

Don't Make Promises—Part II

The Price To Be Paid

Last month, we set forth the facts, trial court ruling, and appeal arguments in *Circle B Enterprises, Inc. vs. Steinke*, decided on September 15, 1998 by the Supreme Court of North Dakota. The case involved breach of a contract to restore a 1961 Corvette, and addressed under that state's law whether a breaching restorer can nevertheless recover the value of the work it did do, and the effect of a contract provision specifying in advance the damages for breach.

The Supreme Court began by noting that a party who fails substantially to perform may not recover at all under the contract. Substantial performance means performance in good faith, except as to unimportant and unintentional omissions or deviations resulting from mistake or inadvertence. It observed that the trial court found Steinke had completed less than one-third of the work remaining on the Corvette. "We decline to characterize the magnitude of the deviations from this contract as unimportant. We hold as a matter of law Steinke failed to substantially perform his con-

tract with Circle B, and he is not entitled to recover [based on the] contract for work performed after October 26, 1994."

Nevertheless, the court noted that a contractor who has not substantially performed may be entitled to payment for whatever benefit was conferred to the other party under "quantum meruit" (the reasonable value of goods and services rendered) or "unjust enrichment."

However, the parties may agree that a breaching contractor is not entitled to such payment if the value of the partial performance was already taken into account in a "liquidated" (specified) damages provision of the agreement.

Here, the contract specified, if Steinke failed to finish restoring the car by April 21, 1995, a "penalty" of \$100 a day would be deducted from the \$10,333 balance to be paid for the work remaining at the time of the contract, and "further, Circle B [would] then be free to contact a third party to perform what [Steinke] had agreed to perform on this vehicle, and any amount which Circle B does have to pay to that third party [would] be the responsibility of [Steinke]." Although penalties imposed by a contract for nonperformance are generally not enforceable, "liquidated" damages for nonperformance may be enforceable where the parties have agreed upon an amount presumed to be the damage from a breach where it would be impracticable or extremely difficult to determine the actual damage.


Here, the trial court found "damages stemming from [Steinke's] breach of contract... [were] difficult to ascertain at the time of contracting." The Supreme Court concluded that the agreement repre-

sented the parties' reasonable endeavor to implement a valid liquidated damage remedy. However, the appellate court disagreed with the trial court's refusal to implement the clause for liquidated damages (the trial court instead awarded Circle B \$18,000 for lost advertising use of the car for six years at \$3,000 a year). "The court's calculation of damages failed to follow the valid liquidated damage remedy specified in the contract and was, therefore, erroneous as a matter of law. Under the plain language of the liquidated damage agreement, Steinke's failure "to complete and deliver the vehicle [to Circle B] no later than April 21, 1995" entitled Circle B to "\$100 per day assessed and deducted from the amount of \$10,333."

The car was returned to Circle B on September 28, 1995—160 days after the agreed completion and delivery date. The effect of Steinke's failure to complete and deliver the vehicle to Circle B by April 21, 1995, results in a \$16,000 assessment that first reduces the \$10,333 contract price. [T]his clause of the liquidated damage agreement effectively reduced the \$10,333 contract price for the remaining work to zero, and authorized an assessment of \$5,667 [\$16,000 minus \$10,333] against

Steinke for his extreme delay."

"The second sentence of the liquidated damage agreement imposed an additional obligation on Steinke: 'Further, Circle B will then be free to contact a third party to perform what [Steinke] had agreed to perform on this vehicle, and any amount which Circle B does have to pay to that third party will be the responsibility of [Steinke].' ... Circle B was not obligated to pay Steinke the balance due on the contract and Steinke was required to pay Circle B the \$5,667 assessment and the third-party costs of \$9,251 to finish restoring the car."

"We hold Circle B is entitled to \$14,918 [\$5,667 plus \$9,251] as liquidated damages and to \$2,161 for return of the credit on its account with Steinke. Therefore, we modify the judgment to award Circle B \$17,079 in damages and, as modified, we affirm." 

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