

## Contract Basics for Litigators: New Jersey

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A Q&A guide to state law on contract principles and breach of contract issues under New Jersey common law. This guide addresses contract formation, types of contracts, general contract construction rules, how to alter and terminate contracts, and how courts interpret and enforce dispute resolution clauses. This guide also addresses the basics of a breach of contract action, including the elements of the claim, the statute of limitations, common defenses, and the types of remedies available to the non-breaching party.

### Contract Formation

#### 1. What are the elements of a valid contract in your jurisdiction?

In New Jersey, the elements of a valid contract are:

- An offer (see Offer).
- An acceptance (see Acceptance).
- Consideration (see Consideration).
- Mutual assent and intent to be bound (see Mutual Assent and Intent to be Bound).
- Reasonably certain contract terms (see Certainty).

(N.J. Jury Instr. Civ. 4.10C; *GMAC Mortgage, LLC v. Willoughby*, 230 N.J. 172, 185 (2017); *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992); *W. Caldwell v. Caldwell*, 26 N.J. 9, 24-25 (1958).)

#### Offer

Under New Jersey law, an offer must:

- Be communicated to the other party (offeree).
- Permit the other party to understand that:
  - an offer is being made; and
  - accepting the offer forms a binding contract (see Acceptance).
- Contain sufficiently definite terms so it is reasonable for the other party to believe its acceptance creates an enforceable contract (see Certainty).

(See *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 250 (3d Cir. 2007) (citing Restatement (Second) of Contracts § 24 (1981)) (applying New Jersey law); *Big M, Inc. v. Dryden Advisory Group*, 2009 WL 1905106, \*14 (D.N.J. 2009) (applying New Jersey law); *Weichert Co. Realtors*, 128 N.J. at 435; *W. Caldwell*, 26 N.J. at 24-25.)

An offeror generally may revoke an offer at any time before acceptance (*Am. Handkerchief Corp. v. Frannat Realty Co.*, 17 N.J. 12, 17 (1954); *Wendell v. 22 Grove Assocs. L.P.*, 2016 WL 3434384, at \*5 (App. Div. June 23, 2016) (unpublished decision, cite according to N.J. R. 1:36-3)). An offeror revokes an offer by any act that shows its intention not to enter the proposed contract. The revocation is effective on receipt. (See, e.g., *Senior Settlements, LLC v. Growth Trust Fund*, 2008 WL 11383961, at \*9 (D.N.J. Feb. 27, 2008), *aff'd*, 373 F. App'x 287 (3d Cir. 2010) (applying New Jersey law) (unpublished decision, cite according to N.J. R. 1:36-3).)

#### Acceptance

Under New Jersey law, a party accepts an offer when:

- It has actual knowledge of and agrees to the contract's essential terms.
- The acceptance is unequivocal and unqualified.

(*Cumberland Farms, Inc. v. New Jersey Dept. of Environmental Protection*, 447 N.J. Super. 423, 439 (2016), *certif. den.*, 229 N.J. 149 (2017); *Weichert Co. Realtors*, 128 N.J. at 435-36; *Gamble v. Connolly*, 399 N.J. Super. 130, 140-41 (2007); *Graziano v. Grant*, 326 N.J. Super. 328, 339-40 (App. Div. 1999).)



Parties may express their assent to form a contract by word (creating an express contract) or conduct (creating an implied-in-fact contract) (*Weichert Co. Realtors*, 128 N.J. at 436; see Question 4).

A response to an offer that is qualified with conditions is a rejection of the offer or a counteroffer, not an acceptance (see, e.g., *Carlin v. Newark*, 36 N.J. Super. 74, 89 (Law Div. 1955)).

### Consideration

Under New Jersey law, consideration is a bargained for exchange of promises or performance that may be an act, a forbearance, or an agreement to create, modify, or destroy a legal relation (*Sipko v. Koger, Inc.*, 214 N.J. 364, 380 (2013); *Martindale v. Sandvik*, 173 N.J. 76, 87 (2002); *Shebar v. Sanyo Business Systems Corp.*, 111 N.J. 276, 289 (1988)). Consideration may include either:

- A benefit to the promisor.
- A detriment to the promisee.

(See *Continental Bank of Pennsylvania v. Barclay Riding Academy, Inc.*, 93 N.J. 153, 170, cert. denied, 464 U.S. 994 (1983); *Bernetich, Hatzell & Pasco, LLC v. Medical Records Online, Inc.*, 445 N.J. Super. 173, 183 (App. Div. 2016).)

Generally, courts do not weigh the value of the consideration but only assess whether it exists (see *Sipko*, 214 N.J. at 381; *Martindale*, 173 N.J. at 87; *Shebar*, 111 N.J. at 289).

### Mutual Assent and Intent to be Bound

Under New Jersey law, the creation of a binding contract requires a “meeting of the minds,” which means that the parties must agree to all the material or essential contract terms and show an intent to be bound by those terms (*Weichert Co. Realtors*, 128 N.J. at 435; *Gamble*, 399 N.J. Super. at 140-41).

Both parties must show that they understand what they are agreeing to do or not to do. The contract cannot be based on one party’s secret or hidden intention or understanding. (*Big M, Inc.*, 2009 WL 1905106, at \*13; *Brawer v. Brawer*, 329 N.J. Super. 273, 283 (App. Div. 2000); *Hagrish v. Olson*, 254 N.J. Super. 133, 136 (App. Div. 1992).)

Courts measure the parties’ mutual assent and intent to be bound using an objective standard based on the parties’ words and actions (*Leitner v. Braen*, 51 N.J. Super. 31, 38 (App. Div. 1958); *Pagnani-Braga-Kimmel Urologic Assoc., PA v. Chappell*, 407 N.J. Super. 21, 28 (Law Div. 2008)).

### Certainty

Under New Jersey law, the contract terms must be sufficiently clear so that what each party should or should not do may be determined with reasonable certainty (*Weichert Co. Realtors*, 128 N.J. at 435; *W. Caldwell*, 26 N.J. at 24-25; *Krill v. IDT Corporation, Inc.*, 2017 WL 3091799 at \*6 (App. Div. July 21, 2017) (unpublished decision, cite according to N.J. R. 1:36-3)).

The contract’s essential terms are those terms that are necessary and detailed enough for a court to enforce (*Rauch v. Rauch*, 2017 WL 3722545, at \*5-6 (App. Div. Aug. 30, 2017) (unpublished decision, cite according to N.J. R. 1:36-3); *Graziano*, 326 N.J. Super. at 339-40). A court must be able to accurately determine each party’s obligation to enforce the contract (*Big M, Inc.*, 2009 WL 1905106, at \*14; *Krill*, 2017 WL 3091799 at \*6). Whether there has been a meeting of the minds on the contract’s essential terms depends on the circumstances (*Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 442 (2014)).

### 2. What categories of contracts must be in writing to satisfy your jurisdiction’s statute of frauds?

New Jersey’s statute of frauds requires certain types of contracts to be in a writing and signed by the party (or the party’s agent) against whom enforcement is sought, such as:

- A prenuptial agreement, if made after the February 19, 2007 enactment of the Uniform Premarital and Pre-Civil Union Agreement Act, N.J.S.A. 37:2-31 to 37:2-41 (N.J.S.A. 25:1-5(c)).
- A loan, grant, or extension of credit of more than \$100,000 made by a person in the business of lending or arranging for the lending of money or extending credit, including leases where the lease is the primary method of obtaining financing (N.J.S.A. 25:1-5(f)).
- A creditor’s agreement not to exercise any contractual remedies where the amount owed exceeds \$100,000 (N.J.S.A. 25:1-5(g)).
- An agreement by one party to a non-marital relationship to support the other party during the relationship or after its termination, if both parties get independent legal advice (N.J.S.A. 25:1-5(h)).
- A contract for the transfer of real property unless the transferee:
  - possesses the real estate and paid all or part of the consideration for the transfer; or

- has reasonably relied on the transfer’s effectiveness to the transferee’s detriment.

(N.J.S.A. 25:1-11(a)(2).)

- Leases of more than three years in duration unless a party proves by clear and convincing evidence:

- the lease term; and
- the lessor and lessee’s identities.

(N.J.S.A. 25:1-12(b).)

- A promise to be liable for another person’s obligations (N.J.S.A. 25:1-15).
- Real estate broker commissions, unless:
  - the broker serves the principal with a written notice memorializing the terms of the oral agreement within five days after making the oral agreement and before the transfer or sale; and
  - before the principal rejects the oral agreement, the broker either completes the transfer or sale or enters good faith negotiations with a prospective party who later completes the transfer or sale.

(N.J.S.A. 25:1-16(b), (d).)

Under New Jersey’s Uniform Commercial Code, contracts for the sale of goods for the price of \$500 or more also must be in writing (N.J.S.A. § 12A:2-201(1)). For more information on the statute of frauds generally and other types of agreements that must be in writing and signed, see [Practice Note, Signature Requirements for an Enforceable Contract](#).

### 3. In your jurisdiction, what must the writing contain to satisfy the statute of frauds?

In New Jersey, to satisfy the statute of frauds, the writing must:

- Consist of one or more documents signed by the party against whom enforcement is sought. The writing can be the contract itself or a memorandum confirming the parties’ agreement. (N.J.S.A. 25:1-5.)
- Contain all essential terms with enough certainty that the agreement’s substance is apparent without resorting to parol evidence (see Question 6).

(*Vanguard Telecommunications, Inc. v. Southern New England Telephone Co.*, 722 F. Supp. 1166 (D.N.J. 1989), *judgment aff’d*, 900 F.2d 645 (3d Cir. 1990) (applying New Jersey law); *Sutton v. Lienau*, 225 N.J. Super. 293 (App. Div. 1988).)

For real property transactions, to satisfy the statute of frauds, the agreement must:

- Be a written contract or a confirming memorandum.
- Be signed by the party against whom enforcement is sought.
- Designate the parties to the transaction.
- Identify and describe the property.
- State the nature of the real estate interest to be transferred.
- Include the agreement’s essential terms, which may include:
  - the purchase price;
  - the time and terms of payment;
  - the required financing;
  - the closing date;
  - the quality of title to be conveyed;
  - the risk of loss during the sale period; and
  - adjustments for taxes and utilities.

(N.J.S.A. 25:1-10 to 25:1-14; *McEnaney v. Spedick*, 13 N.J. Super. 37, 40 (App. Div. 1951) (stating a document listing the parties, a description of the premises, and a price and terms contained the essential elements of a contract for the sale of land), *overruled on other grounds*, *Kutzin v. Pimie*, 124 N.J. 500 (1991); *Jacobson v. Lambert*, 109 N.J. Eq. 88, 90 (E. & A. 1931); *Randolph v. General Investors Co.*, 97 N.J. Eq. 493, 496 (E & A. 1925) (same).)

Although omitting one of the above terms does not render a contract void, omission of several of them may result in a contract that does not contain all essential terms and therefore does not satisfy the statute of frauds (*Sutton*, 225 N.J. Super. at 300).

## Types of Contracts

### 4. Describe the types of contracts your jurisdiction recognizes. Please include how your jurisdiction defines each type.

New Jersey law recognizes the following types of contracts:

- Express (see Express Contract).
- Implied-in-fact (see Implied-in-Fact Contract).

- Quasi-contract or implied-in-law (see Quasi-Contract).
- Unilateral and bilateral (see Unilateral and Bilateral Contracts).

### Express Contract

An express contract is an agreement arrived at by the parties' words, whether oral or written. A party assents to an express contract by its actual words rather than its conduct. (See *Scagnelli v. Schiavone*, 538 Fed. Appx. 192, 193 (3d Cir. 2013) (applying New Jersey law); *Wanaque Borough Sewerage Auth. v. Twp. of W. Milford*, 144 N.J. 564, 574 (1996).)

A written contract contains the transaction's essential terms in writing. An oral contract is an agreement that the parties have not written down. New Jersey recognizes both types of contracts as valid, but the statute of frauds requires certain types of contracts to be in writing (see Question 2).

### Implied-in-Fact Contract

An implied-in-fact contract is based on inferences from the facts and circumstances of the case, including:

- The parties':
  - conduct;
  - communications; and
  - course of dealing.
- Industry custom.

(*Saint Barnabas Med. Ctr. v. Essex Cty.*, 111 N.J. 67, 77 (1988); *St. Paul Fire & Marine Ins. Co. v. Indem. Ins. Co. of N. Am.*, 32 N.J. 17, 23-24 (1960); *Wanaque Borough Sewerage Auth.*, 144 N.J. at 574.)

A court infers the parties' intent from these circumstances. However, all contract elements, including a meeting of the minds, must still exist. (*West Caldwell*, 26 N.J. at 29; *Annunziata v. Miller*, 241 N.J. Super. 275, 289-90 (Ch. Div. 1990).)

The distinction between an express contract and an implied-in-fact contract is how a party manifests assent to its terms. For example, if someone provides services to another under circumstances that do not support the idea that they were donated or free, the law implies an obligation to pay the reasonable value of the services. (N.J. Jury Instr. Civ. 4.10E.)

An implied-in-fact contract cannot exist if:

- There is an express contract.
- The parties intended to be bound only by a written agreement.
- The statute of frauds applies (N.J.S.A. 25:1-5; see Question 2).

(See *Kas Oriental Rugs, Inc. v. Ellman*, 394 N.J. Super. 278, 286 (App. Div. 2007).)

### Quasi-Contract

A quasi-contract, also called an implied-in-law contract, is a legal fiction that does not require a party's assent (by words or conduct) to any specific contract terms. A quasi-contract is a legal obligation the law imposes to ensure an equitable result. It only applies in the absence of an express agreement. (*Insulation Contracting & Supply v. Krayco, Inc.*, 209 N.J. Super. 367, 376 (App. Div. 1986); *Saint Paul Fire & Marine Ins. Co.*, 32 N.J. at 22.)

New Jersey courts recognize a quasi-contract when:

- There is no written agreement covering the subject matter of the dispute.
- One party confers a benefit on another.
- The other party has accepted and retained the benefit conferred or was enriched at the conferring party's expense.
- It would be inequitable for the other party to retain the benefit.

(*Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 172 N.J. 60, 68 (2002); *J.C. Dairy Farm, LLC v. 572 Eighth Ave. Mkt. Corp.*, 2013 WL 764648, at \*4 (App. Div. Mar. 1, 2013) (unpublished decision, cite according to N.J. R. 1:36-3).)

The remedies for breach of a quasi-contract include promissory estoppel, quantum meruit, or unjust enrichment.

A party can plead a quasi-contract claim in the alternative to a breach of contract claim, but recovery under both is impermissible (see N.J. R. 4:5-2 and 4:5-6). For more information on quasi-contract claims under New Jersey law see, [State Q&A, Quasi-Contract Claims: New Jersey](#).

### Unilateral and Bilateral Contracts

A bilateral contract generally involves an exchange of promises between two parties to the contract.

For example, a promise to provide services in exchange for a promise to pay for the services is a bilateral contract. The bilateral contract becomes enforceable once the parties to the contract reach a meeting of the minds. (*Noto v. Skylands Cmty. Bank*, 2005 WL 2362491, at \*5 (App. Div. Sept. 28, 2005) (unpublished decision, cite according to N.J. R. 1:36-3).)

In a unilateral contract, one party makes an offer or promise that the other party accepts only by performing a requested act. The contract is enforceable once the other party performs. (*Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 109 (2007).) For example, a company's promise of bonus compensation for employees who generate revenue beyond normal forecasts is a unilateral contract. The offer is bonus compensation, and the acceptance is the employee's performance of generating revenue beyond the normal forecast. (See *Petronzi v. Comput. Scis. Corp.*, 2018 WL 1586325, \*9-11 (D.N.J. April 2, 2018) (applying New Jersey law) (unpublished decision, cite according to N.J. R. 1:36-3).)

## Construction of Contracts

### 5. What are the general rules of contract construction in your jurisdiction? For example, rules construing inconsistencies, intention of the parties, definitions, etc.

### Intention of the Parties

New Jersey courts enforce contracts based on the parties' intent and the contract's express terms, surrounding circumstances, and purpose. Courts generally determine the parties' intent from the contract's language alone if it is plain and capable of legal construction. (*Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 118 (2014); *Twp. of White v. Castle Ridge Dev. Corp.*, 419 N.J. Super. 68, 74-75 (App. Div. 2011).)

Courts may consider all relevant evidence to determine an unambiguous contract's intent and meaning (*Manahawkin*, 217 N.J. at 118; *Labossiere Assocs., Inc. v. Indep. Harbor I Condo. Ass'n, Inc.*, 2021 WL 520068, at \*8 (App. Div. Feb. 12, 2021) (unpublished decision, cite according to N.J. R. 1:36-3)). When analyzing ambiguous terms in a written contract, courts try to determine what the parties intended the term to mean (*Manahawkin*, 217 N.J. at 118). Courts may use parol or extrinsic evidence when resolving an ambiguous contract (see Ambiguity or Inconsistency).

Courts may not:

- Insert or excise terms or construe the language in any way that distorts the contract's meaning (*Sayles v. G & G Hotels, Inc.*, 429 N.J. Super. 266, 274 (App. Div. 2013)).
- Rewrite the contract's terms to make a better contract for either party (*Graziano*, 326 N.J. Super. at 342).

For more information on the parol evidence rule, see Question 6.

## Grammar and Meanings

Under New Jersey law and principles of contract interpretation, courts do not impose the rules of grammar in a way that would frustrate the parties' intent (*Nester v. O'Donnell*, 301 N.J. Super. 198, 210 (App. Div. 1997)).

To effectuate the parties' intent, courts typically give undefined words their most commonly understood meanings (see, for example, *Cypress Point Condo. Ass'n v. Adria Towers, L.L.C.*, 226 N.J. 403, 426-27 (2016) (undefined term "accident" did not render contract provision ambiguous because the commonly understood dictionary definition of the word made the meaning clear on its face); *M.J. Paquet, Inc. v. N.J. Dep't of Transp.*, 171 N.J. 378, 396 (2002)). However, courts typically avoid applying an overly technical reading to a word that is at odds with the most reasonable interpretation of the contract's terms (*Cypress Point Condo. Ass'n*, 226 N.J. at 426-28).

## Implied Terms

In addition to a contract's written provisions, courts imply certain terms and conditions as a matter of law. One of the most commonly litigated implied provisions is the covenant of good faith and fair dealing because it is implied in every contract in New Jersey (*Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420 (1997)).

The implied covenant of good faith and fair dealing cannot override an express contract term (*Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 244 (2011)). However, even if a party is not in breach of its express contractual obligations, it may be in breach of the implied covenant of good faith and fair dealing if it exercises a contractual right as part of a scheme to deprive the other party of the benefit of its bargain (*Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 224 (2005)).

## Entire Contract

New Jersey courts must interpret contracts in a way that gives meaning to all provisions in the contract, rather than

leaving part of the contract superfluous or without force or effect (*Newark Publishers Ass'n v. Newark Typographical Union*, 22 N.J. 419, 425 (1956)). Courts should read contractual provisions harmoniously to give effect to all portions of the contract and its primary purpose (*M.J. Paquet, Inc.*, 171 N.J. at 396; *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 595 (2001)).

### Ambiguity or Inconsistency

A contractual term is ambiguous if a court finds that it is susceptible to at least two reasonable, alternative interpretations or when the provision contains conflicting terms. A provision is not ambiguous just because the parties disagree about its meaning. (See, e.g., *Nester*, 301 N.J. Super. at 210; *5907 Blvd. L.L.C. v. West N.Y. Suites, L.L.C.*, 2013 WL 3762695, \*4 (App. Div. 2013) (unpublished decision, cite according to N.J. R. 1:36-3).)

In determining if a provision is ambiguous, courts consider the entire agreement to clarify what the parties meant by the provision in question (*Hardy ex rel. Dowdell v. Abdul-Matin*, 198 N.J. 95, 103 (2009)). If the court identifies an ambiguity, it may consider extrinsic evidence to determine the ambiguous term's meaning (see, e.g., *5907 Blvd. L.L.C.*, 2013 WL 3762695, at \*4; see Question 6). The court construes an ambiguous term against the drafter (see *Chubb Custom Ins. Co. v. Prudential Ins. Co. of America*, 195 N.J. 231, 238 (2008); *Karl's Sales & Serv., Inc. v. Gimbel Bros.*, 249 N.J. Super. 487, 493 (App. Div. 1991)).

Although contract interpretation is a question of law (see *Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med. & Physical Therapy*, 210 N.J. 597, 605 (2012)), the meaning of an ambiguous provision is a question of fact if it depends on resolving factual issues (see *5907 Blvd. L.L.C.*, 2013 WL 3762695, at \*4; *Anthony L. Petters Diner, Inc. v. Stellakis*, 202 N.J. Super. 11, 27-28 (App. Div. 1985)).

If two contract provisions appear to conflict or be inconsistent, New Jersey courts interpret the contract in a manner that reconciles the provisions, if possible. In reconciling those provisions, courts often employ other contract construction principles, such as not rendering a provision meaningless. (See *Petroleos Mexicanos Refinacion v. M/T KING A*, 554 F.3d 99, 107 (3d Cir. 2009) (applying New Jersey law); see Question 5: Entire Contract.)

### Specific Over General

A contract provision specifically addressing a particular subject matter controls over any other contract provision that generally addresses that same subject matter (see *Elite Orthopedic & Sports Med. PA v. N.N.J. Teamsters Ben.*

*Plan*, 2017 WL 3718379, at \*7 (D.N.J. 2017) (applying New Jersey law); *In re Cendant Corp. Securities Litigation*, 454 F.3d 235 (3d Cir. 2006), *as amended* (Aug. 30, 2006) (applying New Jersey law); *Gil v. Clara Maass Med. Ctr.*, 450 N.J. Super. 368, 378 (App. Div. 2017)).

### 6. How does your jurisdiction define and apply the parol evidence rule?

New Jersey courts take an expansive view of the parol evidence rule. They consider all relevant evidence when determining a contract's meaning and intent (see Question 5: Intention of the Parties). After a court determines what the parties meant, the parol evidence rule prohibits the parties from using a contemporaneous oral agreement or other extrinsic evidence to alter the terms of an integrated written agreement. (*Labossiere Assocs., Inc.*, 2021 WL 520068, at \*8; *Capparelli v. Lopatin*, 459 N.J. Super. 584, 608 (App. Div. 2019); *Conway*, 187 N.J. at 268.) Instead, the parties may use parol evidence to show that they did not intend for an integrated writing to become a contract (*J.I. Kislak Realty Corp. v. 6051 Boulevard East Corp.*, 192 N.J. Super. 280, 283 (App. Div. 1983)).

A contract may contain an integration clause (also called a merger clause) explaining that the agreement is the parties' entire agreement and supersedes all other written or oral agreements (see, for example, *Cooper Health System v. FMCF 3X, L.L.C.*, 2013 WL 4859793, at \*1 (App. Div. Sept. 13, 2013)). New Jersey courts apply the parol evidence rule regardless of whether a contract includes an integration clause (see, e.g., *Medford Tp. School Dist. v. Schneider Elec. Bldgs. Americas, Inc.*, 459 N.J. Super. 1, 11-12 (App. Div. 2019)).

If the court determines a written contract is only partially integrated, it may properly consider parol evidence to determine the agreement's complete terms (*Foulke Mgmt. Corp.*, 2020 WL 1062867, at \*7; *Zone Co. v. Serv. Transp. Co.*, 137 N.J.L. 112, 118-19 (Law Div. 1948); Restatement (Second) of Contracts § 210).

Common examples of parol evidence courts use to resolve an ambiguity include:

- The actions and circumstances surrounding the parties' execution of an ambiguous term.
- The conversations, negotiations, and agreements between the parties made before or together with the contract's execution.
- The parties' course of conduct during the contract.

(See *Conway*, 187 N.J. at 269-70.)

### Altering and Terminating Contracts

#### 7. Describe how a party modifies a contract in your jurisdiction.

Under New Jersey law, the parties to a contract may modify the contract in one of the following ways:

- In a writing the parties to the contract execute.
- Orally, even if the written contract excludes oral modifications (*CAM Tr. v. Revere High Yield Fund, LP*, 2018 WL 5810296, at \*4 (App. Div. Nov. 7, 2018) (unpublished decision, cite according to N.J. R. 1:36-3); *Sodora v. Sodora*, 338 N.J. Super. 308, 312 (Ch. Div. 2000)).
- By the parties' actions and conduct that shows a meeting of the minds to modify the contract (*DeAngelis v. Rose*, 320 N.J. Super. 263, 280 (App. Div. 1999)).

A modification must include all elements of contract formation, including mutual assent, and new consideration that supports the modification (*County of Morris v. Fauver*, 153 N.J. 80, 100 (1998); *Ross v. Orr*, 3 N.J. 277, 282 (1949); see Question 1).

#### 8. Does your jurisdiction recognize novations? If so, how does your jurisdiction define them and how are they executed?

Yes. Under New Jersey law, a novation is a separate and new agreement between the parties that discharges an existing obligation and substitutes a new one (see *GMAC Mortgage, LLC*, 230 N.J. at 188; *Wells Reit II—80 Park Plaza, LLC v. Director, Div. of Taxation*, 414 N.J. Super. 453, 466 (App. Div. 2010)).

A novation is only valid if:

- The parties clearly express their intent to supersede the previous agreement (*GMAC Mortgage, LLC*, 230 N.J. at 188).
- There is new consideration (*Chicago Five Portfolio, LLC v. Director, Div. of Taxation*, 24 N.J. Tax 342, 354-357 (Tax 2008)).

The party alleging novation bears the burden of proof, which is met only with clear and convincing evidence (*Wells Reit II—80 Park Plaza, LLC*, 414 N.J. Super. at 467; *Sixteenth Ward Bldg. & Loan Ass'n v. Reliable Loan, Mortgage & Security Co.*, 125 N.J. Eq. 340, 345 (E. & A. 1939) (a clear and definite showing of intent is required)).

To prove that the parties intended to create a novation, a party must show:

- A previously valid contract existed.
- All parties agreed to make a new contract.
- The parties intended to extinguish the original contract.
- The new contract is valid.

(*Allen v. Estate of Allen*, 2019 WL 150169, at \*7 (App. Div. Jan. 7, 2019) (unpublished decision, cite according to N.J. R. 1:36-3); *Chicago Five Portfolio, LLC*, 24 N.J. Tax at 354.)

#### 9. Describe how a party terminates a contract in your jurisdiction.

Contracts typically terminate after the parties satisfy the contractual obligations or on a date specified in the contract. However, if a contract does not contain a provision limiting its duration or purports to remain in effect indefinitely, New Jersey law treats it as either:

- Lasting for a reasonable time.
- Terminable at will on reasonable notice.

(*In re Estate of Miller*, 90 N.J. 210, 218, 219 (1982); *Congregation Sons of Israel v. Congregation Meorosnosson, Inc.*, 2019 WL 2591309, at \*2 (App. Div. June 25, 2019) (unpublished decision, cite according to N.J. R. 1:36-3).)

To terminate a contract before the parties have satisfied its terms, the terminating party must either:

- Have a valid legal justification, such as the other party's material breach (see *Magnet Res., Inc. v. Summit MRI, Inc.*, 318 N.J. Super. 275, 285 (App. Div. 1998)).
- Comply with contractual provisions that govern early termination, as long as the terminating party does not violate the implied covenant of good faith and fair dealing in exercising its right to terminate (*Sons of Thunder*, 148 N.J. at 422; see Implied Terms).

(See, e.g., *In re Estate of Miller*, 90 N.J. 210 (1982).)

### Dispute Resolution Clauses

#### 10. How does your jurisdiction interpret and enforce choice of law provisions?

Courts generally enforce a choice of law provision under New Jersey common law unless either:

- The chosen state has no substantial relationship to the parties.
- Application of the chosen state's law would contravene a fundamental policy of a state with a materially greater interest.

(*Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 341-42 (1992) (citing Restatement (Second) of Conflicts of Laws § 187).)

For more information on the enforceability of choice of law provisions, see [Standard Clause, General Contract Clauses: Choice of Law \(NJ\): Drafting Note: Enforceability of Choice of Law Provisions in New Jersey](#).

New Jersey federal courts sitting in diversity jurisdiction apply the forum state's choice of law rules (*Carino v. O'Malley*, 2007 WL 951953, at \*3, 7 (D.N.J. 2007) (applying New Jersey law); *Echols v. Pelullo*, 377 F.3d 272, 275 (3d Cir. 2004) (applying New Jersey law)). Therefore, the federal approach generally follows the approach used in New Jersey state courts (see, e.g., *Carino*, 2007 WL 951953, at \*7).

### 11. How does your jurisdiction interpret and enforce choice of forum provisions?

Under New Jersey law, choice of forum provisions may be either permissive or mandatory. The interpretation and enforcement of choice of forum provisions depends on whether the breach of contract claim is pending in New Jersey state or federal court.

#### New Jersey State Court Analysis

New Jersey courts generally enforce a forum selection clause unless the clause:

- Is invalid because of fraud or overreaching.
- Contravenes public policy.
- Selects a forum in which a trial would be so difficult that it would effectively deprive the challenging party of its day in court.

(See *Paradise Enterprises, Ltd. v. Sapir*, 356 N.J. Super. 96, 103 (App. Div. 2002); *Caspi v. Microsoft Network*, 323 N.J. Super. 118, 122 (App. Div.), *certif. denied*, 162 N.J. 199 (1999); *Wilfred MacDonald, Inc. v. Cushman, Inc.*, 256 N.J. Super. 58, 63-65 (App. Div.), *certif. denied*, 130 N.J. 17 (1992).)

For more information on how New Jersey state courts interpret and enforce forum selection clauses, see [Standard Clause, General Contract Clauses: Choice of Forum \(NJ\): Drafting Note: Enforceability of Choice of Forum Clauses](#).

#### New Jersey Federal Court Analysis

Whether under diversity jurisdiction or federal question jurisdiction, federal courts in New Jersey analyze the enforceability of choice of forum provisions under

federal common law, not New Jersey state law (28 U.S.C. § 1404(a); *Cadapult Graphic Sys. v. Tektronix, Inc.*, 98 F. Supp. 2d 560, 564 (D.N.J. 2000); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995)).

The US Supreme Court has held that courts should enforce the parties' contractually valid choice of forum except in the most unusual cases (*Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 66 (2013); see [Legal Update, Supreme Court Explains How to Enforce Forum Selection Clauses](#)).

Under federal common law, forum selection clauses are presumptively valid. In the US Court of Appeals for the Third Circuit, a party objecting to a forum selection clause must establish that:

- It is the result of fraud or overreaching.
- Enforcing it would violate strong public policy in the forum.
- The forum is so inconvenient that litigating there would be unreasonable.

(See *Leistriz Adv. Techs. Corp. v. IPCG, LLC*, 2015 WL 5572730, at \*2 (D.N.J. Sept. 21, 2015); *Cadapult Graphic Sys.*, 98 F. Supp. 2d at 564-65.)

For more information on how New Jersey federal courts interpret and enforce forum selection clauses, see [Standard Clause, General Contract Clauses: Choice of Forum \(NJ\): Drafting Note: Enforceability of Choice of Forum Clauses](#).

### 12. How does your jurisdiction interpret and enforce alternative dispute resolution provisions, such as mediation and arbitration clauses?

Under New Jersey law, courts may not rule on the merits of the claims underlying an arbitration (N.J.S.A. 2A:23B-1 to 32; *Bank of Am. v. Philip Kushner Assocs.*, 2008 WL 2492247, at \*4 (App. Div. June 18, 2008) (unpublished decision, cite according to N.J. R. 1:36-3)). The courts generally play a gatekeeping role limited to determining substantive arbitrability issues, including the arbitration agreement's:

- Validity (*Atalese*, 219 N.J. at 444; *Martindale*, 173 N.J. at 86).
- Scope (*Laborers' Local Union Nos. 472 & 172 v. Interstate Curb & Sidewalk*, 90 N.J. 456, 463 (1982); *Commerce Bank, N.A. v. DiMaria Constr., Inc.*, 300 N.J. Super. 9, 14 (App. Div. 1997)).

(N.J.S.A. 2A:23B-6(b).)



However, the arbitrator may determine these threshold substantive arbitrability issues if the arbitration agreement clearly requires that they do so (*Goffe v. Foulke Mgt. Corp.*, 238 N.J. 191, 213 (N.J. June 5, 2019); *Amalgamated Transit Union, Loc. 880 v. N.J. Transit Bus Oper., Inc.*, 200 N.J. 105, 115 (2009)).

The arbitrator then generally decides procedural arbitrability issues, including whether:

- The parties have complied with any conditions precedent in the arbitration agreement, such as informal mediation or negotiation (*Com. Bank, N.A. v. DiMaria Const., Inc.*, 300 N.J. Super. 9, 14 (App. Div. 1997)).
- The statutes of limitations bar the underlying claims (*Fave v. Neiman Marcus Grp.*, 2014 WL 1884337, at \*6 (App. Div. May 13, 2014)).
- A party waived its right to arbitrate by engaging in litigation (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Rsch., Inc.*, 427 N.J. Super. 45, 59 (App. Div. 2012)).

(N.J.S.A. 2A:23B-6(c).)

New Jersey state courts and federal courts sitting in diversity generally interpret and enforce alternative dispute resolution provisions by relying on basic principles of contract construction (*Century Indem. Co. v. Certain Underwriters at Lloyd's London*, 584 F.3d 513, 524 (3d. Cir. 2009); *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 307 (2019)). For more information on contract construction principles, see Question 5.

As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the issue is the construction of the contract language or an allegation of waiver, delay, or a similar defense to arbitrability (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

For more information on the interpretation and enforcement of arbitration clauses, see [Practice Note, Compelling and Staying Arbitration in New Jersey](#).

## Breach of Contract

### 13. What are the elements of a breach of contract claim in your jurisdiction?

Under New Jersey law, a breach of contract claim must allege four elements:

- The existence of a valid and binding contract (see Question 1).

- The plaintiff performed or was excused from performing the contract.
- The defendant failed to perform the contract.
- Damages resulting from the breach.

(*Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 275 F. Supp. 2d 543, 566 (D.N.J. 2003) (applying New Jersey law); *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 482 (2016); *Coyle v. Englander's*, 199 N.J. Super. 212, 223 (App. Div. 1975).)

### 14. Describe what circumstances are considered an actionable breach of contract in your jurisdiction.

Under New Jersey law, both material and minor breaches of contract are actionable if the breach caused the plaintiff injury or damage (N.J. Jury Instr. Civ. 4.10L).

The non-breaching party need not perform under the contract if the other party breached a material term (*Roach v. BM Motoring, LLC*, 228 N.J. 163, 174 (2017); *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990)). A material breach goes to the essence of the contract (*Goldman South Brunswick Partners v. Stern*, 265 N.J. Super. 489, 494 (App. Div. 1993); *Ross Sys. v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 341 (1961)).

In determining whether a breach is material, New Jersey courts consider whether:

- The extent to which the nonbreaching party:
  - fails to receive the benefit they expect; and
  - can be compensated for that failure.
- The extent to which the breaching party:
  - demonstrates good faith and fair dealing in their performance under the agreement; and
  - loses rights or property if the nonbreaching party does not have to perform under the contract.
- The likelihood that the breaching party cures the breach.

(*Roach*, 228 N.J. at 174-75; Restatement (Second) of Contracts § 241 (1981).)

New Jersey law also recognizes a claim for breach of the implied covenant of good faith and fair dealing. This covenant provides that neither party is to do anything that destroys or injures the other party's right to receive the contract's benefits. Although the duty of good faith and fair dealing is not a substitute for an unsustainable breach

of contract claim, a party breaches the duty when it acts in a manner that, although not expressly forbidden by the contract, deprives the other party of the right to receive the contract's benefits. (*Sons of Thunder, Inc.*, 148 N.J. at 420; Question 5: Implied Terms.)

The claim arises most often in contracts that give certain rights to one party but not the other. For example, the court has held that a defendant breached the duty of good faith and fair dealing when it terminated the plaintiff's exclusive distributorship (see *Bak-A-Lum Corp. v. Alcoa Building Prods.*, 69 N.J. 123, 130 (1976)). The covenant does not imply obligations that are inconsistent with other terms in the contract. However, it encompasses any promises that a reasonable person in the plaintiff's position would be justified in understanding were included. (*Wilson*, 168 N.J. at 244.)

**15. What is the statute of limitations for a breach of contract action in your jurisdiction? Please also discuss when the limitations period begins to run, whether it may be tolled, and how to plead the defense.**

The statute of limitations for express or implied breach of contract claims under New Jersey law is six years. The limitations period begins to run when the right to the claim arises, either when the breach occurs or the plaintiff, exercising due diligence, should have discovered the breach. (N.J.S.A. 2A:14-1; *Metromedia Co. v. Hartz Mountain Assocs.*, 139 N.J. 532, 534-35 (1995); *Boyd v. Rental Ctr. of Passaic, LLC*, 2020 WL 4590149, at \*5 (App. Div. Aug. 11, 2020) (unpublished decision, cite according to N.J. R. 1:36-3); *Holmin v. TRW, Inc.*, 330 N.J. Super. 30, 35 (App. Div. 2000), *aff'd*, 167 N.J. 205 (2001).)

The limitations period for an installment contract starts to run when each breach occurs (when each payment is missed) (*County of Morris v. Fauver*, 153 N.J. 80, 107 (1998); *In re Estate of Balk*, 445 N.J. Super. 395, 400-01 (App. Div. 2016)).

The defendant typically asserts the statute of limitations:

- As an affirmative defense in an answer to the complaint (N.J. R. 4:5-1).
- In a motion to dismiss, instead of serving an answer to the complaint (N.J. R. 4:6-2(e)).

The statute of limitations for a breach of contract action may be tolled under certain circumstances, such as:

- Equitable estoppel (see Equitable Estoppel).
- By operation of a statute (see Statutes).

### Equitable Estoppel

Equitable estoppel tolls the statute of limitations where the defendant's deception, fraud, or misrepresentation caused the plaintiff's failure to bring a timely action (*Trinity Church v. Lawson-Bell*, 394 N.J. Super. 159, 171 (2007); *Binder v. Price Waterhouse & Co., L.L.P.*, 393 N.J. Super. 304, 311 (App. Div. 2007); *Thakar v. JFK Med. Ctr.*, 2007 WL 1498816, at \*3 (App. Div. May 24, 2007) (unpublished decision, cite according to N.J. R. 1:36-3)).

### Statutes

Counsel should also check relevant statutes for any applicable tolling provisions. For example:

- N.J.S.A. 2A:14-21 allows tolling for a plaintiff that is under a disability, which includes a person:
  - under the age of 18 years; or
  - who has a mental disability preventing them from understanding their legal rights or filing a legal action.
- N.J.S.A. 2A:14-24 restarts the statute of limitations where the defendant signs a writing recognizing an existing debt and contains nothing inconsistent with an intention to pay it (see *Campanella v. Estate of Corradino*, 2007 WL 283188, at \*3 (App. Div. Feb. 2, 2007) (unpublished decision, cite according to N.J. R. 1:36-3); *Bassett v. Christensen*, 127 N.J.L. 259, 261 (E. & A. 1941)).

**16. Under what circumstances does your jurisdiction recognize a third party's standing to sue for breach of contract?**

Under New Jersey law, a third party has standing to sue for breach of contract if:

- There is a valid and binding contract between other parties.
- Those parties intended the third party to receive benefits under their contract.

(N.J.S.A. 2A:15-2; *Rieder Cmtys., Inc. v. Twp. of N. Brunswick*, 227 N.J. Super. 214, 221-22 (App. Div.), *certif. denied*, 113 N.J. 638 (1988) (citations omitted)); *Ross v. Lowitz*, 222 N.J. 494, 513 (2015) (quoting *Broadway Maint. Corp. v. Rutgers*, 90 N.J. 253, 259 (1982).)

The contract must show both parties intended to provide a direct benefit to the third party. A third party who receives only incidental benefits typically cannot enforce the contract. (*Broadway Maint. Corp.*, 90 N.J. at 259.)

The parties' intent to make a third party a beneficiary need not be expressly set out in the contract. Courts determine third-party beneficiary status by examining the parties' intent from their agreement and the surrounding circumstances. (*Kern v. Huettl*, 2009 WL 2461074, at \*5 (App. Div. Aug. 13, 2009) (unpublished decision, cite according to N.J. R. 1:36-3); *Atlantic Northern Airlines*, 12 N.J. at 301-02.) Parties can include a provision expressly precluding third parties from enforcing the contract (*Broadway Maint. Corp.*, 90 N.J. at 260).

## Remedies for Breach of Contract

### 17. What legal remedies are available to the non-breaching party in your jurisdiction?

Under New Jersey law, the prevailing plaintiff in a breach of contract action generally may recover either:

- Compensatory damages, which may include:
  - general damages; and
  - consequential (or special) damages.

(See Compensatory Damages.)

- Liquidated damages if required under the contract (see Liquidated Damages).

A prevailing party may also recover its attorneys' fees if there is a fee-shifting provision in the contract. Courts strictly construe fee-shifting provisions considering the policy disfavoring attorneys' fees awards. (*Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372, 385 (2009).)

A party generally cannot recover punitive damages in ordinary breach of contract actions (*Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1194 (3d Cir. 1993); *U.S. Accu-Measurements, LLC v. Ruby Tuesday, Inc.*, 2014 WL 197878, at \*1 (D.N.J. 2014); *Sandler v. Lawn-A-Mat Chemical & Equipment Corp.*, 141 N.J. Super. 437, 448 (App. Div.), *certif. denied*, 71 N.J. 503 (1976)).

### Compensatory Damages

Compensatory damages restore the plaintiff to the same position it would have been in had the defendant not breached the contract.

There are two types of compensatory contract damages:

- **General damages.** General damages flow directly from the defendant's breach and are the natural, logical, and probable consequence of that breach (*Pickett v. Lloyd's*,

131 N.J. 457, 474 (1993); *Donovan v. Bachstadt*, 91 N.J. 434, 444 (1982)).

- **Consequential (or special) damages.** Consequential damages do not flow directly from the breach, but a party may recover them where the damages were, either before or at the time of contracting:
  - foreseen or reasonably foreseeable; and
  - within the parties' contemplation.

(*Totaro, Duffy, Cannova & Co., L.L.C. v. Lane, Middleton & Co., L.L.C.*, 191 N.J. 1, 14 (2007); *Donovan*, 91 N.J. at 444.)

When pleading consequential damages, the type of consequential damages sought must be specified (N.J. R. 4:5-2 and 4:5-8(f)).

Regardless of the type of compensatory damages, the plaintiff must elect the appropriate method for calculating them. The method depends on the contract type and breach. For example, the appropriate measure of damages may be:

- Lost profits (see *Schwartz v. Menas*, 2020 WL 6538396, at \*3 (App. Div. Nov. 6, 2020); *Desai v. Bd. of Adjustment*, 360 N.J. Super. 586, 595 (App. Div. 2003)).
- Restitution damages (*Donovan*, 91 N.J. at 444).
- Expectation damages (*Goldfarb v. Solimine*, 2021 WL 626991, at \*8 (N.J. Feb. 18, 2021)).

(See, e.g., *Woytas v. Greenwood Tree Experts, Inc.*, 237 N.J. 501, 514 (2019); *Pickett*, 131 N.J. at 474.)

### Liquidated Damages

Contracts may contain a liquidated damages clause (sometimes called a stipulated damages clause). This clause sets damages in the event of a breach. Courts generally enforce liquidated damages clauses if:

- The liquidated damages amount is a reasonable forecast of provable damages the breach causes.
- The breach's harm is impossible or very difficult to estimate.

(*CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC*, 410 N.J. Super. 114, 121 (App. Div. 2009); *Wasserman's Inc. v. Township of Middletown*, 137 N.J. 238, 249 (1994); *Westmount Country Club v. Kameny*, 82 N.J. Super. 200, 206 (App. Div. 1964).)

New Jersey courts do not treat these considerations as a rigid two-prong test but evaluate them when assessing the reasonableness of a liquidated damages clause

(*Borough of Madison v. Marhefka*, 2018 WL 3059940, at \*4 (App. Div. June 21, 2018); *Wasserman's Inc*, 137 N.J. at 249-50). With "reasonableness as the touchstone," courts also consider the parties' intention, the actual damages sustained, and the parties' bargaining power (*MetLife Cap. Fin. Corp. v. Washington Ave. Assocs. L.P.*, 159 N.J. 484, 495 (1999); *Wasserman's Inc*, 137 N.J. at 250-54).

A liquidated damages clause is an unenforceable penalty if it is:

- Unconscionable.
- In violation of public policy.
- A penalty because it is grossly disproportionate to the amount of damages incurred.

(*5907 Blvd. L.L.C.*, 2013 WL 3762695, at \*7; *Westmount Country Club*, 82 N.J. Super. at 206.)

Courts consider a liquidated damages clause to be a penalty when the amount is not a pre-estimate of probable actual damages, but a punishment or threat designed to prevent the breach (*Jet Star Realty, LLC v. Fresh Food Direct, LLC*, 2018 WL 3371008, at \*2 (App. Div. July 11, 2018) (unpublished decision, cite according to N.J. R. 1:36-3); *Westmount Country Club*, 82 N.J. Super. at 205).

If a court upholds a contract's liquidated damages provision, the plaintiff's contract damages are the amount set out in the provision.

### 18. What equitable or other non-legal remedies are typically available to the non-breaching party in your jurisdiction?

Under New Jersey law, if money damages are unavailable or inadequate to compensate the plaintiff for its loss, a court may award equitable relief for breach of contract. The most common equitable remedies include:

- Injunctive relief.
- Rescission.
- Reformation.
- Specific performance.

For more information on the equitable remedies available in breach of contract actions under New Jersey law, see [State Q&A, Equitable Remedies: New Jersey](#).

In addition, a party to a contract may seek a declaratory judgment asking the court to rule on the rights and other legal relations of the parties (N.J.S.A. 2A:16-50 to 62).

## Defenses to Breach of Contract

### 19. Identify common affirmative defenses to a breach of contract action that your jurisdiction recognizes.

Under New Jersey law, defenses to a breach of contract action typically focus on either contract formation or the alleged breach. A party may also assert defenses to damages and procedural defenses.

### Defenses to Contract Formation

The following defenses challenge the formation of the contract itself:

- Ambiguity.
- The parties' capacity.
- Duress.
- Coercion or undue influence.
- Fraudulent inducement.
- Illegality.
- Fraud.
- Mutual mistake.
- Unclean hands.
- Unilateral mistake.
- Unconscionability.

### Defenses to Breach of the Contract

The following common affirmative defenses relate to the merits of the breach of contract claim:

- Accord and satisfaction.
- Anticipatory breach.
- Arbitration and award.
- Failure of consideration.
- Frustration of purpose.
- Impossibility of performance.
- Laches.
- Ratification.
- Statute of frauds (see Question 2 and Question 3).

- Statute of limitations (see Question 15).
- Waiver.

(N.J. R. 4:5-4 and 4:6-2.)

### Defenses to Damages

A defendant may challenge the plaintiff's claimed damages by asserting:

- The damages are duplicative or would result in double recovery (see *Art Res., LLC v. Hartz Carpet II Ltd. P'ship*, 2020 WL 1983055, at \*5 (App. Div. Apr. 27, 2020) (finding that although they required proof of different elements, damages were the same for claims for breach of contract, breach of the duty of good faith and fair dealing, violation of the New Jersey Consumer Fraud Act, forcible entry and detainer, and trespass)).
- The contract prevents damages because it:
  - expressly bars or limits damages (*Cap. Safety, Inc. v. State, Div. of Bldgs. & Constr.*, 369 N.J. Super. 295, 304 (App. Div. 2004)); or
  - contains a liquidated damages clause (see Liquidated Damages).
- The liquidated damages clause is an unenforceable penalty (see Liquidated Damages).
- The damages are unavailable, such as punitive damages (*Sandler*, 141 N.J. Super. at 448).
- The plaintiff failed to mitigate damages (*Frank Stamato & Co. v. Borough of Lodi*, 4 N.J. 14, 21 (1950); *United Cent. Bank v. Bhavani Fruit & Vegetable LLC*, 2016 WL 715660, at \*4 (App. Div. Feb. 24, 2016)).
- The plaintiff cannot prove damages because they were not:
  - reasonably foreseeable as a probable result of the breach; or
  - within the parties' contemplation when they made the contract.

(*Donovan*, 91 N.J. at 444.)

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