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Contract Basics for Litigators: District of Columbia

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

Under District of Columbia law, the elements of a valid contract are:

- An intent to be bound.
- Agreement on all material terms.
- Assumption of mutual obligations, including:
  - an offer;
  - an acceptance; and
  - consideration.

(See *REO Acquisition Grp. v. Fed. Nat'l Mortg. Ass'n*, 104 F. Supp. 3d 22, 28 (D.D.C. 2015) (applying District of Columbia law); *SJ Enters., LLC v. Quander*, 207 A.3d 1179, 1183 (D.C. 2019); *Dyer v. Bilaal*, 983 A.2d 349, 356 (D.C. 2009).)

Intent to be Bound

Parties express their intent to be bound by:

- Written materials.
- The parties' oral expressions.
- The parties' actions after they reach an agreement.

(See *Mobile Now, Inc. v. Sprint Corp.*, 393 F. Supp. 3d 56, 64 (D.D.C. 2019) (applying District of Columbia law); *Duffy v. Duffy*, 881 A.2d 630, 637 (D.C. 2005); *Davis v. Winfield*, 664 A.2d 836, 838 (D.C. 1995) (signature on a written agreement is not essential to the formation of a contract, as the parties' intention can be determined from their actions and the contract's terms).)

There is no intent to be bound by an oral agreement if either:

- One party knows or has reason to know that the other party regards the agreement as incomplete.
- One party only intends to be bound to a later written agreement.

(See *Blackstone v. Brink*, 63 F. Supp. 3d 68, 78 (D.D.C. 2014) (applying District of Columbia law); *New Econ. Capital, LLC v. New Mkts. Capital Grp.*, 881 A.2d 1087, 1094 (D.C. 2005) (party asserting existence of contract has the burden of proof); *Jack Baker, Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236, 1239 (D.C. 1995) (evidence must show that parties clearly intended to be bound by oral agreement and writing was just a memorialization of the agreement).)

Agreement on Material Terms

For a contract to be valid, it must contain the material terms of the bargain. Material terms are those necessary for the parties to understand what they are promising or how to perform the contract, such as subject matter, price, payment terms, quantity, quality, duration, and so on. (*Dyer*, 983 A.2d at 356-57.) Even if the parties intend to be bound by an agreement, the contract is not enforceable

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unless the court can determine what the parties agreed to do (*Strauss v. NewMarket Glob. Consulting Grp., LLC*, 5 A.3d 1027, 1033 (D.C. 2010) (whether a term is material is a question of fact); *1836 S St. Tenants Ass'n, Inc. v. Estate of B. Battle*, 965 A.2d 832, 839 (D.C. 2009); *Eastbanc, Inc. v. Georgetown Park Assocs. II, L.P.,* 940 A.2d 996, 1002 (D.C. App. 2008); *Duffy*, 881 A.2d at 637 (to be enforceable, a contract must be sufficiently definite regarding material terms)).

District of Columbia courts enforce oral agreements if they are valid and do not violate the statute of frauds (*Kramer Associates, Inc. v. Ikam, Ltd.*, 888 A.2d 247, 251-52 (D.C. 2005); see Question 2). An oral contract is valid if the parties:

- Agree on all material terms.
- Intend to be bound by the terms of the oral agreement

(See *Rios v. I.S. Enters., Inc.*, 113 F. Supp. 3d 283, 284 (D.D.C. 2015) (applying District of Columbia law); *Strauss*, 5 A.3d at 1033; *Jack Baker, Inc.*, 664 A.2d at 1238; *Perles v. Kagy*, 473 F.3d 1244, 1251 (D.C. Cir. 2007) (applying District of Columbia law) (in reviewing an oral agreement, courts also consider the importance of the transaction and the amount of money or other rights at stake).)

Assumption of Mutual Obligations

Parties express mutuality, or a meeting of the minds, through the requirements of:

- An offer.
- An acceptance.
- Consideration.

Offer

An offer is a manifestation of an intent to be bound without further action on the part of the offeror. A valid offer must contain all material terms of the bargain and is binding on the offeror if the offeree properly accepts the offer. (*1836 S St.*, 965 A.2d at 839.)

Acceptance

A party accepts an offer when:

- The party has knowledge of and agrees to the essential terms of the offer.
- The acceptance:
  - complies with the offer's terms; and
  - was clear and unequivocal, or otherwise reasonable under the circumstances.

(See *1836 S St.*, 965 A.2d at 839; *Malone v. Saxony Coop. Apartments, Inc.*, 763 A.2d 725, 728 (D.C. 2000); *REO Acquisition*, 104 F. Supp. 3d at 28 (applying District of Columbia law) (an acceptance containing new material terms is a counteroffer and must be accepted by the offeror to form an enforceable contract).)

Consideration

Consideration is either a benefit to the promisor or a detriment to the promisee. It generally exists when the parties exchange promises and each party undertakes to do or refrain from doing something that the party is otherwise under no legal obligation to do. (*Eastbanc*, 940 A.2d at 1003; *Wash. Inv. Partners of Del., LLC v. The Secs. House, K.S.C.C.*, 28 A.3d 566, 574–75 (D.C. 2011).)

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

Under District of Columbia law, the statute of frauds requires certain types of agreements to be in writing and signed by the person against whom enforcement is sought.

The types of contracts required to be in writing include:

- An agreement by an executor or administrator to answer for damages out of his own estate (D.C. Code § 28-3502).
- An agreement by the defendant to answer for the debt, default, or miscarriage of another person (D.C. Code § 28-3502).
- An agreement made on consideration of marriage (D.C. Code § 28-3502).
- An agreement on a contract or sale of real estate, of any interest in or concerning it. For example, a promise to provide a right of first refusal to purchase real estate is unenforceable unless it is in writing and signed (D.C. Code § 28-3502.)
- An agreement that is not to be performed within one year from the date it was made (D.C. Code § 28-3502).
- An agreement creating an estate for a term greater than one year in real estate, unless created by deed (D.C. Code § 28-3501).
- A contract creating a trust or confidence of real estate (D.C. Code § 28-3503).
- An agreement creating a grant or assignment of a trust or confidence (D.C. Code § 28-3503).

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- An agreement conveying real estate by which a trust or confidence is or may arise or result by the implication or construction of law, or is transferred or extinguished by an act or operation of law (D.C. Code § 28-3503).
- An agreement on a simple contract of a new or continuing contract that would take the case out of the operation of the statute of limitations or deprive a party of the benefit of the statute (D.C. Code § 28-3504).
- An agreement to pay a debt contracted during infancy, made after full age, except for necessaries (D.C. Code § 28-3505).

(See D.C. Code §§ 28-3501 to 3505.)

Under District of Columbia's Uniform Commercial Code, contracts for the sale of goods involving the price of five hundred dollars or more must be in writing and signed (D.C. Code § 28:2-201(1); *Segal Wholesale, Inc. v. United Drug Svc.*, 933 A.2d 780, 784 (D.C. 2007)).

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

Under District of Columbia law, a writing satisfies the statute of frauds if it:

- Contains all essential terms of the agreement.
- Adequately identifies the parties to the contract.
- Is signed by the party against whom enforcement is sought or by a person authorized to sign by the party against whom enforcement is sought.

(See *Rumber v. Dist. of Columbia*, 598 F. Supp. 2d 97, 105 (D.D.C. 2009) (applying District of Columbia law); *Clay v. Hanson*, 536 A.2d 1097, 1102 (D.C. 1988) (unilateral letter sent by purchaser to vendor did not satisfy the statute of frauds where it was not signed by the vendor, the party against whom the contract will be enforced); *Apostolides v. Colecchia*, 221 A.2d 437, 438-39 (D.C. 1966).)

The statute of frauds does not require that the parties enter a formal contract. A writing satisfies the statute of frauds if it sets out the agreement's essential terms and is signed by the party against whom enforcement is sought, or its authorized agent (D.C. Code Ann. § 28-3502; *Uhar & Co. v. Jacob*, 710 F. Supp. 2d 45, 50 (D.D.C. 2010) (applying District of Columbia law).) An agreement need not be contained in a single document. Instead, an agreement may consist of several documents if one document is signed by the party to be charged and the other documents clearly indicate that they relate to the same transaction. (*Clay*, 536 A.2d at 1100.)

Types of Contracts

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

The District of Columbia recognizes the following types of contracts:

- Express contracts.
- Implied-in-fact contracts.
- Implied-in-law contracts.
- Bilateral and unilateral contracts.

Express Contracts

An express contract is an agreement arrived at by the parties' words, whether oral or written. Under District of Columbia law, the parties form a contract when they agree to all material terms and intend to be bound. (*United House of Prayer for All People v. Therrien Waddell, Inc.*, 112 A.3d 330, 337-38 (D.C. 2015).)

Implied-in-Fact Contracts

An implied-in-fact contract has all the required elements of a binding contract, but the contract has not been written or stated in specific terms orally. The contract is inferred from the parties' conduct, communication, course of dealing, or industry custom (see *Boyd v. Kilpatrick Townsend & Stockton*, 164 A.3d 72, 81 (D.C. 2017); *Steuart Inv. Co. v. The Meyer Group, Ltd.*, 61 A.3d 1227, 1233-34 (D.C. 2013).)

Courts often find an implied-in-fact contract where one party provides services to another and seeks to recover under quantum meruit. In those cases, the party seeking payment for services rendered must prove:

- Valuable services rendered by the plaintiff.
- Services were rendered for the person from whom recovery is sought.
- The services were accepted and benefitted that person.
- The services were rendered under circumstances which reasonably notified the person that the plaintiff, in performing such services, expected to be paid.

(See *Boyd*, 164 A.3d at 81; *Jordan Keys & Jessamy, LLP v. St. Paul Fire and Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005) (implied-in-fact contract does not exist

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where the defendant never agreed to pay the plaintiff, but rather refused the plaintiff's demand for payment); *Paul v. Howard Univ.*, 754 A.2d 297, 311 (D.C. 2000) (plaintiff must plead and prove all elements of an express contract, such as offer, acceptance, and consideration, to establish an implied-in-fact contract); *New Econ. Capital, LLC*, 881 A.2d at 1095 (Stating, "unlike an implied-in-law 'quasi-contract,' an implied-in-fact contract is a true contract that contains all the required elements of a binding agreement") (citation omitted)).

An implied-in-fact contract cannot exist if the parties have an express contract (*Jordan Keys & Jessamy, LLP*, 870 A.2d at 64). Subject to certain narrow exceptions, under District of Columbia law, the statute of frauds does not bar recovery under a *quantum meruit* theory (*Mace v. Domash*, 2008 WL 11417279, at * 6 (D.D.C. Dec. 1, 2008)).

Implied-in-Law Contracts

Quasi-contract, or an implied-in-law agreement, exists when there is no valid agreement between the parties, but the plaintiff conferred a benefit on the defendant, and it is inequitable to allow the defendant to retain the benefit without paying for its value (*Peart v. Dist. of Columbia Housing Auth.*, 972 A.2d 810, 813-14 (2009)). A party asserting a quasi-contract claim typically seeks restitution for promissory estoppel or unjust enrichment *(Peart*, 972 A.2d at 813-14; *Wallace v. Eckert, Seamans, Cherrin & Mellot, LLC*, 57 A.3d 943, 958 (D.C. 2012)). Unjust enrichment is not based on whether there was a duty to bestow a benefit, but whether justice warrants recovery as if there had been a promise to pay (*4934, Inc. v. District of Columbia Dep't of Emp't Servs.*, 605 A.2d 50, 55 (D.C. 1992)).

A party can plead a quasi-contract claim in the alternative to a breach of contract claim, but recovery under both is generally impermissible (see *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 556 (D.C. 2016); *Harrington v. Troutman*, 983 A.2d 342, 347 (D.C. 2009) (contract will not bar an unjust enrichment claim if there is a basis to set aside the contract as unenforceable)).

Bilateral and Unilateral Contracts

A bilateral contract is an agreement that involves an exchange of reciprocal promises (*Glenn v. Fay*, 281 F. Supp. 3d 130, 140 (D.D.C. 2017) (applying District of Columbia law) (noting that a bilateral contract can become a unilateral contract by full performance on one side); *Wash. Nat'ls Stadium LLC v. Arena, Parks, & Stadium Sols., Inc.*, 192 A.3d 581, 587 (D.C. 2018) (breaching the contract does not convert the contract to a unilateral contract)).

A unilateral contract results from the exchange of a promise for an act. A unilateral contract does not bind either party until the promisee accepts the offer by completing the promised act. (*Wash. Nat'ls Stadium LLC*, 192 A.3d at 587.) The performance of the act constitutes acceptance of the offer and creates a contract (*King v. Indus. Bank of Washington*, 474 A.2d 151, 156 (D.C. 1984)).

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

Under District of Columbia law, courts use the objective law test when interpreting contracts. This test requires courts to determine a contract's meaning by the plain meaning of the words used and how a reasonable person in the parties' position would interpret those words. (See *Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 894-95 (D.C. 2016); *Dyer*, 983 A.2d at 357 (courts determine whether the parties agreed to a contract based on their agreements' terms, not the parties' subjective intentions).)

The agreement's written terms govern the parties' rights and liabilities regardless of their intent when they entered into the contract unless:

- The written language is ambiguous in that it does not have a clear and definite understanding.
- The contract is a result of fraud, duress, or mutual mistake.

(See *DSP Venture Grp., Inc. v. Allen*, 830 A.2d 850, 852 (D.C. 2003); *Geiger v. Crestor Bank*, 778 A.2d 1085, 1091 (D.C. 2001); *Isaac v. First Nat. Bank of Maryland*, 647 A.2d 1159, 1162 (D.C. 1994) (noting that the concept of "meeting of the minds" may make sense in the context of contract formation or negotiation, but not where there is a written contract that is clearly executed by the party sought to be charged).)

Grammar and Meanings

Under District of Columbia law, courts examine a contract on its face, giving words their ordinary and plain meaning unless it is evident the terms have a technical or

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specialized meaning (*Carlyle Inv. Mgmt. LLC*, 131 A.3d at 894-95). Courts follow the contract terms' settled usage and will not create an ambiguity where none exists (*Dyer*, 983 A.2d at 355).

Implied Terms

In addition to the written provision of a contract, certain terms and conditions are implied as a matter of law. For example, all contracts contain an implied covenant of good faith and fair dealing. The implied covenant prevents either party from violating norms of decency, fairness, and reasonableness. (*Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114, 132-33 (D.D.C. 2018) (applying District of Columbia law); *Wright v. Howard Univ.*, 60 A.3d 749, 754 (D.C. 2013).) While the meaning of good faith varies depending on the context, to succeed on a claim that the defendant has violated the implied covenant of good faith and fair dealing, a plaintiff must allege conduct that is bad faith, arbitrary, or capricious (*Wright*, 60 A.3d at 756; *Allworth v. Howard Univ.*, 890 A.2d 194, 201-02 (D.C. 2006) (each party to a contract cannot destroy or injure the other party's right to receive contract benefits)).

Entire Contract

Under District of Columbia law, courts consider the entirety of the contract when interpreting a contract and try to interpret the contract in a way that gives effect to all its provisions (see *Hunt Constr. Grp. Inc. v. Nat'l Wrecking Corp.*, 587 F.3d 1119, 1121 (D.C. Cir. 2009) (applying District of Columbia law); *Steele Foundations, Inc. v. Clark Const. Group, Inc.*, 937 A.2d 148, 154 (D.C. 2007); *Akassy v. William Penn Apts. Ltd. P'ship*, 891 A.2d 291, 303 (D.C. 2006)).

Absent fraud or mistake, a party who signs a contract is bound by a contract that they had an opportunity to read, whether they did so or not (see *Proulx v. 1400 Pennsylvania Ave., SE, LLC*, 199 A.3d 667, 672 (D.C. 2019)).

Ambiguity or Inconsistency

A contract is ambiguous if the language is reasonably susceptible to different constructions, interpretations, or meanings (*Abdelrhman v. Ackerman,* 76 A.3d 883, 888 (D.C. 2013); *Debnam v. Crane Co.*, 976 A.2d 193, 197-98 (D.C. 2009)).

A court examines the document on its face, giving the language its plain meaning to determine if the contract is ambiguous. A writing is not ambiguous where the court can determine its meaning without extrinsic evidence. If the court identifies an ambiguity, it may use extrinsic evidence to resolve the ambiguity. A court should not create ambiguity where none exists merely because the parties disagree over the meaning of the words in the contract. (*Tillery v. District of Columbia Contract Appeals Bd.*, 912 A.2d 1169, 1176-78 (D.C. 2006); *Bragdon v. Twenty-five Twelve Assocs., Ltd. P'ship*, 856 A.2d 1165, 1170 (D.C. 2004); *Washington Props., Inc. v. Chin, Inc.*, 760 A.2d 546, 548 (D.C. 2000).)

Specific Over General

As a rule, specific and exact terms control over general language (see *Dun v. Transamerica Premier Life Ins. Co.*, 442 F. Supp. 3d 229, 239 (D.D.C. 2020) (applying District of Columbia law); *Wash. Auto. Co. v. 1828 L St. Assocs.*, 906 A.2d 869, 880 (D.C. 2006)).

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

Under District of Columbia law, the parol evidence rule prevents parties from using extrinsic evidence to vary the terms of a written contract unless there is ambiguity in the contract. Therefore, when interpreting a contract, courts may not consider evidence that contradicts or adds to the writing where:

- The contract is fully integrated.
- The terms of the written agreement are plain and unambiguous.

(See *Africare, Inc. v. Xerox Complete Document Solutions Maryland, LLC*, 436 F. Supp. 3d 17, 34 (D.D.C. 2020) (applying District of Columbia law) (where the contract contains an integration clause, the parol evidence rule applies with even greater force); *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 928-29 (D.C. 1992); but see *Segal Wholesale, Inc.*, 933 A.2d at 784 (evidence consistent with the terms of a partially integrated document is permissible).)

An unambiguous, completely integrated written agreement may not be contradicted, modified, or varied by prior or contemporaneous agreements or negotiations. To admit parol evidence, a court must determine that the language of the written agreement is ambiguous (see *Abdelrhman,* 76 A.3d at 888; *Segal Wholesale, Inc.*, 933 A.2d at 783; Question 5: Ambiguity or Inconsistency).

Counsel should be aware that District of Columbia courts have been inconsistent in applying the parol evidence rule. For example:

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- Some courts consider parole evidence only where the contract's language contains an ambiguity.
- Other courts consider both the contract's language and the surrounding circumstances, from the perspective of a reasonable person in the position of the parties, when deciding whether to consider parol evidence.

(See *Abdelrhman,* 76 A.3d at 889; *Dyer*, 982 A.2d at 355; *Patterson v. District of Columbia*, 795 A.2d 681, 693 (D.C. 2002); *Debnam*, 976 A.2d at 197-98 (noting that extrinsic evidence may be relied on once a contract is deemed ambiguous to show the subjective intent of the parties).)

Altering and Terminating Contracts

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

Under District of Columbia law, modification of a contract is a change in the original agreement that leaves the general purpose and effect of the contract unchanged (*Akassy*, 891 A.2d at 301). The parties to a contract may modify it:

- In a writing executed by all parties to the contract.
- Orally, unless the contract falls under:
  - the statute of frauds; or
  - the UCC, and then only if the written contract does not bar oral modifications (see D.C. Code § 28:2-209(2)).
- By course of behavior that demonstrates the parties' intent to modify the contract.

(See *2301 M St. Coop. Ass'n v. Chromium LLC*, 209 A.3d 82, 90 (D.C. 2019); *Stancil v. First Mt. Vernon Indus. Loan Ass'n*, 131 A.3d 867, 872 (2014); *Hildreth Consulting Eng'rs, P.C. v. Larry E. Knight, Inc.*, 801 A.2d 967, 974 (D.C. 2002).)

The parties must support a modification with new consideration. Merely fulfilling previous obligations is not adequate consideration to support a modification. (See *Rinck v. Assoc. of Reserve City Bankers*, 676 A.2d 12, 18 (D.C. 1996); *Hershon v. Hellman Co., Inc.*, 565 A.2d 282, 283 (D.C. 1989); but see D.C. Code § 28:2-209(2) (consideration not required for contracts falling under the UCC).)

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

Yes. Under District of Columbia law, a novation is a separate and new agreement between the parties that replaces one debtor for another or discharges an existing obligation and substitutes a new one. (*Hemisphere Nat'l Bank v. D.C. Ins. Guar. Ass'n*, 412 A.2d 31, 37 (D.C. 1980).)

A novation is valid if:

- A valid agreement exists.
- The parties extinguish that agreement and replace it with a new one.
- The new contract is valid and supported by new and valid consideration.

(See *Federal Nat'l Mortgage Assoc. v. Epicurean Foods, LLC*, 2017 WL 10186586, at *3 (D.D.C. January 25, 2017) (applying District of Columbia law); *Bashir v. Moayedi*, 627 A.2d 997, 999 (D.C. 1993) (novation is unavailable absent the parties' mutual agreement to release the debtor from liability).)

A debtor must establish by clear and convincing evidence that all parties to the transaction intended to create a novation (*Pallie v. Riggs Nat'l Bank*, 697 A.2d 1239, 1242 (D.C. 1997); *Hemisphere Nat'l Bank*, 412 A.2d at 37).

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

Under District of Columbia law, a contract generally terminates on or after:

- The occurrence of an agreed contractual event.
- The satisfaction of the contractual obligations.
- A date specified in the contract.

District of Columbia law treats a contract as lasting for a "reasonable time" and subject to termination on "reasonable notice" if the contract either:

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

(See *Uriate v. Perez-Molina*, 434 F. Supp. 76, 79-80 (D.D.C. 1977) (applying District of Columbia law).)

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

- Have a valid legal justification, such as the other party's material breach.
- Comply with contractual provisions that govern early termination.

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(See *Howard Town Center Dev., LLC v. Howard University*, 278 F. Supp. 3d 333, 343 (D.D.C. 2017) (applying District of Columbia law) (termination complied with requirements of operating agreements).)

Dispute Resolution Clauses

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

Under District of Columbia law, courts enforce choice of law provisions if there is a reasonable relationship between the contract and the state law specified in a choice of law provision (*Orchin v. Great W. Life & Annuity Ins. Co.*, 133 F. Supp. 3d 138, 146-47 (D.D.C. 2015) (applying District of Columbia law)). District of Columbia choice of law applies unless the contract specifically provides otherwise. Choice of law provisions only apply to substantive law and not to procedural law, which is governed by the law of the forum. (*Parker v. K&L Gates, LLP*, 76 A.3d 859, 867 (D.C. 2013); *Olivarius v. Stanley J. Sarnoff Endowment for Cardiovascular Science, Inc.*, 858 A.2d 457, 463 (D.C. 2004).)

Courts routinely find the state in which the corporate party's headquarters is located to be a jurisdiction reasonably connected to the contract (*Orchin*, 133 F. Supp. 3d at 146-47 (applying District of Columbia law) (enforcing choice-of-law provision where the corporate defendant was headquartered in Illinois)).

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

Under District of Columbia law, forum selection clauses are prima facie valid, and courts enforce them, if:

- The forum selection clause was reasonably communicated to the objecting party.
- There is a reasonable connection between the chosen forum and the contract.
- The forum selection clause is not otherwise unreasonable.

(See *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010-12 (D.C. 2002); *Yazdani v. Access ATM*, 941 A.2d 429, 431 (D.C. 2008).)

A forum selection clause is unreasonable if the court finds one of the following:

- The clause was induced by fraud or overreaching.
- The forum is so unfair and inconvenient that it deprives a party of a remedy or of its day in court.
- Enforcement of the provision would violate a strong public policy of the forum where the action is filed.

(See *Dentons US LLP v. Republic of Guinea*, 208 F. Supp. 3d 330, 347 (D.D.C. 2016) (applying District of Columbia law); *Yazdani*, 941 A.2d at 431 n. 2; *Forrest*, 805 A.2d at 1011-12.)

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

Under District of Columbia law, courts may not rule on the merits of a claim underlying an arbitration. However, courts may decide if:

- A valid agreement to arbitrate exists.
- The dispute in controversy is subject to an agreement to arbitrate.

(D.C. Code § 16-4406(b); D.C. Code §§ 16-4401 to 16-4432).)

Arbitrators determine if:

- A condition precedent to arbitrability has occurred.
- The contract is enforceable.
- The merits of the dispute.

(See D.C. Code § 16-4406(c); *Cole v. Burns Intern. Sec. Svcs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997) (applying District of Columbia law) (agreement to arbitrate is enforceable where, for instance, it contains minimal standards of procedural fairness and does not require the relinquishment of any statutory rights).)

The party seeking to compel arbitration must establish that a valid agreement to arbitrate exists (*Johansson v. Cent. Properties, LLC*, 320 F. Supp. 3d 218, 222 (D.D.C. 2018) (applying District of Columbia law)). Any ambiguity is construed in favor of arbitration (*Woodroof v. Cunningham*, 147 A.3d 777, 789 (D.C. 2016); *2200 M St. LLC v. Mackell*, 940 A.2d 143, 151 (D.C. 2007) (there is a presumption in favor of arbitration where a valid arbitration agreement exists)).

Under the severability doctrine, even if another provision of the contract, or the whole contract, is invalid, unenforceable, or void, a court can enforce a specific agreement to arbitrate (see *Menna v. Plymouth Rock Assurance Corp.*, 987 A.2d 458, 465 n.30 (D.C. 2010)).

Federal courts apply state contract law to determine whether the parties entered into a valid arbitration

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agreement (see *Mobile Now, Inc.*, 393 F. Supp. 3d at 63-64). Where the Federal Arbitration Act (FAA) applies, federal substantive law preempts state substantive law in both federal and state courts (see *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 271-72 (1995)).

Breach of Contract

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

Under District of Columbia law, the party alleging breach of contract must prove:

- A valid contract between the parties.
- An obligation or duty arising out of the contract.
- A material breach of that duty.
- Damages caused by the breach.

(See *Moini v. LeBlanc*, 456 F. Supp 3d 34, 50 (D.D.C. 2020) (applying District of Columbia law); *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (2009).)

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

Under District of Columbia law, the breach of contract must be material to be actionable. A breach is material if it either:

- Goes to the essence of the agreement between the parties.
- Is so serious as to destroy the essential object of the agreement.

(See *Associated Mortg. Bankers, Inc. v. Carson*, 2020 WL 4748091, at *5 (D.D.C. Aug. 17, 2020) (applying District of Columbia law) (noting that the standard of materiality for the purpose of deciding whether a contract was breached is necessarily imprecise and flexible); *3511 13th St. Tenants' Ass'n v. 3511 13th St., N.W. Residence, LLC*, 922 A.2d 439, 445 (D.C. 2007).)

District of Columbia law recognizes a cause of action for breach of the implied covenant of good faith and fair dealing. To succeed on a breach of implied covenant of good faith and fair dealing claim, a plaintiff must allege conduct that, although not expressly forbidden by the contract, deprives the other party from receiving the contract's benefits, whether by bad faith or arbitrary or capricious conduct (*Wright*, 60 A.3d at 756; *Allworth*, 890 A.2d at 201-02 (contracting parties cannot destroy or injure the other party's right to receive the contract's benefits); see Question 4).

The District of Columbia also recognizes the doctrine of anticipatory breach. Under this doctrine, an aggrieved party may sue before a breach if the other party has anticipatorily repudiated the contract. The repudiating party must have communicated, by word or conduct, unequivocally and positively its intention not to perform (*Wash. Nat'ls Stadium LLC*, 192 A.3d at 586; *Eastbanc, Inc.*, 940 A.2d at 1005; *Order of AHEPA v. Travel Consultants, Inc.*, 367 A.2d 119, 125 (D.C. 1976)).

The doctrine of anticipatory breach does not apply to unilateral contracts and, in particular, to unilateral contracts for the payment of money only. The plaintiff can treat the anticipatory repudiation as a present breach or can elect to wait to file a claim once performance is due. (see *Glenn*, 281 F. Supp. 3d at 139 (applying District of Columbia law).)

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.

Under District of Columbia law, the statute of limitations for breach of an express or implied contract is three years (D.C. Code Ann. § 12–301(7); D.C. Code § 12-301(6) (statute of limitations for an action brought on an instrument under seal is 12 years); *Wright*, 60 A.3d at 751).

A cause of action for breach of contract accrues when the defendant breaches the contract (see *Eastbanc, Inc.*, 940 A.2d at 1004; *Cunningham & Assocs. v. Dugau*, 909 A.2d 1001, 1002 (D.C. 1996) (for contract for services rendered, statute of limitations begins to run when performance is complete or when one of the parties breaches the contract)). The limitations period for a breach of contract action begins to run from the time of breach even in the absence of substantial monetary damages (*Wright*, 60 A.3d at 753 (it is the breach of contract, not damages sustained, that is the essence of a breach of contract action); but see *Moini*, 456 F. Supp. 3d at 51 (noting a potential conflict in the caselaw regarding damages)).

In the case of anticipatory breach of a bilateral contract, the time of accrual depends on whether the plaintiff

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chooses to treat the anticipatory repudiation as a present breach or elects to wait to file a claim once performance is due (*Glenn*, 281 F. Supp. 3d at 139 (applying District of Columbia law) (noting that the statute of limitations only begins to run when a party repudiates the contract and the plaintiff treats the repudiation as a breach)).

Generally, a defendant raises the statute of limitations as an affirmative defense in its answer to the complaint. A defendant may waive this defense if it does not raise it in a responsive pleading. 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 motion to dismiss. (*Logan v. LaSalle Bank Nat. Ass'n*, 80 A.3d 1014, 1019-20 (D.C. 2013); but see *Smoth v. Washington Post Co.*, 962 F. Supp. 2d 79, 86 (D.D.C. 2013) (applying District of Columbia law) (dismissal of a complaint is unfavored since a statute of limitations defense often depends on contested issues of fact).)

Discovery Rule

Under District of Columbia law, the discovery rule tolls the statute of limitations until the plaintiff knew or should have known the facts giving rise to the cause of action. The cause of action accrues when the plaintiff has either:

- Actual notice of a cause of action.
- Inquiry notice because the plaintiff met their duty to act reasonably under the circumstances in investigating matters affecting their affairs, and the investigation, if conducted correctly, led to actual notice.

(See *Harris v. Ladner*, 828 A.2d 203, 205-06 (D.C. 2003); *Diamond v. Davis*, 680 A.2d 364, 372 (D.C.1996) (discussing "actual notice" and "inquiry notice" regarding the discovery rule); *Ehrenhaft v. Malcom Price, Inc.*, 483 A.2d 1192, 1201-02 (D.C. 1984) (discussing application of the discovery rule in the context of contract and warranty claims).)

Equitable Estoppel

Under District of Columbia law, a court may equitably toll the statute of limitations where a defendant, by affirmative conduct, lulls the plaintiff into not suing, which results in the statute of limitations expiring. This may occur where, for example, a plaintiff is lulled into not filing suit within the limitations period by assurances of payment from the responsible party's insurance company. (*Bailey v. Greenberg*, 516 A.2d 934, 940 (D.C. 1986).)

A plaintiff may not assert equitable estoppel if the circumstances causing the delay have ended and ample time exists for the plaintiff to bring suit within the statute of limitations period (*Tiger Steel Eng'g, LLC v. Symbion Power, LLC*, 195 A.3d 793, 803 (D.C. 2018) (lulling doctrine did not apply where defendant's actions in lulling plaintiff into thinking defendant would pay amounts due under a contract stopped at least a year before the statute of limitations period ended); *Cunningham*, 909 A.2d at 1003 (lulling doctrine does not affect the accrual of a cause of action, but merely estops the assertion of a statute of limitations defense when the plaintiff has been lulled into inaction for the entire statute of limitations period)).

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

Under District of Columbia law, a third party has standing to sue for breach of contract if the third party can show that:

- There is a valid binding contract between the contracting parties.
- The contracting parties had an express or implied intention to benefit the third party directly.

(See *Silberberg v. Becker*, 191 A.3d 324, 336 (D.C. 2018); *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008); *Fields v. Tillerson*, 726 A.2d 670, 672 (D.C. 1999).)

An indirect interest in the contract is insufficient to support third-party beneficiary status. However, if the contract and the circumstances around the contract indicate a party is the intended beneficiary, the third party need not be named specifically in the contract. (*Silberberg*, 191 A.3d at 332; *Fort Lincoln Civic Ass'n, Inc.*, 944 A.2d at 1064-65.) Parties can include a provision in their contract expressly preventing third parties from enforcing the contract (see *FiberLight, LLC v. Nat'l R.R. Corp.*, 81 F. Supp. 3d 93, 109-10 (D.D.C. 2015) (applying District of Columbia law); *Fort Lincoln Civic Ass'n, Inc.*, 944 A.2d at 1069).

Remedies for Breach of Contract

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

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

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

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- Liquidated damages if required under the contract.
- Restitution.

A party generally cannot recover punitive damages in ordinary breach of contract actions. Where the alleged conduct does not constitute an independent tort, the breach of contract cannot merge with and assume the character of a willful tort (see *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1090 (D.C. 2008); *Nugent v. Unum Life Ins. Co. of Am.*, 752 F. Supp. 2d 46, 57 (D.D.C. 2010) (applying District of Columbia law) (dismissing an intentional infliction of emotional distress claim because the plaintiff's basic claim was based on a breach of contract).)

A party prevailing on a breach of contract claim may recover interest on the damages awarded from the date of the judgment. The jury or the court has discretion to also award prejudgment interest to fully compensate the plaintiff. (D.C. Code § 15-109; D.C. Code § 28-3302.)

Compensatory Damages

The purpose of compensatory damages is to restore the plaintiff to the same position they would have been in had the defendant not breached the contract (*Hildreth Consulting Eng'rs, P.C.*, 801 A.2d at 972; *Rowan Heating–Air Conditioning–Sheet Metal, Inc. v. Williams*, 580 A.2d 583, 585 (D.C. 1990)). Compensatory damages include:

- **General damages.** General damages are those damages that are the natural consequence and proximate result of the breaching party's conduct (*Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 736-37 (D.C. 2000)).
- **Consequential damages.** Consequential damages do not flow directly from the breach, but a party may recover them when the damages were, either before or at contracting:
  - reasonably foreseeable or foreseen;
  - within the contemplation of both parties; and
  - proved with reasonable certainty.

  (See *Klayman v. Jud. Watch*, 255 F. Supp. 3d 161, 168 (D.D.C. 2017) (applying District of Columbia law).)

Liquidated Damages

Contracts may contain a liquidated damages clause, which determines in advance the measure of damages if a breach occurs. Courts generally enforce liquidated damages clauses if the amount of liquidated damages provided for is a reasonable forecast of just compensation at the time of contracting. (*Proulx*, 199 A.3d at 673.)

Restitution Damages

Under District of Columbia law, an action seeking restitution is an alternative to an action seeking damages. Restitution is limited to recovery under an express contract when there has been a repudiation or material breach. (See *United States ex rel. Am. Civ. Constr. LLC v. Hirani Eng'g & Land Surveying, PC*, 962 F.3d 587, 594-95 (D.C. Cir. 2020) (applying District of Columbia law); *Lee v. Foote*, 481 A.2d 484, 485-86 (D.C. 1984) (purpose of restitution is to put the plaintiff in as good as position as before the contract was made).)

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

Under District of Columbia 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 (see *Hospitality Staffing Sols., LLC v. Reyes*, 736 F. Supp. 2d 192, 200 (D.D.C. 2010) (applying District of Columbia law)).
- Rescission (see *In re Estate of McKenney*, 953 A.2d 336, 342 (D.C. 2008).
- Reformation (see *In re Estate of Munawar*, 981 A.2d 584, 587 (D.C. 2009).
- Specific performance (*Clark v. Route*, 951 A.2d 757, 759–60 (D.C. 2008).

A party to a contract may also seek a declaratory judgment asking the court to rule on the construction or validity of the contract or on the rights, status, or legal relations of the parties (see *1230-1250 Twenty-Third St. Condo. Unit Owners Ass'n, Inc. v. Bolandz*, 978 A.2d 1188, 1193 (D.C. App. 2009)).

Defenses to Breach of Contract

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

Under District of Columbia law, defenses to a breach of contract action typically focus on the contract's formation

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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:

- Ambiguity (see Question 5: Ambiguity or Inconsistency).
- Capacity of the parties (*Hernandez v. Banks*, 65 A.3d 59, 73 (D.C. 2013)).
- Duress (*Osborne v. Howard Univ. Physicians, Inc.*, 904 A.2d 335, 339-40 (D.C. 2006)).
- Coercion or undue influence (*Associated Estates LLC v. Bank Atlantic*, 164 A.3d 932, 939 (D.C. 2017)).
- Fraudulent inducement (*Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1255 (D.C. 2018)).
- Illegal contract (*McMahon v. Anderson, Hibey & Blair*, 728 A.2d 656, 658-59 (D.C. 1999)).
- Mutual mistake (*Anzueto v. Wash. Metro. Area Transit Auth.*, 357 F. Supp. 2d 27, 31 (D.D.C. 2004)).
- Unilateral mistake (*Akassy*, 891 A.2d at 302).
- Statute of frauds (see Question 2 and Question 3).
- Unconscionability (*Curtis v. Gordon*, 980 A.2d 1238, 1244 n. 11 (D.C. 2009)).

Defenses to Breach

Under District of Columbia law, a defendant may assert the following affirmative defenses to the plaintiff's claims that they breached the contract:

- Accord and satisfaction (see *Double H Hous. Corp. v. David*, 947 A.2d 38, 43–44 (D.C. 2008)).
- Anticipatory breach (*Washington Nat'ls Stadium, LLC*, 192 A.3d at 587; *Eastbanc, Inc.*, 940 A.2d at 1004-05).
- Failure of conditions precedent (*Washington Props., Inc.*, 760 A.2d at 549-50).
- Failure of consideration (see Question 1).
- Implied covenant of good faith and fair dealing (*Molock*, 297 F. Supp. 3d at 132-33 (applying District of Columbia law)).
- Impossibility or frustration of purpose (*Island Dev. Corp. v. D.C.*, 933 A.2d 340, 353 (D.C. 2007)).
- Laches (*Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent for Historic Preservation*, 944 A.2d 1036, 1049 (D.C. 2008)).
- Modification (see Question 7).
- Novation (see Question 8).
- Statute of limitations (see Question 15).

Defenses to Damages

The following defenses challenge the damages the plaintiff seeks:

- Failure to mitigate damages, if the contract does not eliminate the duty to mitigate (*Norris v. Green*, 656 A.2d 282, 287 (D.C. 1995)).
- Duplicative damages or improper double recovery (*Saunders v. Hudgens*, 184 A.3d 345, 350 (D.C. 2018)).
- Damages that are unavailable, such as punitive damages.
- Damages that are superseded by a liquidated damages clause (*Proulx*, 199 A.3d at 676; see Question 17: Liquidated Damages).
- The plaintiff cannot prove damages because they are, for example:
  - speculative or contingent;
  - 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.

  (See *Moini*, 456 F. Supp. 3d at 51; *Wright*, 60 A.3d at 753; *Bedell v. Inver Housing, Inc.*, 506 A.2d 202, 205 (D.C. 1986); but see *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 324-25 (D.C. 1999); *Sastry v. Coale*, 585 A.2d 1324, 1328-29 (D.C. 1991).)

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