

# Delaware

---

**By: William B. Larson, Jr. and Wade A. Bredin**



*William B. Larson, Jr. is a partner in the Wilmington, Delaware office of MG+M The Law Firm. He is a well-rounded litigator, counselor, problem solver and trial attorney with extensive experience in Delaware general and commercial litigation; real estate litigation; trusts and estates litigation; local government matters; and national products liability litigation.*



*Wade Bredin is an associate at MG+M The Law Firm. He works across a wide spectrum of complex civil litigation matters, including national products liability litigation, real property litigation, trusts and estates matters, and commercial litigation. He also works on local government matters. He has experience in all phases of litigation, from advising on pre-litigation disputes to working on appellate matters.*

## **I. Public Policy Considerations**

Public policy in Delaware is unique in regard to the imposition of certain types of damages because of its status as home to many of the nation's largest corporations and the Court of Chancery's jurisdiction over many corporate matters and equitable claims and remedies. For example, Delaware's approach to the application of damages for breaches of fiduciary duties, such as in cases where a fiduciary is found to have acted in a way which breaches

the duty of loyalty, is to impose remedies as necessary to correct the breach and to discourage future breaches, finding all presumptions and inferences against the breaching party.

In such cases, the Delaware Court of Chancery has held that damages for such a breach "justify loosening normally stringent requirements of causation and

damages,”<sup>1</sup> and emphasized that “[a]s the Delaware Supreme Court long ago noted, the duty of loyalty does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for purposes of removing all temptation, extinguishes all possibility of profit flowing from the breach of confidence imposed by the fiduciary relation.”<sup>2</sup>

To illustrate this point, the Court of Chancery wrote:

Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly. Damages must be logically and reasonably related to the harm or injury for which compensation is being awarded. But as long as that connection exists, the law does not require certainty in the award of

damages where a wrong has been proven and injury established.... Once a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer.<sup>3</sup>

Another example of this tendency is Delaware’s policy heavily favoring the award of damages over an award of specific performance—courts have held plainly that “if damages would provide adequate relief, then specific performance is not available.”<sup>4</sup>

Delaware’s approach to damages is heavily influenced by its public policy towards protecting the sanctity of fiduciary obligations and enforcing contracts between and among competent parties. Delaware’s “fundamental public policy of contractual enforcement is not absolute and will kneel to competing public policies of overriding concern.”<sup>5</sup>

<sup>1</sup> *In re Primedia Inc. Deriv. Litig.*, 910 A.2d 248, 262 (Del. Ch. 2006) (internal quotations omitted).

<sup>2</sup> *See id.*, quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

<sup>3</sup> *Basho Technologies Holdco B, LLC v. Georgetown Basho Investors, LLC*, C.A. No. 11802, 2018 WL 3326693, at \*50 (Del. Ch. July 6, 2018) (internal quotations omitted).

<sup>4</sup> *See, for example*, 26 *Capital Acquisition Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 464 (Del. Ch. 2023); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010); *Morabito v. Harris*, 2002 WL 550117, at \*3 (Del. Ch. Mar. 26, 2002).

<sup>5</sup> *Unbound Partners Ltd. P'ship v. Invoy Holdings Inc.*, 251 A.3d 1016, 1032 (Del. Super. 2021).

## II. Adoption of the UCC

Delaware has adopted Articles III (Negotiable Instruments), IV (Bank Deposits and Collections), and VIII (Investment Securities) of the Universal Commercial Code (“UCC”).<sup>6</sup> The Delaware Uniform Commercial Code (“Delaware UCC”) has Articles I-XII which mirror those of the UCC but have state-specific amendments in each article.<sup>7</sup>

Delaware maintains its own wealth of precedent to guide the application of certain awards of damages and their calculation as opposed to relying on standard UCC methods—that being said, Delaware courts will often calculate damages in accordance with UCC principles.

## III. Compensatory Damages

Under Delaware law, compensatory damages are the “traditional measure of damages”<sup>8</sup> and are “measured by the plaintiff’s ‘out-of-

pocket’ actual loss” as the result of some injury caused by the Plaintiff.<sup>9</sup> Delaware’s approach to the calculation of compensatory damages, as that of most states, focuses on the difference between the intrinsic value of the bargain contracted for and the benefit actually received by the Plaintiff.<sup>10</sup> Compensatory damages are then typically lessened by the cost saved by the non-breaching party by their not having performed their obligations under the contract.

Like most states, Delaware requires that the non-breaching party use reasonable diligence in mitigating damages stemming from a breach of contract “if it is feasible to do so.”<sup>11</sup> Under Delaware law, questions regarding the extent and reasonableness of mitigation of damages “are factual and therefore properly determined by the trier of fact.”<sup>12</sup>

In contrast to compensatory damages, the Court of Chancery

<sup>6</sup> See 6 DEL. C. §§ 3-101 *et seq.*, 4-101 *et seq.*, 8-101 *et seq.* (last updated August 2023).

<sup>7</sup> See generally, 6 DEL. C. §§ 1 through 12.

<sup>8</sup> *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000).

<sup>9</sup> *In re Rural/Metro Corp. S’holders Litig.*, 102 A.3d 205, 224 (Del. Ch. 2014).

<sup>10</sup> *Id.*

<sup>11</sup> *Norkei Ventures, LLC v. Butler-Gordon, Inc.*, 2008 WL 4152775, at \*2 (Del. Super. Aug. 28, 2008), quoting *Highline Fin. Servs., Inc. v. Rooney*, 1996 WL 663100 (Del. Super. Oct. 25, 1996).

<sup>12</sup> *Mizel v. Xenonics, Inc.*, 2007 WL 4662113, at \*8 (Del. Super. Oct. 25, 2007). See also *Guttridge v. Iffland*, 889 A.2d 283 (Del. 2005) (summary judgment on the issue of damages was inappropriate because “[f]indings relating to damages and to mitigation of damages are issues to be determined by the trier of fact”).

sometimes issues rescissory damages when the equitable remedy of rescission is “impractical.”<sup>13</sup> Rescissory damages differ from compensatory damages in that the loss can be measured at the time of judgment rather than at the time of the injury.<sup>14</sup>

#### IV. Consequential or “Special” Damages

Consequential damages (sometimes known as special damages in Delaware) are defined under Delaware law as those damages which result from the breach’s effect on other contracts or relationships of the injured party.<sup>15</sup> Accordingly, “if the party’s expectation of profit is incidental to the performance of the contract,” then “the loss of that expectancy is consequential.”<sup>16</sup> The distinction between direct and consequential damages are “a foreseeable and highly probably consequence of breach.”<sup>17</sup>

Delaware law permits the award of consequential damages in

occurrences where the act or negligence of a tortfeasor(s) results in further damages to the injured party.<sup>18</sup> In order for consequential damages to be duly awarded, the damages resulting from the wrongful act or negligence of the tortfeasor must have been reasonably foreseeable by them in the first instance.<sup>19</sup>

A claimant seeking an award of consequential damages must be able to trace such damages to the wrongful act and show that the damages were a direct result of the breach.<sup>20</sup> Finally, a contractual restriction on consequential damages, standing alone, does not preclude the recovery of lost profits under Delaware law—the analysis is often case-specific and can blur the line between consequential and compensatory damages.<sup>21</sup>

#### V. Incidental Damages

Incidental damages are typically awarded in Delaware where “the decree [of specific performance] as awarded does not give complete and

<sup>13</sup> *Basho Technologies*, 2018 WL 3326693, at \*49.

<sup>14</sup> *In re Orchard Enterprises, Inc. Stockholder Litig.*, 88 A.3d 1, 38 (Del. Ch. 2014).

<sup>15</sup> *See Bonanza Restaurant Co. v. Wink*, 2012 WL 1415512, at \*3 (Del. Super. 2012).

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

<sup>17</sup> *Id.* (loss of royalty fees was “inevitable” and “flowed necessarily” from the breach).

<sup>18</sup> *See generally Falcon Tankers, Inc. v. Litton Systems, Inc.*, 380 A.2d 569, 573 (Del. Super. 1977) (defects in a product can entitle the purchaser to consequential damages stemming from the actionable negligence of the manufacturer).

<sup>19</sup> *Falcon Tankers, Inc. v. Litton Systems, Inc.*, 355 A.2d 898 (Del. Super. 1976).

<sup>20</sup> *Wink*, 2012 WL 1415512, at \*3.

<sup>21</sup> *See id.*

full relief.”<sup>22</sup> Because Delaware courts typically avoid granting specific performance except under circumstances where it is clearly warranted, the award of incidental damages is relatively rare in Delaware.

## VI. Punitive Damages

Delaware permits the award of punitive damages for the purpose of “punish[ing] a party for outrageous conduct and to deter a party, and others like it from engaging in similar conduct in the future.”<sup>23</sup> Further, Delaware courts will apply a presumption that, if a plaintiff “has been made whole for his injuries by compensatory damages...punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”<sup>24</sup>

Delaware courts have emphasized Delaware’s adherence to the principle of declining to “impose a bright-line ratio which a punitive damage award cannot exceed.”<sup>25</sup> However, Delaware courts have also been willing to reduce the award of punitive damages which “shock the Court’s conscience,” noting that “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”<sup>26</sup> In so doing, the court held that an award in a ratio of 3:1 of punitive to compensatory damages was not inappropriate.<sup>27</sup>

The Court of Chancery, when hearing only equitable claims, does not have authority to issue punitive damages.<sup>28</sup> The court has held as recently as 2022 that “[a]bsent a statutory grant of authorization, the Delaware Court of Chancery does not have jurisdiction to assess punitive damages.”<sup>29</sup> However,

<sup>22</sup> *Shaw v. Thompson*, 2024 WL 4903555, at \*5 (Del. Ch. Nov. 27, 2024), quoting *Tri State Mail Assocs. v. A. A. R. Realty Corp.*, 298 A.2d 368, 371 (Del. Ch. 1972) (citing *Pomeroy*, EQUITY JURISPRUDENCE 5th ed. Vol. 5, § 237(b)).

<sup>23</sup> *Barba v. Boston Scientific Corp.*, 2015 WL 6336151 (Del. Super. 2015).

<sup>24</sup> *Chamberlain v. Pyle*, 2023 WL 1771013, at \*4 (Del. Super. Feb. 6, 2023).

<sup>25</sup> *See, for example, Barba*, 2015 WL 6336151, quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Metro Storage Int’l LLC v. Harron*, 275 A.3d 810, 886 (Del. Ch. 2022).

<sup>29</sup> *See Beals v. Wash. Int’l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (“I therefore hold that Chancery historically and traditionally did not enforce forfeitures or penalties and that this was the rule of law in the high court of chancery in England in 1776 and is therefore the rule in this Court today.”).

when a statute grants the court the power to award punitive or exemplary damages, then the Court of Chancery can exercise that authority.<sup>30</sup>

### VII. Liquidated Damages

Delaware law allows for liquidated damages pursuant to contract. In Delaware, liquidated damages provisions embody “the parties’ best guess of the amount of injury that would be sustained in a contractual breach” and serve to make “certain and definite damages which would otherwise be uncertain and not susceptible of proof.”<sup>31</sup> Delaware law is quite clear that liquid damages provisions must be calculated into the contract in the first instance upon a good faith effort to calculate real expected damages—should the court find

that the calculation is a penalty, the court will consider the provision void as against public policy.<sup>32</sup>

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

Prejudgment interest is awarded as a matter of right in Delaware in cases at law, but not is not awarded as a matter of right in cases at equity.<sup>33</sup> “In any tort action for compensatory damages in the Superior Court...seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded...commencing from the date of injury.”<sup>34</sup>

Under Delaware law, “a party is entitled to post-judgment interest until the date of payment on an amount that includes both the amount of the judgment and the amount of prejudgment interest.”<sup>35</sup>

<sup>30</sup> See, for example, *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at \*28 and n.318 (Del. Ch. Jan. 29, 2010) (awarding exemplary damages where authorized by the Delaware Uniform Trade Secret Act).

<sup>31</sup> *Unbound Partners*, 251 A.2d at 1032, quoting *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 649 (Del. 2006).

<sup>32</sup> See *id.* (“[t]he distinction between a penalty and liquidated damages clause is significant—if a provision is ... a penalty, it is void as against public policy...; if the provision is a true liquidated damages provision, it will be enforced according to its own terms.”).

<sup>33</sup> *Cignex Datamatics, Inc. v. Lam Research Corp.*, 2021 WL 212692 (D. Del. Jan. 21, 2021); see *Delaware Trial Handbook* § 28.10; see also *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 476 (Del. 1992).

<sup>34</sup> *Salt Meadows Homeowners Assc., Inc. v. Zonko Builders, Inc.*, 312 A.3d 195, 203 (Del. 2024).

<sup>35</sup> *Fortis Advisors, LLC v. Dematic Corp.*, 2023 WL 2967781, at \*2 (Del. Super. April 13, 2023) (citing several Court of Chancery

Post-judgment interest is assessed on the entire amount of the judgment, rather than just the verdict or damages award.<sup>36</sup> It begins accruing on the date of judgment, and not when the underlying liability arose.<sup>37</sup> In fact, post-judgment interest actually accrues on pre-judgment interest, and is not considered “compound interest.”<sup>38</sup>

Delaware statute establishes how the legal interest rate should be calculated in the absence of a contrary contract provision.<sup>39</sup> It provides that the legal interest rate “is 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due.” To establish the legal rate of interest, therefore, 5% should be added to the Federal reserve discount rate (including any applicable Federal Reserve surcharge). Both pre and post judgment interest are to be awarded at the legal rate of interest in effect at the time the cause of action arose, unless the parties had previously contracted for a different amount.<sup>40</sup>

---

opinions); *see also* Skretvedt v. E.I. DuPont De Nemours, 372 F.3d 193, 217 (3d Cir. 2004) (under a statute similar to 6 Del. C. § 2301, “postjudgment interest should be calculated based upon the underlying judgment and award of prejudgment interest.”).

<sup>36</sup> NGL Energy Partners LP v. LCT Cap., LLC, 319 A.3d 335 (Del. 2024).

<sup>37</sup> *Id.*

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

<sup>39</sup> *See* 6 DEL. C. § 2301(a).

## IX. Attorneys’ Fees

Delaware follows the American Rule, under which each party is typically responsible for its own litigation costs.<sup>41</sup> In cases where a governing contract explicitly institutes a fee-shifting regime (also known as a “prevailing party” provision), Delaware courts will endeavor to enforce such a provision.<sup>42</sup>

Delaware courts have also recognized a right to shift attorneys’ fees onto a party that is found to have acted in bad faith in bringing or continuing litigation.<sup>43</sup> In “bad faith” cases, the party seeking attorneys’ fees must demonstrate by clear evidence that the opposing party acted in “subjective bad faith” which may include actions such as unnecessarily prolonging or delaying litigation, falsifying records, or asserting frivolous claims.<sup>44</sup>

“Common fund” fees are commonly awarded in Delaware where a lawsuit provides some cost-saving benefit to a corporation: “an award of fees to the plaintiffs’

<sup>40</sup> *See id.*

<sup>41</sup> *See* SIGA Technologies, Inc. v. PharmAthene, Inc., 67 A.3d 330, 352 (Del. 2013).

<sup>42</sup> *See id.*, quoting Mahani v. Edix Media Grp., Inc., 935 A.2d 242, 245 (Del. 2007) (citing Chrysler Corp. v. Dann, 223 A.2d 384, 386 (Del. 1966)).

<sup>43</sup> Johnston v. Arbitrium (Cayman Islands) Handels AG, 720 A.2d 542, 545 (Del. 1998).

<sup>44</sup> *See, for example*, Shawe v. Elting, 157 A.3d 142, 149 (Del. 2017).

counsel is justified if the action conferred some benefit upon the corporation and the action, when filed, was meritorious and had a causal connection to the conferred benefit.”<sup>45</sup>

The landmark ruling regarding fees of this kind is *Sugarland Industries*.<sup>46</sup> There, the court strengthened Delaware precedent that plaintiff’s attorneys are entitled to fees equal to a percentage of the “value of the benefit” received by the stockholders of a corporation as a result of changes spurred by the lawsuit.<sup>47</sup>

## X. Reliance Damages

Delaware courts define reliance damages as the “quintessential remedy for promissory estoppel” and as the “reimbursement of the expenditures and losses incurred by the promisee with the value of the

promised performance.”<sup>48</sup> The amount of damages awarded alongside a finding of promissory estoppel should equal the amount expended by the non-breaching party in preparing to perform or actually performing the contract.

## XI. Unjust Enrichment

Under Delaware law, “[t]he elements of unjust enrichment are (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.”<sup>49</sup>

Unjust enrichment is a recognized legal fiction which permits the recovery of damages under an arrangement where a contract may not be found to have existed between the Parties. Accordingly, “when the complaint alleges an express, enforceable contract that controls the parties’ relationship...a claim for unjust enrichment will be dismissed.”<sup>50</sup> At the same time, however, Delaware courts have cautioned against bringing claims for unjust

<sup>45</sup> *In re Triarc Cos., Inc. Shareholder Litig.*, 2006 WL 903338 (Del. Ch. Mar. 29, 2006), quoting *Dann*, 223 A.2d at 386-387 (internal quotes omitted).

<sup>46</sup> *Sugarland Industries, Inc. v. Thomas, et al.*, 420 A.2d 142 (Del. 1980).

<sup>47</sup> See *In re Anderson Clayton S’holders Litig.*, 1988 WL 97480, at \*3 (Del. Ch. Sept. 19, 1898) (“[t]his court has traditionally placed

greatest weight upon the benefits achieved by the litigation.”).

<sup>48</sup> *Ramone v. Lang*, 2006 WL 905347, at \*16 (Del. Ch. 2006), citing CORBIN ON CONTRACTS § 8.8.

<sup>49</sup> *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

<sup>50</sup> *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 891 (Del. Ch. 2009)

enrichment to supersede or avoid unfavorable rulings on a contract: “[u]njust enrichment cannot be used to circumvent basic contract principles recognizing that a person not party to a contract cannot be held liable to it.”<sup>51</sup>

In Delaware, a claim for unjust enrichment is considered a legal remedy.<sup>52</sup> It should be noted, however, that a plaintiff need establish some other basis for equitable jurisdiction if she is to bring such a claim in the Court of Chancery, or establish the absence of some other remedy at law: “If a plaintiff seeks to pursue a claim for unjust enrichment in the Court of Chancery and has no other basis for equitable jurisdiction, then the plaintiff must establish the absence of a remedy at law to establish equitable jurisdiction.”<sup>53</sup>

---

<sup>51</sup> *Id.* at 892 (cleaned up) (rejecting plaintiff’s attempts to “use a claim for unjust enrichment to extend the obligations of a contract to [defendants] who are not parties to the contract.”).

<sup>52</sup> *See* State ex rel. Jennings v. Monsanto Co., 299 A.3d 372, 391 (Del. 2023).

<sup>53</sup> *See generally* Garfield on behalf of ODP Corp. v. Allen, 277 A.3d 296, 351 (Del. Ch. 2022).