

Contracts: Performance means doing what you promise

In our continuing series of on contracts, we turn to the third phase of the process: performance under a contract.

Performance is the most important aspect of a contract. When you get down to it, a contract is simply an exchange of performances. Someone agrees to do something in exchange for another's agreement to do something else. When they finally agree on that exchange, they become liable to one another for their performance.

That's where the law steps in. It provides a set of rules governing performance. As one might expect, most of these rules are for the benefit of the receiving party.

Let's talk about some of the rules and how they're applied.



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Full performance

Full performance is the most fundamental rule and self-explanatory. All parties must fully perform exactly what they agreed to perform at the time they agreed to do it. Under this rule, both per-

formance and time for performance are of equal importance. Coming close on either doesn't count.

Adequate assurance

Some rules take effect prior to performance. One is adequate assurance, which means one person involved in a contract has the right to require the other to prove intent and ability to perform. This often comes into play when one person's performance is critical to another's business.

Assume ABC Manufacturing wins a contract to supply 10 fighter jets with state-of-the-art optical equipment. To build the planes, ABC subcontracts with XYZ Optical to provide the equipment. ABC then receives reliable infor-

mation that sheds reasonable doubt on XYZ's intent and ability to perform. In this circumstance, ABC has the right to require XYZ to provide adequate assurance that it will perform as agreed. If XYZ fails, ABC can terminate the contract, get a substitute supplier and sue XYZ for any added cost in finding the replacement.

Impossibility of performance

Impossibility of performance excuses a person from performance if an unforeseen event makes it impossible. That can be an "act of God" or manmade event. Hurricanes, earthquakes, strikes and

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government intervention are a few examples. In XYZ's case, if it can't perform because an earthquake destroyed its production facility, this rule is an excuse.

Specific performance

Generally when a person refuses to do something contractually required, the other's redress is limited to obtaining a substitute contract and suing for damages. An exception is if one's performance is unique and extraordinary, the other may sue for specific performance.

In a proper case, a judge issues an injunctive order commanding the defaulting party do what he agreed. Going back to the illustration, if XYZ's optical equipment is unique and can't be replicated by any other supplier, ABC could get a court order requiring XYZ to provide the equipment under terms of the contract.

Rejection

Rejection comes into play after one contracting party does something and the other has the right to inspect for acceptability. If it isn't acceptable, the inspecting person can reject it and require the other to "cure" the problem within a reasonable time. If it isn't fixed, recourse includes getting a substitute contract and suing for damages.

Performance is a serious matter. When contracting with another, make sure you can do what you promise. Contracts aren't like horseshoes — coming close doesn't score any points. In fact, you could be in default. That's a place you don't want to be because the penalty can be severe.

If you want to know more about the cost of default, stay tuned for my next article.

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