93 FAQS ABOUT CONTRACT DISPUTES

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I. BREACH OF CONTRACT

A. REQUIREMENTS FOR AN ENFORCEABLE CONTRACT

Q. WHAT IS A CONTRACT?

A. A contract is a written or oral agreement that two or more parties voluntarily and intentionally enter into that creates legal obligations. A party that fails to perform its obligations risks being in breach of the contract and may be exposed to paying for the harm suffered by the non-breaching party.

One court defined a contract as "[a] promise or set of promises between two or more competent parties, in exchange for legal consideration, to do or not to do a particular act and for the breach of which the law recognizes a remedy."

Q. WHAT ARE THE REQUIREMENTS FOR AN ENFORCEABLE CONTRACT?

A. An enforceable contract requires six things:

- An offer.
- Acceptance of the offer creating "a meeting of the minds."
- Consideration.
- Competent parties.
- Voluntary entry into the agreement.
- A legal objective.

Another caveat to a contract being enforceable is the Statute of Frauds, which requires that some types of contracts be in writing.

Q. WHAT ARE THE REQUIREMENTS FOR AN OFFER?

A. The offer initiates contract formation. One party (the offeror) proposes a set of terms for another party (the offeree) to consider agreeing to.

For an offer to be valid, and therefore able to be accepted, the following factors must be met:

- The offeror (person making the offer) must intend to contract with another party, the offeree;
- The offer must be communicated to the offeree; and
- It must contain definite terms.

For example, if the offeror proposes to provide managed software hosting services, the offer must include price, a period of performance, and quantity of users to access the services.

Q. HOW LONG IS AN OFFER GOOD FOR?

A. An offer can specify an expiration date. If it does not, an offer is good for a reasonable period of time depending on the nature of the contract and the jurisdiction. For example, an offer to sell a law practice may have a longer period than an offer dealing with perishable goods.

Q. CAN AN OFFER BE WITHDRAWN?

A. Yes, an offer can be withdrawn as long as the offeror (person making the offer) withdraws it before the other party accepts it. Still, several scenarios may undercut the general rule:

- Firm Offers—a seller makes an offer in writing to sell goods to a buyer for a specific period of time. The offer cannot be withdrawn until the time expires. If the time is not specified, it will stay open for a maximum of three months.
- Detrimental reliance—the recipient of the offer has reasonably relied on the offer remaining open and will be harmed if the offeror revokes.
- Options—a recipient of the offer pays to keep the offer open for a specific period.
- Performance of a unilateral contract-- a party offers to pay another party if the other party performs an act (e.g. painting a house). The offeror cannot revoke the offer if the painter has already substantially painted the house. (In a unilateral contract, the offeree accepts the offer by performing the contract, rather than by promising to perform it.)

Q. WHAT IS ACCEPTANCE?

A. Acceptance is the offeree's (person to whom the offer is made) unequivocal assent to the terms of the offer. It may be made by signing a contract, sending a written assent, orally agreeing to the offer (for contracts that don't have to be in writing), or performing (e.g. painting a house in the unilateral contract example). Acceptance must be communicated by the offeree or someone acting on the offeree's authorization, in a manner specified by the offeror (person making the offer).

Above all, the form of acceptance must be a clear, unequivocal affirmation that the accepting party intends to be bound by the terms of the offer or counteroffer.

If an accepting party sends the acceptance in traditional mail or email, the offer is considered accepted on dispatch, not receipt. This is commonly referred to as the "Mailbox Rule."

The "mirror image rule" states that if you are to accept an offer, you must accept an offer exactly on the terms it is presented without modifying it. If you change the offer in any way, you have rejected the offer and made a counter-offer. Still, you may ask for additional information without rejecting the offer. In business to business transactions, companies typically use standard form contracts (e.g. a seller will use an end user license agreement while a buyer will use a purchase order). This is referred to as the "battle of the forms" where the issue becomes which form contract controls.

Q. WHAT IS A COUNTEROFFER?

A. A counteroffer is a response to an offer that simultaneously rejects the offer and presents another offer to the original offeror to either accept, reject, or create an additional counteroffer.

Q. WHAT IS CONSIDERATION?

A. Consideration can be anything of value that the parties are contracting to exchange. It can be money, property, a promise to do something, or a promise to refrain from doing something. Each party to a contract must offer consideration, i.e., each party gives up something to get something. A contract has consideration so long as there is bargained-for exchange and the transaction is not completely gratuitous (e.g. a gift).

Q. WHO IS COMPETENT TO ENTER INTO A CONTRACT?

A. Both parties to a contract must be competent. An incompetent party cannot legally enter into a contract. Minors are not competent to enter contracts nor are those who are mentally incapacitated and cannot appreciate the terms of the agreement (e.g., someone with Alzheimer's or some other form of dementia). Even intoxication may make a person incompetent to enter into a contract. A person entering into a contract on behalf of a business entity must be authorized to do so.

Q. WHAT IS MEANT BY A VOLUNTARY AGREEMENT BETWEEN THE PARTIES?

More often than not, particularly in business to business contracts, there is an assumption a party enters into a contract voluntarily. If a party enters into a contract under duress (e.g. a threat of some kind) or one party exerts undue influence (e.g. drugs the other party), that party's assent to the terms is considered involuntary. The contract is consequently void.

Q. WHAT IS A LEGAL OBJECTIVE?

A. Contracts that violate the law or some public policy may be rendered void and unenforceable.

If the underlying basis of the contract is criminal activity, the contract will be unenforceable. For example, a person cannot enforce a contract with someone to form a joint venture in trafficking narcotics.

Q. DOES A CONTRACT HAVE TO BE IN WRITING?

A. Some specific types of contracts enumerated in a law called the Statute of Frauds must be in writing. Contracts other than these can be oral so long as all of the elements of contract formation have been met. However, an oral contract may be harder to enforce because of difficulties proving what the parties actually agreed to.

Q. WHAT KINDS OF CONTRACTS HAVE TO BE IN WRITING?

A. The Statute of Frauds requires the following types of contracts to be in writing:

- Real estate contracts.
- A contract that cannot be performed within one year of the making (e.g., a mortgage).
- A sale of goods for $500 or more.
- A contract of an executor or administrator to answer for a decedent's debt.
- A contract to guarantee another's debt.
- A contract made in consideration of marriage (e.g. a prenuptial agreement)

The purpose of the Statute of Frauds is to limit instances of fraud. Many business contracts fall under the Statute of Frauds.

B. IDENTIFYING A BREACH OF CONTRACT

Q. WHAT IS A BREACH OF CONTRACT?

A. A breach of contract is a legally unexcused failure to meet an obligation imposed by a contract.

Q. WHAT ARE THE WAYS IN WHICH A PARTY CAN BREACH A CONTRACT?

A. Depending on the specific terms of the contract, a breach can occur when a party (1) fails to perform on time, (2) does not perform in accordance with the terms of the agreement, or (3) does not perform at all.

Q. WHAT DOES A PLAINTIFF HAVE TO PROVE IN A BREACH OF CONTRACT CASE?

A. A plaintiff in a breach of contract case has the burden of proof to establish the following: 1) the parties had a contract, 2) the plaintiff performed all obligations imposed by the contract, or had an excuse for not performing, 3) the defendant failed to perform, and 4) the defendant's failure harmed the plaintiff resulting in some quantifiable loss.

Q. IN WHAT SITUATIONS IS THE PLAINTIFF EXCUSED FROM PERFORMING?

A. The following scenarios may excuse a plaintiff from performing:

- **Failure of a condition precedent.** A condition precedent is an event that must occur before a party is required to perform. If the event does not occur, the party need not perform.
- **Duress.** A threat of harm to the plaintiff or to the plaintiff's loved one should the plaintiff perform excuses the plaintiff's performance.
- **Mistake.** A party or both parties rely on a material fact of the contract and that fact ends up not being accurate. If one party bears the risk of that mistake because that party should have known the fact was inaccurate, then the other party is excused from performance.
- **Material breach by the other party.** If one party breaches, the other party is generally excused from performing if the breach was material and was pertinent to the substance of the contract.
- **Unconscionability.** One party's bargaining power is so much greater than the other's or the contract terms are so one-sided that it would be grossly unfair to require the disadvantaged party to perform.
- **Fraud.** A fraudulent misrepresentation or the substance of the contract being fraudulent will excuse performance.
- **Death.** The other party dies.

Q. WHAT IS A CONDITION PRECEDENT?

A. A condition precedent is an event that may not occur, but if it does occur, it activates a duty to perform under a contract. If the event does not occur, the party does not need to perform.

Conditions precedent are included in various business contracts. For example, a contract for employment may be conditioned on passing a background test. An offer to purchase software at a discounted price may be conditioned on the buyer signing the order form before the end of the fiscal year.

Q. WHAT IS A MINOR BREACH OF CONTRACT?

A. A minor breach of contract is a breach that does not defeat the purpose of the contract and consequently, does not terminate the contract. For example, a landscaping company contracts with a building owner to cut the grass every Friday. The landscaping company cuts the grass on Saturday. Cutting the grass on a different day than agreed on in the contract is technically a breach of contract, but the grass is still cut. Unless there was a reason the grass had to be cut on Friday specifically, and that reason was stated in the contract (e.g., a garden party was scheduled for Saturday), cutting the grass a day late is a minor or immaterial breach. The building owner cannot terminate the contract.

Although the non-breaching party can sue for a minor breach, a lawsuit may not be worth the effort as the costs of litigation may outweigh the damages, the plaintiff may not be able to prove damages, or the damage to the business relationship or plaintiff's reputation may outweigh any recovery.

Q. WHAT IS A MATERIAL (OR MAJOR) BREACH OF CONTRACT?

A. When a material breach occurs, the aggrieved party can terminate the contract. Further performance by the aggrieved party is excused and the aggrieved party has the right to sue for breach of contract.

Determining whether a breach is material can be complicated. The difference between a material breach and a non-material breach depends on a number of factors:

- The impact of the non-performance on the non-breaching party—in other words, has the non-breaching party obtained substantially what it bargained for.
- Whether the breach was willful, negligent, or innocent.
- The extent to which the breaching party has already performed.
- How certain it is that the breaching party will not perform further.
- The extent of the non-breaching party's damages.
- The hardship on the breaching party of terminating the contract.

If a breach of contract case goes to trial, it may be up to the jury to decide whether the breach was material.

Q. WHAT DOES "TIME IS OF THE ESSENCE" MEAN IN A WRITTEN CONTRACT?

A. Sometimes a party may want to make it clear that contract obligations need to be completed by a particular date or time. The parties may include a provision that specifically states: "Time is of the essence."

Courts vary considerably on if they will enforce these provisions and will probe the evidence to determine if the parties intended that the timeframe was so central to the purpose of the contract that missing a deadline would be a material breach and grounds for terminating the contract.

Q. WHAT IS AN ANTICIPATORY BREACH OF CONTRACT?

A. Also referred to as anticipatory repudiation, an anticipatory breach of contract occurs when one party unequivocally communicates directly or indirectly that the party is not going to perform. When one party is concerned that the other party may not perform, the concerned party can ask the other party for reassurance. If that

reassurance is not given, the concerned party can cancel the contract. Consequently, the party concerned about the potential breach is excused from performance; however that party is not excused if payment is the only obligation outstanding and the due date has yet to pass.

The refusal to perform can be direct (e.g. a seller communicates to the buyer: “the snowstorm is preventing our trucks from leaving the manufacturing plant so we will not deliver the goods”). On the other hand, the party’s conduct can indirectly communicate repudiation (e.g. the seller shuts down the manufacturing plant for the week).

A party may repudiate the contract and then later retract the repudiation (e.g. the seller informs the buyer: “we are sending our trucks on an alternate route away from the snowstorm”) as long as the other party hasn’t made a “material change” in its position because of the repudiation (e.g., the buyer ordered the shipment from a different seller prior to the retraction).

Q. WHAT IS THE PAROL EVIDENCE RULE?

A. In a breach of contract case, one party may attempt to introduce evidence of preliminary negotiations and agreements made before the final contract was signed to prove what the terms of the contract are. The parol evidence rule prevents this evidence from being introduced to alter the terms of the final contract. Whether evidence of prior agreements will be admitted or excluded by the parol evidence rule will depend on whether the final contract document is “fully integrated.” Fully integrated means that the contract includes all of the agreed upon terms and the parties intended that the document be a final representation of the terms. Written contracts often include an Entire Agreement section stating that the agreement is a final, complete expression of the terms and any previous terms are superseded. The rule controls only what type of evidence is allowed, but it is still up to the jury to determine the credibility of the evidence.

C. DEFENDING AGAINST A BREACH OF CONTRACT CLAIM

Q. WHAT STRATEGIES CAN A DEFENDANT USE TO DEFEND AGAINST A BREACH OF CONTRACT CLAIM?

A. A defendant in a breach of contract case can defend by showing that the plaintiff failed to prove one or more of the elements of the breach of contract case. The defendant would argue one or more of the following:

- The parties did not have a valid contract.
- The defendant did not breach the contract.
- The plaintiff did not perform his contractual obligations and had no excuse for non-performance.
- The plaintiff suffered no damages.

The defendant could also raise one or more affirmative defenses.

Q. WHAT IS AN AFFIRMATIVE DEFENSE?

A. An affirmative defense is a defense that the defendant introduces evidence in support of and has the burden to prove. If the defendant’s affirmative defense is accepted by the judge or jury, the defendant will not be liable, and even if the plaintiff proves that the defendant committed the alleged acts and breached the contract.

Q. WHAT ARE SOME COMMON AFFIRMATIVE DEFENSES TO BREACH OF CONTRACT?

A. There are numerous affirmative defenses to a breach of contract, but here are some of the most common. A defendant is not restricted to using only one affirmative defense.

- **Statute of Frauds.** The contract had to be documented in writing because of the nature of the agreement (e.g. a real estate transaction) and it was not.
- **Statute of Limitations.** The plaintiff filed suit after the applicable statute of limitations had expired. These vary depending on the jurisdiction and type of contract and could be a few years to a decade or more.
- **Laches.** The plaintiff delayed pursuing a claim for an excessive period of time and consequently, the defendant is prejudiced in defending the claim.
- **Unconscionability.** The contract is excessively unfair to one of the parties. Courts will evaluate if either the defendant didn't have a meaningful choice in the agreement or the terms are so blatantly unfavorable that it would create an undue hardship to enforce it.
- **Condition not met.** A condition precedent to activating performance obligations did not occur.
- **Unclean Hands.** The plaintiff acted unethically, unlawfully, or in bad faith. For example, the plaintiff misrepresented an important fact that was the basis of the contract, a fact that could have induced the defendant to sign it.
- **Mutual mistake.** Both parties made a mistake as to an existing material fact of the bargain. But, if one of the parties knew or should have known the truth, that party would "bear the risk" of the mistake and the other party could be entitled to damages.
- **Duress or fraudulent inducement.** The defendant was under duress or fraudulently induced to enter into the deal.
- **Illegality.** The contract is for illegal purposes and inherently against the law.
- **Waiver.** The plaintiff intentionally relinquished a known right.
- **Equitable estoppel.** One party communicated to the other either explicitly or by its behavior that the other party's performance was excused, and the other party relied on that statement or action. The first party is prevented from later denying its statement or action and claiming the other party breached the agreement.
- **Lack of privity.** The parties do not have a binding contract between each other because they did not in fact contract with one another and have no rights or obligations to one another.
- **Accord and satisfaction.** The parties agree to a different form of performance of the contract that discharges the contract when the performance occurs.
- **Impossibility.** It has become impossible to perform the contract through an unforeseeable event or act of nature.
- **Bankruptcy discharge.** A bankruptcy discharge of the contract obligations will bar claims.
- **Failure to mitigate damages.** Even if the plaintiff is able to prove a breach and the amount of damages, those damages will be reduced to the extent the plaintiff failed to mitigate them.

D. REMEDIES FOR BREACH OF CONTRACT

Q. WHAT ARE THE REMEDIES FOR BREACH OF CONTRACT?

A. The following are remedies for breach of contract and may be awarded in combination or independently of one another:

- Damages
- Specific Performance

- Injunction
- Restitution
- Rescission
- Reformation

Q. WHAT ARE COMPENSATORY DAMAGES?

A. Compensatory damages are intended to pay the plaintiff for any costs or losses caused by the defendant's breach. Compensatory damages must be quantifiable monetary harm suffered by the non-breaching party. Compensatory damages can include direct damages from nonperformance and consequential damages flowing from the nonperformance. For example, a buyer contracts to purchase a computer from a seller for $1000. If the buyer breaches the contract by refusing to pay for the computer, the seller could seek compensatory damages or the actual losses sustained. If the seller were to sell the computer to someone for $800, the first buyer is liable to the seller for $200 because that is the quantifiable loss. If the seller doesn't resell the computer but had already purchased shipping materials and had the computer refurbished and cleaned incidental to the sale, those damages would compensate the seller for the loss.

Q. WHAT ARE EXPECTATION DAMAGES?

A. Expectation damages are the amount that would put the non-breaching party in the position she would be in had the contract been performed. For example, if a buyer ordered goods that did not conform to the specifications the buyer was expecting, the buyer could keep the goods and sue for the difference in value between the goods that were delivered and the goods that were expected. Or the buyer could return the goods and seek a refund. The buyer can also seek the difference in price between the cost of substitute goods and the contract price, assuming substitute goods are more expensive.

Q. WHAT ARE INCIDENTAL DAMAGES?

A. Incidental damages are generally expenses incurred by a party in connection with the other party's breach. For example, storage costs for a seller when a buyer wrongfully rejected delivery of goods and refused to pay would qualify as incidental to the breach and possibly be recoverable. Shipping costs incurred by a buyer who returned defective goods to the seller could also qualify.

Q. WHAT ARE CONSEQUENTIAL DAMAGES?

A. Consequential damages are losses suffered by the non-breaching party that extend beyond the contractual loss such as lost profits. For example, a car manufacturer hires a service provider to operate and maintain its equipment. If the provider breaches the contract by failing to maintain a critical piece of manufacturing equipment, causing shut down of the assembly process, the damages to the equipment would be direct damages while the lost profits from not being able to make shipments to dealerships would be considered consequential. The losses therefore must be a direct result of the breach and the non-breaching party has to prove that the breaching party was aware of the possibility of the consequential damages at the time the parties entered into the contract.

Q. WHAT ARE PUNITIVE DAMAGES?

A. Punitive damages are also commonly referred to as exemplary damages and are a means of punishing the defendant in a civil lawsuit. Punitive damages are typically not available in breach of contract cases, but they may be in related types of claims, such as breach of the covenant of good faith and fair dealing, fraudulent inducement, or tortuous interference with contractual relations. Punitive damages are awarded by courts only in rare instances where the breach was so extreme and intentionally in bad faith that additional compensation independent of other compensatory damages is warranted to deter the breaching party from behaving similarly in the future.

The nature of the wrongdoing that justifies punitive damages is subjective. Generally, it involves fraud, malicious intent, violence, or extreme recklessness so naturally these damages are very rare in breach of contract claims. A judge or jury may award punitive damages although different jurisdictions vary with the allowance or extent of them being awarded.

Q. WHAT ARE LIQUIDATED DAMAGES?

A. A liquidated damages clause in a contract specifies a predetermined amount of money that one party must pay to the other for failing to perform under a contract (e.g. an early termination fee in a long-term, variable-cost services contract). The amount of the liquidated damages is supposed to be the parties' best estimate at the time they sign the contract of the damages that would be caused by a breach. While liquidated damages provisions can have the advantage of quantifying damages without requiring the injured party to prove the specific losses, courts do not always enforce these clauses. If the predetermined amount of damages ends up grossly disproportionate to the actual harm suffered, courts will refuse to enforce the provision and construe it as a penalty instead of a good-faith estimate of actual damages.

Q. CAN A PLAINTIFF IN A BREACH OF CONTRACT CASE GET DAMAGES FOR EMOTIONAL DISTRESS?

A. As a general rule, the answer is no. Damages for emotional distress are rarely awarded in breach of contract cases. There are exceptions, however. Emotional distress damages may be available if the plaintiff has suffered a physical injury as a result of the breach. Some courts may allow emotional distress damages if the subject of the contract is sufficiently "personal" and emotional distress is likely to result from a breach. For example, emotional distress damages could be available for breach of contract if a funeral home mistakenly sends a body to be cremated or a portrait photographer posts photos of a customer on his website without the customer's permission.

Q. WHAT IS THE DUTY TO MITIGATE DAMAGES?

A. The non-breaching party to a contract must try to offset his damages (e.g. a landlord must seek out a new tenant when the current tenant moves out before the lease expires or a hotel has to fill rooms with other guests when a company cancels its conference). If the non-breaching party fails to try to offset losses, the court will reduce any total award by what a reasonable non-breaching party would have done to avoid additional losses.

Q. WHAT IS SPECIFIC PERFORMANCE?

A. Specific performance means that the court orders the breaching party to perform the contract as promised. The nature of the contract must be unique for specific performance to be ordered by a court. For example, one-of-a-kind antiques, real estate transactions, or business transactions for the sale of the business itself are unique in that money damages would not adequately compensate the party who suffered the loss.

Q. WHAT IS RESCISSION?

A. A contract rescission effectively cancels a contract as if it had never been formed between the parties in the first place. The cancellation requires that the bargained for exchange be returned to each party. A court may order rescission as a remedy because one party defrauded the other or forced the other into the contract through duress, both parties were mistaken about underlying material facts, one party lacked legal capacity (e.g. was a minor), or the contract was impossible to perform. For example, if a real-estate owner was forced into a contract for the sale of property because the buyer was threatening the owner's family with physical harm, rescission would be the proper remedy because the seller was acting under duress. Likewise, if the seller and buyer were both under the mistaken belief that the seller owned the property when the seller, in fact, did not, rescission may make sense.

Q. WHAT IS RESTITUTION?

A. Restitution is typically awarded in a situation of unjust enrichment to a party (e.g. one party has received a benefit of another party's performance and the party providing the benefit is able to recover the costs involved in providing that benefit). The purpose is to prevent a party from being unjustly enriched. For example, if a contractor builds a shed nearly to completion, but the customer terminates the project before it is finished and refuses to pay, the contractor may be entitled to restitution (i.e. any labor and expenses incurred to build the shed up to that point).

Q. WHAT IS AN INJUNCTION?

A. An injunction is an order issued by a court that compels the party to whom it is issued to act or refrain from acting depending on what the plaintiff is requesting and the urgency.

A party generally seeks an injunction when monetary damages are insufficient relief or the continuous breach is causing ongoing damages. Injunctions and monetary damages are not exclusive of one another. For example, if you own a software company and only authorized partners may post your logo and product information on their sites, but an unauthorized person does so, a court can award money damages and issue an injunction to prevent an unauthorized party from posting your logos and software specifications. In order to be granted an injunction, the plaintiff must show that irreparable harm will occur if the defendant is not stopped from acting (e.g. stock prices will plummet and competitors will use ideas to take revenue streams away from you).

Q. WHAT IS REFORMATION?

A. The court rewrites the contract because the intent of the parties is not reflected in the contract language. Reformation is often ordered if there is a mutual mistake as to a fact of the contract.

E. BREACH OF A COVENANT NOT TO COMPETE

Q. WHAT IS A COVENANT NOT TO COMPETE?

A. A business that seeks to protect its "sweat equity," particularly the customers, trade secrets, products, or services it has established, can contract with its employees and business partners to prevent them from undermining the business's market presence. In an employment contract or partnership contract, the contract provision to protect the business's rights is referred to as a covenant not to compete or a restrictive covenant. Often combined with covenants that restrict the ability to solicit customers and covenants not to disclose information, a covenant not to compete is a promise in which an individual or business partner agrees not to work for the other party's competition, solicit customers away, or generally use knowledge gained while at the employer to damage the employer's business.

Q. WHAT IS AN EXAMPLE OF A COVENANT NOT TO COMPETE?

A. There are two primary types of contracts where covenants not to compete are included. First are contracts to prevent current and former employees or business partners from competing with their employers or businesses. Second are distributor contracts in which a distributor sells to a buyer and that buyer resells those goods to its customer base with a price markup. The buyer may want a covenant not to compete so the distributor cannot sell directly to the buyer's customer base for a cheaper price.

Here is a sample provision from an employment contract:

> During Employee's employment by Company, under the terms of any employment contract or otherwise, and for one year thereafter, (the "Restriction Period"), Employee will not directly or indirectly, own, manage, control, or participate in the ownership, management or control of, or be employed by, consult for, or be connected in any manner with, any business engaged anywhere in the world in the widget business, or any other business that directly competes with Company or any of its parent, subsidiaries or affiliated corporations ("Competitor").

Here is a sample provision from a Reseller context:

> During the term of this agreement and for 12 months after termination of this agreement, distributor will not sell directly or indirectly to purchaser's customer base.

Q. IF AN EMPLOYEE, BUSINESS PARTNER, OR DISTRIBUTOR VIOLATES A COVENANT NOT TO COMPETE, WILL A COURT AWARD THE OTHER PARTY A REMEDY?

A. It depends on the jurisdiction, the terms of the covenant, and the facts. Some courts are more hostile to non-compete covenants than others. As a general rule, covenants not to compete are enforceable if they are reasonable and supported by consideration. The consideration an employee receives is a job and salary. A business partner receives her share of the profits. A distributor gets paid by the buyer and may get the benefit of being the buyer's only distributor.

A covenant not to compete is reasonable if restrictions in the covenant as to time, geographic area, or scope of activity are:

- No greater than necessary to protect a legitimate business interest,
- Reasonable in light of public policy favoring an individual's right to earn a living.

When the business's clientele is the general public, a geographic constraint that is no broader than the employer's normal market is usually reasonable. For example, a hair salon hires stylists and requires that they sign a non-compete agreement so that they do not take their clients with them when they leave. As the clientele is the general market, a covenant not to cut hair within a certain proximity to the salon (e.g. 15 miles) would be reasonable, while a covenant not to cut hair within the entire state would likely be unreasonable.

When the business purpose of the restriction is because of the former employee's knowledge of customer base, the territory should be limited to areas where the employee made contacts during employment. For example, a salesperson who was responsible for selling into a territory could reasonably be restricted from that area (e.g. southern California), but including the northeast would not be a legitimate protection of the employer's investment in customer relations. Much the same in the business to business contract example, if the restriction applied to all of the buyer's customers and the buyer is in a niche industry with a finite number of customers, the restriction would likely be more enforceable than if the buyer has a nation-wide customer base.

Acceptable time limits are typically 5 years or less depending on the jurisdiction.

Courts will also consider numerous other factors, including the nature of the employer's business, industry standards, if the covenant is more punitive than protective, the nature of the former and subsequent employment of the employee, durational limitations, whether the actions of the employee actually violated the terms of the non-compete agreement, uniqueness or expertise in services, and the potential impact on the parties.

Q. WHAT ARE COMMON DEFENSES THE DEFENDANT MIGHT RAISE IN A BREACH OF A NON-COMPETE COVENANT?

A. The party subject to the covenant could argue that:

- The covenant not to compete is unreasonable as far as time (i.e., it lasts too long) or geography (i.e., it restricts competition in too large an area).
- The employee's position within the company does not justify enforcing a covenant not to compete. For example, a former Chief Executive Officer who is privy to trade secrets and has critical knowledge of the industry is more justifiably restricted than a newly hired sales representative.
- The covenant not to compete prevents him from earning a living and is therefore an undue hardship.
- The covenant not to compete is purely punitive and has no rational relationship to protecting a legitimate business interest.

Q. WHAT ARE THE REMEDIES FOR BREACH OF A COVENANT NOT TO COMPETE?

A. Blue Penciling. Before even getting to awarding damages, some courts will modify the covenant if it is too broad so that it is enforceable. This is referred to as "blue penciling."

Liquidated Damages. Because damages are difficult to ascertain in advance of a breach, liquidated damages are widely used to quantify damages for breaches of covenants not to compete. A liquidated damages clause specifies a predetermined amount of money that must be paid as damages for the breach (e.g. a year's worth of salary of the employee or in the distributor example, the lost profits for that sale). The purpose of the liquidated damages provision is to have a reasonable estimate of the harm that would occur and to alleviate having to prove damages. If the

predetermined amount of damages ends up grossly disproportionate to the actual harm suffered, courts will refuse to enforce the provision and construe it as a penalty instead of a good-faith estimate of actual damages.

Injunction. An injunction is an order issued by a court that compels the defendant, which can be an individual or corporation, to act or refrain from acting, depending on what the plaintiff is requesting and the urgency.

A party generally seeks an injunction when monetary damages are insufficient relief or the continuous breach is causing ongoing damages. Injunctions and monetary damages are not exclusive of one another.

Generally, an employer seeking to obtain an injunction to prevent a former employee from competing in violation of the covenant not to compete must establish:

- The employee is violating the covenant not to compete;
- The employer will suffer irreparable harm unless the injunction is granted; and
- Granting the injunction would not go against public policy.

Injunctions require an evaluation of the facts and circumstances. For example, if the employee acquired confidential information, specialized training, or client relationships, and the circumstances suggest the employee is exploiting any of these for competitive purposes, a court is more likely to order an injunction.

Compensatory Damages. Courts may award expectancy damages that compensate the party enforcing the covenant not to compete. Damages generally come in the form of lost profits. For example, the employee could have solicited away critical accounts where there were deals on the table with the former employer. An employee's compensation in violation of the covenant not to compete could be held in escrow until the case is resolved. A court may also order that the former employee pay the employer the compensation earned while in violation of the covenant not to compete. Still, the employer has the burden of proving damages with certainty.

II. OTHER CLAIMS ARISING IN CONTRACT DISPUTES

Note: Jurisdictions vary in the extent to which they recognize these claims, what name they give to them, and, whether they can be filed as independent lawsuits or only as part of a breach of contract sui.

A. BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Q. WHAT IS THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING?

A. Each party to a contract is not only required to perform in accordance with the contract terms, but each party has a duty to perform those obligations in good faith. This legal principle known as the implied covenant of good faith and fair dealing is an implied covenant to act in furtherance of the spirit of the contract. An implied covenant is a promise that is not actually written in the contract, like an express covenant (e.g. Buyer will pay Seller 30 days from the date of invoice). The purpose of the principle is to protect the reasonable expectations of the parties.

The application of the implied covenant of good faith and fair dealing is largely fact-dependent and therefore, the more outrageous the facts and circumstances are in the case, the greater the likelihood courts will apply the principle. The principle moreover can apply to settlement of contract claims, not simply the performance or lack of performance

under the contract. Even though the covenant can exist in almost any contractual relationship, courts rarely allow it to create or override the terms expressly stated in the contract.

Q. HOW IS BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING DIFFERENT FROM BREACH OF CONTRACT?

A. Breach of the covenant of good faith and fair dealing differs from a breach of contract in that the action or inaction that is the breach of the covenant goes to the heart of the bargain, instead of the language of the agreement. Bad faith performance is a case-by-case factual inquiry. Intentional nonperformance, abuse of discretion, and interference with another party's performance all generally indicate a lack of good faith and constitute a breach of the implied covenant of good faith and fair dealing.

Q. HOW DO COURTS APPLY THE COVENANT OF GOOD FAITH AND FAIR DEALING?

A. Courts evaluate several factors in determining if and how to apply the covenant of good faith and fair dealing, but the jurisdiction and the subject matter of the contract are important. For example, an employment contract that involved evidence of discrimination will be looked at differently than a merger agreement between two Fortune 500 publically traded companies.

Other factors include:

- The discrepancy in bargaining power between the parties. Employers and lenders generally have more bargaining power than individual employees and consumers.
- Which party's paper the contract is on. The contract is usually on the more sophisticated parties' form, and that can work against that party depending on the gap in bargaining power.
- How sophisticated the parties are in the type of transaction. Not surprisingly, the more sophisticated the parties are, the less likely a court will apply the implied covenant of good faith and fair dealing. "Sophistication" generally means that the parties are well-versed in the subject matter of the contract. A plaintiff's "first rodeo" will generally be looked at more favorably than if the plaintiff has negotiated similar transactions before.
- Involvement of legal counsel. If a party has a team of lawyers representing it, and there were several rounds of negotiation, it would be more challenging to argue the implied covenant of good faith and fair dealing applies.
- Motive. Intentional disruption of either fulfillment of the contract or the other party's performance is more fertile ground for a court to find breach of the implied covenant of good faith and fair dealing.

Q. WHAT DOES THE PLAINTIFF HAVE TO PROVE TO BE SUCCESSFUL ON A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING?

A. As with the enforcement of any claim, different jurisdictions enforce the implied covenant of good faith and fair dealing differently. But generally speaking, a plaintiff must prove:

- A valid contract between the parties;
- That the plaintiff performed or was legally justified in not performing the obligations under the contract;
- That the defendant through either action or inaction unfairly prevented plaintiff from receiving the benefits that plaintiff bargained for under the contract; and
- Damages to the plaintiff.

Breach of the implied covenant of good faith and fair dealing is typically combined with a breach of contract claim, and therefore a plaintiff may fall short of one breach claim, but a court may award damages under the other breach claim.

It helps to look at it in a practical context. For example, here are Florida Jury Instructions. It is important to note that the court decides first if the covenant even applies, and then the jury decides if it was breached.

416.24 Breach of Implied Covenant of Good Faith and Fair Dealing

In the contract in this case, there is an implied promise of good faith and fair dealing. This means that neither party will do anything to unfairly interfere with the right of any other party to the contract to receive the contract's benefits; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the contract's terms. (Claimant) contends that (defendant) violated the duty to act in good faith and fairly under [a] specific part[s] of the contract. To establish this claim, (claimant) must prove all of the following:

- (Claimant) and (defendant) entered into a contract;
- (Claimant) did all, or substantially all, of the significant things that the contract required [him] [her] [it] to do [or that [he] [she] [it] was excused from having to do those things];
- All conditions required for (defendant's) performance had occurred;
- (Defendant's) actions [or omissions] unfairly interfered with (claimant's) receipt of the contract's benefits;
- (Defendant's) conduct did not comport with (claimant's) reasonable contractual expectations under [a] specific part(s) of the contract; and
- (Claimant) was harmed by (defendant's) conduct.

Q. WHAT ARE COMMON DEFENSES THE DEFENDANT MIGHT RAISE TO A CLAIM OF BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING?

A. Some defenses to breach of the covenant of good faith and fair dealing include:

- The plaintiff failed to perform.
- The breach occurred before the formation of the contract.
- To mitigate damages exposure, there is no special relationship with or fiduciary duty owed to the plaintiff.
- The explicit covenants in the contract are inconsistent with the allegation that the defendant's conduct was in bad faith.
- The plaintiff did not suffer any harm.
- Statute of Limitations (the plaintiff waited too long to sue).
- Statute of Frauds (the contract was oral, but was required to have been in writing).
- Even if the defendant's actions were negligent, they did not rise to the level of bad faith.

Q. WHAT ARE THE REMEDIES FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING?

A. Remedies vary considerably, although plaintiffs primarily seek money damages for the breach. Some courts treat damages purely as they would in a breach of contract case, while others may refuse to award damages entirely.

Often overlooked is the fact that damages may be dictated or limited by the contract itself. For example, a limitation of liability clause may cap recovery for a plaintiff at the fees paid for the transaction serving as the basis of the claim and that limitation could apply to any claim under any theory of liability.

Damages that may be awarded include:

- Compensatory damages to pay the plaintiff for any costs or losses caused by the defendant's breach. Still, these damages must be quantifiable and foreseeable.
- Punitive damages to deter the breaching party from its behavior going forward. Generally, these damages are only awarded in extraordinary circumstances.
- Equitable remedies such as paying restitution for the losses suffered, cancelling the contract entirely through rescission, or if the breaching party failed to perform, ordering specific performance by the breaching party.

B. FRAUDULENT INDUCEMENT TO ENTER A CONTRACT

Q. WHAT IS FRAUDULENT INDUCEMENT TO ENTER A CONTRACT?

A. Usually in a business to consumer transaction, but sometimes in a business to business transaction, one party will intentionally misrepresent information in order to induce the other party to enter into a contract. In that scenario, a plaintiff may allege a civil claim of fraudulent inducement.

There is a distinction between fraudulent inducement and fraud in the factum. Fraud in the factum occurs when one party deceives the other about the substantive terms of the contract. Fraudulent inducement shifts the focus to the circumstances a party justifiably relied on in entering into the contract.

Q. WHAT IS AN EXAMPLE OF FRAUDULENT INDUCEMENT?

A. A prospective buyer goes to a dealership to buy a used truck. The car salesperson shows the prospective buyer a truck and in order to meet quota, states that the truck has never been in an accident or had any major work done on it. The salesperson shows the buyer the odometer and tells the buyer that the truck is an excellent deal at this price with only 20k miles. The buyer purchases the truck. Eventually the buyer does some online research and discovers the truck had been in a major accident and in fact has 100k miles on it. The buyer can claim he justifiably relied on the salesperson's intentionally misleading statements and therefore was fraudulently induced to buy the truck.

Q. WHAT DOES A PLAINTIFF HAVE TO PROVE TO SUCCEED ON A FRAUDULENT INDUCEMENT CLAIM?

A. A plaintiff must prove the following elements to prevail on this claim:

(1) The defendant misrepresented a material fact.

The misrepresentation is the foundation of the fraudulent conduct. A misrepresentation can either be overt, as in the case of the defendant making a false statement, or can be an omission of one or more material facts. Omission of material facts means there is evidence of one party's deliberate decision not to disclose a material fact and knowledge by that party that the other party is acting on the basis that the fact does not exist. For example, a car salesperson fails to inform a potential buyer that a vehicle had five previous owners, when the potential buyer specifically stated he wanted a vehicle with no more than one previous owner.

What type of fact constitutes a "material" fact can vary greatly depending on a court's interpretation. There is no hard and fast definition of "material," but generally it must be something that is significant enough to affect the decision to enter into the contract.

A "fact" is generally an assertion that is subject to actual knowledge when stated (i.e., it is either true or false). Some assertions however do not rise to the level of being a fact. For example:

- Puffing and sales speak ("I would let my mother drive this used car").
- Saying an item is in "excellent" condition.

But assertions of fact may include:

- A statement that a product is "100% organic."
- A statement that "This dwelling is free from structural defect."
- A statement by an agent that an insurance policy covers all medical expenses in excess of a false amount.

(2) The defendant intended to make a false statement or omission of a material fact in order to induce the plaintiff to justifiably rely on it.

The defendant must have known or should have known of the statement's falsities or the omission's significance. The representation or omission must be intentional for the purpose of procuring the contract.

Justifiable reliance is similar to causation in a negligence claim. Essentially, it must have been the misrepresentation, and not some other circumstance, that caused the harm to the plaintiff.

3) Injury to the plaintiff.

The most prevalent injuries are monetary loss and lost opportunity.

Q. WHAT ARE THE REMEDIES FOR FRAUDULENT INDUCEMENT?

A. Fraudulent inducement is an equitable cause of action. Generally courts will order an equitable remedy such as:

- Rescission: The contract is cancelled and the parties are returned to the position they were in before the contract (e.g., the seller returns the buyer's money and the buyer returns the purchased item to the seller).
- Reformation: The contract is rewritten because the intent of the parties is not reflected in the contract language.
- Specific Performance: A court may order the defendant to perform if the misrepresentation is able to be cured.

Depending on the circumstances, a court may award compensatory damages to pay the plaintiff for any costs or losses caused by the defendant's actions. For example:

- If the fraud related to real property, the difference between the actual value of the property at the time the fraudulent contract was made and the value that the property would have if the representation was true.
- Loss of potential future earnings, particularly if the defendant was aware of the earning opportunity.

Unlike a breach of contract, the tort of fraud in the inducement opens up the possibility of punitive damages. Punitive damages are additional compensation independent of other compensatory damages that are warranted to deter the breaching party from committing future fraud.

Q. ARE THERE ANY DEFENSES TO FRAUDULENT INDUCEMENT CLAIMS?

A. The fact that the plaintiff would have entered into the contract even without the misrepresentation is not a defense. A defendant may rely on several defenses, but generally most of them focus on negating one of the elements that the plaintiff is attempting to prove. For example, the defendant may contend that the statement was:

- Not misleading.

- Not material.
- Not based on actual knowledge and could not be known to be false through reasonable efforts.
- Not intentionally made.
- One that no person could have reasonably relied upon.

C. PROMISSORY ESTOPPEL

Q. WHAT IS PROMISSORY ESTOPPEL?

A. Promissory estoppel is a legal principle, generally enforced as an affirmative defense or a standalone cause of action, that prevents a person who made a promise from reneging when someone else has reasonably relied on that promise and will suffer a loss if the promise is broken.

Contract formation requires consideration bargained for by the parties. Each party essentially promises to do something or not to do something in exchange for a benefit. Traditionally, promissory estoppel functioned as a method for courts to enforce a promise when it lacked consideration. In other words, the person making the promise received no benefit or promise of a benefit from the person to whom the promise was made. However, the person to whom the promise was made suffered a detriment by relying on the promise. Even though a contract had not been formed, courts created an equitable solution.

Jurisdictions vary on whether promissory estoppel is an independent cause of action, simply an affirmative defense to a breach of contract claim, or an enforceable doctrine at all.

Q. WHAT DOES A PLAINTIFF CLAIMING PROMISSORY ESTOPPEL NEED TO PROVE?

A. Assuming the defendant is the promisor (person who made the promise), promissory estoppel requires the plaintiff to prove four elements:

- The defendant communicated a definite promise.
- The defendant knew or should have known that the promise would induce the plaintiff to rely on it.
- The plaintiff changed her position in reliance on the promise.
- Injustice can only be avoided by an enforcing the plaintiff's promise

Q. WHAT IS AN EXAMPLE OF PROMISSORY ESTOPPEL?

A. A software company is looking for a developer that can build a particular component for a new software product. The software company needs the component to be programmed in a specific way so that it can resist various hacking techniques and viruses. A developer promises the software company that he can build the component exactly to the security specifications the software company is requesting, but knows that he is going to use some open source code that might be vulnerable. The developer and the software company execute a consulting agreement. The software company subsequently discovers the component renders the software susceptible to the types of security risks the software company was concerned about. The software company refuses to pay the developer. The developer files a lawsuit against the software company to enforce the contract. The software company may be able to use promissory estoppel as an affirmative defense because they relied on the promise that the component would provide the required security protection.

In the same scenario, the software company promises the developer that this project will last two years and that the company will her full time and pay for all the developer's out of state moving expenses. The developer quits her current job, sells her house, and pays a moving company a non-refundable deposit in anticipation of the move. The developer also passes on two other work opportunities because of her reliance on the employment opportunity with the software company. The software company abruptly notifies the developer that they do not need the developer anymore because they found someone within the company who could build the component. The developer may have an independent cause of action for damages because the software company made a promise of employment, knew that by doing so the developer would prepare to move and likely pass on other opportunities, and the developer relied on the promise to the developer's detriment.

Q. WHAT ARE THE DEFENSES TO PROMISSORY ESTOPPEL?

A. A party may attack a promissory estoppel claim on the basis that the other party did not detrimentally rely on the promise, or that the reliance was not reasonable. A party may also defend a promissory estoppel claim on the basis that the party did not know or could not have known the promise would induce the other party to change position. Finally, promises that are too vague or indefinite are not enforceable.

Q. WHAT REMEDIES ARE PROVIDED BY PROMISSORY ESTOPPEL?

A. Courts may remedy the detriment to the aggrieved party through equitable remedies and compensatory damages. Compensatory damages are intended to pay the plaintiff for any costs or losses caused by the defendant's actions and equitable remedies serve to cure the injustice where monetary damages cannot be ascertained.

Where the promisee has suffered financial harm because of a change of position (e.g. a prospective employee incurs moving costs in anticipation of a job), courts are more likely to treat promissory estoppel actions similarly to breach of contract. In these instances, expectation damages may be awarded to compensate the aggrieved party as would be the case in a breach of contract case. This treatment can have a significant impact on damages awarded. Basically, merely awarding reliance damages would put the aggrieved party in the position she had been in before the promise, where expectation damages would put the aggrieved party in the position she would be in had the promise been fulfilled. Any award would generally include the out-of-pocket costs incurred in reliance on the promise.

Still, compensatory damages are not the primary remedy for promissory estoppel. Generally, an equitable remedy would be ordered either in combination with compensatory damages or instead of compensatory damages.

Types of equitable remedies in a promissory estoppel case can include:

- **Restitution:** The purpose is to prevent a party from being unjustly enriched. For example, if a contractor builds a pool on a lot based on the landowner's promise that the contractor will be given part ownership in the land, but the landowner doesn't grant the contractor any title, the contractor may be entitled to restitution (i.e. any labor and expenses incurred to build the pool in reliance upon that promise).
- **Specific Performance:** A court may order that the party, who made the promise that caused the detrimental reliance, perform as promised.

D. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Q. WHAT IS TORTUOUS INTERFERENCE WITH CONTRACTUAL RELATIONS?

A. Tortious interference with contractual relations aims at deterring individuals and businesses from sabotaging the value another party derives from contracting. The claim allows a plaintiff to seek monetary damages against a defendant when the defendant has disrupted the plaintiff's ability to fulfill contractual obligations or contract with another party. The tortious interference may be with an existing contract as well as with a prospective contract or business relationship.

Q. WHAT DOES A PLAINTIFF HAVE TO PROVE TO SUCCEED ON A CLAIM FOR TORTIOUS INTERFERENCE WITH AN EXISTING CONTRACT?

A. The plaintiff has to prove the following four elements to succeed on a claim of tortious interference with an existing contract:

(1) The plaintiff and a third party currently have a valid contract between them.

Mere negotiations are insufficient to meet this element. Bidding on requests for proposals or making sales calls would be preliminary to any valid contract. Consequently, there must be a binding, legal agreement between the plaintiff and a third party.

(2) The defendant knew of that existing contract.

The plaintiff must allege actual knowledge of the contract. Knowledge cannot be implied or imputed (assumed) by virtue of position (e.g., a director on a board cannot be said to know about the contract simply because she voted on an ancillary contract or because she is a director).

(3) The defendant intentionally acted in order to induce a breach or disrupt the contract.

Tortious conduct is required to support this cause of action. Tortious conduct means fraud, misrepresentation, or some form of malicious behavior. Intent is the key and therefore negligence is not enough. Here is where the facts matter. The defendant's specific actions are critical in determining whether the intent was to simply compete for business or to induce breach of the plaintiff's contract.

(4) The plaintiff sustained damages.

The plaintiff must be able to prove actual harm caused by the breach or disruption of the contract.

Q. WHAT MUST A PLAINTIFF PROVE TO RECOUP DAMAGES ON A CLAIM OF TORTUOUS INTERFERENCE WITH CONTRACTUAL RELATIONS?

A. General allegations about the tortious conduct will be insufficient to prove a tortious interference claim because tortious inference claims are very fact-dependent, often relying on some sort of outrageous behavior. Not only do plaintiffs need to establish a claim meeting all the elements, but they need to overcome a courts' propensity to allow competitive business tactics.

Q. WHAT ARE THE DEFENSES TO A TORTIOUS INTERFERENCE CLAIM?

A. In tortious interference claims, there are only a handful of defenses, but fortunately from a defendant's perspective, tortious interference claims are difficult to prove by their very nature.

Although not an exhaustive list, a defendant may rely on the following defenses:

- Akin to an "unclean hands" defense, defendants can claim the plaintiff was already in breach of the contract.
- Defendants can establish lack of actual knowledge of the contract.
- Defendants can argue they did not intend to interfere with the contract. In order to push settlement, a defendant may even concede on damages if they are low and emphasize that the defendant's behavior was either negligent or reckless, but at any rate unintentional.
- An inevitability defense argues that the contract would have been breached anyway for a reason unrelated to the defendant's conduct.
- The plaintiff did not suffer any damages.
- Justification is an affirmative defense to tortious interference with contract and tortious interference with prospective business relations. Intent and motive are generally irrelevant for purposes of this defense. If a trial court finds as a matter of law that the defendant had a legal right to interfere with a contract, the defendant will not be liable. Depending on the jurisdiction, a defendant may only need to show a legitimate economic interest or a good faith belief in the right to interfere, particularly if that good faith belief was based on advice from counsel.

Q. WHAT ARE THE REMEDIES FOR A TORTIOUS INTERFERENCE CLAIM?

A. Because these claims are largely fact-dependent, courts and juries have a great deal of flexibility in striking a balance between competitive business practices and illegal interference with an existing or proposed contract.

Aside from a restraining order precluding the defendant from benefitting from the interference, compensatory damages for lost profits and other money damages are the focal point for a plaintiff. Plaintiffs typically seek the following damages:

- Compensatory damages are intended to pay the plaintiff for any costs or losses caused by the defendant's conduct. Compensatory damages must be quantifiable.
- Incidental damages may be awarded for any accompanying costs incurred because of the defendant's actions.
- Consequential damages are losses suffered by the plaintiff such as lost profits.
- Punitive damages are also commonly referred to as exemplary damages, which are a means of punishing the defendant in a civil lawsuit. Punitive damages are awarded by courts where the defendant acted in bad faith and are intended to deter the breaching party from the bad behavior going forward.

The plaintiff may instead rely on a breach of contract claim to obtain the same damages, unless punitive damages are likely (punitive damages are not awarded for breach of contract). Even if the parties settle any breaches of contract, a plaintiff may want to reserve the right to pursue additional recovery on a tortious interference claim under that contract or use it as leverage to obtain a larger settlement.

Q. CAN A PLAINTIFF SUSTAIN A TORTUOUS INTERFERENCE CLAIM WITHOUT AN EXISTING CONTRACT?

A. Yes, but it is even more challenging for a plaintiff to prove. If a valid contract does not exist but there is a contract on the horizon between the plaintiff and another party, a plaintiff can claim tortious interference with prospective

contracts or economic opportunity. The name of the cause of action varies by jurisdiction. Generally, the plaintiff must establish: 1) a reasonable probability that the plaintiff was going to enter into a contract with a party; 2) the defendant acted with the intent to prevent formation of the contract; 3) the defendant's conduct was independently tortious or unlawful (e.g. the defendant acted fraudulently); 4) the defendant's actions caused damages to the plaintiff; and 5) the plaintiff suffered actual and not speculative damage. Even more critical in these instances, is whether the defendant acted maliciously or in a manner that would independently qualify as a tort. Also critical are the circumstances of the budding contractual relationship between the plaintiff and the party. For example, the plaintiff has a stronger case if the plaintiff was on the cusp of finalizing the contract as opposed to participating in preliminary negotiations while bidding on a request for proposal.

Q. WHAT IS AN EXAMPLE OF TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS?

A. Engaging with a competitor's customers is often fertile ground for these claims. For example, a credit card plastics manufacturer has a contract with a payment processer to sell the payment processer bulk plastic cards for resale to its customers. The payment processor has contracts with its customers to provide the cards. The credit card manufacturer learns that the payment processer is marking up the resale considerably so the manufacturer decides to persuade the customers to terminate their contract with the processor and buy from the manufacturer directly to get a less expensive rate. If the manufacturer knew about the contracts between the processor and its customers and intentionally tried to induce termination of those contracts, the processor, aside from any breach of contract claims, may have a claim for tortious inference with an existing contract.

Another area where these claims arise is the employment context. For example, Company A hires an executive away from the executive's current employer, Company B who happens to be a competitor. Aside from any covenants not to compete between the executive and Company B, Company A may be liable for a tortious interference claim if Company A knew about the employment contract, and intentionally induced the executive to breach that employment contract by hiring the executive despite Company A having that knowledge.

III. RESOLVING CONTRACT DISPUTES

A. INITIAL STEPS

Q. I THINK THAT THE OTHER PARTY HAS BREACHED OUR CONTRACT, [OR I'VE BEEN ACCUSED OF BREACHING A CONTRACT]. HOW DO I DETERMINE IF A BREACH OCCURRED?

A. If you anticipate a contract dispute, your first step is to read your contract and consult with an attorney to assess how the facts converge with the responsibilities the parties have under the contract. If you believe the other party breached the contract by failing to deliver on a promise or failing to fulfill an obligation, first review your own actions in light of your contractual obligations. Have you met all of your responsibilities? If not, you may not be in a position to claim breach, and you could expose yourself to a counterclaim.

If you have received a breach of contract notice, you need to consult with your attorney to generate a response demonstrating how you performed your obligations under the contract. Ultimately, the breaching party's failure to

perform must have caused harm, so doing a preliminary assessment of damages is critical in determining the return on investment of pursuing a breach of contract claim.

Now, in the earliest stages of the dispute before either party has taken legal action, is the most viable opportunity for the parties to resolve an alleged breach with a business solution. Not only does this avoid litigation, but it could result in a continuation of the business relationship. For example, if a service provider has a customer with numerous lines of business, and the customer wants to terminate one contract early but maintain other lines of business, the parties could work out a contract to extend the term of the other lines of business in exchange for not charging an early termination fee on the one contract.

Q. WHAT SHOULD I DO IF A BREACH HAS ARGUABLY OCCURRED, BUT I DON'T WANT TO BE INVOLVED IN A LAWSUIT RIGHT AWAY?

A. Now that you have assessed if a breach occurred or are in negotiation to resolve the dispute without legal action, the next step is to investigate internally to gain a deeper understanding of the key legal issues that serve as the basis for the claims, determine who the witnesses could be, prepare a litigation budget, and assess public exposure and risk to reputation.

Here is where document retention practices can make or break your case because much of the evidence in business litigation is made up of email threads, and these email threads often contain other substantive documents. On a related note, if you have a reasonable belief you are going to be involved in a lawsuit, you should initiate a litigation hold throughout the company. A litigation hold means that all employees must preserve relevant records and electronically stored information (e.g. emails or social media posts). You should consult with counsel on when to initiate a litigation hold.

Employees come and go so it is also prudent to have data backup implemented for all business units, particularly the accounting department. If you have the in-house technical resources, assembling an e-discovery team can be advantageous in managing the dispute process. This e-discovery team is generally made up of attorneys, IT professionals, HR (if employment related), and administrative staff (e.g. data archiving personnel).

Pre-filing strategy is perhaps the most critical phase of the lawsuit because gathering the appropriate facts and listening to the other side's position could save money and time that otherwise would be invested in more formalized dispute resolution.

Q. WILL RESOLVING MY DISPUTE OUTSIDE OF LITIGATION HELP MY BOTTOM LINE?

A. It depends on the amount of damages that are in play, but litigation is a burden and costs must be considered by both parties. First, you have to consider the opportunity cost. Responding to discovery, communicating with outside counsel, internal counsel's workload, and training employees to support litigation take significant time away from business productivity. Document management is challenging even from a day-to-day operational standpoint, but to access and produce records for discovery as well as making employees available for depositions and trial can take considerable time away from business operations. Considering most commercial litigation cases can go on for years, litigation can hinder creating additional revenue.

The extent of damages a plaintiff can collect is a major factor in settlement. If a plaintiff knows he will be limited in recouping damages even if he pursues litigation aggressively, proceeding all the way through trial is not a good economic decision. A plaintiff must also consider attorney's fees and balance the cost and likelihood of obtaining a quick settlement against the risks and anticipated return of a future settlement or verdict.

Q. IF NEGOTIATING A SETTLEMENT BEFORE A LAWSUIT DOESN'T WORK OUT, WHAT IS THE FIRST STEP IN FORMAL DISPUTE RESOLUTION?

A. The first step toward a formal dispute resolution process is to identify the claims and the parties to those claims who are stakeholders in the dispute. If you are the party claiming breach of contract and you decide to proceed with litigation, you will need to have an attorney file a complaint on your behalf with the court. After the complaint is filed, the defendant has the opportunity to respond in a document called an answer. The defendant may simply answer the complaint, but if the defendant believes the plaintiff's claims are unfounded, the defendant will often file a motion to dismiss the complaint. Although rare, if the court grants the motion to dismiss, the case effectively ends. Other pretrial motions such as motions to strike particular claims or motions addressing allowance of particular types of damages (e.g. indirect damages) are also often filed at this point. If your contract contains an arbitration clause, but the other party has bypassed arbitration in favor of suing, this would be the prime opportunity to request the court to compel arbitration. Depending on the venue provision in your contract, if you are in state court and you and counsel determine it would be advantageous to your defense, now is when you would generally file a motion to remove the case to federal court or another jurisdiction.

The defendant generally files its counterclaims when it answers the complaint, which makes this phase ripe for escalating settlement discussions.

Q. I DON'T WANT TO HIRE LEGAL REPRESENTATION; CAN I HANDLE RESOLVING A CONTRACTS DISPUTE ON MY OWN?

A. It is always best to seek counsel as soon as you think a dispute has arisen. You may be in an advantageous place to resolve your dispute without an attorney because you may have been heavily involved in the contract negotiation and therefore know the critical provisions that put you at risk. You also know the facts, but it is natural as a party to a case to be biased about your position. Having a hired advocate allows for an honest assessment of the other party's strengths and weaknesses. Your inability to fairly and objectively evaluate the case in its entirety can handicap you in the dispute resolution process. A couple incidental risks of self-representation include:

- Missed settlement opportunities—a contract dispute is a momentum game. Facts arise, parties gain leverage they did not think they had before, and business solutions are often overlooked. An attorney can utilize negotiation skills in this context and help you settle at an appropriate time to protect your interests and help you reach your goals.
- Miscalculating damages—the bulk of business disputes are about money, and because quantifying damages relies on legal principles, a lawyer can assist you with this calculation. If you are in a long-term services contract, liquidated damages may be in play. Whether those liquidated damages are reasonable and not merely a penalty rest on legal principles that are best argued by an attorney.

If you are dead set on not hiring an attorney, you should consider engaging an attorney at least on a limited basis for consultation and for drafting a settlement agreement if you resolve the dispute on your own. If your dispute is trending towards litigation, it is imperative you seek advice of counsel in order to advise on the procedural aspects of a lawsuit.

B. ALTERNATIVES TO LITIGATION

1. MEDIATION

Q. WHAT IS MEDIATION?

In mediation, disputing parties attempt to resolve their differences with the help of a neutral mediator. Mediations are typically non-binding (the mediator cannot force a settlement on you) and confidential.

Q. IS MEDIATION AN OPTION FOR RESOLVING MY CONTRACT DISPUTE?

A. Mediation may be voluntary, required by contract, or ordered by the court. Often the parties will agree to mediate the dispute outside of a courtroom or, if one of the parties files a lawsuit, the presiding judge will order that, as a preliminary step, the parties must attempt to resolve their dispute through mediation. Sometimes the parties will agree on a mediator, or the judge may assign a specific mediator.

Mediation is typically attempted after direct settlement negotiations have failed. It has the greatest benefit when used early, before substantial litigation costs have been incurred. A mediation can last an hour or days. A mediation can stall when the gap between how much the parties will settle for is too wide or it is apparent that neither party intends to settle the case at this point. In these instances, the mediator will suggest shutting down the mediation.

Q. WHAT ARE THE ADVANTAGES OF MEDIATION?

Some of the advantages of mediation include:

- The mediator cannot force you to accept a decision and, if the mediation fails, you can still have your day in court.
- Mediation is confidential. Material provided to the mediator is not available to the general public and the public cannot attend the sessions. Statements made by the parties during mediation are not admissible in court.
- Mediation reduces the uncertainty of trial, as the parties control their own fate.
- Mediation is cheaper than a trial; the parties pay for their own attorneys and share the mediation fee, but avoid expenses like attorneys' and experts' trial fees.
- Mediation is faster than a trial as it can be scheduled at the convenience of the parties and availability of the mediator.
- An experienced mediator can educate the parties on strengths and weaknesses of their case and clarify whether a settlement proposal is reasonable.
- Mediation permits the parties to craft creative settlements that could not be achieved at trial and that satisfy the real needs of the parties.
- Mediation establishes channels of communication between parties, which is especially important if the parties need or want to have an on-going relationship.
- Mediation may alert your attorney to the positions of the opposition, which can be an advantage if your case does not settle and goes to trial.

Q. WHAT ARE THE DISADVANTAGES OF MEDIATION?

Here are a few disadvantages that sometimes are associated with mediation:

- Mediation may reveal facts or strategies to the opposition providing the opposition with an advantage if the mediation is unsuccessful and the case does eventually go to trial.
- In cases with a disparity of power, one side may feel unduly pressured to settle.
- The informality of the settling may permit antagonistic litigants to fight.
- Experienced litigators may be able to accomplish the same result without the expense of a mediator.
- Unlike litigation, a mediated settlement does not set a precedent set that may positively impact the future.

2. ARBITRATION

Q. WHAT IS ARBITRATION?

A. Arbitration is a dispute resolution method used primarily to resolve business disputes. It is more like a trial than mediation. The arbitrator or arbitrators conduct a hearing in which both sides present their cases. The parties may call no witnesses, or fewer witnesses than might be called at a trial. The attorneys often present testimony and argument in summary form. The arbitrator then renders a decision.

Q. DO I HAVE THE RIGHT TO CHOOSE BETWEEN ARBITRATION AND FILING A COMPLAINT IN COURT?

A. It depends on what your contract provides. Many contracts contain an arbitration clause providing that all disputes involving the contract must be resolved by arbitration. In that case, filing a complaint in court is usually not an option. If a party attempts to circumvent the arbitration by filing a complaint in court, the other party can file a motion to stay or dismiss the litigation. That opposing party may also file a motion to compel arbitration that asks the court to mandate arbitration in accordance with the contract.

If the contract does not provide for arbitration, both parties must agree to submit the dispute to arbitration. They may decide to draft a separate arbitration agreement to add to the contract as an addendum. If a party initiates arbitration proceedings and there is no arbitration agreement, the opposing party can ask the arbitrator to decline jurisdiction.

Q. HOW IS AN ARBITRATION AGREEMENT ENFORCED?

A. The party pursuing the dispute formally notifies the opposing party in writing in accordance with the notice provision in the contract and identifies the nominated arbitrator. If one party attempts to avoid arbitration by filing a claim in court, the other party can file a motion with the court to stay or dismiss the litigation and order arbitration in accordance with the contract.

Q. WHAT ARE THE ADVANTAGES OF ARBITRATING A CONTRACT DISPUTE?

A. Some advantages of arbitration are:

- When the parties are from different jurisdictions, arbitration allows the parties to pick the venue and make the forum equally accessible.
- Arbitration allows the parties to choose an arbitrator or panel of arbitrators who have expertise in subject matter of the contract. If you litigate, the judge assigned to your case may know very little about the nature of your business.
- The parties can agree on what substantive and procedural rules will apply, which can streamline the process and reduce costs.

- In arbitration, all document exchange can be restricted to the parties and one or more arbitrators, which may be desirable to protect your and your business's reputation. Court filings, on the other hand, are generally available to the public;
- A court judgment can be appealed at various levels and the appeals process can drag on for years while an arbitrator's decision can be agreed upon by the parties to be final and not subject to appeal.

Q. WHAT ARE THE DISADVANTAGES OF ARBITRATING A CONTRACT DISPUTE?

A. Some of the disadvantages of arbitration include:

- Limited discovery, which can make it more difficult to gather the evidence you need to prove your case.
- A limited opportunity to cross-examine the opposition's experts.
- The arbitrator is likely to render a decision that reflects some degree of compromise, unlike trial judgments, which are more likely to conclude with a definite winner and loser.
- If favorable to you, the decision sets no legal precedent for future similar disputes.
- In a case that evokes compassion or sympathy, the plaintiff may achieve a better result with a jury.

C. LITIGATION

Q. WHAT SHOULD I EXPECT IF MY CONTRACTS DISPUTE ENDS UP IN LITIGATION?

A. A contracts dispute, like any other civil litigation, may pass through up to eight stages:

- Pre-filing strategy.
- Pleadings and early pre-trial motions.
- Discovery.
- Summary judgment motion.
- Pre-trial conference and later pre-trial motions.
- Trial.
- Post-trial motions.
- Appeal.

However, the vast majority of suits (over 90 percent) are settled or otherwise resolved before they get to a trial.

Q. WHAT IS THE PURPOSE OF THE PRE-FILING PHASE?

A. This phase allows for case assessment and fact gathering before filing a complaint or receiving one that requires an answer. You and your attorneys will investigate, gain a deeper understanding of the key legal issues that serve as the basis for the claims, familiarize yourself with who the players are (e.g. judge and opposing counsel), prepare a litigation budget, and assess public exposure and risk to reputation. This is the time to interview witness, conduct legal research, and evaluate if litigation is preferable to settlement, which could mean walking away from the issue entirely.

Q. WHAT HAPPENS DURING THE PLEADINGS AND EARLY PRE-TRIAL MOTIONS PHASE?

A. This stage identifies the claims and the parties to those claims who are stakeholders in the dispute.

The pleadings consist of the complaint the plaintiff files in court and the defendant's response. The defendant may simply answer the complaint, but if the defendant believes the plaintiff's claims are unfounded, the defendant will often file a motion to dismiss the complaint. If the court grants the motion to dismiss, it will usually grant it without prejudice, which allows the plaintiff to correct any deficiencies and refile. Other pretrial motions such as motions to strike particular claims or motions addressing allowance of particular types of damages are also often filed at this point.

The defendant generally files its counterclaims when it answers the complaint. This can put the plaintiff on the defense and escalate settlement discussions. The defendant may also file cross claims with other parties who may be liable to the plaintiff and join other parties to the lawsuit.

Q. WHAT IS DISCOVERY?

A. Discovery is the process where each side discloses information to the other side. Before discovery formally begins, the parties usually make initial disclosures that include witness information, a description of all electronically stored information that the party has, and expected damages to be claimed.

Discovery takes several forms. Requests for production of documents, requests for admissions, interrogatories, depositions, and retaining expert witness are all methods of obtaining information to bolster your case.

Q. WHAT IS SUMMARY JUDGMENT?

A. After discovery, each side may file a motion to end the case based on the facts and relevant law. If the court determines there is a question about what the evidence would show or how a jury would evaluate it, the court will generally allow the case to proceed to trial. If not, the judge decides the case and the losing party then has the option to appeal. In their summary judgment papers, each party shows what they would ultimately rely on at trial so the parties get a good indication of what they will need to argue against at trial.

Q. WHAT HAPPENS AT THE PRE-TRIAL CONFERENCE?

If the court declines to enter summary judgment in favor of a party, the parties prepare for trial. Generally, both sides will attempt to demonstrate how prepared they are to see the case through to a final judgment. The sides may discuss evidentiary issues, file motions in limine to preclude evidence from being admitted, file motions for draft jury instructions, and consolidate witness information.

Q. WHAT CAN I EXPECT IF MY CASE GOES TO TRIAL?

A. Both sides will have the opportunity to present evidence and demonstrate to the jury or the judge that their position should prevail. If the trial is before a jury, it will begin with jury selection. The process varies from jurisdiction to jurisdiction, but typically each side gets to question prospective jurors and to remove individuals for cause (e.g., bias, conflict of interest). Each side also gets a few peremptory challenges that allow them to remove jurors who might not be favorable without needing to show any reason.

The trial usually begins with opening statements from each side outlining their case and what they intend to prove. Then the plaintiff will put on its case to prove its claims as laid out in the complaint. The defense will have the opportunity to cross-examine the plaintiff's witnesses. Then it's the defense's turn to present its evidence and the plaintiff's to cross-examine defense witnesses.

Both sides present closing arguments, summing up how the evidence supports their case and pointing out deficiencies in the other side's evidence. If the case is heard before a jury, the judge instructs the jury on the applicable law before they retire to deliberate. If the case is heard by a judge, the judge may render a decision immediately or at a future date after taking the case under advisement.

Q. WHAT TYPE OF POST-TRIAL MOTIONS COULD BE FILED IN MY CASE?

A. Post-trial motions notably attempt to reverse the court's judgment or provide new evidence that compels the court to reconsider another trial on the merits. Post-trial motions can linger depending on the complexity of the case and the resources of the parties.

Q. WHAT ARE MY OPTIONS IF THE VERDICT GOES AGAINST ME?

A. You may file an appeal if you lost. Appeals are filed with another court that will review the trial court decision to determine what, if any, errors the trial court may have committed that compel the case to be heard again.

There is a timeframe depending on your jurisdiction (e.g. 45 days) where you as an appellant must file an appeal after final judgment of the court. Your counsel must serve a notice of appeal, prepare a case information sheet, and a request a transcript of the trial court record. These documents are then filed with the appellate court. The appellant subsequently files a brief addressing the issues you want to appeal. The respondent then files a brief responding to your arguments. Both sides engage in oral arguments in front of a three judge panel or the appellate court can decide on the briefs alone, thereby expediting the appeals process.

D. SETTLEMENT OF CONTRACT DISPUTES

Q. WHEN SHOULD I SETTLE MY CONTRACTS DISPUTE?

A. You should settle your dispute when you are confident that the financial costs and opportunity costs of pursuing litigation outweigh the potential reward of securing a verdict in your favor. It could be that you know that the dispute will settle even before you send the other party a breach notice, and the letter is simply a mechanism to force the negotiation process.

Early settlement is optimal to save resources; however sometimes a party or both parties cannot ascertain how strong their case is until they reach the discovery phase of litigation. Discovery can consequently give a party the information it needs to leverage a higher or lower settlement figure. For example, depositions are ripe for this type of information where witness credibility and strength of testimonial evidence come out. Still, this can be a costly process so the amount in controversy needs to be worth investing the time and resources.

Settlement can occur at any point up until trial and even during trial proceedings. For example, a party may gather that the jury is not receptive to its case, its witnesses, or its attorneys. Certain evidentiary rulings by the judge may have hampered a party's case. In that case, despite the investment in trial preparation, it could actually save money long term if you start to anticipate a large-dollar verdict against you.

Q. WILL SETTLING MY CONTRACTS DISPUTE SAVE ME MONEY?

A. More often than not, settlement can save money although it may not seem the case in the short term. Ultimately it comes down to what you can collect if you are successful, not what the verdict award is. For example, the other party may be on the verge of bankruptcy and that is why they breached the contract by not paying on time. In that scenario, proceeding all the way through trial is pointless.

A plaintiff must also consider that time and money spent litigating is time and money not being spent on growing the business or dealing with personal matters. For example, responding to discovery, communicating with outside counsel, increasing internal counsel's workload, document management, and making employees available for depositions and trial can take considerable time away from business operations. Plus, attorneys will generally take at least a third of the settlement or as much as half if the case goes through trial. Or, if you lose your case, or your contract provides that the prevailing party is entitled to attorney's fees, you may have to pay for all legal fees.

Q. ARE THERE ANY OTHER ADVANTAGES TO SETTLING MY DISPUTE OTHER THAN NOT HAVING TO LITIGATE?

A. Aside from legal liability, a business needs to keep its business reputation in mind. A negative perception can affect revenue, which ultimately undermines a potential recovery of damages or avoidance of paying out damages. Preserving the business relationship could therefore yield more than securing a judgment. Or, if the company is publically traded, a party needs to be aware of the ramifications on the stock price.

Q. WHAT FACTORS DO I NEED TO CONSIDER IN PURSUING A SETTLEMENT?

A. The facts and how the law applies to them determine the strengths and weaknesses of the case. The client and attorney should evaluate any developing information including information discovered through requests (e.g. motions to produce documents, depositions, and interrogatories), court orders based on pre-trial motions, and case law.

Other factors that a party should cover with an attorney when deciding on settlement options include insurance coverage for pay-outs, tax implications, and attorney's fees. Although insurance and taxes are almost impossible to contract out of, attorney's fees allow some room for negotiation. A defendant can always request a breakdown of fees and incorporate those fees into the overall settlement figure.

Q. WHAT DO I NEED TO EVALUATE IN MY SETTLEMENT STRATEGY?

A. If you are considering any confrontational action against the other party, first seek advice of counsel to review the contract and the facts surrounding the dispute.

Before sending a breach notice, consider if the damage you are sustaining requires immediate relief. If you require immediate relief, you should consider an injunction before trying to resolve the dispute. An injunction is an order from a judge requiring a party to act or refrain from acting. For example, if you have an agreement with a vendor who handles your data and that vendor breaches an obligation to keep your data secure, you may not have the time to commence a lawsuit and get the remedy you need, which is to prevent the behavior putting your data at risk.

Before assessing whether to pursue litigation, you should confirm with counsel that there is a live controversy, which is an actual dispute between two or more parties relating to their legal rights that is still going on when it is presented to a judge. Also, if you are the plaintiff, you must have standing to sue. Standing requires the plaintiff to be a stakeholder in the dispute, a stakeholder who will suffer harm in the event the decision is not in the plaintiff's favor.

The strength of your case depends on the scope of the evidence. Yet, admissibility of that evidence is even more critical to sustaining your claim. You should answer the following questions:

- What breadth of documents do you have?
- Are your witnesses credible?
- Do you need experts to prove a technical argument based on the evidence you have?

Not only must you support your claim with evidence, the facts of your case must meet the requirements of a legal principle for which the law allows a remedy. In most contract disputes, the legal principle is breach of contract, but depending on the facts, other legal principles could apply such as breach of the covenant of good faith and fair dealing or promissory estoppel, for example.

You will also need to determine where the best venue lies to resolve your dispute. It may make more sense to try to mediate or arbitrate the claim instead of filing a lawsuit. Depending on the terms of your contract, you may be required to try mediation or to arbitrate instead of going to court. If your contract is silent on venue, you should consult with your counsel on where it makes the most sense to file the lawsuit or if you are the defendant, where you may be able to move it. This determination is largely dependent on the rules of the court and the subject matter of your dispute.

Most individuals and small businesses do not have the resources to support litigation unless you are the plaintiff and your attorney is working off a contingency fee. On the other hand, large companies do not want to risk negative public perception. If obtaining monetary relief or terminating a contract early is the focal point, then early settlement should be strongly considered.

Q. WHAT TOPICS SHOULD A SETTLEMENT AGREEMENT ADDRESS?

A. A settlement agreement is a contract. Here are a few of the most common topics covered by a settlement agreement:

- The amount of the settlement and payment terms.
- Establishment of an escrow to hold papers and checks until all documents are signed.
- Whether any attorney fees are to be paid from settlement proceeds.
- What claims are covered and not covered by the settlement.
- Any future activities that need to be undertaken; for example settlement may involve the sale or transfer of an asset or changes to the terms and conditions of employment.
- Whether the settlement terms are confidential and the penalties that will be imposed for violations.
- If the settlement agreement has to be enforced in court, where suit will be filed and what state's law will govern.