

New Jersey

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A. Adoption of the UCC

New Jersey adopted and codified the Uniform Commercial Code to resolve commercial disputes amongst parties at New Jersey Statutes Section 12A:101 *et seq.*, effective January 1, 1963.¹

¹ National State Bank v. Rapp, 49 N.J. 457, 458 (N.J. 1967).

B. Compensatory Damages

In New Jersey, courts most often award compensatory damages in a breach of contract action.² “[A] party who breaches a contract is liable for all of the natural and probable consequences of the breach of contract.”³ Compensatory damages “serve as recompense for the loss sustained” and the goal is to “restore the plaintiff to the extent

² Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C., 191 N.J. 1, 13 (N.J. 2007).

³ Pickett v. Lloyd’s, 131 N.J. 457, 474 (N.J. 1993).

possible to the same position he or she was in prior to the occurrence of the wrong.”⁴ That position is determined by what the parties reasonably expected upon formation of the contract.⁵ It follows that a defendant is not responsible for a loss not foreseeable “as a probable result of the breach when the contract was made.”⁶ A loss or injury does not entitle a plaintiff to the award of compensatory damages as of right. To receive compensatory damages, a plaintiff must meet the burden of demonstrating that a loss or injury

occurred *and* provide the finder of fact with “some information from which to estimate the amount of damages, even if he is unable to prove the exact measure of his damages.”⁷

Compensatory damages may be recoverable under the following claims in New Jersey, *inter alia*:

- breach of contract;⁸
- breach of warranty;⁹
- fraud;¹⁰
- civil conversion;¹¹
- unfair competition;¹²
- defamation;¹³

⁴ Maul v. Kirkman, 270 N.J. Super. 596, 618 (N.J. Super. Ct. App. Div. 1994); “[T]he purpose of compensatory damages is to make the plaintiff whole.” McDarby v. Merck & Co., Inc., 401 N.J. Super. 10, 91 (N.J. Super. Ct. App. Div. 2008).

⁵ Perini Corp. v. Greate Bay Hotel & Casino Inc., 129 N.J. 479, 498 (N.J. 1992).

⁶ *Id.*

⁷ Nappé v. Anschelwitz, Barr, Ansell & Bonello, 97 N.J. 37, 48 n.1 (N.J. 1984).

⁸ Nelson v. Elizabeth Bd. of Ed., 466 N.J. Super. 325 (N.J. Super. Ct. App. Div. 2021) (affirming trial court’s compensatory damage award for breach of the parties’ employment agreement).

⁹ Donovan v. Bachstadt, 91 N.J. 434, 443 (N.J. 1982) (“The fact that one sues for breach of a warranty covenant does not justify depriving a buyer of compensatory damages to which he is justly entitled when the seller breaches the contract of sale.”).

¹⁰ Gennari v. Weichert Co. Realtors, 148 N.J. 582 (N.J. 1997) (affirming award of compensatory damages for violation of the Consumer Fraud Act).

¹¹ Tessmar v. Grosner, 23 N.J. 193 (N.J. 1957) (affirming award of compensatory damages for conversion of medical charts and records).

¹² Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 309 (N.J. 2001) (affirming jury award of compensatory damages in unfair competition action).

¹³ Jobs v. Evangelista, 369 N.J. Super. 384 (N.J. Super. Ct. App. Div. 2004) (affirming award of compensatory damages in action brought against chief of volunteer fire department for defamation).

- tortious interference;¹⁴
- Law Against Discrimination (LAD);¹⁵
- Insurance Fraud Prevention Act (IFPA);¹⁶ and
- Conscientious Employee Protection Act (CEPA).¹⁷

¹⁴ *Belinski v. Goodman*, 139 N.J. Super. 351, 360 (N.J. Super. Ct. App. Div. 1976) (“sufficient evidence supports the award of compensatory damages” in a tortious interference action arising out of negotiations for a sale of a parcel of realty in Alpine, New Jersey).

¹⁵ N.J.S.A. §10:5-1 *et seq.*; *Tarr v. Ciasulli*, 181 N.J. 70, 82 (N.J. 2004) (“We hold that in discrimination cases, which by definition involve willful conduct, the victim may recover all natural consequences of that wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and other intangible injuries.”). “The LAD prohibits discrimination and bias-based harassment based on many protected classes in employment (including labor unions and employment agencies), housing (include housing providers and realtors), and places of public accommodation (generally, places open to the public, including businesses, restaurants, schools, summer camps, medical providers, government offices and agencies, etc.)” New Jersey Office of the Attorney General, “NJ Law Against Discrimination”, available at <https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/know-the-law/njlad/>.

¹⁶ N.J.S.A. §17:33A-1 *et seq.*; *Allstate New Jersey Ins. Co. v. Lajara*, 222 N.J. 129, 144 (N.J. 2015) (“The IFPA authorizes an insurance company to pursue compensatory and treble damages against a violator.”). Under the IFPA, “compensatory damages” include

C. Consequential Damages

Consequential damages “naturally flow as a result of the harm caused by the defendant's wrongdoing.”¹⁸ In New Jersey, consequential damages are “only recoverable where they are reasonably foreseeable at the time the contract was entered into.”¹⁹

not only actual damages, but also “reasonable investigation expenses, costs of suit and attorney’s fees.” N.J.S.A. §17:33A-7(a). “Under the IFPA, compensatory damages, including attorneys’ fees and costs, are trebled if the court determines that the defendant has engaged in a pattern of violating th[e] [A]ct.” *Allstate New Jersey*, 222 N.J. at 145 (citing N.J.S.A. §17:33A-7(a)).

¹⁷ N.J.S.A. § 34:19-1 *et seq.*; “In 1986 the Legislature enacted CEPA to protect employees from retaliatory actions by employers. That law protects ‘whistleblowers’, who, believing that the public interest overrides the interest of the organization he [or she] serves, publicly ‘blows the whistle’ if the organization is involved in corrupt, illegal, fraudulent, or harmful activity.” *Abbamont v. Piscataway Twp. Bd. of Ed.*, 138 N.J. 958, 964 (N.J. 1994) (“Further, we hold ... that the traditional doctrine of *respondeat superior* governs employer liability for compensatory damages under CEPA.”).

¹⁸ *Matter of Gloria T. Mann Revocable Trust*, 468 N.J. Super. 160, 177 (N.J. Super. Ct. App. Div. 2021).

¹⁹ *George H. Swatek, Inc. v. North Star Graphics*, 246 N.J. Super. 281, 286 (N.J. Super. Ct. App. Div. 1991) (internal quotation marks omitted). “Plaintiff need only demonstrate, however, that the damage was of a type that a reasonable man would realize to be a probable result of his breach.” *Id.*

New Jersey Statutes Section 12A:2-715 permits the award of consequential damages for (1) “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 (2) “injury to person or property proximately resulting from any breach of warranty.”²⁰ To recover consequential damages, a plaintiff must demonstrate a loss that is “a reasonably certain consequence of the breach although the exact amount of the loss need not be certain.”²¹ “It is well-settled

that parties injured by a breach of contract have a common law obligation to take reasonable steps to mitigate their damages.”²² Damages will not be awarded “to the extent the injured party could have avoided his losses through reasonable efforts ‘without undue risk, burden or humiliation.’”²³

Consequential damages may be limited or excluded by contract “unless the limitation or exclusion is unconscionable.”²⁴ In New Jersey, limitation of consequential damages for injury to the person is prima facie unconscionable, but limitation for commercial damages is not afforded the same treatment.²⁵

²⁰ N.J.S.A. § 12A:2-715.

²¹ *Gupta v. Asha Enterprises, L.L.C.*, 422 N.J. Super. 136, 154 (N.J. Super. Ct. App. Div. 2011) (citing *Donovan*, 91 N.J. at 444); *Totaro, Duffy, Canova and Co.*, 191 N.J. at 14 (N.J. 2007) (“[M]ere uncertainty as to the quantum of damages is an insufficient basis on which to deny the non-breaching party relief.”).

²² *State v. Ernst & Young, L.L.P.*, 386 N.J. Super. 600, 617 (N.J. Super. Ct. App. Div. 2006) (citing *McDonald v. Mianiecki*, 79 N.J. 275, 299 (N.J. 1979)).

²³ *Id.* at 618 (citation omitted).

²⁴ N.J.S.A. §12A:2-719(3); *Kearney & Trecker Corp. v. Master Engraving Co., Inc.*, 107 N.J. 584, 600 (N.J. 1987) (“It is only when the circumstances of the transaction, including the seller’s breach, cause the consequential damage exclusion to be inconsistent with the intent and reasonable commercial expectations of the parties that invalidation of the exclusionary clause would be appropriate under the Code.”).

²⁵ N.J.S.A. §12A:2-719(3). Although the presumption of unconscionability only applies to attempts to limit damages for personal injury, “[t]his does not mean. . .that considerations of fairness or unconscionability are any less relevant when reviewing warranties which contain limitations on property damages.” *Gladden v. Cadillac Motor Car Div., General Motors Corp.*, 83 N.J. 320, 331 (N.J. 1980). Courts are inclined to declare property damage remedy

Regardless of the limitation, a “[c]ourt always retains the option in an appropriate case of declaring the limitation unconscionable.”²⁶

D. Incidental Damages

In New Jersey, the UCC defines incidental damages. When a seller breaches a contract, the buyer may recover incidental damages including “expenses reasonably incurred in inspection, receipt, transportation and care 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.”²⁷ When a buyer breaches the agreement, the seller may recover incidental damages including “any commercially reasonable charges, expenses or commissions incurred in stopping

limitations unconscionable when it is found that “purchasers were misled or deceived or that warranties were not explicit.” *Id.* at 332 (citing *Jutta’s Inc. v. Fireco Equipment Co.*, 150 N.J. Super. 301 (N.J. Super. Ct. App. Div. 1977)).

²⁶ *Gladden*, 83 N.J. at 332; N.J.S.A. §12A:2-302 (authorizing the court to refuse to enforce any consumer contract clause which it finds unconscionable).

²⁷ N.J.S.A. § 12A:2-715(1).

delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.”²⁸

E. Punitive Damages

In 1995 the New Jersey Legislature enacted the Punitive Damages Act (PDA).²⁹ The PDA’s purpose, in part, “was to establish and enforce more restrictive standards in the awarding of punitive damages.”³⁰ In New Jersey, punitive damages must be specifically prayed for in the complaint.³¹ Punitive damages will only be awarded if a plaintiff proves by clear and convincing evidence that the harm suffered resulted from defendant’s acts or omissions and such acts or omissions “were actuated by actual malice or accompanied by a wanton and

²⁸ N.J.S.A. § 12A:2-710.

²⁹ N.J.S.A. § 2A:15-5.9 *et seq.* “The PDA codified common law principles underlying punitive damages, under which punitive damages were limited to only ‘exceptional cases . . . as a punishment of the defendant and as a deterrent to others from following his example.’” *Rivera v. Valley Hospital, Inc.*, 252 N.J. 1, 18 (N.J. 2022) (quoting *Pavlova v. Mint Mgmt. Corp.*, 375 N.J. Super. 397, 404 (N.J. Super. Ct. App. Div. 2005)).

³⁰ *Rivera*, 252 N.J. at 18. “The PDA thus marked a departure from the liberal imposition of punitive damages in favor of a more limited approach designed to more closely reflect the original purpose of such damages.” *Id.* at 1.

³¹ N.J.S.A. § 2A: 15-5.11.

willful disregard of persons who foreseeably might be harmed by those acts or omissions.”³² To warrant a punitive award, the burden of proof is not satisfied by negligence or gross negligence, the conduct of the defendant must have been “wantonly reckless or malicious,” and comprise an “intentional wrongdoing in the sense of an evil-minded act[.]”³³ Breaches of contract, even if intentionally committed will not warrant an award of punitive damages absent “a showing that defendant also breached a duty independent of that created by the contract.”³⁴ The decision to award punitive damages “rests within the sound discretion of the trier of fact.”³⁵ Despite this, “[t]he PDA envisions an active role for the trial court in reviewing the jury’s determinations.”³⁶

The New Jersey Legislature has enumerated four factors that “the trier of fact shall consider” in determining whether to award punitive damages:

- (1) The likelihood, at the relevant time, that serious harm would arise from the defendant’s conduct;
- (2) The defendant’s awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant’s conduct;
- (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
- (4) The duration of the conduct or any concealment of it by the defendant.³⁷

In actions involving punitive damages, the court shall, at the request of any defendant conduct a bifurcated trial.³⁸ “In the first stage of a bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages.”³⁹ Punitive damages will only be awarded if

³² *Id.* at § 2A:15-5.12(a).

³³ *See Nappe*, 97 N.J. at 49.

³⁴ *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1193 (3d Cir. 1993) (referencing New Jersey law).

³⁵ *Leimgruber v. Claridge Assoc., Ltd.*, 73 N.J. 652, 655 (N.J. 1977).

³⁶ *Pritchett v. State*, 248 N.J. 85, 109 (N.J. 2021). This “active role” calls upon the court, “[b]efore entering judgment for an award of punitive damages, [to] ascertain that the

award is reasonable in its amount and justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct.” *Id.* (internal quotation marks omitted).

³⁷ N.J.S.A. § 2A:15-5.12(b).

³⁸ *Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J. 329, 342 (N.J. 1993); N.J.S.A. § 2A:15-5.13(a).

³⁹ N.J.S.A. § 2A:15-5.13(b).

compensatory damages are awarded in the first stage, nominal damages cannot support an award of punitive damages.⁴⁰ In the trial's second stage, the trier of fact will determine the defendant's liability for punitive damages.⁴¹ If the action involves two or more defendants, punitive damages are defendant-specific and each defendant is only liable for the amount of the award made against that defendant.⁴² The PDA provides for a cap on the amount of punitive damages "that may be assessed against a defendant to the greater of five times the sum of the compensatory damages or \$350,000."⁴³

F. Liquidated Damages

Liquidated damages is "the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good

faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs."⁴⁴ A liquidated damages clause "must constitute a reasonable forecast of the provable injury resulting from breach; otherwise, the clause will be unenforceable as a penalty and the non-breaching party will be limited to conventional damage measures."⁴⁵

In New Jersey, "liquidated damages provisions in a commercial contract between sophisticated parties are presumptively reasonable and the party challenging the clause bears the burden of proving its unreasonableness."⁴⁶ The reasonableness of a liquidated damages provision will be determined by the totality of the circumstances.⁴⁷ The

⁴⁰ *Id.* at § 2A:15-5.13(c).

⁴¹ *Id.* at § 2A:15-5.13(d).

⁴² *Id.* at § 2A:15-5.13(e). *But see* Smith v. Whitaker, 160 N.J. 221, 243 (N.J. 1999) ("We hold that an action under the Survivor's Act, N.J.S.A. 2A:15-3, a claim for punitive damages may be sustained even absent an award of compensatory damages for pain and suffering."). Courts have justified this exception for Survivor's Act claims because a plaintiff's instantaneous death would preclude a damages award for pain and suffering. *Id.* at 244.

⁴³ Pritchett v. State, 477 N.J. Super. 597, 611 (N.J. Super. Ct. App. Div. 2024) (citing N.J.S.A. § 2A:15-5.14(b)).

⁴⁴ Westmount Country Club v. Kameny, 82 N.J. Super. 200, 205 (N.J. Super. Ct. App. Div. 1964).

⁴⁵ Wasserman's v. Twp. of Middletown, 137 N.J. 238, 249 (N.J. 1994).

⁴⁶ Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P., 159 N.J. 484, 496 (N.J. 1999).

⁴⁷ *Id.* at 495. "New Jersey courts have viewed enforceability of stipulated damages clauses as depending on whether the set amount is a reasonable forecast of just compensation for the harm that is caused by the breach and whether that harm is incapable or very difficult of accurate estimate." *Wasserman's*, 137 N.J. at 250 (citation omitted) (internal quotation omitted). Furthermore, "[t]he greater the difficulty of estimating or proving damages, the more likely the stipulated damages will

amount fixed in a liquidated damages provision will be deemed unreasonable if “it serves not as a pre-estimate of probable actual damages, but rather as punishment, grossly disproportionate to the actual harm sustained.”⁴⁸ New Jersey courts, consistent with the trend toward enforcing stipulated damages clauses have recognized that the “party challenging such a clause should bear the burden of proving its unreasonableness.”⁴⁹

G. Pre- and Post-Judgment Interest

Prejudgment interest is an “equitable remedy created to recover the loss of what the money owed would have earned if the payment had not been delayed.”⁵⁰ The use of prejudgment interest serves to promote the early settlement of cases.⁵¹ In New Jersey, prior to 1972, a request to recover prejudgment interest was limited to

cases in which a claim was liquidated.⁵² The award of prejudgment interest and the rate at which it is calculated is “within the sound discretion of the trial court.”⁵³ A prejudgment interest award is not punitive, the award instead “acknowledges that plaintiff has been denied the use of the money, while defendant has not.”⁵⁴ The primary consideration behind an award of prejudgment interest is that “the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled.”⁵⁵

Contrasting the discretionary nature of pre-judgment interest, post-judgment interest is an award “to which a litigant is entitled as of

appear reasonable.” *Id.* (citation omitted) (internal quotation omitted).

⁴⁸ CSFB-CP-4 Princeton Park Corporate Center, LLC. v. SB Rental, LLC, 410 N.J. Super. 114, 121 (N.J. Super. Ct. App. Div. 2009) (citation omitted) (internal quotations omitted).

⁴⁹ *Wasserman’s*, 137 N.J. at 252 (collecting cases).

⁵⁰ *New Jersey Dept. of Labor v. Pepsi-Cola Co.*, 336 N.J. Super. 532, 539 (N.J. Super. Ct. App. Div. 2001).

⁵¹ *New Jersey Mfrs. Ins. Co. v. National Cas. Co.*, 393 N.J. Super. 340, 354 (N.J. Super. Ct. App. Div. 2007).

⁵² *Potente v. County of Hudson*, 187 N.J. 787, 792 (N.J. 2006).

⁵³ *Nelson*, 466 N.J. Super. at 344; *Bd. of Educ. of City of Newark, Essex Cnty. v. Levitt*, 197 N.J. Super. 239, 244 (N.J. Super. Ct. App. Div. 1984) (pre-judgment interest “is not a litigant’s right but rests rather in the court’s discretion, required to be exercised in accordance with equitable principles and considerations.”).

⁵⁴ *New Jersey Mfrs. Ins. Co.*, 393 N.J. Super. at 354.

⁵⁵ *Litton Industries, Inc. v. IMO Industries, Inc.*, 200 N.J. 372, 390 (N.J. 2009) (citation omitted).

right.”⁵⁶ New Jersey Court Rule 4:42-11(a) governs post-judgment interest.⁵⁷ Under the Rule, post-judgment interest is calculated as follows:

(ii) For judgments not exceeding the monetary limit of the Special Civil Part at the time of entry, regardless of the court in which the action was filed: commencing January 2, 1986 and for each calendar year thereafter, the annual rate of interest shall equal the average rate of return, to the nearest whole or one-half percent, for the corresponding preceding fiscal year terminating on June 30, of the State of New Jersey Cash Management Fund (State accounts) as reported by the Division of Investment in the Department of the Treasury, but the rate shall be not less than 0.25%.

(iii) For judgments exceeding the monetary limit of the Special Civil Part at the time of entry: in the manner provided for in subparagraph (a)(ii) of this Rule until September 1, 1996; thereafter, at the rate provided in subparagraph (a)(ii) plus 2% per annum.⁵⁸

Although post-judgment interest is commonly awarded, a court may prohibit post-judgment interest upon a showing of good cause to the contrary.⁵⁹

H. Attorneys’ Fees

Generally, courts in New Jersey adhere to the “American Rule,” which states that “absent statutory or judicial authority or express contractual language to the contrary, each party is responsible for its own attorneys’ fees.”⁶⁰ There are instances however, where legal fees can, and must be paid by the opposing party such as: (1) when

⁵⁶ R. Jennings Mfg. Co. v. Northern Elec. Supply Co., Inc., 286 N.J. Super. 413, 416 (N.J. Super. Ct. App. Div. 1995) (“It is well-settled that a judgment-creditor is entitled to interest on an unsatisfied judgment.”); Marko v. Zurich North America Ins. Co., 386 N.J. Super. 527, 530 (N.J. Super. Ct. App. Div. 2006) (Post-judgment interest is “routinely awarded.”).

⁵⁷ Brown v. Davkee Inc., 324 N.J. Super. 145, 147 (N.J. Super. Ct. App. Div. 1999).

⁵⁸ N.J. Ct. R. 4:42-11(a)(ii)-(iii).

⁵⁹ *Levitt*, 197 N.J. Super. at 245; *Marko*, 386 N.J. Super. at 532 (post-judgment interest will be awarded “absent an extraordinary and equitable reason.”).

⁶⁰ *Boyle v. Huff*, 257 N.J. 468, 479 (N.J. 2024); *Rendine v. Pantzer*, 141 N.J. 292, 322 (N.J. 1995) (“[T]he prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”).

expressly authorized by statute, (2) court rule, and (3) by contract.⁶¹

The “primary and most readily recognized” instance is “counsel fee awards granted pursuant to a fee-shifting statute.”⁶² The New Jersey State Legislature has included fee-shifting provisions in multiple statutes such as the New Jersey Law Against Discrimination (LAD),⁶³ New Jersey Civil Rights Act,⁶⁴ and the Conscientious Employee Protection Act (CEPA).⁶⁵ The underlying purpose of these statutes may vary, however, the common rationale for incorporating a fee shifting measure is to “ensure that plaintiffs with bona fide claims are able to find lawyers to represent them [...] ... to attract competent counsel in cases involving statutory rights, ... and to ensure justice for all citizens.”⁶⁶

A narrower exception to New Jersey’s adherence to the “American Rule” are fees authorized by court

rule. New Jersey’s court rules “evinced New Jersey’s strong public policy against shifting counsel fees.”⁶⁷ Court Rule 4:42-9(a) enumerates eight circumstances in which attorneys’ fees will be awarded: family action, out of court fund, probate action, foreclosure of mortgage, tax certificate foreclosure action, action upon liability or indemnity policy of insurance, expressly provided by the rules with respect to any action, and in all cases where attorneys’ fees are permitted by statute.⁶⁸

Although “New Jersey has a strong policy disfavoring shifting of attorneys’ fees[,]” parties may agree by contract to pay attorneys’ fees.⁶⁹ When analyzing the validity of such contractual provisions, “courts will strictly construe that provision in light of the general policy disfavoring the award of attorneys’ fees.”⁷⁰ This policy is grounded in the notion “that sound judicial

⁶¹ Matter of Thomas, 278 N.J. Super. 580, 584 (N.J. Super. Ct. App. Div. 1995) (“Deeply impeded in New Jersey jurisprudence is the principle that legal expenses . . . are not recoverable absent express authorization by statute, court rule, or contract.”) (internal quotation marks omitted).

⁶² Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242, 258 (N.J. 2023); *New Jerseyans for Death Penalty Moratorium v. New Jersey Dept. of Corr.*, 185 N.J. 137, 152 (N.J. 2005) (“[T]he New Jersey Legislature has promulgated a substantial number of statutes authorizing an award of a reasonable counsel fee to the attorney for the prevailing party.”) (internal quotation marks omitted).

⁶³ N.J.S.A. §10:5-1 *et seq.*

⁶⁴ N.J.S.A. §10:6-2.

⁶⁵ N.J.S.A. §34:19-1 *et seq.*

⁶⁶ *New Jerseyans for Death Penalty Moratorium*, 185 N.J. at 153 (internal quotation marks omitted) (citation omitted).

⁶⁷ *Innes v. Marzano-Lesnevich*, 224 N.J. 584, 592 (N.J. 2016).

⁶⁸ N.J. Ct. R. 4:42-9 (a)(1)-(8).

⁶⁹ *North Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 569-570 (N.J. 1999).

⁷⁰ *Id.* at 570; *McGuire v. City of Jersey City*, 125 N.J. 310, 327 (N.J. 1991).

administration is best advanced if litigants bear their own counsel fees.”⁷¹

I. Reliance Damages

Courts in New Jersey, following the Restatement (Second) of Contracts, permit reliance damages to parties prevailing on claims of promissory estoppel.⁷² Reliance damages “look backward” and compensate for losses “plaintiff suffered as a result of his relying on defendant’s later-broken promise.”⁷³ “Promissory estoppel . . . requires that a promise has been made, that the promise was made with the expectation it be relied upon, that the moving party reasonably relied on the promise, and that the promisee incurred a detriment due to that reliance when the promisor broke the promise.”⁷⁴ If a plaintiff is able to prove the aforementioned elements of a promissory estoppel claim, reliance damages may be awarded “so as to restore him or her to the position he

or she was in before the parties met.”⁷⁵ Promissory estoppel claims are “designed to deter individuals who make promises with the intent that others rely on them and thereafter seek to avoid the consequences of that reliance when the promise is broken.”⁷⁶

J. Unjust Enrichment

A claim for unjust enrichment “rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.”⁷⁷ Unjust enrichment is not an independent theory of liability but provides the basis for a claim of quasi-contractual liability.⁷⁸ The overall intent of an unjust enrichment cause of action is “disgorgement of profits retained by the defendant.”⁷⁹ “To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be

⁷¹ Dept. of Env’t Prot. v. Ventron Corp., 94 N.J. 473, 504 (N.J. 1983).

⁷² Goldfarb v. Solimine, 245 N.J. 326, 340 (N.J. 2021). In *Goldfarb*, the New Jersey Supreme Court held that plaintiff, prospective employee could assert a promissory estoppel claim for reliance damages after employer allegedly reneged on oral promise of employment after plaintiff quit current job to accept position. *See id.* at 329.

⁷³ *Id.* at 331.

⁷⁴ *Id.* at 341; *see also* Model Jury Charges (Civil), 4.10K (approved May 1998).

⁷⁵ *Id.* (citing *Pop’s Cones, Inc. v. Resorts Int’l Hotel, Inc.*, 307 N.J. Super. 461, 473 (N.J. Super. Ct. App. Div. 1998)).

⁷⁶ *Id.* at 331.

⁷⁷ *Associates Com. Corp. v. Wallia*, 211 N.J. Super 231, 243 (N.J. Super. Ct. App. Div. 1986).

⁷⁸ *Nat’l Amusements, Inc. v. New Jersey Tpk. Auth.*, 261 N.J. Super. 468, 478 (N.J. Super. Ct. App. Div. 1992).

⁷⁹ *Kleinman v. Merck & Co.*, 417 N.J. Super. 166, 186 (N.J. Super. Ct. Ch. Div. 2009). “Disgorgement of profits is a punitive, not a compensatory, form of damages.” *Id.*

unjust.”⁸⁰ New Jersey courts will only impose liability for unjust enrichment if “plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred.”⁸¹ New Jersey courts have “recognized . . . that a claim for unjust enrichment may arise outside of the usual quasi-contractual setting.”⁸²

K. Unique Remedies (Plaintiff-Friendly Pre-Judgment Remedy Statutes)

New Jersey provides several plaintiff-friendly prejudgment remedies. Regarding prejudgment attachment of assets, New Jersey Statutes Section 2A:26-1 “is the sole

source of an attachment remedy in [New Jersey].”⁸³ Prejudgment attachment of assets is an “extraordinary remedy”, and its availability is “narrowly circumscribed by statute[.]”⁸⁴ The statute enumerates five instances where “[a]n attachment may issue. . . upon the application of any resident or nonresident plaintiff against the property, real and personal, of any defendant[.]

- a. Where the facts would entitle plaintiff to an order of arrest before judgment in a civil action . . . ;
- b. Where the defendant absconds or is a nonresident of this State, and a summons cannot be served on him in this State . . . ;
- c. Where the cause of action existed against a decedent, which survives against his

⁸⁰ VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (N.J. 1994).

⁸¹ Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109 (N.J. Super. Ct. App. Div. 1966).

⁸² Goldsmith v. Camden Cnty. Surrogate’s Off., 408 N.J. Super. 376, 382 (N.J. Super. Ct. App. Div. 2009). Unjust enrichment has been recognized outside of the quasi-contractual setting “when corrupt means have been employed to obtain a government contract . . . the concept of unjust enrichment has been used to deny the wrongdoer any profit from the transaction and to thereby

deter such conduct.” Cnty of Essex v. First Union Nat’l Bank, 373 N.J. Super 543, 550 (N.J. Super. Ct. App. Div. 2004).

⁸³ Tanner Assoc. v. Ciraldo, 33 N.J. 51, 53 (N.J. 1960).

⁸⁴ *In re* Estate of Balgar, 399 N.J. Super. 426, 439 (N.J. Super. Ct. Ch. Div. 2007); Wolfson v. Bonello, 270 N.J. Super. 274, 289 (N.J. Super. Ct. App. Div. 1994) (“[A]ttachment is an extraordinary remedy *in rem* for the collection of an ordinary debt by seizure of the property of the debtor.”) (internal quotation marks omitted).

- heirs, devisees, executors, administrators or trustees, and there is property in this State which by law is subject to plaintiff's claim . . . ;
- d. Where plaintiff has a claim of an equitable nature as to which a money judgment is demanded against the defendant, and the defendant absconds or is a nonresident and a summons cannot be served upon him in this State; or
- e. Where the defendant is a corporation created by the laws of another state but authorized to do business in this State and such other

state authorizes attachments against New Jersey corporations authorized to do business in that state.⁸⁵

In New Jersey, the award of pre-judgment remedies is not limited to statutory authority or the courts. Administrative agencies possess “incidental powers that have been extended to the fashioning of remedies . . . not expressly enumerated by statute.”⁸⁶ These remedies have included *inter alia*, the award of pre-judgment interest on a teacher’s back-wages in a tenure dispute by the Commissioner of Education,⁸⁷ and the imposition of pre-judgment interest on the payment of disputed overtime pay

⁸⁵ N.J.S.A. § 2A:26-2; *Estate of Balgar*, 399 N.J. Super. at 439.

⁸⁶ *Levitt*, 197 N.J. Super. at 243-246; *see also in re Comm’r of Banking & Ins. v. Parkwood Co.*, 98 N.J. Super. 263, 271-272 (N.J. Super. Ct. App. Div. 1967) (“[T]he powers of an administrative agency should be liberally construed to permit the agency to achieve the task assigned to it, and that such administrative agency has such implied incidental powers as may reasonably be adapted to that end.”).

⁸⁷ *Levitt*, 197 N.J. Super. at 247 (“In our view, an award of interest, whether pre-judgment or post-judgment, is more appropriately made by the Commissioner as part of his determination of the cause than by a court which could do so only by undertaking a complete review of the entire record of the case.”).

by the Commissioner of the Department of Labor.⁸⁸

L. Public Policy Prohibitions

Although “parties bargaining at arms-length may generally contract as they wish,” in New Jersey “[n]o contract can be sustained if it is inimical to the public interest or detrimental to the common good.”⁸⁹ “Public policy eludes precise definition and may have diverse meanings in different contexts.”⁹⁰ Its sources may “include federal and state legislation and judicial decisions.”⁹¹ Courts in New Jersey will consider multiple factors “in the balancing process” including but not limited to:

- (1) The parties’ justified expectations;
- (2) Any forfeiture that would result if enforcement were denied;
- (3) Any special public interest in the

enforcement of the particular term;

- (4) The strength of the public policy involved;
- (5) The extent to which that policy would be impaired or subverted;
- (6) The seriousness of any misconduct involved and whether it was deliberate; and
- (7) The connection between the misconduct and the terms.⁹²

The factors arguing against enforcement must “clearly outweigh the law’s traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term.”⁹³

In New Jersey, exculpatory agreements that are found to contravene public policy will be invalidated, even if unambiguous.⁹⁴ Courts will “closely scrutinize

⁸⁸ *New Jersey Dept. of Labor v. Pepsi-Cola Co.*, 336 N.J. Super. 532, 539 (N.J. Super. Ct. App. Div. 2001). The court explained that “[o]ur dictum in *Levitt* was predicated on the finding that the Commissioner was endowed with the ancillary power to impose such liability in order to fully execute his statutory responsibilities under the school laws[.]” and “[i]n this case, the Commissioner of the DOL should, as well, be able to impose prejudgment interest because he is specifically charged with the recovery and payment of wages due to an employee in New Jersey.” *Id.*

⁸⁹ *Saxon Constr. & Mgmt. Corp. v. Masterclean, Inc.*, 273 N.J. Super. 231, 235-236 (N.J. Super. Ct. App. Div. 1994).

⁹⁰ *Vasquez v. Glassboro Serv. Ass’n*, 83 N.J. 86, 98 (N.J. 1980).

⁹¹ *Id.*

⁹² *Saxon Constr. & Mgmt. Corp.*, 273 N.J. Super. at 237 (citation omitted).

⁹³ *Id.* (citation omitted).

⁹⁴ *Marcinczyk v. State of New Jersey Police Training Com’n*, 203 N.J. 586, 594 (N.J. 2010) (“Even if unambiguous, it is well-established that exculpatory contracts will not be

liability releases and invalidate them if they violate public policy.”⁹⁵ Agreements to release tort liability for intentional or reckless conduct,

or a statutorily imposed duty are per se violations of public policy.⁹⁶ Beyond the previous well-established violations of public policy, “the weighing process becomes opaque.”⁹⁷ Under New Jersey law, “an agreement is against public policy if it is injurious to 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 . . . is at war with the interests of society and is in conflict with public morals.”⁹⁸

enforced where they are contrary to public policy.”).

⁹⁵ *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 333 (N.J. 2006); *Lucier v. Williams*, 366 N.J. Super. 485, 491 (N.J. Super. Ct. App. Div. 2004) (“[C]ourts have not hesitated to strike limited liability clauses that are unconscionable or in violation of public policy.”).

⁹⁶ *Hojnowski*, 187 N.J. at 333; *McCarthy v. NASCAR, Inc.*, 48 N.J. 539, 542 (N.J. 1967).

⁹⁷ *Stelluti v. Casapenn Enters., L.L.C.*, 203 N.J. 286, 303 (N.J. 2010).

⁹⁸ *Marcinczyk*, 203 N.J. at 594 (quoting *Frank Briscoe Co. v. Travelers Indem. Co.*, 65 F. Supp.2d 285, 312 (D. N.J. 1999)).