

# CONTRACTS: MONTANA

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## I. Uniform Commercial Code

Montana has adopted the Uniform Commercial Code, including Article 2 (Sales) (Mont. Code Ann. §§ 30-2-101 et seq) and Article 2A (Leases) (Mont. Code Ann. §§ 30-2A-101 et seq). Following are some important variations.

A. **Article 1.** Article 1 of the UCC contains general provisions that apply throughout the UCC, including rules of construction and general definitions. In 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL, now known as the Uniform Law Commission) promulgated changes to Article 1; these changes are known as Revised Article 1. Montana has adopted Revised Article 1.

B. **Article 2.** In 2003, NCCUSL proposed a substantially revised Article 2. Only a handful of states have adopted Revised Article 2; Montana is not one of them.

C. **Battle of the Forms.** Compare Montana’s version of the “battle of the forms” to the standard version:

Standard Version: UCC 2-207	Montana version: Mont. Code Ann. 30-2-207
(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.	(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional <b>or different</b> terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Thus, in Montana, different terms are treated the same as additional terms; they will not become a part of the contract if (a) through (c) apply, and the terms of the original offer will control. The knock-out rule, which a number of courts in other jurisdictions have applied to remove the "different" terms from **both** acceptance and offer, substituting UCC default provisions in their place, does not apply in Montana.

## II. Montana Statutes Governing Contracts

A. **Title 28.** Title 28 of the Montana Code, entitled “Contracts and Other Obligations,” has numerous provisions governing contracts and their interpretation. Most of these provisions were enacted by the Montana legislature in 1895, and were taken from California law, which in turn was based upon the efforts of Dudley Field to codify common law, referred to as the “Field Code.” There are approximately 150 sections in Title 28. Before you draft or litigate a contract that is governed by Montana law, you should determine whether there are any applicable provisions in Title 28. Following is a non-exclusive and very brief listing of some of the topics addressed in Title 28:

- 28-1-211: establishes standard for the implied covenant of good faith and fair dealing;
- 28-1-302; 28-3-703: presumption that joint obligations are joint and several;
- 28-1-303: right of contribution amongst joint debtors;
- 28-1-1401, -1402: accord and satisfaction;
- 28-1-1501 to -1504: novation;
- 28-1-1601 to -1603: releases;
- 28-2-102: essential elements of a contract;
- 28-2-201: capacity to contract;
- 28-2-401 to -411: defenses of duress, fraud, mistake;
- 28-2-801 to -814: consideration
- 28-2-903: statute of frauds
- 28-2-905: parole evidence rule (non-UCC)
- 28-2-1602: contract modification
- 28-2-1711 to -1716: rescission
- 28-2-2202: warranties for new residential construction
- Title 28, Chapter 3: interpretation of contracts including, for example:
  - 28-2-306: uncertainty resolved against party causing ambiguity
  - 28-3-602: time is not of essence unless expressly stated
  - 28-3-704: attorney fees must be reciprocal
- Title 28, Chapter 10: agency
- Title 28, Chapter 11: guarantees and indemnification agreements

B. **Title 1.** Title 1 of the Montana Code also contains many “Field Code” provisions governing contracts.

C. **Notaries.** Montana has adopted the Uniform Law on Notarial Acts. Sample forms of notaries’ certifications are found at Mont. Code Ann. § 1-5-610.

### III. Illegal Contracts (Title 28, Chapter 2, Part 7)

A. **Exculpatory Contracts.** Mont. Code Ann. § 28-2-702 prohibits “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.” See, for example, Miller v. Fallon County, 222 Mont. 214 (1986), in which the Montana Supreme Court refused to enforce an agreement signed by a truck driver’s spouse in which she waived her right to pursue any negligence claim against her husband’s employer as a condition of the employer’s consent allowing her to ride along with her husband. See also Mont. Code Ann. § 1-3-204 which prohibits the waiver of a benefit provided by a “law established for a public reason.”

B. **Restraints against Trade.** Mont. Code Ann. § 28-2-703 states that “[a]ny contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by § 28-2-704 [in the context of a sale of the goodwill of a business] or 28-2-705 [in the context of a dissolution of a partnership], is to that extent void.” In spite of this clear prohibition against such restraints, the Montana Supreme Court has ruled that “reasonable” covenants not to compete are enforceable. For recent discussions of the “reasonableness” analysis, see Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C., 362 Mont. 496 (2011).

C. **Restraints upon Legal Proceedings.** Mont. Code Ann. § 28-2-708 provides that “[e]very stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void.” This section does not affect the validity of arbitration agreements (discussed below). The Montana Supreme Court has applied this statute to refuse to enforce, for example, forum selection clauses (State ex rel. Polaris Indus., Inc. v. District Court, 215 Mont. 110 (1985)) and clauses reducing the statute of limitations (Thielbar Realties, Inc. v. Nat’l Union Fire Ins. Co., 91 Mont. 525 (1932)).

D. **Liquidated Damages.** Mont Code. Ann. § 28-2-721 provides that liquidated damages clauses are void, unless “it would be impracticable or extremely difficult to fix the actual damage.” However, the Montana Supreme Court has adopted a different rule to analyze liquidated damages, and instead of applying 28-2-721 it applies an **unconscionability** analysis. Under this analysis (and in spite of the statutory “void” language), liquidated damages clauses are presumed enforceable, unless the liquidated damages are unconscionable. The party seeking to avoid the clause has the burden of proving unconscionability.

1. In Cole v. Valley Ice Garden, LLC, 2005 MT 21, the Montana Supreme Court ruled that the plaintiff employee waived the benefits of Mont. Code Ann. § 28-2-721 because the plaintiff, whose attorneys drafted his employment agreement, inserted a liquidated damages clause in the event of a termination without cause.

#### **IV. Unconscionability**

If a clause in a contract is unconscionable, it will not be enforced. In Arrowhead School District No. 75 v. Klyap, 318 Mont. 103 (2003) (involving a liquidated damages clause when a teacher prematurely terminated his employment contract), the Montana Supreme Court set forth a two-prong analysis as to whether a clause is unconscionable. First, the clause must occur in a “contract of adhesion” such that the weaker party has no meaningful choice regarding acceptance of the contract provisions. If there is no contract of adhesion, there is no unconscionability. If there is a contract of adhesion, the clause must fail the second prong of the test: the contractual terms must be unreasonably favorable to the drafter, which is usually the party with superior bargaining power. Whether the clause is unreasonably favorable to the drafter in turn involves an inquiry into whether the clause is within the reasonable expectations of or unduly oppressive to the weaker party. In Kortum-Managhan v. Herbergers NBGL, 2009 MT 79, this second prong was expanded to include, in determining “reasonable expectations”, whether the clause is unduly oppressive, unconscionable or against public policy.

#### **V. Arbitration Clauses**

Whereas the Federal Arbitration Act encourages agreements that provide for arbitration of disputes (9 U.S.C. § 2), the Montana legislature and Montana courts have historically disfavored arbitration clauses, because they take away the important right of a jury trial. In 1996, the U.S. Supreme Court determined that a provision of Montana law limiting the enforceability of arbitration clauses to be invalid. Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). Under this important decision, the U.S. Supreme Court stated that an arbitration clause may be invalidated under state law only if such clause would be unenforceable under general contract or equitable principles. Subsequently, in Kloss v. Edward D. Jones, 310 Mont. 123 (2003), the Montana Supreme Court addressed whether an arbitration clause contained in an investment account form contract was enforceable. The court refused to enforce the arbitration clause based upon its analysis that it was a contract of adhesion; Mrs. Kloss was presented the contract on a “take-it-or-leave-it” basis, and had no opportunity to meaningfully negotiate its terms. This case is a must read, because it sets forth the factors the Court will consider in determining the enforceability of an arbitration clause.