

Cir. 2001); *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684 (6th Cir. 2012); *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003); *Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684 (10th Cir. 2004); *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235 (11th Cir. 2008).

5. 218 F.3d at 1091 (Tashima, J., concurring).
6. See, e.g., *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343 (3d Cir. 1997); *Salt Lake Tribune*, 290 F.3d 684; see also *Bakoss*, 707 F.3d 140.
7. See, e.g., *Fit Tech*, 374 F.3d 1.
8. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427, 451–52 (2007).
9. See *Fit Tech*, 374 F.3d at 7; see also *Evanston Ins. Co.*, 683 F.3d at 693; *Advanced Bodycare Solutions*, 524 F.3d at 1239.
10. See, e.g., Colo. Rev. Stat. Ann § 13-22-302; Fla. Stat. Ann. § 44.1011; Ind. ADR Rule 1.3.

Avoiding Pyrrhic Victories, Risks in Joining Legal and Equitable Claims in Contract Cases



Steve Berman

By Steve Berman, Stoll Berne

Lawsuits involving breaches of contract often include claims for both legal and equitable relief. When employers sue departing employees for breach of a non-solicitation agreement, the employers commonly seek damages relating to solicitations that have occurred *and* to enjoin future solicitations.

In a partnership dispute, one partner might demand damages for the other partner's violation of the partnership agreement *and* an injunction to prevent the other partner from depleting partnership resources. In a breach of a sales agreement, the buyer may seek damages for the seller's failure to provide unique goods *and* specific performance to require the seller to provide those goods in the future.

Parties frequently allege legal and equitable claims without giving much thought as to whether they need both, or how the legal and equitable claims may impact one another if the case goes to trial. While a party may *believe* that the threat of the relief demanded in an equitable claim provides a tactical advantage, the equitable claims may detract from the case or impact the ultimate effect of the jury's verdict. During a recent multi-week trial regarding a contract dispute, I learned first-hand how a party's equitable claims can affect that party's breach of contract claim for damages. Based in part on that experience, this article addresses some practical and legal considerations that may arise when taking both legal and equitable claims to trial in a breach of contract case.

I will use a hypothetical dispute regarding the sale of goods. ToyCo makes stuffed animals. SupplyCo supplies ToyCo with a special non-flammable, non-toxic fabric, and SupplyCo is the only company that produces this kind of fabric. The parties have a ten year written agreement that requires SupplyCo to sell its specialty fabric to ToyCo. Certain terms in the contract

could be clearer, including the annual price adjustments. The contract has a prevailing party attorneys' fees provision. After a few years, a dispute arises between ToyCo and SupplyCo regarding the pricing provision of the parties' contract. SupplyCo asserts that it has been underpaid, and cuts off its supply to ToyCo.

ToyCo determines it has claims for: damages arising out of SupplyCo's breach of contract; specific performance or equitable relief, requiring SupplyCo to fulfill its obligations; and, a declaratory judgment, to determine the meaning of the disputed terms of the supply agreement.

ToyCo's first obstacle in obtaining equitable relief is the burden of proof. It is more difficult to prove an entitlement to equitable relief than an entitlement to damages. For a breach of contract claim, the burden of proof is "preponderance of the evidence." *W.D. Miller Construction Co. v. Donald M. Drake Co.*, 221 Or 249, 270 (1960). In contrast, the burden of proof for obtaining the "extraordinary remedy" of mandatory injunctive relief is clear and convincing evidence. *Knight v. Nyara*, 240 Or App 586, 597 (2011). Similarly, a claim "for specific performance must be proved by clear and convincing evidence." *Beaty v. Oppedyk*, 212 Or App 615, 621 (2007). In other words, ToyCo must meet a lower burden to obtain damages than to obtain equitable relief.

Equitable claims face further hurdles that do not arise in breach of contract claims. Orders compelling a party to take specific action are highly disfavored. "Mandatory injunctions are but rarely issued and should be issued only in extreme cases and where the right to such relief is clear." *Levasseur v. Armon*, 240 Or App 250, 258 (2010) (citation and internal quotation marks omitted). To obtain an injunction compelling specific action, the party seeking relief must establish "great necessity" and demonstrate an "appreciable threat of continuing harm." *Levasseur*, 240 Or App at 259 (citations and internal quotation marks omitted).

ToyCo may feel buoyed in its pursuit of equitable relief by Uniform Commercial Code ("UCC") section 2-716 (ORS 72.7160), which provides that in sales of goods, a buyer may obtain specific performance if the seller's goods are unique. UCC 2-716 was adopted for the purpose of clarifying that specific performance is available in cases involving the sales of goods, and is not limited to property transactions. See UCC 2-716, *Official Comment 1* (Section 2-716 "seeks to further a more liberal attitude than some courts have shown in connection with specific performance on contracts of sale"). However, section 2-716 only clarifies that specific performance is available in disputes involving sales of goods. Section 2-716 does not supplant the common law standards a party must meet to obtain a specific performance. Specific performance remains an "extraordinary remedy" available under very limited circumstances. *Voin v. Szabo*, 139 Or App 590, 596 (1996). Even worse for ToyCo, any equitable relief that requires long term, ongoing involvement by the court weighs heavily against a court's awarding equitable relief. See, e.g., *McDonough v. Southern Or. Mining Co.*, 177 Or 136, 150 (1945) (court may decline specific performance where the demanded relief "requires a continuous series of acts over an extended period"); *Natural Resources Defense Counsel, Inc. v. U.S. E.P.A.*, 966 F.2d

1292, 1300 (9th Cir 1992) (“[i]njunctive relief may be inappropriate where it requires constant supervision”).

The unclear terms in the parties’ agreement further weigh against equitable relief. Specific performance may be awarded only where the alleged agreement is clear and without ambiguity. “To be entitled to specific performance, a contract must be definite in all material respects, with nothing left for future negotiation.” *Booras v. Uyeda*, 295 Or 181, 191 (1983) (citation omitted). Specific performance is “not possible” when “the agreement itself [is] not specific enough to serve as the foundation of a specific decree.” *Booras*, 295 Or at 194 (citation omitted). See also *Genset v. John Glenn Corp.*, 298 Or 723, 747 (1985) (rejecting as “at least unfortunate” earlier Supreme Court opinions which indicated that courts could “fill gaps”). When “[t]he course of dealings between the parties, both before and after the drafting of the [contract], demonstrates that the [contract] did not address certain substantive concerns,” specific performance is unavailable. *Miller v. Ogden*, 134 Or App 589, 594 (1995), *affirmed*, 325 Or 248 (1997).

While courts may be disinclined to resolve ambiguous contract terms in equitable claims for specific performance, a factfinder is able to decide the intent of the parties as to ambiguous terms when deciding a contract claim for damages. Under well-settled Oregon law, the court first determines whether a disputed contract term is ambiguous. *Yogman v. Parrott*, 325 Or 358, 361 (1997). “A contract provision is ambiguous if it has no definite significance or if it is capable of more than one sensible and reasonable interpretation.” *Deerfield Commodities, Ltd. v. Nerco, Inc.*, 72 Or App 305, 317, *review denied*, 299 Or 314 (1985). If a court determines that a disputed contractual term is clear, the provision is construed by the court as a matter of law. *Yogman*, 325 Or at 361. However, if the court concludes that the meaning of a term is unclear, that term is presented as a question of fact for the jury to decide. *Deerfield Commodities*, 72 Or App at 317. The Uniform Civil Jury Instructions set forth a list of factors jurors must consider when interpreting an ambiguous contract term. Those factors include pre-contract discussions, the parties’ conduct both before and after the contract was entered, and business customs within the industry. See UCJI 65.17A & UCJI 65.17B (jury instructions regarding ambiguous contract terms).

There is a lack of reported case law on whether a contract term that fails to meet the “definiteness” requirement for specific performance necessarily is “ambiguous” and can be interpreted by a jury in a breach of contract case. However, the two formulations appear to be counterparts of one another. In other words, if a court determines that a contract term is too vague for specific performance, then the meaning and import of the term should be determined by a jury in a breach of contract claim for damages. ToyCo may well have an easier time convincing a jury (by a preponderance of the evidence) than a court (by clear and convincing evidence) that the disputed terms should be interpreted in ToyCo’s favor.

ToyCo may be able to leverage its claim for declaratory relief regarding the disputed contract terms by asking the jury – not the court – to resolve that claim. Having a jury decide the terms of a contract is an underused strategy in Oregon. The right to a jury trial “entitles a civil litigant to a jury trial

on disputed issues of fact material to the application of contract terms.” *Farmers Ins. Co. of Oregon v. Munson*, 127 Or App 413, 419 (1994). The Declaratory Judgment Act provides that a party seeking declaratory relief has the right to have issues of fact determined “in the same manner as issues of fact are tried and determined in other actions at law * * *.” ORS 28.090. That right extends to claims for declaratory relief. See, e.g., *Farmers Ins. Co.*, 127 Or App at 419 (1994) (“[t]he fact that this action was a complaint for declaratory relief does not alter the right to a jury trial”). Thus, at trial, ToyCo could ask the jury to determine the meaning of the ambiguous terms in the contract.

However, a jury’s finding in ToyCo’s favor on ToyCo’s claim for declaratory relief regarding interpretation of the disputed terms of the parties’ agreement may not buttress ToyCo’s claim for equitable relief. Oregon law is unclear as to when, if ever, a trial court may disregard a jury’s verdict when legal claims are tried to a jury and overlapping equitable claims are tried to a court in the same case at the same time. In *Sasser v. DeLorme*, 56 Or App 630 (1982), the plaintiff alleged three claims. The first two claims, for conversion and money had and received, were tried to a jury. The third claim, for an accounting, was tried to the court in the same proceeding. The jury found for the defendants on the legal claims, and the court found for the defendant on the accounting claim. The plaintiff appealed, and argued in part that the court erred by adopting the jury’s findings as part of the court’s findings in the equitable accounting claim. The Court of Appeals rejected that argument. It reasoned:

“The central issue in all three claims for relief was whether the protected person had made a gift to the defendant and the scope of any such gift. . . . The right of defendant to use the funds was therefore determined in the two law actions. *Equity cannot disregard the determination in the law action of the legal rights of the parties to funds involved in the accounting.*”

Sasser, 56 Or App at 634 (emphasis added). Accordingly, *Sasser* appears to stand for the proposition that if overlapping legal and equitable claims are tried simultaneously, and a jury makes factual determinations in its verdict, the court must accept those determinations when addressing the equitable claims.

In *Westwood Corp., Developers and Contractors v. Bowen*, 108 Or App 310 (1991), the Court of Appeals dodged its holding in *Sasser*. In *Westwood*, the plaintiff sought to foreclose a construction lien (for \$945,000) and damages for the defendants’ alleged breach of contract; the defendant brought a counterclaim for damages for the plaintiff’s alleged breach of contract. The lien foreclosure claim was tried to the court and the breach of contract claims simultaneously were tried to the jury. The jury found for defendant and awarded defendant \$903,280 in damages against plaintiff. The court, however, found for the plaintiff on the foreclosure claim; the court further determined that the defendant’s damages for the plaintiff’s breach of contract were only \$48,000, rather than the \$903,280 awarded by the jury. The judgment entered by the trial court included a net judgment for plaintiff of \$41,720 (\$945,000 less \$903,280) on the breach of contract claim

and counterclaim and a foreclosure judgment for plaintiff of \$897,000 (\$945,000 less \$48,000).

The defendant appealed. The defendant assigned error to the trial court's entry of a foreclosure judgment in an amount that reflected the trial court's finding on damages rather than the jury's. *Westwood*, 108 Or App at 313-314. The Court of Appeals affirmed. The Court of Appeals reasoned that the lien foreclosure claim was a creature of statute, wholly independent from the defendants' breach of contract counterclaim. As the Court of Appeals explained, "when both are properly presented, lien foreclosure issues and contract issues are triable to different factfinders, and neither's findings bind the other." *Id.* at 317. The Court of Appeals asserted that *Sasser* was inapplicable.

"Unlike *Sasser*, this is not a situation in which the subject matter of the equitable claim is eliminated by the disposition of the law claims; rather, this case required findings on the same subject in the two separate contexts, both of which could serve as an independent occasion for a remedy."

Id. at 318.

The Court of Appeals' efforts to distinguish *Sasser* seem to fall short. In *Sasser*, as in *Westwood Corp.*, the legal and equitable claims provided independent bases for remedies. In *Sasser*, the jury's verdict resolved the factual issue common to the legal and equitable claims of whether the defendant's use of disputed funds was a gift. In *Westwood Corp.*, the jury determined a factual issue – the amount of damages – that was the same issue resolved by the court in the statutory foreclosure claim. For a time, it seemed that *Westwood Corp.* created at least an exception in lien foreclosure cases to the rule set forth in *Sasser*.

More recently, however, the Court of Appeals has shown an inclination to extend *Westwood Corp.* to all cases where multiple claims are tried simultaneously. In *Westwood Construction Co. v. Hallmark Inns & Resorts, Inc.*, 182 Or App 624, 631-632 (2002), *review denied*, 335 Or 42 (2002), the Court of Appeals explained its decision in *Westwood Corp.* as, when "correctly understood," to "stand[] only for the proposition that issue preclusion does not bar relitigation of an issue common to separate claims *when those claims are litigated as part of a single action or lawsuit.*" And, in *Minihan v. Stiglich*, 258 Or App 839 (2013), the Court of Appeals went out of its way to emphasize that a court may determine the same fact differently in different claims in the same case.

In *Minihan*, after a bench trial that determined the plaintiff's claims for trespass and ejectment, the court subsequently granted the plaintiff summary judgment on his quiet title claim. The court reasoned that claim preclusion applied due to the court's determination of factual issues on the trespass and ejectment claims. The defendant challenged the trial court's holding of claim preclusion. The Court of Appeals cited the holding in *Westwood Construction Co.* that "issue preclusion does not bar relitigation of an issue common to separate claims *when those claims are litigated as part of a single action or lawsuit.*" See *Minihan*, 258 Or App at 855 (quoting *Westwood Construction Co.*). However, because the defendant did not

raise the issue on appeal, the Court of Appeals declined to address it. In *Minihan*, the court made a deliberate detour to highlight for litigants that a court is not bound by its own determination of fact in a different claim in the same case. Neither *Westwood Construction Co.* nor *Minihan* involved a court's re-evaluation of a question of fact determined by a jury. But, both cases rely on the analysis in *Westwood Corp.*, where the trial court did disregard the jury's verdict.

Two additional issues bear mention. There is a prevailing party attorneys' fees provision in the ToyCo-SupplyCo agreement. Under Oregon law, the court is required to determine the prevailing party *on each claim*. ORS 20.077. The court cannot weigh the total outcome in the case, but rather must do a claim by claim analysis. *Robert Camel Contracting, Inc. v. Krautscheid*, 205 Or App 498, 502-505 (2006). Thus, if the jury finds that SupplyCo breached the agreement, but the court determined that ToyCo had not proven its claim for specific performance, ToyCo would be the prevailing party on the contract claim, and SupplyCo would be the prevailing party on the equitable claim. ToyCo could win its breach of contract case and still be responsible for paying some of SupplyCo's attorneys' fees.

ToyCo also might consider moving for immediate injunctive relief, an equitable remedy. Because SupplyCo is the sole supplier of the fabric, ToyCo would seek an order requiring SupplyCo to continue to supply ToyCo. In order to obtain a TRO or a preliminary injunction, ToyCo must establish that "there is not an adequate remedy at law." *Bates v. Department of Motor Vehicles*, 30 Or App 791, 793 (1977). ToyCo is facing business losses, which may well be calculable claims at law. Moreover, ToyCo may be unable to make a clear showing to a judge that it is "entitled to relief demanded in" its complaint, see ORCP 79 A (setting forth that standard for obtaining equitable relief). See also, *Giftango, LLC v. Rosenberg*, 925 F Supp2d 1128, 1138 (D Or 2013) (party seeking preliminary injunction must make a "clear showing" that it is "likely to succeed on the merits"). The material term of the contract ToyCo seeks to enforce is unclear, and a judge may well conclude that ToyCo's likelihood of prevailing on its specific performance claim is limited. Despite the fact that a court may have the authority to re-evaluate its prior legal determinations, ToyCo would face an uphill battle after losing a motion for a temporary restraining order.

In sum, there are no easy answers for a party contemplating both legal and equitable claims. The extra burdens in proving an equitable claim and the ability of a judge deciding equitable claims to disregard the jury's findings on the claims at law are key considerations. In many instances, a party may best be served by forgoing more difficult equitable claims, and thereby reduce the potential for complication at trial and a Pyrrhic victory.