

LITIGATING BREACH OF CONTRACT CLAIMS

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I. (§7.1) Introduction and Scope

While the remainder of this deskbook addresses the formation and performance of contracts, this chapter discusses the consequences when contracts are not performed as anticipated. Specifically, this chapter concerns the cause of action for breach of contract and its various remedies. The quasi contractual actions of quantum meruit and unjust enrichment are also addressed.

Because contractual litigation is such a broad topic, limitations of space require that several related areas of the law fall outside this chapter's scope. This work does not discuss specialized contracts governed by distinct rules (e.g., the Uniform Commercial Code agreements, insurance claims, and leases). Other lawsuits that are not claims for breach of contract, but could relate to contractual disputes (such as declaratory judgments and injunctions), are also not addressed. The emphasis of this chapter is on the rules specific to contractual litigation, rather than on rules of pleading, discovery, and trial applicable to all litigation.

II. Jurisdiction

A. (§7.2) Subject Matter

Subject matter jurisdiction for breach of contract actions is vested in the circuit courts of Missouri. MO. CONST. art. V, § 14(a); § 478.070, RSMo 2000. Breach of contract actions in which the amount sought (excluding interest and costs) is less than \$25,000 may be originally filed with the associate circuit division and may be pursued using simplified procedures. Section 517.011, RSMo 2000. Circuit judges and associate circuit judges have concurrent original jurisdiction over all cases seeking more than \$25,000, but the simplified procedures in Chapter 517, RSMo, do not apply in such actions. *Mogley v. Fleming*, 11 S.W.3d 740, 746'47 (Mo. App. E.D. 1999).

B. (§7.3) Personal Jurisdiction

Personal jurisdiction is determined by the defendant's contacts with Missouri. Missouri courts exercise personal jurisdiction over Missouri residents. Cf. *In re Marriage of Berry*, 155 S.W.3d 838, 840'42 (Mo. App. S.D. 2005). Missouri courts may exercise personal jurisdiction over nonresidents if the state long arm statute (§ 506.500, RSMo 2000) applies and the exercise of such jurisdiction is consistent with federal constitutional restraints (i.e., the defendant must have sufficient "minimum contacts" with the state so as to make the exercise of jurisdiction reasonable). *State ex rel. Wichita Falls Gen. Hosp. v. Adolf*, 728 S.W.2d 604, 606 (Mo. App. E.D. 1987).

Section 506.500 provides personal jurisdiction over nonresidents for actions that arise from the nonresident's "transaction of any business within this state" or "[t]he making of any contract within this state." Section 506.500.1(1) and (2). The requirement of transacting any business within the state is broadly construed and may consist of a single transaction (if that is the basis for the suit), but the mere use of the phone or mail from out of state does not constitute transacting business in Missouri. *Johnson Heater Corp. v. Deppe*, 86 S.W.3d 114, 11920 (Mo. App. E.D. 2002). A contract is considered to be made in Missouri if the offer is accepted within Missouri. *Garrity v. A.I. Processors*, 850 S.W.2d 413, 417 (Mo. App. S.D. 1993). An offer is accepted when the offeree performs the act that, by the terms of the offer, constitutes acceptance and creates the binding contract. *Id.* So, if the

defendant is a Missouri resident or if the defendant had sufficient contacts with the state of Missouri related to the contract at issue, Missouri courts have personal jurisdiction.

C. (§7.4) Forum Selection Clauses

Personal jurisdiction of the parties may also be affected by forum selection clauses. Forum selection clauses specify the jurisdiction in which a lawsuit arising from a contract may be filed; if the forum selection clause is enforceable, the state specified in the contract has personal jurisdiction over the contracting parties for claims arising from the contract. A forum selection clause (either an "inbound" clause, specifying Missouri as the state with jurisdiction, or an "outbound" clause, specifying another state) is enforceable in Missouri unless the opposing party proves it is unfair or unreasonable. *High Life Sales Co. v. Brown Forman Corp.*, 823 S.W.2d 493, 496 (Mo. banc 1992). The court first considers whether the contract is unfair (based on whether it was freely negotiated and whether it is neutral and reciprocal) and then whether it is unreasonable (based on public policy or location of parties, witnesses, or evidence). See *Whelan Sec. Co. v. Allen*, 26 S.W.3d 592, 596-97 (Mo. App. E.D. 2000). If the forum selection clause is neither unfair nor unreasonable, it is enforceable. *Id.*

III. (§7.5) Venue

Venue for most breach of contract actions is based on Missouri's general venue statute, § 508.010, RSMo Supp. 2006. Unless the lawsuit includes a tort claim, § 508.010 specifies the appropriate venues as follows:

- (1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;
- (2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;
- (3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;
- (4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state.

Section 508.010.2.

Obviously, if the breach of contract action involves facts that implicate one of the specific venue statutes, those statutes must be consulted. For example, if the lawsuit is for the possession of real estate, § 508.030, RSMo 2000, mandates that the suit be filed in the county in which the real estate is located. If, on the other hand, the suit includes a tort count and the plaintiff was first injured in Missouri, the county where the injury occurred is the proper venue. Section 508.010.4.

Venue is determined solely by statute. *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 191 (Mo. banc 1998). In general, venue for breach of contract actions is determined by the defendant's residence (or location when served). Section 508.010. There is no venue statute applicable specifically to contracts that allows suit to be brought in a county simply because that was the location where the contract was entered or where it was breached. *Platinum Express, Inc. v. Scott*, 164 S.W.3d 537, 538 (Mo. App. W.D. 2005). If suit is filed in the wrong venue, the court should transfer the case to the appropriate venue. Section 476.410, RSMo 2000; *State ex rel. Bugg v. Roper*, 179 S.W.3d 893, 894 (Mo. banc 2005).

The parties' contract may establish a venue that is different than the venue provided by statute. A venue selection clause is analyzed using the same criteria as a

forum selection clause; in fact, many venue selection clauses are simply part of a forum selection clause (e.g., the "exclusive venue for the resolution of disputes shall be in Dade County, Florida"). *Burke v. Goodman*, 114 S.W.3d 276, 27980 (Mo. App. E.D. 2003). The opponent to the enforcement of the venue selection clause must prove that its enforcement is unreasonable or unfair. *Id.* If the venue selection clause is neither unreasonable nor unfair, the locale specified in the contract is the correct venue.

IV. (§7.6) Choice of Law

Choice of law refers to the process by which the court determines what state's substantive law applies. In Missouri, the laws of the state with the most "significant relationship" to the action are applied. *Dillard v. Shaughnessy, Fickel & Scott Architects, Inc.*, 943 S.W.2d 711, 715 (Mo. App. W.D. 1997). The state with the most significant relationship is determined by applying the Restatement (Second) of Conflict of Laws § 188 (1971). *Id.* The factors that determine the most significant relationship are:

the place of contracting;
the place of negotiation;
the place of performance;
the location of the subject matter of the contract; and
the domicile, residence, nationality, incorporation, or business of the parties.
Armstrong Bus. Servs., Inc. v. H & R Block, 96 S.W.3d 867, 873 (Mo. App. W.D. 2002). The court then applies the substantive law of the state with the most significant relationship to the action unless the contract contains a valid "choice of law" provision. *Dillard*, 943 S.W.2d at 715.

In many situations, the parties' contract may specify the substantive (not procedural) law to be applied in Missouri through a "choice of law" provision. *Consol. Fin. Invs., Inc. v. Manion*, 948 S.W.2d 222, 224 (Mo. App. E.D. 1997). Whether the parties' contractual choice of law will be followed is determined on an issue by issue basis using the following analysis: The court determines the outcome of the dispute that follows from the parties' choice of law. The court then identifies the state with the most significant relationship to the action and determines what the outcome would be using that state's law. If the outcome is the same, the choice of law provision is upheld. If the outcome is different, the court inquires as to whether the state with the most significant relationship would enforce the result determined by the chosen state's law if the parties had specifically agreed to that result. If the state with the most significant relationship would enforce that choice "had the parties made it specifically" the choice of law is valid. *Armstrong Bus. Servs.*, 96 S.W.3d at 872-73. If, however, the state with the most significant relationship would not enforce the choice (because, for example, that outcome is contrary to a fundamental public policy of that state), the choice of law is invalid. See *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 921 (Mo. App. W.D. 1991).

Validity of a choice of law provision cannot be determined without analysis of the specific issues in dispute. Ordinarily, on most issues, one state's laws will not be so contrary to another state's that the outcome would be unenforceable. Consequently, most choice of law provisions should be upheld.

V. Pleading

A. (§7.7) Introduction

The prosecution or defense of breach of contract actions requires knowledge of both the rules generally applicable to litigation and the numerous rules unique to contractual litigation.

B. The Parties

1. (§7.8) Plaintiffs

To enforce a contract, the plaintiff must be a party to it. *McFarland v. O 'Gorman*, 814 S.W.2d 692, 694 (Mo. App. E.D. 1991). If the original party properly assigns its rights to another, that person (the assignee) may sue to enforce the contract. Cf. *E. Attucks Cmty. Hous., Inc. v. Old Republic Sur. Co.*, 114 S.W.3d 311, 318 (Mo. App. W.D. 2003). A principal can sue to enforce a contract entered into by its agent. *Phillips v. Hoke Constr., Inc.*, 834 S.W.2d 785, 789 (Mo. App. S.D. 1992). Similarly, if the original parties intended to benefit a third party at the time the contract was entered, that person (the third party beneficiary) may sue to enforce the contract. *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 260 (Mo. banc 2002).

A party that enters into a contract for the benefit of another party may sue on the contract without joining the beneficiary. Rule 52.01; *Thomas v. DeGrace*, 776 S.W.2d 500, 500 (Mo. App. W.D. 1989). Thus, a party may sue on a contract on behalf of third party beneficiaries without joining the beneficiaries. *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. App. E.D. 1984). Similarly, a personal representative can sue to enforce a contract entered by the decedent as long as the contract is not merely of a personal nature. See *Aufenkamp v. Grabill*, 112 S.W.3d 455, 459 (Mo. App. W.D. 2003). It has been held, however, that an agent cannot bring suit in the agent 's own name when merely acting on behalf of the principal. See *Morris v. Jesky*, 796 S.W.2d 139, 140 (Mo. App. W.D. 1990).

To enforce a contract, not only must the plaintiff be a proper party, but the plaintiff should also join all necessary plaintiffs as parties. Rule 52.04. Rule 52.04(a) provides:

A person shall be joined in the action if: (1) in the person 's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person 's absence may: (i) as a practical matter impair or impede the person 's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

If a party is determined necessary under Rule 52.04, that party must be joined if possible. *Id.*

If a party cannot be joined, the court must consider whether the party is not just necessary, but also indispensable. *Id.* This determination is made based on the following factors set forth in Rule 52.04(b):

The factors to be considered by the court include: (i) to what extent a judgment rendered in the person 's absence might be prejudicial to that person or those already parties; (ii) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (iii) whether a judgment rendered in the person 's absence will be adequate; and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

See also *Kingsley v. Burack*, 536 S.W.2d 7, 1213 (Mo. banc 1976). If an indispensable party cannot be joined, the action must be dismissed. *Goodkin v. 8182 Maryland Assocs. Ltd. Pship*, 80 S.W.3d 484, 49091 (Mo. App. E.D. 2002). If a contract is entered into by two parties jointly, both

parties must sue on the contract. *Justus v. Webb*, 634 S.W.2d 567, 570 (Mo. App. S.D. 1982).

2. (§7.9) Defendants

In a breach of contract action, the necessary parties are the contracting parties liable for performance and any other parties that have an interest in the dispute that may be affected by the action. *Ray v. Wooster*, 270 S.W.2d 743, 753 (Mo. 1954). If more than one party is obligated to perform a contract, the contract is presumed joint and several. Section 431.110, RSMo 2000. Thus, any one of the obligated parties on a joint and several contract may be held liable to perform all the contractual duties, and the plaintiff may sue only one of the obligated parties. See *Smith v. Wohl*, 702 S.W.2d 905, 91011 (Mo. App. E.D. 1985).

An agent for a fully disclosed principal is not liable for a breach of contract claim, but if the agent fails to disclose either the agency status or the identity of the principal, the agent is liable. *Cent. Mo. Prof'l Servs., Inc. v. Shoemaker*, 108 S.W.3d 6, 10 (Mo. App. W.D. 2003). If the agent was acting for the principal, the principal is, of course, liable on the contract as well. *Orrock v. Crouse Realtors, Inc.*, 823 S.W.2d 40, 42 (Mo. App. E.D. 1991). The liability of the principal and the agent, however, is alternative; the plaintiff can only obtain one recovery. *Id.*

A principal may be sued on a contract entered into by an agent if the agent had authority to sign the contract on the principal's behalf. *Nichols v. Prudential Ins. Co. of Am.*, 851 S.W.2d 657, 661 (Mo. App. E.D. 1993). Even if the agent had no authority, the principal may be held liable if the principal ratifies the contract by impliedly adopting or confirming, with knowledge of all material matters, the acts performed on its behalf. *Springfield Land & Dev. Co. v. Bass*, 48 S.W.3d 620, 628 (Mo. App. S.D. 2001).

C. (§7.10) Elements of a Breach of Contract Claim

It is axiomatic that a petition for breach of contract must state all the elements of a breach of contract claim. Missouri appellate opinions vary significantly in stating both the number and the content of the elements of a breach of contract claim. See, e.g., *Norber v. Marcotte*, 134 S.W.3d 651, 657 (Mo. App. E.D. 2004); *Rhodes Engg Co. v. Pub. Water Supply Dist. No. 1 of Holt County*, 128 S.W.3d 550, 560 (Mo. App. W.D. 2004); *Leo Journagan Constr. Co. v. City Utils. of Springfield, Mo.*, 116 S.W.3d 711, 717 (Mo. App. S.D. 2003). Nevertheless, these opinions are generally consistent in their requirements"the difference being that some courts consider certain requirements to be part of one element and others consider them to be distinct elements.

Stated most simply, a breach of contract action requires a party to plead:

- a valid contract;
- breach of the contract; and
- damages.

See *Veterans Linoleum & Rug, Inc. v. Tureen*, 432 S.W.2d 372, 378 (Mo. App. E.D. 1968). With this simple enunciation, the broadly stated elements are, in essence, legal conclusions. Thus, each element must be further dissected into its parts to understand fully the elements of a breach of contract claim.

The element of "a valid contract" includes many requirements:

Parties with capacity
An agreement

Description of the agreement with sufficient detail
Valid consideration or mutual obligations to support the agreement

Gillen v. Bayfield, 46 S.W.2d 571, 57475 (Mo. 1931).

The element of "breach of the contract," in turn, requires that:

all conditions to the defendant's obligation to perform be satisfied;
" the plaintiff performed its duties (or tendered performance or had its performance somehow excused); and
" the defendant failed to perform its duties.

See generally Greentree Props., Inc. v. Kisse, 92 S.W.3d 289, 293 (Mo. App. S.D. 2002). Thus, "breach" of a contract is more than mere nonperformance; it is nonperformance when the duty to perform has arisen.

The element of "damages" consists of some loss, or lack of gain, suffered by the plaintiff that was proximately caused by the breach and that could have been reasonably contemplated by the parties. Mansfield v. Trailways, Inc., 732 S.W.2d 547 (Mo. App. S.D. 1987). In this sense, "damages" includes both causation and harm. It should be noted that, while the courts repeatedly list damages as an element of a breach of contract claim, it has been held that nominal damages are available if the plaintiff is able to prove the existence of a contract and breach. Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804, 808 (Mo. App. W.D. 2005). Thus, the right to nominal damages is considered to satisfy this element. Id.

The variance in how the courts enumerate the elements of a contract action is understandable. Each "element" represents a term of art consisting of several, often distinct, requirements in the law of contract.

A more comprehensive list of the elements of a breach of contract action can be stated as follows:

- An agreement as to a definite subject matter between the parties
- Valid consideration (including mutual obligations)
- Performance by the plaintiff (or partial performance or excused nonperformance)
- Breach by the defendant (nonperformance, repudiation, or prevention of performance)
- Proximately caused damages

Norber, 134 S.W.3d at 657. While no formulation of the elements of a breach of contract claim is perfect, or even standard, the more precisely the elements are stated, the more likely a petition can be drafted that includes all requirements for a valid claim.

D. (§7.11) Special Pleading Rules for Contract Actions

In addition to stating the elements for a breach of contract claim, the petition (and, in some cases, the answer) must comply with pleading requirements that are either unique to contract cases or, at least, most frequently encountered in contractual litigation.

If the breach of contract action is based on a written instrument, the instrument must be pleaded according to its legal effect, recited at length, or attached to the petition. Rule 55.22; § 509.230, RSMo 2000. It is advisable to attach the document to the pleading and incorporate it by reference. Rule 55.12. The execution of the document is deemed confessed unless the defendant specifically denies the execution. Section 509.240, RSMo 2000.

Conditions precedent are conditions that must be fulfilled before a party has an obligation to perform the contract. *Jetz Serv. Co. v. Botros*, 91 S.W.3d 157, 161 (Mo. App. W.D. 2002). If the plaintiff is pleading a breach of contract because of the defendant's failure to perform some duty and there are conditions precedent to that duty, the satisfaction of the conditions precedent must be pleaded. *Gillis v. New Horizon Dev. Co.*, 664 S.W.2d 578, 580 (Mo. App. W.D. 1983). A petition is sufficient if it alleges generally that all conditions have been satisfied. Rule 55.16; § 509.120, RSMo 2000. If the defendant disagrees, the defendant's answer must deny the performance or occurrence of the conditions specifically and particularly. Rule 55.16; § 509.120.

Special care must be given to breach of contract actions against a municipality. Section 432.070, RSMo Supp. 2006, states that (except for the City of St. Charles, because of a recent amendment):

No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing. . . .

The requirements of § 432.070 are mandatory. *Muncy v. City of O'Fallon*, 145 S.W.3d 870, 873 (Mo. App. E.D. 2004). If a contract does not comply with the provisions of this section, it cannot be enforced against the municipality regardless of the equities of the case. *Id.*

If several breaches of contract arising from one transaction are alleged, they may be pleaded in one count. *Pryor v. Kansas City*, 54 S.W. 499, 501 (Mo. banc 1899). Separate transactions should be the subject of separate counts. Rule 55.11. In a contract action, unlike a tort, the amount of damages sought is to be pleaded and included in the prayer for relief. Rule 55.05.

E. Defenses

1. (§7.12) Statute of Limitations

The statute of limitations is an affirmative defense that must be raised by the defendant or it is waived. Rule 55.08; *Storage Masters Chesterfield, L.L.C. v. City of Chesterfield*, 27 S.W.3d 862, 865 (Mo. App. E.D. 2000). The statute of limitations for breach of an oral contract is five years. Section 516.120(1), RSMo 2000; *Duncan v. Estate of Booker*, 816 S.W.2d 705, 708 (Mo. App. S.D. 1991). The statute of limitations for breach of a written contract is ten years. Section 516.110(1), RSMo 2000; *Collins v. Narup*, 57 S.W.3d 872, 874 (Mo. App. E.D. 2001).

The statute of limitations begins to run not at the time of the breach, but when the damage from the breach is sustained and capable of ascertainment. Section 516.100, RSMo 2000; *Verbrugge v. ABC Seamless Steel Siding, Inc.*, 157 S.W.3d 298, 301'02 (Mo. App. S.D. 2005). For contracts that require repeated performance, the statute of limitations for all breaches runs with that for the last breach. *Reed v. Rope*, 817 S.W.2d 503, 508 (Mo. App. W.D. 1991).

As with other statutes of limitations, the limitations period for breach of contract will be tolled while the plaintiff is under the age of 21 or during periods of incapacity. Section 516.170, RSMo 2000. The parties can agree to delay, or even waive entirely, the statute of limitations. *Thompson v. Volini*, 849 S.W.2d 48, 50 (Mo. App. W.D. 1993). The parties cannot, however, agree to reduce the statute of limitations. Section 431.030, RSMo 2000.

2. (§7.13) Statute of Frauds

The statute of frauds makes contracts falling within its provisions voidable, not void, and, therefore, constitutes an affirmative defense that must be raised or it is waived. *Norden v. Friedman*, 756 S.W.2d 158, 162 (Mo. banc 1968). The statute of frauds is a potential defense against the enforcement of the following oral contracts:

- By a personal representative for debts of an estate
- By a person for the debt of another
- In consideration of marriage
- For the sale of land
- For the lease of land for more than one year
- For any agreement that is not to be performed within one year

Section 432.010, RSMo 2000.

To be enforceable, contracts subject to the statute of frauds must be "in writing and signed by the party to be charged therewith." *Id.* Courts have held that for a contract to be "in writing," the writing must describe:

- the parties;
- the subject of the contract;
- the duration (if applicable); and
- the consideration.

Peet v. Randolph, 33 S.W.3d 614, 619 (Mo. App. E.D. 2000). The writing may constitute more than one document. *Bayless Bldg. Materials Co. v. Peerless Land Co.*, 509 S.W.2d 206, 211 (Mo. App. E.D. 1974). Furthermore, as long as all of the essential terms of the contract are contained in the writing, the writing does not need to be an explicit or entirely complete contract in and of itself. *Peet*, 33 S.W.3d at 619.

The statute of frauds is waived if it is not properly raised. *Norden*, 756 S.W.2d at 162. The statute of frauds also has several exceptions. The statute does not apply if one of the parties has fully performed its obligations under the contract. *Don King Equip. Co. v. Double D Tractor Parts, Inc.*, 115 S.W.3d 363, 374 (Mo. App. S.D. 2003). In addition, the courts have held that the statute of frauds may not be applied if it assists a party in perpetrating a fraud. *Mika v. Cent. Bank of Kansas City*, 112 S.W.3d 82, 88 (Mo. App. W.D. 2003).

3. (§7.14) Fraud

A contract procured by fraud is not enforceable. *Lauria v. Wright*, 805 S.W.2d 344, 347 (Mo. App. E.D. 1991). The elements of fraud are:

- (1) a representation;
- (2) its falsity;
- (3) its materiality;
- (4) the speaker's knowledge of its falsity or his ignorance of its truth;
- (5) the speaker's intent that the representation should be acted on by the person and in the manner reasonably contemplated;
- (6) the hearer's ignorance of the falsity of the representation;
- (7) the hearer's reliance on the representation being true;
- (8) the hearer's right to rely thereon; and

(9) the hearer's consequent and proximately caused injury.

Citizens Bank of Appleton City v. Schapeler, 869 S.W.2d 120, 126 (Mo. App. W.D. 1993). Fraud is an affirmative defense. Rule 55.08. The defense of fraud must be averred with particularity. Section 509.160, RSMo 2000; Rule 55.15.

4. (§7.15) Duress

A contract procured by duress is also unenforceable. *Aurora Bank v. Hamlin*, 609 S.W.2d 486, 487 (Mo. App. S.D. 1980). Duress constitutes the inability of one party to exercise their free will because of the threats or wrongful conduct of another. *Andes v. Albano*, 853 S.W.2d 936 (Mo. banc 1993). Duress is an affirmative defense. Rule 55.08.

5. (§7.16) Mistake

Contracts entered as a result of mistake may be unenforceable depending on the type of mistake. A contract based on mutual mistake of material fact is unenforceable. *Liquidation of Prof'l Med. Ins. Co. v. Lakin*, 88 S.W.3d 471, 481 (Mo. App. W.D. 2002). If, however, the mistake is one of law (i.e., the legal consequences of an act), the mistake does not prevent the enforcement of the contract. *Id.*; see also *Thompson v. Volini*, 849 S.W.2d 48, 50 (Mo. App. W.D. 1993).

A unilateral mistake is normally not a basis for avoiding the enforcement of a contract, though it has been sufficient for relief when proof of the mistake is accompanied by evidence that the mistake is:

- one of fact;
- vital; or
- one the other party knew or should have known.

Sheinbein v. First Boston Corp., 670 S.W.2d 872, 876 (Mo. App. E.D. 1984). Other cases have stated that a unilateral mistake is a defense if the other party had reason to know of the mistake or if enforcement of the agreement would be unconscionable. *Ricks v. Mo. Local Gov't Employees Ret. Sys.*, 981 S.W.2d 585, 593 (Mo. App. W.D. 1998). While the standard for unilateral mistake has not been stated consistently, the courts have always clearly indicated that a unilateral mistake, by itself, is insufficient to prevent enforcement of a contract.

In either case, the defense of mistake is an affirmative defense that must be raised or it is waived. Rule 55.08. In addition, all allegations of mistake must be made with particularity. Section 509.160, RSMo 2000; Rule 55.15.

6. (§7.17) Illegality, Public Policy, and Unconscionability

Contracts may be unenforceable because of policy considerations that make certain agreements illegal or impossible to enforce. The defenses of illegality, public policy, and unconscionability are all affirmative defenses based on the determination that the subjects of certain contracts are such that the courts will not enforce them.

If a contract is illegal, it is, obviously, unenforceable. *Rice v. James*, 844 S.W.2d 64, 69 (Mo. App. E.D. 1992). Illegal contracts are contracts that require a violation of the law (including municipal regulations). *Id.*

While not illegal, some contracts are considered against public policy and, therefore, are

unenforceable. *Allen Foods, Inc. v. Lawlor*, 94 S.W.3d 436, 438 (Mo. App. E.D. 2003). For a contract to be unenforceable because of a violation of public policy, that public policy must be one expressed by the legislature. *First Nat'l Ins. Co. of Am. v. Clark*, 899 S.W.2d 520, 521 (Mo. banc 1995).

Similarly, contracts in restraint of trade are unenforceable. Section 416.031, RSMo 2000; *Schmersahl Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 348 (Mo. App. E.D. 2000). Although the statute prohibiting agreements in restraint of trade appears to be absolute, the courts have recognized that many legitimate agreements may restrain trade to some degree yet still serve a vital and legitimate purpose. See *id.* Consequently, the prohibition on contracts in restraint of trade has led Missouri courts to find covenants not to compete to be presumptively invalid, but they are valid and enforceable to the extent an employer can show that the covenant is a reasonable protection of the employer's legitimate interests. *Systematic Bus. Servs., Inc. v. Bratten*, 162 S.W.3d 41 (Mo. App. W.D. 2005). An employer has no legitimate interest in punishing the employee or protecting itself from competition, but it does have legitimate interests in its trade secrets and customer contacts. *Id.* The reasonableness of the limitations is assessed considering both the employer's and the employee's legitimate interests. *Id.* If a covenant not to compete is limited geographically and temporally and is no broader than necessary to protect the employer's legitimate interests, it is normally found not to be in restraint of trade and, consequently, is enforceable. See *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 610 (Mo. banc 2006).

If a court deems the enforcement of a contract to be unconscionable, the contract will not be enforced. *Killion v. Bank Midwest, N.A.*, 987 S.W.2d 801, 810 (Mo. App. W.D. 1998). A contract is considered unconscionable when the inequality is so harsh in its terms that no reasonable person would agree to it. *Id.*

7. (§7.18) Impossibility and Commercial Frustration

A party has not breached a contract if performance was impossible. See *Bolz v. Hatfield*, 41 S.W.3d 566, 573 (Mo. App. S.D. 2001). Performance is impossible only if the party under a duty to perform took virtually every action within its power to perform its duties but was unable to. *Id.*

Even if performance is possible, it may be excused under the doctrine of commercial frustration if an unforeseen event, not caused by or controlled by either party, nearly destroys the value of the contract for one of the parties. *Adbar, L.C. v. New Beginnings C Star*, 103 S.W.3d 799 (Mo. App. E.D. 2003). If the event was reasonably foreseeable, the parties should have provided for it in the contract, and the occurrence of the event will not excuse a party from performance. *Id.* Both impossibility and commercial frustration are affirmative defenses. Rule 55.08.

8. (§7.19) Waiver

A party may not sue for breach of contract if the breach has been waived. *Horne v. Ebert*, 108 S.W.3d 142, 147 (Mo. App. W.D. 2003). Waiver is the intentional relinquishment of a known right. *Id.* Waiver is an affirmative defense. Rule 55.08.

9. (§7.20) Estoppel

A party may be estopped from suing for breach of contract. *McCullough v. Newton*, 348 S.W.2d 138, 143 (Mo. 1961). For estoppel to apply, the party raising it must allege and prove:

- (1) a promise;
- (2) promisee detrimentally relies on the promise;

(3) promisor could reasonably foresee the precise action the promisee took in reliance; and
(4) injustice can only be avoided by enforcement of the promise.

Chesus v. Watts, 967 S.W.2d 97, 107 (Mo. App. W.D. 1998). Estoppel is an affirmative defense. Rule 55.08.

10. (§7.21) Cancellation and Novation

A contract can be cancelled by one party rescinding the contract (based on fraud, mistake, or material breach), by the terms of the agreement itself, or on mutual consent of the parties. *MFA Mut. Ins. Co. v. Sw. Baptist Coll., Inc.*, 381 S.W.2d 797, 801 (Mo. 1964). Novation is the substitution of a new contract for an old one that is, thereby, extinguished. *Moley v. Plaza Props., Inc.*, 549 S.W.2d 633, 635 (Mo. App. W.D. 1977). Although cancellation and novation are not expressly listed in Rule 55.08, and the argument can be made that these defenses deny one of the elements of a breach of contract claim itself (the existence of the contract alleged at the time of the breach), it is still advisable to plead cancellation or novation as an affirmative defense. See *McDowell v. Miller*, 557 S.W.2d 266, 272 (Mo. App. S.D. 1977).

VI. Interpreting the Contract

A. (§7.22) Parol Evidence

To adjudicate a contract dispute, the court must first determine what the parties' agreement is. This determination, of course, requires interpreting the contract. The first decision the court must make in interpreting a contract is what evidence the court can consider. If the contract is oral, the court considers all competent testimony about the parties' agreement. Cf. *Thompson v. St. Louis Union Trust Co.*, 253 S.W.2d 116 (Mo. 1952).

If the agreement is in writing, however, the court must decide whether to consider only the writing itself or to consider the writing together with other evidence. This determination involves the application of the parol evidence rule.

The parol evidence rule, in its simplest form, states that if the parties have expressed their final agreement in writing, the court will interpret the agreement solely from the writing and not from oral testimony; in other words, oral evidence may not vary the terms of an unambiguous, complete document. *Norden v. Friedman*, 756 S.W.2d 158, 163 (Mo. banc 1988). Parol evidence is a rule of substantive law, not a rule of evidence. *Commerce Trust Co. v. Watts*, 231 S.W.2d 817, 820 (Mo. 1950). Thus, when the rule applies, even if parol evidence is received without objection, it must be ignored. *Id.*

The parol evidence rule applies to integrated writings. *Don King Equip. Co. v. Double D Tractor Parts, Inc.*, 115 S.W.3d 363, 372'73 (Mo. App. S.D. 2003). A writing is integrated if it represents the parties' complete agreement. *Centerre Bank of Kansas City, N.A. v. Distribs., Inc.*, 705 S.W.2d 42, 51 (Mo. App. W.D. 1985). A "merger clause" (one stating that the writing is intended to be a complete and final expression of the parties' agreement) creates a strong presumption that the writing is integrated. *CIT Group/Sales Fin. Inc. v. Lark*, 906 S.W.2d 865, 868 (Mo. App. E.D. 1995).

If the writing is integrated, the parol evidence rule applies to bar consideration of evidence that varies or contradicts the terms of the writing (unless an exception to the parol evidence rule applies). *Commerce Trust*, 231 S.W.2d 817. If the writing is not integrated, the court considers oral evidence of the parties' agreement. *Don King Equip.*, 115 S.W.3d at 37273. Thus, when an

agreement has been entirely reduced to writing, the parol-evidence rule mandates that only the writing be consulted to interpret the parties' contract"unless an exception to the rule applies. CIT Group/Sales Fin., 906 S.W.2d at 868.

The courts have created several exceptions to the parol evidence rule whereby parol evidence may be considered. First, it is often stated that parol evidence is admissible if it does not vary or contradict the terms of the writing. *Frimel v. Blake*, 360 S.W.2d 258, 260-61 (Mo. App. E.D. 1962). This may be considered an exception to the parol evidence rule (by allowing parol evidence when a written agreement exists) or simply a determination that the rule does not apply because an agreement cannot wholly be reduced to writing (i.e., integrated) if there is oral evidence of the agreement that does not vary or contradict it (i.e., it must supplement the written agreement). Cf. *Don King Equip.*, 115 S.W.3d at 37273.

Second, parol evidence is admissible to prove fraud, accident, or mistake. *W.E. Koehler Constr. Co. v. Med. Ctr. of Blue Springs*, 670 S.W.2d 558 (Mo. App. W.D. 1984). Again, this is sometimes stated as an exception, but it may also be considered outside the scope of the rule because evidence of fraud or mistake, for example, is admitted to show there is no agreement at all. Cf. *City Wide Asphalt Co. ex rel. City of Kansas City v. E.E. Scott Constr. Co.*, 610 S.W.2d 330, 336 (Mo. App. W.D. 1980).

Third, parol evidence is admissible to prove subsequent changes to the contract. *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538, 541 (Mo. 1954). If the written contract is subsequently amended by oral agreement, evidence of the amendment is admissible. *Id.*

Finally, parol evidence may be admissible if an ambiguity exists. *Fisher v. Miceli*, 291 S.W.2d 845, 848-49 (Mo. 1956). An ambiguity is language that is reasonably susceptible to two or more meanings. CIT Group/Sales Fin., 906 S.W.2d at 868. An ambiguity may be patent or latent. A patent ambiguity is an ambiguity on the face of the document itself. *Id.* A latent ambiguity exists when the contract is not ambiguous on its face but is ambiguous only as applied to a certain set of facts. *Jake C. Byers, Inc. v. J.B.C. Invs.*, 834 S.W.2d 806, 816 (Mo. App. E.D. 1992). If an ambiguity exists, parol evidence may be considered to resolve the ambiguity. *Aluminum Prods. Enters., Inc. v. Fuhrmann Tooling & Mfg. Co.*, 758 S.W.2d 119, 124 (Mo. App. E.D. 1988).

B. (§7.23) Rules of Construction

Missouri courts have developed many rules of construction to guide in the interpretation and enforcement of contracts. These rules"or maxims"represent the principles courts have found helpful in determining a contract's meaning in previous cases. In many situations, however, the rules of construction are of limited help because several may apply to the same contract (each producing a different result), and the courts have been unable to establish a consistent hierarchy of which rules have priority. Consequently, the rules of construction may best be considered as a set of arguments a litigant can use to advance a theory of the contract's meaning.

The most common of the rules of construction are summarized below.

- Courts will rely on (other) rules of construction only when the language of the contract is not clear; otherwise, the meaning of the contract is determined solely by the contract's language. *Bailey v. Federated Mut. Ins. Co.*, 152 S.W.3d 355, 357 (Mo. App. W.D. 2004).
- The courts interpret contracts according to the language's natural and ordinary meaning. *Sonoma Mgmt. Co. v. Boessen*, 70 S.W.3d 475, 479 (Mo. App. W.D. 2002).

- Whether a term in the contract is ambiguous must be determined by analyzing the term within the context of the contract as a whole. *Rathbun v. CATO Corp.*, 93 S.W.3d 771, 778 (Mo. App. S.D. 2002).
- If there is a conflict between two provisions, specific language prevails over general language. *A & L Holding Co. v. S. Pac. Bank*, 34 S.W.3d 415, 419 (Mo. App. W.D. 2000).
- If there is a conflict, handwritten language prevails over printed language. *Burst v. R.W. Beal & Co.*, 771 S.W.2d 87, 89 (Mo. App. E.D. 1989).
- If an ambiguity exists, the contract is construed against the drafter. *Graham v. Goodman*, 850 S.W.2d 351, 35657 (Mo. banc 1993).
- If no time is mentioned for performance, performance is due at a reasonable time. *Detmer v. Miller*, 220 S.W.2d 739, 743 (Mo. App. E.D. 1949).
- VII. Remedies

A. (§7.24) Introduction

Sections 7.257.27 below discuss the remedies available in a breach of contract lawsuit. A breach of contract may give rise to several different remedies. A party suing for breach of contract may seek monetary damages, specific performance, or rescission and restitution. *Harris v. Desisto*, 932 S.W.2d 435, 443 (Mo. App. W.D. 1996). Many issues commonly arise in determining which of the potential remedies for breach of contract apply (e.g., is a party entitled to just damages or to an order of specific performance) and what the scope of that particular remedy includes (e.g., is the party entitled to interest, lost profits, attorney fees, etc.).

B. (§7.25) Damages

Generally, a party is entitled to monetary damages if the other contracting party has breached the contract. Cf. *Weiss v. Leanon*, 225 S.W.2d 127, 130 (Mo. 1949). It should be noted that the definition of breach of contract mandates that the breach actually cause damage, but courts have held that nominal damages are available if the other elements of a breach of contract claim are established (in essence, supplying "damages" when a breach is otherwise proven). *Shirley's Realty, Inc. v. Hunt*, 160 S.W.3d 804, 808 (Mo. App. W.D. 2005).

The amount of damages for breach of contract is the sum that places, as far as possible, the claimant in the same position as the claimant would have been if the contract had been performed. *Dunning v. Alfred H. Mayer Co.*, 483 S.W.2d 423, 427 (Mo. App. E.D. 1972). The claimant is entitled to the value of the contract, the value of the promised performance, or the value of the benefit contracted for. *Id.* The plaintiff is entitled to the "benefit of the bargain" by being placed in the same position as if the contract had been performed. *Turner v. Shalberg*, 70 S.W.3d 653, 658 (Mo. App. S.D. 2002).

Several issues frequently arise when the court determines the extent of damages. One recurring issue is whether lost profits are compensable. Lost profits are generally recoverable when:

- the breach naturally and proximately caused the loss;
- the profits were in the contemplation of the parties at the time of the contracting;
- the lost profits can be established with reasonable certainty; and
- the profits are not speculative or conjectural.

Harvey v. Timber Res., Inc., 37 S.W.3d 814, 819 (Mo. App. E.D. 2001). Evidence of net profits, rather than evidence of gross income and expenses, is essential to a lost profits claim. *Id.* The evidence must include actual facts that present a rational basis for estimating the damages. *Wisch & Vaughan Constr. Co. v. Melrose Props. Corp.*, 21 S.W.3d 36, 42 (Mo. App. S.D. 2000).

More certainty of the fact of damages is required than of the amount of damages, but lost profits are not recoverable if the court must speculate as to what the expected profits might be. *Id.*

Prejudgment interest may be recoverable in a breach of contract claim when the contract states that interest will accrue on any sums not paid when due. *Bolivar Insulation Co. v. R. Logsdon Builders, Inc.*, 929 S.W.2d 232, 236 (Mo. App. S.D. 1996). The interest rate is the rate specified in the contract. *Id.* If the contract does not specify the rate, prejudgment interest accrues at nine percent per annum. *Id.*; § 408.020, RSMo 2000.

Even when a contract does not specifically provide for interest, prejudgment interest, at the rate of nine percent per annum, is provided under § 408.020 upon demand for payment. *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 397 (Mo. App. E.D. 1998). If no demand is made, the prejudgment interest starts to accrue from the time the petition is filed. *Id.*

A plaintiff often seeks to recover attorney fees incurred in pursuing a breach of contract lawsuit. Under the American rule, attorney fees are recoverable only if:

- attorney fees are provided by statute;
- attorney fees are provided by contract; or
- equity allows for such fees.

City of Cottleville v. St. Charles County, 91 S.W.3d 148, 149 (Mo. App. E.D. 2002).

For most contractual claims, there is no statute that provides for the claimant's attorney fees to be awarded. The equitable allowance of fees is authorized only when the breach has caused one party to incur attorney fees in collateral litigation or, in rare instances, when the court finds very "unusual" or special circumstances. *Osterberger v. Hites Constr. Co.*, 599 S.W.2d 221, 230 (Mo. App. E.D. 1980). Therefore, in most cases, attorney fees are recoverable only if the parties' contract provides for their recovery.

The contract can provide that either side that prevails in the suit may recover its attorney fees, or it may provide that only one party (e.g., the lessor in a lease or the creditor on a note) may collect its fees if that party wins. See *First State Bank of St. Charles, Mo. v. Frankel*, 86 S.W.3d 161, 176 (Mo. App. E.D. 2002). When a contract provides for attorney fees, the court must adhere to the terms of the contract. *Sheppard v. East*, 192 S.W.3d 518, 523 (Mo. App. E.D. 2006). The amount of fees a party can collect is within the court's discretion. *Id.* The court is considered an expert on the amount of fees, and no evidence as to the value of the services is required. *First State Bank*, 86 S.W.3d at 176.

Liquidated damages are damages to which the parties have stipulated in advance. These damages are enforceable if:

- the amount is reasonable; and
- the damages resulting from the breach would be difficult to ascertain at the time the contract was entered.

Frank v. Sandy Rothschild & Assocs., Inc., 4 S.W.3d 602, 60506 (Mo. App. E.D. 1999). If the liquidated damages are unreasonably high, the court classifies the damages as a penalty and will not enforce the liquidated damages clause. *Hawkins v. Foster*, 897 S.W.2d 80, 85 (Mo. App. S.D. 1995). The courts look to the parties' intentions; if the provision is designed to compensate a party for loss, it is enforceable. *Diffley v. Royal Papers, Inc.*, 948 S.W.2d 244, 24647 (Mo. App. E.D. 1997). If, however, it is intended as a penalty, the clause is unenforceable. *Id.* If a party does recover liquidated damages, it cannot be awarded actual damages as well because the

award of actual damages would result in double recovery. *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 882 (Mo. App. E.D. 1994).

C. (§7.26) Specific Performance

Another potential remedy for breach of contract is specific performance"when the court orders the breaching party to perform the terms of the contract. Specific performance is not a remedy to which a litigant has a right; it is an equitable remedy that the court may impose, in its discretion, if certain conditions are met. *Kopp v. Franks*, 792 S.W.2d 413, 419 (Mo. App. S.D. 1990). The principles of equity allow a court to order specific performance when legal remedies (i.e., monetary damages) are inadequate. *Dazey v. Elvin*, 134 S.W. 85, 86 (Mo. App. S.D. 1911).

To state a claim for specific performance, the plaintiff must, of course, first state all the elements for breach of contract. In addition, the contract alleged must be sufficiently definite, certain, and complete that it can be enforced as written. *Coale v. Hilles*, 976 S.W.2d 61, 65"66 (Mo. App. S.D. 1998). In other words, the court requires a greater degree of certainty with respect to proof of the terms of the alleged contract for specific performance than it does for a claim for damages. The following terms have been held mandatory for a contract to be specifically enforced:

The parties

- The subject matter
- The duties
- The price (if applicable)
- The consideration

Dean Operations, Inc. v. Pink Hill Assocs., 678 S.W.2d 897, 900 (Mo. App. W.D. 1984). If the terms of the contract are not sufficiently certain, the trial court will refuse to order specific performance. In addition to requiring more certainty in a specific performance case than in a case seeking damages, the courts have required additional proof that the plaintiff actually tendered performance before it will order the other party to perform. *Crow v. Bertram*, 725 S.W.2d 634, 636 (Mo. App. E.D. 1987).

The final element for specific performance is proof that legal remedies are inadequate. The inadequacy of the legal remedy is the fact that confers jurisdiction on the court to "do equity." See *Asbury v. Crawford Elec. Coop., Inc.*, 51 S.W.3d 152, 158 (Mo. App. S.D. 2001). Legal remedies have been found inadequate for:

breach of a land sale contract, *Farrington v. Hays*, 182 S.W.2d 186, 202 (Mo. 1944);
a covenant not to compete, *Washington County Mem'l Hosp. v. Sidebottom*, 7 S.W.3d 542, 54546 (Mo. App. E.D. 1999); and

other cases when the money will not place the contracting party in the same position as performance would have, see e.g., *Asbury*, 51 S.W.3d at 158 (obligation to furnish electricity was specifically enforceable).

A party seeking specific performance should plead for that relief. Specific performance has, however, been found to have been tried by implied consent in at least one case. See *Land Improvement, Inc. v. Ferguson*, 800 S.W.2d 460, 463 (Mo. App. W.D. 1990). The request for specific performance can be made in the alternative to a request for monetary damages. *Dunning v. Alfred H. Mayer Co.*, 483 S.W.2d 423, 427 (Mo. App. E.D. 1972). A litigant cannot, however, recover both monetary damages for the breach and specific performance, though monetary damages attributable to the delay in performance may be awarded in some instances. Quality

Wig Co. v. J.C. Nichols Co., 728 S.W.2d 611, 617 (Mo. App. W.D. 1987).

Even though specific performance is an equitable remedy, the equitable exception to the American rule allowing the award of attorney fees is not automatically applicable. Kopp, 792 S.W.2d at 42223. The plaintiff still must plead and prove the unusual circumstances or other independent basis for attorney fees in a specific performance case. *Id.*

Because specific performance is an equitable action, both the regular defenses to a breach of contract action, discussed in §§7.127.21 above, and equitable defenses, such as laches and unclean hands, apply. Kopp, 792 S.W.2d at 41920.

D. (§7.27) Rescission and Restitution

Another equitable remedy that may apply in a breach of contract case is rescission and restitution. Rescission and restitution is an equitable action that voids the contract (i.e., rescinds it) and then restores the parties to their position before the contract was entered (i.e., restitution). See *Patel v. Pate*, 128 S.W.3d 873, 878 (Mo. App. W.D. 2004).

Rescission and restitution applies only when there has been a material breach of the contract. *Id.* Consequently, in addition to the elements for a general breach of contract claim, the plaintiff seeking rescission and restitution must allege and prove a "material" breach (i.e., a breach that goes to the very substance or root of the agreement). *Id.* Whether a breach is material is a question of fact. *Greentree Props., Inc. v. Kisse*, 92 S.W.3d 289, 294 (Mo. App. S.D. 2002). The remedy of rescission and restitution is inconsistent with a claim for damages. *Mills v. Keasler*, 395 S.W.2d 111, 116 (Mo. 1965). Although a petition can seek both the remedy of damages and that of rescission and restitution, the plaintiff must eventually elect between these two remedies. *Harris v. Desisto*, 932 S.W.2d 435, 442 (Mo. App. W.D. 1996).

A judgment granting rescission can include as a restitution item an award of attorney fees. *Id.* at 448. Because the court's order rescinds the contract, the award is not premised on any contractual attorney fee provision, but on the court's equitable power to balance benefits by including attorney fees as part of the restitution award. *Id.*

Equitable defenses apply to a claim for rescission and restitution. In particular, if the rescinding party fails to act before the other party is prejudiced by the rescission, the delay may prohibit the granting of equitable relief. *Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324, 330 (Mo. App. E.D. 1995).

VIII. Quasi Contractual Actions

A. (§7.28) Introduction

While a breach of contract claim gives rise to both legal and equitable remedies, a contractual relationship (or even the bestowal of certain benefits in the absence of a contract) can also give rise to equitable actions that are distinct from a breach of contract claim. These equitable, or quasi contractual, actions are primarily designed to use a court's equitable powers to prevent one party's unjust enrichment at the expense of the other. *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. App. W.D. 1984). Quantum meruit and unjust enrichment are these equitable actions. *Johnson Group, Inc. v. Grasso Bros., Inc.*, 939 S.W.2d 28, 30 (Mo. App. E.D. 1997).

Quantum meruit and unjust enrichment have traditionally been distinct actions. See *id.* Nevertheless, courts have more recently treated both actions as essentially synonymous. See,

e.g., *Webcon Group, Inc. v. S.M. Props., L.P.*, 1 S.W.3d 538, 542 (Mo. App. E.D. 1999). Some appellate court opinions have used terms of "quasi contract," "implied contract," and "restitution" interchangeably with those of "quantum meruit" and "unjust enrichment." See, e.g., *Green Quarries*, 676 S.W.2d 261.

Quantum meruit has traditionally been applied in cases when services or materials are provided by the plaintiff upon the request (or with the acquiescence) of the defendant with the expectation of payment, but without a valid contract. *Bellon Wrecking & Salvage Co. v. Rohlfing*, 81 S.W.3d 703, 71112 (Mo. App. E.D. 2002). When the defendant receives the benefits, but refuses to pay for them, the courts imply a promise to pay for the reasonable value of the services or materials provided. *Id.* Thus, quantum meruit is a quasi contractual remedy involving an implied contract. *Id.* The courts justify a quantum meruit action on the theory that it prevents "unjust enrichment." *Id.*

Unjust enrichment, on the other hand, is a distinct action based broadly on the goal of preventing unjust enrichment, even in the absence of a contract. *Petrie v. LeVan*, 799 S.W.2d 632, 63436 (Mo. App. W.D. 1990). Simply put, unjust enrichment applies any time the plaintiff bestows a benefit on the defendant in circumstances when it would be unjust for the defendant not to pay for the benefit received. *Id.* The remedy for unjust enrichment is often referred to as "restitution." *Id.*

Although actions for quantum meruit and unjust enrichment are occasionally treated the same, one occasionally important distinction is the different manner in which the value of the remedy is determined. *Johnson Group*, 939 S.W.2d at 30. In quantum meruit actions, the measure of the remedy is the reasonable value of the goods and services provided by the plaintiff. *Id.* In unjust enrichment, the measure of the remedy is the amount of enrichment received by the defendant that would be unjust for the defendant to retain. *Id.*

B. (§7.29) Quantum Meruit

Quantum meruit can be used to recover the value of goods or services provided even in the absence of a contract. *Moran v. Hubbartt*, 178 S.W.3d 604, 615 (Mo. App. W.D. 2005). Therefore, a quantum meruit action is often an advisable alternative count to a breach of contract claim (in case the court, for example, were to find that no valid contract existed on some technical ground).

The elements of a quantum meruit claim are as follows:

The plaintiff provided materials or services to the defendant at the defendant's request or with the defendant's acquiescence.

Those materials or services had a certain reasonable value.

Despite demand for payment, the defendant has failed and refuses to pay the reasonable value of the materials and labor.

Fowler v. Scott, 164 S.W.3d 119, 120 (Mo. App. E.D. 2005). The remedy in a quantum meruit claim is to order the defendant to pay the reasonable value of the materials or services provided by the plaintiff. *Id.*

C. (§7.30) Unjust Enrichment

Unjust enrichment applies when the plaintiff bestows a benefit on the defendant when the circumstances are such that it would be inequitable for the defendant not to pay for the benefit.

Zipper v. Health Midwest, 978 S.W.2d 398, 412 (Mo. App. W.D. 1998). The elements of an unjust enrichment action are as follows:

- The plaintiff conferred a benefit on the defendant.
- The defendant acknowledged or recognized that a benefit was conferred.
- The defendant accepted and retained the benefit under circumstances in which retention without payment would be unjust.

Id. The remedy in an unjust enrichment action is to order the defendant to pay the value of the benefit bestowed. Johnson Group, Inc. v. Grasso Bros., Inc., 939 S.W.2d 28, 30 (Mo. App. E.D. 1997).

IX. (§7.31) Conclusion

Contract drafting and contract litigation are more related than they may at first appear. The role of a contract is both to memorialize clearly the parties' agreement so that it can be performed and to specify the consequences if one party does not perform as agreed. Because many of the consequences of a breach may be altered by the contract itself, attorneys should be aware of these consequences and how they can be affected even if their involvement ends when the contract is signed. Similarly, knowledge of contractual litigation is essential for attorneys who are hired during the contractual performance stage because the parties may take many actions that help to avoid a breach or to improve their position if a breach does occur (e.g., avoiding waiver or estoppel, documenting mistake or impossibility of performance, or recording evidence of lost profits). Obviously, once a breach has occurred, the rules for litigation assume a more immediate importance because the complexity and breadth of the rules for contractual litigation provide many opportunities for litigators to make the right (or wrong) decisions that affect the client's case from the point the pleading is drafted until the case is submitted.