

Kentucky

By: Robin D. Miller



Robin D. Miller is a member of the Cincinnati office of Stites & Harbison PLLC. She focuses on efficiently representing clients in high-stakes, complex commercial disputes. Her practice areas include business litigation, class actions, construction, employment law, financial services, product liability, and professional liability.



A. Adoption of the UCC

With some changes, Kentucky adopted the Uniform Commercial Code to govern commercial disputes. Kentucky's adoption is codified at Kentucky Revised Statutes Section 355.2-207.¹

B. Compensatory Damages

Under Kentucky law, an aggrieved party generally is entitled to damages in a sum that would put the party in the same position it would have been in had the defendant performed the contract.² These expectancy or benefit-of-the-bargain damages include damages

that reasonably and naturally arise from the other party's breach or that the parties reasonably contemplated when the contract was formed.³ Special damages may also be awarded when there are special or unique circumstances surrounding the making of an agreement and where the defendant had notice of the special circumstances from which the damages arose.⁴

A plaintiff must prove the existence and amount of damages to reasonable certainty, and damages that are contingent, uncertain, or speculative are not recoverable.⁵ However, if money damages are not

¹ Cousins Smokehouse, LLC v. Louisville Processing & Cold Storage, Inc., 588 F. Supp.3d 753 (W.D. Ky. 2022) (applying Kentucky law).

² Univ. of Louisville v. RAM Eng'g & Constr., Inc., 199 S.W.3d 746, 748 (Ky. Ct. App. 2005).

³ *Id.*

⁴ Tex. Cap. Bank, N.A. v. First Am. Title Ins., 822 F. Supp.2d 678, 685 (W.D. Ky. 2011) (applying Kentucky law).

⁵ Mattingly Bridge Co. v. Holloway & Son Constr. Co., 694 S.W.2d 702, 705 (Ky. 1985).

available or would be inadequate to fully compensate the plaintiff for a loss,⁶ Kentucky courts may award equitable remedies including, but not limited to, injunctive relief,⁷ rescission,⁸ reformation,⁹ specific performance,¹⁰ declaratory judgment,¹¹ unjust enrichment,¹² and promissory estoppel.¹³

Kentucky requires injured parties to attempt to mitigate their damages.¹⁴ The law will not compensate a party, even an injured party, where the party does not at least try to avoid or lessen its damages.¹⁵

C. Consequential Damages

Kentucky allows the recovery of consequential damages.¹⁶ Consequential damages are intended to compensate a plaintiff for those damages that, although not an invariable result of every breach of this sort, were reasonably foreseeable or contemplated by the parties at the time the contract was entered into and they include a wide range of damages.¹⁷ Consequential damages also includes interest (both pre- and post-judgment) as a means of recognizing the economic reality that a breaching party enjoyed a long opportunity to earn

⁶ *Billy Williams Builders & Devs. Inc. v. Hillerich*, 446 S.W.2d 280, 283 (Ky. 1969).

⁷ *Louisville Cycle & Supply Co. v. Baach*, 535 S.W.2d 230, 232-233 (Ky. 1976); *Lareau v. O'Nan*, 355 S.W.2d 679, 681 (Ky. 1962).

⁸ *Payne v. Rutledge*, 391 S.W.3d 875, 880 (Ky. Ct. App. 2013); *Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753, 757 (Ky. Ct. App. 1999).

⁹ *James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC*, 941 F. Supp.2d 807, 832 (E.D. Ky. 2013) (applying Kentucky law).

¹⁰ *AEP Indus., Inc., v. B.G. Props., Inc.*, 533 S.W.3d 674, 676 (Ky. 2017).

¹¹ See *KRS 418.040 to 418.055; Commonwealth v. Ky. Ret. Sys.*, 396 S.W.3d 833, 839-840 (Ky. 2013).

¹² *Lipson v. Univ. of Louisville*, 556 S.W.3d 18, 32 (Ky. Ct. App. 2018).

¹³ *Jackson v. JB Hunt Transp., Inc.*, 384 S.W.3d 177, 184 (Ky. Ct. App. 2012); *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 643 (Ky. Ct. App. 2003).

¹⁴ *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 852 (Ky. Ct. App. 2014).

¹⁵ *Id.*

¹⁶ *Consolidated Aluminum Corp. v. Krieger*, 710 S.W.2d 869 (Ky. Ct. App. 1986).

¹⁷ *Marley Cooling Tower Co. v. Caldwell Energy & Environmental, Inc.*, 280 F. Supp.2d 651 (W.D. Ky. 2003) (applying Kentucky law).

interest on money that he wrongfully withheld.¹⁸ Such damages may be recovered where they are reasonably ascertainable, not the result of losses that the plaintiff could reasonably have prevented, and where the damages were in the contemplation of the parties when they entered into the contract.¹⁹ Consequential damages include those which reasonably flow from the defendant's misconduct so long as the damages are traceable to the breach and are supported by the evidence.²⁰

Kentucky provides for the limitation or exclusion of consequential damages in contracts involving buyers and sellers, unless the clause is held to be unconscionable or where the exclusion of the remedy would cause the contract to fail of its essential purpose.²¹

D. Incidental Damages

Kentucky recognizes incidental damages in commercial transactions and construction disputes. Specifically, a buyer is

entitled to incidental damages where the seller's breach caused the buyer to reasonably incur expenses related to the inspection, receipt, transportation, care, and custody of goods rightfully rejected, as well as any commercially reasonable charges, expenses, or commissions in connection with effecting cover.²²

E. Punitive Damages

Punitive damages are damages that are intended to punish the defendant and deter similar conduct.²³ Punitive damages must be proven by clear and convincing evidence and require a showing of particularly egregious conduct by the defendant.²⁴ When a defendant acts with malice or engages in conscious wrongdoing, or where there is evidence of oppression, fraud, or gross negligence, punitive damages may be awarded.²⁵ Allowing punitive damages for gross negligence is a departure from other jurisdictions.²⁶

Punitive damages are not available in breach of contract cases, nor can they be assessed against a

¹⁸ Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (Ky. 1991); Curtis v. Campbell, 336 S.W.2d 355, 361 (Ky. 1960).

¹⁹ Kentucky Heating Co. v. Hood, 118 S.W. 337 (Ky. 1909).

²⁰ Nucor Corp. v. General Electric Co., 812 S.W.2d (Ky. 1991).

²¹ KRS 355.2-711 – 355.2-714, 355.2-715(2); Moore v. Mack Trucks, Inc., 40 S.W.3d 888, 892 (Ky. Ct. App. 2001).

²² KRS 355.2-715.

²³ KRS 411.184; PBI Bank, Inc. v. Signature Point Condos. LLC, 535 S.W.3d 700, 715 (Ky. Ct. App. 2016).

²⁴ KRS 411.184.

²⁵ KRS 411.184; Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998); PBI Bank, 535 S.W.3d at 715.

²⁶ See, for example, Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998).

principal or an employer for the acts of an agent or employee, unless such principal or employer authorized the conduct or should have anticipated the actionable conduct.²⁷ But, if a trier of fact awards punitive damages, the court may also make an equitable award of attorney's fees.²⁸ Kentucky does not place a statutory cap on punitive damages. However, Kentucky courts are guided by the United States Supreme Court's emphasis that grossly excessive awards should be avoided.²⁹

F. Liquidated Damages

Liquidated damages are a predetermined amount that the parties agree, in advance, are a reasonable estimate of the actual damages that may be suffered following a breach.³⁰ Liquidated damages clauses are generally enforced when actual damages are difficult to determine, the amount of fixed damages is proportionate to

the actual damages suffered, and the amount of liquidated damages is not so unreasonably large to be considered a penalty.³¹

G. Pre- and Post-Judgment Interest

The purpose of prejudgment interest is to compensate a plaintiff who has been deprived of the use of money.³² Prejudgment interest is mandatory and is awarded as a matter of right on liquidated claims.³³ A claim is liquidated when the amount sought can be ascertained in accordance with fixed rules of evidence and known standards of value, or when it can be determined by reference to well-established market values.³⁴ When the claim is unliquidated, prejudgment interest can be awarded within the discretion of the trial court.³⁵ With respect to breach of contract claims, the interest is calculated from the date payment is due.³⁶

²⁷ KRS 411.184.

²⁸ *Mo-Jack Distributor, LLC v. Tamarack Snacks, LLC*, 476 S.W.3d 900 (Ky. Ct. App. 2015).

²⁹ *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

³⁰ *Goetz v. Asset Acceptance, LLC*, 513 S.W.3d 342, 346 (Ky. Ct. App. 2016).

³¹ *Mattingly Bridge Co.*, 694 S.W.2d at 705.

³² *Nucor*, 812 S.W.2d at 141.

³³ *AnyConnect US, LLC v. Williamsburg Place, LLC*, 636 S.W.3d 556 (Ky. Ct. App. 2021).

³⁴ *See 3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005). (citing 22 Am. Jur. 2d DAMAGES § 469 (2004)).

³⁵ *Friction Materials Company, Inc. v. Stinson*, 833 S.W.2d 388 (Ky. Ct. App. 1992); *3D Enterprises*, 174 S.W.3d at 450.

³⁶ *Nucor*, 812 S.W.2d at 144 (citing Restatement (Second) of Contracts § 354 (1981)) ("If the breach consists of a

Kentucky also provides prevailing parties a statutory right to recover post-judgment interest.³⁷ And absent factors demonstrating that it is inequitable to require post-judgment interest, the interest will be allowed at the rate set out in the statute.³⁸ At present, the statutory interest rate for both pre and post-judgment interest is 6%, compounded annually.³⁹

H. Attorney's Fees

Like many states, Kentucky follows the American Rule as a general principle. As a result, attorney's fees are not recoverable, either as a cost or as damages, absent a statute or an express contractual provision.⁴⁰ However, Kentucky recognizes an equitable rule that an award of attorney's fees rests within the sound discretion of the court depending on the circumstances of each particular case, including where recovery is

sought in the common interest of others.⁴¹

However, attorney's fees can be awarded in Kentucky pursuant to Civil Rule 11 where there is a finding of frivolous conduct.⁴² Civil Rule 11 is designed to curb abusive conduct in the civil litigation arena.⁴³ Although it is an exceptional remedy, fees may be awarded where an attorney's conduct, at the time he or she signs the allegedly offending paper, was not reasonable under the circumstances.⁴⁴ Because an award of attorney's fees is within the discretion of the court, a trial court's finding will not be reversed absent an abuse of discretion.⁴⁵

I. Reliance Damages

Kentucky recognizes claims based on one party's reliance to its detriment on the representations of another. Such claims include promissory estoppel and negligent and fraudulent misrepresentation.⁴⁶ Promissory estoppel, however, cannot be used to defeat the statute of frauds.⁴⁷ The material

failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due....").

³⁷ KRS 360.040; *see also* *Chesley v. Abbott*, 524 S.W.3d 471 (Ky. Ct. App. 2017).

³⁸ *Chesley*, 524 S.W.3d 471; *Courtenay v. Wilhoit*, 655 S.W.2d 41, 42 (Ky. Ct. App. 1983).

³⁹ KRS 360.40.

⁴⁰ *Haney v. Stykes*, 688 S.W.3d 561 (Ky. Ct. App. 2023).

⁴¹ *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754 (Ky. Ct. App. 1984).

⁴² *Lexington Inv. Co. v. Willeroy*, 396 S.W.3d 309 (Ky. Ct. App. 2013).

⁴³ *Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky. Ct. App. 1988).

⁴⁴ *Id.*

⁴⁵ *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

⁴⁶ *Bank of America, N.A. v. Corporex Realty & Inv., LLC*, 875 F. Supp.2d 689 (E.D. Ky. 2012) (applying Kentucky law).

⁴⁷ *Rivermont Inn*, 113 S.W.3d at 643.

misrepresentation must related to a past or present fact.⁴⁸ Although Kentucky does not allow an action for an alleged promise to perform a contractual obligation in the future, it does allow claims for fraudulent inducement when a defendant makes promises that induce the plaintiff to enter into a contract where the defendant has no intention of performing.⁴⁹

As a prerequisite to recover reliance damages, a plaintiff must plead and prove actual reliance on the misrepresentation.⁵⁰ Further, the plaintiff's reliance must be reasonable.⁵¹ Reliance has been held to be reasonable where the defendant claims to have special knowledge of the subject matter that the plaintiff does not have, the defendant is in a trust or fiduciary role, or the defendant has some other special reason to expect that

the plaintiff will rely on his statement.⁵² Both restitution and expectation damages are available as reliance damages.⁵³

J. Unjust Enrichment

Unjust enrichment is available under Kentucky law as an equitable remedy when the parties' relationship is not governed by an express contract.⁵⁴ While both contract and unjust enrichment legal theories may be pled, a party cannot recover under both theories.⁵⁵ To recover for unjust enrichment, the plaintiff must prove that a benefit was conferred on the defendant at the plaintiff's expense, the defendant appreciated the benefit, and it would be inequitable for the defendant to keep the benefit without paying for its value.⁵⁶ The measure of damages in an unjust enrichment claim is the value of the benefit conferred on the defendant.⁵⁷

⁴⁸ *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 262 (Ky. Ct. App. 2007); *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 549 (Ky. 2009) (noting that future statements or mere opinions generally are not actionable).

⁴⁹ *SMA Portfolio Owner, LLC v. Corporex Realty & Inv., LLC*, 112 F. Supp.3d 555, 569-570 (E.D. Ky. 2015) (applying Kentucky law); *Major v. Christian Cnty. Livestock Mkt., Inc.*, 300 S.W.2d 246, 249 (Ky. 1957).

⁵⁰ *UPS Co. v. Rickert*, 996 S.W.2d 464, 469 (Ky. 1999); *Wilson v. Henry*, 340 S.W.2d 449, 451 (Ky. Ct. App. 1960).

⁵¹ *Flegles*, 289 S.W.3d at 549.

⁵² *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 45 (Ky. 2018).

⁵³ *Gibson v. Ky. Farm Bureau Mut. Ins.*, 328 S.W.3d 195, 204 (Ky. Ct. App. 2010); *Sanders, Inc. v. Chesmotel Lodge, Inc.*, 300 S.W.2d 239, 241 (Ky. Ct. App. 1957).

⁵⁴ *Superior Steel, Inc. v. Ascent at Roebing's Bridge, LLC*, 540 S.W.3d 770, 777-778 (Ky. 2017).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *First Technology Capital, Inc. v. JPMorgan Chase Bank, N.A.*, 53 F. Supp.3d 972 (E.D. Ky. 2014) (applying Kentucky law).

K. Public Policy Prohibitions

Kentucky recognizes typical public policy considerations related to antitrust issues,⁵⁸ relative bargaining power,⁵⁹ and certain

unconscionable contracts,⁶⁰ but Kentucky public policy generally allows businesses to enter into contracts as they see fit.⁶¹

⁵⁸ *Gaines v. Carrollton Tobacco Bd. Of Trade, Inc.*, 386 F.2d 757 (6th Cir. 1967) (applying Kentucky law).

⁵⁹ *Mullins v. Northern Kentucky Inspections, Inc.*, 2010 WL 3447630 (Ky. Ct. App. 2010), citing *Greenwich Insurance Co. v. Louisville & N.R. Co.*, 112 Ky. 598, 66 S.W. 411 (Ky. 1902).

⁶⁰ *Kegal v. Tillotson*, 279 S.W.3d 908 (Ky. Ct. App. 2009); *Material Handling Systems, Inc. v. Cabrera*, 572 F. Supp.3d 375 (W.D. Ky. 2021) (applying Kentucky law).

⁶¹ *United Services Auto. Ass'n v. ADT Sec. Services, Inc.*, 241 S.W.3d 335 (Ky. App. 2006) (“there is a broad public policy of freedom to contract in Kentucky”).