

Langdon T. Owen<sup>1</sup>  
Cohne Kinghorn, pc  
(801) 363-4300  
lowen@cohnekinghorn.com

## A Primer on Breaches of Contracts to Sell Real Property

Contracts to sell real property are subject to generally applicable contract rules, but the rules for real estate contracts have some special features, as well. In our discussion here, we will mostly ignore cases relating to installment contracts for future delivery of a deed, such as the notorious Uniform Real Estate Contract, litigation over which crowds the Utah case reporters, because those contracts are essentially security devices. We will instead concentrate on contracts to sell which lead to a conveyance at closing, which will generally be by deed (although such a contract to sell could lead to a closing involving replacement by a Uniform Real Estate Contract). We will also for the most part narrow our focus to situations involving failures to consummate the sale, and generally will not deal with other sorts of defaults.

1. **Defaults in General.** The kind of default we will deal with can occur by one party, either seller (sometimes called “vendor”) or buyer (sometimes called a “vendee”), simply failing to appear at closing or at closing failing to convey or pay as required. The default may also occur before the time for closing or (particularly as to a seller’s breach) may not be discovered until after closing. In any event, an enforceable contract is required for any breach, although in some circumstances, remedies may be available to protect certain interests, even without an enforceable contract.

(a) **Anticipatory Repudiation.** Where one party unequivocally repudiates the contract, this is an immediate default. Merely suggesting an alternative performance is not a repudiation, unless it is clear that the party is insisting that it will not perform at all except on the new terms. See *Scott v. Majors*, 980 P.2d 214 (Ut. App. 1999); Restatement 2d Contracts § 250, comment b. (American Law Institute 1981). The repudiation generally can be rescinded if timely done, so long as the other party has not acted on the repudiation or substantially changed its position. Restatement 2d Contracts, § 256. To claim a repudiation, the nondefaulting party must itself be ready, willing, and able to perform. Restatement 2d Contracts § 255, comment a.

(b) **Postclosing.** Absent fraud or mistake, under the “merger into the deed” doctrine, the delivery and acceptance of a deed at closing will indicate fulfillment of the sales contract and of all the terms of the contract that are not treated as collateral or independent. The

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doctrine applies, absent a showing of contrary intent in the contract, for example by a no-merger, or by a survival of closing provision. See *Embassy Group, Inc. v. Hatch*, 865 P.2d 1366 (Ut. App. 1993) (merger into deed absent mistake), *Secor v. Knight*, 716 P.2d 790 (Ut. 1986), *Dobranski v. Isbell*, 740 P. 2d 1325 (Ut. 1987) (merger of oral boundary agreement). See also *Christiansen v. Intermountain Association of Credit Men*, 267 P.1074 (Id. 1928) (general discussion of “collateral” covenants). The doctrine generally would not apply to latent defects in the property not discoverable at the time of closing. See *Worthey v. Holmes*, 287 S.E. 2d 9 (Ga. 1982).

After closing, the property’s title may prove to be defective. If the deed contains a warranty of title, it could be enforced against the seller, but the seller usually must be given notice of the defect and the opportunity to defend title before the seller can be held liable. See *Cott v. Jacklin*, 226 P. 460 (Ut. 1924).

(c) Types of Provisions. An enforceable contract includes promises or covenants, express or implied, which may be breached and may also include warranties and representations.

(i) Warranties and Representations. “A warranty is an assurance by one party to a contract of the existence of a fact upon which the other may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself and it amounts to a promise to answer in damages for any injury proximately caused if the fact warranted proves untrue. . . . [A] breach of warranty sounds in strict liability.” *Groen v. Tri-O-Inc.*, 667 P.2d 598, 604 (Utah 1983). On the other hand, representations which are not warranties, typically give rise to liability only where made with some level of fault (from negligence to intentional fraud).

(ii) Express or Implied Covenants. Express covenants are the negotiated and drafted provisions of the agreement. They are not always as clear and precise as circumstances may later require, thus courts may need to construe or interpret them in light of the circumstances in an attempt to determine what the parties intended when they now take diametrically opposed positions. The courts sometimes apply what are called “cannons of construction,” which are rules of thumb, derived from long experience, as to what parties generally may intend; they are not strict rules of law, so a showing of some other actual intent will trump them.

Also, in some case, no amount of interpretation of the words provided by the parties will do, so courts will sometimes imply a promise to the extent necessary to make the express promises work. These generally tend to be rather strongly fact specific. However, by far the most important implied covenant is the implied covenant of good faith and fair dealing which is implied into every contract under Utah law. See *Eggett v. Wasatch Energy Corp.*, 94 P.3d 193 (Ut. 2004). It thus always exists and does not arise under given factual circumstances. Naturally, how it applies will turn on the factual circumstances of the given case. The implied covenant of good faith can be breached every bit as much as any express covenant, because it relates to judicially recognized duties, even if they are not found within the four corners of the document. *Christiansen v. Farmers Insur. Exch.*, 116 P.3d 259 (Ut. 2005). The gist of the

covenant is that all parties impliedly promise not to intentionally do anything to injure another party's right to receive the benefits of the contract. It cannot be waived. *Beck v. Farmers Insur. Exch.*, 701 P.2d 795 (Ut. 1985). It generally requires objective reasonableness where a party has discretion and no other express standard applies. Thus, for example, under a rather standard seller's financing addendum to a real estate purchase contract, section 8.1 provides "If the content of the credit report or the Buyer disclosures is not acceptable to Seller, Seller may elect to . . . immediately cancel the REPC." This does not allow cancellation by seller on a whim, because as stated in *Markham v. Bradley*, 173 P.3d 865 (Ut. App. 2007), "the interpretation urged by Sellers, that there are no limits on the right to reject the financial information, would render their promise to sell illusory." In *Markham*, the sellers were held to breach for failure to close, and specific performance was ordered.

(d) Enforceability. The normal requirements for an enforceable contract must be met (such as offer and acceptance, consideration or promissory estoppel).

(i) General Requirements. A valid contract is not formed unless the following five elements are established: (1) proper subject matter, (2) competent parties, (3) offer, (4) acceptance, and (5) consideration. *Neiderhauser Builders & Dev. Corp. v. Campbell*, 824 P.2d 1193, 1197-98 (Utah Ct. App. 1992). An offer is a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." *Nunley v. Westates Casing Servs., Inc.*, 989 P.2d 1077, 1086 (Utah 1999). Acceptance is manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made. *Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995) (citing *Engineering Assocs., Inc. v. Irving Place Assocs., Inc.*, 622 P.2d 784, 787 (Utah 1980)). Consideration "is an act or promise, bargained for and given in exchange for a promise." *U.S. General, Inc. v. Jensen*, 128 P.3d 56, 60 (Utah Ct. App. 2005) (further citations omitted). Consequently, "[c]onsideration is commonly defined as '[s]omething of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee.'" *Underwriters v. E & C Trucking, Inc.*, 10 P.3d 338, 342 n.6 (Utah 2000). In certain cases of reliance, promissory estoppel (discussed below) may prevent a party from denying consideration for a transaction.

(ii) Statute of Frauds. In addition, the statute of frauds requires contracts relating to transfers of real property to be in writing (UCA §§ 25-5-1 and 3), although there are a few exceptions, such as part performance of the agreement incompatible with an explanation other than the existence of the contract. See Note, The Doctrine of Part Performance as Applied to Oral Contracts in Utah, 9 Ut. L. Rev. 91 (1964). The statute of frauds also applies to any material modification of an agreement subject to the rule. *Holt v. Katsenavis*, 854 P.2d 575 (Ut. App. 1993).

(iii) Promissory Estoppel. An otherwise unenforceable agreement (often for lack of consideration) may become enforceable to protect a party's reliance interest under the doctrine of promissory estoppel by which the other party is estopped to deny enforceability. To succeed on a claim for promissory estoppel a plaintiff is normally required to show that: (1) the plaintiff acted with prudence and in reasonable reliance on a promise made by

the defendant; (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person; (3) the defendant was aware of all material facts; and (4) the plaintiff relied on the promise and reliance resulted in a loss to the plaintiff. *Youngblood v. Auto-Owners Ins. Co.*, 158 P.3d 1088 (Ut. 2007). See *McKinnon v. Corporation of Pres. of Church of Jesus Christ of Latter-Day Saints*, 529 P.2d 434, 437 (Utah 1974) (a promise to execute a written memorandum and a subsequent failure to do so is insufficient to support a claim of promissory estoppel).

(iv) Promissory Estoppel and Statute of Frauds. However, promissory estoppel can be used, but only in very rare circumstances, to avoid the statute of frauds. See *Fericks v. Lucy Ann Soffe Trust*, 14, 100 P.3d 1200 (“[T]he doctrine of promissory estoppel has been extended, in a limited form, to those cases concerned with the statute of frauds.”) To establish the promissory estoppel exception to the statute of frauds, the acts and conduct of the defendant must so clearly manifest an intention that he will not assert the statute that to permit him to do so would be to work a fraud upon the other party. *Eldridge v. Farnsworth*, 166 P.3d 639 (Ut. App. 2007) and *McKinnon v. Corporation of Pres. of Church of Jesus Christ of Latter-Day Saints*, 529 P.2d 434, 437 (Utah 1974). Specifically, “[i]n situations involving the purchase or lease of real property, ... [a] defendant is estopped from asserting the statute of frauds as a defense only when he or she has expressly and unambiguously waived the right to do so.” *Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356, 360-61 (Utah Ct. App. 1997).

(e) Certain Remedies for Unenforceable Contract. However, even without an enforceable contract, certain remedies may be available, such as relief for unjust enrichment or in some cases an equitable vendee’s lien (discussed further in section 3 of this outline) to secure the return of amounts paid (but not loss of the bargain). See Annot., 33 ALR 3d 1384 (1954) (vendee’s lien).

The elements of a claim for unjust enrichment are:

There must be (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.

*Berrett v. Stevens*, 690 P.2d 553, 557 (Ut. 1984); *Concrete Products Co. v. Salt Lake County*, 734 P.2d 910, 911 (Ut. 1987); *Alpha Partners, Inc. v. Transamerica Investment Management, LLC*, 153 P.3d 714, 723 (Ut. Ct. App. 2006) (which also notes that “an action in quantum meruit, such as unjust enrichment, is typically applied in instances where no enforceable written or oral contract exists”). In a case where the elements are shown, the damage recovery for unjust enrichment would be:

The benefit conferred on the defendant, and not the plaintiff’s detriment or the reasonable value of its services. . .

*Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 425-26 (Ut. Ct. App. 1994).

Unjust enrichment may, as an additional remedy, create a constructive trust for the return of the property or its value. The Restatement (First) of Restitution § 160 (American Law Institute 1937) describes the remedy of a constructive trust this way:

Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

See also UCA § 78B-6-1307 (formerly 78-40-5) (setoff or counterclaim for improvements made). The foregoing remedies may also apply where a contract is enforceable.

(f) General Enforcement and Construction. Typically, if the contract is enforceable, the usual legal and equitable defenses to contract enforcement would be available such as, fraud, failure of consideration, mistake (discussed further in section 4 of this outline), impossibility (*Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct. App. 1989) (“Under the contractual defense of impossibility, an obligation is deemed discharged if an unforeseen event occurs after formation of the contract and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable.”)), abandonment, unconscionability (see general discussion of illusory contracts and of unconscionability in *Resource Management Livestock Co. v. Weston Ranch and Livestock Co., Inc.*, 706 P.2d 1028 (Ut. 1985) and Restatement 2d Contracts § 208), and so on. Also, the usual rules of contract interpretation and construction would apply (see, e.g., *Comm’l Invest. Corp. v. Siggard*, 936 P.2d 1105 (Ut. App. 1997) (strict enforcement, so that premature notice of forfeiture is ineffective), but we mostly will not go into those matters here.

2. Buyer’s Default. Let’s look at the sorts of remedies to which seller may be entitled upon a default by the buyer. See generally 2 Friedman, *Contracts and Conveyances of Real Property*, PLI (1998) § 12.1.

(a) Damages. The measure of damages, for either a default by a buyer or by a seller, is generally based on providing the nondefaulting party the benefit of its bargain. See *Smith v. Warr*, 564 P.2d 771 (Ut. 1977). The damages recoverable by the seller against the buyer are normally measured by the difference between the price and the (lower) market value of the property at the time of the breach. *Bellon v. Malnor*, 808 P.2d 1089 (Ut. 1991). Interest may accrue on the damages from the time of breach. *Abrams v. Motter*, 3 Cal. App. 3d 828 (2d Dist. 1978). Interest and certain expenses other than transactional costs may be recoverable, even where the market value is too high for an additional recovery. See *Glezos v. Frontier Investments*, 896 P.2d 1230 (Ut. 1995). Sometimes, interest will be denied where the seller retains possession. *VanMoorlehem v. Brown Realty*, 747 F.2d 992 (10th Cir. 1984).

(i) Mitigation. The seller must mitigate its damages to the extent reasonable, with the burden to prove a failure to mitigate being on the defaulting party; however, the sale to a third party by the seller will not alone prevent the seller from recovering damages.

*Walters v. Michel*, 745 P.2d 913 (Wyo. 1987). See generally, *Utah Farm Production Credit Ass'n v. Cox*, 627 P.2d 62 (Ut. 1981) (on general rule of mitigation of damages).

(ii) Consequential. Where foreseeable at the time of contracting (see *Harris v. Shell Devel. Corp.*, 594 P.2d 731 (Nev. 1979)), some items may be included in damages in order to really provide the seller with the true benefit of its bargain. See generally, *Mahmood v. Ross*, 990 P.2d 933 (Ut. 1999) (discussion of consequential damages, foreseeability, and provability with reasonable certainty). These items might include, for example, interest or damage for loss of use of funds which the seller should have received, expenses incurred after closing was to have occurred, such as for a caretaker, taxes, utilities, and so on. One court has allowed later title opinion expenses, but not later real estate commissions on resale. *Williams v. Cotten*, 684 S.W.2d 837 (Ark App. 1985). On the other hand, another court has allowed later commissions as an item of damage where the liability for it was due to the buyer's breach. *Gordon v. Pfab*, 246 N.W.2d 283 (Iowa 1976). Such damages may for some courts include later reductions in value, but in that case, later increases in value would reduce damages, and damage could be offset for the seller's use of the property. *Askari v. R & R Land Co.*, 179 Cal. App.3d 1101 (1986). Additional income tax cost where buyer knew the transaction was to be tax free to seller, or additional refinancing costs, may be recoverable, as well. *Alexsey v. Kelly*, 205 A.D.2d 650 (N.Y. App. Div. 2d Dept. 1994).

(b) "Specific Performance" Action for Price. Unless the seller has sold the property to someone else, the seller may be able to recover the price conditioned on delivery of the deed conveying marketable title. This is sometimes referred to as the seller's version of the remedy of "specific performance." Under the doctrine of substantial performance, minor issues relating to the conveyance will not prevent this form of recovery by the seller. *Bruner v. Hines*, 324 So.2d 265 (Alab. 1975). The seller must return the buyer's earnest money before seeking such specific performance; to do otherwise is an election of remedies. *McKean v. Crump*, 53 P.3d 494 (Ut. App. 2002). This remedy is, however, equitable in nature and may be denied where the seller has engaged in misrepresentation or other unfair conduct, or where there has been a mistake. Restatement 2d Contracts § 364(b) (1981). See *Mostrong v. Jackson*, 866 P.2d 573 (Ut. App. 1993) (buyer rescission for mistake). If this remedy is denied, the normal benefit of the bargain damages may still be available.

(c) Forfeiture of Buyer's Earnest Money or Other Payments; Liquidated Damages. At least to the extent not an unconscionable penalty (see *Biesinger v. Behunin*, 584 P.2d 801 (Ut. 1978); Restatement 2d Contracts § 356; and see also *Madsen v. Anderson*, 667 P.2d 44 (Ut. 1983) (real estate installment contract forfeiture may be an unenforceable penalty)), the seller may retain funds paid by the buyer as earnest money or as other payments under the contract where the seller would be able to convey. See *Strand v. Mayne*, 384 P.2d 396 (Ut. 1963). The seller may recover against checks or promissory notes used by the buyer to make these payments, at least where the property has not been resold. *Bramwell Inv. Co. v. Ugglä*, 16 P.2d 913 (Ut. 1932).

(i) Time of Essence. However, for such amount to be retained by the seller, the contract must provide that time is of the essence, and merely having a closing date set

is not sufficient for this. See *Cahoon v. Cahoon*, 644 P.2d 140 (Ut. 1982). Absent such a provision in the contract the seller may unilaterally make time of the essence by specific written notice to the buyer after the closing date fixing a reasonable time. See *Trevillian v. Lee*, 527 P.2d 100 (Az. 1974).

(ii) Liquidated Damages. Retention of the down payment or earnest money, or requiring of buyer the payment of further amounts as liquidated damages, is allowable if the retained amount or amount payable is reasonable. *Warner v. Rasmussen*, 704 P.2d 559 (Ut. 1985). Where the liquidated damages provision gives the buyer the choice of pay or perform, the damages will be limited to the amount specified. The normal rule is that liquidated damages, when provided, are the only damages recoverable. However, if the seller has a choice of accepting the liquidated damages or not, the provision will not eliminate the right of the seller to obtain further damages (*e.g.*, benefit of bargain, or the price under a “specific performance” theory), but the seller would be required, in Utah, to return the down payment or earnest money if it wants to pursue further damages. *Dowding v. Land Funding, Ltd.*, 555 P.2d 957 (Ut. 1976); *McKean v. Crump*, 53 P.3d 494 (Ut. App. 2002).

(iii) Buyer’s Countermeasures. One issue the seller may face is that the buyer may file a *lis pendens* (discussed further in section 5 of this outline), affecting title to the property, where the seller seeks to retain amounts paid or obtain liquidated damages, if the buyer counters by asserting a right to specific enforcement of conveyance of the land or seeks to foreclose an equitable vendee’s lien to recover back its payments. A seller may also be subject to a later suit to recover forfeited amounts deemed unreasonable. See generally *Jensen v. Nielsen*, 485 P.2d 673 (Ut. 1971) (installment contract; action brought 2 ½ years after vacating property; case settled 10 years after default).

3. **Seller Defaults**. Now let’s turn to the remedies available for the situation where the seller defaults by failing to convey as required at closing. See generally, 2 Friedman, *Contracts and Conveyances of Real Property*, PLI (1998) § 12.2.

(a) Recover Amounts Paid. The nonbreaching buyer may rescind the contract and recover amounts paid or other part performance. See *McBride v. Stewart*, 249 P.114 (Ut. 1926); *Brandjen & Kluge, Inc. v. Shonka*, 272 P.2d 155 (Ut. 1954). As noted above (see section 1.e.), the buyer may have a claim for unjust enrichment and an equitable vendee’s lien in the seller’s property to secure the recovery of the amounts earlier paid by buyer, but not to secure any additional damages. See *Harwitz v. Eagan Real Est. Inc.*, 162 A.D.2d 797 (N.Y. App. Div. 3d Dept. 1990). The filing of a *lis pendens* (see section 5) would be appropriate in connection with an action to foreclose any such equitable lien.

An equitable vendee’s lien is recognized in Utah. In the case of *Brown v. Cleverly*, 70 P.2d 881 (Ut. 1937), the court noted that “the lien has been recognized and enforced by courts of equity to prevent injustice, and springs from the broad powers with which such courts are invested. . .The power to decree such a lien, therefore, does not spring from the contract but arises from the broad powers of a court of equity as an incident to a rescission of the contract to secure to the purchaser a return of his money by resorting to the land itself.” A vendee's lien

attaches only to such interest as the vendor has in the property sold. *U.S. Building & Loan Ass'n v. Midvale Home Finance Corporation*, 44 P.2d 1090 (Ut. 1935). Reimbursement claims are not founded on contractual rights unless expressly written in the contract; consequently, the four-year limitation period applies, rather than the six-year statute of limitations that is applicable to written contracts. *CIG Exploration, Inc. v. State*, 24 P.3d 966 (Ut. 2001). See also, *McKean v. McBride*, 884 P.2d 1314 (Utah Ct. App. 1994), *cert. denied*, 899 P.2d 1231 (Utah 1995).

(b) Damages. The buyer could seek damages in addition to return of the amounts paid earlier. However, to obtain damages, a contract breach is necessary; if all that has occurred is a failure of a condition precedent to have been met, the buyer will only receive back the amounts it paid. Assuming an actual default, the damages are generally benefit of the bargain damages measured at the time of breach. *Beckstrom v. Beckstrom*, 578 P.2d 520 (Ut. 1978). The time damages are measured in the event of a breach which is an anticipatory repudiation, may well be at the time closing was to have occurred (rather than the earlier time of breach), in order to prevent a defaulting seller from benefitting from a lower value at repudiation during a time of increasing values. The measure of damage is the value of the property less the unpaid portion of the price.

(i) Possible Tort. Separate additional tort damages (potentially including punitive damages; see UCA § 78B-8-201 (formerly 78-18-1)) may be available, as well, if the seller has committed fraud. *Salter v. Heiser*, 239 P.2d 327 (Wa. 1951).

(ii) Consequential Damage. Consequential damages likely and proximately caused by the breach may be available where the existence of such damages was the result of circumstances known at the time of contracting. *Wall v. Pate*, 715 P.2d 449 (N.M. 1986). Loss of profits or loss of a profitable resale may be allowable as damages by some courts (see *Repub. Nat'l Life Insur. Co. v. Red Lion Homes, Inc.*, 704 F.2d 484 (10th Cir. 1983)) or at least considered in determining the value of the property (*Annon II, Inc. v. Rill*, 597 N.E. 2d 320 (Ind. 1992)). Other damage may include increases in costs of building or financing, additional taxes payable by reason of a failed rollover, or similar items, where the loss was foreseeable and sufficiently proven. See *Dunning v. Alfred H. Mayer Co.*, 483 S.W. 2d 423 (Mo. App. 1972) (requires the additional financing cost to actually be incurred) and *Otero v. Buslee*, 695 F.2d 1244 (10th Cir. 1982). See generally, Annot., 28 ALR 4th 1078 (increased mortgage interest); Annot., 11 ALR 3d 719 (loss of profits from contemplated sale or use of land); Annot. 74 ALR 2d 578 (damages for seller's delay in conveying); Annot., 17 ALR 2d 1300 (expenditures in preparation for performance).

(iii) Third-person Liability. Where the seller sells to, or encumbers the property in favor of, a third person, that person may become liable for damages or for specific performance where that person was aware of the buyer's rights. In the event of such a resale, the damages may include the profit on the sale or, in some courts, the proceeds of the sale. See *Coppola Enters v. Alfone*, 531 S. 2d 334 (Fla. App. 1988); *Niles v. Groover*, 3 S.E. 899 (Ga. 1887). Tort damage for a fraudulent conveyance may be available, if actual fraud is present. *Morse v. Bates*, 74 S.W. 439 (Mo. App. 1903); see UCA § 25-6-1, *et seq.*, Utah's fraudulent transfer act.

(iv) No Mitigation. Generally, the buyer seeking damages does not have a duty to mitigate its damages. *Hickey v. Griggs*, 738 P.2d 899 (N.M. 1987). This is different from the rule generally applicable where a seller seeks to recover damages.

(c) Specific Performance. The Buyer may seek specific performance to obtain the property itself and may file a lis pendens after starting the suit. To be entitled to specific performance, the nondefaulting party must make an unconditional tender of the performance required by the agreement (see *Collard v. Nagle Const., Inc.*, 57 P.3d 603 (Ut. App. 2002)), except that the tender may be conditioned on the other party's performance (*Kelly v. Leucadia Fin. Corp.*, 846 P.2d 1238 (Ut. 1992)). However, a deficient tender made in good faith where the failure of full performance is due to the bad faith and failure to perform of the defaulting party, will not preclude specific performance. *PDQ Lube Center, Inc. v. Huber*, 949 P.2d 792 (Ut. App. 1997). See also, *Shields v. Harris*, 934 P.2d 653 (Ut. App. 1997) (unreasonable conduct may render tender of no avail and thus excuse tender, and an offer to comply is then sufficient). This is an equitable remedy (*L.H.I.W., Inc. v. DeLorean*, 753 P.2d 961 (Ut. 1988)) and may be denied where the buyer unduly delays seeking the remedy. However, the time to seek the remedy may be extended, for example, where the seller tries to cure a title defect. *Hochard v. Deiter*, 549 P.2d 970 (Kan. 1976).

If the seller is not in a position to fully perform the required conveyance, the buyer may still be able to obtain specific performance to the extent the seller can perform, with a price abatement to the extent seller cannot perform. *Kelly v. Leucadia Fin. Corp.*, 846 P.2d 1238 (Ut. 1992). This remedy of specific performance with abatement is generally available, even where the buyer could have rescinded. However, where there is a mistake subject to the rules relating to equitable remedies for mistake, a buyer may instead be given the choice to affirm the contract or rescind. See *Dlug v. Wooldridge*, 538 P.2d 883 (Colo. 1975).

4. **Relief on Grounds of Mistake**. There is a good deal of confusion about when mistake can be used to modify or defeat a contract; it is often raised as a defense in a breach of contract case. Although we will not go into other possible contract defenses, we will try to clarify the issues relating to assertions of mistake.

(a) Mistake Generally. Under certain circumstances, a contract can be reformed by a court where there has been a mutual mistake by the parties. Also, under certain circumstances, a contract can be voided where there has been a mutual mistake of the parties or a unilateral mistake by a party. However, in either case, whether the mistake is mutual or is unilateral, there are no grounds for relief at all for a party who bears the risk of the mistake.

(i) Mutual. The circumstances where a mutual mistake allows a contracting party to claim relief are very limited. As stated in the Restatement 2d Contracts § 152:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of

performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(ii) Unilateral. The circumstances where a unilateral mistake can void a contract are even more limited. As stated in the Restatement 2d Contracts § 153:

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154 and

(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(b) the other party had reason to know of the mistake or his fault caused the mistake.

(b) Risk of the Mistake. The crucial question becomes, when does a party bear the risk of a mistake? The answer is provided by Restatement 2d Contracts § 154:

A party bears the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

The rules on mistake do not allow a party to simply eliminate a specific contractual provision just because that party may be in violation of that provision. The other contracting party is entitled to the benefit of the specific provisions of the agreement. Restatement 2d Contracts § 154(a).

Under Restatement § 154(b), where a party knows its knowledge of a matter (for example, title or condition of the property) is limited but it undertakes to warrant the matter anyway, the risk is on the warranting party. As stated in comment e. to this section:

If he was not only aware that his knowledge was limited but undertook to perform in the face of that awareness he bears the risk of the mistake. It is sometimes said in such a situation that in a sense, there was not a mistake but “conscious ignorance.”

Further situations may make it reasonable to allocate the risk of a mistake to a party. The rule of Restatement § 154(c) is flexible enough to cover a variety of such situations. This may include a situation where a party is negligent in protecting against a possible mistake.

(c) Utah Cases. The foregoing Restatement rules are consistent with the Utah cases dealing with mistake.

(i) Reformation. In *Hottinger v. Jensen*, 684 P.2d 1271 (Utah 1984) the court allowed a reformation where the deed drafter made an error in the metes and bounds descriptions in a deed such that the intention of the parties was not met. In doing so, however, the court said:

There are two grounds for reformation of such an agreement: mutual mistake of the parties and ignorance or mistake by one party coupled with fraud by the other party. (p. 1273)

Unlike the *Hottinger* case, any reformation or defense to allow a party to unilaterally get out of its specific undertaking would not meet the parties' intention at the time of contracting, but would unfairly deprive the other party of a clearly-intended contractual protection. Also, any relief in the face of a party's conscious ignorance would similarly deprive the other party of the agreed contractual benefit. In such situations, there is no real mistake at all, only a contract undertaking which turned out to be hard on the undertaking party. As stated by the court in *Grahn v. Gregory*, 800 P.2d 320 (Ut. Ct. App. 1990) in its discussion of the *Hottinger* case:

Reformation is appropriate where the written instrument is not in conformity with the parties' agreement, not where the parties have failed to agree. We will not make a contract for the parties which they did not make, only reform a contract to reflect the agreement actually made.

Even more strongly, a court will not reform a contract to relieve a party of an obligation it intentionally made and undertook, unless, under both the *Hottinger* case and the Restatement, some actual fault, such as fraud, on the part of the other party can be shown.

(ii) Rescission. In the case of *Blackhurst v. Transamerica Insurance Company*, 699 P.2d 688 (Utah 1985), the court followed the Restatement Rule of § 154(b) and refused to allow a rescission of a settlement agreement in a personal injury case because there was "a conscious uncertainty regarding the medical outcome of the victim's case." (p. 692.) The court noted that in that case both parties undertook a risk that the resolution of the uncertainty might be unfavorable. In other cases, only one party will have taken that risk, and as the court said:

This Court will not nullify a settlement contract because one of the parties would have acted differently if all future outcomes had been known at the time of the agreement. (p. 692)

This rule applies to any kind of contract, including real estate sales contracts, and a party will not be allowed to shift its burden under the express agreement of the parties by reason of its own conscious ignorance of the facts.

However, where a mutual mistake is shown, rescission may be granted even if the contract is a fully integrated agreement with an express integration clause. See Kendall Insurance, Inc. V. R&R Group, Inc., 179 P.3d 117 (Ut. App. 2008).

(iii) Sophistication. Similarly to *Blackhust* (supra), the case of *American Towers Owners Association v. CCI Mechanical*, 930 P.2d 1182 (Utah 1996) follows the rule of Restatement 2d Contracts § 154(b), and in doing so, notes as an additional factor that the claims there “were negotiated between parties sophisticated in commercial transactions.” See also, as to sophistication, *Klas v. Van Wagoner*, 829 P.2d 135 (Ut. Ct. App. 1992) and *Maack v. Resource Design & Construction Inc.*, 875 P.2d 570 (Ut. Ct. App. 1994) (attorneys were involved in both such cases as parties or participants).

(iv) Requirement of Diligence. In *Davis v. Mulholland*, 475 P.2d 834 (Utah 1970), a real estate option case where a party tried unsuccessfully to avoid its contract over a boundary line issue, the Court reiterated the statement from *Ashworth v. Charlesworth*, 231 P.2d 724 (Utah 1951) relating to a unilateral mistake:

Equitable relief from a mutual mistake is frequently given by a reformation of the contract. But a contract will not be reformed for a unilateral mistake. Equitable relief may, however, be given from a unilateral mistake by a rescission of the contract. Essential conditions to such relief are (1) The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable. (2) The matter as to which the mistake was made must relate to a material feature of the contract. (3) Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake. (4) It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in statu quo.

The court in *Davis* upheld the trial court’s finding that the selling party had not been at fault but that the buying party

cannot have rescission of the contract for the reason that if there was any mistake on his part it was due entirely to his own negligence.

The requirement that the mistaking party must have exercised ordinary diligence fits well the provision of the Restatement § 154(c) where the court can allocate to the mistaking party the risk of mistake where it is reasonable in the circumstances to do so.

The lack of ordinary diligence of the party trying to avoid the contract caused the appellate court to reverse the trial court in *Klas v. Van Wagoner*, 829 P.2d 135 (Ut. Ct. App. 1992) (attorney was a party). The court in that case also cited favorably the rule of Restatement § 154 as applying to show who bore the risk of mistake. (P. 141 fn. 8.) In the *Klas* case, it was the failure to obtain an independent real estate appraisal which amounted to failing to rise to the level of ordinary diligence required to demonstrate unilateral mistake.

(v) Standard of Proof. Even if a party could possibly demonstrate the elements for relief by reason of either mutual mistake or unilateral mistake, it would need to do so by clear and convincing evidence. *Embassy Group Inc. v. Hatch*, 865 P.2d 1366 (Ut. Ct. App. 1993).

5. Lis Pendens. The law allows for recording notice of “any action affecting the title to, or the right of possession of, real property” to give constructive notice of the pendency of the action. UCA § 78B- 6-1303 (formerly 78-40-2). The notice is called a “lis pendens” and is recorded after the commencement of the appropriate legal action. It can be a powerful device to protect an interest in land from being wrongfully conveyed.

(a) Security Requirement. The court may require that the party filing the lis pendens give a “guarantee” to pay damages in an amount specified by the court if the claim giving rise to the lis pendens fails and the person benefitting from the guarantee suffers damage. See UCA § 78B- 6-1304 (formerly 78-40-2.5(1)(b), (5), and (6)). Such a guaranty is not a third-party surety bond.

(b) No Lien. A lis pendens is not a lien. A lis pendens is merely a method of providing prospective buyers or mortgage lenders notice that there is litigation pending that may affect title. *Matter of Leonard*, 125 F.3d 543, 545 (7th Cir. 1997) (citing *Connecticut v. Doehr*, 501 U.S. 1, 29 (1991) (Rehnquist, J. concurring) (“The lis pendens itself creates no additional right in the property on the part of the plaintiff, but simply allows third parties to know that a lawsuit is pending.”)); see also, *George v. Oakhurst Realty, Inc.*, 414 A.2d 471, 474 (R.I. 1980) (notice of lis pendens is not equivalent of attachment, nor is it a lien, as it merely puts all prospective purchasers on notice that there is suit pending involving an issue of title to real property); *Kensington Development Corp. v. Israel*, 142 Wis. 2d 894, 904 (Wis. 1988) (“The lis pendens does not create or serve as a lien on real property . . . .”); *J.P. Castagna, Inc. v. Castagna*, 14 Conn. L. Rptr. 56 (Conn. Super. Ct. 1995) (holding lis pendens is not a lien).

(c) Effect of Recording. Under the recording act, such a notice may prevent a third person from becoming a bona fide purchaser for value and without notice; thus a purchaser (including lenders) would take the property subject to the outcome of the litigation. See UCA § 57-3-102 and § 57-4a-2 (recorded documents impart notice); see also, *Tracy Collins Bank & Trust Co. v. Seiger*, 546 P.2d 237 (Ut. 1976). Utah courts have explained that “the sole purpose of recording a lis pendens is to give constructive notice of the pendency of proceedings which may be derogatory to an owner’s title or right of possession.” *Hidden Meadows Development Co v. Mill*, 590 P.2d 1244, 1248 (Utah 1979); see also *Winters v. Schulman*, 977 P.2d 1218, 1222 (Utah Ct. App. 1999) (“The recording of a lis pendens serves as a warning to all persons that any rights or interests they may acquire in the interim are subject to the judgment or decree . . . . Thus, the primary purpose of [former] section 78-40-2 is to provide prospective purchasers with notice of litigation affecting title to or possession of property located in Utah.”)

(d) Release. Release of a lis pendens is governed by Utah Code Ann. § 78B-6-1304 (formerly 78-40-2.5), which provides that a court is to order a notice released if: (a) the court receives a motion to release and (b) the court finds that the claimant has not established by

a preponderance of the evidence the probable validity of the real property claim that is the subject of the notice.

There may be an early mini-trial in a case where a party moves the court for release of the lis pendens. The issue on the motion will be “probable validity,” not the ultimate determination of the case itself, but, as a practical matter, the ruling on the motion is likely to have a very strong influence on the later course of the case.

**A Primer on Breaches of Contracts to Sell Real Property**  
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