CCIT---REMEDIES PRESENTATION, Jed Franklin, February 20, 2008

1. What are REMEDIES?

A. Remedies are solutions to problems

1. Band-aids

2. Erasers

3. Atomic Bombs

B. We use remedies to sort out the contract when things start to go bad.

2. Sources of Remedies

A. Uniform Commercial Code

B. Common Law/ Restatement

C. State Model Personal Services Contract

3. Why do we need remedies in contracts for Services?

A. Goods

i. Covered by UCC: 2-703, 2-711, etc.

ii. Stat cite: UCC is all of Title 4 of CRS. Sales is Title 4, Article 2. To find the above provisions in CRS, just say 4 in front of the numbers. So 4-2-703, etc.

iii. Only applies to Goods. Don't have same protections for Services.

B. Services

i. Restatement 2d §§ 236-243

a. looks to the materiality of the breach to decide remedy

i. partial breach

a. damages only for part of the remaining contract duties

ii. total breach

a. so substantially impairs the value of the contract that justice requires total breach damages.

b. total breach damages = all of injured parties remaining rights to performance.

c. case law and judges determine substantiality and damages.

b. The State can operate under the Restatement, but its risky. So the State writes its own remedies.

ii. Case law:

1. Joyce v. Davis, 539 F. 2d 1262 (10th Cir. 1976) (interpreting Colorado law).

a. **Case law**: No rescission/ termination for mere variance of terms of the contract.

b. "Mere variance" is a breach, a small one. But who really knows? Only the courts.

c. So what happens if breach? Look to the RS and case law for guidance.

2. Earthinfo, Inc. v. Hydrosphere Resource Consultants, 900 P. 2d 113 (Colo.1995)

a. Termination granted if:

i. Substantial breach;

ii. irreparable injury; and

ii. damages difficult or impossible to assess.

b. Can be rescinded with mutual agreement:

i. Mutual agreement can happen after the contract is executed and there is a dispute. OR

ii. Parties can mutually contract for it. *(We do).

iii. Rule: must have major problem to terminate contract and if terminate wrongly, State liable for breach.

C. Policy reasons to use State remedies in Model Personal Services Contract:

i. Common law termination is limiting

1. May be done only as provided above.

2. State sometimes wants to terminate a contract regardless.

ii. Common law termination is risky

1. If State stops paying, then it goes to court and court says it was an immaterial breach, then State has breached and may be in default.

2. Don't know what a court will decide for damages. Contract lays it all out. Cuts down on uncertainty.

3. Litigation is expensive. Just to find out how much we owe costs $$.

4. Let's parties know the expectations from the outset.

a. V can decide whether to contract or not.

5. Fairness to both sides.

4. What Remedies are in State Contracts?

A. Section 20 of Model Personnel Services Contract = REMEDIES

i. Gives the State options if there is any problem with the contract.

ii. **<u>Not mutual.</u>** Sections 20, 21, and 22 apply only to problems caused by Vendor, not State.

iii. Substantial failure to perform = material, insufficient, incorrect, or improper action or inaction.

iv. This is State's definition of "breach" (basically).

1. similar to case law

v. Parties' options under Section 20 (BOTH parties have the options)

20(a). Suspend contractor's Performance of the Contract

a. No contractor performance until problem is solved

i. solving problem = cure

ii. band-aid

b Example: Contract to install 100 computer workstations. Installs 50 and they don't work.

i. Workstations don't work = breach

ii. Suspend performance of the whole contract (50 more workstations) until fixed.

iii. State not obligated to pay for suspended work. State will pay for good work when fixed. Then pay for the rest of the work when done right.

20(a). Suspend contractor's performance of other obligations that are rendered unnecessary b/c of the breach.

a. State not liable for contractor's costs for obligations that are suspended.

b. Example: Contract to purchase and install tires. Tires come in and they are PINK.

i. Wrong tires = breach

ii. Suspend installment until tires are right color.

iii. Not liable for installation, or preparation of installation (hire extra worker) until cure tires.

20(b). Don't pay until problem is solved

a. This means the State's obligation to perform (pay) is suspended until the Contractor cures.

b. Example: Roofer puts in a leaky roof.

i. Leaky roof = breach

ii. Don't pay until roof is fixed.

20(c). Request that Contractor remove its employees that are part of the problem

a. Powerful

b. May remove employees for:

i. carelessness
ii. insubordination
iii. incompetence

c. Example: hire someone to work on the noxious weeds problem, so they are going to hoe weeds.

i. Don't hoe any weeds, show up late, and break equipment, which happens to be the State's.

ii. No work = incompetence.

iii. Show up late = insubordination.

iv. Break hoe = careless.

v. So = breach (any one of these problems could be called a breach).

vi. State can require that employee be removed from work on the contract.

vii. State doesn't grant employers the same rights b/c:

i. State personnel system
ii. State not usually doing the work—usually just pays.

20(d). Don't pay for services not performed, can't be performed, or have no value if performed.

a. Pay for work done OK
b. Don't pay for work not performed.

c. Straightforward.

d. BUT we have it b/c: its not as easy as it sounds—if we don't pay for contract work, even though a problem, in the common

law, if the problem is not "material", then we are in breach for not paying. Preserves State's rights.

e. This is an eraser type of remedy because we erase the obligations that are not necessary b/c of K'er's breach.

20(e). Terminate entire contract for default.

a. State may not have right to terminate under common law.

b. Allows the parties to walk away from the deal for a substantial failure of performance.

c. State does not have to worry about court-imposed liability if it terminates under this provision.

d. Can move on from bad deal with bad vendor.

e. Allows State to exercise one of the less drastic remedies above, then if still problems, can terminate the contract.

f. See Section 22 of Model Contract

g. This is an Atom Bomb type remedy b/c the contract gets blown up.

7. Only the State can exercise these options.

a. One option for Remedies is Termination.

i. State may want to do something besides terminate
ii. These provisions allow it.
iii. Other options preserved.
iv. If want to terminate, can, then look to Section 22.

b. Or a combination of the above remedies.

B. Termination for Public Interest (used to be Convenience), Section 21 of Model.

i. Not about Vendor's performance.

ii. About a change in public policy from a high level of State government.

iii. Only the State has the right to do this.

iv. Lots of pushback from Vendor's b/c looks like State can walk away at any time.

1. Well, that's true.

2. State does not use this clause without special consideration and thought.

   a. Would never be able to contract with that Vendor again.
   b. Reputation may affect relationships with other V's and potential V's
   c. Courts do not really like this much.

3. When used (see Section 21.1 of the Model Contract):

   a. Change in administrations, or a decision by policy makers (Gov, Legis, or Jud) that in the best interests of the people of the State to not have this contract anymore.

      i. Hypothetical: Gov. Owens contracted to build a coal plant. Gov. Ritter wants a wind plant b/c best interests of the people. Gov. Ritter could terminate contract with coal plant.

   b. Different than Funds Availability:

      a. Funds Avail is more specific and can occur without public policy being in question.

      b. Funds Avail only for budget/ funding issues.

      c. This clause has nothing to do with funding.

4. Payment terms (See Section 21.2 of the Model Contract).

   a. Contractor profit margin preserved.

      1. Will pay for work done and accepted
      2. Will preserve the profit margin based on percentage of work done and accepted.

   b. If less than 60% completed, contractor paid for out-of-pocket expenses in preparation of performance, even if perf not done b/c of the cancellation of this contract.

   c. More favorable to V than other terms.

C. Termination for Default or Cause (Section 22 of Model):

i. Used when the Vendor fails to perform and the State wants to get out.

ii. "Substantial nonperformance" as defined in § 20 (Remedies)

iii. To use:

1. Notify Vendor in writing

2. Give Vendor time to cure

i. Specified in notice to V or a reasonable time.

iv. After you have done above, then State can:

1. Terminate the entire contract; or

2. Terminate the part of the contract that the V is not performing

i. Pay only for work done and accepted before the termination

ii. State owns all the work and done up to the termination; or

3. Continue the rest of the contract.

v. Damages in Termination for Default provision

1. Contractor to pay costs for State to acquire work not completed

a. Damages provided for in Termination for default= market value for work not done.

b. Example: Contract to advertise for State Fair. Does a bad job, terminate the contract half way done, one week before Fair. New advertiser charges more b/c short notice. Old advertiser pays the difference in costs. <u>Expectation</u> damages.

vi. Miscellaneous provisions in the clause

1. Contractor to protect State property if in possession.

2. Protects State if State exercises § 20, § 22, or § 15 (Warranty)

i. Protects State if court decides we wrongfully terminated because the improper termination will not be considered a breach.

3. If contractor is decided to not be in default, then Termination for Convenience applies.

i. Better payment terms for Vendor than regular default

ii. If V wants this last sentence removed, take it out! Better for State that way. But try to keep TOC in.

4. State can withhold money for accepted work due to the contractor for payment of damages for another, unacceptable part of the project.

5. State's obligation to <u>mitigate</u>: Leaky roof damages wood floor, need to patch roof or something to prevent further damage to floor. Contractor pays for patch, and wood damage b/c of hole, but not if you let it snow inside for a month.

5. Damages generally:

a. Expectation (Compensatory, Actual): compensate the injured party for the injury sustained and nothing more. Make good the loss caused by the injury.

i. Example: Contract to buy 100 widgets for $100. Says won't deliver for less than $200. Pay $200. Damages = $100. The benefit of the bargain.

b. Consequential: damages that do not flow directly or immediately from the act itself, but from the consequences of the act.

i. Example: Contract to buy IT product that administers state welfare system. Messed up system = breach. System doesn't work and people don't get benefits. Suit under denial of benefits statute = consequence from bad software.

ii. More remote than special damages (below)

c. Special: The actual damages, but not necessary result of the breach, that flow from the act as a natural and proximate consequence in the case, by reason of the special conditions.

i. Example: Contract for special fuel to be put in an airplane. Use different kind of fuel = breach. Plane explodes, liable for the people on board and not just the plane.

ii. More circumstantially driven than consequential.

6. Conclusion

a. Remedies are solutions to problems

b. State has remedies in its contracts to guide us if things go bad and to protect us from the Common Law.

c. To use Remedies:

If want to Default:
1. Notice
2. Opportunity to Cure.

If no default, and after notice and opp for cure given if default:

3. Determine the appropriate remedy.

Damages:
1. Read the remedy
2. Fairness to both parties
3. State pays for good work done that is accepted by the State.