



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Contracts – specifically, substantial performance doctrine versus material breach. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can always reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Welcome back to the Bar Exam Toolbox podcast! Today, we are discussing Contracts – specifically, substantial performance versus material breach. Under the common law, a material breach will excuse the non-breaching party’s performance. A minor breach, however, will not excuse performance, and the non-breaching party must still perform – though he may bring a separate action for damages resulting from the breach. A material breach occurs when a party does not render substantial performance, i.e., the party did not perform major parts of the contract.

Lee Burgess: To determine whether a breach is material, courts will consider, (1) the extent of the benefit deprived to the injured party – essentially, what was the extent of performance; (2) the adequacy of compensation for loss to the non-breaching party; (3) the extent the breaching party will suffer hardship; (4) the likelihood that the breaching party will cure; and (5) the absence of good faith or fair dealing by the breaching party – so whether the breach was intentional, negligent, or innocent.

Lee Burgess: Unless the agreement provides otherwise, the work must be substantially performed before payment can be demanded. Please remember that this doctrine applies to contracts governed by the common law, not contracts under the UCC.

Lee Burgess: Before we move on, it might be helpful to think about the kinds of contracts this doctrine applies to. The most common are fact patterns involving contractors building something. If the performance is deficient in some way, but basically fits the bill, the person hiring the contractor still has to pay for the work. However, the hiring person can sue to get damages due to the deficiencies.



Lee Burgess: It's important to note that courts are split on the effect of an intentional breach by a party. Some courts have held that substantial performance cannot occur if an intentional breach exists, regardless of the breach's impact. Other courts have held that an intentional breach is just a factor to be considered and does not automatically defeat recovery.

Lee Burgess: Now that we have a basic understanding of the substantial performance doctrine and the factors courts will consider, let's jump into some hypos. These hypos have all been edited for brevity and focus. Our first hypo has been adapted from the [July California bar exam in 2013](#):

Lee Burgess: "On March 1, Ben, a property owner, and Carl, a licensed contractor, executed a written agreement containing the following provisions: Carl agrees to construct a residence using solar panels and related electrical equipment manufactured by Sun Company, and to complete construction before Thanksgiving. Ben agrees to pay Carl \$200,000 upon completion of construction.

Lee Burgess: Prior to the execution of the written agreement, Ben told Carl that Carl had to use Sun solar panels and related electrical equipment, because Sun was owned by Ben's brother, and that Carl had to complete the construction prior to Thanksgiving. Carl assured Ben that he would comply.

Lee Burgess: To complete construction prior to Thanksgiving, Carl had to use solar panels and related electrical equipment of equal grade and manufactured by one of Sun's competitors, because Sun was temporarily out of stock. Carl completed construction prior to Thanksgiving. Ben, however, has refused to pay Carl anything. What are Carl's rights and remedies against Ben?"

Lee Burgess: Let's go over what we know happened in the contract. One, Carl completed construction of the residence prior to Thanksgiving, and two, Carl used solar panels, but not Sun solar panels, despite Ben's request that they use Sun solar panels. Now Ben is refusing to pay.

Lee Burgess: First, let's start with the rule. A material breach will excuse the non-breaching party's performance. A minor breach will not excuse performance, and the non-breaching party must still perform. A material breach occurs when a party does not render substantial performance. Therefore, we must first determine whether this was a material breach or a minor breach. To do that, we have to analyze five factors: (1) the extent of the benefit deprived to the injured party; (2) the adequacy of compensation for loss to the non-breaching party; (3) the extent the breaching party will suffer hardship; (4) the likelihood that the



breaching party will cure; and (5) the absence of good faith or fair dealing by the breaching party.

Lee Burgess: Now that we've reviewed the rule, let's start with the five factors to determine whether this was a material or minor breach. First, we look at the extent of the benefit deprived to the injured party – essentially, what was the extent of performance. Here, Carl has fully completed construction, including using solar panels. This tells us there is nothing left to be done in the contract, despite the fact that the solar panels are the wrong brand. The hypo even tells us that Carl completed construction by the deadline. This demonstrates that Ben has benefited from receiving an entirely new residence, with solar panels, by the deadline requested. A court will view that as a big benefit to Ben, because Carl essentially completed the entire contract. This factor weighs in favor of a minor breach, since performance is complete.

Lee Burgess: On to the second factor: The court will ask whether compensation for the loss is adequate. Here, that means, if Ben wins in court and Carl has to compensate him for the breach, will monetary damages be adequate? On one hand, Ben could use the money to buy the Sun solar panels that he wanted in the first place. On the other hand, then he would have two sets of solar panels, and one residence to use them on. Given the fact that his request in the contract was to have solar panels on his new residence, and that is what he currently has, the court will likely find that compensating Ben with money for new solar panels is inadequate. Therefore, this factor weighs in favor of a minor breach.

Lee Burgess: The third factor is the extent the breaching party will suffer hardship. Here, it is likely that Carl would suffer tremendously, given the fact that he completed construction on an entire residence. If the court decided that his breach was material and that Ben did not have to pay, then Carl would have lost the time, effort, labor, and materials that goes into constructing an entire residence. Because the court is in favor of a just, fair result, it is likely that this factor weighs in favor of a minor breach.

Lee Burgess: The fourth factor is the likelihood the breaching party will cure the breach. Here, Carl will likely argue that while he may be able to cure the breach – i.e., switch out the solar panels with Sun solar panels – it would be time consuming and costly for him to do so, and it would push the project past the deadline. On the other hand, Ben may argue that because Sun Solar Company is run by his brother, it is easier for him to switch out the solar panels, and then he would have two sets of solar panels for his new residence. The court will take into account the deadline, which is typically very important in construction contracts, and likely find that Carl could cure the breach, even if it meant



pushing the construction past the deadline. Therefore, it is likely this factor weighs in favor of a minor breach, because the breaching party likely can cure it.

Lee Burgess: Finally, the fifth factor is the absence of good faith or fair dealing by the breaching party. Here, the court will likely understand that timing in construction contracts is very important, sometimes the most important aspect of the contract. Carl will point to the fact that he abided by the deadline and still used solar panels, despite Ben’s desire that they be from a certain company. On the other hand, Ben may argue that the choice of solar panels was the most important aspect of the contract, but Carl can counter this argument by saying that if it was so important to Ben, it would have been written in the contract from the beginning. The court will look at Carl’s effort to finish the construction in a timely way and likely find this factor in favor of a minor breach. Therefore, the five factors point to Carl having substantially performed, i.e., only committing a minor breach, and therefore, Ben is still required to perform, in this case, pay Carl the \$200,000 for his work.

Lee Burgess: Now, let’s go through another example. This one is adapted from the [February 2020 California bar exam](#):

Lee Burgess: “Barn Exports, a company, hired Sam, an artist, to paint a one-of-a-kind artistic design along the border of the ceiling in its newly renovated lobby. After discussing the work, Ed, the president of Barn, and Sam signed a mutually drafted handwritten contract, which states in its entirety: ‘Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay \$75,000 upon completion of the work.’”

Lee Burgess: Sam spent four days preparing and painting the ceiling of the lobby. When Sam finished painting, he submitted a bill for \$75,000. In response, Barn sent a letter to Sam stating that, because he had not painted the borders in the two public restrooms in the lobby, no payment was yet due. According to Sam, before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations. Barn sued to have the borders in the bathrooms painted.”

Lee Burgess: Okay, let’s summarize what we know happened in the contract. Sam painted the entire ceiling border, but did not paint the bathrooms. Barn refused to pay and insists on the bathrooms being painted. Whether Barn is required to pay Sam will turn on whether this is a minor breach or a material breach.

Lee Burgess: Let’s move to analyzing each factor in turn. First, the court will ask to what extent did Barn benefit from Sam’s partial performance? Here, Sam has painted



the entire lobby, which is likely much bigger than the two restrooms. Sam's paintings are unique, one-of-a-kind artistry, which the court will likely view as a benefit to Barn. Sam's painting has likely increased the attractiveness of Barn's lobby, which would turn into more customers and more profit for Barn. Therefore, despite Sam's failure to paint the restrooms, it is likely that this first factor weighs in favor of a minor breach.

Lee Burgess: Second, the court will ask if compensation is adequate for loss to the non-breaching party. Here, if Barn were to be compensated for Sam's failure to paint the restrooms, they would have money to hire another artist to do so. However, Sam may argue that most artists aren't able to paint the restrooms because of the high humidity. Barn will point out that they can hire someone with different materials. This factor is likely neutral, not necessarily falling in favor of a minor breach or a material breach.

Lee Burgess: Third, the court will analyze whether the breaching party will suffer hardship. Here, Sam spent four days preparing and painting the lobby, which is an extensive amount of time and materials that he put into painting. As an artist, he was likely depending on the money to continue his business and sustain his livelihood. To have worked on a contract for almost a week and not be paid could be crucial to his business, and therefore, likely considered a hardship if he is not paid for the work he has already completed. Therefore, this factor works in favor of a minor breach.

Lee Burgess: Fourth, the court will analyze the likelihood that the breaching party will cure the breach. Here, it is possible that Barn could pay Sam to use different materials that would work in a high-humidity location. There are no facts to indicate Sam is unwilling to finish the work, only that he cannot finish with his current materials. In fact, Barn may prefer Sam to finish the work so the entire lobby and restrooms are seamless, as opposed to hiring a different artist. This factor likely points to a minor breach.

Lee Burgess: Finally, the fifth factor courts will analyze is whether there was an absence of good faith and fair dealing by the breaching party. Here, Sam will argue that he warned Barn ahead of time that his materials would not withstand the humidity in the restroom. Barn may argue that they did not know this because it was not in the contract, but the court may take into account that "all public areas" is ambiguous. Therefore, it is likely that the court will determine that Sam did not breach this contract in bad faith, especially because he painted all other possible areas of the lobby. Therefore, this factor points in favor of a minor breach.



Lee Burgess: Overall, the factors weigh heavily in Sam's favor, indicating that Sam substantially performed the contract. Therefore, the court will likely require Barn to perform their side of the contract, by paying Sam the contract price for his work.

Lee Burgess: This concludes our breakdown of minor breach versus material breach. Remember, practicing essays is the best way to fully understand how the court uses each of these factors to determine what type of breach occurred.

Lee Burgess: And with that, we are out of time. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. We have future "Listen and Learn" episodes coming out. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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