

Maryland

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A. Adoption of the UCC

Maryland adopted the Uniform Commercial Code in 1963.¹ In the Annotated Code of Maryland, the UCC comprises Titles 1 through 9 of the Commercial Law Article.

B. Compensatory Damages

“In a breach of contract action, upon proof of liability, the non-breaching party may recover damages for 1) the losses proximately caused by the breach, 2) that were reasonably foreseeable, and 3) that have been proven with reasonable certainty. In this context,

‘proximate cause’ means losses that actually resulted from the breach. Losses that are speculative, hypothetical, remote, or contingent either in eventuality or amount will not qualify as ‘reasonably certain’ and therefore recoverable as contract damages.”² “[F]ixed expenses need not be deducted from gross income to arrive at lost profit properly recoverable” for breach of contract.³

Under the doctrine of avoidable consequences, a victim of breach of contract must mitigate damages by “mak[ing] all reasonable efforts to minimize the loss he sustains as a result of the breach, and he can

¹ *Jenkins v. Karlton*, 329 Md. 510, 517 (Md. 1993) (citing Chapter 538, Acts of 1963).

² *Adcor Indus. v. Beretta U.S.A. Corp.*, 250 Md. App. 135, 154 (Md. App. Ct. 2021) (quoting *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594-595 (Md. App. Ct. 2007)).

³ *Sloane, Inc. v. House & Assocs., Inc.*, 311 Md. 36, 50 (Md. 1987).

charge the party in default with such damages only as, with reasonable endeavors and expense and without risk of additional substantial loss or injury, he could not prevent.”⁴ “When the doctrine applies, ‘the burden is necessarily on the defendant to prove that the plaintiff failed to use all reasonable efforts to

minimize the loss he or she sustained.”⁵

Compensatory damages may be recoverable under, *inter alia*, the following claims in Maryland:

- account stated;⁶
- aiding and abetting;⁷
- breach of contract;⁸
- breach of fiduciary duty;⁹

⁴ *Blumenthal Kahn Elec. L.P. v. Bethlehem Steel Corp.*, 120 Md. App. 630, 643 (Md. App. Ct. 1998) (quoting *Sergeant Co. v. Pickett*, 285 Md. 186, 203 (Md. 1979)).

⁵ *Fort Myer Constr. Corp. v. Banneker Ventures LLC*, No. 2019-1002, 2021 WL 5234692 at *22 (Md. App. Ct. Nov. 10, 2021) (quoting *Cave v. Elliott*, 190 Md. App. 65, 96 (2010)) (internal citations omitted).

⁶ *Baltimore Cnty. v. Archway Motors, Inc.*, 35 Md. App. 158, 166 (Md. App. Ct. 1977) (citing *Lyell v. Walbach*, 111 Md. 610, 614-615 (1909)) (“[T]o maintain a cause of action on an account stated, all that need be shown is an admission that the stated sum of money constitutes a present existing debt. Such admission need not be express, but may be inferred. Thus, under appropriate circumstances, a failure within a reasonable time to object to the correctness of a stated sum may be regarded as an admission of liability.”).

⁷ Liability for aiding and abetting requires an underlying tortious act by a principal tortfeasor, *Alleco Inc. v. Harry & Jeanette 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). An aider and abettor is jointly and severally liable as a principal. *Duke v. Feldman*, 245 Md. 454, 457 (Md. 1967).

⁸ *See Sloane*, 311 Md. at 50.

⁹ *Plank v. Cherneski*, 469 Md. 548, 599 (Md. 2020) (“To establish a breach of fiduciary duty as an independent cause of action, a plaintiff must show: ‘(i) the existence of a fiduciary relationship; (ii) breach of the duty owed by the fiduciary to the beneficiary; and (iii) harm to the beneficiary.’ The remedy for a breach is dependent upon the type of fiduciary relationship, and the remedies provided by law, whether by statute,

- breach of warranty;¹⁰
- civil conspiracy;¹¹
- defamation;¹²
- fraud (both actual¹³ and constructive);¹⁴
- misappropriation of trade secrets;¹⁵
- negligent misrepresentation;¹⁶

common law, or contract. Under our *Kann* analysis, a court should consider the nature of the fiduciary relationship and possible remedies afforded for a breach, on a case-by-case basis. If a plaintiff describes a fiduciary relationship, identifies a breach, and requests a remedy historically recognized by statute, contract, or common law applicable to the specific type of fiduciary relationship and the specific breach is alleged, a court should permit the court to proceed.” (citations omitted). *Plank* upended decades of often contradictory case law. It should be the starting point for any case involving an alleged breach of fiduciary duty.

¹⁰ See *infra*, Sections C & D.

¹¹ The damages recoverable for civil conspiracy are those proximately resulting from the wrongful conduct. *Daugherty v. Kessler*, 264 Md. 281, 292 (Md. 1972). However, there will be no recoverable damages where damages would be unavailable for accomplishing the object of the alleged conspiracy. See, for example, *Shamberger v. Dessel*, 236 Md. 318, 322 (Md. 1964) (“There could be no conspiracy to accomplish by lawful means what the law permits.”).

¹² *Hearst Corp. v. Hughes*, 297 Md. 112, 121 (Md. 1983) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974)) (“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.”).

¹³ See *Hall v. Lovell Regency Homes, L.P.*, 121 Md. App. 1, 12 (Md. App. Ct. 1998) (recognizing a “flexible measure of damages” that allows a plaintiff a choice of tests: the “out-of-pocket rule,” which is the “preferred test,” and the “benefit-of-the-bargain test”); *Weisman v. Connors*, 69 Md. App. 732, 750 (Md. App. Ct. 1987), *rev’d on other grounds*, 312 Md. 428 (1988) (discussing out-of-pocket rule); *Goldstein v. Miles*, 159 Md. App. 403, 422-434 (Md. App. Ct. 2004) (discussing benefit-of-the-bargain damages).

¹⁴ *Crawford v. Mindel*, 57 Md. App. 111, 122 (Md. App. Ct. 1984) (citing *Empire Realty Co., Inc. v. Fleisher*, 269 Md. 278, 284-285 (Md. 1973)) (damages for constructive fraud must be the “natural and proximate consequence” of the wrongful act, and the “fraud and the injury must be connected and must bear to each other the relation of cause and effect”).

¹⁵ MD. CODE ANN., COM. LAW § 11-1203(b) (entitling plaintiff to recover actual loss caused by the misappropriation as well as any unjust enrichment not considered in the computation of actual loss).

¹⁶ As with fraud, Maryland courts recognize both the out-of-pocket rule and benefit-of-the-bargain damages. See *Ward Dev. Co., v. Ingraio*, 63 Md. App. 645, 659 (Md. App. Ct. 1985) (discussing *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 511-512 (Md. 1971) (“We perceive no reason why this flexible approach [*i.e.*, the out-of-pocket rule] should not be applied to cases of negligent as well as fraudulent misrepresentation.”); *Goldstein*, 159 Md. App. at 422-434 (discussing benefit-of-the-bargain damages).

- replevin/detinue;¹⁷
- trover and conversion;¹⁸
- tortious interference with prospective advantage;¹⁹
- tortious interference with contract;²⁰
- unfair competition;²¹ and
- private nuisance.²²

C. Consequential Damages (and Exclusions)

Maryland 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,

¹⁷ See *Koch v. Mack Int'l Motor Truck Corp.*, 201 Md. 562, 572 (Md. 1953) (quoting *Burnett v. Bealmear*, 79 Md. 36, 40 (Md. 1894)) (In replevin, “[t]he proper verdict for the plaintiff, when he is entitled to it, is merely for damages for the detention of the goods.”); MD. CODE ANN., CTS. & JUD. PROC. § 11-104(a) (“In an action of detinue a plaintiff may recover the personal property and damages for the wrongful detention of the property”). See also, MD. R. 12-602(c) (detailing how to plead for relief in a replevin or detinue action).

¹⁸ *United States v. Arora*, 860 F. Supp. 1091, 1100 (D. Md. 1994), *aff'd*, 56 F.3d 62 (4th Cir. 1995) (measure of damages for trover and conversion is the difference between the property’s value immediately before and after the harm, or the cost of repair. If, however, the property was destroyed, or converted, the measure of damages is the value of the property at the time of destruction or conversion).

¹⁹ *Rite Aid Corp. v. Lake Shore Investors*, 298 Md. 611, 620 (Md. 1984) (citing Restatement, Second, of Torts, § 774A (1979)) (The action is for a tort, and damages, per Prosser, include: pecuniary loss of the benefits of the contract or the prospective relation; 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 from the interference.)

²⁰ See *id.*

²¹ See *GAI Audio of N.Y., Inc. v. Columbia Broad. Sys.*, 27 Md. App. 172, 195-196 (Md. App. Ct. 1975) (citing 74 Am. Jur. 2d, Trademarks and Tradenames, § 145) (actual damages include special proof damages and loss of profits).

²² *Gorman v. Sabo*, 210 Md. 155, 162-165 (Md. 1956) (measure of damages for nuisance include all losses caused by the nuisance, including diminution of the property’s value).

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.”²³

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.²⁴

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.²⁵

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.”²⁶

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

²³ Stone v. Chicago Title Ins. Co., 330 Md. 329, 339 (Md. 1993) (quoting United States Telegraph Co. v. Gildersleve, 29 Md. 232, 249-253 (Md. 1868)).

²⁴ MD. CODE ANN., COM. LAW § 2-706(1).

²⁵ *Id.*, COM. LAW § 2-715(2).

²⁶ *Id.*, COM. LAW § 2-719(1)(a) & (3).

goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach."²⁷

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."²⁸

E. Punitive Damages

"[P]unitive damages ... are not available as a form of relief for breach of contract.²⁹ "[I]n a tort claim arising from a contractual

relationship" – for example, fraudulent inducement – "actual malice is a prerequisite to the recovery of punitive damages."³⁰ "Actual malice" refers to evil motive, intent to injure, ill will, or fraud.³¹ Punitive damages are available for intentional torts – *e.g.*, aiding and abetting and civil conspiracy. "In a non-intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by ... 'actual malice.'"³² To establish actual malice in products liability cases "plaintiff must prove (1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect."³³

²⁷ *Id.*, COM. LAW § 2-710.

²⁸ *Id.*, COM. LAW § 2-715(1).

²⁹ *Impac Mortg. Holdings, Inc. v. Timm*, 245 Md. App. 84, 125 (Md. App. Ct. 2020) (citing *George Wasserman & Janice Wasserman Goldstein Family LLC v. Kay*, 197 Md. App. 586, 636 (Md. App. Ct. 2011)).

³⁰ *Peamon v. Pep Boys, Inc.*, 2019 Md. App. LEXIS 986, *10, 2019 WL 6002117 (Md. App. Ct. Nov. 13, 2019) (quoting *Schaefer v. Miller*, 322 Md. 297, 299-300 (Md. 1991)). *See generally*, *Scott v. Jenkins*, 345 Md. 21, 29 (1997) ("in order to recover punitive damages in *any* tort action in the State of Maryland, facts sufficient to show *actual malice* must be pleaded and proven by clear and convincing evidence, and a specific demand for the recovery of punitive damages must be made before an award of such damages may be had") (emphasis in original).

³¹ *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460 (Md. 1992) (citing *Davis v. Gordon*, 183 Md. 129, 133 (Md. 1944)).

³² *Id.*

³³ *Id.* at 462; *see Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 260 (Md. 2004) (actual malice must be shown by clear

“As a general rule, ‘a necessary condition for the recovery of punitive damages is an underlying award of compensatory damages.’”³⁴ Nominal compensatory damages will support an award of punitive damages; nominal

damages will not.³⁵ Whenever punitive damages are appropriate, the amount of reasonable attorney’s fees incurred in the pending litigation may be considered by the jury.³⁶ “[A] court of equity may not award punitive damages.”³⁷

F. Liquidated Damages

“It has long been the rule in Maryland that valid liquidated damages provisions are enforceable. Our predecessors stated ‘the settled rule of law’ with respect to liquidated damages as follows:

[W]here the parties, at or before the time of the execution of the contract, agree upon and name a sum therein to be paid as liquidated damages, in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, that the amount so named in the

and convincing evidence and plaintiff is not obliged to present evidence of the defendant’s financial condition); MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (providing that, in any action for punitive damages for personal injury, evidence of the defendant’s financial means is inadmissible until there has been a finding of liability and that punitive damages are supportable under the facts).

³⁴ *FZata Inc. v. Guan*, 2023 Md. App. LEXIS 794, *108, 2023 WL 8053056 (Md. App. Ct. Nov. 21, 2023) (quoting *Shabazz v. Bob*

Evans Farms, Inc., 163 Md. App. 602, 639 (Md. App. Ct. 2005)).

³⁵ *Id.* (quoting *Shabazz*, 163 Md. App. at 639-640).

³⁶ *St. Luke Evangelical Lutheran Church v. Smith*, 318 Md. 337, 338 (Md. 1990).

³⁷ *Id.* at 348 (citing *Prucha v. Weiss*, 233 Md. 479, 483-484 (Md. 1964), *cert. denied*, 377 U.S. 992 (1964)). (“The merger of law and equity was accomplished in [Maryland] on July 1, 1984, as a part of a comprehensive revision of the Maryland Rules of Procedure.” *Higgins v. Barnes*, 310 Md. 532, 534 (Md. 1987)).

agreement will be regarded as liquidated damages and not as a penalty, unless the amount so agreed upon and inserted in the agreement be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. And whether it is excessive or whether the damages are incapable of exact ascertainment should be determined from the subject-matter of the contract considered in the light of all the surrounding facts and circumstances connected therewith and known to the parties at the time of its execution. That these questions should be considered and determined from the contract itself, its subject-matter and the surrounding facts and circumstances connected therewith with which the parties are confronted at the time of its execution, is made necessary in order to ascertain the intention

of the parties, which is one of the essential factors in deciding whether the stipulation is for liquidated damages or is a penalty. It may afterwards be disclosed that the damages actually sustained are more or less than those anticipated at the time of the execution of the contract. If more, this fact would not characterize or stamp the stipulation as a penalty unless it was so exorbitant as to clearly show that such amount was not arrived at in a *bona fide* effort, made at or before the execution of the contract, to estimate the damages that might have been reasonably expected to result from a breach of it, and that it was named as a penalty for such breach. And on the other hand, if the amount stipulated was found to be inadequate, a greater amount could not be recovered for such breach, because of the agreement between the parties that the amount so named should be in lieu of the damages resulting therefrom.”³⁸

³⁸ *Barrie Sch. v. Patch*, 401 Md. 497, 508-509 (Md. 2007) (quoting *Balto. Bridge Co. v. U.*

To be valid and enforceable, a liquidated-damage provision must exhibit three elements. It must: (1) award a sum certain in clear and unambiguous terms; (2) provide reasonable compensation for damages anticipated in the event of breach; and (3) be a mandatory, binding agreement before the fact that may not be altered to “correspond to actual damages determined after the fact.”³⁹

“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.”⁴⁰

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.”⁴¹

G. Pre- and Post-Judgment Interest

“Any pre-judgment interest awarded by a jury or by a court sitting without a jury shall be separately stated in the verdict or decision and included in the judgment.”⁴² This rule is “narrowly construed,” such that a “jury’s addition of the words ‘plus interest’ after the amount of the compensatory award was insufficient to satisfy the requirement in Rule 2-604(a) that an award of prejudgment interest be ‘separately stated in the verdict.’”⁴³

Maryland Rule 2-604(b) applies to post-judgment interest, and states that “[a] money judgment shall bear interest at the rate prescribed by law from the date of entry.”⁴⁴ “Maryland Rule 2-604(b) explicitly requires [post-judgment interest] on a money judgment ...”⁴⁵ There is a “distinct difference between pre-judgment interest which is a part of damages and interest on a judgment which

Rwys. & E. Co., 125 Md. 208, 214-215 (Md. 1915)).

³⁹ Bd. of Educ. v. Heister, 392 Md. 140, 156 (Md. 2006) (internal citations omitted).

⁴⁰ *Barrie Sch.*, 401 Md. at 514-515.

⁴¹ MD. CODE ANN., COM. LAW § 2-718(1).

⁴² Md. R. 2-604(a).

⁴³ *Fraidin v. Weitzman*, 93 Md. App. 168, 218-219 (Md. App. Ct. 1992).

⁴⁴ Md. R. 2-604(b).

⁴⁵ *Estate of Dorsey v. Kaplan Higher Educ. Corp.*, 2022 Md. App. LEXIS 375, *7 (Md. App. Ct. May 23, 2022).

does not constitute part of the damages.”⁴⁶

“Three rules control the award of prejudgment interest. First, prejudgment interest is allowed as a matter of right where ‘the obligation to pay and the amount due had become certain, definite, and liquidated by a specific date prior to judgment so that the effect of the debtor’s withholding payment was to deprive the creditor of the use of a fixed amount as of a known date.’ Second, prejudgment interest is not allowed ‘in tort cases where the recovery is for bodily harm, emotional distress, or similar intangible elements of damage not easily susceptible of precise measurement’ because ‘the award itself is presumed to be comprehensive.’ Third, prejudgment interest is left to the discretion of the trier of fact, either the jury or the court in a bench trial, when a contract case falls in between these two ends of the spectrum – one end being allowance as a right and the other being non-allowance. This third rule serves as the general rule for prejudgment interest and encompasses the vast majority of contract cases. An

award of prejudgment interest as a matter of right and the non-allowance of prejudgment interest are exceptions to the general rule.”⁴⁷

“Except as provided in § 11-106 of [the Maryland Courts and Judicial Proceedings Article], the legal rate of interest on judgments shall be at the rate of 10 percent per annum on the amount of the judgment.”⁴⁸

Section 11-106 provides that “[a] money judgment entered in an action arising from a contract for the loan of money shall carry interest at the rate charged in the contract on any balance remaining unpaid until the date of maturity of the contract as originally scheduled. However, the rate of interest shall be on the unpaid principal of the money borrowed. The provisions of this section do not apply to any loan secured by a mortgage or deed of trust. The provisions of this section do not apply when the contractual rate of interest for a student loan of money is less than the prevailing legal rate of interest allowable on the judgment, as set forth in Section 11-107 of this subtitle, unless the

⁴⁶ Md. State Hwy. Admin. v. Kim, 353 Md. 313, 327 (Md. 1999) (quoting *Austin v. State*, 831 S.W.2d 789, 791 (Tenn. Ct. App. 1991)).

⁴⁷ *Nationwide Prop. & Cas. Ins. Co. v. Selective Way Ins. Co.*, 473 Md. 178, 193 (Md. 2021) (citing cases).

⁴⁸ MD. CODE ANN., CTS. & JUD. PROC. § 11-107(a). Section 11-107 sets forth different rates of post judgment interest for money judgments for rent of residential premises and delinquent real or personal property taxes. *See id.*, CTS. & JUD. PROC. § 11-107(b), (c).

agreement for the loan of money expressly provides otherwise.”⁴⁹

H. Attorney’s Fees

Maryland follows the “American Rule”, which generally prohibits the prevailing party from recovering attorney’s fees as an element of damages.⁵⁰ Recognized exceptions to the rule include where (1) parties to a contract have agreed to the awarding of fees; (2) a statute allows the awarding of fees;⁵¹ (3) the defendant’s wrongful acts either involved the plaintiff in litigation with others, or required the plaintiff to incur legal expense to protect its interest; or (4) where the plaintiff was forced to defend against a malicious prosecution.⁵²

I. Reliance Damages

Ordinarily, profits lost due to a breach of contract are 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.⁵³

“Under Maryland law, 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.’”⁵⁴

Generally, reliance damages cannot be recovered for expenditures made after a non-defaulting party’s awareness of the breach. However, a party can recover expenses made after the breach if, at the time, it was still possible that the parties’ disputes could be resolved.⁵⁵

⁴⁹ *Id.*, CTS. & JUD. PROC. § 11-106(a).

⁵⁰ *St. Luke Evangelical Lutheran Church*, 318 Md. at 348 (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *Fleisher*, 269 Md. at 285).

⁵¹ *See id.* at 346 n.6, for a then-current listing of Maryland statutes allowing an award of fees.

⁵² *Id.* at 345-346 (citing cases).

⁵³ *Wartzman v. Hightower Prods., Ltd.*, 53 Md. App. 656, 662 (Md. App. Ct. 1983) (citing

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

⁵⁴ *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 347 (Md. App. Ct. 2011), *aff’d*, 429 Md. 387 (Md. 2012) (quoting *Dialist Co. v. Pulford*, 42 Md. App. 173, 180-181 (1979) (internal citation omitted)).

⁵⁵ *Id.* at 349 (quoting *Dialist Co.*, 42 Md. App. at 185).

A plaintiff seeking reliance damages need not prove that a future business venture rendered impossible by the defendant's breach would have generated profits. Instead, it is for "the breaching party to prove any loss that the injured party would have suffered had the contract been performed."⁵⁶

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."⁵⁷ 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.⁵⁸

⁵⁶ *Wartzman*, 53 Md. App. at 663.

⁵⁷ *Berry & Gould v. Berry*, 360 Md. 142, 151 (Md. 2000) (quoting Restatement (Second) of Restitution § 1 (Tentative Draft No. 1, 1983)).

⁵⁸ *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)).

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

Maryland recognizes the economic loss doctrine, which bars tort recovery for purely economic loss where (a) the parties are not in privity or its equivalent; or (b) the alleged negligent conduct did not result in physical injury or pose a risk of severe physical injury or death.⁵⁹

The equivalent to privity is the so-called "intimate nexus,"⁶⁰ 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.⁶¹

⁵⁹ *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 612 (Md. 2017) (citing cases).

⁶⁰ *Jacques v. First Nat'l 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).

⁶¹ *Balfour Beatty*, 451 Md. at 617. 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

Several state statutes provide for awards of treble damages, attorney’s fees, and, in some cases, punitive damages and other relief. Examples include the following:⁶²

- Md. Code Ann., Com. Law Section 11-109(b)(4) (authorizing award of treble actual damages and attorney’s fees to victims of violations of Foreign Discriminatory Boycotts Act);
- Md. Code Ann., Com. Law Section 11-209(b)(4) (authorizing award of treble actual damages and attorney’s fees to complainant for violations of Maryland Antitrust Act);
- Md. Code Ann., Com. Law Section 14-1912(a) (authorizing award of actual damages, a monetary award equal to three times the total amount collected from the consumer, punitive damages, costs, and reasonable attorney’s fees for “willful[] fail[ure]” to comply with any requirement imposed under the Maryland Credit Services Businesses Act); and
- Md. Code Ann., Lab. & Empl. Section 3-105 (authorizing award of three times the value of an employee’s lost wages, damages equal to the amount of wages, salary, employment benefits, or other compensation denied or lost, punitive damages, and reasonable counsel fees to any employee who prevails in an action to enforce a civil penalty against an employer for adverse employment actions, hindrance and delay related to enforcement of employment standards and conditions under enumerated subtitles);
- Md. Code Ann., Real Prop. Section 7-406 (authorizing award of treble damages and reasonable attorney’s fees for violations of the Maryland

professionals in the context of large government construction projects. *Id.* at 604.

⁶² This is not intended to be a comprehensive list.

Mortgage Fraud
Protection Act).

enforceability of a contract. These include the following:

L. Public Policy Prohibitions

“[C]ontractual limitations provisions in insurance contracts are ‘against State public policy, illegal and void”⁶³

“As a general rule, contracts that violate statutes will not be enforced. Such contracts when executed by a corporation are illegal and not merely *ultra vires*.”⁶⁴

Maryland also recognizes several defenses to the

- lack of mutuality;⁶⁵
- unconscionability;⁶⁶

⁶³ 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); 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) (holding that § 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).

⁶⁴ McGinley v. Massey, 71 Md. App. 352, 356 (Md. App. Ct. 1987) (citing Queen v. Agger, 287 Md. 342, 346 (Md. 1980); Downing Dev. Corp. v. Brazelton, 253 Md. 390, 398-400 (Md. 1969); 7A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 3400, 3580-3583 (1978)) (holding that, since state law prohibits a corporation’s purchase or redemption of its stock if the corporation is or the transaction would cause it to be

insolvent, guaranty of payments under redemption agreement was illegal and unenforceable as against public policy).

⁶⁵ See, e.g., Cheek v. United Healthcare of the Mid-Atlantic, Inc., 378 Md. 139, 144 (Md. 2003) (an agreement to arbitrate was not valid and enforceable because the employer’s promise to arbitrate disputes was illusory where it reserved to itself “the right to alter, amend, modify, or revoke the [arbitration agreement] at its sole and absolute discretion at any time with or without notice”).

⁶⁶ See, for example, Mbongo v. Robinhood Mkts., Inc., 2022 Md. App. LEXIS 174, *10 (Md. App. Ct. Mar. 3, 2022) (comparing procedural unconscionability, which “deals with the process of making a contract’ and ‘looks much like fraud or duress,’” and substantive unconscionability, which “may also ‘impair the integrity of the bargaining process or otherwise contravene the public interest or public policy ...”’); *but see* Young v. Anne Arundel Cnty., 146 Md. App. 526, 597-598 (Md. App. Ct. 2002) (quoting Blum v. Blum, 59 Md. App. 584, 594-595 (Md. App. Ct. 1984)) (noting that a contract voidable due to duress may be ratified once the duress has been removed).

- 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;⁶⁷
- intoxication;⁶⁸ and

- minority.⁶⁹

Maryland enacted a cap on non-economic damages “in response to a legislatively perceived crisis concerning the availability and cost of liability insurance in this State.”⁷⁰ Though this comes up only in the context of personal injury or wrongful death actions, and therefore likely is beyond the scope of this summary, the cap is important enough that it should be discussed.

The cap defines both economic and noneconomic damages. The former refers to loss of earnings and medical expenses and expressly excludes punitive damages.⁷¹ In an action for personal injury, “non-economic damages” means pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary

⁶⁷ See, for example., *Young*, 146 Md. App. at 597 (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.””).

⁶⁸ See, for example., *Lynn v. Magness*, 191 Md. 674, 682 (Md. 1948) (“We accept the rule that the intoxication of a person which will invalidate a deed or contract made by him must be such as to render him incapable of knowing what he is doing, or to deprive him of the powers of reasoning and understanding to such an extent that he fails entirely to comprehend the consequences of his act. In order to set aside a person’s

contract on the ground of drunkenness, it is not sufficient to show that he was under undue excitement from the use of liquor. His incompetency can be established only by proof that at the time of the challenged act his understanding was clouded or his reason dethroned by actual intoxication.”).

⁶⁹ 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)) (recognizing that a minor’s contracts are voidable, unless the minor contracted for necessities such as board, apparel, medical aid, teaching and instruction).

⁷⁰ *Murphy v. Edmonds*, 325 Md. 342, 368 (Md. 1992).

⁷¹ MD. CODE ANN., CTS. & JUD. PROC. § 11-109(a).

injury.⁷² In a wrongful death action, “noneconomic damages” means “mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education, or other noneconomic damages authorized under Title 3, Subtitle 9 of this article (*i.e.*, the wrongful death statute).”⁷³ Punitive damages are expressly excluded from noneconomic damages.⁷⁴

Maryland has a statutory cap on noneconomic damages, but it does not apply to personal injury actions in which the cause of action arises before July 1, 1986,⁷⁵ or wrongful death actions in which the cause of action arises before October 1, 1994.⁷⁶ For causes of action arising on or after October 1, 1994, through September 30, 1995, an award for noneconomic damages may not exceed \$500,000.⁷⁷ Starting on October 1, 1995, and on each anniversary thereafter, the cap

increases by \$15,000.⁷⁸ Thus, the cap applicable to an action in which the cause of action arose on or after October 1, 2024, would be \$875,000.

In actions tried to a jury, jurors are not to be informed of a statutory cap on noneconomic damages.⁷⁹ In actions subject to the cap, the trier of fact shall itemize the award to reflect the monetary amount intended for: (1) past medical expenses; (2) future medical expenses; (3) past loss of earnings; (4) future loss of earnings; (5) noneconomic damages; and (6) other damages.⁸⁰

A complex set of rules governs actions involving multiple claimants or beneficiaries. First, if there are two or more claimants or beneficiaries, regardless of the number who will share in the award, an award for noneconomic damages may not exceed 150% of the cap.⁸¹

Second, there are two classes of wrongful death claimants. “Primary claimants” include spouses, minor children, parents of minor children, and unmarried children between

⁷² *Id.*, CTS. & JUD. PROC. § 11-108(a)(2)(i)(1).

⁷³ *Id.*, CTS. & JUD. PROC. § 11-108(a)(2)(i)(2).

⁷⁴ *Id.*, CTS. & JUD. PROC. § 11-108(a)(2)(ii).

⁷⁵ *Id.*, CTS. & JUD. PROC. § 11-108(b)(1). For actions arising between July 1, 1986, and September 30, 1994, the cap was set at \$350,000. *Id.*

⁷⁶ *Id.*, CTS. & JUD. PROC. § 11-108(b)(2)(i).

⁷⁷ *Id.* The statute’s reference to when a cause of action “arises” for purposes of the cap should not be confused with when a cause of action accrues for statute of limitations purposes. The Supreme Court of Maryland has held that the word “arises,” as used in

Courts and Judicial Proceedings § 11-108(b)(1) (the statutory cap on noneconomic damages in personal-injury actions), and as applicable to cases involving cancer allegedly caused by asbestos exposure, refers to when *exposure* to asbestos occurred. *John Crane, Inc. v. Scribner*, 369 Md. 369, 391-392 (Md. 2002).
⁷⁸ MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b)(2)(ii).

⁷⁹ *Id.*, CTS. & JUD. PROC. § 11-108(d)(1).

⁸⁰ *Id.*, CTS. & JUD. PROC. § 11-109(b).

⁸¹ *Id.*, CTS. & JUD. PROC. § 11-108(b)(3)(ii).

the ages of 18 and 22.⁸² “Secondary claimants” include parents of children not included within the description provided in Courts and Judicial Proceedings Section 3-904(d) and adult children seeking redress for the death of a parent.⁸³

Third, these two classes become relevant where there are two or more claimants or beneficiaries and the jury has awarded noneconomic damages in excess of the cap. In that event, the court must “reduce each individual award of a primary claimant proportionately to the total award of all of the primary claimants so that the total award to all claimants or beneficiaries conforms to the limitation”; and it must reduce each award, if any, to a secondary claimant to zero

dollars.⁸⁴ If the amount of noneconomic damages awarded to primary claimants does not exceed the applicable cap amount or if there is no award of noneconomic damages to a primary claimant, then the court shall enter the award to the primary claimant as directed by the verdict and then reduce each individual award to secondary claimants “proportionately to the total award of all of the secondary claimants so that the total award to all beneficiaries or claimants conforms” to the cap.⁸⁵

⁸² *Id.*, CTS. & JUD. PROC. § 11-108(a)(3).

⁸³ *Id.*, CTS. & JUD. PROC. § 11-108(a)(4).

⁸⁴ *Id.*, CTS. & JUD. PROC. § 11-108(d)(2)(ii)(1).

⁸⁵ *Id.*, CTS. & JUD. PROC. § 11-108(d)(2)(ii)(2).