

Michigan

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A. Adoption of the UCC

Michigan adopted the Uniform Commercial Code with the passage of 1962 Public Act 174 “(a) to simply, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (c) to make uniform the law among the various jurisdictions.”¹

¹ M.C.L. § 440.1102; *Neibarger v. Universal Coop.*, 486 N.W.2d 612, 623 (Mich. 1992).

B. Compensatory Damages

The remedy for the breach in a contract case may be compensatory damages. “Because the purpose of compensatory damages is to make the injured party whole for the losses actually suffered, the amount of recovery for such damages is inherently limited by the amount of the loss.”²

A party seeking damages must mitigate his damages.³ “Failure to mitigate reduces the amount of

² *McAuley v. Gen. Motor Corp.*, 578 N.W.2d 282, 285 (Mich. 1998); *see also Schankin v. Buskirk*, 93 N.W.2d 293, 296 (Mich. 1958) (demonstrating a flexible approach to damages after holding that the rules for damages recoverable in a particular action should yield to the principle of compensation; whatever approach is most appropriate to compensate for a client’s particular loss should be adopted).

³ *Webster v. Edward D. Jones & Co., L.P.*, 197 F.3d 815, 820 (6th Cir. 1999).

damages obtainable by a plaintiff, but only to the extent the plaintiff failed to make reasonable efforts in mitigating the damages.”⁴

Damages in commercial contract cases are limited to the monetary value of the breaching party’s performance and cannot include damages for mental distress.⁵

C. Consequential Damages

In Michigan, consequential damages resulting from the seller's breach include: (1) loss resulting from general or particular requirements and/or the buyer’s needs that the seller had reason to know at the time of contracting, and

(2) injury to person or property proximately resulting from any breach of warranty.⁶ Consequential damages may also include lost profits.⁷

Plaintiffs can recover damages that arise naturally from a breach of contract, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made.⁸ Michigan courts construe the definition of consequential damages to mean those that do not come from the immediate transaction but rather those that come from the losses of the nonbreaching party.⁹ However, the “doctrine of avoidable consequences prevents parties

⁴ Pa. Life Ins. Co. v. City of River Rouge, 676 F. Supp.2d 575, 582 (E.D. Mich. 2009).

⁵ Kewin v. Mass. Mut. Life Ins. Co., 295 N.W.2d 50, 53 (Mich. 1980).

⁶ M.C.L. § 440.2715.

⁷ Uganski v. Little Giant Crane & Shovel Inc., 192 N.W.2d 580, 591 (Mich. Ct. App. 1971).

⁸ Kewin, 295 N.W.2d at 53; *see also* Lawrence v. Will Darrah & Assocs., Inc., 516 N.W.2d 43, 47 (Mich. 1994) (plaintiff was entitled to recover consequential damages caused by any extension of its business interruption that is determined to be due to the defendant’s unreasonable refusal to authorize the proper payment due on its claim as long as such damages “were in contemplation of the parties at the time the contract was formed”).

⁹ Sullivan Indus., Inc v. Double Seal Glass Co., 480 N.W.2d 623, 632 (Mich. Ct. App. 1991) (“A plaintiff may recover damages for loss of business where the loss is proven. To sustain his burden of proof, the plaintiff must establish with reasonable certainty injury, a causal connection between the conduct complained of and the injury, and the appropriate compensation.” (citations omitted)).

from recovering damages that could have been avoided with reasonable effort.”¹⁰ There also must be proximate cause that would have been reasonably foreseeable by the breaching party.¹¹

D. Incidental Damages

“Damages available to a buyer as compensation for a seller’s breach . . . ‘are intended to place the injured party in as good a position as he would have been in had the promised performance been rendered.’”¹² The UCC defines incidental damages as including “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 breach.”¹³

When a buyer breaches, incidental damages 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.”¹⁴

While incidental damages are expressly available for breach of contract and warranty claims, they can also encompass attorney fees.¹⁵

¹⁰ *Braverman v. Granger*, 844 N.W.2d 485, 492 (Mich. Ct. App. 2014).

¹¹ *Sullivan Indus.*, 480 N.W.2d at 630-631.

¹² *Id.* at 630.

¹³ M.C.L. § 440.2715(1).

¹⁴ M.C.L. § 440.2710.

¹⁵ See *Cady v. Dick Loehr’s, Inc.*, 299 N.W.2d 69, 72 (Mich. Ct. App. 1980) (M.C.L. §§ 440.2714–15 “confer[s] on the trial court discretion to award attorneys’ fees as an elements of the damages incurred as a result of a breach of warranty”); *Kelynack v. Yamaha Motor Corp., USA*, 394 N.W.2d 17, 22 (Mich. Ct. App. 1986) (“failure to award plaintiff attorney’s fees would in effect result in no remedy at all” in determining attorneys’ fees can be included in incidental and consequential damages); *cf.* *Leavitt v. Monaco Coach Corp.*, 616 N.W.2d 175, 187 (Mich. Ct. App. 2000) (“we hold that a contractual bar of incidental or consequential damages does not bar a successful plaintiff from recovering attorney fees under the Magnuson-Moss Act, when otherwise appropriate”).

E. Punitive Damages

“Punitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan.”¹⁶ The Michigan Supreme Court interpreted “exemplary or punitive damages” as “referring to damages intended solely to *compensate* plaintiff for the increase in injury to feelings attributable to defendant’s fault (or malice, in the common-law sense).”¹⁷ “[E]xemplary and punitive damages pick up where actual damages leave off by in effect compensating the plaintiff for injured feelings attributable solely to the egregiousness of defendant’s conduct.”¹⁸ In Michigan, punitive damages are available “only when expressly authorized by the Legislature.”¹⁹ As a result, an award of punitive damages is uncommon in Michigan courts.²⁰

In the commercial contract context, “[p]unitive damages may

not be awarded even for a deliberate breach of contract except under special circumstances rarely present when the contract breached is an ordinary commercial contract.”²¹ Ultimately, unless expressly permitted by statute, a Michigan litigant may not recover punitive damages.

F. Liquidated Damages

Liquidated damages refer to a specific sum agreed upon by the parties “fixing the amount of damages in the event of a breach and [are] enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive.”²² The Michigan Court of Appeals has explained that a liquidated damages provision in a contract “is particularly appropriate ‘where actual damages are uncertain and difficult to ascertain or are of a purely speculative nature’”²³ A

¹⁶ *Casey v. Auto Owners Ins. Co.*, 729 N.W.2d 277, 286 (Mich. Ct. App. 2006).

¹⁷ *Peisner v. Detroit Free Press, Inc.*, 364 N.W.2d 600, 604 (Mich. 1984).

¹⁸ *Id.* at 605.

¹⁹ *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 (Mich. 2004).

²⁰ *Cf. id.* at 402 (“[e]ven among cases in which a plaintiff recovered punitive damages for sexual harassment, our research discloses no case in which a party recovered a punitive award that approached or exceeded \$21 million that was upheld”).

²¹ *Caradonna v. Thorious*, 169 N.W.2d 179, 182 (Mich. Ct. App. 1969); *see also Kewin*, 295 N.W.2d at 55 (Mich. 1980) (“The wrong suffered by the plaintiff is the same, whether the breaching party acts with a completely innocent motive or in bad faith.” (citations omitted)); *Van Marter v. Am. Fid. Fire Ins. Co.*, 318 N.W.2d 679, 683 (Mich. Ct. App. 1982) (“Generally, the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made.”).

²² *St. Clair Med., P.C. v. Borgiel*, 715 N.W.2d 914, 921 (Mich. Ct. App. 2006).

²³ *Id.*

liquidated damages provision's validity "depends on the conditions existing when the contract was signed rather than at the time of the breach."²⁴ Liquidated damages provisions are enforceable so long as they are not masked contractual penalties. Determining whether a liquidated damages provision is invalid as a penalty is a question of law—the intent of the parties is immaterial.²⁵

G. Pre- and Post-Judgment Interest

Prejudgment interest is available in actions brought on the basis of breach of contract and, in some cases, tort.²⁶ The purpose of awarding prejudgment interest "is not only to compensate the prevailing party for the delay in the use of the money, but also to offset the costs of bringing the action and

to provide an incentive for prompt settlement."²⁷

Michigan courts have the discretion to award prejudgment awards pursuant Michigan Compiled Laws Section 600.6013. This statute provides the Michigan court with guidelines when it starts to accrue. Specifically, Section 600.6013(10) provides that interest on a money judgment recovered in a civil action "is calculated from the date of filing the complaint" and "is calculated on the entire amount of the money judgment, including attorney's fees and costs."²⁸

The following table gives an understanding of how each of these variables impact the calculation of a pre- and post-judgment award:

²⁴ *Barclae v. Zarb*, 834 N.W.2d 100, 120 (Mich. Ct. App. 2013).

²⁵ *Moore v. St. Clair Cnty.*, 328 N.W.2d 47, 49 (Mich. Ct. App. 1982).

²⁶ *Std. Oil Co. v. Payne*, 190 N.W. 769, 772 (Mich. Ct. App. 1922) (awarding interest in a negligence case).

²⁷ *Perceptron, Inc. v. Sensor Adaptive Machines, Inc.*, 221 F.3d 913, 923 (6th Cir. 2000).

²⁸ M.C.L. § 600.6013(2), (8).

| DATE OF FILING COMPLAINT | BASIS OF ACTION | CALCULATION OF AWARD | EXCEPTIONS |
|--|---|---|--|
| Before June 1, 1980 | Civil action involving anything other than a written instrument with a rate of interest exceeding 6%/yr | Calculated from the date of filing complaint to June 1, 1980, at the rate of 6%/yr On and after June 1, 1980 to the date of satisfaction of the judgment at the rate of 12%/yr compounded annually | None specified |
| Before June 1, 1980 | Written instrument having a rate of interest exceeding 6%/yr | Calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed | Rate after the date of judgment entered shall not exceed: 7%/yr compounded annually for period of time between when judgment is entered and the date of satisfaction of the judgment that elapses before June 1, 1980; OR 13%/yr compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses after May 31, 1980 |
| On or after June 1, 1980 but before January 1, 1987 | Written instrument does not specify rate | Date of filing the complaint to the date of satisfaction of the judgment at the rate of 12%/yr compounded annually | None specified |
| On or after June 1, 1980, but before January 1, 1987 | Written instrument specifies rate | Calculated at rate specified if the rate was legal at the time instrument was executed | Shall not exceed 13%/yr compounded annually after the date judgment is entered |
| On or after January 1, 1987, but before July 1, 2002 | Written instrument | Date of filing the complaint to the date of satisfaction of the judgment that the rate of 12%/yr compounded annually | Except as provided in the below column |
| On or after July 1, 2002 | Written instrument evidencing indebtedness with a specified interest rate | Date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at time the instrument was executed | Shall not exceed 13%/yr compounded annually |
| On or after July 1, 2002 | Written instrument evidencing indebtedness with a variable rate | Interest is fixed at the rate in effect under the instrument at the time the complaint is filed | Shall not exceed 13%/yr compounded annually |
| Filed on or after January 1, 1987 | Civil action except as otherwise provided in subsections (5) and (7) and subject to subsection (13) | Calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually | None specified |

H. Attorney's Fees

Michigan courts follow the “American Rule” with respect to the payment of attorney fees and costs whereby each party is responsible for their own attorney fees unless a statute or court rule specifically authorizes the trial court to enter an award of attorney fees.²⁹ However, contractually-based attorney's fees do not need statutory or rule-based authority; instead, a contract that includes a provision requiring payment of attorney's fees becomes a part of the damages claims available to be recovered, absent public policy violations.³⁰

²⁹ *ABCS Troy, LLC v. Loancraft, LLC*, 972 N.W.2d 317 (Mich. Ct. App. 2021); *Pranksy v. Flacon Group, Inc.*, 874 N.W.2d 367, 383 (Mich. Ct. App. 2015).

³⁰ *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 220 N.W.2d 83, 87 (Mich. Ct. App. 1974) (Burns, P.J., concurring).

I. Reliance Damages

Generally, in cases of breach of contract, expectation damages are the measure of damages.³¹ However, “where profits are speculative, the measure of damages is the actual expenditures and value of services reasonably spent in a *bona fide* attempt to perform the contract or reasonably expended upon the faith of the contract.”³² In these instances, a party can properly seek reliance damages based on the reasonable expenses incurred attempting to perform under the contract.³³

J. Unjust Enrichment

The equitable doctrine of unjust enrichment is recognized in cases where there is no contract between the parties.³⁴ The law implies a

³¹ *Earl Dubey & Sons, Inc. v. Macomb Concrete Corp.*, 266 N.W.2d 152, 160 (Mich. Ct. App. 1978).

³² *Id.*

³³ *Id.*

³⁴ *Morris Pumps v. Centerline Piping, Inc.*, 729 N.W.2d 898, 903 (Mich. Ct. App. 2006); *see also* *Power Tools & Supply, Inc. v. Cooper Power Tools, Inc.*, 543 F. Supp.2d 749, 763 (E.D. Mich. 2008) (“A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”). Notably, Michigan courts often use the terms “quantum meruit” and “unjust enrichment” interchangeably. *Daimler-Chrysler Services N. Am., LLC v. Summit Nat., Inc.*, 289 Fed. Appx. 916, 925 (6th Cir. 2008).

contract in order to ensure justice,³⁵ and it will only be implied if there is no express contract.³⁶ However, this doctrine is applied cautiously.³⁷ The plaintiff must establish two main elements to succeed on such a claim.³⁸ First, the plaintiff must show that the defendant received a benefit from the plaintiff.³⁹ Second, the plaintiff must show that the plaintiff faced an inequity as a result of the defendant receiving the

benefit.⁴⁰ To maintain an action for unjust enrichment, the circumstances must show that it be unjust or inequitable for the defendant to retain such benefit.⁴¹ The measure of damages is the value conferred upon the defendant, rather than the actual damage that the plaintiff incurred.⁴²

K. Public Policy Prohibitions

Even when there may otherwise be a valid contract, it will be voided if it violates public policy, although such public policy must be “clearly rooted in the law.”⁴³ In determining whether a contract is against public policy, courts consider the purpose of the public policy (not whether there is any harm that actually results from the public policy).⁴⁴ Contracts that have a tendency to hurt the public interest violate public policy.⁴⁵ There are multiple public policy principles that courts may consider. Michigan also recognizes certain

³⁵ *Kammer Asphalt Paving Co., Inc. v. East China Twp. Schs.*, 504 N.W.2d 635, 640 (Mich. 1993) (unjust enrichment is a remedy in which “the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received”).

³⁶ *Martin v. E. Lansing Sch. Dist.*, 483 N.W.2d 656, 661 (Mich. Ct. App. 1992) (there can be no remedy for unjust enrichment because there was an express contract).

³⁷ *Power Tools*, 543 F. Supp.2d at 763 (“Courts, however, should be cautious in imposing a ‘contract in law’ in order to prevent unjust enrichment.”).

³⁸ *Morris Pumps*, 729 N.W.2d at 904.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *McIntosh v. Fixel*, 297 N.W. 512, 517 (Mich. 1941).

⁴³ *Royal Prop. Grp., LLC v. Prime Ins. Syndicate, Inc.*, 706 N.W.2d 426, 436 (Mich. Ct. App. 2005).

⁴⁴ *Mahoney v. Lincoln Brick Co.*, 8 N.W.2d 883, 887–888 (Mich. 1943) (“For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present.”).

⁴⁵ *Id.*

doctrines that may prevent enforcement of a contract, including: unconscionable contracts;⁴⁶ lack of capacity, including contracts involving minors;⁴⁷ and contracts induced

by fraud, undue influence, or duress.⁴⁸

⁴⁶ Whirlpool Corp. v. Grigoleit Co., 713 F.3d 316 (6th Cir. 2013).

⁴⁷ Woodman ex rel. Woodman v. Kera LLC, 785 N.W.2d 1 (Mich. 2010).

⁴⁸ See Rory v. Cont'l Ins. Co., 703 N.W.2d 23 (Mich. 2005); Mercurio v. Huntington Nat'l Bank, 16 N.W.3d 748 (Mich. Ct. App. 2023).