

Contract Basics for Litigators: Massachusetts

by Lawrence J. Casey, James E. Gallagher, Christopher J. Marino, and Gary S. Matsko, Davis, Malm & D'Agostine, P.C., with Practical Law Commercial Litigation

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A Q&A guide to state law on contract principles and breach of contract issues under Massachusetts 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?

To create a valid contract under Massachusetts law, there must be:

- An offer.
- An acceptance.
- Consideration.

(*Lambert v. Fleet Nat'l Bank*, 865 N.E.2d 1091, 1095 (Mass. 2007); *Northrup v. Brigham*, 826 N.E.2d 239, 243 (Mass. App. Ct. 2005).)

Offer

An offer is an expression of willingness or desire to enter into a contract made with the intent that, if the other party accepts the offer, there is a contract (*I & R Mech., Inc. v. Hazelton Mfg. Co.*, 817 N.E.2d 799, 802 (Mass. App. Ct. 2004)).

The offer must be sufficiently definite so the parties can ascertain the nature and extent of their obligations. An offer is valid if, when applied to the transaction and construed under the attending circumstances, it can be understood with reasonable certainty. (*Hurtubise v. McPherson*, 951 N.E.2d 994, 998 (Mass. App. Ct. 2011).) Courts do not require precision. Courts permit undefined or unspecified terms if the essential terms are sufficiently

definite when applied to the transaction and considering the attending circumstances. (*Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 724 N.E.2d 699, 703 (Mass. 2000); *Hurtubise*, 951 N.E.2d at 998.)

The terms can identify present unknowns or later contingencies and provide mechanisms or norms for their determination (*Targus Grp. Int'l, Inc. v. Sherman*, 922 N.E.2d 841, 850 (Mass. App. Ct. 2010)). For example, a contract is sufficiently definite where:

- It contains a procedure for determining the fair value of a parcel of land in the future (*Lafayette Place Assocs. v. Boston Redev. Auth.*, 694 N.E.2d 820, 826 (Mass. 1998)).
- The contract identifies the property and price, but ancillary terms remain open to negotiation (*McCarthy v. Tobin*, 706 N.E.2d 629, 631-32 (Mass. 1999)).

Acceptance

Acceptance exists when the offeree assents to the offer under the terms in which it is made. A conditional acceptance or one that substantially varies from the offer is not an acceptance, but rather a counteroffer. (*Sea Breeze Estates, LLC v. Jarema*, 113 N.E.3d 355, 361 (Mass. App. Ct. 2018).)

A party must have a present intent to bind itself to terms when it forms the contract. Courts consider the words used by the parties, the entire agreement, and the surrounding facts and circumstances. (*Situation Mgmt.*



Sys., Inc., 724 N.E.2d at 703; *Targus Grp. Int'l, Inc.*, 922 N.E.2d at 851; *Basis Tech. Corp. v. Amazon.com, Inc.*, 878 N.E.2d 952, 962 (Mass. App. Ct. 2008).) For example, the phrase “agreement in principle” or the need for further documentation of the agreement does not necessarily prevent the formation of a binding contract. Parties may arrange for a later, final writing to memorialize an already formed agreement (*Targus Grp. Int'l, Inc.*, 922 N.E.2d at 848-49).

Consideration

Consideration is the reciprocal exchange of a benefit or detriment by each of the parties to the contract (*Miller v. Cotter*, 863 N.E.2d 537, 547 n.16 (Mass. 2007)).

Promises that bind one to do nothing are illusory and do not qualify as consideration (*A.L. Prime Energy Consultant, Inc. v. Mass. Bay Transp. Auth.*, 95 N.E.3d 547, 557 (Mass. 2018)). For example, the Supreme Judicial Court (SJC) held that an oral promise to donate money to a religious institution was unenforceable because there was “no legal benefit to the promisor nor detriment to the promisee” (*Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691, 692 (Mass. 1989)).

Courts do not concern themselves with the adequacy of the consideration exchanged if it is valuable (*A.L. Prime Energy Consultant, Inc.*, 95 N.E.3d at 560).

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

Massachusetts's statute of frauds requires certain promises, contracts, and agreements that form the basis of particular actions to be in writing and signed (M.G.L. c. 259, § 1). These include actions:

- To charge an executor or administrator, or an assignee under an insolvent law of Massachusetts, on a special promise to answer for damages out of an estate.
- To charge a person on a special promise to answer for the debt, default, or misdoings of another.
- On an agreement made on consideration of marriage.
- On a contract for the sale of lands, tenements, or hereditament or of any interest in or concerning them.
- On an agreement that is not to be performed within one year from its making.

(M.G.L. c. 259, § 1.)

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

For a writing to satisfy the statute of frauds under Massachusetts law, it must contain directly or by implication all the essential terms of the parties' agreement (*Simon v. Simon*, 625 N.E.2d 564, 567 (Mass. App. Ct. 1994)). Those essential terms must be set out with reasonable certainty (*Maffei v. Roman Catholic Archbishop of Boston*, 867 N.E.2d 300, 318 (Mass. 2007)). The determination whether a writing satisfies the statute of frauds is a question of law for the courts (*Simon*, 625 N.E.2d at 568).

The writing need not be a formal contract or a memorandum of an agreement to satisfy the statute of frauds (*A.B.C. Auto Parts, Inc. v. Moran*, 268 N.E.2d 844, 846-47 (Mass. 1971) (holding endorsement on a check was a sufficient writing); *Saint-Fort v. Sanon-Desir*, 103 N.E.3d 770, at *2 (Mass. App. Ct. 2018) (holding draft agreement plus an email was sufficient) (unpublished opinion under Mass. App. Ct. Rule 1:28); *Slover v. Carpenter*, 2016 WL 54899, at *7 (Mass. Land Ct. Jan. 4, 2016), *aff'd sub nom., Slover v. Boyd*, 83 N.E.3d 198 (Mass. App. Ct. 2017) (holding emails between the parties may create a binding contract that satisfies the Statute of Frauds, provided the emails contain all essential terms, even in the absence of a formal signature)).

The parties' written agreement may consist of multiple documents where two or more papers are so connected in the minds of the parties that they contain the entire contract with enough certainty for the court to determine the parties' essential obligations. For example, courts have found email exchanges containing the essential terms of the contract sufficient. (See *Tzitzon Realty Co. v. Mustonen*, 227 N.E.2d 493, 496 (Mass. 1967); *Saint-Fort*, 103 N.E.3d 770, at *2.)

Types of Contracts

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

Massachusetts law recognizes the following types of contracts:

- Express.
- Implied-in-fact contracts.

- Quasi-contract.
- Unilateral and bilateral.

Express Contract

An express contract declares the material terms of the parties' agreement. It can be oral or written. (*Rodriguez v. MBTA*, 80 N.E.3d 365, 368 (Mass. App. Ct. 2018).) A party assents to an express contract using its actual words, rather than its conduct (*E.H. Perkins Constr., Inc. v. Consigli-O'Connor*, 2007 WL 3012959, at *3 (Mass. Super. Sept. 17, 2007), citing *Grant v. Carlisle*, 101 N.E.2d 376 (Mass. 1951) (noting express contracts may be in writing or oral)).

A party may seek to enforce an oral contract (not required to be in writing by the statute of frauds) by testimony showing an offer and acceptance, setting out, with certainty, the material rights and obligations of the parties (*Rodriguez*, 80 N.E.3d at 368).

Implied-in-Fact Contract

A contract implied in fact may exist despite the absence of a written or verbal agreement based on the parties' conduct and that nature of their relationship, including their:

- Communications.
- Course of dealing.
- Industry's practices and customs.

(*Sullivan v. O'Connor*, 961 N.E.2d 143, 153 (Mass. App. Ct. 2012); see *Vita v. Berman, Devalerio & Pease, LLP*, 967 N.E.2d 1142, 1148 (Mass. App. Ct. 2012); *Fin. Res. Network, Inc. v. Brown & Brown, Inc.*, 930 F. Supp. 2d 287, 304 n.27 (D. Mass. 2013) (applying Massachusetts law).)

To establish a contract implied in fact, a party must show that:

- There was a benefit to the other party.
- It expected the other party to provide consideration for that benefit.
- The other party expected or a reasonable person should have expected that it must provide consideration for that benefit.

(*Vita*, 967 N.E.2d at 1148.)

An implied-in-fact contract cannot exist where the parties also have an express contract concerning the same topic (*Sullivan*, 961 N.E.2d at 153; *Sullivan v. Dumont Aircraft Charter, LLC*, 364 F. Supp. 3d 63, 90 (D. Mass.), reconsideration denied sub nom. *Sullivan v. Dumont*, 391 F. Supp. 3d 161 (D. Mass. 2019)).

Quasi-Contract

Massachusetts courts recognize a quasi-contract (also called an implied-in-law contract) to ensure an equitable result by enforcing an obligation when there is no express contract governing the dispute and one party may be unjustly enriched (see *Metro. Life Ins. Co. v. Cotter*, 984 N.E.2d 835, 850 (Mass. 2013); *Cantrell v. Hill Holliday Connors Cosmopoulos, Inc.*, 772 N.E.2d 1078, 1082 n.6 (Mass. App. Ct. 2002); *Salls v. Digital Fed. Credit Union*, 349 F. Supp. 3d 81, 89 (D. Mass. 2018)).

For a plaintiff to recover under a quasi-contract theory, it must prove that:

- It conferred a benefit to the defendant.
- It reasonably expected a benefit in return from the defendant.
- When the defendant accepted/received the benefit, it did so with the knowledge that the plaintiff expected a benefit.

(*Finard & Co., LLC v. Sitt Asset Mgmt.*, 945 N.E.2d 404, 407-08 (Mass. App. Ct. 2011).)

Unilateral and Bilateral Contracts

A bilateral contract generally involves an exchange of promises between two parties that requires them to act or not act. A unilateral contract involves an exchange of a promise for an act or forbearance (for example, a contract that a party accepts by performance). (*United Multifamily Corp. v. Mayo Eight, LLC*, 888 N.E.2d 387, at *1 (Mass. App. Ct. 2008) (unpublished opinion under Mass. App. Ct. Rule 1:28); *LeMaitre v. Massachusetts Tpk. Auth.*, 876 N.E.2d 888, 895 (Mass. App. Ct. 2007), *aff'd*, 897 N.E.2d 1218 (Mass. 2008).)

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.

General Rule

When interpreting a contract under Massachusetts law, courts generally construe it as a whole, in a reasonable and practical way and consistent with its language, background, and purpose. They consider the words of a contract in the context of the entire writing rather than in

isolation. (*Rubin v. Murray*, 943 N.E.2d 949, 960 (Mass. App. Ct. 2011).)

Intention of the Parties

Courts interpret contracts to ascertain fairly and reasonably the intentions of the parties and to carry out their purpose (*Honey Dew Assocs., Inc. v. Creighton Muscato Enter., Inc.*, 903 N.E.2d 239, 242 (Mass. App. Ct. 2009)). In the process, courts consider the parties' words, the entire agreement, and the surrounding facts and circumstances (*Colorio v. Marx*, 892 N.E.2d 356, 361 (Mass. App. Ct. 2008)).

Grammar and Meanings

When the words of a contract are plain and free from ambiguity, they are to be construed by their ordinary and usual sense (*Colorio*, 892 N.E.2d at 363; *DeWolfe v. Hingham Ctr., Ltd.*, 985 N.E.2d 1187, 1194-95 (Mass. 2013)).

Implied Terms

In addition to the written terms and conditions of a contract, courts can imply certain provisions as a matter of law. One of the most commonly litigated implied provisions is the covenant of good faith and fair dealing, which is implied in every contract. The covenant of good faith and fair dealing requires that neither party do anything when performing the contract that injures the rights of the other to reap the benefits of the contract. (*Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 805 N.E.2d 957, 964 (Mass. 2004).) It does not, however, create rights and duties not otherwise provided in the contract (*Chokel v. Genzyme Corp.*, 867 N.E.2d 325, 329 (Mass. 2007)).

Entire Contract

When interpreting a contract under Massachusetts law, courts presume that the parties attributed a purpose for every word. As a result, every word must be given meaning and effect whenever practicable without giving undue emphasis to any particular part of the contract over another. (*Great Divide Ins. Co. v. Lexington Ins. Co.*, 84 N.E.3d 844, 850 (Mass. 2017); *Wilder Cos., Ltd. v. Cal. Pizza Kitchen, Inc.*, 2015 WL 291442, at *5 (Mass. Super. Jan. 21, 2015).)

Ambiguity or Inconsistency

Contract language is not ambiguous because each party favors an interpretation contrary to the other (*Boazova v. Safety Ins. Co.*, 968 N.E.2d 385, 390 (Mass. 2012)). It is ambiguous if its terms are inconsistent on their face or

where it can support reasonable and different meanings or obligations. To determine if a contract is ambiguous, courts examine the language of the contract itself. (*Bank v. Thermo Elemental, Inc.*, 888 N.E.2d 897, 907 (Mass. 2008).)

Ambiguous or uncertain language in a contract is construed against the drafting party (*Leblanc v. Friedman*, 781 N.E.2d 1283, 1288 n.6 (Mass. 2003)). When a court finds an ambiguity, the parties may introduce extrinsic evidence (that is, parol evidence) to interpret the contract and resolve the ambiguity (*Winchester Gables, Inc. v. Host Marriott Corp.*, 875 N.E.2d 527, 533 (Mass. App. Ct. 2007)).

Specific Over General

When general and more broadly inclusive language in a contract is inconsistent with more specific language, the more specific language generally controls (*Rush v. Norfolk Elec. Co.*, 874 N.E.2d 447, 453 (Mass. App. Ct. 2007); Restatement (Second) Contracts § 203(c) (1981)).

Where two provisions in a contract cannot be reconciled, the clause requiring some affirmative act may be given greater consideration than the other which defeats a full performance. While repugnant words may sometimes be rejected, this result is only to carry out the evident purpose of the entire contract (*Rosen v. A-H, Inc.*, 456 N.E.2d 477, 480 (Mass. App. Ct. 1983); *MRJE, LLC v. Hajjar*, 2010 WL 4070719, at *2 (Mass. Super. July 15, 2010)).

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

Under Massachusetts law, the parol evidence rule generally holds that a party may not introduce evidence of prior or contemporaneous written or oral agreements to contradict, vary, or broaden the terms of a fully integrated contract (*Winchester Gables, Inc.*, 875 N.E.2d at 533; *Kobayashi v. Orion Ventures, Inc.*, 678 N.E.2d 180, 184 (Mass. App. Ct. 1997)). While it excludes certain evidence, it is a substantive rule of law (*Sound Techniques, Inc. v. Hoffman*, 737 N.E.2d 920, 924 (Mass. App. Ct. 2000)).

However, a party may offer parol evidence to remove or explain existing uncertainty or ambiguity about a term's meaning (*Gen. Convention of The New Jerusalem in the U.S. of Am., Inc. v. MacKenzie*, 874 N.E.2d 1084, 1087 (Mass. 2007)). For purposes of applying the rule, a contract term is ambiguous if it is susceptible of more than one meaning and reasonably intelligent people can differ regarding which meaning is the proper one (*S. Union Co. v. Dep't of Pub. Utils.*, 941 N.E.2d 633, 640 (Mass. 2011)).

The parol evidence rule is not applicable until the court determines that the parties intended a written contract to be a statement of their complete agreement (*Winchester Gables, Inc.*, 875 N.E.2d at 533; *Ryder v. Williams*, 558 N.E.2d 1134, 1136 (Mass. App. Ct. 1990)). The court then may accept extrinsic evidence (*Realty Fin. Holdings, LLC v. KS Shiraz Manager, LLC*, 18 N.E.3d 350, 356-57 (Mass. App. Ct. 2014)).

Where a contract is ambiguous regarding the meaning of key terms, the contract is only partially integrated. Under these circumstances, the parol evidence rule allows in extrinsic evidence that elucidate the meaning of the ambiguous contract term. (*Kobayashi*, 678 N.E.2d at 184.)

The court may look to extrinsic evidence to determine whether an agreement is fully integrated (*Realty Fin. Holdings, LLC*, 18 N.E.3d at 355). The existence of an integration clause is evidence of integration but not dispositive of the issue (*Chambers v. Gold Medal Bakery, Inc.*, 982 N.E.2d 1190, 1197 (Mass. App. Ct. 2013)).

Altering and Terminating Contracts

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

Under Massachusetts law, the parties to a contract can modify the contract. However, a party cannot do so unilaterally. To modify a contract the parties must:

- Agree to the modification.
- Support their modification with new consideration.

(*Cambridgeport Sav. Bank v. Boersner*, 597 N.E.2d 1017, 1021-22 (Mass. 1992); *BourgeoisWhite, LLP v. Sterling Lion, LLC*, 71 N.E.3d 171, 177 n.12 (Mass. App. Ct. 2017).)

Parties may modify contracts by either:

- Express agreement.
- Oral Agreement.
- The parties' conduct and the surrounding circumstances.

(*Cambridgeport Sav. Bank*, 597 N.E.2d at 1021-22; *First Pa. Mortg. Tr. v. Dorchester Sav. Bank*, 481 N.E.2d 1132, 1139 (Mass. 1985).)

Before modifying a contract, a party should review the existing contract for any provisions governing modifications. For example, many written contracts do not permit modifications or do not permit oral

modifications. Even with those limitations, courts have held that parties can still modify a contract orally by mutual agreement or their conduct and from the circumstances of the case (see *Cambridgeport Sav. Bank*, 597 N.E.2d at 1021-22; *Sea Breeze Estates, LLC*, 113 N.E.3d at 362).

Best practice is to have the contracting parties execute a written modification that identifies the new consideration for the modification.

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

Massachusetts law recognizes novations. A novation is an agreement between the parties to discharge a prior contract and substitute a new one. To prove a novation, a party must show:

- The existence of a previously valid contract.
- The parties agreed to terminate the previous contract.
- The parties agreed to substitute a new contract for the previous contract.

(*Pagounis v. Pendleton*, 753 N.E.2d 808, 811 (Mass. App. Ct. 2001).)

Novation can occur based on the circumstances and conduct of the parties in which case the court must find that the parties clearly and definitely intended to discharge the previous contract (*Pagounis*, 753 N.E.2d at 811).

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

Contracts typically terminate after satisfaction of the contractual obligations or on a date specified in the contract. Under Massachusetts law, a contract also is terminable at will by either party on reasonable notice if the contract either:

- Contains no provision regarding its duration.
- Purports to remain in effect indefinitely.

(*RGJ Assocs., Inc. v. Stainsafe, Inc.*, 300 F. Supp. 2d 250, 252 (D. Mass. 2004), citing *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 14 (1st Cir. 1999).)

A party may also terminate a contract:

- Under a specific termination provision in the contract (*Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 295 (Mass.

1980) (ruling termination at will is a common contract term and is not *per se* unconscionable)).

- On a material breach by the other party to the contract. When a party's breach of the contract is material, the other party is excused from further performance under the contract and entitled to cancel the contract and sue for total breach. (*Prozinski v. Ne. Real Estate Servs., LLC*, 797 N.E.2d 415, 424 (Mass. App. Ct. 2003); see *Center Garment Co., Inc. v. United Refrigerator Co.*, 341 N.E.2d 669, 673 (Mass. 1976) (ruling breach of contract was material to justify the plaintiff suing for total breach).)

Parties may also terminate a contract by mutual or unilateral rescission. An agreement to rescind a contract need not be express and can be inferred from the circumstances and parties' conduct. (*Chang v. Winklevoss*, 123 N.E.3d 204, 215 (Mass. App. Ct. 2019), review denied sub nom., *Chang v. ConnectU, Inc.*, 127 N.E.3d 273 (Mass. 2019).)

A party seeking unilateral rescission must show that the other party committed a substantial breach of the contract that is so significant and fundamental that it defeats the object and purpose of the contract (*Worcester Heritage Soc'y, Inc. v. Trussell*, 577 N.E.2d 1009, 1010 (Mass. App. Ct. 1991)).

A party must bring an action for unilateral rescission within a reasonable time after discovering the facts that give rise to the right to rescind. Waiting too long may result in a finding that the party ratified the contract and is not entitled to rescission. Courts determine reasonable time by considering all the facts and circumstances of the case. (*Gen. Motors Corp. v. Firepond, Inc.*, 2003 WL 21960673, at *4 (Mass. Super. July 3, 2003), citing *Solomon v. Birger*, 477 N.E.2d 137 (Mass. App. Ct. 1985); *Hills v. Chambers*, 2000 WL 1532335, at *10 (Mass. Super. Aug. 18, 2000), *aff'd*, 795 N.E.2d 615 (Mass. App. Ct. 2003).)

Dispute Resolution Clauses

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

Massachusetts law follows and applies established functional choice of law principles and Section 187 of the Restatement (Second) of Conflict of Laws (1971) when analyzing a choice of law provisions in a contract (*Taylor v. E. Connection Operating, Inc.*, 988 N.E.2d 408, 411 (Mass. 2013)).

A court may not enforce a choice of law provision when the party challenging it did not have a meaningful choice at the time of negotiation. For example, when parties had unequal bargaining power and the party attempting to

enforce the choice of law provision essentially forced the clause on the party with less bargaining power. (*Taylor*, 988 N.E.2d at 411 n.8; see Restatement (Second) of Conflict of Laws § 187 cmt. b (1971) ("A factor which the forum may consider is whether the choice of law provision is contained in an 'adhesion' contract, namely one that is drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms").)

Massachusetts federal courts sitting in diversity must apply the choice of law rules of the forum state (*Dykes v. DePuy, Inc.*, 140 F.3d 31, 39 (1st Cir. 1998), citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

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

Massachusetts follows the modern view that forum selection clauses are enforceable when they are fair and reasonable (*Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741, 743 (Mass. 1995)). A plaintiff attempting to argue that the clause is not fair and reasonable faces a heavy burden (*Reder Enters., Inc. v. Loomis, Fargo & Co. Corp.*, 490 F. Supp. 2d 111, 117 (D. Mass. 2007)). When deciding whether a clause meets this fair and reasonable standard, a court examines the totality of the circumstances, which includes the following:

- The law governing the contract.
- The execution location.
- The location where the parties have or intend to perform their transactions.
- The availability of remedies in the contractually designated forum.
- The public policy of the plaintiff's choice of forum state.
- The location and convenience of the parties and witnesses and the access to evidence.
- The parties' relative bargaining power and the circumstances of their negotiations.
- Whether there was fraud, duress, or undue influence.
- The parties' general conduct.
- Whether the clause is in an adhesion or take-it-or-leave-it type of contract or the product of other unconscionable means.

(*Jacobson*, 646 N.E.2d at 743 n.5; *Reder*, 490 F. Supp. 2d at 117; *Doe v. Seacamp Ass'n, Inc.*, 276 F. Supp. 2d 222, 225 (D. Mass. 2003).)

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

Alternative dispute resolution clauses are valid and enforceable under Massachusetts law, unless the court finds that the clause does not cover the parties' particular dispute or is otherwise barred by legal or equitable grounds. The court resolves all doubts in favor of arbitration. (M.G.L. c. 251, § 1; *City of Pittsfield v. Local 447 Int'l Brotherhood of Police Officers*, 107 N.E.3d 1137, 1141 (Mass. 2018); *McInnes v. LPL Fin., LLC*, 994 N.E.2d 790, 794-95 (Mass. 2013); *Brandao v. Jan Pro Franchising Int'l, Inc.*, 103 N.E.3d 768, at *1 n.6 (Mass. App. Ct. 2018) (unpublished opinion under Mass. App. Ct. Rule 1:28); *Mass. Correction Officers Federated Union v. Sheriff of Bristol Cty.*, 770 N.E.2d 528, 531 (Mass. App. Ct. 2002).)

A party aggrieved by a refusal to arbitrate when provided for in a contract may seek an order from the Superior Court directing the parties to arbitrate (M.G.L. c. 251, § 2(a)).

Under federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself 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)).

Breach of Contract

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

Under Massachusetts law, a breach of contract claim must allege:

- A valid agreement between the parties.
- The plaintiff performed its obligations or was ready, willing, and able to perform.
- The defendant failed to perform under the contract.
- Damages resulting from the defendant's breach.

(*477 Harrison Ave., LLC v. JACE Bos., LLC*, 134 N.E.3d 91, 101 (Mass. 2019); *Hoang v. Eternal Salon, Inc.*, 81 N.E.3d 822 (Mass. App. Ct. 2017) (unpublished opinion under Mass. App. Ct. Rule 1:28).)

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

Under Massachusetts law, both material and nonmaterial breaches are actionable. Every breach of contract can give rise to a claim of at least nominal damages. (*Duff v. McKay*, 52 N.E.3d 203, 211 (Mass. App. Ct. 2016); Restatement (Second) Contracts § 236 cmts. a, b (1981).) It is normally a question of fact for the jury to decide whether a breach of contract is material or immaterial (*Prozinski*, 797 N.E.2d at 424).

However, only material breaches relieve a nonbreaching party of its contractual obligations. A breach is material if it is an essential and inducing feature of the contract. (*Dalrymple v. Town of Winthrop*, 2020 WL 2847167, at *5-6 (Mass. App. Ct. 2020), rev. denied, 2020 WL 4432790 (Mass. July 27, 2020); *Duff*, 52 N.E.3d at 211.) Essential and inducing features are those provisions that are so serious and intimately connected with the substance of the contract that a failure to perform them justifies the other party in walking away from the contract altogether and no longer being bound by its terms (see *G4S Tech. LLC v. Mass. Tech. Park Corp.*, 99 N.E.3d 728, 739-40 (Mass. 2018)).

When a nonmaterial breach occurs, a party cannot stop performing its obligations under the contract. A nonmaterial breach occurs when the breaching party fails to perform a minor or trivial part of its contractual obligations. (*Duff*, 52 N.E.3d at 211.)

Massachusetts courts also recognize claims for breach of the covenant of good faith and fair dealing. A party must usually do more than simply breach the contract to violate the covenant of good faith and fair dealing. A breach of the implied covenant of good faith and fair dealing typically involves bad faith conduct implicating a dishonest purpose, consciousness of wrong, or ill will in the nature of fraud. (*Targus Grp. Int'l, Inc.*, 922 N.E.2d at 853.)

A repudiation of a contract is a material breach if it is regarding either the entire promised performance or the material terms that go to the essence of the contract (*Bucciero v. Drinkwater*, 434 N.E.2d 1315, 1318 (Mass. App. Ct. 1982)).

Massachusetts courts also recognize the doctrine of anticipatory repudiation in limited circumstances. Anticipatory repudiation permits a party to bring an action for breach of contract before the time performance is due if the other party repudiates. (*K.G.M. Custom Homes*,

Inc. v. Prosky, 10 N.E.3d 117, 123 (Mass. 2014)). Examples of when a party can seek recourse for anticipatory repudiation include:

- When a party's anticipatory repudiation occurs with an actual breach (see *NExTT Solutions, LLC v. XOS Techs., Inc.*, 113 F. Supp. 3d 450, 457 (D. Mass. 2015) (applying Massachusetts law)).
- When a nonbreaching party seeks specific performance for breach of contract based on a repudiation when the time for payment is due on occurrence of a contingency within the repudiating party's control (see *Cavanagh v. Cavanagh*, 598 N.E.2d 677, 679 (Mass. App. Ct. 1992)).
- When a party repudiated its obligations based on the premise that, in equity, relief is available for events which occur after the commencement of the suit and which grow out of the matters on which the complaint is founded (*Tucker v. Connors*, 342 Mass. 376, 382-383, 173 N.E.2d 619, 623 (1961)).
- When a party repudiates the contract by declaration and conduct, the non-repudiating party may treat the contract as rescinded and maintain an action for quantum meruit (see *Johnson v. Starr*, 74 N.E.2d 137, 139 (Mass. 1947)).

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 a breach of contract claim under Massachusetts law depends on the type of contract involved. They are either:

- Six years for breach of express contracts, contracts implied in fact and quasi-contracts (M.G.L. c. 260, §2; see *Brine v. Paine, Webber, Jackson & Curtis, Inc.*, 745 F.2d 100 (1st Cir.1984) (applying Massachusetts law)).
- Twenty years for breach of contracts under seal, actions on bills, notes, or other indebtedness issued by a bank and certain other miscellaneous actions (M.G.L. c. 260, § 1).

However, a three-year statute of limitations in M.G.L. c. 260, § 3A applies to all contract claims against the Commonwealth of Massachusetts (*Cameron Painting, Inc. v. Univ. of Mass.*, 983 N.E.2d 1210, 1213-14 (Mass. App. Ct. 2013)).

The statute of limitations for breach of contract generally begins to run after the cause of action accrues, which

typically is when the breach occurs (M.G.L. c. 260, § 2; *Berkshire Mut. Ins. Co. v. Burbank*, 664 N.E.2d 1188, 1188 (Mass. 1996); *Cambridge Plating Co. v. Napco, Inc.*, 991 F.2d 21, 23-25 (1st Cir. 1993) (applying Massachusetts law)).

Massachusetts law permits tolling of the statute of limitations under the discovery rule, fraudulent concealment, and equitable tolling. Under the discovery rule, a cause of action does not accrue until a plaintiff discovers or reasonably should have discovered that it was injured by the defendant. (M.G.L. c. 260, § 12; *Pagliarini v. Iannaco*, 785 N.E.2d 1233, 1235 (Mass. App. Ct. 2003), *aff'd*, 800 N.E.2d 696 (2003); *Cambridge Plating Co.*, 991 F.2d at 25.) The plaintiff bears the burden to show that the discovery rule applies (*Zamboni v. Aladan Corp.*, 304 F. Supp. 2d 218, 224 (D. Mass. 2004) (applying Massachusetts law)).

If a person fraudulently conceals the cause of action from the person entitled to bring the claim, the period before discovery of the cause of action is excluded in determining the time limit for bringing the action (M.G.L. c. 260, § 12). When no fiduciary duty exists between the parties, active fraud is ordinarily required to prove fraudulent concealment (*Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 376-77, 893 N.E.2d 1187 (2008)). Active fraud requires an affirmative action taken with the intent to conceal the cause of action (*Puritan Med. Ctr., Inc. v. Cashman*, 413 Mass. 167, 175, 596 N.E.2d 1004 (1992)).

Under the doctrine of equitable tolling, a statute of limitations is tolled "if a plaintiff exercising reasonable diligence could not have discovered information essential to the suit" (*Bernier v. Upjohn Co.*, 144 F.3d 178, 180 (1st Cir.1998) (applying Massachusetts law)). A party invoking equitable tolling must at the least show that the information could not have been found by a timely diligent inquiry (*Bernier*, 144 F.3d at 180).

Equitable Estoppel can also toll the statute of limitations in breach of contract actions. A plaintiff must show that:

- The defendant's statements lulled the plaintiff into the false belief that it was not necessary for it to commence the action within the limitations period.
- The plaintiff was likely to have sued but was induced by the defendant's statements to refrain from suing.
- The defendant knew or had reasonable cause to know the effect of its statements.

(*Pagliarini*, 785 N.E.2d at 1235.)

Parties typically assert the statute of limitations as a defense in either:

- An answer to the complaint, as an affirmative defense (Mass. R. Civ. P. 8(c)).
- A motion to dismiss (Mass. R. Civ. P. 12(b)(6); *Muldoon v. C.J. Muldoon & Sons Corp.*, 907 N.E.2d 682, at *1 (Mass. App. Ct. 2009) (unpublished opinion under Mass. App. Ct. Rule 1:28)).

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

Intended third-party beneficiaries of a contract may sue for breach of contract under Massachusetts law. Incidental beneficiaries may not recover for a breach of contract. (*Spinner v. Nutt*, 631 N.E.2d 542, 546 (Mass. 1994); *Harvard Law Sch. Coalition for Civil Rights v. President & Fellows of Harvard Coll.*, 595 N.E.2d 316, 319 (Mass. 1992); *Lind v. Domino's Pizza LLC*, 37 N.E.3d 1, 11 (Mass. App. Ct. 2015).)

The intent of the parties to the contract determines whether a third party is an incidental or intended beneficiary (*Lind*, 37 N.E.3d at 11). Courts look to the language and circumstances of the contract to determine the parties' intent (*James Family Charitable Found. v. State St. Bank and Tr. Co.*, 956 N.E.2d 243, 247 (Mass. App. Ct. 2011)).

The third party intended beneficiary does not have to be a beneficiary of the entire contract, only the promise that it seeks to enforce. The contract also does not have to identify the intended beneficiary. (*James Family Charitable Found.*, 956 N.E.2d at 247; see *Flattery v. Gregory*, 489 N.E.2d 1257, 1260-62 (Mass. 1986) (holding an injured motorist was an intended third-party beneficiary of a contract between the insured motorist and that motorist's insurance agent who breached its contract to procure appropriate insurance for its client).)

Remedies for Breach of Contract

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

Under Massachusetts law, the prevailing plaintiff in a breach of contract action may typically recover either:

- Compensatory damages, which may include:
 - general damages; and
 - consequential damages.
- Liquidated damages, if specified under the contract.

A contract can also provide for the prevailing party to recover its attorneys' fees in the litigation (*Sea Breeze Estates, LLC*, 113 N.E.3d at 363).

Compensatory Damages

Compensatory damages redress the concrete loss that the plaintiff suffered by reason of the defendant's breach (*Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 753 (Mass. 2013)).

The plaintiff is entitled to recover damages in an amount necessary to compensate it for the losses sustained and to put the plaintiff in as good a position financially as if there had been no breach. The plaintiff cannot recover extraordinary or unforeseen damages, but only those that are both:

- The natural and probable consequences of the breach.
- Presumed to have been in the contemplation of the parties at the time they made the contract.

(*Pierce v. Clark*, 851 N.E.2d 450, 454 (Mass. App. Ct. 2006).)

The plaintiff need not prove its damages with mathematical certainty, but it cannot recover damages if they are remote, speculative, hypothetical, or outside the realm of reasonable certainty (*Pierce*, 851 N.E.2d at 454).

There are two types of compensatory contract damages:

- **General damages.** General damages are those damages which "flow according to common understanding as the natural and probable consequences of the breach" (*Pierce*, 851 N.E.2d at 454). These include:
 - benefit-of-the-bargain damages (also called expectation damages) designed to put the plaintiff in the position it would have been in had the contract been performed (*Hlatky v. Steward Health Care Sys., LLC*, 144 N.E.3d 229, 241 (Mass. 2020)); and
 - Reliance or restitution damages, which compensate the injured party for expenditures made in reliance on a contractual obligation that was not performed (*Schaumburg v. Friedmann*, 888 N.E.2d 963, 968 (Mass. App. Ct. 2008); *Fecteau Benefits Grp., Inc. v. Knox*, 890 N.E.2d 138, 143 (Mass. App. Ct. 2008)).
- **Consequential damages.** Consequential damages are damages that a party cannot reasonably prevent and arise naturally from the breach or which the parties reasonably contemplated at the time they entered into the contract (*Pierce*, 851 N.E.2d at 454; *Town of Hanover v. Cervelli*, 849 N.E.2d 1271, 1274 (Mass. App. Ct. 2006)).

Ct. 2006)). Parties can waive the right to recover consequential damages in the contract (*Costa v. Brait Builders Corp.*, 972 N.E.2d 449, 459 (Mass. 2012)).

Liquidated Damages

Massachusetts courts enforce liquidated damages clauses when:

- The contract clearly and reasonably establishes the plaintiff's right to liquidated damages.
- The amount set out in the clause is not a penalty. For example, courts can refuse to enforce a liquidated damages clause if its amount is out of proportion to the amount of actual damages sustained.
- At the time the parties entered the contract the damages resulting from the breach were difficult, if not impossible, to ascertain to determine.

(*NPS, LLC v. Minihane*, 886 N.E.2d 670, 673 (Mass. 2008)).

Courts evaluate the liquidated damages provision based on the specific breach alleged as opposed to any breach to which the provision may also apply (*Cummings Prop., LLC v. Nat'l Comm. Corp.*, 869 N.E.2d 617, 620-22 (Mass. 2008)).

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

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

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

A plaintiff may also seek a declaratory judgment asking the court to rule on the rights and other legal obligations and relations of the parties. Declaratory judgment and breach of contract actions involve different legal concepts and seek different forms of redress. A plaintiff may seek declaratory judgment in the alternative to money damages for a breach of contract claim. (M.G.L. c. 231A, § 1; Mass. R. Civ. P. 8(a), (e)(2); Mass. R. Civ. P. 57; *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 763 N.E.2d 38, 41 (Mass. 2002).)

Specific Performance

A party to a contract may seek specific performance of the contract (*Perroncello v. Donahue*, 859 N.E.2d 827, 831 (Mass. 2007)). Specific performance is most frequently associated with contracts to convey land because courts consider real property unique and money damages inadequate to redress a deprivation of an interest in land (*Pierce*, 851 N.E.2d at 452-54). A party ordinarily may not obtain both specific performance and money damages for a breach because they are alternative remedies (*Perroncello*, 859 N.E.2d at 831). While a party may not obtain both specific performance and monetary damages, it is entitled to plead its relief in the alternative (Mass. R. Civ. P. 8(a)).

Rescission

Rescission is the "unmaking" or "voidance" of a contract. A party normally seeking rescission must restore or offer to restore all consideration the party received in the bargain (*May*, 7 N.E.3d at 1042). The party seeking to rescind the agreement must also show fraud or conduct that amounts to a complete abrogation of the contract or that goes to the contract's essence (*Cabot v. Cabot*, 774 N.E.2d 1113, 1127 (Mass. App. Ct. 2002); *Worcester Heritage Soc., Inc.*, 577 N.E.2d at 1010).

Reformation

Reformation seeks to restate the terms of a written contract when a written agreement does not reflect the parties' actual intent. A court can typically reform a contract only when there is a mutual mistake of the parties. The party seeking reformation must present full, clear, and decisive proof of a mistake. (*Polaroid Corp. v. Travelers Indem. Co.*, 610 N.E.2d 912, 917 (Mass. 1993); *MacDonald v. Jenzabar, Inc.*, 93 N.E.3d 1173, 1179 n.7, rev. denied, 103 N.E.3d 1229 (Mass. 2018).)

Defenses to Breach of Contract

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

Defenses to Contract Formation

The following defenses challenge the formation of the contract itself:

- Ambiguity.
- Capacity of the parties.

- Duress or undue influence.
- Fraudulent inducement or misrepresentation.
- Illegality of the object of the contract.
- Mutual mistake.
- Unilateral mistake.
- Lack of privity.
- Lack of consideration.
- Lack of acceptance.
- Novation.
- Laches.
- Statute of Frauds.
- Unconscionability.
- Impossibility.
- Illegality.
- Ratification.
- Statute of frauds.
- Statute of limitations.
- Waiver.

Defenses to Breach

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

- Accord and satisfaction.
- Arbitration and award.
- Duress.
- Excuse of performance.
- Fraud in the inducement.
- Failure of consideration.
- Frustration of purpose.
- Prevention of performance by the plaintiff.

Defenses to Damages

The following defenses challenge the damages sought by the plaintiff:

- Duplicative damages or improper double recovery.
- Damages are superseded by a contractual liquidated damages clause.
- Damages not available for breach of contract (for example, punitive damages).
- Failure to mitigate damages if the contract does not eliminate the duty to mitigate.
- The plaintiff cannot prove damages because they are, for example:
 - speculative or not reasonably certain;
 - not directly traceable to the breach;
 - too remote;
 - the result of other intervening causes; or
 - damages that were not contemplated by the parties when they made the contract.

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