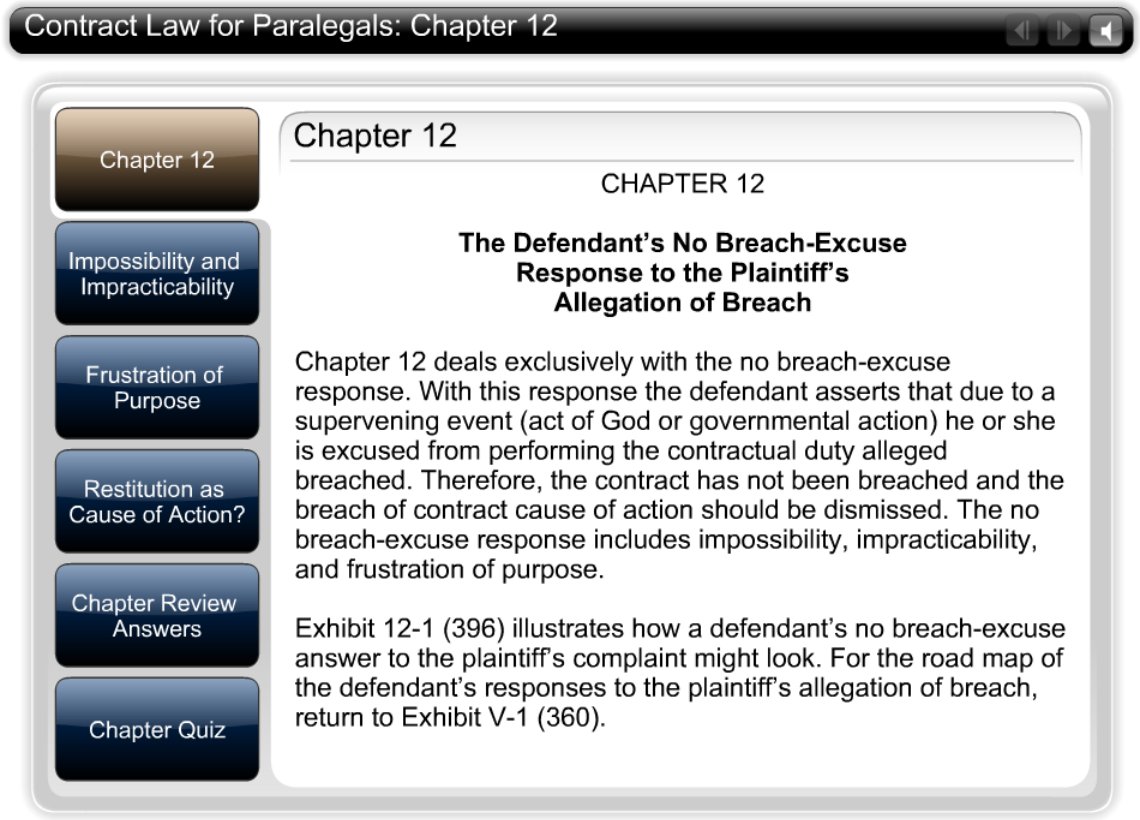
Contract Law for Paralegals: Chapter 12

Chapter 12



Tab Text

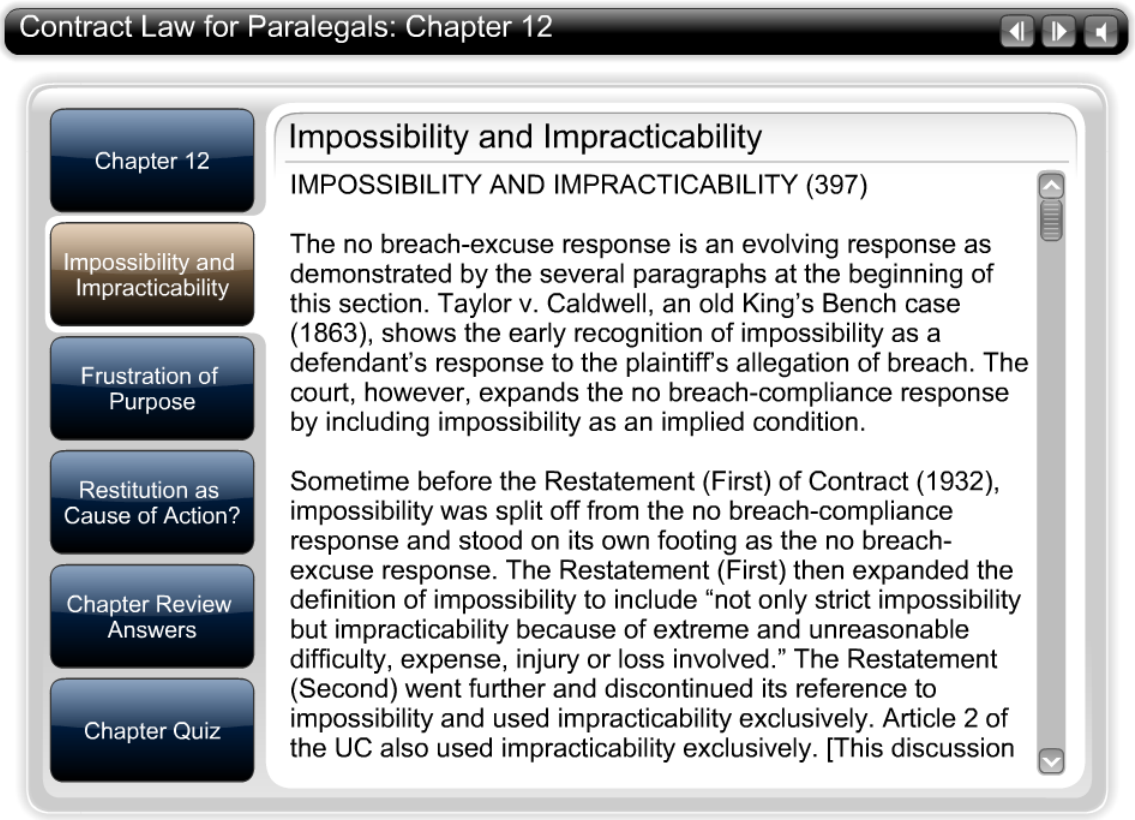
CHAPTER 12

The Defendant's No Breach-Excuse Response to the Plaintiff's Allegation of Breach

Chapter 12 deals exclusively with the no breach-excuse response. With this response the defendant asserts that due to a supervening event (act of God or governmental action) he or she is excused from performing the contractual duty alleged breached. Therefore, the contract has not been breached and the breach of contract cause of action should be dismissed. The no breach-excuse response includes impossibility, impracticability, and frustration of purpose.

Exhibit 12-1 (396) illustrates how a defendant's no breach-excuse answer to the plaintiff's complaint might look. For the road map of the defendant's responses to the plaintiff's allegation of breach, return to Exhibit V-1 (360).

Impossibility and Impracticability



Tab Text

IMPOSSIBILITY AND IMPRACTICABILITY (397)

The no breach-excuse response is an evolving response as demonstrated by the several paragraphs at the beginning of this section. Taylor v. Caldwell, an old King's Bench case (1863), shows the early recognition of impossibility as a defendant's response to the plaintiff's allegation of breach. The court, however, expands the no breach-compliance response by including impossibility as an implied condition.

Sometime before the Restatement (First) of Contract (1932), impossibility was split off from the no breach-compliance response and stood on its own footing as the no breach-excuse response. The Restatement (First) then expanded the definition of impossibility to include "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." The Restatement (Second) went further and discontinued its reference to impossibility and used impracticability exclusively. Article 2 of the UC also used impracticability exclusively. [This discussion of the no breach -

excuse response provides the opportunity to demonstrate that law is not stagnant but evolves over time.]

After this short discussion, the text lists and discusses the following four questions that focus the impossibility and impracticability response:

1. Did an unexpected event occur after the contract was formed?
   - The no breach-excuse response requires an event (act of God or governmental action) and not the action or inaction of the other party, which may trigger a no breach-justification response.
   - The event must occur after and not before contract formation.
   - The event must be unexpected, that is, it must be unpredicted or unanticipated by the parties.
2. Did the occurrence of this event render the promisor's performance of his or her contractual duty impossible or impracticable?
   - Impossibility occurs when the promisor is totally unable to perform.
   - Impracticability occurs when the promisor can perform but performance is unreasonably difficult or costly.
3. Was the risk associated with the occurrence of this event allocated by contract or custom?
   - Allocation of the risk associated with the occurrence of the event takes the event out of the unpredicted or unanticipated category.
4. Was the nonoccurrence of this event a basic assumption on which the contract was made?
   - The nonoccurrence of this unforeseen supervening event must have been something the parties took for granted at the time of contract formation.

Example 12-1 (400) involves the death of one of the contracting parties, the manager of a baseball team. The example follows the road map when the team's owner brings a breach of contract action against the manager's estate. Step 5 is the defendant's no breach-excuse response. The example demonstrates the application of the four no breach-excuse questions to a set of facts.

PARALEGAL EXERCISE 12.1 (401) involves applying the four-step no breach-excuse analysis to a judicial opinion, Di Scipio v. Sullivan (402), a case in which the purchaser of real estate unexpectedly died after paying a deposit but before closing. The seller brought a breach of contract action against purchaser's administrator alleging the failure to close as the breach. The administrator answered with no breach-excuse.

1. An unexpected event (death of the purchaser) occurred after the contract for the sale of the real estate was formed.
2. The occurrence of this event (death of the purchaser) did not render the performance of the purchaser's contractual duty impossible or impracticable since the purchaser's administrator could perform on the purchaser's behalf.

The fact that performance will be financially difficult or will create an economic hardship does not rise to the level of impossibility or impracticability.

PARALEGAL EXERCISE 12.2 (403) illustrates the first question in the no breach-excuse analysis. Did an unexpected event occur after the contract was formed?

1. The event was the high winds on the Fourth of July and they did occur after the contract was formed. The question for discussion is whether high winds on the Fourth of July are expected or unexpected.

2, 3, & 4. If unexpected, the occurrence of this event would need to render that Browning's performance of its contractual duty impossible or impracticable, the risk associated with the occurrence of this event was not allocated by contract or custom, and the nonoccurrence of this event was a basic assumption on which the contract was made, then the no breach-excuse response would be effective.

PARALEGAL EXERCISE 12.3 (403) illustrates the second question in the no breach-excuse analysis. Did the occurrence of this event render the promisor's performance of his or her contractual duty impossible or impracticable?

1. The theft of the sculpture was the supervening event and was unexpected.
2. Because the sculpture was stolen, delivery became impossible.

3 & 4. The defendant's no breach-excuse response would be effective assuming the risk associated with the occurrence of this event was not allocated by contract or custom and the nonoccurrence of this event (nonoccurrence of the theft of the sculpture) was a basic assumption on which the contract (to create and deliver the sculpture) was made.

PARALEGAL EXERCISE 12.4 (403) illustrates the second and third questions in the no breach-excuse response.

1. The train derailment was the event that occurred after contract formation and was unexpected.
2. Whether the damage to the trucks (as a result of the derailment) made performance of the contract impossible depends on whether the contract was for these specific trucks or whether replacement trucks could be shipped.
3. Even if the performance of the contract (delivery of the trucks) was impossible, the risk of nonperformance would be allocated by contract since Article 2 of the UCC (this contract was for the sale of goods, i.e., trucks) designates who bears the risk of loss if the parties fail to designate.

PARALEGAL EXERCISE 12.5 (404) focuses on the fourth question in the no breach-excuse response. Was the nonoccurrence of the unexpected supervening event a basic assumption on which the contract was made?

1. The supervening event was the disease of the potatoes and such a disease is unexpected.
2. Because the potatoes under contract were to be grown on certain land (to be grown on Baldwin's farm), performance of the contract (delivery of the potatoes) became impossible.
3. The risk of nonperformance (nondelivery of the potatoes) due to the event (the disease) was neither allocated by contract or custom.
4. The issue then becomes "was the nonoccurrence of this event (the disease) a basic assumption on which the contract was made?"

PARALEGAL EXERCISE 12.6 (404) focuses on the fourth question in the no breach-excuse response. Was the nonoccurrence of the unexpected supervening event a basic assumption on which the contract was made?

1. The supervening event was the skiing injury and accidents by their very nature are unexpected.
2. Howard's broken legs prevented him from performing motorcycle stunts and therefore his performance became impossible.
3. The risk of not performing the stunts was neither allocated by contract or by custom.
4. Was the nonoccurrence of a skiing injury a basic assumption on which the contract was made?

PARALEGAL EXERCISE 12.7 (405) involves the death of one of the contracting parties.

1. The supervening event (Brent's death) was unexpected (no indication of health issues that would raise the issue of impending death).
2. Did the occurrence of supervening unexpected event (Brent's death) render the performance of his contractual duty (delivery of the car to Susan) impossible or impracticable? The representative of Brent's estate could have the car delivered to Susan, so the performance of the contract (delivery of the car to Susan) was not impossible.

If the contract is for personal services, death of the promisor renders his or her performance impossible. If the contract is for something other than for personal services (such as the delivery of the car), death of the promisor would not render performance impossible although the promisor's representative rather than the promisor would perform.

PARALEGAL EXERCISE 12.8 (405) involves a change in the law.

1. The supervening event was the change in the law (importation of lamb pelts made illegal by a United States agency) that was unexpected.
2. The governmental ban on the lamb pelts prevented importation of these pelts.

Hudson Bay could not deliver the pelts if delivery was in the United States, and therefore Hudson Bay's performance (delivery in the United States) was impossible. If, however, Hudson Bay were to deliver the pelts in Canada (and it was buyer's responsibility to transport the pelts to the United States, then performance of the contract (delivery in Canada) was not impossible.

PARALEGAL EXERCISE 12.9 (405) involves impracticability rather than impossibility.

At times, an unexpected supervening event makes performance impracticable although not impossible. Courts excuse the promisor's performance "when the [supervening] event is so unusual and unexpected that the performance under the new conditions is entirely different from the performance anticipated at the time of contract formation."

The four-step impossibility analysis will be used for impracticability.

PARALEGAL EXERCISE 12.9 was based on *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916). The Mason Company contracted to take all the gravel it needed for a construction project from Brady's land. After removing 50,000 cubic yards of gravel, Mason discovered that the remaining gravel it needed was underwater and would require dredging and drying, something not required when taking the first 50,000 cubic yards.

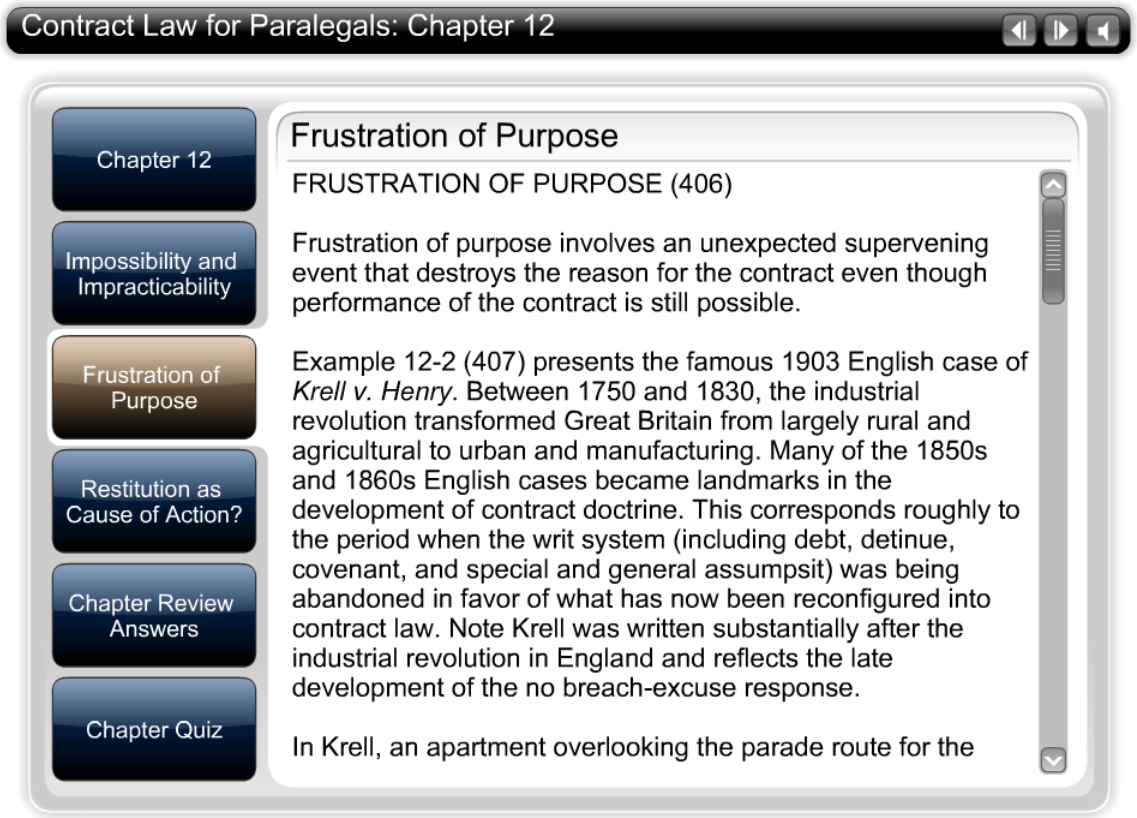
1. Was the water a supervening event or was the water there before contract formation and Mason just misjudged how much gravel was above the water line? Would it make any difference if, at the time of contracting, all the gravel was dry and a flood occurred after the contract was formed?
2. Because the cost of dredging and drying the gravel that was underwater was twelve times the cost of buying dry gravel elsewhere, performance of the contract (buying the gravel) became financially impracticable.
3. The risk of nonperformance (not taking all the gravel needed due to the gravel being underwater) was not allocated by contract or by custom.
4. Was the nonoccurrence of this unexpected event (gravel underwater) a basic assumption on which the contract was made?

PARALEGAL EXERCISE 12.10 (406) gives students a second opportunity to deal with the impracticability issue.

1. The supervening event was the encountering of technical difficulties in production. Was this supervening event unexpected?
2. When it became known that production costs would far exceed any profits to be made under the contract, would the performance of the contract be impracticable?

3. Was the risk of nonperformance (not developing the heat-sensitive device) due to the supervening event (the unexpected technical difficulties in production) allocated by contract or custom?
4. Was the nonoccurrence of this unexpected event (the nonoccurrence of technical difficulties in production) a basic assumption on which the contract was made?

Frustration of Purpose



Tab Text

FRUSTRATION OF PURPOSE (406)

Frustration of purpose involves an unexpected supervening event that destroys the reason for the contract even though performance of the contract is still possible.

Example 12-2 (407) presents the famous 1903 English case of *Krell v. Henry*. Between 1750 and 1830, the industrial revolution transformed Great Britain from largely rural and agricultural to urban and manufacturing. Many of the 1850s and 1860s English cases became landmarks in the development of contract doctrine. This corresponds roughly to the period when the writ system (including debt, detinue, covenant, and special and general assumpsit) was being abandoned in favor of what has now been reconfigured into contract law. Note Krell was written substantially after the industrial revolution in England and reflects the late development of the no breach-excuse response.

In Krell, an apartment overlooking the parade route for the King’s coronation was rented for the occasion. When the coronation was postponed due to the King’s

illness, the owner sued the renter for the balance due on the lease. The renter answered with a no breach-excuse response. Note the no breach-excuse analysis has been altered by adding a frustration of purpose question after the impossibility/impracticablity. The frustration of purpose analysis becomes:

1. What was the external event that led to the promisor's failure to perform, was this event expected or unexpected, and did it occur after the contract was formed?
2. Did the occurrence of this event render promisor's performance of its contractual duty impossible or impracticable?
3. Did the occurrence of this event substantially frustrate the promisor's principal purpose in making the contract?
4. Was the risk of frustration of purpose associated with the occurrence of this event allocated by contract or by custom?
5. Was the nonoccurrence of this event a basic assumption on which the contract was made?

The Paralegal Exercise requires the application of the frustration of purpose analysis to *Krell v. Henry*.

1. The King's illness was the unexpected supervening event.
2. The performance of the contract (using and paying for the use of the rooms) was neither impossible nor impracticable.
3. The purpose of the contract, however, was frustrated since the purpose was to view the coronation that was postponed.
4. The risk of frustration of purpose (no coronation procession) associated with the occurrence of the unexpected supervening event (the King's illness) was neither allocated by contract or custom.
5. The nonoccurrence of this event (the King's sudden illness) was a basic assumption on which the contract was made since the parties had not contemplated such an event when they contracted.

PARALEGAL EXERCISE 12.11 (407) gives students another opportunity to explore the frustration of purpose analysis.

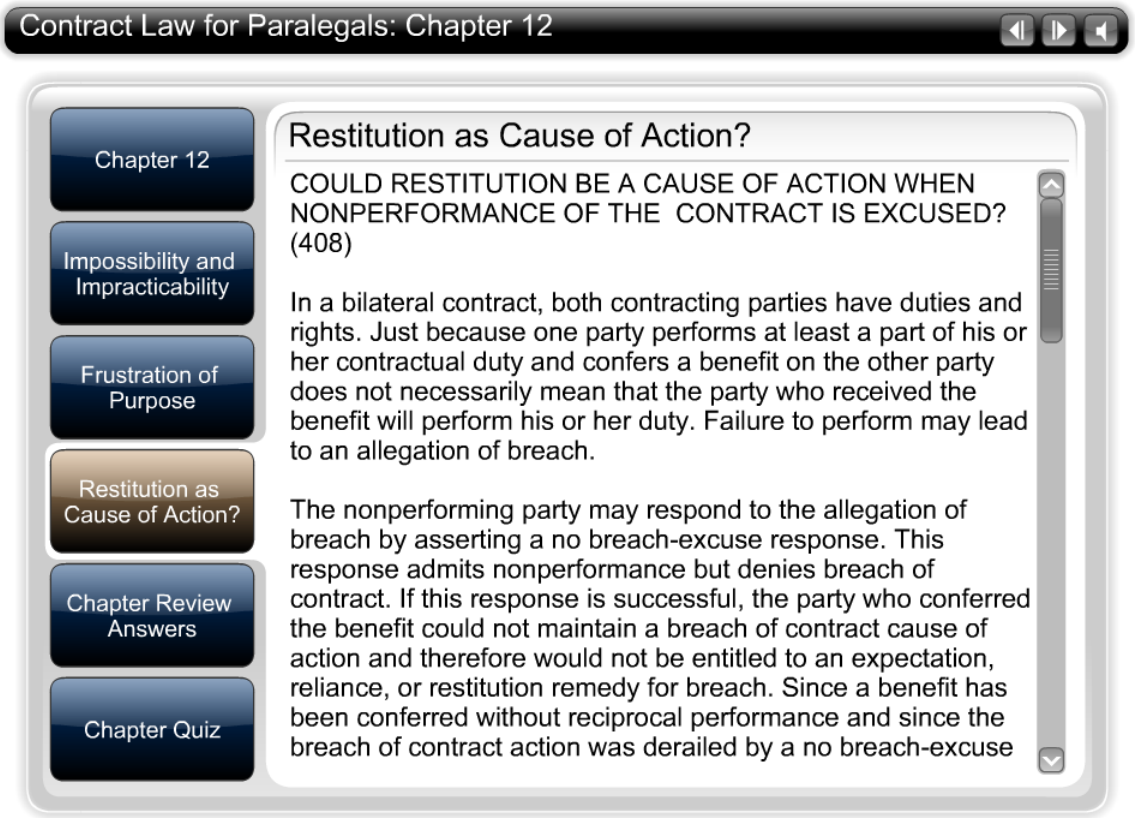
1. The event (the multinational boycott of the Olympic games) was unexpected and occurred after contract formation.
2. The occurrence of the event (the boycott) did not render the California T-Shirt Company performance (buying the Olympic T-shirts) impossible or impracticable since the shirts could be bought even without the Olympics.
3. The occurrence of this event (the boycott) substantially frustrated the buyer's principal purpose in making the contract (reselling the T-shirts for a profit).
4. The risk of frustration of purpose (no market in which to resell) associated with the occurrence of this event (the boycott) was not allocated by contract or by custom.

5. The nonoccurrence of this event (the boycott) was a basic assumption on which the contract was made since the parties never considered that nations would boycott the Olympics and the event would be cancelled.

PARALEGAL EXERCISE 12.12 (408) is another frustration of purpose problem.

1. The external event (the FCC declaration banning the use of satellite dishes by homeowners) led to the promisor's failure to perform (canceling the lease), was unexpected, and occurred after the contract (the lease) was formed.
2. The occurrence of this event (the FCC declaration) did not render the promisor's performance of its contractual duty (leasing the building) impossible or impracticable because nothing prevented the promisor from leasing.
3. The occurrence of this event (the FCC declaration) substantially frustrated the promisor's principal purpose in making the contract (renting the space to use in its business).
4. The risk of frustration of purpose (inability to continue business) associated with the occurrence of this event (the FCC declaration) was neither allocated by contract nor by custom.
5. The nonoccurrence of this event (the FCC declaration banning homeowners' ownership of satellite dishes) was a basic assumption on which the contract was made since the parties could not foresee the FCC's subsequent ban.

Restitution as Cause of Action?



Tab Text

COULD RESTITUTION BE A CAUSE OF ACTION WHEN NONPERFORMANCE OF THE CONTRACT IS EXCUSED? (408)

In a bilateral contract, both contracting parties have duties and rights. Just because one party performs at least a part of his or her contractual duty and confers a benefit on the other party does not necessarily mean that the party who received the benefit will perform his or her duty. Failure to perform may lead to an allegation of breach.

The nonperforming party may respond to the allegation of breach by asserting a no breach-excuse response. This response admits nonperformance but denies breach of contract. If this response is successful, the party who conferred the benefit could not maintain a breach of contract cause of action and therefore would not be entitled to an expectation, reliance, or restitution remedy for breach. Since a benefit has been conferred without reciprocal performance and since the breach of contract action was derailed by a no breach-excuse response, the party who conferred the benefit may be able to maintain a restitution cause of action and receive a restitution remedy. This restitution cause of action is

supported by the Restatement (Second) of Contracts § 377 (1981) (see text 409).

The paragraph leading into Example 12-3 (409) and Example 12-3 focus on the availability of a restitution cause of action when the contract pertains to construction.

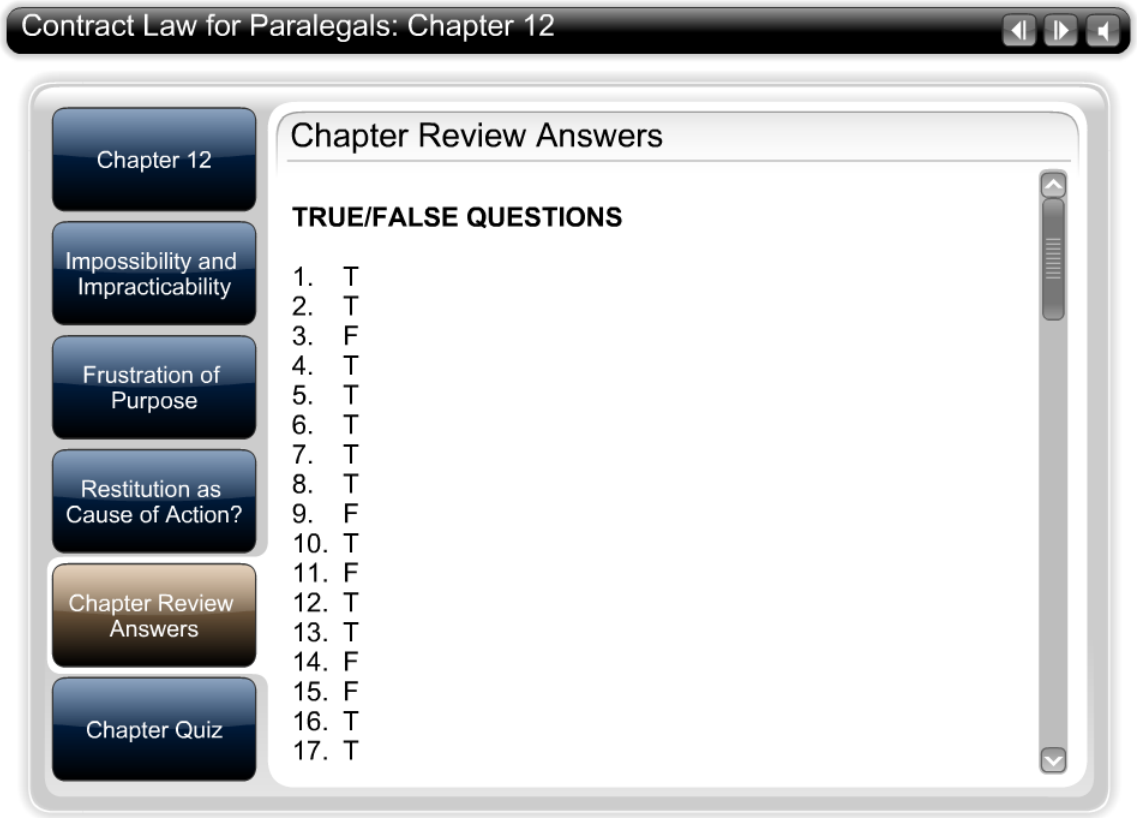
Chapter 12 concludes with a case, Stein v. Shaw (410). We were attracted to Stein since it dealt with the effect of an attorney's disbarment on an attorney/client relationship and the impact of the no breach-excuse response to the relationship between a breach of contract cause of action and a restitution cause of action. The attorney and client had entered into an oral contingent fee contract. [This presents the opportunity to stress that the attorney/client contract should always be in writing.]

After the attorney initiated the lawsuit on behalf of the client and began negotiating for her, he was disbarred from the practice of law. His disbarment was unrelated to this client. The client found another attorney, who ultimately negotiated a settlement. The disbarred attorney sued his former client on two grounds (two counts). The first stated by the court was in restitution (quasi contract) for the reasonable value of his services. The second was for breach of contract for his contingent fee under the contract. The former client moved to dismiss the attorney's complaint (both the restitution and breach of contract counts). The trial court sustained the client's motion finding no cause of action. The attorney appealed to the Appellate Division of the Superior Court and the New Jersey Supreme Court, on its own motion, certified the appeal so it would hear the appeal. The Supreme Court reversed the trial court's judgment as to the restitution cause of action and remanded the case for further proceedings.

The opinion was silent on the breach of contract count. To get to the restitution count, the no breach-excuse response must have been effective to block the breach of contract action. The 4th paragraph of the opinion analogizes disbarment to other supervening events including acts of God such as death. In those cases, the party who conferred the benefit was entitled to a restitution cause of action to recover the reasonable value of his or her services to the recipient, less what the recipient paid another to complete the performance.

The dissent raises an interesting point. Is there a reasonable value of for the services rendered under a contingent fee contract until the contingency has occurred?

Chapter Review Answers



Tab Text

TRUE/FALSE QUESTIONS

1. T
2. T
3. F
4. T
5. T
6. T
7. T
8. T
9. F
10. T
11. F
12. T
13. T
14. F
15. F

16. T
17. T
18. F
19. F

FILL-IN-THE-BLANK QUESTIONS

1. Unexpected event
2. Impossibility
3. Impracticability
4. Frustration of purpose
5. Restitution cause of action

MULTIPLE CHOICE QUESTION

1. c
2. a
3. a, b, & c

SHORT ANSWER QUESTIONS

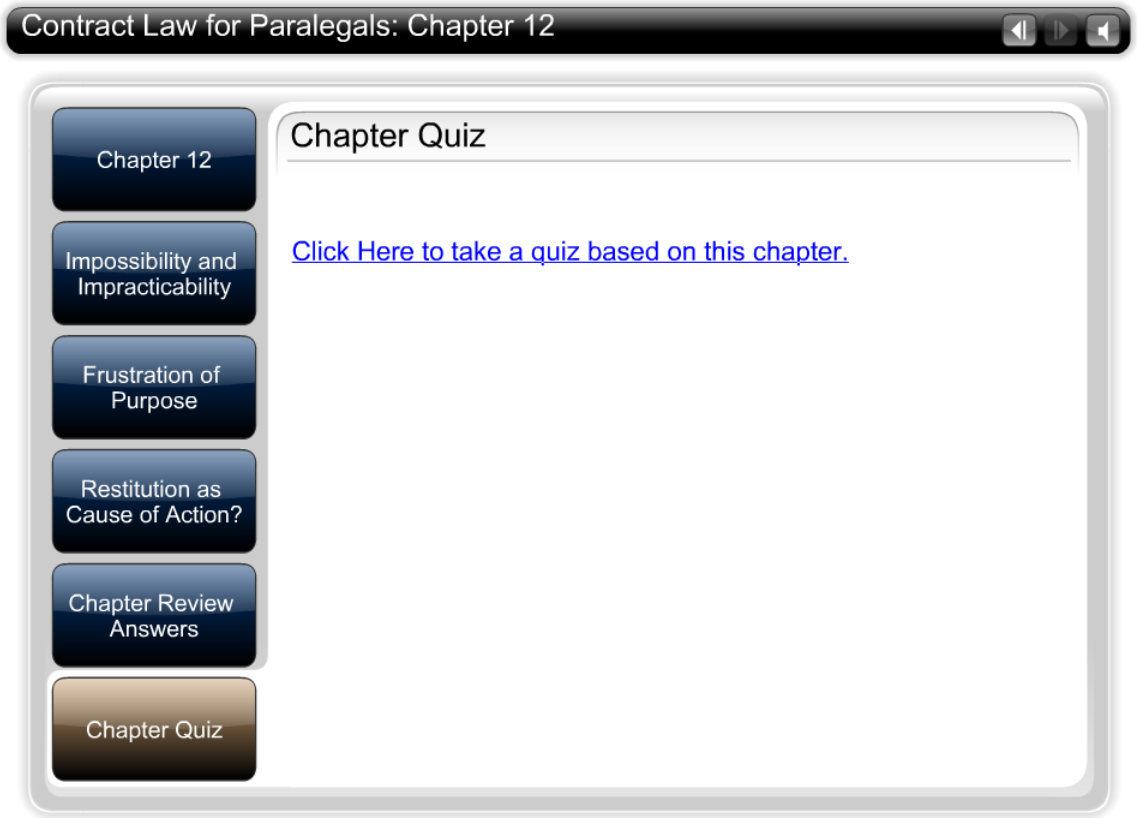
1. The four steps (questions) to be considered are:
(1) Did an unexpected event occur after the contract was formed?
(2) Did the occurrence of the event render the promisor's performance of his or her contractual
duty impracticable?
(3) Was the risk associated with the occurrence of this event allocated by contract or custom?
(4) Was the nonoccurrence of this even a basic assumption on which the contract was made?
2. The five steps (questions) are
(1) What was the external event that led to the promisor's failure to perform, was this event
expected or unexpected, and did it occur after the contract was formed?
(2) Did the occurrence of this event render promisor's performance of its contractual duty
impossible or impracticable?
(3) Did the occurrence of this event substantially frustrate the promisor's principal purpose in
making the contract?
(4) Was the risk of frustration of purpose associated with the occurrence of this event allocated
by contract or by custom?

(5) Was the nonoccurrence of this event a basic assumption on which the contract was made?

3. In the “no breach-compliance” response, the promisor alleges that he or she is complying with the terms of the contract. In the “no breach-excuse” response, the promisor admits that he or she is not complying with the terms of the contract but has an excuse for not complying.

4. WhiteEagle will prevail if George sues him for breach of contract. The external event that led to the promisor’s failure to perform was the death of “Run Away,” the racehorse. The death of the horse meant that WhiteEagle’s delivery of the horse was impossible. Evidently, the risk of the horse not living so it could be delivered was not allocated by contract or custom. A viable racehorse was the basis of the contract. Therefore, WhiteEagle will prevail in his no breach-excuse response.

Chapter Quiz



Tab Text

Click Here to take a quiz based on this chapter.