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Contract Basics for Litigators: California

by Anthony J. Ellrod and Natalya D. Vasyuk, Manning & Kass, Ellrod, Ramirez, Trester LLP, 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 California 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 California, there are four elements necessary for a valid contract:

- Parties capable of contracting.
- The parties' consent.
- A lawful object.
- A sufficient cause or consideration.

(Cal. Civ. Code § 1550; *J.B.B. Investment Partners Ltd. v. Fair*, 37 Cal. App. 5th 1, 9 (2019); *Schaefer v. Williams*, 15 Cal. App. 4th 1243, 1246 (1993) (promise by one party is not contract); *Marshall & Co. v. Weisel*, 242 Cal. App. 2d 191, 196 (1966); also Restatement (Second) of Contracts § 9 (1981) (there must be at least two parties to a contract: a promisor and a promisee).)

Parties Capable of Contracting

Under California law, all persons can contract except:

- Minors (with limited exceptions) (Cal. Civ. Code § 1557(a)).
- Persons "of unsound mind" (Cal. Civ. Code § 1557(b)).
- Persons who have lost civil rights.

(Cal. Civ. Code § 1556.)

Consent

The consent of the parties is required for a valid contract (Civ. Code § 1550). The consent must be mutual and communicated to the other party (Civ. Code § 1565). California courts typically refer to consent as "mutual assent," which is established when a specific offer is communicated to the offeree and the offeree communicates its acceptance to the offeror (*Russell v. Union Oil Co.*, 7 Cal. App. 3d 110, 114 (1970)). This "meeting of the minds" means that **all** parties to the contract must agree on **all** the material terms (Cal. Civ. Code §§ 1580 and 1581; *Monster Energy Co. v. Schechter*, 7 Cal. 5th 781, 789 (2019); *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 215 (2006); *Weddington Prods, Inc. v. Flick*, 60 Cal. App. 4th 793, 797 (1998)).

The material terms of a contract are those terms that are necessary and have enough detail for a court to enforce them (*Estate of Thottam*, 165 Cal. App. 4th 1331, 1340 (2008)). Whether there has been a meeting of the minds of the essential terms of a contract depends on the circumstances (see, for example, *Esparza v. Sand & Sea, Inc.*, 2 Cal. App. 5th 781, 783 (2016); *Bustamante*, 141 Cal. App. 4th at 215 (failure of meeting of the minds on all material points prevented contract formation)).

Courts generally ask whether a reasonable, objective person would have understood that the offeree assented to the offer (*Monster Energy Co.*, 7 Cal. 5th at 789; *Merced Cty. Sheriff's Employee's Ass'n v. Cty. of Merced*, 188 Cal. App. 3d 662, 670 (1987); *Meyer v. Benko*, 55 Cal. App. 3d 937, 942-43 (1976)). Undisclosed intentions and unexpressed state of a party's mind are irrelevant (*Palmquist v. Mercer*, 43 Cal. 2d 92, 98 (1954)).

Parties may express their assent to enter into a contract by words, acts, or conduct (see *Bustamante*, 141 Cal. App. 4th at 208). Courts look at the totality of the parties' conduct under the circumstances and the objectives the parties were trying to achieve in the contract (*Mattel, Inc. v. MGA Entertainment, Inc.*, 782 F. Supp. 2d 911, 943 (C.D. Cal. 2011) (applying California law)). Courts typically examine the offer and the acceptance to determine whether they are sufficiently definite and unequivocal to evidence the parties' mutual assent to the material terms of the contract (*Bustamante*, 141 Cal. App. 4th at 209).

Consent must be:

- Free.
- Mutual.
- Communicated by each party to the other.

(Cal. Civ. Code § 1565; also Cal. Civ. Code §§ 1566, 1567, and 1589; *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (applying California law); *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1387 (1993); *Windor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993 (1972) (regardless of manifestation of consent, offeree was not bound by inconspicuous contractual provisions of which he was unaware that were contained in a document whose contractual nature was not obvious) (Uniform Commercial Code (UCC) case).)

A Lawful Object

The object (or purpose) of the contract must be a lawful one. The object of a contract is the thing the party receiving consideration has agreed to do or not do. (Cal. Civ. Code §§ 1550 and 1595; see *Homami v. Iranzadi*, 211 Cal. App. 3d 1104, 1109 (1989).)

A contract's object is unlawful if it is any of the following:

- Contrary to an express provision of law.
- Contrary to the policy of express law, though not expressly prohibited.
- Otherwise contrary to good morals.

(Cal. Civ. Code § 1667.)

The object of a contract must be lawful both when the parties made the contract and "possible and ascertainable" by the time the contract is to be performed (Cal. Civ. Code § 1596; also Cal. Civ. Code § 1597 (definition of "impossible")). A contract with a single, unlawful object is entirely void (Cal. Civ. Code § 1598; *Tiedje v. Aluminum Taper Milling Co. Inc.*, 46 Cal. 2d 450, 453-54 (1956); *Koenig v. Warner Unified School Dist.*, 41 Cal. App. 5th 43, 55 (2019)).

Where a contract has multiple objects, of which one is unlawful, then the contract is void just regarding the unlawful object and valid for the rest (Cal. Civ. Code § 1599; *Koenig*, 41 Cal. App. 5th at 55).

Consideration

A contract must have sufficient consideration, that is, a thing of value (Cal. Civ. Code § 1550). Consideration exists under California law when there is either:

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

(Cal. Civ. Code §§ 1605 and 1606.)

California courts have repeatedly refused to enforce gratuitous promises, even if reduced to writing in the form of an agreement (see, for example, *Simonian v. Patterson*, 27 Cal. App. 4th 773, 783 (1994); *Sparks v. Lauritzen*, 248 Cal. App. 2d 269, 273-74 (1967)).

The consideration is valid only if it:

- Acts as an inducement to the original promise (*Property Calif. SCJLW One Corp. v. Leamy*, 25 Cal. App. 5th 1155, 1165 (2018); *Conservatorship of O'Connor*, 48 Cal. App. 4th 1076, 1102 (1996); *Mercer v. Lemmens*, 230 Cal. App. 2d 167, 171 (1964)).
- Is lawful within the meaning of California Civil Code Section 1667 (Cal. Civ. Code § 1607; see A Lawful Object). If the consideration is unlawful, the entire contract is void (Cal. Civ. Code § 1608).

Refraining from doing something one may otherwise legally do is a form of consideration. This type of consideration is common in forbearance agreements where a party agrees to refrain from enforcing a legal right, such as suing another party. (*Levine v. Tobin*, 210 Cal. App. 2d 67, 69 (1962).)

While the adequacy of consideration does not necessarily invalidate a bargain, courts consider the adequacy of consideration when determining whether a contract is unconscionable and may be grounds to deny specific performance (see, for example, *Donovan v. RRL Corp.*, 26 Cal. 4th 261, 291-92 (2001) (UCC case); Restatement (Second) of Contracts § 208 (1981)).

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

California'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:

- Any agreement that a party cannot perform within one year (Cal. Civ. Code § 1624(a)(1)). However, this requirement does not necessarily apply to contracts with an indefinite duration. For example, a court may find an oral employment contract without a termination date to be capable of being performed within one year and therefore falling outside the statute of frauds (*Steward v. Mercy Hospital*, 188 Cal. App. 3d 1290, 1295 (1987)).
- A promise to pay the debt or default of another person unless the guarantor, for example:
  - received independent consideration; and
  - promised to become primarily liable for the debt.

  (Cal. Civ. Code § 1624(a)(2); Cal. Civ. Code § 2794 (exceptions).)
- An agreement for the sale, lease, option, or other disposition of real property. However, the lease of property for less than one year is not within the statute of frauds and may be oral. (Cal. Civ. Code § 1624(a)(3).)

(Cal. Civ. Code § 1624(a); Cal. Civ. Code § 1624(b), (c) (exceptions to statute of frauds requirement).)

Under California's UCC, contracts for the sale of goods for the price of $500 or more also must be in writing (Cal. Com. Code § 2201(1)).

The statute of frauds does not apply when one party prevented the contract from being reduced to writing through the use of fraud (Cal. Civ. Code § 1623).

For more 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 California, a writing satisfies the statute of frauds if it is signed by the party (or the party's agent) against whom enforcement is sought and:

- Identifies the subject of the parties' agreement.
- Shows that the parties made a contract.
- States the essential contract terms with reasonable certainty.

(*Sterling v. Taylor*, 40 Cal. 4th 757, 765-66 (2007), quoting Restatement (Second) of Contracts § 131 (1981); *Smyth v. Berman*, 31 Cal. App. 5th 183, 197 (2019); *Harshad & Nasir Corp. v. Global Sign Systems, Inc.*, 14 Cal. App. 5th 523, 537 (2017) (the writing need not contain all contract terms); *Poag v. Winston*, 195 Cal. App. 3d 1161, 1179 (1987) (complete handwritten signature is not required).)

The writing may consist of more than one document (*Smyth*, 31 Cal. App. 5th at 197 (the writing may be "cobbled together from various documents")).

Types of Contracts

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

California law recognizes the following types of contracts:

- Express.
- Implied-in-fact.
- Quasi-contract.
- Written and oral.
- Unilateral and bilateral.

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 the party's actual words rather than the party's conduct. (Cal. Civ. Code § 1620; See *Green Valley Landowners Ass'n v. City of Vallejo*, 241 Cal. App. 4th 425, 433 (2015); also Cal. Civ. Code § 1619 (a contract is either express or implied).)

Implied-in-Fact Contract

An implied-in-fact contract is based on the parties' conduct (Cal. Civ. Code § 1621; also Cal. Civ. Code § 1619 (a contract is either express or implied)). An implied-in-fact contract is an actual agreement that parties enter where the manifestation of assent is by conduct rather than words (*Maglica v. Maglica*, 66 Cal. App. 4th 442, 455-56 (1998)).

For example, an implied-in-fact contract may arise where two parties informally discuss all the terms of a repair project and one party begins the project without objection by the other party. An implied-in-fact contract cannot exist when there is an express contract (*Lance Camper*

Manufacturing Corp. v. Republic Indemnity Co., 44 Cal. App. 4th 194, 203 (1996)). There is no difference in the legal effect of an express contract and an implied-in-fact contract. The only distinction is how a party manifests assent to the contract. (*Green Valley Landowners Ass'n*, 241 Cal. App. 4th at 433.)

Quasi-Contract

A quasi-contract, sometimes called an implied-in-law contract, is a legal fiction created without regard to 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. (*Welborne v. Ryman-Carroll Foundation*, 22 Cal. App. 5th 719, 725 (2018).) It only applies in the absence of an express agreement (*Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)).

California 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.

(*Rutherford Holdings, LLC*, 223 Cal. App. 4th at 231; *McBride v. Boughton*, 123 Cal. App. 4th 379, 388-89 (2004).)

Causes of action for quasi-contract include promissory estoppel and quantum meruit.

A party can plead a quasi-contract claim in the alternative to a breach of contract claim but recovery under both is impermissible because it would constitute a windfall to the plaintiff (see *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1388 (2012); *Mendoza v. Continental Sales Co.*, 140 Cal. App. 4th 1395, 1402 (2006)).

Written and Oral Contracts

A written contract contains the essential terms of the transaction in writing while an oral contract represents an agreement that the parties have not reduced to writing. California recognizes both types of contracts as valid, but the statute of frauds requires certain types of contracts to be in writing (Cal. Civ. Code §§ 1622 and 1624; *Louis Lesser Enterprises, Ltd. v. Roeder*, 209 Cal. App. 2d 401, 404-05 (1962) (terms of oral contract enforceable even if parties intended to later execute a written contract); see Question 2).

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. California courts recognize a presumption in favor of bilateral contracts (*Davis v. Jacoby*, 1 Cal. 2d 370, 378-79 (1934)).

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. (*Asmus v. Pacific Bell*, 23 Cal. 4th 1, 14-15 (2000); *Palo Alto Town & Country Village, Inc. v. BBTC Co.*, 11 Cal. 3d 494, 502-04 (1974); *Smith v. Hermann*, 199 Cal. App. 2d 748, 753-54 (1962).) For example, a company's promise of insurance coverage for employees who work for the company for 20 years and have reached the age of 55 is a unilateral contract. The offer is insurance coverage and the acceptance is the employee's performance of working for 20 years until the age of at least 55.

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

The mutual intent of the parties guides how California courts interpret a contract (Cal. Civ. Code § 1636). If a contract is in writing and unambiguous, California courts determine the parties' intent based solely on the words of the contract. Courts may not insert or excise terms or construe the language in any way that distorts the contract's meaning. (Cal. Civ. Code §§ 1638, 1639, 1644, and 1645; *Maggio v. Windward Capital Mgmt. Co.*, 80 Cal. App. 4th 1210, 1215 (2000).)

When analyzing ambiguous terms in a written contract, courts try to determine what the parties intended the term to mean considering the overall contract (Cal. Civ. Code §§ 1640 to 1654; also *Larwin-Southern Calif., Inc. v. JGB Investment Co.*, 101 Cal. App. 3d 626, 645 (1979)). Courts may use parol, or extrinsic, evidence when resolving an ambiguous contract (Cal. Civ. Code § 1647; see Ambiguity or Inconsistency).

Grammar and Meanings

Under California principles of contract interpretation, courts look at the whole of the contract, so that each clause helps interpret the other clauses (Cal. Civ. Code § 1641). Some key rules that guide the courts in interpreting a contract are:

- **Lawful meaning.** Courts must interpret a contract in a way that makes it lawful, operative, definite, reasonable, and capable of performance, if the court can do so without violating the intent of the parties (Cal. Civ. Code § 1643).
- **Ordinary meaning.** Courts must look at the words of a contract according to their ordinary and popular meaning, unless the words are used in a technical sense or given a special meaning by usage (Cal. Civ. Code § 1644).
- **Technical words.** Courts interpret technical words according to the meanings understood by the persons in the business or profession to which they relate, unless they are clearly used in a different sense in the contract (Cal. Civ. Code § 1645).
- **Law and usage of place.** Courts interpret a contract according to the law and usage of the place where the parties are to perform the contract or, if the contract does not indicate a place of performance, according to the law and usage of the place where the contract was made (Cal. Civ. Code § 1646).
- **Restriction to parties' intent.** However broad a term may be in a contract, courts interpret it with respect to how the parties' intended it to mean (Cal. Civ. Code § 1648).
- **Particular clauses versus general intent.** Courts treat particular clauses in a contract as subordinate to the contract's general intent (Cal. Civ. Code § 1650).

Implied Terms

In addition to the written provisions of a contract, courts may 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. The covenant of good faith and fair dealing is implied by law in every contract and exists to prevent one party from unfairly depriving the other party of the benefit of the bargain. Courts and parties may not use implied covenants, however, to vary the express terms of a contract. (*Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349-50 (2000); *Chu v. Old Republic Home Protection Co., Inc.*, 60 Cal. App. 5th 346 (2021).)

Entire Contract

California courts must construe contracts in a way that gives a reasonable meaning to all provisions of the contract, rather than an interpretation that leaves part of the contract useless or inexplicable. Courts should read contractual provisions harmoniously to give effect to all portions of the contract and not defeat the mutual objectives of the parties. (Cal. Civ. Code § 1641; *Howe v. American Baptist Homes of the West, Inc.*, 112 Cal. App. 3d 622, 626 (1980); *Heidlebaugh v. Miller*, 126 Cal. App. 2d 35, 38 (1954).)

Ambiguity or Inconsistency

A contractual term is ambiguous if a court finds that it has more than one reasonable interpretation. However, in determining if a provision is ambiguous, a California court must consider the entire agreement to clarify what the parties meant by the provision. (Cal. Civ. Code § 1641; *Scheenstra v. Calif. Dairies, Inc.*, 213 Cal. App. 4th 370, 389-90 (2013); *Wolf v. Super. Ct.*, 114 Cal. App. 4th 1343, 1350-51 (2004).) If the court cannot resolve the ambiguity by reference to the entire agreement, the court may sometimes admit parol evidence to determine the meaning by reference to the parties' statements or conduct (*Scheenstra*, 213 Cal. App. 4th at 390; *Wolf*, 114 Cal. App. 4th at 1350-51; *Larwin-Southern Calif., Inc.*, 101 Cal. App. 3d at 645-46; see Question 6).

Courts construe ambiguities in a contract most strongly against the drafter (Cal. Civ. Code § 1654; *Victoria v. Super. Ct.*, 40 Cal. 3d 734, 739 (1985); *Maggio*, 80 Cal. App. 4th at 1215).

If two contract provisions appear to conflict or be inconsistent, California courts should construe the contract in a manner that reconciles the provisions, giving effect to the likely intentions at the time the contract was drafted, if possible. In reconciling those provisions, courts should employ other principles of contract construction, such as ensuring specific provisions control over general. (*Starlight Ridge South Homeowners Ass'n v. Hunter-Bloor*, 177 Cal. App. 4th 440, 447 (2009); see Specific Over General.)

Specific Over General

A contract provision that addresses a specific subject matter controls over any other contract provision that generally addresses that same subject matter (Cal. Civ. Proc. Code § 1859; *Starlight Ridge South Homeowners Ass'n*, 177 Cal. App. 4th at 447-48).

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

In California, the parol evidence rule prevents a party from using a contemporaneous oral agreement or other extrinsic evidence to vary the terms of an integrated written agreement unless there is ambiguity in the contract (Cal. Civ. Code § 1625; Cal. Civ. Proc. Code § 1856; also Cal. Com. Code § 2202 (UCC version of parol evidence rule); *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 343 (2004)). Therefore, an unambiguous written contract intended by the parties to be their final agreement may not be contradicted, modified, or varied by parol evidence (*Tahoe National Bank v. Phillips*, 4 Cal. 3d 11, 22 (1971); see also *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*, 55 Cal. 4th 1169, 1174 (2013) (although the parol evidence rule results in exclusion of evidence, it is a rule of substantive law rather than a rule of evidence); *Casa Herrera, Inc.*, 32 Cal. 4th at 343).

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

- The acts and circumstances surrounding the execution of the ambiguous term (*Neverkovec v. Fredericks*, 74 Cal. App. 4th 337, 350-51 (1999)).
- Industry custom and usage (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.*, 18 Cal. App. 4th 1, 15 (1993)).
- The course of dealings and conduct of the parties, including subsequent conduct of the parties (see, for example, *Fisher v. Allis-Chalmers Corp. Product Liability Trust*, 95 Cal. App. 4th 1182, 1192 (2002)).

In practice, the application of the parol evidence rule often turns on whether there is an integration clause (sometimes called a merger clause or a merger and integration clause) in the contract. If there is no integration clause, a court may admit parol evidence only if an ambiguity exists in the contract. To determine if an ambiguity exists, courts resort to ordinary principles of contract construction (see Question 5). If the court determines that the contract is ambiguous, a party may introduce parol evidence to prove the parties' intent. However, a party may not use parol evidence to vary any terms of the contract. (Cal. Civ. Proc. Code § 1856(d), (e); *Masterson v. Sine*, 68 Cal. 2d 222, 225 (1968); *Grey v. Am. Mgmt. Services*, 204 Cal. App. 4th 803, 809 (2012); *Blackburn v. Charnley*, 117 Cal. App. 4th 758, 766 (2004); *Bionghi v. Metropolitan Water Dist. of So. Calif.*, 70 Cal. App. 4th 1358, 1364 (1999).)

If the contract contains an unambiguous integration clause, courts generally do not look to extrinsic evidence to vary or contradict contractual terms (see, for example, *Grey*, 204 Cal. App. 4th at 809; *EPA Real Estate Partnership v. Kang*, 12 Cal. App. 4th 171, 175-77 (1992)).

There are, however, exceptions to the parol evidence rule. Even when a writing is integrated, parol evidence is admissible to prove that the instrument is void or voidable for mistake, fraud, duress, undue influence, illegality, alteration, lack of consideration, or other invalidating causes, such as that the writing is a forgery, joke, or sham. Most of these types of problems typically do not appear on the face of the writing, and so parol evidence is needed to evaluate them. (Cal. Civ. Code § 1640; Cal. Civ. Proc. Code § 1856(e)-(g); see *Riverisland Cold Storage, Inc.*, 55 Cal. 4th at 1174-75).

Courts may also admit parol evidence to rebut a term the law would otherwise presume (see, for example, *Masterson*, 68 Cal. 2d at 229-30). A court may consider parol evidence of the circumstances of the making of an agreement, including the object, nature, and subject matter of the writing so the court can place itself, for evaluation purposes, in the same situation in which the parties found themselves at the time of contracting (Cal. Civ. Proc. Code § 1856(g); see *Winet v. Price*, 4 Cal. App. 4th 1159, 1168 (1992)).

Altering and Terminating Contracts

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

Under California law, parties to a written contract may modify it in one of the following ways:

- By a new written contract.
- By oral agreement, if:
  - the parties fully performed the terms of the oral modification; or
  - the oral modification is supported by new consideration (unless the written contract expressly prohibits future oral contract modification) and the statute of frauds does not require the modification to be in writing.

(Cal. Civ. Code § 1661 (definition of "executed" contract); Cal. Civ. Code § 1698 (modification of written contract); also Cal. Civ. Code § 1624 (statute of frauds); *D.L. Godbey & Sons*

Const. Co. v. Deane, 39 Cal. 2d 429, 432 (1952); Judicial Council of California Civil Jury Instructions (CACI) 313.)

If parties modify a written contract by written agreement before performance has begun, the substitution of new rights between the parties is enough consideration for the relinquishment of the parties' rights under the old agreement (*D.L. Godbey & Sons Const. Co.*, 39 Cal. 2d at 431).

Before modifying a contract, a party should review the existing contract, if written, for any provisions governing modifications. For example, many written contracts do not permit modifications or contain "no oral modification" clauses. If the contract permits modifications, best practice is to have the contracting parties execute a written modification that identifies the new consideration for the modification. If the contract contains a "no oral modification" clause, California law nevertheless permits oral modifications if:

- It was the intention of the party who allegedly relinquished a known legal right to waive a "no oral modification clause."
- The parties agreed on and accepted an oral modification to the contract.
- The oral agreement:
  - was fully performed by the parties; or
  - was supported by new consideration (unless the written contract expressly prohibits future oral contract modification) and the statute of frauds does not require the modification to be in writing.

(*Wind Dancer Prod. Grp. v. Walt Disney Pictures*, 10 Cal. App. 5th 56, 78 (2017); *Biren v. Equality Emergency Med. Group, Inc.*, 102 Cal. App. 4th 125, 141 (2002) (parties may waive "no oral modification" clauses by their conduct "where evidence shows that was their intent").)

Parties can modify an oral or implied-in-fact contract by the consent of the parties, in writing, and without new consideration. The oral or implied-in-fact contract is then extinguished to the extent of the modification. (Cal. Civ. Code § 1697.)

If the modification merely corrects errors or omissions, then consideration is not necessary (*Texas Co. v. Todd*, 19 Cal. App. 2d 174, 185 (1937)).

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

Yes. Under California law, a novation is a separate and new agreement between the parties that discharges an existing obligation and substitutes a new one (Cal. Civ. Code § 1530; see *Alexander v. Angel*, 37 Cal. 2d 856, 860 (1951)). To prove that the parties intended to create a novation, a party must show:

- The existence of a previously valid contract.
- There was an express or implied agreement to:
  - extinguish obligations under the existing contract; and
  - create new obligations under a new contract.
- The parties entered into a new contract supported by valid consideration.

(Cal. Civ. Code §§ 1530, 1531, and 1532; *Alexander*, 37 Cal. 2d at 860; *Klepper v. Hoover*, 21 Cal. App. 3d 460, 463 (1971).)

A novation is only valid if:

- The parties clearly express their intent to supersede the previous agreement (*Wells Fargo Bank v. Bank of America*, 32 Cal. App. 4th 424, 432 (1995)).
- There is new consideration (see *Wells Fargo Bank*, 32 Cal. App. 4th at 432 (where novation is in the form of substituting a new debtor for an old one, the release of the old debtor constitutes sufficient consideration for the new debtor's promise)).

The burden of proof is on the party asserting that a novation has taken place. The intention of the parties to extinguish the prior obligation and to substitute a new agreement in its place must clearly appear. (See *Hunt v. Smyth*, 25 Cal. App. 3d 807, 812 (1972).) A party must plead novation either expressly or "by unequivocal implication" (*Alexander*, 37 Cal. 2d at 860).

Novation differs from contract modification in that a novation is the substitution of one obligation for an existing one. For a novation to occur, it must "clearly appear" that the parties intended to extinguish, rather than merely modify, the original agreement. The party asserting that a novation occurred has the burden of proof. (*Howard v. Cty. of Amador*, 220 Cal. App. 3d 962, 977 (1990).)

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. California law treats a contract as lasting for a "reasonable time" and subject to termination on "reasonable notice" (after the reasonable time has passed) if the contract either:

- Does not contain a provision limiting its duration.
- Purports to remain in effect indefinitely.

(*Consolidated Theaters, Inc. v. Theatrical Stage Emp. Union, Local 16*, 69 Cal. 2d 713, 727-28 (1968); *Zee Medical Distributor Ass'n, Inc. v. Zee Medical, Inc.*, 80 Cal. App. 4th 1, 12-13 (2000) (no legal justification to look beyond what was agreed to); *Zimco Restaurants v. Bartenders Union*, 165 Cal. App. 2d 235, 240 (1958).)

If a contract is silent regarding the termination date, California courts first must judicially determine the duration of a contract in accordance with rules of contract construction. In doing so, courts look to see if the duration can be implied from the nature of the contract and the circumstances surrounding it. If the nature of the contract and surrounding circumstances give no indication regarding a determinable end date, the law implies a reasonable duration subject to termination on reasonable notice. (*Consolidated Theaters, Inc.*, 69 Cal. 2d at 724-25, 727-28; *Zinn v. Ex-Cell-O Corp.*, 148 Cal. App. 2d 56, 73-74 (1957).)

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

- Have a valid legal justification, such as the other party's material breach (see, for example, *Multani v. Knight*, 23 Cal. App. 5th 837, 851 (2018)).
- Comply with contractual provisions that govern early termination (see, for example, *Gould v. Corinthian Colleges, Inc.*, 192 Cal. App. 4th 1176, 1178 (2011)).

Dispute Resolution Clauses

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

If the parties choose California law to govern the contract, and the contract is worth at least $250,000, then courts generally apply California law, even where the transaction bears no "reasonable relation" to California (Cal. Civ. Code § 1646.5). This rule is subject to several exceptions, including:

- Labor contracts.
- Personal service contracts.
- Personal, family, or household contracts.
- Certain specified contracts governed by the UCC.

(Cal. Civ. Code § 1646.5; Cal. Com. Code § 1301(c) (UCC).)

If the parties choose the law of a state other than California to govern the contract (or they choose the law of California and the contract is worth less than $250,000), then California courts typically enforce the choice of law clause where:

- Either:
  - the chosen state has a substantial relationship to the parties or their transaction; or
  - there is any other reasonable basis for the parties' choice of law.
- The chosen state's law is not contrary to a fundamental policy of California. If the chosen state's law is contrary to a fundamental policy of California, courts analyze whether California has a materially greater interest than the chosen state in the determination of the particular issue and whether, under the Restatement (Second) of Conflict of Laws § 188 (1971), California would be the state of the applicable law in the absence of an effective choice of law by the parties.

(See, for example, *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459, 464-66 (1992) (applying an analysis under Restatement (Second) of Conflict of Laws § 187 (1971)).)

If the contract is silent regarding the parties' choice of law, courts interpret the contract according to the law and usage of the place where either:

- The parties are to perform the contract.
- The parties made the contract, if the contract does not indicate a place of performance.

(Cal. Civ. Code § 1646; *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1197 (S.D. Cal. 2007) (in applying California law, stating that a contract is "made" where it is accepted); *ABF Capital Corp. v. Grove Properties Co.*, 126 Cal. App. 4th 204, 222 (2005).)

Additionally, courts look to whether a choice of law clause applies solely to contract disputes or also to extra-contractual matters such as tort, fraud, and statutory claims related to the contract. For more on the enforceability of choice of law provisions, see Standard Clause, General Contract Clauses: Choice of Law (CA): Drafting Note: Enforceability of Choice of Law Provisions in California.

Under California law, the statute of limitations of the chosen forum governs the dispute (*Hambrecht & Quist Venture Partners v. Am. Medical Internat., Inc.*, 38 Cal. App. 4th 1532, 1540-41 (1995)).

California federal courts sitting in diversity jurisdiction must apply the choice of law rules of the forum state (*Hatfield v. Halifax PLC*, 564 F.3d 1177, 1182 (9th Cir. 2009) (applying California law)). Therefore, the federal approach generally follows the approach used in California state courts (see, for example, *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d 1156, 1166 (S.D. Cal. 2015) (applying California law)).

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

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

California State Court Analysis

California state courts generally enforce forum selection clauses where:

- The parties enter into them freely and voluntarily.
- Enforcement would not be unreasonable.

(See, for example, *Am. Online, Inc. v. Super. Ct.*, 90 Cal. App. 4th 1, 11 (2001) (citing *Smith, Valentino & Smith, Inc. v. Super. Ct.*, 17 Cal. 3d 491, 495-96 (1976)).)

Mere inconvenience or additional expense is insufficient to demonstrate that a forum selection clause is unreasonable (*Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459, 464 (1992); *Smith, Valentino & Smith, Inc.*, 17 Cal. 3d at 496; *Miller-Leigh LLC v. Henson*, 152 Cal. App. 4th 1143, 1149 (2007); also Cal. Civ. Proc. Code §§ 410.30(a) and 418.10(a)(2)).

Courts consider several different factors in determining whether a forum selection clause is unreasonable. For example they may examine whether:

- The chosen forum is unsuitable, unavailable, or otherwise unable to accomplish substantial justice (see, for example, *Smith, Valentino & Smith, Inc.*, 17 Cal. 3d at 494-96; *Miller-Leigh LLC*, 152 Cal. App. 4th at 1149; *Am. Online, Inc.*, 90 Cal. App. 4th at 12; *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*, 12 Cal. App. 4th 1666, 1683-84 (1993)).
- Inclusion of the clause was the result of overreaching or unfair use of unequal bargaining power (see, for example, *Cal-State Bus. Prods. & Servs.*, 12 Cal. App. 4th at 1679).
- Enforcement of the clause would:
  - result in a seriously inconvenient forum for the trial of the particular action; or
  - bring about a result contrary to the public policy of the forum (see, for example, *Cal-State Bus. Prods. & Servs.*, 12 Cal. App. 4th at 1679-80).
- The chosen forum does not have some rational basis considering the facts underlying the transaction (see, for example, *Cal-State Bus. Prods. & Servs.*, 12 Cal. App. 4th at 1679).

For more on how California state courts interpret and enforce forum selection clauses, see Standard Clause, General Contract Clauses: Choice of Forum (CA): Drafting Note: Enforceability of Choice of Forum Clauses.

California Federal Court Analysis

Whether under traditional diversity or federal question jurisdiction, federal courts in California analyze the enforceability of forum selection clauses under federal common law, not California state law (28 U.S.C. § 1404(a); see, for example, *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324-25 (9th Cir. 1996)).

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 Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 66 (2013); see Legal Update, Supreme Court Explains How to Enforce Forum Selection Clauses). The Ninth Circuit has generally found forum selection clauses to be presumptively valid and enforceable unless the party challenging enforcement can show that the clause is unreasonable under the circumstances (*Argueta*, 87 F.3d at 324-25).

A court may find a forum selection clause unreasonable where:

- The inclusion of the clause was a product of fraud, undue influence, or overweening bargaining power.
- Enforcement of the clause would deprive the party opposing the forum of its day in court.
- Enforcement of the clause violates a strong public policy of the forum where the plaintiff commenced suit.

(*Argueta*, 87 F.3d at 325 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).)

A forum selection clause does not need to provide reciprocal and equal benefits to be enforceable (*Great*

Am. Ins. Co. of N.Y. v. Nippon Yusen Kaisha, 2013 WL 3850675, at *5 (N.D. Cal. May 10, 2013) (unreported opinion)).

For more on how California federal courts interpret and enforce forum selection clauses, see Standard Clause, General Contract Clauses: Choice of Forum (CA): 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 California law, parties may enter into alternative dispute resolution agreements that require the parties to mediate or arbitrate their disputes. California courts generally enforce these types of agreements (*Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 714 (1976)). However, courts may not rule on the merits of the claims that are subject to an alternative dispute resolution agreement (Cal. Civ. Proc. Code § 1281.2; *Acquire II, Ltd. v. Colton Real Estate Grp.*, 213 Cal. App. 4th 959, 972 (2013)). Instead, courts are limited to determining whether the alternative dispute resolution agreement is enforceable, including whether:

- The parties have a valid arbitration agreement.
- The arbitration agreement covers the parties' dispute.
- There are statutory grounds for refusing to compel arbitration.
- The party seeking to compel arbitration has waived the right to arbitration.
- There are grounds for rescinding the agreement.

(Cal. Civ. Proc. Code § 1281.2; see, for example, *Wagner Constr. Co. v. Pac. Mech. Corp.*, 41 Cal. 4th 19, 26 (2008); *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1283 (2008); see also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).)

Once the court rules on these issues and compels arbitration, the arbitrator decides all remaining questions in the dispute (*Finley v. Saturn of Roseville*, 117 Cal. App. 4th 1253, 1259-60 (2004); *Brock v. Kaiser Found. Hosps.*, 10 Cal. App. 4th 1790, 1795-96 (1992)).

California state courts, and federal courts sitting in diversity jurisdiction, generally interpret and enforce alternative dispute resolution clauses by relying on basic principles of contract construction (see, for example, *Irwin v. UBS Painewebber, Inc.*, 324 F. Supp. 2d 1103, 1107 (C.D. Cal. 2004); *Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233, 246-48 (2016)). For more on contract construction principles, see Question 5. Courts generally resolve all doubts in favor of arbitration (see, for example, *Sandquist*, 1 Cal. 5th at 247; *San Francisco Police Officers' Ass'n v. San Francisco Police Comm'n*, 27 Cal. App. 5th 676, 683 (2018); also Cal. Civ. Proc. Code § 1281.2).

As a matter of federal and California state 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); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 97 (2000); *Rice v. Downs*, 248 Cal. App. 4th 175, 185 (2016)).

For more on the interpretation and enforcement of arbitration clauses, see Practice Note, Compelling and Staying Arbitration in California.

Breach of Contract

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

Under California law, a breach of contract claim must allege four elements, including:

- The existence of a valid and binding contract between the parties.
- The plaintiff's performance of the contract or excuse for nonperformance.
- The defendant's failure to perform under the contract.
- Damages to the plaintiff resulting from the breach.

(*Reichert v. Gen. Ins. Co.*, 68 Cal. 2d 822, 830 (1968); *Coles v. Glaser*, 2 Cal. App. 5th 384, 391 (2016); *Hamilton v. Greenwich Inv'rs XXVI, LLC*, 195 Cal. App. 4th 1602, 1614 (2011); *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006); CACI 303.)

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

Under California law, a breach of contract is not actionable without damage (*Levy v. Only Cremations for Pets, Inc.*, 57 Cal. App. 5th 203, 214 (2020); *Bramalea Calif., Inc. v. Reliable Interiors, Inc.*, 119 Cal. App. 4th

468, 473 (2004)). However, when it is clear that a party suffered damages, the fact that the amount of damage may be difficult to ascertain does not bar recovery (*Dillingham-Ray Wilson v. City of Los Angeles*, 182 Cal. App. 4th 1396, 1406 (2010)).

In addition, a party's breach of a contract must be material to relieve the nonbreaching party from any further performance of its contractual duties (*Plotnik v. Meihaus*, 208 Cal. App. 4th 1590, 1602-03 (2012)). A material breach occurs where, for example:

- A party fails to perform a substantial part of the contract or one or more of its essential terms or conditions.
- The breach substantially defeats the contract's purpose.
- The breach is one that, on a reasonable interpretation of the contract, the parties considered vital to the contract's existence.
- The promisee receives something substantially less or different from what it bargained for.

(See, for example, *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 186-87 (1961); *Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.*, 41 Cal. App. 5th 357, 367 (2019) (discussion when untimely performance constitutes material breach); *Schellinger Bros. v. Cotter*, 2 Cal. App. 5th 984, 1002 (2016); *NIVO 1 LLC v. Antunez*, 217 Cal. App. 4th Supp. 1, 4 (2013); *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (2011); *Crofoot Lumber, Inc. v. Thompson*, 163 Cal. App. 2d 324, 332-33 (1958); *Wilson v. Corrugated Kraft Containers*, 117 Cal. App. 2d 691, 696 (1953); 23 Williston on Contracts (4th ed.), § 63:3; Restatement (Second) of Contracts § 241 (1981); also Cal. Civ. Code §§ 1688 and 1689 (rescission).)

While a breach of a nonmaterial contract term technically is an actionable breach of contract, it is generally not worth bringing a breach of contract action for a technical breach because the plaintiff is unlikely to be able to prove any meaningful damages flowing from that breach (see, for example, *Karz v. Dept. of Prof. & Vocational Stds.*, 11 Cal. App. 2d 554, 557 (1936)).

California law also recognizes a cause of action based on breach of the implied covenant of good faith and fair dealing. This doctrine encompasses a pledge that neither party may do anything that destroys or injures the other party's right to receive the contract's benefits. A party breaches the implied covenant of good faith and fair dealing where 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. (*Ojjeh v. Brown*, 43 Cal. App. 5th 1027, 1037 (2019); *Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 218 Cal. App. 4th 1230, 1244 (2013).)

Under California law, a cause of action based on breach of the implied covenant of good faith and fair dealing:

- May not contradict the express terms of the agreement.
- Is a breach of the contract, and a breach of a specific provision of the contract is not necessary for a claim of breach of the implied covenant.

(*Carma Developers (Cal.), Inc. v. Marathon Development Calif., Inc.*, 2 Cal. 4th 342, 373 n.12, 374 (1992); *Thrifty Payless, Inc.*, 218 Cal. App. 4th at 1230; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 55 (2002).)

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 California law is:

- Four years for breach of a written contract (Cal. Civ. Proc. Code § 337 (some exceptions); compare Cal. Com. Code § 2725(1) (four-year statute of limitations under the UCC); also Cal. Civ. Proc. Code § 337.2 (four years for breach of written lease and abandonment of property)).
- Two years after the alleged breach, for breach of an oral (or implied) contract (Cal. Civ. Proc. Code § 339; also Cal. Civ. Proc. Code § 339.5 (two years for breach of unwritten lease and abandonment of property)).

The limitations period begins to run when the last element creating the cause of action occurs (*Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal. 4th 809, 815 (2001); *Eloquence Corp. v. Home Consignment Center*, 49 Cal. App. 5th 655, 661 (2020); *Gilkyson v Disney Enterprises, Inc.*, 244 Cal. App. 4th 1336, 1341 (2016) (noting exceptions, such as the continuous accrual doctrine)).

California generally does not apply the discovery rule to statutes of limitation in breach of contract actions unless there is a breach of fiduciary duty (*Alfaro v. Community Housing Improvement System & Planning Ass'n, Inc.*, 171 Cal. App. 4th 1356, 1397 (2009)). However, for certain unusual breach of contract actions, California courts may apply the discovery rule where the breaching party commits the breach in secret and the plaintiff could not reasonably have discovered the harm until a later date (*NBCUniversal Media, LLC v. Super. Ct.*, 225 Cal. App. 4th 1222, 1233-34 (2014) (delayed accrual may apply in certain breach of contract actions, such as those involving fraud or misrepresentation by the defendant); see also *McGranahan v. Ins. Corp. of NY*, 544 F. Supp. 2d 1052, 1063 (E.D. Cal. 2018) (applying California law) (statute of limitations for breach of duty to defend a claim is equitably tolled until final judgment)).

The party responding to a breach of contract claim typically raises the statute of limitations as an affirmative defense in its answer to the complaint. However, if the face of the complaint reveals that the statute of limitations has expired, a defendant may raise the statute of limitations in a demurrer in California state court or a motion to dismiss in federal court. (Federal Rules of Civil Procedure (FRCP) 8(b) and 12; Cal. Civ. Proc. Code §§ 430.10 and 431.30; *In re Andrew V.*, 232 Cal. App. 3d 1286, 1291 (1991).)

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

- Continuous contracts.
- Equitable estoppel.
- By operation of a statute.

Continuous Contracts

Contracts requiring continuous performance are capable of being partially breached, and each partial breach is subject to its own accrual date and own limitation period. This typically occurs where an obligation is payable by installments. (*Gilyson v. Disney Enterprises, Inc.*, 244 Cal. App. 4th 1336, 1341 (2016) (continuous accrual doctrine).)

Equitable Estoppel

Equitable estoppel tolls the statute of limitations where the plaintiff's failure to bring a timely action was caused by the defendant's deception or concealment of material facts (see *Transport Ins. Co. v. TIG Ins. Co.*, 202 Cal. App. 4th 984, 1013 (2012)).

Statutes

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

- If a plaintiff is either under the age of 18 years or lacking the legal capacity to make decisions when the cause of action accrues, the time of the disability is not part of the time limited for the commencement of the action (Cal. Civ. Proc. Code § 352(a); Cal. Civ. Proc. Code § 352(b) (exceptions)).
- If a plaintiff is, at the time the cause of action accrued, imprisoned or on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years (Cal. Civ. Proc. Code § 352.1).

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

Under California law, a third party to a contract may have standing to sue under the contract if the third party is an intended third-party beneficiary to the contract. To be a third-party beneficiary, the contract must expressly state that it is for the benefit of the third party (Cal. Civ. Code § 1559). A third party may bring a breach of contract action against a party to a contract only if the third party can show that:

- It is likely to benefit from the contract.
- A motivating purpose of the contracting parties was to provide a benefit to the third party.
- Permitting the third party to bring its own breach of contract action against a contracting party is "consistent with the objectives of the contract" and the reasonable expectations of the parties to the contract.

(*Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 821, 821 (2019); see also, for example, *Unite Here Local 30 v. Dept. of Parks & Recreation*, 194 Cal. App. 4th 1200, 1217 (2011).)

The contract must show an intent by both parties to provide a direct benefit to the third party. A third party who receives only incidental benefits typically cannot enforce the contract. (*Martinez v. Socoma Companies, Inc.*, 11 Cal. 3d 394, 400 (1974); *Lucas v. Hamm*, 56 Cal. 2d 583, 590 (1961); *Brown v. Calif. State Lottery Com.*, 232 Cal. App. 3d 1335, 1341 (1991).)

A third party beneficiary must take the contract as they find it and cannot take provisions favorable to them and reject unfavorable provisions (Cal. Civ. Code § 1589; *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 181 Cal. App. 3d 122, 132 (1986)).

Remedies for Breach of Contract

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

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

- Compensatory damages, which may include:
  - general (or direct) damages; and
  - special (or consequential) damages.
- Liquidated damages, if required under the contract.

Under California law, litigants generally are responsible for their own attorneys' fees (*Philipson & Simon v. Gulsvig*, 154 Cal. App. 4th 347, 364 (2007)). A prevailing plaintiff typically may recover an award of attorneys' fees from an adverse party only when authorized by either statute or contract (Cal. Civ. Proc. Code § 1021; Cal. Civ. Code § 1717; but see *Howard v. Am. Nat. Fire Ins. Co.,* 187 Cal. App. 4th 498, 533 (2010) (insured's attorneys' fees recoverable where insurer denied insured's claim in bad faith)).

The plaintiff generally cannot recover punitive damages in ordinary breach of contract actions (*Cates Construction, Inc. v. Talbot Partners*, 21 Cal. 4th 28, 61 (1999)).

Compensatory Damages

The purpose of compensatory damages is to restore the plaintiff to the same position it would have been in had the defendant not breached the contract. The plaintiff may not recover compensatory damages in excess of the loss actually incurred (Cal. Civ. Code § 3358).

There are two types of compensatory contract damages:

- **General (or direct) damages.** General damages flow directly from the defendant's breach and are the natural, logical, and probable consequence of that breach (Cal. Civ. Code § 3300; *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified School Dist.*, 34 Cal. 4th 960, 968 (2004)).
- **Special (or consequential) damages.** Special damages do not flow directly from the breach, but a party may recover them if the special or particular circumstances from which they arose were actually communicated to or known by the breaching party (subjective test) or were matters of which the breaching party should have been aware at the time of contracting (objective test) (for example, loss of the plaintiff's customers as a result of the defendant's breach). (*Lewis Jorge Constr. Mgmt., Inc.*, 34 Cal. 4th at 968-69; *Greenwich S.F., LLC v. Wong*, 190 Cal. App. 4th 739, 754 (2010).) Special damages "beyond the expectations of the parties" are not recoverable (*Amelco Elec. v. City of Thousand Oaks*, 27 Cal. 4th 228, 243 (2002)).

Regardless of the type of compensatory damages, the plaintiff must choose the appropriate method for calculating them. The method largely depends on the factual circumstances surrounding the type of contract and the breach. For example, depending on the circumstances, the appropriate measure of damages may be:

- Lost profits.
- Reliance damages.
- Expectation damages.
- Market value of the loss.

(Cal. Civ. Code § 3300; see, for example, *Lewis Jorge Constr. Mgmt., Inc.*, 34 Cal. 4th at 975-76 (discussion of lost profits); *Agam v. Gavra*, 236 Cal. App. 4th 91, 105 (2015); *Reese v. Wong*, 93 Cal. App. 4th 51, 56 (2001).)

A plaintiff cannot recover damages that are not ascertainable both in nature and origin (Cal. Civ. Code § 3301). Damages for the breach of a contract to pay money is the amount not paid plus interest (Cal. Civ. Code § 3302).

Liquidated Damages

Contracts may contain a liquidated damages clause, which determines in advance the measure of damages in the event of a breach. Courts generally enforce liquidated damages clauses unless the party seeking to invalidate the clause establishes that it was unreasonable under the circumstances that existed when the parties made the contract. Courts consider a liquidated damages clause unreasonable if it "bears no relationship to the range of actual damages that the parties could have anticipated would flow from a breach." (Cal. Civ. Code § 1671(b); *Ridgley v. Topa Thrift & Loan Ass'n*, 17 Cal. 4th 970, 977 (1998); *Red & White Distribution, LLC v. Osteroid Enterprises, LLC*, 38 Cal. App. 5th 582, 584 (2019); *Vitatech Internat., Inc. v. Sporn*, 16 Cal. App. 5th 796, 805-06 (2017).)

There is a presumption that liquidated damages in consumer contracts for goods and services and certain real estate leases are void. The proponent of the clause may rebut the presumption by showing that, based on the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. (Cal. Civ. Code § 1671(c), (d).) Courts look to whether the liquidated damages clause is a penalty to deter early termination rather than a reasonable approximation of damages for a breach (see, for example, *Cellphone Termination Fee Cases*, 193 Cal. App. 4th 298, 322-23 (2011)).

Counsel should check the statutes and rules applicable to the type of contract at issue, as specific liquidated damages statutes may apply (Cal. Civ. Code § 1671(a); for example, Cal. Civ. Code § 1675 (default on real property purchase contract)).

If a court upholds a contract's liquidated damages provision, the court limits the plaintiff's contract damages to 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 California 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.

A party to a contract may also seek a declaratory judgment asking the court to rule on the parties' rights and obligations under the contract. A plaintiff may obtain this ruling if it shows an "actual controversy" relating to the legal rights and duties of the parties (28 U.S.C. § 2201; Cal. Civ. Proc. Code § 1060; see *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 942-43 (9th Cir. 1981) (discussion of "actual controversy" requirement); *Environmental Defense Project of Sierra Cty. v. Cty. of Sierra*, 158 Cal. App. 4th 877, 885 (2008) (discussion of what constitutes "actual controversy")). Actions for declaratory relief can be equitable (with no right to a jury trial) or legal in nature (with a right to a jury trial) depending on the types of issues raised in the complaint (*Entin v. Super. Ct.*, 208 Cal. App. 4th 770, 777 (2012)).

The plaintiff may either plead declaratory relief as a separate cause of action or request declaratory relief in the demand for relief section, if the body of the complaint sufficiently alleges an actual controversy appropriate for declaratory relief. Pleading it as a separate cause of action (as well as including it in the demand for relief) is the more common practice in California state court. However, pleading it as a remedy is the more common practcie in federal court. (See, for example, *S. Cal. Edison Co. v. Super. Ct.*, 37 Cal. App. 4th 839, 846 (1995) (discussing proper use of declaratory relief cause of action); *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 807-08 (2003) (noting declaratory relief was appropriate where the complaint adequately pleaded a claim for declaratory relief, even though plaintiff did not separately identify it as a cause of action); also 28 U.S.C. §§ 2201 and 2202; FRCP 57; but see *DPR Construction v. Shire Regenerative Medicine, Inc.*, 204 F. Supp. 3d 1118, 1132 (S.D. Cal. 2016) (declaratory judgment is a remedy not a cause of action).)

For more on these equitable remedies, see Standard Clauses:

- Rescission Cause of Action (CA).
- Reformation Cause of Action (CA).
- Specific Performance Cause of Action (CA).

Defenses to Breach of Contract

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

Under California law, defenses to a breach of contract action typically focus on formation of the contract or the alleged breach, as well as defenses to damages and procedural defenses.

Defenses to Contract Formation

The following defenses challenge the formation of the contract itself:

- Ambiguity
- Capacity of the parties.
- Duress, undue influence, or menace.
- Economic duress.
- Failure of condition precedent.
- Fraud, including:
  - material misrepresentation;
  - negligent misrepresentation;
  - fraudulent concealment; and
  - promissory fraud.

- Illegal purpose.
- Mutual mistake.
- Statute of frauds.
- Unilateral mistake.
- Unclean hands.
- Unconscionability.

For more on each of these and other defenses, see Breach of Contract Defenses Checklist (CA).

Defenses to Breach

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

- Accord and satisfaction.
- Ambiguity.
- Anticipatory breach.
- Economic duress.
- Equitable estoppel.
- Failure of condition precedent.
- Failure of consideration.
- Frustration of purpose.
- Good faith and fair dealing.
- Impossibility of performance.
- Modification.
- Novation.
- Payment.
- Ratification.
- Release.
- Unclean hands.
- Waiver.

For more on each of these and other defenses, see Breach of Contract Defenses Checklist (CA).

Defenses to Damages

The following defenses challenge the damages the plaintiff seeks:

- Duplicative damages or improper double recovery.
- Damages were replaced or indemnified in whole or in part by collateral sources (*El Escorial Owners' Ass'n v. DLC Plastering, Inc.*, 154 Cal. App. 4th 1337, 1359 (2007) (the collateral source rule "has not been generally applied in cases founded on breach of contract… It does apply, however, where the plaintiff sues for breach of contract and the underlying conduct involves a tort")).
- Damages are superseded by contractual liquidated damages clause.
- The liquidated damages clause is unenforceable.
- The damages the plaintiff seeks are contractually precluded.
- Damages not available for breach of contract (for example, punitive damages).
- Failure to mitigate damages, if there is no liquidated damages clause.
- Failure to specifically plead special (consequential) damages.
- The plaintiff cannot prove damages because they are:
  - speculative or not reasonably certain;
  - not directly traceable to the breach;
  - too remote;
  - the result of intervening causes; or
  - damages that the parties did not contemplate when they made the contract.

For more on each of these and other defenses, including procedural defenses, see Breach of Contract Defenses Checklist (CA).