

# Contract Basics for Litigators: Kentucky

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A Q&A guide to state law on basic contract principles and breach of contract issues under Kentucky 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. Answers to questions can be compared across many jurisdictions (see [Contract Basics for Litigators: State Q&A Tool](#)).

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## Contract Formation

1. What are the elements of a valid contract in your jurisdiction?

The elements of a valid and enforceable contract under Kentucky law are:

- Offer.

- Acceptance.
- Full and complete terms, including:
  - definite and certain terms; and
  - each party's promise of performance.
- Consideration.
- Mutuality of obligations.

(*Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013); *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997).)

## Offer

An offer is a manifestation of a party's willingness to enter a bargain, communicated in a way that gives the other party the understanding that the offeror is inviting the party to accept the bargain (*Baker v. Lexington-Fayette Urban Cnty. Gov't*, 2019 WL 3763539, at \*3 (Ky. Ct. App. Aug. 9, 2019) (unpublished decision, see KY ST RAP Rule 41); *Mafcote Indus., Inc. v. Averitt Express, Inc.*, 2012 WL 5497936, at \*4 (W.D. Ky. Nov. 13, 2012) (applying Kentucky law)). However, a manifestation of willingness to enter a bargain is not an offer if the other party knows or has a reason to know that the offering party does not intend to finalize the agreement until they make a further manifestation of assent (*Furtula v. Univ. of Ky.*, 438 S.W.3d 303, 309 (Ky. 2014)).

## Acceptance

A party's acceptance of an offer must be:

- Clear, unambiguous, and unequivocal.
- Comply exactly with the offer's requirements.

(*Baker*, 2019 WL 3763539, at \*3 (unpublished decision, see KY ST RAP Rule 41); *Venters v. Stewart*, 261 S.W.2d 444, 446 (Ky. 1953); *Cincinnati Equip. Co. v. Big Muddy River Consol. Coal Co.*, 164 S.W. 794, 798 (Ky. 1914) (a party's silence after receiving an offer is not an acceptance unless the party agrees that silence equates to an acceptance).)

## Full and Complete Terms

A valid contract must include definite and certain terms setting out each party's promises of performance (*Frankfort Med. Invs., LLC v. Thomas*, 577 S.W.3d 484, 488 (Ky. Ct. App. 2019); *MidAmerican Distrib., Inc. v. Clarification Tech., Inc.*, 807 F. Supp. 2d 646, 667 (E.D. Ky. 2011) (applying Kentucky law)). A contract does not have to cover every conceivable term to

be enforceable, but it must set out all the essential terms (*AutoChannel, Inc. v. Speedvision Network, LLC*, 144 F. Supp. 2d 784, 790 (W.D. Ky. 2001) (applying Kentucky law)). For example, a contract is generally unenforceable if it leaves material terms open to future negotiations (*Cinelli v. Ward*, 997 S.W.2d 474, 477 (Ky. Ct. App. 1998)).

## Consideration

Consideration under Kentucky law is either:

- A benefit to the party making the promise (the promisor).
- A loss or detriment to the party to whom the promise was made (the promisee).

(*Phillips v. Phillips*, 171 S.W.2d 458, 464 (Ky. 1943).)

Courts do not weigh the value of consideration but only whether valid consideration exists (see *Price's Adm'x v. Price's Adm'x*, 66 S.W. 529, 530 (Ky. 1902); *Thornberry's Adm'r v. Dils*, 1882 WL 3773, at \*2 (Ky. Apr. 18, 1882) (unpublished decision, see KY ST RAP Rule 41)).

## Mutuality of Obligation

Mutuality of obligation requires agreement by both parties to be bound by the contract's terms (*Morgan v. Morgan*, 218 S.W.2d 410, 412 (Ky. 1949)). Mutuality of obligation is absent when, for example:

- The contract is illusory, meaning one party is bound under the contract and the other is not (*David Roth's Sons, Inc., v. Wright & Taylor, Inc.*, 343 S.W. 2d 389, 391 (Ky. 1961)).
- One party reserves the right to cancel or terminate at any time an executory contract (a contract that requires performance by both parties over a set time period) (*Fowler's Bootery v. Selby Shoe Co.*, 117 S.W.2d 931, 933 (Ky. 1938)).

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

The following contracts must be in writing under the Kentucky [statute of frauds](#):

- A representation or assurance concerning another person's character, conduct, credit, ability, trade, or dealings made with the intent to allow the other person to obtain credit, money, or goods.
- A promise to pay debts contracted during infancy, or ratification of a contract or promise made during infancy.

- A personal representative's promise to answer for a decedent's liability out of their own estate.
- A promise to pay the debt, default, or misdoing of another.
- An agreement made in consideration of marriage, except mutual promises to marry.
- A contract for the sale of real property.
- A real estate lease with a term longer than one year.
- An agreement that a party cannot perform within one year.
- A promise, agreement, or contract to pay a commission or compensation for:
  - the sale or lease of real property; or
  - assisting in the sale or lease of any real property.
- A promise, contract, agreement, undertaking, or commitment, other than credit card agreements or consumer credit transactions, to:
  - loan money;
  - grant, extend, or renew credit; or
  - provide financial assistance to establish or assist a business enterprise.
- A contract for the sale of standing trees or timber.
- A contract for wage assignment.

([KRS 371.010](#), [371.100](#), and [371.110](#).)

Under Kentucky's Uniform Commercial Code, contracts for the sale of goods for \$500 or more must be in writing ([KRS 355.2-201\(1\)](#)).

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

A writing satisfies the statute of frauds under Kentucky law if it contains the essential elements of a contract and is signed by the party against whom enforcement is sought ([KRS. 371.010](#); [Antle v. Haas](#), 251 S.W.2d 290, 294-95 (Ky. 1952); [Nicholson v. Clark](#), 802 S.W.2d 934, 938 (Ky. Ct. App. 1990); [Guangzhou Consortium Display Prod. Co. v. PNC Bank, Nat'l Ass'n](#), 956 F. Supp. 2d 769, 776 (E.D. Ky. 2013) (applying Kentucky law)).

Separate writings can collectively form a contract that satisfies the statute of frauds ([Lonnie Hayes & Sons Staves, Inc. v. Bourbon Cooperage Co.](#), 777 S.W.2d 940, 942 (Ky. Ct. App. 1989)).

In contracts for the sale of goods under Kentucky's Uniform Commercial Code, the written document must:

- Be signed or constructively signed by the party against whom enforcement is sought.
- Specify the quantity of goods being purchased and sold.
- Demonstrate that it is a contract for the sale of goods.

([KRS 355.2-201](#); [Commonwealth Aluminum Corp. v. Stanley Metal Assocs.](#), 186 F. Supp. 2d 770, 772-73 (W.D. Ky. 2001) (applying Kentucky law).)

For real property contracts, the contract must describe the property so that its identity can be ascertained from the document ([KRS 371.010\(6\)](#); [Chaney v. Noland](#), 387 S.W.2d 308, 309 (Ky. 1964); [Stewart v. Gray](#), 2020 WL 3401154, at \*3 (Ky. Ct. App. June 19, 2020) (unpublished decision, see [KY ST RAP Rule 41](#)), *aff'd*, 658 S.W.3d 1 (Ky. 2022)).

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

Kentucky law recognizes the following types of contracts:

- Express.
- Implied-in-fact.
- Implied-in-law.
- Unilateral and bilateral.

## Express Contract

An express contract is an oral or written agreement that clearly sets out all the terms and conditions the parties agreed to ([Beaver v. Oakley](#), 279 S.W.3d 527, 534 n.27 (Ky. 2009)).

## Implied-in-Fact Contract

An implied-in-fact contract is an actual agreement where one or more terms or conditions of the contract are mutually understood from the parties' circumstances, conduct, acts, or relationships, instead of their written or spoken words (*Furtula*, 438 S.W.3d at 308 n.6; *Dorton v. Ashland Oil & Refin. Co.*, 197 S.W.2d 274, 281 (Ky. 1946); *Victor's Ex'r v Monson*, 283 S.W.2d 175, 176-77 (Ky. 1955)).

## Implied-in-Law Contract

An implied-in-law contract is not actually a contract at all, but a binding obligation imposed by law as a matter of equity to prevent unjust enrichment. These are sometimes called quasi-contracts and generally include quantum meruit, promissory estoppel, and unjust enrichment. (*Perkins v. Daugherty*, 722 S.W.2d 907, 909 (Ky. Ct. App. 1987); *Kellum v. Browning's Adm'r*, 21 S.W.2d 459, 465 (Ky. 1929).)

For example, a plaintiff may recover in *quantum meruit* for an implied-in-law contract if:

- The plaintiff provided valuable services or furnished materials to the defendant.
- The defendant accepted or received the services or materials.
- The circumstances reasonably notified the defendant that the plaintiff expected to be paid for the services or materials provided.

(*Quadrille Bus. Sys. v. Ky. Cattlemen's Ass'n*, 242 S.W.3d 359, 366 (Ky. Ct. App. 2007).)

## Unilateral and Bilateral Contracts

A bilateral contract involves an exchange of promises between two parties, while a unilateral contract results from one party making a promise in exchange for the other party's act (see *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 362-63 (Ky. 2005); *Jackson v. Pepper Gasoline Co.*, 133 S.W.2d 91, 93 (Ky. 1939)).

5. What are the general rules of contract construction in your jurisdiction? For example, rules construing inconsistencies, intention of the parties, definitions, etc.

## Parties' Intent

Courts look to the parties' intentions when interpreting a Kentucky contract, which courts generally ascertain based solely on the words the parties used in their contract. Courts may not insert or excise terms or construe the language in a way

that distorts what the parties agreed to. (*State Farm Mut. Auto. Ins. v. Hobbs*, 268 S.W.2d 420, 422 (Ky. 1954); *3D Enters. Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005).)

## Grammar and Meanings

Contractual terms are interpreted according to their plain and ordinary meaning (*Larkins v. Miller*, 239 S.W.3d 112, 115 (Ky. Ct. App. 2007)). In the absence of an ambiguity, courts should interpret a contract by assigning language its ordinary meaning without resorting to extrinsic evidence (*Maze v. Bd. of Dir. for Commonwealth Postsecondary Ed. Prepaid Tuition Tr. Fund*, 559 S.W.3d 354, 363 (Ky. 2018); *Cook v. Cook*, 798 S.W.2d 955, 957 (Ky. 1990) (courts may rely on accepted dictionary definitions when interpreting contract language)). Preference is given to contract interpretations that give a reasonable, lawful, and effective meaning to all the terms over a reading that leaves a part unreasonable, unlawful, or of no effect (*Maze*, 559 S.W.3d at 363).

## Implied Terms

In addition to the written provisions of a contract, courts may imply certain terms and conditions as a matter of law. One of the most litigated implied provisions is the covenant of good faith and fair dealing, which is implied by law in every contract. It imposes a duty on the parties to do everything reasonably necessary to carry out the terms and spirit of their contract. (*Farmers Bank & Tr. Co. of Georgetown v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005).)

## Entire Contract

Courts interpret contracts as a whole and must read all writings that are part of the same transaction together (*Cook United, Inc. v. Watts*, 512 S.W.2d 493, 495 (Ky. 1974)). Courts should interpret various provisions of the contract in a way that gives effect to all parts of the contract and promotes harmony between apparently conflicting provisions and to the contract's primary purpose (*Journey Acquisition-II, L.P. v. EQT Prod. Co.*, 39 F. Supp. 3d 877, 887 (E.D. Ky. 2014) (applying Kentucky law), *aff'd*, 830 F.3d 444 (6th Cir. 2016)).

## Ambiguity or Inconsistency

A contract term is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations (*Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 682 (Ky. 2012); *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 105-06 (Ky. 2003); *Cantrell Supply, Inc. v. Liberty Mut. Ins.*, 94 S.W.3d 381, 385 (Ky. Ct. App. 2002)).

When resolving ambiguous contract terms, courts analyze the intention of the parties by examining the whole contract, including:

- The subject matter of the contract.
- The parties' situations.
- The conditions under which the contract was written.

- Parol (or extrinsic) evidence, meaning evidence outside the four corners of the contract, including the circumstances of:
  - the contract's execution;
  - the parties' conduct; and
  - the contract's subject matter.

(*Frear*, 103 S.W.3d at 106; *Cantrell Supply*, 94 S.W.3d at 385.)

Kentucky law seeks to give effect to all terms of a contract, harmonize apparent contradictions when possible, and construe contractual inconsistencies to carry out the parties' original intention (*Kemper Nat'l Ins. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 875-76 (Ky. 2002); *Cantrell Supply*, 94 S.W.3d at 384).

## Specific Over General

A contract's specific and exact terms receive greater weight than general language, and separately negotiated or added terms receive greater weight than standardized terms or other terms not separately negotiated (*Journey Acquisition-II*, 39 F. Supp. 3d at 887).

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

The [parol evidence rule](#) is a substantive rule under Kentucky law that prevents parties from offering extrinsic written or oral evidence to vary or modify the terms of an unambiguous written contract (*Vanhook Enters. v. Kay & Kay Contracting, LLC*, 543 S.W.3d 569, 572 (Ky. 2018); *Radioshack Corp. v. Comsmart, Inc.*, 222 S.W.3d 256, 261 (Ky. Ct. App. 2007)).

Courts may use parol evidence to resolve a dispute over the interpretation of contract terms when, for example:

- The contract contains ambiguities (*New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 323 (Ky. Ct. App. 2009)).
- The UCC governs the contract, and evidence of the parties' course of dealing, course of performance, or usage of trade can resolve the matter (*A&A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 510-11 (Ky. Ct. App. 1999)).
- The contract was procured by illegality, fraud, duress, mistake, or failure of consideration (*Johnson v. Dalton*, 318 S.W.2d 415, 417 (Ky. 1958)).

- Parol evidence is necessary to show the nature of the consideration supporting the contract ([C.C. Leonard Lumber Co. v. Reed](#), 236 S.W.2d 961, 963-64 (Ky. 1951)).

## Altering and Terminating Contracts

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

Under Kentucky law, the parties to the contract may modify it in any of the following ways:

- In a subsequent agreement.
- Orally, if:
  - contract modifications do not have to be in writing; and
  - there is [clear and convincing evidence](#) for the modification.
- By the parties' conduct.

([Energy Home](#), 406 S.W.3d at 834; [Hyatt Corp. of Del. v. Young & Assocs.](#), 2005 WL 3004744, at \*3 (Ky. Ct. App. 2005) (unpublished decision, see [KY ST RAP Rule 41](#)); [W. H. Simmons & Co. v. Price's Adm'r](#), 38 S.W.2d 6, 7 (Ky. 1931).)

Any attempted modification of a contract generally requires new consideration ([Coffman v. AT&T, Corp.](#), 678 F. Supp. 3d 880, 8887 (E.D. Ky. 2023) (applying Kentucky law)).

A party seeking to modify a contract based on a mistake must show that:

- The parties agreed to different terms from those expressed in the written document.
- The mistake was mutual, not unilateral.
- The mutual mistake is proven by clear and convincing evidence.

([Nichols v. Zurich Am. Ins.](#), 423 S.W.3d 698, 702-03 (Ky. 2014).)

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

Kentucky law recognizes [novation](#), which relieves the parties of their obligations under the original contract and results in a new agreement (*White/Reach Brannon Rd., LLC v. Rite Aid of Ky., Inc.*, 488 S.W.3d 631 (Ky. Ct. App. 2016); *Forcht v. Forcht Bank, N.A.*, 533 S.W.3d 695, 701 n.8 (Ky. Ct. App. 2017)).

A contract novation requires:

- A previous valid contract.
- The parties' agreement to form a new contract.
- An intention by parties to extinguish the old contract.
- A valid new contract.

(*Frontier Ins. in Rehab. v. MC Mgmt., Inc.*, 2009 WL 541301, at \*5 (W.D. Ky. March 4, 2009) (applying Kentucky law) (unpublished decision, see [KY ST RAP Rule 41](#))).

Sometimes a novation does not, by its terms, clearly dissolve the former contract. In these circumstances, a novation may still occur if either the new contract:

- Obviously takes the place of or is inconsistent with the original contract's terms.
- Renders performance of the former contract impossible.

(*Combs v. Morgan*, 211 S.W.2d 821, 825 (Ky. 1948); *White/Reach Brannon Rd.*, 488 S.W.3d at 636-37.)

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

Under Kentucky law, a party can terminate a contract early under certain circumstances. For example:

- By giving reasonable notice to the other party when:
  - the contract does not specify a duration; and

- the duration cannot be determined by the circumstances or nature of the contract.

(*Elec. & Water Plant Bd. of City of Frankfort v. S. Cent. Bell Tel. Co.*, 805 S.W.2d 141, 143 (Ky. Ct. App. 1990).)

- Under the contract's termination clause, subject to the requirements of good faith and fair dealing (*Britt v. Univ. of Louisville*, 628 S.W.3d 1, 10 (Ky. 2021); *RAM Eng'g & Constr., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 584 (Ky. 2003)).
- Based on a valid legal justification, such as the other party's material breach (*D.H. Wilburn, Inc. v. H&H Painting, LLC*, 648 S.W.3d 687, 695 (Ky. Ct. App. 2022)).

## Dispute Resolution Clauses

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

Kentucky courts approach choice of law provisions warily and do not automatically honor a contractual choice of law provision (*Osborn v. Griffin*, 865 F.3d 417, 443 (6th Cir. 2017) (applying Kentucky law)).

In breach of contract actions, Kentucky law applies the most significant relationship test from the [Restatement \(Second\) of Conflicts of Laws, Section 188](#) (*Saleba v. Schrand*, 300 S.W.3d 177, 181 (Ky. 2009)). Under this test, courts apply the law of the state with the greatest interest in the outcome of the litigation (*Saleba*, 300 S.W.3d at 181).

If a contract contains a choice of law provision for another state's law to apply but there is a significant relationship between Kentucky and the contract itself, Kentucky courts generally ignore the choice of law provision and apply Kentucky law (*Schnuerle v. Insight Commc'ns Co.*, 376 S.W.3d 561, 567 (Ky. 2012); *Adam v. J.B. Hunt Transp., Inc.*, 130 F.3d 219, 230-31 (6th Cir. 1997) (applying Kentucky law)).

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

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

## Kentucky State Court Analysis

Kentucky courts applying state law generally enforce forum selection clauses as prima facie valid unless the opposing party can show that extenuating circumstances make enforcement of the clause unfair or unreasonable (*Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888, 889 (Ky. 1997)). When determining if a forum selection clause is unfair or unreasonable, courts consider:

- The inconvenience created by holding the trial in the specified forum.
- The disparity of bargaining power between the two parties when they entered the contract containing the forum selection clause.
- Whether the forum where the incident occurred has a minimal interest in the lawsuit.

(*Prezocki*, 938 S.W.2d at 889.)

## Kentucky Federal Court Analysis

Federal courts sitting in Kentucky analyze the enforceability of forum selection clauses under federal common law (28 U.S.C. § 1404). Federal courts generally enforce the parties' contractually valid choice of forum except in the most unusual cases, such as where:

- The forum selection clause was obtained by fraud, duress, or other unconscionable means.
- The designated forum would ineffectively or unfairly handle the suit.
- The designated forum would be so seriously inconvenient that requiring the plaintiff to bring suit there would be unjust.

(*Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 64 (2013); *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 828 (6th Cir. 2009); *Ellenberger v. Alphabet, Inc.*, 2020 WL 11772628, at \*2 (W.D. Ky. July 17, 2020); see [Legal Update, Supreme Court Explains How to Enforce Forum Selection Clauses.](#))

The party opposing the forum selection clause bears the burden of showing that the clause should not be enforced (*Wong*, 589 F.3d at 828). A party can enforce a forum selection clause by a motion to transfer under 28 U.S.C. § 1404 (*Aldridge Elec., Inc. v. Am. Mun. Power, Inc.*, 2017 WL 986682, at \*4 (W.D. Ky. Mar. 14, 2017)).

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

Kentucky law allows enforcement of alternative dispute resolution provisions if they are not unconscionable. Courts determine whether an alternative dispute resolution clause is unconscionable by considering:

- The circumstances surrounding the parties' making of the alternative dispute resolution clause (procedural unconscionability). Procedural unconscionability, known as unfair surprise, exists when the agreement contains hidden, convoluted, or unclear language ([Schnuerle, 376 S.W.3d at 575-77](#)).
- The substantive content of the clause (substantive unconscionability). Substantive unconscionability exists when the contract terms unreasonably or exceptionally favor one party and to which the other party does not assent ([Schnuerle, 376 S.W.3d at 577](#)).

Kentucky law recognizes that a written agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable, and courts are vested with subject-matter jurisdiction to enforce an arbitration award or enter judgment consistent with an arbitration award (KRS 417.050 and 417.200; see [LP Louisville E., LLC v. Patton, 651 S.W.3d 759, 766 \(Ky. 2020\)](#)). Courts resolve any doubts concerning arbitrable issues in favor of arbitration, regardless of whether the issue concerning the provision is the construction of the contract terms or an allegation of a defense to arbitrability ([LP Louisville E., 651 S.W.3d at 765](#)).

A party seeking to enforce an arbitration agreement has the burden of establishing its existence. Once prima facie evidence of the agreement's existence has been shown, the burden shifts to the party seeking to avoid it to show that the agreement is unconscionable ([Schnuerle, 376 S.W.3d at 575](#)).

## Breach of Contract

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

The elements of a breach of contract claim under Kentucky law are:

- Proof of the existence of a valid and enforceable contract (see [Contract Formation](#)).
- The defendant's breach of the contract.
- The plaintiff suffered damages caused by the breach.

([EQT Prod. Co. v. Big Sandy Co., 590 S.W.3d 275, 293 \(Ky. Ct. App. 2019\)](#); [Specialty Auto Parts USA, Inc. v. Holley Performance Prods., Inc., 2024 WL 1427127, at \\*3 \(W.D. Ky. Mar. 27, 2024\)](#) (applying Kentucky law).)

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

Under Kentucky law, an actionable breach of contract claim requires a plaintiff to prove the existence of a contract and identify the specific terms they allege the defendant breached (*Metro Louisville/Jefferson Cnty. Gov't v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009); *J.S. v. Berla*, 456 S.W.3d 19, 26 (Ky. Ct. App. 2015)).

In determining whether there is an actionable breach, courts compare the actions taken (or not taken) with the obligations imposed by the contract (*Abma*, 326 S.W.3d at 8). A breach may be either material or nonmaterial. A material breach:

- Goes to the essence of the contract.
- Substantially defeats the contract's purpose or is vital to the contract's existence.
- Makes it impossible for the other party to perform.

(*Self-Made, LLC v. SKPR KY-2, LLC*, 2015 WL 6778688, at \*2 (Ky. Ct. App. Nov. 6, 2015) (unpublished decision, see KY ST RAP Rule 41); *Morel Constr. Co. v. Richardson Bulldozing, LLC*, 2014 WL 3548144, at \*3 (Ky. Ct. App. July 18, 2014) (unpublished decisions, see KY ST RAP Rule 41).)

A nonmaterial breach is a minor breach of the contract's terms that does not affect the contract's overall purpose (see *ValleyScapes, Inc. v. Divs., Inc.*, 2022 WL 16824716, at \*4 (E.D. Ky. Nov. 8, 2022); *Stansbury v. Hopkins Hardwoods, Inc.*, 2016 WL 3619616, at \*7 (W.D. Ky. June 24, 2016); *Evergreen Land Co. v. Gatti*, 554 S.W.2d 862, 865 (Ky. Ct. App. 1977)). A non-material breach does not allow a party to abandon its performance under the contract (*Morel Constr.*, 2014 WL 3548144, at \*3 (unpublished decision, see KY ST RAP Rule 41)).

In determining whether a breach of contract is material, Kentucky courts consider whether:

- The injured party will be deprived of the benefit reasonably expected.
- The injured party can be adequately compensated for the benefit lost because of the breach.
- The breaching party will suffer forfeiture.
- The likelihood that the breaching party will cure the failure.
- The breaching party's failure to perform complies with the standard of good faith and fair dealing.

(*Bluegrass Equine & Tourism Found., Inc. v. Commonwealth*, 2013 WL 1919567, at \*15-16 (Ky. Ct. App. May 10, 2013) (unpublished decision, see KY ST RAP Rule 41) (citing *Restatement (Second) of Contracts* § 241).)

15. What is the statute of limitations for a breach of contract action in your jurisdiction? Please also discuss when the limitations period begins to run, whether it may be tolled, and how to plead the defense.

The [statute of limitations](#) for a breach of contract action under Kentucky law is:

- Five years for contracts not in writing ([KRS 413.120\(1\)](#)).
- Ten years for written contracts executed after July 15, 2014 ([KRS 413.160](#)).
- 15 years for written contracts executed before July 15, 2014 ([KRS 413.090\(2\)](#)).
- Four years for contracts for the sale of goods under Kentucky's Uniform Commercial Code, which the parties cannot extend but may reduce by agreement to not less than one year ([KRS 355.2-725\(1\)](#)).
- One year for breach of professional services contract ([KRS 413.245](#)).

Parties may contractually alter the length of the limitations period if the new limitation is reasonable (*State Farm Mut. Auto. Ins. v. Riggs*, 484 S.W.3d 724, 727 (Ky. 2016)).

The statute of limitations for a breach of contract starts to run:

- At the time of the breach, for a sales contract under the UCC, regardless of the aggrieved party's lack of knowledge of the breach ([KRS 355.2-725\(2\)](#)).
- For other contracts, at the time of the breach (*EQT Prod.*, 590 S.W.3d at 292; *Easterly v. Metro. Life Ins.*, 2009 WL 350595, at \*6 (Ky. Ct. App. Feb. 13, 2009) (unpublished decision, see KY ST RAP Rule 41)).
- For contracts procured by fraud or mistake, when the plaintiff discovers or should have discovered the fraud or mistake. However, the cause of action must be started within ten years after the time of making the contract or perpetration of the fraud ([KRS 413.130\(3\)](#)).

A defense based on the statute of limitations is an [affirmative defense](#) that a defendant must plead in their initial responsive pleading. The failure to do so may result in a waiver of the defense. (*Ky. R. Civ. P. 8.03.*)

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

- Continuous contracts.
- Equitable [estoppel](#).
- Tolling statutes.

## Continuous Contracts

If a contract requires continuing performance, such as an agreement to perform regular maintenance on a right of way, Kentucky courts may treat the contract as continuous. The statute of limitations begins anew every time the party fails to perform as required by the contract (*Flege v. Covington & Cincinnati Elevated Ry. & Transfer & Bridge Co.*, 91 S.W. 738, 738-39 (Ky. 1906)).

## Equitable Estoppel

The doctrine of equitable estoppel tolls the statute of limitations when a defendant's conduct, such as false representations or fraudulent concealment, prevents the plaintiff from bringing a timely breach of contract claim. For equitable estoppel to apply, the plaintiff must show that they:

- Lacked knowledge of and the ability to discover the defendant's false representations or concealment of material facts.
- Relied in good faith on the defendant's conduct or statements.
- Acted or failed to act based on the defendant's false representations or concealment of material facts.

(*Williams v. Hawkins*, 594 S.W.3d 189, 196 (Ky. 2020).)

## Tolling Statutes

Counsel should also check relevant statutes for any applicable tolling provisions. For example, the statute of limitations may be tolled when:

- A party is under a legal disability, including:
  - infancy; or
  - unsound mind.

(KRS 413.170.)

- The plaintiff cannot serve process on the defendant, who is a Kentucky resident, because the defendant is absent from the state when the cause of action accrues (KRS 413.190(1)).
- The defendant is a Kentucky resident and absconds or conceals themselves to obstruct the prosecution of an action (KRS 413.190(2)).

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

A third party has standing to sue for breach of contract under Kentucky law when they qualify as third-party beneficiaries of the contract. To qualify as a third-party beneficiary, the third party must show that the contract was made for their actual and direct benefit. (*Phoenix Am. Adm'rs, LLC v. Lee*, 670 S.W.3d 832, 839 (Ky. 2023).) Third-party beneficiaries include, for example:

- Donee beneficiaries, where the promisee intends to give the benefit of the contract's performance to the third party as a gift.
- Creditor beneficiaries, where a party's contract performance satisfies a debt, the party owes to the third-party beneficiary.

Third parties who are incidental beneficiaries of the contract do not have standing to sue (*Phoenix Am. Adm'rs*, 670 S.W.3d at 838-39; *Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 579-80 (Ky. 2004)).

## Remedies for Breach of Contract

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

Under Kentucky law, damages for breach of contract are typically a sum that would put the plaintiff in the position it would have been in if the defendant performed the contract (commonly called expectancy or benefit-of-the bargain damages) (*Univ. of Louisville v. RAM Eng'g & Constr., Inc.*, 199 S.W.3d 746, 748 (Ky. Ct. App. 2005)).

The prevailing plaintiff in a breach of contract action typically may recover:

- **General damages**, which are damages that:
  - reasonably and naturally arise from the breach; or
  - the parties may have reasonably contemplated when they made the contract.
- **Special damages**, which occur when there are special circumstances surrounding the making of the contract and are only recoverable when the defendant had notice of the special circumstances from which the damages arise (*Univ. of Louisville*, 199 S.W.3d at 748; *Tex. Cap. Bank, N.A. v. First Am. Title Ins.*, 822 F. Supp. 2d 678, 685 (W.D. Ky. 2011) (applying Kentucky law)).

- **Liquidated damages**, which are a predetermined amount the parties agreed to in their contract as a reasonable estimate of the actual damages a party may suffer from a breach (*Goetz v. Asset Acceptance, LLC*, 513 S.W.3d 342, 346 (Ky. Ct. App. 2016)). Courts generally enforce liquidated damages clauses when:
  - the actual damages from a breach of contract are difficult, if not impossible to determine;
  - the amount fixed as liquidated damages is proportionate to the actual damages the plaintiff sustained; and
  - the amount of liquidated damages is not so unreasonably large to be considered a penalty.

(*Mattingly Bridge Co. v. Holloway & Son Constr. Co.*, 694 S.W.2d 702, 705 (Ky. 1985).)

A plaintiff must prove the existence and amount of its damages. Damages generally may not be recovered when they are contingent, uncertain, or speculative (*Nami Res. Co. v. Asher Land & Min., Ltd.*, 554 S.W.3d 323, 332-33 (Ky. 2018)).

A plaintiff typically may not recover punitive damages for a breach of contract (*Nami Res. Co.*, 554 S.W.3d at 335).

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

Under Kentucky 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 available equitable remedies include:

- Injunctive relief.
- Rescission.
- Reformation.
- Specific performance.
- Declaratory judgment.
- Unjust enrichment.
- Promissory estoppel.

## Injunctive relief

A plaintiff may obtain injunctive relief for a breach of contract when:

- A damages award would not compensate the plaintiff for the harm done.
- The injury is irreparable.

(*Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642, 645 (Ky. 1992).)

It is often difficult for a plaintiff in a breach of contract action to establish irreparable injury because most harms are compensable by money damages (see *Cyprus Mountain Coal*, 828 S.W.2d at 645-46).

Certain types of contracts, however, present situations in which a plaintiff may obtain injunctive relief, including:

- Actions to enforce a contractual **non-compete provision** or other restrictive covenant (see *Louisville Cycle & Supply Co. v. Baach*, 535 S.W.2d 230, 232-33 (Ky. 1976); *Lareau v. O'Nan*, 355 S.W.2d 679, 681 (Ky. 1962); *Gardner Denver Drum LLC v. Goodier*, 2006 WL 1005161, at \*4 (W.D. Ky. Apr. 14, 2006) (unpublished decision, see KY ST RAP Rule 41) (applying Kentucky law)).
- Where the contract specifically provides for injunctive relief or stipulates to the presumption of irreparable harm (see *Potter v. Dark Tobacco Growers' Co-op. Ass'n*, 257 S.W. 33, 34-36 (Ky. 1923); *York Risk Servs. Grp., Inc. v. Couture*, 787 F. App'x 301, 308 (6th Cir. 2019)).

## Rescission

Kentucky law allows a plaintiff to rescind a contract for a defendant's substantial or material breach or misrepresentation (*Payne v. Rutledge*, 391 S.W.3d 875, 880 (Ky. Ct. App. 2013); *Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753, 757 (Ky. Ct. App. 1999)).

## Reformation

A plaintiff may obtain reformation of a written contract where the original contract does not accurately represent the parties' true agreement because of mutual mistake or fraud, or where the contract is illegal (*James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC*, 941 F. Supp. 2d 807, 832 (E.D. Ky. 2013) (applying Kentucky law)).

To obtain reformation based on the parties' mutual mistake, the plaintiff must show by clear and convincing evidence that:

- The mistake was mutual, not unilateral.
- The parties agreed on terms different from those expressed in the written contract.

(*Nichols*, 423 S.W.3d at 702-03.)

## Specific Performance

A plaintiff may obtain an order of specific performance directing the defendant to comply with certain specific obligations set out in the contract. Specific performance typically is available only where:

- The plaintiff has complied with all their obligations under the contract (*AEP Indus., Inc., v. B.G. Props., Inc.*, 533 S.W.3d 674, 676 (Ky. 2017)).
- An action for damages would be inadequate to afford the plaintiff complete relief (*Billy Williams Builders & Devs. Inc. v. Hillerich*, 446 S.W.2d 280, 283 (Ky. 1969)).

Specific performance most often arises in the context of contracts involving property or items that are considered unique, such as contracts for:

- The sale of real property (*AEP Indus.*, 533 S.W.3d at 682; *Smith v. Williams*, 396 S.W.3d 296, 300 (Ky. 2012)).
- Specially bred horses (*Curry v. Bennett*, 301 S.W.3d 502, 504 (Ky. Ct. App. 2009); *Beasley v. Trontz*, 677 S.W.2d 891, 893 (Ky. Ct. App. 1984)).
- Unique goods arising under Article 2 of Kentucky's Uniform Commercial Code (*KRS 355.2-716(1)*).

## Declaratory Judgment

Kentucky has a declaratory judgment act that authorizes parties to seek a declaration of their rights before they suffer harm, but only where an actual controversy exists between them (*KRS 418.040 to 418.055*). For example, a party to a contract may seek a declaratory judgment asking the court to rule on the construction or validity of a contract or on the parties' rights, status, or legal relations in the underlying controversy (see *Commonwealth v. Ky. Ret. Sys.*, 396 S.W.3d 833, 839-40 (Ky. 2013)).

## Unjust Enrichment

Unjust enrichment is an equitable remedy that allows a party to recover for the value of a benefit conferred on and unjustly retained by the defendant. Unjust enrichment can support a restitution award, to prevent the defendant from keeping money or benefits belonging to the plaintiff (*Lipson v. Univ. of Louisville*, 556 S.W.3d 18, 32 (Ky. Ct. App. 2018)).

To recover for unjust enrichment, a plaintiff must prove:

- A benefit was conferred on the defendant at the plaintiff's expense.
- The defendant's resulting appreciation of benefit.
- The defendant's inequitable retention of the benefit without paying for its value.

(*Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 540 S.W.3d 770, 777-78 (Ky. 2017).)

A party generally may not recover for unjust enrichment when the parties' relationship is governed by an express contract (*Superior Steel*, 540 S.W.3d at 777-78). While a plaintiff can plead unjust enrichment in addition or in the alternative to breach of contract, it cannot recover under both theories (*Superior Steel*, 540 S.W.3d at 778).

## Promissory Estoppel

A plaintiff may recover under promissory estoppel where:

- One party makes a promise that they should reasonably expect to induce action or forbearance on the part of the other party (or a third person).
- The other party acts or refrains from acting in a material way in reasonable reliance on the promise.
- Injustice can be avoided only by enforcing the promise.

(*Jackson v. JB Hunt Transp., Inc.*, 384 S.W.3d 177, 184 (Ky. Ct. App. 2012); *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 643 (Ky. Ct. App. 2003).)

Promissory estoppel cannot be used to defeat or avoid the statute of frauds (see *Rivermont Inn*, 113 S.W.3d at 643).

## Defenses to Breach of Contract

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

## Defenses to Contract Formation

Defenses to contract formation under Kentucky law include:

- Ambiguity (see [Question 5: Ambiguity or Inconsistency](#)).
- Lack of capacity (*Estate of Adams ex rel. Mitchell v. Trover*, 547 S.W.3d 545, 554 (Ky. Ct. App. 2018); *Mitchell ex rel. v. Mitchell*, 963 S.W.2d 222, 223 (Ky. Ct. App. 1998)).
- Coercion or undue influence (*Mays v. Mays*, 541 S.W.3d 516, 524 (Ky. Ct. App. 2018); *Acton v. Acton*, 283 S.W.3d 744, 747 (Ky. Ct. App. 2008)).

- Duress (*Keeney v. Billy Trent Constr., LLC*, 602 S.W.3d 162, 166 (Ky. Ct. App. 2019); *Humana, Inc. v. Fairchild*, 603 S.W.2d 918, 920 (Ky. Ct. App. 1980)).
- Fraudulent inducement (*United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999); *Radioshack Corp.*, 222 S.W.3d at 261).
- Lack of consideration (see [Question 1: Consideration](#)).
- Mistake (see [Question 7](#)).
- The contract violates public policy (*State Farm Mut. Auto. Ins. v. Hodgkiss-Warrick*, 413 S.W.3d 875, 880-81 (Ky. 2013)).

## Defenses to Breach of the Contract

Under Kentucky law, a defendant may assert the following affirmative defenses to the plaintiff's claim that it breached the contract:

- Accord and satisfaction (*Liggons v. House & Assocs. Ins.*, 3 S.W.3d 363, 365 (Ky. Ct. App. 1999)).
- Arbitration and award (*Jackson v. Mackin*, 277 S.W.3d 626, 628 (Ky. Ct. App. 2009)).
- Duress (see [Question 19: Defenses to Contract Formation](#)).
- Estoppel (*Nichols*, 423 S.W.3d at 701-02).
- Failure of consideration (*Spurlock v. Begley*, 308 S.W.3d 657, 660-61 (Ky. 2010)).
- First to breach (*Hall v. Rowe*, 439 S.W.3d 183, 186-87 (Ky. Ct. App. 2014)).
- Fraud, including fraud in:
  - the factum (*Bean v. VNB N.Y., LLC*, 2017 WL 2399343, at \*6 (Ky. Ct. App. June 2, 2017) (unpublished decision, see [KY ST RAP Rule 41](#))); and
  - the inducement (see [Question 19: Defenses to Contract Formation](#)).
- Illegality (*Louisville & Jefferson Cnty. Metro. Sewer Dist. v. T+C Contracting, Inc.*, 570 S.W.3d 551, 559 (Ky. 2018); *Zeitz v. Foley*, 264 S.W.2d 267 (Ky. 1954)).

- Laches (*Plaza Condo. Ass'n, Inc. v. Wellington Corp.*, 920 S.W.2d 51, 54 (Ky. 1996); *Gover's Adm'r v. Dunagan*, 184 S.W.2d 225, 226-27 (Ky. 1944); *Bank Josephine v. McGuire*, 2005 WL 856896, at \*1-2 (Ky. Ct. App. Apr. 15, 2005) (unpublished decision, see KY ST RAP Rule 41)).
- Payment (*Bensinger v. West*, 255 S.W.2d 29, 32-33 (Ky. 1953)).
- Release (*Waddle v. Galen of Ky., Inc.*, 131 S.W.3d 361, 364-65 (Ky. Ct. App. 2004)).
- Statute of frauds (see [Question 2](#)).
- Unclean hands (*Suter v. Mazyck*, 226 S.W.3d 837, 843 (Ky. Ct. App. 2007); *Javier Steel Corp. v. Cent. Bridge Co.*, 353 S.W.3d 356, 361 (Ky. Ct. App. 2011)).
- Waiver (*Edmondson v. Pa. Nat'l Mut. Cas. Ins.*, 781 S.W.2d 753, 755 (Ky. 1989); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. Ct. App. 2001)).

## Defenses to Damages

The following defenses challenge the damages the plaintiff seeks:

- Failure to mitigate (see *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 852 (Ky. Ct. App. 2014)).
- The damages are duplicative or result in a double recovery (see *Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 918 (Ky. 1998)).
- The damages are unavailable, such as punitive damages (see *Nami Res. Co.*, 554 S.W.3d at 335).
- The damages are superseded by a liquidated damages clause (see [Question 17](#)).
- The plaintiff cannot prove damages because they are:
  - speculative or contingent (see *Curry*, 301 S.W.3d at 506);
  - not directly traceable to the breach;
  - too remote (see *Ky. Utils. Co. v. Warren Ellison Café*, 21 S.W.2d 976, 978 (Ky. 1929));
  - the result of other intervening causes; or
  - not contemplated by the parties when they made the contract (see *Univ. of Louisville*, 199 S.W.3d at 748).

For more information on challenging damages in a breach of contract action, see [Practice Note, Litigating Contract Damages: Limitations on Contract Damages](#).

