach consists of nonpayment, and this must be alleged. But where the contract calls for performance of some service, delivery of goods, or something other than payment of money, and the action is for damages for breach, there is no need for the plaintiff to allege that the defendant has failed to pay the damages; the demand or prayer is sufficient to show that they have not been paid. Where the action is based on an anticipatory breach, the complaint should allege defendant's repudiation. Negligent acts of performance may also be alleged as a breach.

## Damages to The Plaintiff

The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of performance. (See C.C. 3300; U.C.C. 1106(1)) "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (C.C. 3300.)

It is essential to establish a causal connection between the breach and the damages sought. (C.C. 3300 [compensation for detriment "proximately caused thereby"])

C.C. 3294, providing for exemplary or punitive damages, refers to breach of an obligation "not arising from contract." Hence, such damages are never recoverable for breach of contract, no matter how willful or malicious, except where the wrongful act is also a tort.

C.C. 3301 states that "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Subject to this limitation, the injured party may recover for the profits or benefits which he would have obtained by performance if he can establish them with reasonable certainty. Such damages may include:

Giving Up Established Business. If the plaintiff gives up an established business or profession to enter into new activities by contract with the defendant, on breach the plaintiff may recover the profit or earnings he would have made if he had remained in his former business or profession.

Future Profits From Existing Business. "In the one case, the success of the business usually depends upon a variety of circumstances, and the outcome is therefore too uncertain to provide a tangible basis for computation; while in the other, past experience has demonstrated the success of the enterprise and provides a reasonably certain basis for the calculation of plaintiff's probable loss consequent upon the breach."

(Hoag v. Jenan (1948) 86 C.A.2d 556, 564, 195 P.2d 451) On the other hand, if the anticipated profits were not to come from an established business or profession, but from a new business to be established, the difficulty of estimating them has generally led the courts to classify the damages as uncertain and speculative, and to deny recovery.

Plaintiff's expenditures. Another measure of contract damages is the amount of the plaintiff's expenditures, together with the reasonable value of his own services, in preparation and performance in reliance on the contract. This type of recovery is frequently sought or awarded where, because of uncertainty or difficulty of proof or other reason, the plaintiff is unable to establish a claim for lost profits

Mental or Physical Suffering. Ordinarily, damages are not recoverable for mental suffering resulting from a breach of contract in the absence of physical injury. However, where the breach of contract causes physical suffering or illness, recovery is appropriate. "Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach." [*Westervelt v. McCullough* (1924) 68 C.A. 198, 228 P. 734]

Interest. "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt." (C.C. 3287(a))

Liquidated Damages. (C.C. 3287(a), "damages certain" provides for the recovery of damages where the amount of money due is an amount fixed by terms of contract.

Attorneys' Fees. Attorney fees may not be recovered where there is no provision in writing for the recovery of attorney fees in the event of a breach and suit. Such a provision is commonly found in promissory notes, conditional sales agreements, deeds of trust, mortgages, leases and building contracts.

## **General Procedural Outline:**

No two cases are alike and procedures vary with the nature and complexity of the legal and evidentiary issues involved. The following is a very general outline of the stages of a civil action.

### Complaint Filing

Every case begins with the filing and service of a Summons and Complaint. The Complaint will contain one or more "causes of action" such as "Breach of Contract" or "Fraud".

### Service Of Complaint

After the Summons and Complaint have been filed with the court, they must be

properly served on the defendant(s). If the defendant(s) will accept service, he/she may sign an Acknowledgment of Service." Otherwise the documents will have to be formally served.

### Response To Complaint

The Defendant(s) have 30 days from the date of service of the Summons and Complaint to serve on the Plaintiff(s) either an Answer to the Complaint or a pleading challenging the sufficiency of the the Complaint. Responses challenging the sufficiency of the Complaint include a motion called a "Demurrer" and a "Motion To Strike"

### Hearing Of Challenges To Sufficiency Of Complaint (If Applicable)

If the defendant(s) decide to file a demurrer or motion to strike, these motions must be heard and ruled upon before the matter may proceed. This can take up to 2 months. If such motion is sustained and the court grants leave to amend the Complaint, a new complaint must be drafted and served and the process starts over. Sometimes a second demurrer or motion will be filed causing more delays.

### Discovery

Once the Complaint and Answer have been filed both parties commence "discovery" procedures by which the evidence necessary to prosecute both sides of the case. Depending on the nature and complexity of the case, one or more of the following discovery devices may be used by the parties:

- Interrogatories: Written questions which must be answered under oath.
- Request For Production Of Documents: Demands for production of documents by the parties involved.
- Requests For Admission: Requiring the parties to say which allegations they affirm and which they deny.
- Deposition: The parties may be required to appear in the opposing attorney's office to answer questions under oath in front of a court reporter. Depositions can also be taken from 3rd parties.
- Subpoena Documents From Third Party: Documents may be subpoenaed from 3rd parties such as banks and employers.

### **Discovery Motions (If Applicable)**

If a party fails or refuses to comply with discovery requests, it may be necessary for the party propounding the discovery to make a motion in court to compel responses. If the court grants the motion, further responses will be made. If those responses are still inadequate, another motion may be made and the court can sanction (fine) the resisting party. In extreme cases the court can even terminate the action in favor of the moving party.

### **Trial Setting**

Throughout the case the court will set a series of Case Management Conferences

to be attended by attorneys for all parties. These hearings are designed to determine whether the case is ready for trial. When the court feels that a case is ready for trial, it will set the date for trial and make orders concerning completion of discovery and final preparation for trial.

### **Settlement Negotiations**

Settlement negotiations may proceed throughout the trial. Often the court will require the parties to try a mediation of the issues or will set a "Mandatory Settlement Conference" (MSC) before the trial date. Settlement negotiations general become more intense as the trial date approaches.

### **Trial**

The vast majority of cases settle before trial. However if the parties cannot settle the case, the only way to resolve the issues is by way of trial.

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