

Indiana

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A. Adoption of the UCC

Indiana adopted Indiana Code §§ 26-1-2, the state's version of the Uniform Commercial Code ("UCC"), to resolve commercial disputes between parties.¹

B. Compensatory Damages²

It is a fundamental rule of damages that "a party injured by a breach of contract may recover the benefit of his bargain but is limited in his recovery to the loss actually suffered [and] . . . the injured party may not be placed in a better position than he would have enjoyed if the breach had not occurred."³ The determination of expectation damages typically involves a calculation of the

difference between the value of the breaching party's promised performance (the contract price), less any benefit received or cost saved by the non-breaching party as a result of not having to complete performance.⁴

Although a non-breaching party is entitled to the benefit of his bargain, "as a general rule a non-breaching party must mitigate damages."⁵ However, the "breaching party has the burden of proving that the nonbreaching party has failed to use reasonable diligence to mitigate damages."⁶ Compensatory damages may be recoverable under claims in Indiana, including:

- breach of contract;⁷
- breach of warranty;⁸

¹ See *Stardust Ventures, LLC v. Roberts*, 65 N.E.3d 1122, 1126 (Ind. Ct. App. 2016).

² This discussion excludes claims relating to restrictive covenants, securities fraud, conspiracy, and civil RICO (Racketeer Influence and Corrupt Organizations).

³ *Sanchez v. Benkie*, 799 N.E.2d 1099, 1102 (Ind. Ct. App. 2003) (quoting *Fowler v. Campbell*, 612 N.E.2d 596, 603 (Ind. Ct. App. 1997)) (finding lower court erred in awarding the given amount of compensatory damages, as the proper measure of damages was the benefit of the bargain).

⁴ See *Nat'l Advert. Co. v. Wilson Auto Parts, Inc.*, 569 N.E.2d 997 (Ind. Ct. App. 1991) (affirming award of compensatory damages to lessee and holding computation of damages was correct in calculating difference between fair market value before loss and fair market value at time of loss).

⁵ *Id.* at 1001 (citing *Ind. Indus., Inc. v. Wedge Prods., Inc.*, 430 N.E.2d 419 (Ind. Ct. App. 1982)).

⁶ *Id.* (citing *Callander v. Sheridan*, 546 N.E.2d 850 (Ind. Ct. App. 1989)).

⁷ *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. 1993) (affirming jury award of compensatory damages where plaintiff-insureds brought action against defendant insurer seeking recovery for breach of insurance contract).

⁸ *Frantz v. Cantrell*, 711 N.E.2d 856 (Ind. Ct. App. 1999) (affirming trial court award regarding breach of implied warranty of merchantability where plaintiff-homeowner

- fraud (both actual⁹ and constructive);¹⁰
- civil conversion;¹¹
- misappropriation of trade secrets;¹²
- defamation;¹³
- account stated;¹⁴
- unfair competition (must be deliberate and willful);¹⁵
- breach of fiduciary duty of officers;¹⁶

sued defendant roofers for allegedly using defective shingles when installing roof).

⁹ *Epperly v. Johnson*, 734 N.E.2d 1066 (Ind. Ct. App. 2000) (affirming award for compensatory damages because defendant breached oral agreement to enter partnership with plaintiff regarding purchase of golf course).

¹⁰ *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113 (Ind. Ct. App. 2008) (Indiana courts have held parties may not rely upon contractual relationship to create duty that, if breached, would form the basis of constructive fraud claim).

¹¹ *Kesling v. Kesling*, 83 N.E.3d 111 (Ind. Ct. App. 2017); *SJS Refractory Co., LLC v. Empire Refractory Sales, Inc.*, 952 N.E.2d 758, 766 (Ind. Ct. App. 2011) (“[w]ith respect to a conversion claim, damages are restricted to actual losses sustained as a proximate result of the conversion and damages are mitigated by returning the property to the owner,” and conversion exists where a “person [] knowingly or intentionally exerts unauthorized control over the property of another person,” such that the owner of the property suffers a pecuniary loss). See IND. CODE § 34-24-3-1; IND. CODE § 35-43-4-3.

¹² *Carmichael v. Separators, Inc.*, 148 N.E.3d 1048 (Ind. Ct. App. 2020) (affirming default judgement award of compensatory damages for misappropriation of trade secrets and other claims where employer sued former employee).

¹³ *Stanley v. Kelley*, 422 N.E.2d 663, 668–669 (Ind. Ct. App. 1981) (“In a defamation action, there are generally two classes of compensatory damages. The first is general damages, injury to the plaintiff’s reputation, and standing in the community, personal humiliation, and mental anguish and

suffering, which damages the law presumes to be the natural proximate and necessary result of publication. The second class is special damages, pecuniary in nature, which damages are not assumed to be necessary or inevitable but must be shown by allegation and specific proof to have been actually incurred as a natural and proximate consequence of the wrongful act.”).

¹⁴ *Sollers Point Co. v. Zeller*, 145 N.E.3d 790, 799–800 (Ind. Ct. App. 2020) (an account stated is “an agreement between the parties that all items of an account and balance are correct, together with a promise, express or implied, to pay the balance. An account stated operates as a new contract without the need for renewed consideration, and the plaintiff does not need to plead and prove the creation and performance of each contract underlying the account. An agreement that the balance is correct may be inferred from delivery of the statement together with the account debtor’s failure to object to the amount of the statement within a reasonable time. When a debtor fails to object to an account until after a lawsuit is filed, such will generally be considered a failure to object within a reasonable time and will support an inference of the debtor’s implied agreement that the account balance is correct.” (quoting *Jackson v. Trancik*, 935 N.E.2d 1087, 1091 (Ind. Ct. App. 2011))).

¹⁵ *Hammons Mobile Homes, Inc. v. Laser Mobile Home Transp., Inc.*, 501 N.E.2d 458 (Ind. Ct. App. 1986) (affirming damage award for unfair competition for use of director’s surname in mobile home corporation’s transport business).

¹⁶ *Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*, 900 N.E.2d 786, 800 (Ind. Ct. App. 2009) (noting

- tortious interference with business relationships;¹⁷ and
- tortious interference with contract.¹⁸

C. Consequential Damages

Consequential damages may be awarded in a breach of contract claim when “the non-breaching party’s loss flows naturally and probably from the breach and was contemplated by the parties when

the contract was made.”¹⁹ “This follows the rule announced in *Hadley v. Baxendale*, and generally limits consequential damages to reasonably foreseeable economic losses.”²⁰ “Lost profits need not be proved with mathematical certainty,” but cannot be awarded “on the mere basis of conjecture and speculation.”²¹ Sufficient evidence must be presented to the factfinder to allow for an estimated amount that is reasonably certain and confined to the loss of net profits.²² The party seeking consequential damages has the burden of proving,

to recover damages for claim of breach of fiduciary duty, plaintiff must present evidence of damages arising from breach that affected plaintiff directly).

¹⁷ See *McCullough v. Noblesville Sch.*, 63 N.E.3d 334 (Ind. Ct. App. 2016) (explaining the elements of a contract claim); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003) (noting Indiana’s Supreme Court has held that claim for interference with business relationship requires some independent illegal action and cannot be pled as a single claim); *Bradley v. Hall*, 720 N.E.2d 747, 751 n.3 (Ind. Ct. App. 1999) (noting Indiana has not set forth a clear definition for the “illegal conduct” requirement). *But see Miller v. Cent. Ind. Cmty. Found., Inc.*, 11 N.E.3d 944 (Ind. Ct. App. 2014) (Indiana courts have determined defamation “does not constitute illegal conduct for the purpose of determining whether one tortiously interfered with the business relationship of another.”). See *Syndicate Sales, Inc. v. Hampshire Paper Corp.*, 192 F.3d 633 (7th Cir. 1999) (Seventh Circuit has concluded “illegal conduct” includes transgressions that are not crimes as trademark dilution suffices to show illegality). See also *United Consumers Club, Inc. v. Bledsoe*, 441 F. Supp.2d 967, 983 (N.D.

Ind. 2006) (demonstrating Indiana federal courts have determined “tortious” conduct suffices for “illegality” requirement and plaintiffs failed to show defendant acted “tortiously” so as to meet requirement); *Moffett v. Gene B. Glick Co.*, 604 F. Supp. 229, 239 (N.D. Ind. 1984), *rev’d on other grounds* (advising invasion of privacy and intentional infliction of emotional distress satisfy “illegal conduct” requirement).

¹⁸ See *Levee v. Beeching*, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000) (providing Indiana law has not expressly mandated that tortious interference with a contract also requires an illegal action, like tortious interference with business relations).

¹⁹ *Indianapolis City Mkt. Corp. v. MAV, Inc.*, 915 N.E.2d 1013, 1024 (Ind. Ct. App. 2009) (citing *Johnson v. Scandia Assocs., Inc.*, 717 N.E.2d 24, 31 (Ind. 1999)).

²⁰ *Id.* (citing *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854)).

²¹ *Farm Bureau Mut. Ins. Co. v. Dercach*, 450 N.E.2d 537, 540–541 (Ind. Ct. App. 1983).

²² *Clark’s Pork Farms v. Sand Livestock Sys., Inc.*, 563 N.E.2d 1292, 1298 (Ind. Ct. App. 1990); see *Berkel & Co. Contractors v. Palm & Assocs., Inc.*, 814 N.E.2d 649, 658 (Ind. Ct. App. 2004).

“by a preponderance of the evidence that the breach was the cause in fact of its loss.”²³

Under the UCC, consequential damages from a seller’s breach include any losses resulting from, general or particular, requirements and needs that the seller has reason to know of at the time of contracting and that could not have been prevented by cover of subject goods or other means.²⁴ The buyer should mitigate damages, because recovery could be barred where the loss could have been avoided had the buyer covered the goods in some manner.²⁵ In the event a buyer breaches a contract for the sale of goods, the seller may recover the difference between the market price for the goods at the time and place of tender and the unpaid contract price.²⁶ A seller may also resell the goods in an effort to mitigate damages and recover the difference between the resale price and the contract price, along with any incidental damages but less any

expenses saved as a consequence of the buyer’s breach.²⁷

“Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.”²⁸ Normally, “parties are left free to shape their remedies to their particular requirements and, reasonable agreements limiting or modifying remedies are to be given effect.”²⁹ Limitations on consequential damages for an “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.”³⁰

D. Incidental Damages

When a seller breaches a contract for the sale of goods, the following may be awarded as incidental to the breach:

- expenses reasonably incurred by the buyer in the inspection, receipt, transportation, custody, and

²³ *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60, 67 (Ind. Ct. App. 2009) (consequential damages are generally limited to reasonably foreseeable economic losses).

²⁴ IND. CODE § 26-1-2-715.

²⁵ *Id.* at §§ 26-1-2-712, 715-717; *Fischer v. Heymann*, 12 N.E.3d 867, 871 (Ind. 2014); *Maples Health Care, Inc. v. Firestone Bldg. Prod.*, 162 N.E.3d 518, 529 n.5 (Ind. Ct. App. 2020).

²⁶ IND. CODE §§ 26-1-2-706-708.

²⁷ *Id.*

²⁸ *Id.* at § 26-1-2-719(3); *Maples Health Care, Inc.*, 162 N.E.3d at 530 n.7.

²⁹ IND. CODE § 26-1-2-719 cmt. 1; *Guideone Ins. Co. v. U.S. Water Sys. Inc.*, 950 N.E.2d 1236, 1247 (Ind. Ct. App. 2011) (affirming notion that agreement limiting remedies should be honored so long as they are reasonable).

³⁰ IND. CODE § 26-1-2-719(3).

- care of goods rightfully rejected by the buyer;
- any commercially reasonable charges, expenses, or commissions incurred in connection with the buyer's cover; or
- any other reasonable expenses.³¹

When a buyer breaches the agreement, a seller's incidental damages include any "commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, or custody of the goods after the buyer's breach, in connection with the return or resale of the goods or otherwise resulting from the breach."³² These damages are explicitly available for breach of contract and warranty claims, but parties have attempted to link this

³¹ See *Coyle Chevrolet Co. v. Carrier*, 397 N.E.2d 1283, 1286–1287 (Ind. Ct. App. 1979) (noting incidental damages include sales tax, license fees, and insurance).

³² IND. CODE § 26-1-2-710.

damage to other remedies such as attorney's fees or the equity remedy of specific performance.³³

E. Punitive Damages

Punitive damages are intended to punish the defendant for wrongdoing and deter future, similar activity by the defendant or others.³⁴ Under Indiana law, "punitive damages are available only if there is clear and convincing evidence that the defendant 'acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing, in the sum [that the jury believes] will serve to punish the defendant and to deter it and others from like conduct in the

³³ *Ind. Glass Co. v. Ind. Mich. Power Co.*, 692 N.E.2d 886, 887 (Ind. Ct. App. 1998) (affirming judgement denying party's claim to attorney's fees as incidental damages); *Kesler v. Marshall*, 792 N.E.2d 893, 896 (Ind. Ct. App. 2003) (holding specific performance improper, so incidental damages cannot follow); *Haas v. Holder*, 218 Ind. 263, 32 N.E.2d 590, 593 (Ind. 1941) (reversing and granting new trial for examination of incidental damages and specific performance where teacher sued public school township and its trustee to compel re-employment as permanent teacher).

³⁴ See *Sims v. Pappas*, 73 N.E.3d 700, 706 (Ind. 2017) (quoting *Crabtree ex rel. Kemp v. Est. of Crabtree*, 837 N.E.2d 135, 139 (Ind. 2005)).

future.”³⁵ “Proof that a tort was committed is not sufficient to establish the right to punitive damages.”³⁶ The facts must evince conscious wrongdoing or egregious action that would allow a reasonable factfinder to award punitive damages.³⁷

If a fraud claim arises under the UCC, punitive damages and attorney’s fees are expressly available.³⁸ The most typical example occurs where a seller makes false statements in order to induce a buyer to make a purchase or where a seller fails to disclose known defects in a product and the buyer relies upon those statements or omissions in making its purchase.³⁹ Where there are claims for both breach of contract and fraud in a given lawsuit, to recover punitive damages for fraud, a plaintiff must prove: “(1) the breaching party committed the

separate and independent tort of fraud[,] and (2) the fraud resulted in injury *distinct* from that resulting from the breach” of contract.⁴⁰

F. Liquidated Damages

Indiana enforces reasonable liquidated damages provisions that do not act as a penalty. “Liquidated damages refers to a specific sum of money that has been stipulated by parties to a contract as ‘the amount of damages to be recovered by one party for a breach by the other, whether it exceeds or falls short of actual damages.’”⁴¹ A typical liquidated damages provision provides for a “stated sum of money upon breach without proof of damages.”⁴² Only “reasonable liquidated damage[s] provisions are permitted.”⁴³ “Contractual provisions [that constitute] penalties are not.”⁴⁴ Whether a contract

³⁵ *Balzer v. Am. Fam. Ins. Co.*, 805 F. Supp.2d 618, 629 (N.D. Ind. 2011) (citing *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137–138 (Ind. 1988)).

³⁶ *Id.*

³⁷ *Id.*; *Am.’s Directories Inc., Inc. v. Stelhorn One Hour Photo, Inc.*, 833 N.E.2d 1059 (Ind. Ct. App. 2005) (upholding judgement for punitive damages, finding fraud claim was separate from breach of contract claim and since party acted with malice and fraud, punitive damages were allowed).

³⁸ IND. CODE § 26-1-2-721.

³⁹ *See, for example*, *Don Medow Motors, Inc. v. Grauman*, 446 N.E.2d 651 (Ind. Ct. App. 1983) (finding punitive damages were available and remanding for new trial under standard of clear and convincing evidence

when car dealership represented used car as new).

⁴⁰ *Tobin v. Ruman*, 819 N.E.2d 78 (Ind. Ct. App. 2004) (emphasis added) (plaintiff could not prevail on fraud claim separate from contract claim and therefore was not entitled to punitive damages).

⁴¹ *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208, 211 (Ind. 2019) (citing *Time Warner Ent. Co., L.P. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004)).

⁴² *Gershin v. Demming*, 685 N.E.2d 1125, 1127 (Ind. Ct. App. 1997).

⁴³ *Skendzel v. Marshall*, 301 N.E.2d 641, 645 (Ind. 1973) (liquidated damages provision provided for excessive forfeiture).

⁴⁴ *Weinreb v. Fannie Mae*, 993 N.E.2d 223, 232–233 (Ind. Ct. App. 2013) (prepayment provision, as liquidated damages clause, was

provision providing for liquidated damages is an “unenforceable penalty is a question of law.”⁴⁵

G. Pre- and Post-Judgment Interest

“Prejudgment interest may be recovered as additional damages when necessary to fully compensate an injured party for its loss.”⁴⁶ “An award of pre-judgment interest in a breach of contract action is warranted if the amount of the claim rests upon a simple calculation and the terms of the contract makes such a claim ascertainable.”⁴⁷

The test for determining whether an award of pre-judgment interest is appropriate is whether the damages are complete and may be ascertained as of a particular time. The award is considered proper when the trier of fact does not have to exercise its

judgment to assess the amount of damages.⁴⁸

“Prejudgment interest is computed from the time the principal amount was demanded or due and is allowable at the permissible statutory rate when no contractual provision specifies the interest rate.”⁴⁹ Pursuant to Indiana Code Section 34-51-4-9, the rate of pre-judgment interest “may not be less than six percent (6%) per year [but] not more than ten percent (10%) per year.”⁵⁰

“Post-judgment interest is a creature of statute, borne of legislative authority.”⁵¹ Under Indiana Code Section 24-4.6-1-101, unless otherwise provided by statute, the rate of post-judgment interest should be either:

- (1) The rate agreed upon in the original contract in litigation and “shall not exceed an annual rate of eight percent (8%) even though a higher rate may

not grossly disproportionate to losses suffered and thus was enforceable).

⁴⁵ *Corvee, Inc. v. French*, 943 N.E.2d 844, 847 (Ind. Ct. App. 2011) (whether liquidated agreement is enforceable is a question of law).

⁴⁶ *Cincinnati Ins. Co. v. BACT Holdings, Inc.*, 723 N.E.2d 436, 440 (Ind. Ct. App. 2000) (insured was entitled to prejudgment interest).

⁴⁷ *Town of New Ross v. Ferretti*, 815 N.E.2d 162, 169–170 (Ind. Ct. App. 2004) (quoting

Olcott Int’l & Co. v. Micro Data Base Sys., Inc., 793 N.E.2d 1063, 1078 (Ind. Ct. App. 2003)).

⁴⁸ *Id.* (internal citations omitted).

⁴⁹ *Cincinnati Ins. Co.*, 723 N.E.2d at 441.

⁵⁰ IND. CODE § 34-51-4-9.

⁵¹ *Piccadilly Mgmt. v. Abney*, 215 N.E.3d 1078, 1079–1080 (Ind. Ct. App. 2023) (quoting *Denman v. St. Vincent Med. Grp., Inc.*, 176 N.E.3d 480, 503 (Ind. Ct. App. 2021)) (post-judgment interest can include attorney’s fees).

properly have been charged according to the contract prior to judgment; or

- (2) An annual rate of eight percent (8%) if there was no contract by the parties.”⁵²

“The ‘shall’ in the statute is mandatory and, therefore, unless a statutory exception applies, ‘prevailing plaintiffs are automatically entitled to post-judgment interest.’”⁵³ Post-judgment interest accrues “between the date the trial court entered final judgment and the date the judgment was paid in full.”⁵⁴ “Unlike prejudgment interest, which according to [Indiana’s] common law may only be awarded in limited circumstances, post-judgment

interest is statutorily mandated for money judgments.”⁵⁵

H. Attorney’s Fees

Generally, Indiana follows the “American Rule” for attorney’s fees, requiring each party pay their own attorney’s fees.⁵⁶ Parties may shift the obligation to pay such fees by contract, which is enforceable if it is not contrary to law or public policy.⁵⁷ However, even under the parties’ contract, an award of attorney’s fees must be reasonable:

The determination of reasonableness of attorney’s fees necessitates consideration of all relevant circumstances [in a given case]. [Therefore], where the amount of the fee is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee.⁵⁸

Notably, a “court may award attorney fees . . . to the prevailing party[] if the court finds that [a]

⁵² IND. CODE §24-4.6-1-101.

⁵³ *Picadilly Mgmt.*, 215 N.E.3d at 1080.

⁵⁴ See *Pac-Van, Inc. v. Wekiva Falls Resort*, 975 N.E.2d 831, 832 (Ind. Ct. App. 2012) (citing *State v. Booher*, 935 N.E.2d 274, 282 (Ind. Ct. App. 2010)).

⁵⁵ *Caldwell v. Black*, 727 N.E.2d 1097, 1100 (Ind. Ct. App. 2000).

⁵⁶ *Stewart v. TT Commercial One, LLC*, 911 N.E.2d 51, 58 (Ind. Ct. App. 2009) (citation omitted).

⁵⁷ *Id.*

⁵⁸ *Id.*

party litigated the action in bad faith.”⁵⁹ Under Indiana Code Section 34-52-1-1:

[a] court may award attorneys’ fees . . . to the prevailing party, if the court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
- (3) litigated the action in bad faith.⁶⁰

A claim or defense is frivolous if:

(a) it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of

the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. A claim or defense is unreasonable under the statute, if, based on a totality of the circumstances, including the law and the facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of justification. . . . [A] defense [is] . . . groundless if no facts exist which support the legal claim relied on and presented by the losing party. . . . [A] . . . defense is neither groundless nor frivolous merely because a party loses on the merits.⁶¹

The statute “strikes a balance between respect for an attorney’s duty of zealous advocacy and ‘the important policy of discouraging unnecessary and unwarranted litigation.’”⁶² The “recovery of attorneys’ fees under Indiana Code

⁵⁹ IND. CODE § 34-52-1-1(b)(3); *SJS Refractory Co.*, 952 N.E.2d at 770.

⁶⁰ *Id.* at § 34-52-1-1.

⁶¹ *N. Elec. Co. v. Torma*, 819 N.E.2d 417, 430–431 (Ind. Ct. App. 2004) (citation omitted).

⁶² *Mitchell v. Mitchell*, 695 N.E.2d 920, 924 (Ind. 1998) (quoting *Kahn v. Cundiff*, 533 N.E.2d 164, 170 (Ind. Ct. App. 1989)).

[Section 34-52-1-1] must leave breathing room for zealous advocacy and access to the courts to vindicate rights.”⁶³

I. Reliance Damages

Reliance damages refer to a party suffering a pecuniary loss as a result of their reliance on a promise or inaccurate statement.⁶⁴ Reliance damages are normally considered an equity remedy as the remedy relies on a party meeting the elements of promissory estoppel.⁶⁵ Instead of lost profits, a plaintiff may only be entitled to “damages based on the plaintiffs’ reliance.”⁶⁶ Indiana draws a line between expectation damages (compensatory, consequential, incidental) and reliance damages.⁶⁷ While this type of damage is rare, it could be awarded in breach of contract cases. Commonly, reliance damages are awarded to plaintiffs who successfully prove fraud and demonstrate detrimental reliance

on the misrepresentation of the information provided.

J. Unjust Enrichment

Unjust enrichment “is a legal fiction invented by the common law . . . in order to permit a recovery . . . where the circumstances are such that under the law of natural and immutable justice there should be recovery[.]”⁶⁸ “To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant’s retention of the benefit without payment would be unjust.”⁶⁹ “Unjust enrichment operates when there is no governing contract” and is an equitable doctrine.⁷⁰ Indiana often uses the terms “quantum meruit” and “unjust enrichment”

⁶³ *Id.* at 925.

⁶⁴ See *Pearman v. Hale Abstract Co.*, 159 N.E.3d 597, 601 (Ind. Ct. App. 2020) (purchaser did not suffer pecuniary loss due to his reliance on title company’s representation and thus title company was not liable).

⁶⁵ See *AgReliant Genetics, LLC v. Gary Hamstra Farms, Inc.*, 213 N.E.3d 1087, 1098 (Ind. Ct. App. 2023) (“If a party has established the elements of promissory estoppel, justice does not require the award of lost profits”).

⁶⁶ *Id.*

⁶⁷ *Cnty. Found. of Nw. Ind., Inc. v. Miranda*, 120 N.E.3d 1090, 1102 (Ind. Ct. App. 2019) (reliance damages are an equitable remedy).

⁶⁸ *Zoeller v. E. Chicago Second Century, Inc.*, 904 N.E.2d 213, 220 (Ind. 2009) (quoting *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991)) (it was an error to dismiss unjust enrichment claim when plaintiff sued defendant for retaining profits that were meant to benefit local community).

⁶⁹ *Id.* (citing *Bayh*, 573 N.E.2d at 408).

⁷⁰ *DiMizio v. Romo*, 756 N.E.2d 1018, 1025 (Ind. Ct. App. 2001) (reversing claim for unjust enrichment because there was a valid modification for contract).

interchangeably.⁷¹ However, quantum meruit focuses on a “claim or right of action for the reasonable value of services rendered” whereas, unjust enrichment “focuses on the benefit realized and retained . . . as a result of some improvement provided[.]”⁷² “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”⁷³ A damage award must be “referenced to some fairly defined standard, such as cost of repair, market value, [invoice amounts,] established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances of a given case.”⁷⁴ The computation of damages is a matter within the trial court’s discretion, and no degree of mathematical certainty is required so long as the amount awarded is supported by the evidence in the record.⁷⁵

K. Good Faith and Fair Dealing

“Both the Uniform Commercial Code and the Restatement (Second)

of Contracts impose obligations of good faith in the performance and enforcement of contracts.”⁷⁶ However, “Indiana does not impute into every contract a duty of good faith and fair dealing.”⁷⁷ “[S]uch a duty arises only in limited circumstances, such as when a fiduciary relationship exists,”⁷⁸ like in employment or insurance contracts.⁷⁹ An implied covenant of good faith and fair dealing can also exist where these “contracts are ambiguous as to the application of the covenants or expressly impose them.”⁸⁰ The statute of limitations on breach of implied duty of good faith and fair dealing is two years,⁸¹ and due to its similarity to a breach of fiduciary duty claim,⁸² compensatory or incidental damages may be awarded.

L. Unique Remedies

Indiana authorizes prejudgment attachment under Indiana Code Section 34-25-2-1 and Indiana Rule of Trial Procedure 64.⁸³ Indiana Code Section 34-25-2-1 allows a

⁷¹ Lash v. Kreigh, 202 N.E.3d 1098, 1102–1103 (Ind. Ct. App. 2023).

⁷² *Id.* at 1103.

⁷³ *Id.*

⁷⁴ Walsh v. Chris Sweeney Const., Inc., No. 17A05–1107–PL–370, 2012 WL 219344, at *6 (Ind. Ct. App. Jan. 25, 2012) (unpublished memorandum opinion) (citation omitted).

⁷⁵ *See id.*

⁷⁶ Ford Motor Credit Co. v. Garner, 688 F. Supp. 435, 442 (N.D. Ind. 1988).

⁷⁷ Del Vecchio v. Conseco, Inc., 788 N.E.2d 446, 451 (Ind. Ct. App. 2003) (citation omitted).

⁷⁸ *Id.*

⁷⁹ Coates v. Heat Wagons, Inc., 942 N.E.2d 905, 918 (Ind. Ct. App. 2011).

⁸⁰ *Id.*

⁸¹ Del Vecchio, 88 N.E.2d at 451.

⁸² *Id.*

⁸³ IND. CODE § 34-25-2-1; IND. R. TRIAL P. 64.

plaintiff attachment to the property of the defendant when the defendant or defendants:

- (1) are a foreign corporation or a non-Indiana resident;
- (2) are secretly leaving or have left Indiana with the intent to defraud the state, a municipal corporation, a political subdivision, a school corporation, or the defendant's own creditors;
- (3) are concealed for the purpose of preventing service of a summons;
- (4) are removing or are about to remove property subject to execution outside Indiana and thus not leaving enough behind to satisfy plaintiff's claim; or

- (5) have sold, conveyed, disposed of, or are about to sell, convey, dispose of their property subject to execution with the fraudulent intent to cheat, hinder, or delay.⁸⁴

Additionally, plaintiffs' counsel may seek prejudgment attachment through Indiana Rule of Trial Procedure 64, as Rule 64 provides additional situations in which the remedy may apply.⁸⁵ Plaintiffs seeking attachment are required to complete an affidavit and post a bond.⁸⁶

Prejudgment attachment is an "extraordinary remedy."⁸⁷ The plaintiff bears the burden of coming forward with "all the necessary facts available at the time [the plaintiff] requested . . . pre-trial

⁸⁴ IND. CODE § 34-25-2-1.

⁸⁵ IND. R. TRIAL P. 64.

⁸⁶ IND. CODE § 34-25-2-4-5 (providing list of requirements that must be met for request for attachment to be granted); *see generally* Wayne Mfg., LLC v. Cold Headed Fasteners & Assemblies Inc., No. 1:21-CV-00290-HAB, 2023 WL 6290576 (N.D. Ind. Sept. 26, 2023) (discussing whether plaintiff was entitled to prejudgment attachment).

⁸⁷ Lakes & Rivers Transfer v. Rudolph Robinson Steel Co., 795 N.E.2d 1126, 1130 (Ind. Ct. App. 2003) (discussing whether plaintiff had met evidentiary burden for prejudgment attachment).

attachment.”⁸⁸ This requirement allows the court to make an “informed decision.”⁸⁹ If a plaintiff fails to provide all known facts, the plaintiff is subjected to a “possible subsequent finding of wrongful and oppressive attachment” under Indiana Code Section 34-25-2-23, which permits the aggrieved defendant to recover damages.⁹⁰

Indiana courts may also consider the due process implications of prejudgment attachment. “Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable . . . would permit the deprivation of the defendant’s property[.]”⁹¹ Because Indiana Code Section 34-25-2-1(a) grants a court “permissive,” rather than “mandatory” “authority to order prejudgment attachment,” the court may use its permissive authority to grant prejudgment attachment only when the plaintiff “show[s] a likelihood of success on the merits of his . . . claim.”⁹²

M. Public Policy Prohibitions

Although a valid contract might exist, if the contract contravenes public policy, the instrument could

be void and unenforceable. A contract is unenforceable on grounds of illegality or public policy in two circumstances: (1) “legislation provides that it is unenforceable[.]” or (2) “the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”⁹³ In examining the second set circumstances, courts will weigh the following factors to determine the interest of enforcement against public policy.⁹⁴

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1130–1131.

⁹¹ *Vukadinovich v. Posner*, No. 2:22-CV-118-TLS-JPK, 2023 WL 4348059, at *6 (N.D. Ind. July 3, 2023) (explaining implications of granting prejudgment attachment when plaintiff does not meet burden of proof)

(quoting *Connecticut v. Doe*, 501 U.S. 1, 13–14 (1991) (holding Connecticut *ex parte* attachment procedure violated due process)).

⁹² *Id.*

⁹³ Restatement (Second) of Contracts § 178 (Am. L. Inst. 1981).

⁹⁴ *Id.*

In weighing public interest for enforcement, courts will consider:	In weighing public policy against enforcement, courts will consider:
(a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.	(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.

Additionally, Indiana recognizes several avoidance doctrines that may preclude recovery by an injured party. Those include:

- unconscionable contracts;⁹⁵
- lack of capacity;⁹⁶
- intoxication at time of formation;⁹⁷
- contracts with a minor;⁹⁸
- contracts made in violation of a statute;⁹⁹ and
- contracts induced by fraud, undue influence, or duress.¹⁰⁰

⁹⁵ *Justus v. Justus*, 581 N.E.2d 1265 (Ind. Ct. App. 1991).

⁹⁶ *Gallagher v. Cent. Ind. Bank, N.A.*, 448 N.E.2d 304 (Ind. Ct. App. 1983).

⁹⁷ *Scherer v. Scherer*, 405 N.E.2d 40 (Ind. Ct. App. 1980).

⁹⁸ *Mullen v. Tucker*, 510 N.E.2d 711 (Ind. Ct. App. 1987).

⁹⁹ *Tolliver v. Mathas*, 538 N.E.2d 971 (Ind. Ct. App. 1989).

¹⁰⁰ *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276 (Ind. 1983).