

# New Hampshire

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## **A. Adoption of the UCC**

New Hampshire began adopting the UCC in 1961.<sup>1</sup> Articles One through Five, Seven through Nine, and Twelve through Thirteen have since been adopted.<sup>2</sup>

## **B. Compensatory Damages**

In New Hampshire, compensatory damages are awarded if one has tortiously caused harm to another.<sup>3</sup> The plaintiff must

establish the extent of the harm and the amount of money that should be compensated given the nature of the tort.<sup>4</sup> The goal of compensatory damages is to restore the person harmed to a position they would have been in if the wrong did not occur.<sup>5</sup> A mathematical equation is not required to calculate actual damages.<sup>6</sup> An approximation of the damages is sufficient in calculating damages.<sup>7</sup>

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<sup>1</sup> N.H. REV. STAT. ANN. §§ 382A:1-101 to 382A:13-306.

<sup>2</sup> *Id.*

<sup>3</sup> *Clipper Affiliates v. Checovich*, 138 N.H. 271, 273 (N.H. 1994).

<sup>4</sup> *Id.*

<sup>5</sup> *Emery v. Caledonia Sand & Gravel Co.*, 117 N.H. 441, 444 (N.H. 1977).

<sup>6</sup> *Carbone v. Tierney*, 151 N.H. 521, 531 (N.H. 2004).

<sup>7</sup> *Phillips v. Verax Corp.*, 138 N.H. 240, 241 (N.H. 1994).

### C. Consequential Damages

In New Hampshire, consequential damages are awarded for “reasonably foreseeable losses that flow from a breach of contract.”<sup>8</sup> The goal is to put the non-breaching party in the same position if the contract was fully performed.<sup>9</sup> The losses are reasonably foreseeable if “the damages follow the breach in the ordinary course of events or it may be satisfied if the claimant specifically proves that the breaching party had reason to know the facts and to foresee the injury.”<sup>10</sup> The Sales Article of the New Hampshire UCC also defines what damages entitle plaintiffs to consequential damages when a seller breaches. New Hampshire Revised Statutes Section 382-A:2-715 (2) states:

Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

The New Hampshire UCC also allows parties to contractually limit consequential damages.<sup>11</sup> New Hampshire Revised Statutes Section 382-A:2-719 (1)(3) allows parties to limit damages available, if the agreement is not unconscionable. This reflects the idea that parties are free to make their own agreements.<sup>12</sup> An agreement to limit damages will generally be upheld if it is not fraud or patent overreaching.<sup>13</sup> Overreaching may occur when there is unequal bargaining power.<sup>14</sup>

### D. Incidental Damages

The Sales Article of the New Hampshire UCC permits incidental damages when a seller breaches. New Hampshire Revised Statutes Section 382-A:2-715 (1) defines incidental damages as:

Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care

<sup>8</sup> *Petrie-Clemons v. Butterfield*, 122 N.H. 120, 124 (N.H. 1982); *Mentis Scis., Inc. v. Pittsburgh Networks, LLC*, 173 N.H. 584, 589 (N.H. 2020).

<sup>9</sup> *Mentis Scis., Inc.* 173 N.H. at 589.

<sup>10</sup> *Petrie-Clemons*, 122 N.H. at 124.

<sup>11</sup> N.H. REV. STAT. ANN. § 382-A:2-715(2)(b).

<sup>12</sup> *Hydraform Prods. Corp. v. Am. Steel & Aluminum Corp.*, 127 N.H. 187, 195 (N.H. 1985).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Incidental damages can also be contractually limited.<sup>15</sup> Similar to consequential damages, incidental damages are subject to the same limitations allowed under New Hampshire Revised Statutes Section 382-A:2-719.<sup>16</sup>

### E. Punitive Damages

New Hampshire generally prohibits punitive damages unless it is provided by a statute.<sup>17</sup> The purpose of damages is not a punishment or a deterrent,<sup>18</sup> and punitive damages are described as deforming the symmetry of law.<sup>19</sup> New Hampshire law rejects punitive damages in “forceful and colorful language,” holding that “[t]he idea

[of punitive or exemplary damages] is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.”<sup>20</sup>

Instead of punitive damages, New Hampshire allows enhanced compensatory damages. These damages show aggravating circumstances but are not punitive.<sup>21</sup> Enhanced compensatory damages are awarded if a plaintiff can show the defendant's acts were wanton, malicious, or oppressive.<sup>22</sup> They are only awarded in exceptional cases, even if an intentional tort is involved.<sup>23</sup> A jury will decide if enhanced compensatory damages should be awarded.<sup>24</sup>

### F. Liquidated Damages

Liquidated damages in New Hampshire are a stipulated sum in a contract to be paid for a breach.<sup>25</sup> Courts use a three-factor test to determine if a liquidated damage clause is enforceable.<sup>26</sup> Since liquidated damages cannot be a penalty in New Hampshire, it is not

<sup>15</sup> *Xerox Corp. v. Hawkes*, 124 N.H. 610, 617 (N.H. 1984).

<sup>16</sup> *Id.*

<sup>17</sup> N.H. REV. STAT. ANN. § 507:16.

<sup>18</sup> *Vratsenes v. N. H. Auto*, 112 N.H. 71, 73 (N.H. 1972).

<sup>19</sup> *Fay v. Parker*, 53 N.H. 342, 382 (N.H. 1872).

<sup>20</sup> *Vratsenes*, 112 N.H. at 71.

<sup>21</sup> *Id.*

<sup>22</sup> *Figlioli v. R.J. Moreau Cos.*, 151 N.H. 618, 621 (N.H. 2005).

<sup>23</sup> *Munson v. Raudonis*, 118 N.H. 474, 479 (N.H. 1978).

<sup>24</sup> *MacDonald v. Jacobs*, 171 N.H. 668, 676 (N.H. 2019).

<sup>25</sup> *Holloway Auto. Grp. v. Lucic*, 35 A.3d 577, 579 (N.H. 2011).

<sup>26</sup> *Id.* at 581; *C & M Realty Tr. v. Wiedenkeller*, 133 N.H. 470, 477 (N.H. 1990).

permissible for a liquidated damages sum to be so disproportionate to the actual damage of a breach.<sup>27</sup> The three-party test for determining whether a liquidated damage clause is valid looks to:

- (1) The damages anticipated as a result of the breach are uncertain in amount or difficult to prove;
- (2) the parties intended to liquidate damages in advance; and
- (3) the amount agreed upon is reasonable and not greatly disproportionate to the presumable loss or injury.<sup>28</sup>

If a liquidated damages clause is deemed valid and enforceable, New Hampshire courts will then turn to a two-part test to determine whether the stipulated sum is reasonable. The two-prong test involves:

First, we assess whether the amount “was a reasonable *estimate* of difficult-to-ascertain damages at the time the parties agreed to it.”<sup>29</sup> Next, we ask whether

actual damages are “easily ascertainable” after a breach.<sup>30</sup>

The party that alleges the liquidated amount is unreasonable will bear the burden of proof.<sup>31</sup>

### G. Pre- and Post-Judgment Interest

Pre- and post-judgment interest in New Hampshire is governed by New Hampshire Revised Statutes Sections 524:1-a and 524:1-b and is treated as substantive law.<sup>32</sup> The intention behind recovering pre-judgment interest is to compensate parties for the time they are deprived of the use of their money.<sup>33</sup>

New Hampshire Revised Statutes Section 524:1-a (Interest to be Added) mandates that:

[i]n the absence of a demand prior to the institution of suit, in any action on a debt or account stated or where liquidated damages are sought, interest shall commence to run from the time of the institution of suit. This statute shall be inapplicable where the

<sup>27</sup> *Lucic*, 35 A.3d at 581.

<sup>28</sup> *Id.*; *C & M Realty Tr.*, 133 N.H. at 477.

<sup>29</sup> *Shallow Brook Assoc's v. Dube*, 135 N.H. 40, 48, 599 A.2d 132 (N.H. 1991) (quotation omitted).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 58.

<sup>32</sup> *Nault v. N & L Development Co.*, 146 N.H. 35, 37 (N.H. 2001).

<sup>33</sup> *In re Estate of Bergquist*, 166 N.H. 531, 536 (N.H. 2014).

party to be charged pays the money into court in accordance with the rules of the superior court.<sup>34</sup>

In breach of contract claims, New Hampshire courts examine whether the parties had “clearly provided an interest rate” within their contract.<sup>35</sup> If such a rate is clearly included in the contract, “that interest rate must be applied.”<sup>36</sup>

However, an award of pre-judgment interest is not precluded merely because a contract fails to include such interest.<sup>37</sup> On the contrary, New Hampshire Revised Statutes Section 524:1-a provides a “default rule” in circumstances where a contract excludes a pre-judgment interest provision, because “[t]he very purpose of adding interest to an award or judgment, including under Sections 524:1-a and :1-b, is to recognize the time value of money by compensating a creditor for the delay between when money is due and when it is paid.”<sup>38</sup>

As for when pre-judgment interest begins, “[t]he customary

rule in New Hampshire is that pre-judgment interest can only accrue from the time that suit is filed or when a demand is made,” whichever is done earlier.<sup>39</sup> Further, the “demand” under New Hampshire Revised Statutes Section 524:1-a applies to a demand of payment, not a demand for interest.<sup>40</sup>

Additionally, New Hampshire Revised Statutes Section 336:1 outlines the annual simple rate of pre-judgment interest as being “determined by the state treasurer as the prevailing discount rate of interest on 26-week United States Treasury bills at the last auction thereof preceding the last day of September in each year, plus 2 percentage points, rounded to the nearest tenth of a percentage point.”<sup>41</sup>

Post-judgment interest may be awarded under New Hampshire Revised Statutes Sections 524:1-a and :1-b to the prevailing party in all civil proceedings of law or equity.<sup>42</sup> Additionally, it does not matter if an original judgment failed to mention the issue of interest, as “plaintiffs can receive post-judgment interest

<sup>34</sup> N.H. REV. STAT. ANN. § 524:1-a (2025).

<sup>35</sup> *Tully v. Sheldon*, 159 N.H. 269, 274-275 (N.H. 2009).

<sup>36</sup> *Id.*

<sup>37</sup> *In re Liquidation of the Home Ins. Co.*, 166 N.H. 84, 91 (N.H. 2014).

<sup>38</sup> *Id.*

<sup>39</sup> *Singer Asset Fin. Co., LLC v. Wyner*, 156 N.H. 468, 477 (N.H. 2007) (quoting *Kenerson v. Morgan Guar. Tr. Co.*, 889 F. Supp. 523, 528 (D. N.H. 1995)); *see also* *J & M Lumber and Constr. Co., v. Smyjunas*, 161 N.H. 714, 729 (N.H. 2011); *Home Ins. Co.*, 166 N.H. at 93.

<sup>40</sup> *Home Ins. Co.*, 166 N.H. at 93.

<sup>41</sup> N.H. REV. STAT. § 336:1 (2025).

<sup>42</sup> *Nault*, 146 N.H. at 37.

by statute” despite the prior judgment’s silence.<sup>43</sup>

New Hampshire Revised Statutes Section 524:1-b (Interest from Date of Writ) mandates that:

[i]n all other civil proceedings at law or in equity in which a verdict is rendered or a finding is made for pecuniary damages to any party, whether for personal injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added forthwith by the clerk of court to the amount of damages interest thereon from the date of the writ or the filing of the petition to the date of judgment even though such interest brings the amount of the judgment beyond the maximum liability imposed by law.<sup>44</sup>

Although the statute does not specifically address post-judgment interest, New Hampshire courts have interpreted RSA 524:1-a and :1-b as not precluding prejudgment interest, noting that the difference in language between the statutes did not indicate a legislative intent to do so.<sup>45</sup>

#### H. Attorney’s Fees

While New Hampshire generally follows the American Rule – requiring parties to pay their own attorney’s fees – several exceptions exist which may allow prevailing parties to recover attorney’s fees.<sup>46</sup> These exceptions include:

- (1) statutory authorization;<sup>47</sup>
- (2) agreement of the parties;<sup>48</sup> or
- (3) an established judicial exception.<sup>49</sup>

Two judicial exceptions include the “substantial benefit theory” and the “bad faith litigation theory.”<sup>50</sup> Under the substantial benefit theory, attorney’s fees may be awarded “where the action conferred a

<sup>43</sup> *Bergquist*, 166 N.H. at 533; *see also Nault*, 146 N.H. at 37.

<sup>44</sup> N.H. REV. STAT. ANN. § 524:1-b (N.H. 2025).

<sup>45</sup> *Nault*, 146 N.H. at 37.

<sup>46</sup> *Jesurum v. WBTSCC Ltd. P’ship*, 169 N.H. 469, 482 (N.H. 2016).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Fat Bullies Farm, LLC v. Davenport*, 170 N.H. 17, 30 (N.H. 2017); *Jesurum*, 169 N.H. at 482.

substantial benefit on not only the plaintiffs . . . but on the public as well.”<sup>51</sup> Under the bad faith theory, attorney’s fees may be warranted “to do justice and vindicate rights” against private parties who have acted in bad faith, and “discourage frivolous lawsuits.”<sup>52</sup>

### I. Reliance Damages

Reliance damages refer to the loss that a party suffered due to their reliance on another’s promise, often in the context of promissory estoppel. While reliance damages may be appropriate in some circumstances, they are typically limited to cases involving “an indefinite or unclear promise,” and are limited further “to expenses incurred in reasonable reliance on [a] vague promise.”<sup>53</sup> This is notably different from how expectation damages are awarded, which generally fall into cases where a promise is express, clear and definite.<sup>54</sup>

<sup>51</sup> *Jesurum*, 169 N.H. at 482 (quoting *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 594 (N.H. 1999)).

<sup>52</sup> *Fat Bullies Farm*, 170 N.H. at 30; *see also Jesurum*, 169 N.H. at 483.

<sup>53</sup> *Jackson v. Morse*, 152 N.H. 48, 53 (N.H. 2005) (quoting *Garwood Packaging, Inc. v. Allen & Co., Inc.*, 378 F.3d 698, 703 (7th Cir. 2004)).

### J. Unjust Enrichment Damages

Unjust enrichment is available as an equitable remedy for when an individual benefits at the expense of another without providing adequate (or any) compensation and it would be unconscionable for that individual to retain such a benefit.<sup>55</sup> Recovery of unjust enrichment damages may include situations in which a benefit is beyond the scope of the contract, or in cases of breach or rescission of contract.<sup>56</sup>

Overt bad-faith acts are not the only way to recover under a theory of unjust enrichment. If an individual passively accepts a benefit at the expense of another, and such benefit would nonetheless be unconscionable for them to retain, then the other party may be entitled to unjust enrichment damages.<sup>57</sup>

### K. Unique Remedies

New Hampshire Revised Statutes Section 511-A:1 provides a comprehensive guideline for pre-judgment attachments to safeguard a defendant’s property rights and

<sup>54</sup> *Id.*

<sup>55</sup> *Axenics, Inc. v. Turner Constr. Co.*, 164 N.H. 659, 665 (N.H. 2013).

<sup>56</sup> *Clapp v. Goffstown Sch. Dist.*, 159 N.H. 206, 211 (N.H. 2009).

<sup>57</sup> *Estate of Mortner v. Thompson*, 170 N.H. 625, 631-632 (2018); *Cohen v. Frank Developers*, 118 N.H. 512, 518 (N.H. 1978).

right to due process.<sup>58</sup> This statute is procedural, not substantive, and includes a notice requirement and the opportunity for a preliminary hearing to be conducted prior to a pre-judgment attachment being executed.<sup>59</sup>

In exceptional circumstances, an ex-parte attachment may be made prior to a defendant being given notice or an opportunity for a preliminary hearing.<sup>60</sup> This may be done if the plaintiff shows probable cause of their basic right to recovery as well as a risk of substantial danger that their property will be concealed, damaged or destroyed.<sup>61</sup>

#### L. Public Policy Prohibitions

While New Hampshire courts give broad deference to the terms of private contracts, contracts that contravene public policy will not be enforced.<sup>62</sup> A contract is against public policy when “it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or . . . if it is at war with the interest of society

and is in conflict with the morals of the time.”<sup>63</sup>

New Hampshire courts also “will not enforce an exculpatory contract that contravenes public policy.”<sup>64</sup> Exculpatory contracts are intended to absolve one party from liability for wrong or negligent acts against another. However, “[o]nce an exculpatory agreement is found unobjectionable as a matter of public policy, . . . [the courts] will enforce the agreement if ‘the plaintiff understood the import of the agreement or a reasonable person in [their] position would have understood the import of the agreement.’”<sup>65</sup> Public policy arguments are, however, generally disfavored under New Hampshire law and our Supreme Court has cautioned “against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when other points fail.”<sup>66</sup>

A contract may also be rendered void under circumstances involving:

<sup>58</sup> *Hampton Nat. Bank v. Desjardins*, 114 N.H. 68, 70 (N.H. 1974).

<sup>59</sup> *Id.* at 70 (holding that the failure to provide advance notice and an opportunity for a hearing violated due process); *Sindt v. Gilfoyle*, 124 N.H. 315, 317 (N.H. 1983).

<sup>60</sup> *Hampton*, 114 N.H. at 70.

<sup>61</sup> *State v. Bader*, 148 N.H. 265, 269 (N.H. 2002).

<sup>62</sup> *Rizzo v. Allstate Insurance Co.*, 170 N.H. 708, 713 (N.H. 2018).

<sup>63</sup> *Pelissier v. Geico Gen. Ins. Co.*, 177 N.H. 63, 67 (N.H. 2024).

<sup>64</sup> *Ladue v. Pla-Fit Health, LLC*, 173 N.H. 630, 633 (N.H. 2020).

<sup>65</sup> *Id.*

<sup>66</sup> *Hill v. Spear*, 50 N.H. 253, 274 (N.H. 1870).

- fraud,<sup>67</sup>
  - duress,<sup>68</sup>
  - illegality,<sup>69</sup>
  - unconscionability,<sup>70</sup> or
- failure to satisfy statutory conditions.<sup>71</sup>

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<sup>67</sup> *Tessier v. Rockefeller*, 162 N.H. 324, 331-332 (N.H. 2011) (“[O]ne who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”).

<sup>68</sup> *Id.* at 331 (“In New Hampshire, a contract entered into under duress is voidable and thus duress is a defense to a breach of contract claim.”).

<sup>69</sup> *Am. Home Improvement, Inc., v. Iver*, 105 N.H. 435, 438 (N.H. 1964) (“It has often been said that an agreement for the doing of that

which is forbidden by statute is itself illegal and necessarily unenforceable. This is an unsafe generalization, although most such agreements are unenforceable.”).

<sup>70</sup> *PK’s Landscaping v. New Eng. Tel. & Tel. Co.*, 128 N.H. 753, 755 (N.H. 1986) (“We have held ‘that contracts may be declared void because [they are] unconscionable and oppressive.’”).

<sup>71</sup> *Empire Ins. Cos. v. Nat’l Union Fire Ins. Co.*, 128 N.H. 171, 174 (N.H. 1986) (“[W]e have declared exclusions to be void only when their application would actually have violated a statutory requirement or have defeated a statutory policy.”).