

North Carolina

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A. Adoption of the UCC and Limitations of Liability

North Carolina adopted and codified the Uniform Commercial Code in Chapter 25 of the North Carolina General Statutes, effective July 1, 1967.¹

¹ 1965 Session Laws, Chapter 700.

North Carolina allows and enforces contractual limitations and alterations of the measure of damages.² “This policy of generally enforcing mutually-assented-to limitations on liability extends beyond the goods context.”³ Parties also may agree to limit or exclude

² N.C. GEN. STAT. § 25-2-719(1)(a) (“the agreement . . . may limit or alter the measure of damages recoverable under this as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts”).

³ *Severn Peanut Co. v. Indus Fumigant Co.*, 807 F.3d 88, 92 (4th Cir. 2015) (citing *Hyatt v. Mini Storage on Green*, 763 S.E.2d 166, 171 (N.C. Ct. App. 2014) (enforcing contractual exclusion of liability for personal injury encountered on premises of self-storage facility)); *Lexington Ins. Co. v. Tires*

consequential damages “unless the limitation or exclusion is unconscionable.”⁴

North Carolina generally recognizes that a party “damaged by a breach of contract is entitled to be placed, insofar as this can be done by money, in the same position that party would have occupied if there had been no breach of the contract.”⁵ Those damages can include compensatory (or direct) damages, consequential damages, and incidental damages.⁶

B. Compensatory Damages

Compensatory damages aim to restore the injured party to the position they would have occupied had the wrong not occurred.⁷ In actions for breach of contract, recoverable damages are the damages that may have been reasonably within the contemplation of the parties when the contract was made.⁸ An injured party is entitled to full

compensation for a loss with damages being measured by the amount that would have been received if there had been no breach.⁹ Such damages include the benefit of the bargain.¹⁰ Under North Carolina law, damages should make the plaintiff whole but not provide a windfall.¹¹

The party seeking damages bears the burden of proving the damages, and damages must be proven with reasonable certainty.¹² Although mathematical precision is not required, proof of damages requires some relevant information from which a just and reasonable estimate of damages may be drawn.¹³ Damages may include loss of future profits if the loss is the natural and proximate result of the breach. Lost profit damages may not be based on hypothetical or speculative forecasts.¹⁴

A damaged party has an obligation to mitigate damages. Failure to mitigate is a defense to damages, and the breaching party

Into Recycled Energy & Supplies, Inc., 136 N.C. App. 223, 226-227, 522 S.E.2d 798, 801 (N.C. Ct. App. 1999) (enforcing lease provision limiting liability for fire damages covered by insurance)).

⁴ *Severn Peanut Co.*, 807 F.3d at 91.

⁵ North Carolina Pattern Jury Instruction (Civil) 503.06 (citing relevant legal authorities).

⁶ *Id.*

⁷ *Troitino v. Goodman*, 225 N.C. 406, 412, 35 S.E.2d 277, 281 (N.C. 1945).

⁸ *Chesson v. Kieckheffer Container Co.*, 216 N.C. 337, 4 S.E.2d 886, 887 (N.C. 1939).

⁹ *Troitino*, 225 N.C. at 412, 35 S.E.2d at 277.

¹⁰ *Shaver v. N.C. Monroe Const. Co.*, 63 N.C. App. 605, 616, 306 S.E.2d 519, 526 (N.C. Ct. App. 1983).

¹¹ *Holland v. S. Pub. Utilities Co.*, 208 N.C. 289, 180 S.E. 592, 594 (N.C. 1935).

¹² *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547-548, 356 S.E.2d 578, 586 (N.C. 1987).

¹³ *Whiteside Estates, Inc., v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 462, 553 S.E.2d 431, 440 (N.C. Ct. App. 2001).

¹⁴ *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 407-408, 466 S.E.2d 324, 329-330 (N.C. Ct. App. 1996).

bears the burden to show a failure to mitigate. A failure to mitigate damages bars recovery for damages that could have been avoided through reasonable efforts; it does not bar all damages.¹⁵

For personal injury cases, compensatory damages include recovery for mental or physical pain and suffering, lost wages and medical expenses.¹⁶

Damages for property damage are measured by the difference in market value before and after the injury. If the damage is not permanent, damages should consist of the reasonable costs of replacement or repair.¹⁷ Compensatory damages for a defamation claim include pecuniary loss and damages for pain and inconvenience, mental suffering, and reputational injury.¹⁸

North Carolina recognizes the economic loss rule which generally prevents recovery in tort where a contract governs the relationship

between the parties.¹⁹ A public policy exception exists, however, for damages arising out of claims by homeowners for negligent construction of residential buildings.²⁰ In addition, the economic loss rule does not apply to claims for fraud²¹ or for claims of professional negligence.²²

C. Consequential or Special Damages

Consequential or special damages for breach of contract result as a secondary consequence of non-performance by a breaching party.²³ A party may recover indirect losses caused by a breach of contract, but the damages must have been a probable result from the breach.²⁴ Any consequential damages must have been foreseeable at the time of contracting.²⁵ The amount must be established with reasonable certainty.²⁶

¹⁵ *Smith v. Childs*, 112 N.C. App. 672, 682-683, 437 S.E.2d 500, 507-508 (N.C. Ct. App. 1993).

¹⁶ *Iadanza v. Harper*, 169 N.C. App. 776, 780, 611 S.E.2d 217, 221 (N.C. Ct. App. 2005).

¹⁷ *BSK Enters., Inc. v. Beroth Oil Co.*, 246 N.C. App. 1, 8-9, 783 S.E.2d 236, 243 (N.C. Ct. App. 2016).

¹⁸ *Hien Nguyen v. Taylor*, 219 N.C. App. 1, 10, 723 S.E.2d 551, 559 (N.C. Ct. App. 2012).

¹⁹ *Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc.*, 376 N.C. 54, 62, 852 S.E.2d 98, 104 (N.C. 2020).

²⁰ *Id.*; see also *Oates v. Jag, Inc.*, 314 N.C. 276, 280, 333 S.E.2d 222, 225 (N.C. 1985).

²¹ *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 34, 795 S.E.2d 253, 259 (N.C. Ct. App. 2016).

²² *Provectus Biopharmaceuticals, Inc. v. RSM US LLP*, No. 17 CVS 10396, 2018 WL 4700371, at *20 (N.C. Super. Sept. 28, 2018).

²³ *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 671, 464 S.E.2d 47 (N.C. Ct. App. 1995).

²⁴ *Rodd v. W. H. King Drug Co.*, 30 N.C. App. 564, 569, 228 S.E.2d 35, 38 (N.C. Ct. App. 1976).

²⁵ *Troitino*, 225 N.C. at 412.

²⁶ *Parris v. H. G. Fischer & Co.*, 221 N.C. 110, 19 S.E.2d 128, 129 (N.C. 1942).

Consequential damages may include lost profits, if shown with reasonable certainty.²⁷ The consequential damages for loss of reproducing livestock include the damages incurred between the time of the animal's death and the time when a reasonable replacement can be obtained.²⁸ North Carolina courts will uphold contractual limits on consequential damages.²⁹ Special damages must be pled, and an instruction on special damages will be given only if the damages are particularly pled and the evidence supports them.³⁰

Juries are instructed on consequential damages using North Carolina Pattern Jury Instruction (Civil) 503.73. Footnotes in the Pattern Jury Instruction cite to relevant legal authorities.

D. Incidental Damages

Incidental damages are minor, reasonable expenses directly incurred because of the breach, and under the UCC, they include expenses for inspection, receipt,

transportation, care and custody of rightfully rejected goods, and commercially reasonable charges in effecting cover.³¹ A seller of goods may recover commercially reasonable charges for care and custody of goods after the buyer's breach, and costs of return or resale.³²

Juries are instructed on incidental damages using North Carolina Pattern Jury Instruction (Civil) 503.70. Footnotes in the Pattern Jury Instruction cite to relevant legal authorities.

E. Liquidated damages

Liquidated damages clauses in contracts are enforceable if the damages were a product of a good faith effort to estimate the actual damage which would occur from a breach.³³ In contrast, a fixed sum that is not an estimate of probable damages is a prohibited penalty.³⁴ A liquidated damages clause establishing a set amount is enforceable if the reasonably anticipated damages are difficult to determine because they are

²⁷ *Rannbury-Kobee Corp. v. Miller Mach. Co.*, 49 N.C. App. 413, 417, 271 S.E.2d 554, 557 (N.C. Ct. App. 1980).

²⁸ *Phillips v. North Carolina State Univ.*, 206 N.C. App. 258, 266, 697 S.E.2d 433, 438 (N.C. Ct. App. 2010).

²⁹ *Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp.*, 63 N.C. App. 292, 296, 304 S.E.2d 773, 776 (N.C. Ct. App. 1983).

³⁰ *Piedmont Plastics, Inc. v. Mize Co.*, 58 N.C. App. 135, 140, 293 S.E.2d 219, 223 (N.C. Ct. App. 1982); *see also* N.C. R. Civ. P. 9.

³¹ *See Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 114, 317 S.E.2d 5, 13 (N.C. Ct. App. 1984).

³² *Indus. Circs. Co. v. Terminal Communications, Inc.*, 26 N.C. App. 536, 541, 216 S.E.2d 919, 923 (N.C. Ct. App. 1975).

³³ *City of Kinston v. Suddreth*, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (N.C. 1966).

³⁴ *Id.*

indefinite and uncertain and where the amount is a reasonable estimate or is reasonably proportionate to the damages.³⁵ The reasonableness of the amount of liquidated damages is evaluated as of the time of making a contract.³⁶

The enforceability of liquidated damages clauses is a reflection of the fundamental principle of freedom of contract.³⁷ A party against whom liquidated damages will be ordered bears the burden of proving that the clause is unenforceable.³⁸

Liquidated damages provisions are common in construction contracts.³⁹ North Carolina courts generally enforce per diem delay damages if reasonable, recognizing the difficulty in proving actual damages from delayed completion.⁴⁰

Under the UCC, liquidated damages are valid if reasonable in light of the anticipated or actual harm, the difficulties of proof of loss, and the inconvenience or non-

feasibility of otherwise obtaining an adequate remedy.⁴¹

F. Nominal Damages

A party is entitled to nominal damages where there has been an injury to its legal rights.⁴² Nominal damages are awarded in recognition of a technical injury where no actual loss or substantial injury has occurred.⁴³ A party receiving nominal damages is entitled to recover costs.⁴⁴

G. Punitive Damages

Punitive damages in North Carolina are subject to statutory requirements.⁴⁵ They are capped at the greater of \$250,000 or three times the amount of compensatory damages, with exceptions for accidents caused by impaired driving and for injury to energy, water, wastewater, or manufacturing facilities.⁴⁶ Punitive damages serve to punish and deter egregious conduct.⁴⁷ Punitive damages are recoverable in tort actions where there are aggravating factors such as

³⁵ *Knutton v. Cofield*, 273 N.C. 355, 362, 160 S.E.2d 29, 35 (N.C. 1968).

³⁶ *Id.*

³⁷ *Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc.*, 182 N.C. App. 128, 130, 641 S.E.2d 711, 713 (N.C. Ct. App. 2007).

³⁸ *Id.*

³⁹ *Ledbetter Bros. v. N. Carolina Dep't of Transp.*, 68 N.C. App. 97, 105, 314 S.E.2d 761, 767 (N.C. Ct. App. 1984).

⁴⁰ *See id.*

⁴¹ N.C. GEN. STAT. § 25-2-718.

⁴² *Hutton v. Cook*, 173 N.C. 496, 499, 92 S.E. 355, 356 (N.C. 1917).

⁴³ *Hairston v. Greyhound Corp.*, 220 N.C. 642, 644, 18 S.E.2d 166 (N.C. 1942).

⁴⁴ *Marsico v. Adams*, 47 N.C. App. 196, 198, 266 S.E.2d 696, 698 (N.C. Ct. App. 1980).

⁴⁵ N.C. GEN. STAT. § 1D-25.

⁴⁶ N.C. GEN. STAT. §§ 1D-25, 1D-26, 1D-27.

⁴⁷ *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167 594 S.E.2d 1, 7 (N.C. 2004).

actual malice, oppression, gross and willful wrong, insult, indignity or a reckless or wanton disregard of rights.⁴⁸ Punitive damages must be established by clear and convincing evidence.⁴⁹ Punitive damages may only be awarded if nominal damages are recoverable.⁵⁰

H. Interest

There is no common law right to pre-judgment interest in North Carolina.⁵¹ Rather, interest is governed by statute.⁵² In an action for breach of contract, interest runs from the date of breach.⁵³ In all other actions, compensatory damages bears interest from the date the suit was filed until the judgment is paid.⁵⁴ Post-judgment interest is assessed as a cost and runs from the date of entry of judgment until satisfaction.⁵⁵

⁴⁸ *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 84, 665 S.E.2d 478, 487 (N.C. Ct. App. 2008).

⁴⁹ *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 644 (N.C. 2009).

⁵⁰ *Collier v. Bryant*, 216 N.C. App. 419, 434, 719 S.E.2d 70, 82 (N.C. Ct. App. 2011).

⁵¹ *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 8, 430 S.E.2d 895, 899 (N.C. 1993).

⁵² *See* N.C. GEN. STAT. § 24-5.

⁵³ *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 824, 561 S.E.2d 578, 583 (N.C. Ct. App. 2002).

⁵⁴ *Ledford v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 44, 49, 453 S.E.2d 866, 868 (N.C. Ct. App. 1995).

I. Attorneys' Fees

Unless otherwise provided by statute, North Carolina follows the American Rule, and each party bears its own attorneys' fees.⁵⁶

Notable statutory authorizations for fees include unfair and deceptive trade practices claims,⁵⁷ wage and hour claims,⁵⁸ frivolous litigation,⁵⁹ lien enforcement,⁶⁰ derivative actions,⁶¹ frivolous and malicious claims related to punitive damages,⁶² and trade secrets.⁶³

Parties may enter into contractual fee-shifting provisions. Fee provisions in LLC operating agreements are enforceable.⁶⁴ Notes or other evidence of indebtedness may also provide for reasonable fees.⁶⁵ Reciprocal attorneys' fees provisions in business contracts are permitted.⁶⁶ In addition, a negotiated class action settlement may include a fee-

⁵⁵ N.C. GEN. STAT. § 24-1.

⁵⁶ *Sullivan v. Woody*, 287 N.C. App. 199, 209, 882 S.E.2d 707, 714 (N.C. Ct. App. 2022); *see also* *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (N.C. 1972).

⁵⁷ N.C. GEN. STAT. § 75-16.1.

⁵⁸ N.C. GEN. STAT. § 95-25.22.

⁵⁹ N.C. GEN. STAT. § 6-21.5.

⁶⁰ N.C. GEN. STAT. § 44A-35.

⁶¹ N.C. GEN. STAT. §§ 55-7-46, 57D-8-05, or 59-1004(a).

⁶² N.C. GEN. STAT. § 1D-45.

⁶³ N.C. GEN. STAT. § 66-154(d).

⁶⁴ N.C. GEN. STAT. § 57D-2-32.

⁶⁵ N.C. GEN. STAT. § 6-21.2.

⁶⁶ N.C. GEN. STAT. § 6-21.6.

shifting provision, although it will be subject to court approval.⁶⁷

On appeal, the issue of whether fees should have been awarded is reviewed *de novo*.⁶⁸ The amount of fees is reviewed on an abuse of discretion standard.⁶⁹

J. Unjust Enrichment

North Carolina allows recovery for the quasi-contractual claim of unjust enrichment. To establish a claim for unjust enrichment, a party must show that it conferred a measurable benefit on another party with the expectation that it would be compensated, and that the other party knowingly accepted the benefit.⁷⁰ The appropriate measurement of damages is the reasonable value of the goods and services to the defendant.⁷¹

K. Unique Remedies

North Carolina allows prejudgment attachment of property.⁷² A party must demonstrate entitlement to an attachment through an affidavit or verified complaint.⁷³ In the situation of a resident defendant, the party seeking attachment must show that the defendant has taken or is about to take an act with intent to defraud its creditors.⁷⁴ No such showing is required for an out-of-state defendant.⁷⁵ Although the remedy of attachment must be strictly construed, substantial compliance with the statutory provisions is sufficient.⁷⁶ The procedures for attachment have been upheld as not violative of the Due Process Clause of the United States Constitution.⁷⁷

L. Public Policy Prohibitions

North Carolina has a public policy of allowing punitive damages to punish intentional wrongdoing and to deter others from similar

⁶⁷ *Ehrenhaus v. Baker*, 243 N.C. App. 17, 30, 776 S.E.2d 699, 708 (N.C. Ct. App. 2015).

⁶⁸ *S. Seeding Serv., Inc. v. W.C. English, Inc.*, 224 N.C. App. 90, 99, 735 S.E.2d 829, 835 (N.C. Ct. App. 2012).

⁶⁹ *Cunningham v. Cunningham*, 171 N.C. App. 550, 565, 615 S.E.2d 675, 686 (N.C. Ct. App. 2005).

⁷⁰ *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 541–542, 750 S.E.2d 555, 559 (N.C. Ct. App. 2013).

⁷¹ *Booe v. Shadrack*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (N.C. 1988).

⁷² N.C. GEN. STAT. § 1-440.1 *et seq.*

⁷³ N.C. GEN. STAT. § 1-440.11.

⁷⁴ *Connolly v. Sharpe*, 49 N.C. App. 152, 154, 270 S.E.2d 564, 566 (N.C. Ct. App. 1980).

⁷⁵ N.C. GEN. STAT. § 1-440.3.

⁷⁶ *Bethell v. Lee*, 200 N.C. 755, 758, 158 S.E. 493, 494 (N.C. 1931).

⁷⁷ *Northside Props., Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 540, 222 S.E.2d 267, 273 (N.C. Ct. App. 1976).

behavior.⁷⁸ Consistent with that policy, punitive damages are not allowed for nonquantifiable compensatory damages.⁷⁹ Punitive damages are, however, allowed where the appropriate remedy is rescission.⁸⁰

North Carolina public policy does not prevent insurance coverage for punitive damages.⁸¹ Clauses in commercial leases relieving a landlord from any duty to mitigate

damages are not against public policy.⁸² Similarly, risk allocation provisions in contracts are not void as against public policy.⁸³

M. Appellate Review

The amount of damages is ordinarily a question of fact, but the determination of the proper standard for measuring damages is a question of law.⁸⁴

⁷⁸ *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 113, 229 S.E.2d 297, 302 (N.C. 1976).

⁷⁹ *Id.*

⁸⁰ *Mehovic v. Mehovic*, 133 N.C. App. 131, 137, 514 S.E.2d 730, 734 (N.C. Ct. App. 1999).

⁸¹ *Mazza v. Med. Mut. Ins. Co. of N. Carolina*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (N.C. 1984).

⁸² *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 430, 623 S.E.2d 785, 791 (N.C. Ct. App. 2006).

⁸³ *Blaylock Grading Co., LLP v. Smith*, 189 N.C. App. 508, 512, 658 S.E.2d 680, 683 (N.C. Ct. App. 2008).

⁸⁴ *Olivetti Corp.*, 319 N.C. at 548.