Breach of Contract Claims

2026 Construction Law Seminar | Spokane, WA

Allen Benson & Cynthia Park

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Speaker Introductions

Allen R. Benson

Allen is a Member at Ogden Murphy Wallace, PLLC. His legal practice focuses primarily on construction transactions and disputes. He advises public entities, developers, contractors, and subcontractors through all phases of construction projects—from drafting and negotiating construction and design agreements to the final resolution of disputes, including trial and appeals. Allen has successfully litigated numerous complex civil and construction disputes before administrative bodies and trial courts in Washington and Alaska, including contractor claims for disruption and delay, differing site conditions, defective design, equitable adjustments, and wrongful termination.

Cynthia S. Park

Cynthia is a Senior Associate with Ogden Murphy Wallace, PLLC. She primarily handles construction law matters, advising public entities, contractors, and subcontractors on various issues that arise during the course of a project. Cynthia also represents corporations, small businesses, and public entities in commercial disputes. Throughout her practice, Cynthia has worked with clients to navigate the different stages of litigation, including from discovery through appeal.

Contract Formation

A “contract” is nothing more than a promise or set of promises which the law will enforce. A “promise,” in turn, is a “manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made.”

1 Bruner & O’Connor on Construction Law § 2:1.

A contract is a promise or set of promises for the breach of which the law gives a recovery or the performance of which the law in some way recognizes as a duty.

Restatement (Second) of Contracts § 1.

Contract Formation (cont.)

Washington follows the objective theory of contracts.

- Washington "adopted the 'context rule' and recognized that intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)).

- Under the "context rule," "[d]etermination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. *Berg*, 115 Wn.2d at 667.

- Adoption of the context rule did not change Washington's adherence to the objective theory of contracts: "Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst Commc'ns, Inc.*, 154 Wn.2d at 503.

- Mutual assent is required for the formation of a valid contract. *Yakima Cnty. (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993)).

Contract Formation (cont.)

Forms of contracts.

- Washington recognizes two types of contracts: bilateral and unilateral. *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 35-36, 330 P.3d 159 (2014).

- "The vast majority of contracts are bilateral, where two parties exchange reciprocal promises and one party's promise provides consideration for that of the other party." *Storti*, 181 Wn.2d at 35 (citing *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950)).

- Unilateral contracts, however, reflect the promise of only one party. *Storti*, 181 Wn.2d at 36. And, the "second party may accept that promise and establish a unilateral contract only through performance of her end of the bargain. *Id.* Unilateral contracts are still "defined by traditional contract concepts of offer, acceptance, and consideration." *Id.* (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 228-29, 685 P.2d 1081 (1984).
  - Example: employee handbook provisions.

Contract Formation in Construction

In construction, the "contraction formation process is controlled by the owner's decisions regarding its desired: (1) project delivery method, (2) process for source selection, and (3) type of contract, and extent of risk-sharing between the parties. The traditional formation processes are competitive negotiation and competitive bidding."

Bruner & O'Connor on Construction Law § 2:13.

Case Law Example: *City of Roslyn v. Paul E. Hughes Const. Co., Inc.*, 19 Wn. App. 59, 573 P.2d 385 (1978) (applying *Blue Mt. Const. Co. v. Grant Cnty. Sch. Dist. 150-204*, 49 Wn.2d 685, 688, 306 P.2d 209 (1957).

Common Contracts in Construction

Cost-Plus

Design-Build

Guaranteed Maximum Price

Incentive Construction

Integrated Project Delivery

Lump-Sum

Time & Materials

Unit Price

Contract Elements - Offer

> An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Restatement (Second) of Contracts § 24.

- In other words: "an offer must evidence an intent to be bound by the terms of a proposal." *Storti*, 181 Wn.2d at 37 (citing Restatement (Second) of Contracts § 24.

Contract Elements – Offer (cont.)

Offeror is the master of the offer.

- "It is well established that the offeror is the master of his offer under traditional contract law principles." *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 590, 998 P.2d 305 (2000) (Justice Sanders, dissenting); *Discover Bank v. Ray*, 139 Wn. App. 723, 727, 162 P.3d 1131 (2007).

- An offer or an illusory promise?
  - "An intention to do a thing is not a promise to do it . . . [Therefore] [i]f a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a *further expression of assent*, he had not made an offer." *Garza v. Perry*, 25 Wn. App. 2d 433, 447, 523 822 (2023) (emphasis in original).

  - "An 'illusory promise' is a purported promise that actually promises nothing because it leaves to the speaker the choice of the performance or nonperformance. When a 'promise' is illusory, there is no actual requirement upon the 'promisor' that anything be done because the 'promiseor' has an alternative which, if taken, will render the 'promise' nothing." *Interchange Assocs. v. Interchange, Inc.*, 16 Wn. App. 359, 360, 557 P.2d 357 (1976).

Contract Elements – Acceptance

Acceptance is an expression (communicated by word, sign, or writing to the person making the offer) of the intention to be bound by the offer's terms.

- *Veith v. Xterra Wetsuits, L.L.C.*, 144 Wn. App. 362, 366, 183 P.3d 334 (2008)

Must be Mutual Assent to Essential Terms:

- Requires "an objective manifestation of mutual intent on the essential terms of the promise."
  - *Peoples Mortg. Co. v. Vista View Builders*, 6 Wn. App. 744, 747–48, 496 P.2d 354 (1972).
- Ambiguity of Terms Not Necessarily Fatal.
  - Courts resolve ambiguity using context (other provisions of contract) and, if necessary, parole evidence. *See Peoples Mortg. Co. v. Vista View Builders*, 6 Wn. App. 744, 748-49, 496 P.2d 354 (1972).

"The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract."

- *Blue Mt. Constr. Co.*, 49 Wn.2d at 688.

Contract Elements – Acceptance

Acceptance = Promise to Perform OR Commencement of Performance

- Preparations to perform, even if necessary / essential, are not sufficient for acceptance.
- Acceptance by performance must provide actual (not prospective) benefit to offeror.
- *See Knight v. Seattle First Nat. Bank*, 22 Wn. App. 493, 497-98, 589 P.2d 1279 (1979).

Silence Can Constitute Acceptance if:

- The offeree has reasonable opportunity to reject offered services, but accepts the benefit of them under circumstances which would indicate to a reasonable person that the services were offered with the expectation of compensation;
- The offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer; OR
- Prior dealings between the offeror and offeree give the offeror reason to understand that silence or inaction is intended as a manifestation of assent, and the offeror does so understand.
- *See* Restatement (First) of Contracts § 72 (1932).

Contract Elements – Acceptance

Hypothetical – Valid Contract?

Contractor sends an email to Subcontractor: "I was hired by ABC Company to build a new warehouse. If you perform the electrical work on this project, I will reimburse all of your costs and pay a 20% markup." The electrical plans for the project are attached to the email. Subcontractor responds to the email: "I'll do it for a 25% markup." Contractor does not respond. Subcontractor arrives on site the following day and begins work.

Do Contractor and Subcontractor have a valid contract? No.

- Contractor's email is offer which could be accepted by performance.
- However, Subcontractor's response is a counter-offer which constitutes rejection of the original offer.
- Contractor did not accept Subcontractor's new offer.

What if Contractor watched – and allowed – Subcontractor to Complete the Work Without Disputing the Existence of Any Agreement?

- Valid Contract – Contractor's Silence Constitutes Acceptance

Contract Elements – Consideration

Consideration required.

- "It is well established in Washington that every contract must be supported by consideration to be enforceable." 25 Wash. Practice Series § 2:23.
  - An enforceable contract requires consideration. *SAK & Assocs., Inc. v. Ferguson Const., Inc.*, 189 Wn. App. 405, 411, 357 P.3d 671 (2015).

- What is consideration?
  - "Consideration is a bargained-for exchange of promises or any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in the exchange." *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 741, 406 P.3d 1199 (2017) (quoting *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004)) (internal quotations omitted).

- Offer and consideration:
  - If the promise is illusory, *i.e.,* not an offer, then there is no consideration and no enforceable obligation. *SAK & Assocs., Inc.*, 189 Wn. App. at 411-12; *Interchange Assocs.*, 16 Wn. App. at 361 ("An illusory promise is neither enforceable nor sufficient consideration to support enforcement of a return promise.").

  - HOWEVER: "It is well recognized that partial performance provides adequate consideration for enforcement of what otherwise might be an illusory provision granting unilateral control to one party." *Id.* at 414.

- Consideration in construction contracts:
  - "In construction contracts, consideration usually consists of reciprocal promises of the contractor and the owner, or the subcontractor and the general contractor, to perform work and to pay for that work." *SAK & Assocs., Inc.*, 189 Wn. App. at 412.

Contract Modifications / Change Orders

Enforceable modifications to a contract.

- Contract modifications are recognized if such modifications comply with the following requirements:
  1. Modification must be mutual: there must be a manifestation of the objective intention of the parties mutuality of assent.
  2. Modification must be supported by **new** consideration independent of the consideration involved in the original agreement.
  3. Mutual modification by subsequent agreement must be clear; it cannot be based on doubtful or ambiguous factors.

25 Wash. Practice Series § 11:1.

- "It is well settled in Washington that 'a contract may be modified or abrogated by the parties thereto in any manner they choose, notwithstanding provisions therein prohibiting its modification or abrogation except in a particular manner." *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 82, 248 P.3d 1067 (2011).

Contract Modifications / Change Orders (cont.)

Certainty of change in construction.

- Change is expected on construction projects. "Construction 'rarely proceeds as planned,' because 'there are always unexpected events and conditions that occur during construction and impact the contractor's ability to complete the project as planned.'" 1 Bruner & O'Connor on Construction Law § 4:1 (citing Construction Planning & Scheduling 4-5 (1997) (a publication of the Associated General Contractors of America)).
    - "Just as no plan of battle survives first contact with the enemy, it appears no plan of construction survives first contact with the elements." *Gen. Constr. Co. v. Pub. Utility Dist. No. 2 of Grant Cnty.*, 195 Wn. App. 698, 702, 380 P.3d 636 (2016).

- A change or an extra?
    - Change: an alteration to an existing contract requirement concerning work that is already required to be done.
    - Extra: Additon to the contract involving work that had not been included in the original agreement.

1 Bruner & O'Connor on Construction Law § 4:1; *see Campos-Chaves v. Garland*, 602 U.S. 447, 144 S. Ct. 1637, 219 L. Ed. 2d 179 (2024).

Contract Modifications / Change Orders (cont.)

Written order typically required.

- Construction contracts with changes clauses or provisions typically require that changes be made by written order. 1 Bruner & O'Connor on Construction Law § 4:37; *see e.g., Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 320 P.3d 130 (2014); *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 619, 821 P.2d 63 (1991); *CR Constr., LLC v. Corstone Contractors LLC*, 31 Wn. App. 2d 1084, 2024 WL 3650244, at *1 n. 2 (2024) (unpublished opinion).

- "A change order is a written instrument prepared by the Contractor and signed by the Contractor and Owner, and may be signed by the Architect at the Owner's discretion, stating their agreement upon the following: the change in the work; the amount of the adjustment, if any, in the Contract Sum; and the extent of the adjustment, if any, in the Contract time." *CR Constr., LLC*, 2024 WL 3650244, at *1 n.2; *see also Gilbert H. Moen Co. v. Spokane River Assocs.*, 88 Wn. App. 1064, 1997 WL 789726, at *2 (1997) (unpublished opinion) ("A change order is a written instrument prepared by the architect and signed by the owner, contractor and architect stating their agreement on the change, price adjustment if any and time adjustment if any.").

Contract Modifications / Change Orders (cont.)

Writing requirement waived.

- Under circumstances, courts have been willing to find waiver of the requirement that change orders be made in writing:
  - Course of dealing between persons with authority demonstrates – either by direct or circumstantial evidence – that there writing requirement was waived.
  - Oral modification of the written contract by persons in authority.
  - Prior contract authorization for payment for increases in estimated quantities of agreed work as distinguished from different extra work.
  - Formation of a separate express, oral, or implied contract not governed by the changes caluse of the inapplicable written contract.
  - Restitutionary principles of unjust enrichment where extra work is performed with the full knowledge of the other party.
  - Frustration of purpose.
  - Knowledge of performance of changed work and of the contractor's expectation to be paid for it.
  - Breach of the implied covenant of good faith and fair dealing.

1 Bruner & O'Connor on Construction Law § 4:1

Case Law Example: *Skanska USA Bldg. Inc. v. 1200 Howell St., LLC*, 33 Wn. App. 2d 1055, 2025 WL 262389, at *13-24 (2025) (unpublished opinion).

Breach of Contract Claim - Elements

1. Valid Contract
    i. Written or Oral
    ii. Elements
    iii. Statute of Frauds

2. Duty Imposed by the Contract
    i. Affirmative and Negative Duties
    ii. Express vs Ambiguous
    iii. Materiality

3. Breach of Contractual Duty
    i. Breach by Act or Omission
    ii. Common Construction Examples

4. Damages Proximately Caused by Breach
    i. Expectation Interest / Benefit of the Bargain
    ii. Exculpatory Clauses

Claim Elements – Duty & Breach

Must prove specific duty imposed by contract and breach of that duty.

Type of Breach:

- Standard / Non-Material
- Material / Default

Manner of Breach:

- Non-Performance
- Delayed Performance
- Insufficient Performance

Affirmative Defense – Excuse of Performance

- First Breach Rule
  - A material breach by one party excuses further performance of the other. A party is barred from enforcing a contract that it has materially breached. *Rosen v. Ascentry Technologies, Inc.*, 143 Wn. App. 364, 369, 177 P.3d 765 (2008).
- Other Party's Wrongful Interference with Performance
- Waiver / Estoppel

Implied Duty of Good Faith & Fair Dealing

Where Contract Provides One Party with Discretion to Determine Contract Term, that Party must Exercise its Discretion "Reasonably."

- Implied covenant "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance."
  - *Conway Construction Company v. City of Puyallup*, 197 Wn.2d 825, 833-34 (2021).

Common Examples:

- "If the remedy does not take place to the satisfaction of the Contracting Agency, the Engineer may…terminate the Contract."
  - WSDOT Standard Specs § 1-08.10(1).
- "Substantial Completion Date is the day the Engineer determines the Contracting Agency has full and unrestricted use and benefit of the facilities…"
  - WSDOT Standard Specs § 1-01.3.
- If Contractor and Owner reach a global resolution of any claim or dispute that includes one or more of Subcontractor's Owner-Related Disputes, Subcontractor's recovery for Subcontractor's Owner Related Dispute(s) will be computed on a pro-rata basis after Contractor adjusts the Subcontractor's Claim to an amount the Contractor determines equitable…

Claim Elements - Damages

Types of Damages

- Expectation Damages (Benefit of the Bargain) – An amount sufficient to put the injured party in a position monetarily equivalent to the position of the breaching party had performed.
- Restitution Damages – The measure of recovery is often the value of the benefit conferred.
- Reliance Damages – Expenditures made in preparation for performance or in the course of performance.
- Consequential Damages – damages that are the proximate result of breaching parties' non-performance and were contemplated when the contract was made.
- Liquidated Damages – pre-agreed amount in the event of a breach.

Exculpatory Clauses & Damages Limitations

Limitations on Damages

- "The general rule is that a party to a contract can limit liability for damages resulting from negligence."
  - *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 797 P.2d 477 (1990).
- Strictly construed.
- Must be conspicuous & clear.
- Commonly found in construction contracts.
  - Waiver of consequential damages & lost revenue/profits.
  - Specific / limited recovery for specified breaches (e.g. liquidated damages, wrongful termination for default)
- Theory of Economic Waste
  - Limits recovery to diminished market price of property if cost to complete performance or remedy defects is clearly disproportionate to the probable loss in value.
  - Can be avoided by contract language specifying remedy. *See Crest Inc. v. Costco Wholesale Cor.*, 128 Wn. App. 760, 115 P.3d 349 (2005).
- Statutory Limitations - Examples
  - RCW 4.24.115 limits scope of enforceable indemnity provisions in contracts related to construction.
  - RCW 4.24.360 limits enforceability of 'no damage for delay' clauses

Quasi-Contract Claims

An Implied Contract?

- Contract Implied in Law – Unjust Enrichment
  - Elements of a Contract Implied in Law:
    1. A benefit conferred upon the defendant by the plaintiff;
    2. An appreciation or knowledge by the defendant of the benefit; and
    3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it *inequitable* for the defendant to retain the benefit without payment of its value [to plaintiff].
- Contract Implied in Fact – *Quantum Meruit*
  - Elements of a Contract Implied in Fact:
    1. Defendant requests work;
    2. Plaintiff expects payment for the work; and
    3. The defendant knows or should know that plaintiff expects payment for the work.

Young v. Young, 164 Wn.2d 477, 485-86, 191 P.3d 1258 (2008).

- Difference in Recovery:
  - Unjust Enrichment:
    - By the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position; OR
    - By the extent to which the other party's property has increased in value or his other interests advanced.
  - *Quantum Meruit*:
    - Actual value of the services or materials provided.

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