

# District of Columbia

---

**By: Andrew Gendron**



*Andrew Gendron is a partner in the Baltimore office of Lewis Brisbois Bisgaard & Smith LLP. He has tried nearly 100 cases to verdict, practiced throughout the United States, and is skilled in handling mass and class actions and multidistrict litigation in product liability, toxic tort, environmental, and stockholder/corporate-governance matters, as well as actions concerning fiduciary duties and professional liability.*



## **A. Adoption of the UCC**

The District of Columbia adopted the Uniform Commercial Code in 1965.<sup>1</sup> In the D.C. Code, the UCC comprises Subtitle 1 of Title 28, §§ 28:1-101 – 28:12-207.<sup>2</sup>

## **B. Compensatory Damages**

In a breach-of-contract action, the non-breaching party may recover damages intended to cover the actual loss suffered due to the breach. These include damages that arise naturally from the breach or those that were in the contemplation of both parties at the

---

<sup>1</sup> Potomac Plaza Terraces, Inc. v. QSC Prod., Inc., 868 F. Supp. 346, 351 n.4 (D. D.C. 1994).

<sup>2</sup> Due to D.C.'s jurisprudential connection to Maryland, the two sections may share a number of entries in common. *See* Solid Rock Church, Disciples of Christ v. Friendship Public Charter School, Inc., 925 A.2d 554, 560-561 (D.C. 2007) (quoting *West v. United States*, 866 A.2d 74, 79 (D.C. 2005)) (District of Columbia courts “may look to Maryland common law for guidance since ‘the District of Columbia derives its common law from Maryland as of 1801.’”); *In re C.A.P.*, 633 A.2d 787, 790 (D.C. 1993) (“District derives its common law from Maryland and decisions

of Maryland courts on questions of common law are authoritative in the absence of District authority”) (citation omitted); *see* D.C. CODE § 45-401(a) (that the “common law, all British statutes in force in Maryland on February 27, 1801, [and] the principles of equity and admiralty, ... in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code”). Except as otherwise expressly stated, this summary of District of Columbia damages law does not address statutory causes of action.

time the contract was made as the probable result of a breach.<sup>3</sup> “The recovery ‘may also extend to loss of business income or profits suffered through collateral contracts or from collateral sources if such damages were otherwise foreseeable and proved with certainty.’ ‘[M]athematical precision’ is not necessary, and lost goodwill may also be included as damages. Compensatory damages can also cover loss of business income or profits if such damages were foreseeable and proved with certainty.”<sup>4</sup>

“[F]ixed expenses need not be deducted from gross income to arrive at lost profit properly recoverable” for breach of contract.<sup>5</sup>

“The doctrine of avoidable consequences, also known as the duty to mitigate damages, bars

recovery for losses suffered by a non-breaching party that could have been avoided by reasonable effort and without risk of substantial loss or injury.” “The burden of proving that the losses could have been avoided rests with the breaching party.” “It is not necessary for the plaintiff to take steps to avoid losses, even though the defendant has actually committed a breach, so long as the breaching party has not definitely repudiated the contract and continues to assure the plaintiff that performance will take place.”<sup>6</sup>

Compensatory damages may be recoverable under, *inter alia*, the following theories in the District of Columbia:

- account stated;<sup>7</sup>
- aiding and abetting;<sup>8</sup>

<sup>3</sup> Mark Keshishian & Sons, Inc. v. Washington Square, Inc., 414 A.2d 834, 841-842 (D.C. 1980) (quoting *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 832 (D.C. 1972), *cert. denied*, 409 U.S. 1049 (1972) (as amended on denial of rehearing en banc) (quoting *Fowler v. A & A Co.*, 262 A.2d 344, 349 (D.C. 1970) (citing *Hadley v. Baxendale*, 9 Exch. 341 (1854))).

<sup>4</sup> *Id.* at 842 (quoting *Sears*, 290 A.2d at 832 (citing 22 Am. Jur. 2d *Damages* §§ 61-62 (1965)); *id.* at 833 (citing *Spar v. Obwoya*, 369 A.2d 173, 180 (D.C. 1977)).

<sup>5</sup> See *Sloane, Inc. v. House & Assocs., Inc.*, 311 Md. 36, 50 (Md. 1987); *but see NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr.*, 957 A.2d 890, 905 n.48 (D.C. 2008) (citing as *obiter dictum* *Cromartie v. Carteret Sav. & Loan*, 649 A.2d 76, 83 (N.J. Super 1994), for the proposition that “Lost profits’ signifies the difference between gross income and the

costs or expenses which had to be expended to produce the income. Proof of the relevant costs or expenses is not a matter of mitigation. It is part of the damage case of the party seeking recovery for lost profits.”).

<sup>6</sup> See *Bolton v. Crowley, Hoge & Fein, P.C.*, 110 A.3d 575, 586 (D.C. 2015) (quoting *Crough, Inc. v. Dep’t of Gen’l Servs. of the District of Columbia*, 572 A.2d 457, 466-467 (D.C. 1990); 11-57 CORBIN ON CONTRACTS, § 57.11 (Matthew Bender & Co. 2014)).

<sup>7</sup> See *First Nat. Realty Corp. v. Impact Advert. Inc.*, 206 A.2d 579, 580 (D.C. 1965) (“The essential of an account stated is that ‘[a] balance must have been struck in such circumstances as to import a promise of payment on the one side and acceptance on the other.’”).

<sup>8</sup> Liability for aiding and abetting requires an underlying tortious act by a principal tortfeasor, *Alleco Inc. v. Harry & Jeanette*

- breach of contract;<sup>9</sup>
- breach of fiduciary duty;<sup>10</sup>
- breach of warranty;
- civil conspiracy;<sup>11</sup>
- defamation;<sup>12</sup>

---

Weinberg Found., 340 Md. 176, 201 (Md. 1995), and “a lesser showing that the aider and abettor engaged in conduct knowing that the [underlying] criminal (or tortious) act would be the natural consequence of his conduct,” *Saadeh v. Saadeh, Inc.*, 150 Md. App. 305, 327-328 (Md. App. Ct. 2003). *See Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711 n.11 (D.C. 2013) (citing *Alleco*, 340 Md. at 200-201). An aider and abettor is jointly and severally liable as a principal. *Duke v. Feldman*, 245 Md. 454, 457 (Md. 1967).

<sup>9</sup> *See Mark Keshishian & Sons*, 414 A.2d at 841-842.

<sup>10</sup> *See Pietrangelo*, 68 A.3d at 711-712 (citing *Alleco*, 340 Md. at 201) (“A predicate to any liability based on a theory of an inducement of a breach of a fiduciary duty is the breach of fiduciary duty by the principal.”).

<sup>11</sup> *See Wiggins v. Hitchens*, 853 F. Supp. 505, 513 (D. D.C. 1994) (quoting *Waldon v. Covington*, 415 A.2d 1070, 1074 n.14 (D.C. 1980); *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983)); *Okusami v. Psychiatric Institute of Washington, Inc.*, 959 F.2d 1062, 1066 (D.C. Cir. 1992) (citing *Halberstam*, 705 F.2d at 487) (“It is well established that ‘there is no recognized independent tort action for civil conspiracy in the District of Columbia’; however, District of Columbia law ‘acknowledges the concept of civil conspiracy.’ ‘Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather it is a means for establishing vicarious liability for the underlying tort.’ Under District of Columbia law, the elements of a claim for civil conspiracy are ‘an agreement to do an

unlawful act or a lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act.’ Moreover, ‘[t]o establish liability, the plaintiff also must prove that an unlawful overt act produced an injury and damages.’ An agreement may be inferred from the underlying facts.”).

<sup>12</sup> *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (“It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define ‘actual injury,’ as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.”); *but see Indigenous People of Biafra v. Sheehan*, 643 F. Supp.3d 140, 146 (D. D.C. 2022) (quoting *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985)) (stating that “[a] company suing for defamation ... may only recover damages in the form of lost profits.”) (cleaned up).

- fraud (both actual<sup>13</sup> and constructive);<sup>14</sup>
- misappropriation of trade secrets;<sup>15</sup>
- negligent misrepresentation;<sup>16</sup>
- replevin/detinue;<sup>17</sup>
- trover and conversion;<sup>18</sup>

<sup>13</sup> See *Attias v. CareFirst, Inc.*, 365 F. Supp.3d 1, 10 (D. D.C. 2019), *on reconsideration in part*, 518 F. Supp.3d 43 (D. D.C. 2021) (quoting *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 860-861 (D.C. 1999) (citing *Dresser v. Sunderland Apartments Tenants Ass’n, Inc.*, 465 A.2d 835, 839 (D.C. 1983))) (“‘provable damages’ is also an ‘essential element[ ] of common law fraud’ in the District”).

<sup>14</sup> See *id.* (quoting *De May v. Moore & Bruce, L.L.P.*, 584 F. Supp.2d 170, 185 (D. D.C. 2008) (quoting *Nguyen v. Voorthuis Opticians, Inc.*, 478 F. Supp.2d 56, 64 (D. D.C. 2007)) (“‘Constructive fraud differs from actual fraud only in that the misrepresentation of material fact is not made with the intent to mislead, but is made innocently or negligently.’ As such, constructive fraud also requires actual damages.”).

<sup>15</sup> Under the D.C. Uniform Trade Secrets Act, D.C. CODE § 36-401 *et seq.*, “[d]amages may include both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation that is not taken into account in computing actual loss.” D.C. CODE § 36-403. “Instead of damages measured by other methods, the damages caused by misappropriation may be measured by the imposition of liability for a reasonable royalty for the unauthorized disclosure or use of a trade secret by a misappropriator.” *Id.* “The Court first assesses whether Plaintiffs have pointed to any documents that satisfy the criteria for trade secrets. The Court then analyzes whether the alleged misappropriation of those documents caused either actual loss or unjust enrichment.” *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 82 F. Supp.3d 344, 360 (D. D.C. 2015).

<sup>16</sup> See *United States ex rel. Morsell v. NortonLifeLock, Inc.*, 651 F. Supp.3d 95, 200 (D. D.C. 2023), *opinion amended and supplemented sub nom. United States ex rel. Morsell v. Gen Digital, Inc.*, 712 F. Supp.3d 14 (D. D.C. 2024) (quoting Restatement (Second) of Torts § 552B (1977)) (“According to the Second Restatement, ‘[t]he damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause,’ which includes ‘the difference between the value of what he has received in the transaction and its purchase price or other value given for it’ or ‘pecuniary loss suffered otherwise as a consequence of the plaintiff’s reliance upon the misrepresentation.’ . . . [N]egligent misrepresentation does not provide “benefit-of-the-bargain” damages.”).

<sup>17</sup> See *generally*, D.C. CODE § 16-3701 *et seq.* For action in replevin, damages awardable to plaintiff “shall be the full value of the goods, if eloiigned by the defendant, including, in every case, the loss sustained by the plaintiff by reason of the detention,” D.C. CODE § 16-3710; if judgment is for the defendant, then the judgment “shall be that the goods, if delivered to the plaintiff, be returned to the defendant with damages for their detention, or, on failure, that the defendant recover against the plaintiff and [plaintiff’s] surety the damages sustained by [plaintiff],” D.C. CODE § 16-3711. For detinue, see *Katz v. Myers*, 114 A.2d 75, 76 (D.C. 1955) (“damages for detention of personal property are not strictly limited to rental value, but are in their nature compensation to the owner for being wrongfully deprived of the use and enjoyment thereof”).

<sup>18</sup> See *Whittingham v. Owen*, No. 27287, 8 Mackey 277, 1890 WL 11343, at \*1 (D.C. Oct. 21, 1890) (citations omitted) (“The well-

- tortious interference with prospective advantage;<sup>19</sup>
- tortious interference with contract;<sup>20</sup>
- unfair competition;<sup>21</sup> and
- private nuisance.<sup>22</sup>

---

settled rule of damages in trover is ‘the value of the goods at the time of the conversion, and interest from that time.’”); *Buchheit v. Palestine Liberation Org.*, 388 F.3d 346, 350 (D.C. Cir. 2004) (quoting *Bowler v. Joyner*, 562 A.2d 1210, 1213 (D.C.1989) (quoting *Duggan v. Keto*, 554 A.2d 1126, 1137 (D.C. 1989))) (“The ‘traditional standard for calculating damages for conversion is the fair market value of the property at the time of the conversion.’”).

<sup>19</sup> See *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp.2d 86, 100 (D. D.C. 2009) (quoting Restatement (Second) of Torts § 774A (1979)) (“the resultant damage element of this tort includes ‘the pecuniary loss of the benefits of the ... prospective relation ... [and] consequential losses for which the interference is the legal cause’”); *PM Servs. Co. v. Odoi Assocs., Inc.*, No. 03-1810, 2006 WL 20382, at \*35 (D. D.C. Jan. 4, 2006) (plaintiff demonstrated a consequential loss, and thus injury, due to the plaintiff’s not being awarded the contract that was the subject of the litigation); *Williams v. Fed. Nat’l Mort. Ass’n*, No. 05-1483, 2006 WL 1774252, at \*9 (D. D.C. Jun. 26, 2006) (plaintiff satisfied the resultant damage element by alleging a pecuniary loss due to the defendants’ interference).

<sup>20</sup> See *Alemayehu v. Abere*, 199 F. Supp.3d 74, 86 (D. D.C. 2016) (citing Restatement (Second) of Torts § 774A (1979)) (“if Mr. Alemayehu prevails in his interference claim, he is entitled to all damages flowing from Mr. Tilahun’s interference – even if those damages are prospective in nature”);

Restatement (Second) of Torts § 774A (1979) (damages for interference include “the pecuniary loss of the benefits of the contract”; “consequential losses for which the interference is a legal cause”; and “emotional distress or actual harm to reputation, if they are reasonably to be expected to result”); see also *Nat’l R.R. Passenger Corp.*, 592 F. Supp.2d at 100 (applying the Restatement’s approach).

<sup>21</sup> See *Hanley-Wood LLC v. Hanley Wood LLC*, 783 F. Supp. 2d 147, 153 (D.D.C. 2011) (citing *Furash & Co. v. McClave*, 130 F. Supp.2d 48, 57 (D. D.C. 2001); quoting *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 881 n.3 (D.C. 1982) (“Unfair competition is not defined in terms of specific elements, but by various acts that would constitute the tort if they resulted in damages. These acts include ‘defamation, disparagement of a competitor’s goods or business methods, intimidation of customers or employees, interference with access to the business, threats of groundless suits, commercial bribery, inducing employees to sabotage, [and] false advertising or deceptive packaging likely to mislead customers into believing goods are those of a competitor.’”).

<sup>22</sup> See *Carrigan v. Purkhiser*, 466 A.2d 1243, 1244-1245 (D.C. 1983) (citing *B & W Mgmt.*, 451 A.2d at 882; *Holloway v. Bristol-Myers Corp.*, 327 F. Supp. 17, 24 (D.D.C. 1971), *aff’d*, 485 F.2d 986 (D.C. Cir. 1973) (the special-damage test, which gives a private party standing to bring an action for a public nuisance, “has no place in an action seeking damages for, or equitable relief from, a private nuisance”).

### C. Consequential Damages (and Exclusions)

As *Mark Keshishian & Sons*<sup>23</sup> shows, D.C. follows the rule of *Hadley v. Baxendale*. That is, damages in a breach of contract matter

should be, either such as may fairly and substantially be considered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made, were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the

amount of injury which would ordinarily follow from a breach of a contract under these special circumstances so known and communicated.<sup>24</sup>

Consequential damages refer to losses that do not flow directly from the breach but result from the breach, while incidental damages are additional costs incurred due to the breach. Both types of damages are intended to compensate the injured party for losses incurred due to the breach.<sup>25</sup>

“The measure of consequential damages for breach of contract under the UCC does not differ from that developed in this jurisdiction’s pre-UCC case law.”<sup>26</sup>

Under the UCC, upon a buyer’s breach the seller may resell the goods concerned or the undelivered balance of them. Where the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under Section 2-710, minus expenses saved as a result of the buyer’s breach.<sup>27</sup>

---

<sup>23</sup> 414 A.2d at 841.

<sup>24</sup> *Hadley v. Baxendale*, 9 Exch. 341 (1854).

<sup>25</sup> *Bay Gen’l Indus., Inc. v. Johnson*, 418 A.2d 1050 (D.C. 1980)).

<sup>26</sup> *Id.* at 1057 (citing cases).

<sup>27</sup> D.C. CODE § 28:2-706(1).

Consequential damages resulting from the seller's breach include: (a) any loss resulting from general or particular requirements and needs the seller had reason to know of at the time of contracting and that could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.<sup>28</sup>

An agreement for the sale of goods may, *inter alia*, limit or alter the measure of damages and limit the buyer's remedies. "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."<sup>29</sup>

#### D. Incidental Damages

"Incidental damages to an aggrieved seller [of goods] include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of

the goods or otherwise resulting from the breach."<sup>30</sup>

A buyer's incidental damages recoverable upon the seller's breach "include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach."<sup>31</sup>

#### E. Punitive Damages

"A plaintiff must prove a basis for actual damages to justify the imposition of punitive damages. The amount of such damages may be nominal, stemming from the difficulty of quantifying them or from some other cause. But without proof of at least nominal *actual* damages, punitive damages may not be awarded."<sup>32</sup>

The intersection of punitive damages and breach of contract under D.C. law is confused and confusing. One decision will state that "[p]unitive damages will not lie for breach of contract, even if it is proven that the breach is willful,

---

<sup>28</sup> *Id.*, § 28:2-715(2).

<sup>29</sup> *Id.*, § 28:2-719(1)(a) & (3).

<sup>30</sup> *Id.*, § 28:2-710.

<sup>31</sup> *Id.*, § 28:2-715(1).

<sup>32</sup> *Maxwell v. Gallagher*, 709 A.2d 100, 104 (D.C. 1998) (emphasis original) (footnote omitted).

wanton, or malicious.”<sup>33</sup> Another will say that punitive damages are recoverable where the “acts of the breaching party are malicious, wanton, oppressive or with criminal indifference to civil obligations ... [and] merge with and assume the character of a willful tort.”<sup>34</sup> Still another speaks of allowing punitive damages where a party acted with “an intent to defraud or other ‘circumstances of extreme aggravation.’”<sup>35</sup>

An award of punitive damages must be supported “by clear and convincing evidence that the [tortious] act was accompanied by conduct and a state of mind evincing malice or its equivalent.”<sup>36</sup>

#### F. Liquidated Damages

The District of Columbia Court of Appeals laid out the law of liquidated damages in *Proulx v. 1400 Pennsylvania Avenue, SE, LLC*:

“It is well-settled that parties to a contract may agree in advance to a sum certain to be forfeited as

liquidated damages for breach of contract.” This is because a liquidated damages clause serves “to simplify the resolution of a breach of contract dispute” by “giving the parties an opportunity to resolve the damages question without resorting to litigation” and by “fix[ing] the measure of damages at the outset before a breach even occurs.” “Such a provision is particularly appropriate ... where the damages ... are uncertain in amount and cannot be easily ascertained.”

Thus, this court has held that a “liquidated damages clause is valid unless it is found to constitute a penalty,” and has adopted “the prevailing rule” that the burden is on “the party challenging [ ] enforceability ... to establish that the liquidated damages clause

<sup>33</sup> See *Bernstein v. Fernandez*, 649 A.2d 1064, 1073 (D.C. 1991) (quoting *Bedell v. Inver Housing, Inc.*, 506 A.2d 202, 206 (D.C. 1986)).

<sup>34</sup> See *Den v. Den*, 222 A.2d 647, 648 (D.C. 1966) (citing *Brown v. Coates*, 253 F.2d 36, 39 (D.C. Cir. 1958)).

<sup>35</sup> See *Bay Gen'l Indus.*, 418 A.2d at 1058 (citing, *inter alia*, *Minick v. Assocs. Inv. Co.*, 110 F.2d 267, 268 (D.C. Cir. 1940)); *District Motor Co. v. Rodill*, 88 A.2d 489, 493 (D.C. Mun. Ct. App. 1952).

<sup>36</sup> *Fred A. Smith Mgmt. Co. v. Cerpe*, 957 A.2d 907, 914-915 (D.C. 2008) (quoting *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C.1995); *Wash. Med. Ctr. v. Holle*, 573 A.2d 1269, 1284 (D.C.1990)) (to sustain an award of punitive damages, tortious act must be accompanied by “fraud, ill will, recklessness, wantonness, oppressiveness, wilful disregard of the plaintiff’s rights, or other circumstances tending to aggravate the injury”).

was a penalty.” As this court has recognized, “it has become increasingly difficult to justify the peculiar historical distinction between liquidated damages and penalties. Today the trend favors freedom of contract through the enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation.”

To distinguish between enforceable liquidated damages provisions and unenforceable penalties, we consider the reasonableness of the terms of the liquidated damages clause, as compensation for breach, viewed as of the time and under the circumstances when it was agreed.

If under the circumstances and expectations of the parties existing at the time of execution it appears that the provision is a reasonable protection against uncertain future litigation the provision will be enforced even though no actual damages were proved as of the date of the breach. If, on the other

hand, it appears that the stipulation is designed to make the default of the party against whom it runs more profitable to the other party than performance would be, it will be void as a penalty. Thus, damages stipulated in advance should not be more than those which at the time of the execution of the contract can be reasonably expected from its future breach, and agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced.

Because the touchstone is reasonableness as of the time of execution, “agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced,” and “liquidated damages must not be disproportionate to the level of damages reasonably foreseeable at the time of the making of the contract.” Thus, we have stated that “[t]he common law views liquidated damages clauses with a gimlet eye.”

Still, “[w]hen a liquidated damages provision is the product of fair arm's length bargaining, particularly between sophisticated parties, common law suspicions may be eased and more latitude may be afforded the contracting parties to agree as they wish on the remedies for breach.” Using this framework, courts have generally upheld liquidated damages provisions.<sup>37</sup>

“Because mitigation of damages is part of a post-breach calculation of actual damages, in the absence of a statute mandating mitigation of damages, there exists no duty to mitigate damages where a valid liquidated damages clause exists.”<sup>38</sup>

Under the UCC, “[d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the

inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.”<sup>39</sup>

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

“In an action in the United States District Court for the District of Columbia or the Superior Court of the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.”<sup>40</sup> “[A]s a ‘remedial’ statute, section 15-108 ‘should be generously construed so that the wronged party can be made whole.’”<sup>41</sup>

“In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if the trial be by the

<sup>37</sup> Proulx v. 1400 Pennsylvania Ave., SE, LLC, 199 A.3d 667, 673-674 (D.C. 2019) (quoting Burns v. Hanover Ins. Co., 454 A.2d 325, 237 (D.C. 1982); Vicki Bagley Realty, Inc. v. Laufer, 482 A.2d 359, 367 (D.C. 1984); S. Brooke Purll, Inc. v. Vailes, 850 A.2d 1135, 1137-1138 (D.C. 2004); Davy v. Crawford, 147 F.2d 574, 575 (D.C. Cir. 1945); Order of AHEPA v. Travel Consultants, Inc., 367 A.2d 119, 126 (D.C. 1976); Council v. Hogan, 566

A.2d 1070, 1072 (D.C. 1989); District Cablevision Ltd. P’ship v. Bassin, 828 A.2d 714, 723-724 (D.C. 2003)) (cleaned up).

<sup>38</sup> Barrie Sch. v. Patch, 401 Md. 497, 514-515 (Md. 2007).

<sup>39</sup> D.C. CODE § 28:2-718(1).

<sup>40</sup> *Id.*, § 15-108.

<sup>41</sup> Riggs Nat’l Bank v. District of Columbia, 581 A.2d 1229, 1255 (D.C.1990).

court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest.”<sup>42</sup> The trial court has “broad discretion” to award pre-judgment interest under Section 15-109.<sup>43</sup>

“In an action on a contract for the payment of a higher rate of interest than is lawful in the District, made or to be performed in a State or territory of the United States where such a contract rate of interest is lawful, the judgment for the plaintiff shall include the contract interest to the date of the judgment and interest thereafter at the rate of 6 per cent per annum until paid.”<sup>44</sup>

“The rate of interest in the District upon the loan or forbearance of money, goods, or things in action in the absence of expressed contract, is 6% per annum.”<sup>45</sup> “Interest, when authorized by law, on judgments or decrees against the District of Columbia, or its officers, or its employees acting within the scope of their employment, is at the rate of not exceeding 4% per annum.”<sup>46</sup>

“The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia, or its officers, or its employees acting within the scope of their employment or where the rate of interest is not fixed by contract, shall be 70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986 . . . for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent, or if exactly 1/2 of 1%, increased to the next highest full percent; provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the

---

<sup>42</sup> D.C. CODE § 15-109.

<sup>43</sup> District of Columbia v. Pierce Assoc., 527 A.2d 306, 310 (D.C.1987); (courts are gradually “giv[ing] up the traditional dichotomy between liquidated and unliquidated debts,” as evidenced by “the creation of statutes and judicial exceptions,

such as that in D.C. Code § 15-109, which give the court discretion to allow prejudgment interest even when the debt amount is unliquidated,” *id.* at 311).

<sup>44</sup> D.C. CODE § 15-110.

<sup>45</sup> *Id.*, § 28-3302(a).

<sup>46</sup> *Id.*, § 28-3302(b).

judgment. In the case of the judgments entered prior to the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, that are not satisfied until after the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, the rate of interest thereon shall be the rate of interest prescribed in this subsection from the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, until the date of satisfaction.”<sup>47</sup>

#### H. Attorney’s Fees

The District follows the “American Rule,” which generally prohibits the prevailing party from recovering attorney’s fees as an element of damages, save where a statute, contract, or certain narrowly defined common-law exceptions may apply.<sup>48</sup> Common-law exceptions to the American Rule “are primarily designed to encourage or to compensate worthy litigants, ... to punish those who have abused the judicial process and to deter those who would do so in the future,”<sup>49</sup> or to compensate one who has preserved or recovered a

fund or property for the benefit of others.<sup>50</sup>

In *Ludwig & Robinson, PLLC v. BiotechPharma, LLC*,<sup>51</sup> the D.C. Court of Appeals noted that, in tort actions for fraud or fraudulent inducement, “our jurisdiction recognizes the principle that ‘the perpetrator of a fraud is liable to respond in such damages as naturally and proximately resulted from the fraud, and the proximate result rule should be employed in a flexible manner.’ Under that flexible approach, if L & R is able to prove fraudulent inducement by the BTP defendants and/or Kalin and the expenses it has incurred in pursuing its claims for payment under the contract against the BTP defendants, it may be entitled to recover those expenses as an item of compensatory damages (for which the perpetrators of the fraud would be jointly and severally liable).”<sup>52</sup>

“In a proceeding in the United States District Court for the District of Columbia or the Superior Court of the District of Columbia to recover damages upon a bond or undertaking given to obtain a restraining order or preliminary or pendente lite injunction, the Court,

<sup>47</sup> *Id.*, § 28-3302(c).

<sup>48</sup> *Pajic v. Foote Properties, LLC*, 72 A.3d 140, 145 n.6 (D.C. 2013) (quoting *Nest & Totah Venture, LLC v. Deutsch*, 31 A.3d 1211, 1229 (D.C. 2011) (quoting *Psaromatis v. English Holdings I, L.L.C.*, 944 A.2d 472, 490 (D.C. 2008))).

<sup>49</sup> *Id.* (citing *Synanon Found., Inc. v. Bernstein*, 517 A.2d 28, 37 (D.C. 1986)).

<sup>50</sup> *Malik Corp. v. Tenacity Group, LLC*, 961 A.2d 1057, 1063 (D.C. 2008).

<sup>51</sup> 186 A.3d 105, 114-115 (D.C. 2018)

<sup>52</sup> *Id.* (quoting *Espaillet v. Berlitz Schs. of Languages of Am., Inc.*, 383 F.2d 220, 222 (D.C. Cir. 1967) (internal quotation marks omitted); citing *Hundley v. Johnston*, 18 A.3d 802, 809 (D.C. 2011)).

in assessing damages to be recovered thereunder, may include such reasonable counsel fees as the party damaged by the restraining order or injunction may have incurred in obtaining a dissolution thereof.”<sup>53</sup>

### I. Reliance Damages<sup>54</sup>

Profits lost due to a breach of contract are ordinarily recoverable. Where anticipated profits are too speculative to be determined, monies spent in part performance, in preparation for or in reliance on the contract are recoverable.<sup>55</sup> “[A] party may recover for ‘expenditures made in reliance on a contract but not strictly in part performance of it, or as necessary preparation for performance.’ Reliance damages may be awarded if, at the time of the contract, it was reasonably foreseeable to the defendant that such expenditures would be made and that the defendant’s breach would prevent

reimbursement. ‘The award of a party’s reliance interest as a measure of damages may serve as an alternative to the ordinary award of his expectation interest. This alternative may be employed when the available evidence relevant to anticipated profits permits no more than a speculative estimate as to their amount.’”<sup>56</sup>

Reliance damages generally cannot be recovered for expenditures made after a non-defaulting party’s awareness of the breach. A party can recover expenses made after the breach if, at the time, it was still possible that the parties’ disputes could be resolved.<sup>57</sup>

A plaintiff seeking reliance damages need not prove that a future business venture rendered impossible by the defendant’s breach would have generated profits. It is for “the breaching party to prove any loss that the injured party would have suffered had the contract been performed.”<sup>58</sup>

<sup>53</sup> D.C. CODE § 15-111.

<sup>54</sup> It appears that the District of Columbia Court of Appeals has endorsed the availability of reliance damages under D.C. law in only the most oblique way. *See Ludwig & Robinson*, 186 A.3d at 114 (discussing *EDCare Mgmt., Inc. v. DeLisi*, 50 A.3d 448, 452 (D.C. 2012)) (plaintiff pursuing fraud claim in *EDCare* “sought to recover reliance damages, which we said ‘could have been addressed in an action for breach of contract’”). This section relies on Maryland authority.

<sup>55</sup> *Wartzman v. Hightower Prods., Ltd.*, 53 Md. App. 656, 662 (Md. App. Ct. 1983) (citing

5 Corbin, *Contracts* § 1031; Restatement of Contracts § 333).

<sup>56</sup> *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 347 (Md. App. Ct. 2011), *aff’d*, 429 Md. 387 (2012) (quoting *Dialist Co. v. Pulford*, 42 Md. App. 173, 180-181 (Md. App. Ct. 1979) (internal citation omitted)).

<sup>57</sup> *Id.* at 349 (quoting *Dialist Co.*, 42 Md. App. at 185).

<sup>58</sup> *Wartzman*, 53 Md. App. at 663; *see Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 1:13-CV-1053-RCL, 2022 WL 11110548, at \*3 (D. D.C. Oct. 19, 2022), *adhered to sub nom. Berkley Ins. Co. v. Fed. Hous. Fin. Agency*, No. 1:13-CV-1053-RCL,

## J. Unjust Enrichment Damages

“A person who receives a benefit by reason of an infringement of another person’s interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.”<sup>59</sup> The measure of damages for unjust enrichment is not the amount necessary to compensate the plaintiff; it is the amount of the benefit it would be unjust to let the defendant keep.<sup>60</sup> The United States District Court for the District of Columbia has stated that “the proper remedy for unjust enrichment is disgorgement” because “disgorgement primarily serves to prevent unjust enrichment.”<sup>61</sup>

## K. Unique Remedies (for example, plaintiff-favorable prejudgment remedy statutes)

The District of Columbia recognizes the economic loss doctrine, which bars “recovery of purely economic losses in negligence, subject to only

one limited exception where a special relationship exists.”<sup>62</sup> Per *Heidi Aircraft, LLC v. Jetcraft Aviation Corp.*,<sup>63</sup>

the court in *Aguilar* noted that its articulation of the District of Columbia’s “special relationship exception conforms with similar exceptions to the economic loss doctrine adopted in other jurisdictions.” Among the cases cited by the D.C. Court of Appeals in *Aguilar* is *L & P Converters, Inc. v. Alling & Cory Co.*, which holds that a “special relationship” can be demonstrated by a showing of contractual privity between the parties. (“Where failure to exercise due care only creates a risk of economic loss, an intimate nexus between the parties is generally required... The requirement of an intimate nexus is satisfied by

2023 WL 3790739 (D. D.C. June 2, 2023) (applying Virginia and Delaware law) (citing Restatement (Second) of Contracts § 349) (“Reliance damages can be reduced if the breaching party can prove that the nonbreaching party would have lost money if the contract had been performed.”).

<sup>59</sup> *Berry & Gould v. Berry*, 360 Md. 142, 151 (Md. 2000) (quoting Restatement (Second) of Restitution § 1 (Tentative Draft No. 1, 1983)).

<sup>60</sup> *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 296 (Md. 2007) (quoting *Mass Trans. Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 775 (Md. App. Ct. 1984)).

<sup>61</sup> *United States v. Project on Gov’t Oversight*, 572 F. Supp.2d 73, 77 (D. D.C. 2008) (quoting *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

<sup>62</sup> *Aguilar v. RP MRP Washington Harbour, LLC*, 98 A.3d 979, 985-986 (D.C. 2014)

<sup>63</sup> 573 F. Supp.3d 182 (D. D.C. 2021).

contractual privity or its equivalent.” Although that case is not binding on this Court, “[w]e look to Maryland’s common law as Maryland is ‘the source of the District’s common law and an especially persuasive authority when the District’s common law is silent.’”<sup>64</sup>

The equivalent to privity is the so-called “intimate nexus,<sup>65</sup> which exists where the plaintiff shows: (1) the defendant’s awareness that its work was to be used for a particular purpose; (2) a known party’s intended reliance on the work; and (3) conduct linking the defendant to that party, thereby demonstrating the defendant’s understanding of that party’s reliance.<sup>66</sup>

Several statutes provide for awards of treble damages, attorney’s fees, and, in some cases, punitive damages and other relief.

Examples<sup>67</sup> include the following:

- D.C. Code Section 32-1303- under D.C. Wage Payment and Collection Law, upon failure to pay wages to an employee who was discharged, who quit or resigned, or was suspended due to a labor dispute, authorizing award of liquidated damages equal to 10% of unpaid wages for “each working day during which such failure shall continue after the day upon which payment is hereunder required, or an amount equal to treble the unpaid wages, whichever is smaller;
- D.C. Code Section 32-1308- authorizing back wages, treble damages on unpaid wages, and award of attorneys’

<sup>64</sup> *Id.* at 200 (internal citations omitted).

<sup>65</sup> *Jacques v. First Nat. Bank of Md.*, 307 Md. 527, 532 (Md. 1986); *see Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645, 674 (Md. 2000) (adopting three-part test of *Credit Alliance Corporation v. Arthur Andersen & Co.*, 65 N.Y.2d 536 (N.Y. 1985), as one way to establish an intimate nexus between parties).

<sup>66</sup> *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600,

617 (Md. 2017). Even though the facts alleged appeared to satisfy the *Credit Alliance/Walpert* test, and the Supreme Court of Maryland did not attempt to demonstrate otherwise, *Balfour Beatty* declined to find an intimate nexus to support a contractor’s tort claims against design professionals in the context of large government construction projects. *Id.* at 604.

<sup>67</sup> This is not intended to be a comprehensive list.

fees to persons aggrieved by a violation of EPCL, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act and who prevail in a civil action in a court of competent jurisdiction against the employer or other person violating one of these laws;

- D.C. Code Section 28-3905- Under D.C. Consumer Protection Procedures Act, claimant may recover treble damages, or \$1,500 per violation, whichever is greater; additionally, notwithstanding the foregoing, actual damages;<sup>68</sup> reasonable attorney's fees; and punitive damages;
- D.C. Code Section 42-1601- under statute on

actions for waste of real property, authorizing award of life or years tenant's interest and treble damages to prevailing party with a future interest; and

- D.C. Code Section 2-381.02- Under D.C. False Claims Act, authorizing award of treble damages, costs, and civil penalties to District.

#### L. Public Policy Prohibitions

Unlike its sister jurisdiction, Maryland, which deems “contractual limitations provisions in insurance contracts [to be] against State public policy, illegal and void ...,”<sup>69</sup> “[u]nder District of Columbia law, [c]ontractual provisions limiting the period within which insurance policy-holders may validly initiate a lawsuit are generally enforceable.”<sup>70</sup>

<sup>68</sup> “Actual damages shall not include dignitary damages, including pain and suffering.” D.C. CODE § 28-3905(k)(2)(A)(ii).  
<sup>69</sup> *Millstone v. St. Paul Travelers*, 183 Md. App. 505, 513 (Md. App. Ct. 2008) (quoting *Gan’l Ins. Co. of Am. V. Interstate Service Co.*, 118 Md. App. 126, 138 (Md. App. Ct. 1997); discussing MD. CODE ANN., INS. § 12-104); *see* MD. CODE ANN., INS. § 12-104(a) (a “provision in an insurance contract or surety contract that sets a shorter time to bring an action under or on the insurance contract or surety contract than required by the law of

the State when the insurance contract or surety contract is issued or delivered is against State public policy, illegal, and void.”); *but see* *Harvey v. N. Ins. Co. of N.Y.*, 153 Md. App. 436, 444-445 (Md. App. Ct. 2003) (Section 12-104 does not apply to contracts insuring marine vessels, crafts, or hulls and interests in or related to them; therefore, action filed beyond one-year limitations period stated in hull-insurance contract was time-barred).

<sup>70</sup> *Gardner v. Erie Ins. Co.*, 639 F. Supp.3d 135, 141 (D. D.C. 2022) (quoting *Martinez v.*

“In the District of Columbia it is a principle of long standing that an illegal contract made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no rights ....”<sup>71</sup>

The District of Columbia (likely) recognizes several common-law defenses to the enforceability of a contract. These include the following:

- lack of mutuality;<sup>72</sup>
- unconscionability;<sup>73</sup>

---

Hartford Cas. Ins. Co., 429 F. Supp.2d 52, 56 (D. D.C. 2006)).

<sup>71</sup> Wharf, Inc. v. D.C. Wharf Horizontal Reit Leaseholder LLC, No. CV 15-1198 (CKK), 2021 WL 1198143, at \*15 (D. D.C. Mar. 30, 2021) (quoting Cevern v. Ferbish, 666 A.2d 17, 19-20 (D.C. 1995)) (cleaned up); *see also* Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968) (finding a lease void as an illegal contract because of violation of Housing Code regulations).

<sup>72</sup> *See, e.g.*, Abreu v. Howard Univ., 93 F.4th 498, 503 (D.C. Cir. 2024) (citing Eastbanc, Inc. v. Georgetown Park Assocs. II, L.P., 940 A.2d 996, 1003 (D.C. 2008)) (“Under D.C. law, a party must be obligated by the contract to do something not otherwise required”; a contract lacking mutuality of legal obligations is not enforceable).

<sup>73</sup> *See, e.g.*, Doucette v. Neutron Holdings, Inc., 288 A.3d 339, 342–343 (D.C. 2023) (quoting Simon v. Smith, 273 A.3d 321, 331 & 331 n.15 (D.C. 2022)) (“A party may avoid enforcement of a contract that is unconscionable because the contract is ‘oppressive and plainly one-sided.’ ‘Unconscionability of a contract is ultimately a legal conclusion, dependent on proof and findings of facts supporting such a determination.’ A contract is unconscionable if there is ‘an absence of meaningful choice on the part of one of the parties’ (procedural unconscionability) and ‘the contractual terms are unreasonably favorable to the other party’ (substantive unconscionability). ‘Generally, we require that the party seeking to avoid the contract prove both’ procedural and substantive unconscionability. ‘In an egregious situation, however, a showing of one or the other may suffice.’”).

- traditional defenses such as voidness due to lack of mutual consent, consideration, or capacity, or voidability due to fraud, duress, lack of capacity, mistake, or violation of a public purpose;<sup>74</sup>
- intoxication;<sup>75</sup> and
- minority.<sup>76</sup>

---

<sup>74</sup> See, e.g., *Young v. Anne Arundel Cnty.*, 146 Md. App. 526, 597 (Md. App. Ct. 2002) (quoting *Holmes v. Coverall North America, Inc.*, 98 Md. App. 519, 529 (Md. App. Ct. 1994)) (“Grounds in equity or law for revocation of a contract include an allegation that the contract is void for lack of mutual consent, consideration or capacity or voidable for fraud, duress, lack of capacity, mistake, or violation of a public purpose.”); see also *Hernandez v. Banks*, 65 A.3d 59, 75 (D.C. 2013) (en banc) (party may avoid obligations under contract if that party was mentally incapacitated at time contract was signed); *Island Dev. Corp. v. District of Columbia*, 933 A.2d 340, 349–350 (D.C. 2007) (party may avoid contract obligations if performance of contract has become impossible or impracticable, or if events beyond parties’ control have frustrated the contract’s purpose); *Isaac v. First Nat’l Bank*, 647 A.2d 1159, 1163 (D.C. 1994) (party may avoid contract obligations based on mutual

mistake, fraud in the inducement, or duress); *Truitt v. Miller*, 407 A.2d 1073, 1079 (D.C. 1979) (party may avoid contract obligations if contract violates statute designed to protect public).

<sup>75</sup> *Amirmotazedi v. Viacom, Inc.*, 768 F. Supp.2d 256, 263 (D. D.C. 2011) (citing *Harmon v. Johnston*, 8 D.C. 139, 1 MacArth. 139, at \*3-4 (D.C. 1873)) (“voluntary intoxication is a type of mental capacity defense that permits an individual to avoid a contract if she was so intoxicated at the time of formation that she could not understand the terms and conditions of the agreement.”).

<sup>76</sup> See, e.g., *Schmidt v. Prince George’s Hosp.*, 366 Md. 535, 542-544 (Md. 2001) (quoting *Monumental Bldg. Ass’n v. Herman*, 33 Md. 128, 131-132 (Md. 1870)) (a minor’s contracts are voidable, unless the minor contracted for necessities such as board, apparel, medical aid, teaching, and instruction).