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STUDENTS' VIEWS OF THE ETHICAL IMPLICATIONS OF THE LAWS OF CONTRACT DAMAGES

by

Arthur M. Magaldi*

One approach in determining whether a law is effective is to determine whether the law achieves the ends set forth by the proponents of the law at the time of its passage. Where there are no specifically stated objectives for its passage, e.g., when the law has been in effect for a long time, ascertaining whether the law accomplishes the goals generally associated with it will similarly reflect on its effectiveness. A related and equally important consideration is whether the law in question moves people in the direction of ethical or unethical conduct.

In the area of contract damages, it is generally accepted that the goal of the law is to compensate the victorious plaintiff for the loss caused by the breach. It is commonly stated that contract damages should put the plaintiff in the same financial position the plaintiff would have been in had the contract been properly performed. A study of contract damages by the writer has led to the conclusion that the law of contract damages is seriously flawed and frequently fails to properly compensate victorious plaintiffs. In addition and perhaps more importantly, the writer has concluded that in failing to properly compensate for contract breaches. The law encourages parties to contracts to make conscious unethical decisions to breach contracts protected by the knowledge that they will not later be called upon to fully compensate for those breaches. The law thus encourages unethical conduct rather than ethical conduct.

Concerns about the failings in the laws of contract damages centered on the failure of the law to compensate for reasonable attorneys' fees when the defendant did not make a good faith attempt to perform the contract, and the failure to compensate for the mental distress or stress caused by the breach when the defendant did not make a good faith effort to perform the contract and the mental distress or stress was reasonably foreseeable by the defendant. With co-author Ivan Fox. "Contract Damages: A Proposal for Reform"¹ set forth below:

1. In cases where a breach of contract has been clearly established and the trier of facts determines that the defendant did not make a reasonable,

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good faith attempt to perform the contract, the trier of the facts may award a reasonable amount of damages for attorneys' fees.

2. In cases where a breach of contract has been clearly established and the trier of the facts determines that the defendant had reasonable grounds to foresee that the breach would cause substantial mental distress and that the defendant did not make a reasonable, good faith attempt to perform the contract, the trier of the facts may award a reasonable amount of damages for mental distress.
3. In the cases where damages are awarded for attorneys' fees and/or mental distress, where the trier of the facts is the jury, the jury shall state the amount so awarded. If the trial judge deems the amount(s) awarded to be excessive, the trial judge shall have the right to reduce any amounts so awarded to a reasonable amount.

It is important for students to consider the effectiveness of specific laws and to determine the extent to which laws accomplish their stated or traditional aims. Students also need to understand the ethical implications of our laws. With such understanding, students may form ethical guidelines for use in their affairs and also offer input in setting the policies of the future. Knowing and understanding the views of students is critically important as part of the necessary exchange and sharing of knowledge which is fundamental to true education. To help students evaluate the effectiveness of the laws of contract damages and to consider the ethical implications of such laws, the survey, which is the subject of this paper, was created. The purpose of this paper is to set forth the positions of the students on the effectiveness and the ethical implications of the laws of contract damages.

The survey consists of nine statements concerning the laws of contract damages and the ethical implications of those laws. The students are asked to register one of five responses to each statement. The responses range from strong agreement to strong disagreement. The opportunity to indicate that the student has no opinion on the matter is also presented. See Appendix A for a copy of the survey. Three hundred fifty students in business law/legal environment classes were surveyed. All of the students had exposure to the laws in question through their studies and as a captive audience provided a 100% response ratio. In a very few cases, students did not register a response to a particular question. Each statement and comments on the observations of the students are set forth below. No attempt at detailed statistical analysis is attempted. Rather, this paper attempts to convey the sense of the views of the students.

Survey and Findings

1. It is ethical to complete those contracts entered into in a fair and free manner.

There was over whelming support for this position with only one student registering strong disagreement and five students registering disagreement. It

seems safe to conclude that the surveyed students strongly believe that the ethical course is to perform a contract freely entered into.

2. Where one has breached a contract, the ethical course of action is to compensate the victim of the breach for the actual loss caused by the breach.

There was even greater support for the idea that the victim of a breach should be compensated for the actual loss. Four students registered disagreement and 14 expressed no opinion out of the 344 registered responses, while 173 express a strong agreement and 153 expressed agreement. Clearly the subjects of the survey believe that victims of breaches of contract should be fully compensated.

3. When it is established in a lawsuit for breach of contract that the defendant did not make a good faith effort to perform the contract, the plaintiff should be entitled to a reasonable award for attorneys' fees.

Only 30 students registered disagreement with this position and 264 supported awards for attorneys' fees. This, of course, runs contrary to the law in its present state which unrealistically perceives each person to be capable as acting as his/her own attorney.

4. Since the law in its present state generally does not allow an award of damages for attorneys' fees in breach of contract cases even if the defendant did not make a good faith effort to perform the contract, the law does not properly compensate plaintiffs.

One hundred eighty-six students agreed with this position and 54 disagreed (5 strongly). Therefore, more than 3 out of 4 students indicated support for the idea that failure to compensate for reasonable attorneys' fees results in the victorious plaintiff not receiving complete redress for the breach. Although not as strong as the response to question #3, this finding follows logically from that basis.

5. Since the law in its present state generally does not allow an award of damages for attorneys' fees in breach of contract cases even if the defendant did not make a good faith effort to perform the contract, the law does not encourage ethical conduct.

Sixty-one and six tenths percent of the respondents expressing an opinion supported this proposition (154 in agreement versus 96 in disagreement). This would seem to be an expression of a serious reservation about the ethical thrust of the law. Ninety-six of those surveyed were apparently unsure and expressed no opinion on the matter.

6. When it is established in a lawsuit for breach of contract both that the defendant did not make a good faith effort to perform the contract and that the defendant should have reasonably foreseen that the breach would cause emotional distress,

the plaintiff should be entitled to a reasonable award for the emotional distress caused by the breach of contract.

Agreement with this position was extremely strong with 214 respondents expressing support (52 strongly) and 73 expressing disagreement (17 strongly). By a margin of slightly less than 3-to-1, student respondents indicated their support for damages for emotional distress in circumstances set forth in the proposition. This differs dramatically from the present law, which does not allow for such damages.

7. Since the law in its present state generally does not allow an award of damages for mental distress in breach of contract cases even if the defendant did not make a good faith effort to perform the contract and the mental distress was foreseeable, the law does not properly compensate plaintiffs.

This proposition would seem to follow logically from statement #6 and it received strong support, but not to the same extent as the previous statement. One hundred fifty-six respondents supported this principle and 90 disagreed. So, by slightly more than a 5-to-3 ration, students registered their belief that the law does not properly compensate plaintiffs in situations where emotional distress is foreseeable and caused by a breach in a situations where the defendant did not truly make an effort to perform the contract. It should be noted that a relatively high number (103) expressed no opinion on this matter.

8. Since the law in its present state generally does not allow an award of damages for mental distress in breach of contract cases even if the defendant did not make a good faith effort to perform the contract and the mental distress was foreseeable, the law does not encourage ethical conduct.

Support was substantial for this position, but not as strong as the support for propositions #6 and #7 to which it is related. On hundred thirty-eight respondents supported this idea while 121 opposed. Again, a high number of respondents were apparently undecided, as 95 expressed no opinion.

9. In a lawsuit for breach of contract when damages are awarded for attorneys' fees and/or mental distress, the jury should state the amount awarded. If the trial judge deems the amount(s) awarded for attorneys' fees an/or mental distress to be excessive, the trial judge should have the right to reduce the amount(s) to a reasonable amount.

Possibly as a safeguard against abuse, respondents overwhelmingly advocated this position with 247 expressing agreement (91 strongly) and a mere 48 expressing disagreement (15 strongly). By more than 5-to-1, the students support this safeguard on the system they envision.

Conclusions

The laws establishing contract damages originated centuries ago. Significant principles of the damage laws remain in effect relatively unchanged.

In earlier, simpler times, perhaps it was feasible an/or advisable to represent oneself in litigation. Today, with the acknowledged complexity of business matters and of life itself, most people would be neither competent nor confident representing themselves. Most would turn to attorneys for legal representation. The responses of the students seem to recognize this fact by strongly advocating that a victorious plaintiff should be entitled to a reasonable sum for attorneys' fees. It should be noted that the responses indicate very strong support for the proposition that the ethical course to take when a contract is breached is to compensate the party aggrieved by the breach. The students' responses recognize that the failure to provide for reasonable attorneys' fees often leaves the innocent victim of the breach without true compensation. Therefore, the conclusion is reached that the law in its present state does not encourage ethical conduct, i.e., and true compensation for the loss caused by the breach.

Two additional matters are worth noting. First, the survey elicited the students' views on a situation where the defendant did not make a good faith effort to perform the contract. Second, people who have studied these matters are aware that unscrupulous parties will often use the present law's prohibition of awards for attorneys' fees in contract cases as a weapon. In short, they elect the unethical choice of breaching the contract and defying the other party to sue knowing that the cost of paying one's attorney frequently makes the institution of the lawsuit impractical.

Stress and mental distress were certainly present throughout history, but it seems to be generally accepted that modern life contains a high amount of stress. The role of mental distress and stress in many mental and physical illnesses is well documented.

It is well established that the failure to receive that which one has contracted for in good faith often causes mental distress. In situations where it is established that the defendant did not make a good faith effort to perform the contract and the defendant should reasonably have foreseen that the breach would cause mental distress, the students indicate that the ethical thing to do is to compensate the victim of the breach in damages for this loss. The students would seem to be in agreement with the following position.

Since there is no recovery for attorneys' fees and damages due to stress and mental disturbance caused by the breach, the law does not properly compensate those aggrieved by the breach. In failing to do so, the law encourages the unethical choice of contract breach over contract performed. As the law now stands, a party who does not wish to do what is contractually called for, e.g., pay what is due, may refuse to do so and put the other side in a position where it must incur the cost of an attorney to pursue its rights. Upon a successful conclusion of the case, the plaintiff must still absorb the expense of paying the attorney. At worst, the breach g party has simply postponed doing what was required of it. At

best, if the aggrieved party does not persevere through lawsuit, the breaching party may completely avoid the responsibility for the breach. In any event, the breaching party is not called to account for whatever mental distress or stress the breach has caused in spite of the fact that it may have been clear that such distress or stress was a probable consequence.²

The responses of the students seem to reflect thoughtful consideration of the issues raised by the questionnaire and a high degree of ethical integrity. The students strongly supported as ethical the fulfillment of one's contracts and in the event of failure to do so, compensation for the aggrieved party. Their strong support for the inclusion of reasonable attorneys' fees where the breaching party did not make a good faith effort to perform the contract would seem to be an attempt to truly put the victorious plaintiff in the position the plaintiff would have occupied had the contract been properly carried out. More difficult to quantify would be an award from mental distress or stress reasonably foreseen by the breaching party and caused by a defendant who failed to make a good faith effort to perform. Accordingly, although the students supported such awards, their support was not nearly as strong as their support for the attorney' fees.

Inasmuch as the students expressed that it was ethical to compensate for breaches of contract and that it was appropriate to include in such compensation sums for reasonable attorneys' fees and mental distress, their support for the proposition that the law in its present form was not encouraging ethical action followed logically. Further, they overwhelmingly supported the proposition that the trial judge should have the right to reduce to a reasonable sum any excessive amount awarded for attorneys' fees or mental distress.

¹ Arthur M. Magaldi & Ivan Fox, *Contract Damages: A Proposal for Reform*, J. of L. & Com., Spring 1997, at 6.

² *Id.* At 8.