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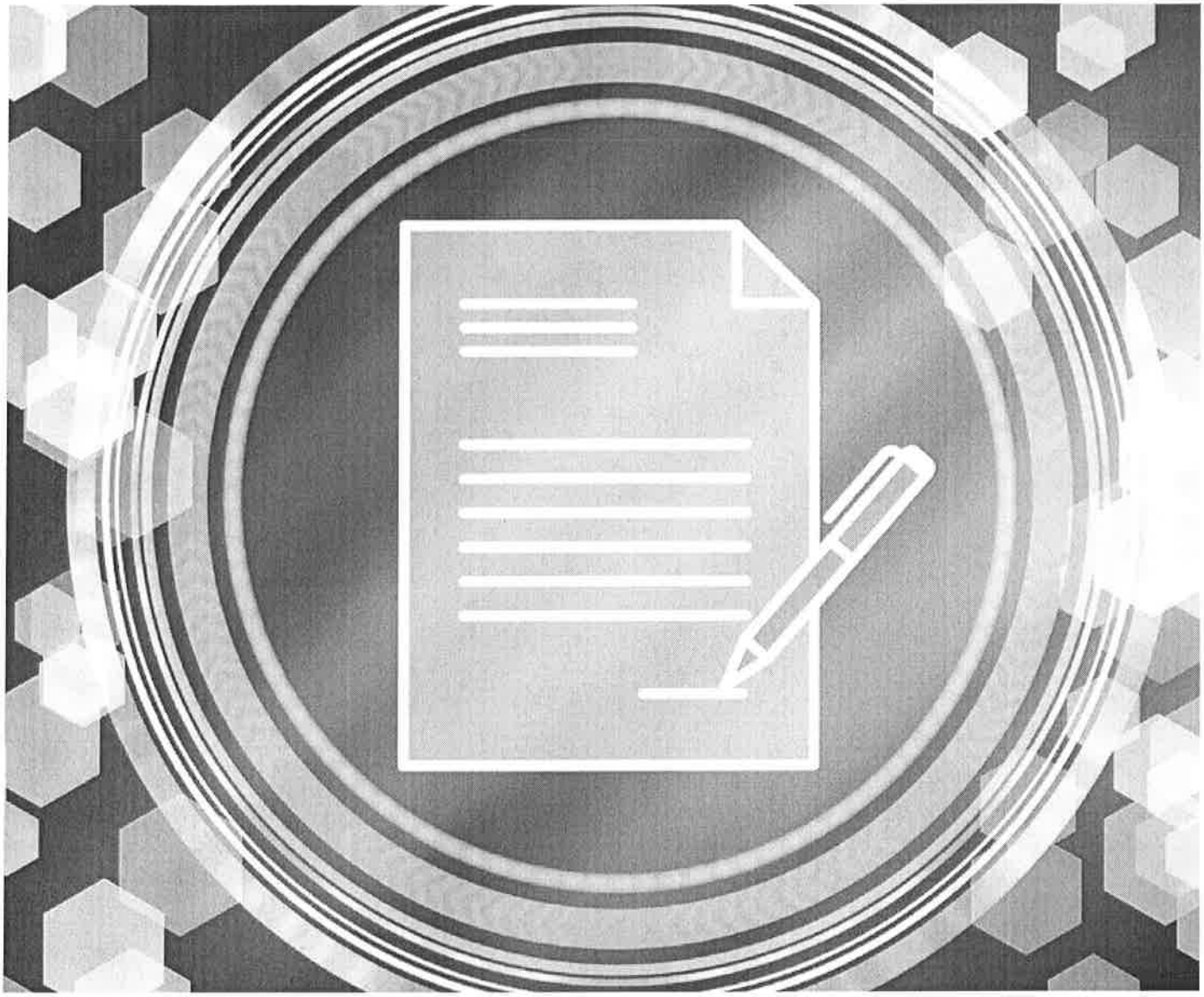
Infidelity Clauses in New York, Liquidated Damages, Public Policy, Tort: Part I

New York includes adultery as a ground for divorce. Would an infidelity clause be enforceable under New York law? The analysis here establishes that an infidelity clause would not be enforceable pursuant to public policy under a variety of theories.

By **Elliott Scheinberg** | June 22, 2022



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"Infidelity Clauses: Proceed With Caution (https://www.law.com/newyorklawjournal/2022/06/09/infidelity-clauses-proceed-with-caution/)," NYLJ (June 10, 2022), by Alyssa Rower, Karina VanHouten and Leo Wiswall, is a very interesting article about a timeless issue that has not even received short shrift in New York legal or judicial literature. Such a clause seeks to compel marital fidelity at the pain of forfeiture. The authors cite various out-of-state cases that invalidated such contractual provisions on public policy. In *Diosdado v. Diosdado*, 97 Cal. App. 4th 470 (Cal. Ct. App. 2002), "a California appellate court held that infidelity clauses and misconduct clauses, more generally, are unenforceable" as such contractual provision was "in direct contravention of the public policy underlying no-fault divorce. The postnuptial agreement violated California's requirement that a contract have a 'lawful object,' and was therefore unenforceable." The article identifies another offending provision that would have awarded marital property to the wife if the husband used cocaine. *In re Marriage of Mehren & Dargan*, 118 Cal. App. 4th 1167

(Cal. Ct. App. 2004). The article identifies Pennsylvania and Tennessee as "the only states in which courts have explicitly held infidelity clauses enforceable, [as] both allow for divorce on grounds of adultery."

New York includes adultery as a ground for divorce. Would an infidelity clause be enforceable under New York law? The analysis here establishes that an infidelity clause would not be enforceable pursuant to public policy under a variety of theories.

The source of public policy. Albeit a slow, churning process, public policy, as fashioned by the Legislature and the judiciary, is a barometer that paces and marks legal and societal evolution as well as time-honored tenets. Black's Law Dictionary (11th ed. 2019) defines public policy: "Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." "Public policy, like society, is continually evolving and those entrusted with its implementation must respond to its ever-changing demands." *In re Sprinzen*, 46 N.Y.2d 623 (1979).

In *Glaser v. Glaser*, 276 N.Y. 296, 301 (1938), the Court of Appeals noted where public policy is found: "What is the public policy of a State and where do we look to find it? The decisions of this court have given it a limited legal meaning, for in *People v. Hawkins*, 157 N.Y. 1, at page 12 ... this court said: 'The term 'public policy' is frequently used in a very vague, loose or inaccurate sense. Courts have often found it necessary to define its juridical meaning and have held that a state can have no public policy except what is to be found in its Constitution and laws. (*Vidal v. Girard's Ex'rs*, 2 How. [U.S.] 127 [11 L.Ed. 205]; *Hollis v. Drew Theological Seminary*, 95 N.Y. 166; *Cross v. United States Trust Co.*, 131 N.Y. [330] ... ; *Dammert v. Osborn*, 140 N.Y. [30] ...) Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes or judicial records.'"

"'In a juridical sense, public policy does not mean simply sound policy, or good policy; but as defined by Daniel Webster in the *Girard Will Case* (2 How. [U.S.] 127) [43 US 127 (1844)) it means the policy of a State established for the public weal 'either by law, by courts or general consent.' "*Hollis v. Drew Theol. Seminary* (95 N.Y. 166, 172 (1884)); *Balcerzak v. DNA Contracting, LLC,* 9 Misc. 3d 524 (Sup. Ct., Kings Co. 2005); *F. A. Straus & Co. v. Canadian Pac. R. Co.*, 254 N.Y. 407 (1930) ("Public policy is necessarily variable. It changes with changing conditions. It is evidenced by the expression of the will of the Legislature contained in statutory enactments. Whatever the term may imply in other jurisdictions, in this state: [C]ourts have often found it necessary to define its juridical meaning and have held that a state can have no public policy except what is to be found in its constitution and laws. * * * [W]hen we speak of the public policy of the state, we mean the law of the state, whether found in the constitution, the statutes, or judicial records.")

Freedom of contract is 'deeply rooted in public policy'; parties may chart the basis upon which their litigation will be resolved, which may be overridden by societal interests expressed by public policy. New York has a "strong public policy favoring freedom of contract." *159 MP Corp. v. Redbridge Bedford*, 33 N.Y.3d 353, 356 (2019). "Strong public policy generally favors individuals ordering and deciding their own interests through contractual

arrangements, including prenuptial and postnuptial agreements." *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 193 (2001). "Generally, parties may contract as they wish and courts will enforce their agreements without passing on the substance of them." *New England Mutual Life Insurance Co. v. Caruso*, 73 N.Y.2d 74, 81 (1989).

"Judicial acceptance of compromises in which the most fundamental of rights are waived is not uncommon. Judicial policy has been so solicitous of stipulations that it is undeniable that constitutionally secured rights ... as well as those evinced by positive act of the Legislature ... may validly be waived without offending public policy. *Nishman v. De Marco*, 76 A.D.2d 360, 370 (2d Dep't 1980). "Rights that may be abandoned, of both constitutional and statutory dimension, include many that are otherwise inviolate." *159 MP Corp.* [at 187] (the Appellate Division notes many such instances).

"[I]n the absence of an affront to public policy, parties to a civil dispute have the right to chart their own litigation course," *Trump v. Trump*, 179 A.D.2d 201, 204 (1st Dep't 1992), and "may fashion the basis upon which a particular controversy will be resolved," *Cullen v. Naples*, 31 N.Y.2d 818, 820 (1972), including "the right to make a rule of evidence for their own case." *Brady v. Nally*, 151 N.Y. 258, 264 (1896). "Parties to actions may make stipulations for the government of their conduct, or the control of their rights, or the conduct of a litigation, which, unless they be unreasonable or against good morals or sound public policy, not only bind them, but are enforceable by the courts," *Potter v. Rossiter*, 109 AD 737, 739-40 (1st Dep't 1905), *In re Malloy's Estate*, 278 N.Y. 429 (1938), *Koren-DiResta Constr. Co., Inc. v. N.Y. City Sch. Constr. Auth.*, 293 A.D.2d 189 (1st Dep't 2002), and "thus become estopped from denying that there is another law applicable to their rights." *Levy v. Delaware, Lackawanna & W. R.R. Co.*, 211 A.D. 503, 506 (4th Dep't 1925); *Freidus v. Eisenberg*, 71 N.Y.2d 981, 982 (1988) ("It is well settled that 'parties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied ... Thus, an agreement on a theory of damages at trial, even if only implied, must control on appeal.'"); *Martin v. City of Cohoes*, 37 N.Y.2d 162 (1975).

However, the power to contract is not unconstrained. "[A] contractual provision [is] unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy." *159 MP Corp.* [at 360]. "While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy." *Sternaman v. Metro. Life Ins. Co.*, 170 N.Y. 13, 14 (1902).

"Contracts are illegal at common law, as being against public policy, when they are such as to injuriously affect or subvert the public interests, good will or welfare." *Johnston v. Fargo*, 184 N.Y. 379, 384 (1906). "An agreement between two private parties, no matter how explicit, cannot change the public policy of this state." *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 400 (1981). So strong is public policy that "where a contract provision is arguably void as against public policy, that issue may even be raised for the first time at the appellate level by a party or by the court on its own motion." *Niagara Wheatfield Adm'rs Ass'n v. Niagara*

Wheatfield Cent. Sch. Dist., 44 N.Y.2d 68 (1978); *People v. Knowles,* 88 N.Y.2d 763 (1996); *New England Mutual* [at 81] ("[Contractual] promises are unenforceable only when statute or public policy dictates that the interest in freedom to contract is outweighed by an overriding interest of society; courts refuse to enforce contracts in such cases because they wish to discourage undesirable conduct by the parties or others and to avoid use of the judicial process to give effect to an unsavory transaction. Freedom of contract itself is deeply rooted in public policy, however, and therefore a decision to refrain from enforcing a particular agreement depends upon a balancing of the policy considerations against enforcement and those favoring the encouragement of transactions freely entered into by the parties.")

'In matrimonial cases, public policy considerations abound'. It is settled that "in matrimonial cases, public policy considerations abound," *Hirsch v. Hirsch*, 37 N.Y.2d 312 (1975); *In re Phillips' Estate*, 293 N.Y. 483, 491 (1944) ("There are considerations of public policy which cluster about contracts that touch the marriage relation."); *De Cicco v. Schweizer*, 221 N.Y. 431 (1917); *Fraioli v. Fraioli*, 1 A.D.2d 967 (2d Dep't 1956) ("[A] matrimonial action involve[s] as it does important questions of public policy and the interests not alone of the parties thereto but those of the State itself ...")

Absent 'very rare' 'egregious conduct' that 'shocks the conscience of the court' New York disallows consideration of marital fault in the distribution of marital property. In the absence of "egregious conduct," fault, which includes adultery, may not be deemed a factor in the distribution of marital property in New York. In the seminal decision, *Blickstein v. Blickstein*, 99 A.D.2d 287, 292 (2d Dep't 1984), decided four years after the advent of the Equitable Distribution Law, the Second Department held: "[A]s a general rule, the marital fault of a party is not a relevant consideration under the equitable distribution law in distributing marital property upon the dissolution of a marriage. This is not to deny, however, that there will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered. But such occasions, we would stress, will be very rare and will require proof of marital fault substantially greater than that required to establish a bare prima facie case for matrimonial relief. They will involve situations in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that 'shocks the conscience' of the court thereby compelling it to invoke its equitable power to do justice between the parties."

The *Blickstein* rule is repeated in at least 30 decisions including two from the Court of Appeals: (1) *O'Brien v. O'Brien*, 66 N.Y.2d 576, 589 (1985); and (2) *Howard S. v. Lillian S.*, 14 N.Y.3d 431, 435-36 (2010) ("Domestic Relations Law §236(B)(5)(d) sets forth the factors a court must consider when making an equitable distribution award. The statute does not specifically provide for consideration of marital fault, but does contain a catch-all provision that allows a court to consider 'any other factor which the court shall expressly find to be just and proper' (DRL §236(B)(5)(d)(14)). *We have, however, rejected the notion that marital fault is a 'just and proper' factor for consideration, '[e]xcept in egregious cases which shock the conscience of the court'* (*O'Brien v. O'Brien*, 66 N.Y.2d 576, 589-90 ... (1985)). This rule is based, in part, upon the recognition that marriage is, among other things, an economic partnership and that the marital estate should be divided accordingly. We also observed that 'fault will usually be

difficult to assign and [that] introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues,' "citing *O'Brien* ...); *Linda G. v. James G.*, 156 A.D.3d 25, 29 (1st Dep't 2017), quoting *Howard S.* ("*adultery, by itself, is not egregious conduct*; cf. *Havell v. Islam*, 301 A.D.2d 339, 751 N.Y.S.2d 449 (1st Dep't 2002) (malicious assault of a spouse in the proximity of children amounts to egregious conduct); *Pierre v. Pierre*, 145 A.D.3d 586 (1st Dep't 2016) (stabbing and physically assaulting wife is egregious conduct)."); *Snacki v. Pederson*, 36 Misc.3d 1240(A) (Sup. Ct. 2010) ("Given that the public policy of New York—as a general rule—does not permit this court to factor the marital fault of the parties into the equitable distribution of property they acquired during their marriage ...")

Liquidated damages may neither be a penalty nor compel performance; punitive damages are relegated to the sovereign as vindication of public rights. The plain purpose of an infidelity clause, in the guise of liquidated damages, is to compel compliance or face a predetermined penalty, which violates another strata of public policy. By way of example, the ABA Journal reported the rumored provision in Michael Douglas' and Catherine Zeta-Jones' prenuptial agreement that Zeta-Jones would receive "$2.8 million per year of marriage and an additional $5 million if Douglas cheats." However, state law holds that liquidated damages may neither be punitive, *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427 (1972); *Reads Co. v. Katz*, 72 A.D.3d 1054, 1056-57 (2d Dep't 2010), nor compel performance, *Nat'l Telecanvass Assocs., Ltd. v. Smith*, 98 A.D.2d 796 (2d Dep't 1983).

"Parties to a contract may provide for anticipatory damages in the event of failure to complete performance within the time specified, as long as such agreement is neither unconscionable nor contrary to public policy. (*Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N.Y. 479, 485 ...). Absent statutory authority the imposition of penalties or forfeitures contravenes public policy. (*City of Rye v. Public Serv. Mut. Ins. Co.*, 34 N.Y.2d 470, 472-73...)." *X.L.O. Concrete v. John T. Brady and Co.*, 104 AD2d 181, 183 (1st Dep't 1984), aff'd, 66 N.Y.2d 970 (1985).

"Public policy is firmly set against the imposition of penalties or forfeitures for which there is no statutory authority," *Truck Rent-A-Center v. Puritan Farms 2d*, 41 N.Y.2d 420, 424 (1977). "It is well settled that the imposition of a penalty is exclusively the prerogative of the sovereign and that a contractual provision that operates as a penalty is unenforceable," *Wetzler v. Roosevelt Raceway*, 208 A.D.2d 120, 126 (1st Dep't 1995), citing *City of Rye v. Public Service Mut. Ins. Co.*, 34 N.Y.2d 470 (1974).

"[P]unitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights" ... Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally" (citing *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 315-16 ... and *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 612 ...) ...Moreover, punitive damages are

available where the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious to warrant the additional imposition of exemplary damages." *Reads* [at 1056-57].

The parties' designation does not control, the language is a question of law. Parties' designation whether a provision is a penalty or a liquidated damages clause is not conclusive as to their legal meaning and its interpretation is for the court, *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N.Y. 479, 485-86 (1910). "Whether a contractual provision represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances" *Bates Advertising USA. v. 498 Seventh*, 7 N.Y.3d 115 (2006), *JMD Holding v. Congress Financial Corp.*, 4 N.Y.3d 373 (2005), at the time it was entered into, *Fingerlakes Aquaculturev. Progas Welding Supply*, 34 A.D.3d 1070, 1071 (3d Dep't 2006).

Where damages are either uncertain or unascertainable. In *Truck Rent-A-Center v. Puritan Farms 2d*, 41 N.Y.2d 420, 424 (1977), the Court of Appeals emphasized that "provisions for liquidated damages have value where it would be difficult, if not actually impossible, to calculate the amount of actual damage. In such cases, the contracting parties may agree between themselves as to the amount of damages to be paid upon breach rather than leaving that amount to the calculation of a court or jury"; *Mosler Safe Co.*, 199 N.Y. 479 (1910) ("Where the damages resulting from the breach would be uncertain, or difficult, if not incapable, of ascertainment, then the agreement of the parties liquidating them, in anticipation, will be enforced."); see *Ward v. Hudson River Bldg. Co.*, 125 N.Y. 230, 235 (1891).

'When there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty'. "Where there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty." *Pyramid Centres and Co. Ltd. v. Kinney Shoe*, 244 A.D.2d 625, 627 (3d Dep't 1997); *Willner v. Willner*, 145 A.D.2d 236 (2d Dep't 1989). "When a clause is rejected as being a penalty the recovery is limited to actual damages proven, *JMD Holding*, supra. "The tendency of the courts in doubtful cases is to favor the construction which makes the sum payable for breach of contract a penalty rather than liquidated damages, even where the parties have styled it liquidated damages rather than a penalty." *City of N. Y. v. Brooklyn & Manhattan Ferry Co.*, 238 N.Y. 52 (1924); *Willner*, supra.

Part II studies: (1) foreseeability; (2) tort relief and contractual obligations, public policy; (3) the remedies for a breach of contract versus those for a tort; (4) "New York allows concurrent recovery in tort and contract so long as the defendant has violated a distinct independent legal duty" even from the same facts but there must be an independent duty extraneous to the contract; (5) intentional infliction of emotional distress; and (6) prima facie tort.

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New York Law Journal

Infidelity Clauses in New York, Liquidated Damages, Public Policy, Tort: Part II

ASII avenues of public policy appear to render an infidelity clause unenforceable in New York.

By **Elliott Scheinberg** | June 23, 2022

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Part II continues here with the study whether an infidelity clause may be enforceable in New York.

Foreseeability. Compensation for foreseeable emotional distress is the undeniable motivator behind the infidelity clause. "In ascertaining the reasonable contemplation of the parties, the nature and purposes of the contract and the attending circumstances known to the parties should be considered; and those damages which are not foreign to a disclosed or apparent purpose, or which might reasonably have been apprehended from the violation, or the prevention or avoidance of which was within the fair purview of the agreement, are direct, and should be awarded. It may justly be assumed that such damages were within the contemplation and purposes of the parties in entering into the agreement; and therefore they are only a fair and adequate indemnity to the plaintiff for the loss, and do not subject the defendants to a greater liability than they intended to assume when they made the agreement." *Mortimer v. Otto*, 206 N.Y. 89, 91-92 (1912).

"The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent. It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made ..." *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N.Y. 487 (1875); *Fruition v. Rhoda Lee*, 1 AD3d 124, 125 (1st Dep't 2003).

Tort and contracts, public policy. "A tort obligation is a duty *imposed by law* to avoid causing injury to others." *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995). The "threshold question in tort cases is whether the alleged tortfeasor owe[s] a duty of care to the injured party," *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136 (2002).

"A tort is described in general as a wrong independent of contract. And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with a contract, and that precisely the same state of facts, between the same parties, may admit of an action either ex contractu or ex delicto. In such cases the tort is dependent upon, while at the same time independent of the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract." *Rich v. New York Cent. & H.R.R. Co.*, 87 NY 382, 390 (1882).

"Tort liability ... depends on balancing competing interests: the question remains who is legally bound to protect plaintiffs' right at the risk of liability...To identify an interest deserving protection does not suffice to collect damages from anyone who causes injury to that interest ... Not every deplorable act ... is redressable in damages." *Caronia v. Philip Morris USA*, 22 N.Y.3d 439, 450-51 (2013); *Madden v. Creative Services*, 84 N.Y.2d 738, 746 (1995). "[W]e have been precise and prudent in resolving tort duties, because the significant expansion of a duty 'must be exercised with extreme care, for legal duty imposes legal liability' ... It remains part of this Court's important common law tradition and responsibility to define the orbits of duty." *Trombetta v. Conkling*, 82 N.Y.2d 549, 553 (1993).

"Imposing a new tort duty, and tort liability for compensatory and punitive damages, is unquestionably a 'part of this Court's important common-law tradition and responsibility' ... We exercise that responsibility with care, mindful that a new cause of action will have foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability." *Madden v. Creative Services*, 84 N.Y.2d 738, 746 (1995); *Trombetta v. Conkling,* 82 N.Y.2d 549, 553 (1993) ("[W]e have been precise and prudent in resolving tort duties, because the significant expansion of a duty 'must be exercised with extreme care, for legal duty imposes legal liability' ... It remains part of this Court's important common law tradition and responsibility to define the orbits of duty.")

"[Tort] is 'apart from and independent of promises made and therefore apart from the manifested intention of the parties' to a contract. Thus, defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations. The very nature of a contractual obligation, and the public interest in seeing it

performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim. Where a party has fraudulently induced the plaintiff to enter into a contract, it may be liable in tort ... or where a party engages in conduct outside the contract but intended to defeat the contract, its extraneous conduct may support an independent tort claim." *New York Univ.* [at 316].

Tort obligation emanates from public policy. "Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor's duty is *usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration* ... Common-law experience teaches that duty is not something derived or discerned from an algebraic formula. Rather, it coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis. Chief Judge Cardozo sagely instructed all who have continued to search for this shimmering line of duty in endless fact patterns and juridical relationships with the now familiar axiom that" [t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation "(*Palsgraf v. Long Is. R.R. Co.*, 248 N.Y. 339, 344)." *Palka v. Servicemaster Management Services*, 83 N.Y.2d 579, 584 (1994).

Critically, a contractual relationship "does not give rise to a duty which could furnish a basis for tort liability." *Derago v. Ko*, 189 A.D.3d 1352, 1355 (2d Dep't 2020); *Rakylar v. Washington Mut. Bank*, 51 A.D.3d 995 (2d Dep't 2008) (damages for emotional, psychological, and mental distress and anxiety are unavailable in a contract-related dispute where there is an absence of a duty upon which liability can be based.)

The remedies for a breach of contract versus those for a tort. "'The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. *The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties* ***. Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent and are owed only to the specific individuals named in the contract. Even as to these individuals, the damages recoverable for a breach of the contract duty are limited to those reasonably within the contemplation of the defendant when the contract was made, while in a tort action a much broader measure of damages is applied.'" *Albemarle Theatre v. Bayberry Realty*, 27 A.D.2d 172, 175 (1st Dep't 1967); *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 401 (1975).

"[A contractual remedy] seeks to provide the parties with the benefit of their bargain. It is, in essence, a remedy designed to enforce the agreement, express or implied, [] and to place the[parties], should one of the parties fail to perform in accordance with the agreement, in the

same position they would have been had the agreement been performed." *Martin v. Julius Dierck Equipment Co.*, 43 N.Y.2d 583, 589-90 (1978).

"[A] cause of action for negligence or for strict products liability seeks to provide a remedy for an individual injured because of another's violation of an obligation imposed not by contract, but by law. It does not attempt to afford the injured party the benefit of any bargain, but rather endeavors to place him in the position he occupied prior to his injury ... to make the injured party 'whole.'" (...The pros and cons of pursuing a claim in contract or in tort are discussed in *Niagara Mohawk Power v. Stone & Webster Engineering*, 725 F. Supp. 656 (N.D.N.Y. 1989).)"

New York allows concurrent recovery in tort and contract from the same facts provided the defendant has violated a distinct independent legal duty. "The existence of a contract is not a shield from liability for separately actionable tortious conduct." *Geler v. National Westminster Bank USA*, 770 F. Supp. 210, 212 (S.D.N.Y. 1991). "A contracting party may be charged with a separate tort liability arising from a breach of a duty *distinct from, or in addition to*, the breach of contract." *North Shore Bottling Co. v. C. Schmidt & Sons*, 22 N.Y.2d 171, 179 (1968); *Sommer v. Federal Signal*, 79 N.Y.2d 540 (1992). (Parenthetically, by way of background, "although the principle of liability for tort by one party to a contract to another party is more frequently applied in cases of public carriers, innkeepers and confidential relationships, it is by no means limited thereto." *Albemarle Theatre v. Bayberry Realty*, 27 A.D.2d 172, 174 (1st Dep't 1967)).

"New York law allows concurrent recovery in tort and contract so long as the defendant violates distinct legal duties: one that arises from the contract at issue, and one that arises independently." *Carmania Corp., N.V. v. Hambrecht Terrell Intern.*, 705 F. Supp. 936, 938 (S.D.N.Y. 1989). "Absent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty." *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523 (1984); *Wehringer v. Standard Sec. Life Ins. Co. of New York*, 57 N.Y.2d 757 (1982). "This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract." *Clark Fitzpatrick v. Long Island R. Co.*, 70 N.Y.2d 382, 389 (1987); *Meyers v. Waverly Fabrics, Div. of F. Schumacher & Co.*, 65 N.Y.2d 75, 80 (1985). "If a defendant owes a plaintiff a legal duty independent of contract, he is liable in tort for breaching that duty no matter how similar the factual allegations underlying the contract claim. *Carmania,* n.1, supra, citing *Clark Fitzpatrick*, supra.

"When the duty of one person to another exists solely by virtue of a negotiated agreement, the relationship is normally governed only by the law of contract ... Accordingly, a violation of that duty does not ordinarily give rise to a remedy in tort. Nevertheless, if the conduct of one party would constitute a tort in the absence of the contract, then that cause of action is not extinguished simply because some aspects of the relationship between the parties happen also to be governed by an independent agreement. International Ore & Fertilizer v. SGS Control Services, 743 F. Supp. 250, 258 (S.D.N.Y. 1990). Cf. *Apple Records v. Capitol Records*, 137 A.D.2d 50, 55-56 (1st Dep't 1988).

"In disentangling tort and contract claims, we have *also* considered the nature of the injury, the manner in which the injury occurred and the resulting harm." *Sommer v. Federal Signal*, 79 N.Y.2d 540, 552 (1992). *Sommer* examines whether there was an "abrupt, cataclysmic occurrence" such as in "*Bellevue S. Assoc. v. HRH Const.*, 78 N.Y.2d 282 (1991) or the general contractor in *Clark-Fitzpatrick*, *810* is not seeking the benefit of its contractual bargain, but instead seeks recovery of damages for a fire that spread out of control–the sort of 'abrupt, cataclysmic occurrence' referred to in *Bellevue*...where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory (citing *Clark-Fitzpatrick*, supra)."

"Where a party is merely seeking to enforce its bargain, a tort claim will not lie." *New York Univ.* (at 316).

Intentional infliction of emotional distress. "The tort of intentional infliction of emotional distress (IIED) is a departure from the common law," *McIntyre v. Manhattan Ford, Lincoln Mercury*, 256 A.D.2d 269, 270 (1st Dep't 1998), and is inapplicable to infidelity clauses. IIED is comprised of four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress ... 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993); *Chanko v. Am. Broadcasting Companies*, 27 N.Y.3d 46, 56 (2016); *Freihofer v. Hearst*, 65 N.Y.2d 135, 143 (1985).

"Unlike other intentional torts, [IIED] does not proscribe specific conduct ... but imposes liability based on after-the-fact judgments about the actor's behavior. [This] broadly defined standard of liability is both a virtue and a vice. The tort is as limitless as the human capacity for cruelty ... Consequently, the 'requirements of the rule are rigorous, and difficult to satisfy.'" *Howell* [at 122]. Those few claims of IIED that have been upheld in the First Department "were supported by allegations detailing long-standing campaign of deliberate, systematic and malicious harassment of the plaintiff." *Seltzer v. Bayer*, 272 A.D.2d 263, 264-65 (1st Dep't 2000).

"IIED is 'a highly disfavored tort under New York law,' and such claims generally 'do not survive dispositive motions' ...This is because 'New York sets a high threshold for conduct that is 'extreme and outrageous' enough to constitute' IIED." *Allam v. Meyers*, 2011 WL 721648 (S.D.N.Y. 2011). Emotional distress "is a theory of recovery that is to be invoked only as a last resort." *McIntyre v. Manhattan Ford, Lincoln-Mercury*, 256 A.D.2d 269, 270 (1st Dep't 1998). "Strong public policy considerations militate against allowing recovery for IIED when a claim arises out of the interpersonal relationships in a matrimonial context." *Nacson v. Semmel*, 292 A.D.2d 432 (2d Dep't 2002). *Williams v. Lynch*, 245 AD2d 715 (3d Dep't 1997) did not involve an "atypical" matrimonial dispute. The Appellate Division noted that IIED requires a "level of atrocity or outrageousness."

Prima facie tort. In *Freihofer v. Hearst*, 65 N.Y.2d 135, 142-44 (1985), the Court of Appeals stated:

(1) "Prima facie tort affords a remedy for 'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful'... The elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful ... A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages; and

(2) Prima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its own legs." ... Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort ... However, where a traditional tort remedy exists, a party will not be foreclosed from pleading, as alternative relief, a cause of action for prima facie tort ... [W]e recognize that 'there may be instances where the traditional tort cause of action will fail and plaintiff should be permitted to assert this alternative claim[.]'"

"[P]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs" ... [P]rima facie tort ... the complaining party must have suffered specific and measurable loss, which requires an allegation of 'special damages, i.e., 'the loss of something having economic or pecuniary value' ... allegations in the complaint, which generally amounted to a claim of emotional distress, were insufficient to allege special damages." *Berland v. Chi*, 142 AD3d 1121, 1123 (2d Dep't 2016). The injury sustained from a breach of an infidelity clause is neither economic nor pecuniary.

Conclusion

It being settled law that "private parties, no matter how explicit, cannot [by agreement] change the public policy of this state," *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981), all avenues of public policy appear to render an infidelity clause unenforceable in New York.

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