

Pennsylvania

By: Emily Rogers



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A. Adoption of the UCC

Pennsylvania was the first state to adopt the Uniform Commercial Code in 1953, and it is codified at Pennsylvania Combined Statutes Title 13, Sections 1101 to 91136. The underlying purposes and policies of Pennsylvania’s UCC are: (1) to simplify, clarify and modernize the law governing commercial transactions; (2) permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.¹ Article 2 of the Uniform Commercial Code governs sales and can be found at

¹ 13 PA. C.S.A. § 1103(a).

Pennsylvania Combined Statutes Title 13, Sections 2101 to 2725.

In 2024, Pennsylvania passed Act 41, adopting Uniform Commercial Code Article 12, governing Controllable Electronic Records (certain digital assets).² “Controllable electronic record” means a record stored in an electronic medium that can be subjected to control under Section 12105 (relating to control of a controllable electronic record).³

B. Compensatory Damages

In Pennsylvania, the purpose of compensatory damages is “to make

² 13 PA. C.S.A. § 12101 to § 12107.

³ 13 PA. C.S.A. §12102(a).

the plaintiff whole.”⁴ In tort actions, a plaintiff may recover both economic and noneconomic damages. Economic damages include past and future medical expenses and past and future loss of earnings and earning capacity.⁵ Noneconomic damages include: (1) pain and suffering; (2) embarrassment and humiliation; (3) loss of ability to enjoy the pleasures of life; and (4) disfigurement.⁶ There is no cap on compensatory damages in Pennsylvania. A jury’s compensatory damages award may be set aside where it appears to have been the product of passion, prejudice, partiality, or corruption, or where it appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered.⁷

In contract actions, compensatory damages are intended to place the non-breaching party “nearly as possible in the same position [it] would have occupied had there been no breach.”⁸ The non-breaching party is not permitted to recover any more than the amount that will compensate for the loss sustained.⁹ Unless the

contract provides otherwise, the non-breaching party is entitled to recover damages which (1) would naturally and ordinarily result from the breach, or (2) were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) can be proved with reasonable certainty.¹⁰ Compensatory damages are not recoverable if they are too speculative, vague, or contingent and are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.¹¹

In a breach of warranty action, the measure of damages is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.¹²

Pennsylvania law imposes a duty to mitigate damages in breach of contract actions; however, the burden is on the breaching party to show how losses could have been

⁴ Bert Company v. Turk, 298 A.3d 44, 61 (Pa. 2023).

⁵ Pa. SSJI (Civ.), §§ 7.20, 7.30, 7.40.

⁶ See Pa. R. Civ. P. 223.3; McManamon v. Washko, 906 A.2d 1259, 1281 (Pa. Super. 2006); Pa. SSJI (Civ.), § 7.110.

⁷ See *McManamon*, 906 A.2d at 1280.

⁸ *Vinculum, Inc. v. Goli Technologies, LLC*, 310 A.3d 231, 249 (Pa. 2024) (citing

Lambert v. Durallium Prods. Corp., 72 A.2d 66, 67 (Pa. 1950)).

⁹ *Id.*

¹⁰ *Id.* at 250 (citing *Taylor v. Kaufhold*, 84 A.2d 347, 351 (Pa. 1951)).

¹¹ Pa. SSJI (Civ.), § 19.250 (Subcommittee Note) (citing *Spang & Co. v. U.S. Steel Corp.*, 545 A.2d 861, 866 (Pa. 1988)).

¹² 13 Pa. C.S.A. § 2714.

avoided.¹³ The duty to mitigate is not applicable where the liable party has an equal opportunity to reduce the damages.¹⁴

C. Consequential Damages

Pennsylvania law permits consequential damages in breach of contract actions. Consequential damages are differentiated from direct compensatory damages as economic harm beyond the immediate scope of the contract.¹⁵ In other words, direct damages refer to those which the party lost from the contract itself (i.e., the benefit of the bargain), while consequential damages are collateral losses following the breach.¹⁶ Lost profits

are a form of consequential damages available in both breach of contract and tort cases.¹⁷ Generally, lost profits are available where (1) there is evidence to establish them with reasonable certainty, and (2) there is evidence to show they were the proximate cause of the wrong (in tort actions) or that they were reasonable foreseeable (in contract actions).¹⁸

In breach of warranty actions, consequential damages include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and injury to person or property proximately resulting from any breach of warranty.¹⁹ In order to obtain consequential damages, the plaintiff must prove the damages were reasonably foreseeable at the time the agreement was entered into.²⁰ There are three types of lost profit recoverable as consequential damages for breach of warranty: (1) loss of primary profits; (2) loss of secondary profits; and (3) loss of good will damages.²¹

¹³ *Delliponti v. DeAngelis*, 681 A.2d 1261, 1265 (Pa. 1996).

¹⁴ *TruServ Corp. v. Morgan's Tool & Supply Co., Inc.*, 39 A.3d 253, 262 (Pa. 2012).

¹⁵ *Jay Jala, LLC v. DDG Construction, Inc.*, No. 15-3948, 2016 WL 6442074 (E.D. Pa. Nov. 1, 2016).

¹⁶ *Id.* at *2.

¹⁷ *See Vinculum*, 310 A.3d at 250 (internal citations omitted).

¹⁸ *MFW Wine Co., LLC v. Pa. Liquor Control Bd.*, 276 A.3d 1225 (Pa. Commw. Ct. 2022).

¹⁹ 13 PA. C.S.A. § 2715(b)(1)-(2).

²⁰ *See AM/PM Franchise Ass'n v. Atlantic Richfield Co.*, 584 A.2d 915, 921 (Pa. 1990).

²¹ *Id.* at 920.

D. Incidental Damages

Incidental damages are available in breach of warranty actions. In the case of a breach by the seller, the buyer may recover the following incidental damages: (1) expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected; (2) any commercially reasonable charges, expenses or commissions in connection with effecting cover; and (3) any other reasonable expense incident to the delay or other breach.²² In the case of a breach by the buyer, the seller's recoverable incidental damages include any commercial reasonable charges, expenses or commissions incurred in (1) stopping delivery; (2) in the transportation, care and custody of goods after the breach by the buyer; (3) connection with return or resale

²² 13 PA. C.S.A., § 2715(a).

of the goods; and (4) or otherwise resulting from the breach.²³

E. Punitive Damages

In Pennsylvania, punitive damages are recoverable in tort but not in actions sounding solely in breach of contract.²⁴ The purpose of punitive damages is to punish and deter outrageous and egregious conduct done in a reckless disregard of another's rights.²⁵ This punishment function is inconsistent with traditional contract actions, where damages are awarded to compensate an injured party for the loss suffered due to the breach.²⁶

To recover punitive damages in tort actions in Pennsylvania, the plaintiff must plead and prove that that the defendant's actions "are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct."²⁷

²³ 13 PA. C.S.A. § 2710.

²⁴ *DiGregorio v. Keystone Health Plan East*, 840 A.2d 361, 370 (Pa. Super. 2003). *See also AM/PM Franchise Ass'n*, 584 A.2d at 927 (affirming dismissal of claims for exemplary damages in a warranty action). *But see* Section L, *infra* (discussing availability of treble damages under Pennsylvania's Unfair Trade Practices and Consumer Protection Law).

²⁵ *DiGregorio*, 840 A.2d at 370. (citing *Johnson v. Hyundai Motor America*, 698 A.2d 631, 639 (Pa. Super. 1997)).

²⁶ *Id.*

²⁷ *SHV Coal v. Continental Grain Co.*, 587 A.2d 702, 704 (Pa. 1991); *Feld v. Merriam*, 485 A.2d 742, 747 (Pa. 1984) (quoting Restatement (Second) of Torts § 908(2) ("Punitive damages may be awarded for

Because punitive damages are designed to penalize only “particularly egregious” conduct, they “should not be meted out to every defendant who is found to have acted negligently” or even grossly negligent.²⁸

Pennsylvania does not cap punitive damages awards; however, excessive awards may be molded by the trial court. The trial court will have discretion whether to bifurcate. Pennsylvania Rule of Civil Procedure 213(b) provides: “[t]he court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues.”²⁹

conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”); *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005); *see also Johnson*, 698 A.2d at 639 (punitive damages warranted only if actor’s conduct was malicious, wanton, willful, oppressive, or exhibited reckless indifference to rights of others).

²⁸ *Phillips*, 883 A.2d at 446; *Smith v. Celotex Corp.*, 564 A.2d 209, 211 (Pa. Super. 1989).

²⁹ PA. R. CIV. P. 213(b).

F. Liquidated Damages

Pennsylvania permits liquidated damages clauses in transactions involving sales of goods.³⁰ However, the amount must be reasonable under the circumstances of the case.³¹ A term fixing unreasonably large liquidated damages is void as a penalty.³² To determine whether a liquidated damages stipulation is valid or a penalty, Pennsylvania courts consider the intention of the parties based on the contract and its subject matter; the relation of the stipulated amount to the extent of the injury which may be caused by the breach; the ease or difficulty of accurately measuring the breach in damages; and other matters as are legally or necessarily inherent in the transaction.³³

³⁰ 13 PA. C.S.A. § 2718.

³¹ *Id.* at § 2718(a) (“[d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach . . .”).

³² *Id.*; *see also Holt’s Cigar Co. v. 222 Liberty Associates*, 591 A.2d 743 (Pa. Super. 1991) (“Where a stipulated damages clause is intended as a form of punishment with the purpose, in terrorem, to secure compliance, the principles of compensation are subordinated and the provision must fail as an unenforceable penalty.”).

³³ *Holt’s Cigar Co.*, 591 A.2d at 743 (citing *Commw. v. Musser Forests, Inc.*, 146 A.2d 714, 717 (Pa. 1959), Restatement (First) of Contracts, § 339. *See also* 13 PA. C.S.A. § 2718 (liquidated damages amount must be “reasonable in light of the anticipated or

G. Nominal Damages

Pennsylvania recognizes awards of nominal damages where “a plaintiff is able to prove a breach of contract but can show no damages flowing from the breach.”³⁴ Under the law, nominal damages are generally one dollar (\$1.00).³⁵

H. Pre- and Post-Judgment Interest

In contract actions, prejudgment interest is automatically awarded where the damages resulting from the breach are liquidated and certain.³⁶ The prejudgment interest rate applied in such cases is the rate fixed by the contract, and if none, then the fixed statutory rate of 6% will apply.³⁷ Prejudgment interest (delay damages) is awarded at the request of the plaintiff in civil tort actions seeking relief for bodily injury, death, or property

damages.³⁸ In such cases, delay damages are calculated on the amount of compensatory damages from the date one year after service of original process through the date of the verdict (if the liable defendant has not offered a settlement within 125% of the verdict and if the plaintiff did not contribute to the delay for any period of time).³⁹ The interest is calculated using the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus 1%, not compounded.⁴⁰

A plaintiff is entitled to post-judgment interest from the date of the verdict through the date of payment in both contract and tort actions.⁴¹ The rate of post-judgment interest applied is fixed by statute at 6%, but again, the parties to a contract may agree to a higher rate.⁴²

actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.”)

³⁴ Pa. SSJI (Civ.) § 19.250; *see also* Thorsen v. Iron & Glass Bank, 476 A.2d 928, 931 (Pa. Super. 1984).

³⁵ Pa. SSJI (Civ.) § 19.250; *Carter v. May Dept. Store Co.*, 853 A.2d 1037, 1042 (Pa. Super. 2004) (“Nominal damages represent the award of a trifling sum where there has been a breach of duty . . . but no real substantial or serious loss or injury has been established.”) (quoting *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 727 (Pa. 1964)).

³⁶ *Pittsburgh Const. Co. v. Griffith*, 834 A.2d 572, 590 (Pa. Super. 2003).

³⁷ *Id.*; *see also* 41 P.S. § 202.

³⁸ PA. R. CIV. P. 238(a)(1).

³⁹ PA. R. CIV. P. 238(a)(2), (b)(1); *see also* *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1290 (Pa. Super. 2018), *aff’d*, 240 A.3d 537 (Pa. 2020) (only the compensatory portion of the award is subject to delay damages); *Colodonato v. Consolidated Rail Corp.*, 470 A.2d 475 (Pa. 1983).

⁴⁰ PA. R. CIV. P. 238 (a)(3).

⁴¹ *Pittsburgh Const. Co.*, 834 A.2d at 590-591, citing *Osiel v. Cook*, 803 A.2d 209, 215 (Pa. Super. 2002) (“Statutory post-judgment interest is a matter of right where damages are ascertainable by computation, even though a *bona fide* dispute exists to the amount of indebtedness.”) (internal quotations omitted).

⁴² *Id.*; 41 P.S. § 202.

I. Attorney’s Fees

Pennsylvania follows the “American Rule,” under which parties to litigation are responsible for their own attorney’s fees unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.⁴³ With respect to the second exception, agreements providing for attorney’s fees will be enforced “where the intent of the parties is expressed in clear, unambiguous terms in a contract.”⁴⁴

Attorney’s fees are authorized by statute in certain situations, including where the record supports a finding that the other party has engaged in obdurate, vexatious, or arbitrary conduct during the course of a lawsuit:

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

* * *

⁴³ See *Vinculum*, 310 A.3d, at 244 (citing *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 482-483 (Pa. 2009)).

⁴⁴ *Id.* (enforcing a one-sided attorney fee provision requiring one party to pay reasonable attorney fees associated with the other party’s enforcement a non-compete provision).

(6) Any participant who is awarded counsel fees as a sanction against another participant for violation of any general rule which expressly prescribes the award of counsel fees as a sanction for dilatory, obdurate or vexatious conduct during the pendency of any matter.

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

* * *

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.⁴⁵

⁴⁵ 42 PA. C.S.A. § 2503; *see also* *Brenckel v. Arblastar*, 466 A.2d 1075, 1078-1079 (Pa. Super. 1983) (the trial court record supported the lower court’s findings that parties’ conduct was arbitrary, vexatious, and in bad faith, award of counsel fees was appropriate and would not be disturbed absent an abuse of discretion); *Miller v. Nelson*, 768 A.2d 858, 862 (Pa. Super. 2001) (“The relentless pursuit of a claim which plainly lacks legal merit warrants an award of counsel fees.”).

A suit is vexatious for purposes of Section 2503(7) if “brought without legal or factual grounds and if the action served the sole purpose of causing annoyance.”⁴⁶ The term “obdurate” has been defined as resistant to persuasion or softening influences, inflexible or unyielding.⁴⁷ Finally, a party’s conduct is “arbitrary” within the meaning of Section 2503(9) if that “conduct is based on random or convenient selection or choice rather than reason or nature.”⁴⁸ Section 2503(9) is not intended to punish anyone who initiates a legal action and is ultimately not successful or who seeks to develop novel theories in law, “as such a rule would have a chilling effect on the right to bring suit for real legal harms suffered.”⁴⁹ Rather, the statute focuses on the conduct of the adverse party and on the relative merits of that party’s claims.⁵⁰

J. Reliance Damages

Reliance damages may be available following the breach of a contract in order to put the non-

breaching party back in the same position as if he had never entered into the contract.⁵¹ Such damages may be appropriate where the non-breaching party has “changed his position in reliance on the contract, by for example, incurring expenses in preparing to perform.”⁵²

K. Unjust Enrichment

The elements of unjust enrichment under Pennsylvania law are: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.⁵³ In determining whether the unjust enrichment doctrine applies, Pennsylvania courts focus on whether the defendant has been unjustly enriched and not on the intention of the parties.⁵⁴ The doctrine does not apply simply because the defendant may have benefited from the actions of the plaintiff; the enrichment of the

⁴⁶ *Miller*, 768 A.2d at 862 (quoting *Thunberg v. Strause*, 682 A.2d 295, 299 (Pa. 1996)).

⁴⁷ *McDade v. Garland*, 1991 WL 330900 (Pa. C.P. Mar. 13, 1991); *Boyer v. Hicks*, 9 D.&C. 3d 300, 305 (Pa. C.P. 1981).

⁴⁸ *Thunberg*, 682 A.2d at 299-300; see also *Lundy v. Manchel*, 2002 WL 31012284 (Pa. C.P. Aug. 21, 2002).

⁴⁹ *Dong Yuan Chen v. Saidi*, 100 A.3d 587, 592 (Pa. Super. 2014).

⁵⁰ *Id.*

⁵¹ *Shovel Transfer and Storage, Inc. v. Pa. Liquor Control Bd.*, 739 A.2d 133, 140 (Pa. 1999) (quoting Restatement (Second) of Contracts § 344, cmt. a.); see also Pa. SSJI (Civ.) § 19.250.

⁵² *Shovel Transfer and Storage, Inc.*, 739 A.2d at 140.

⁵³ *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. 2001) (quoting *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. 1993)).

⁵⁴ *Id.*

defendant must be unjust.⁵⁵ Where unjust enrichment is found, Pennsylvania law implies a quasi-contract that requires the defendant to pay restitution to the plaintiff (the value of the benefit conferred).⁵⁶

L. Pennsylvania’s Unfair Trade Practices and Consumer Protection Law

Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (UTPCPL) is found at Pennsylvania Statutes, Title 73, Sections 201-1 to 201-9.3. The statute provides for a private cause of action to consumers who demonstrate an ascertainable loss of money or property as a result of an alleged unfair trade practice.⁵⁷ Pennsylvania courts “have consistently held that, to establish a private right of action under the UTPCPL, a plaintiff must demonstrate that he/she detrimentally relied upon the deceptive practice of the defendant and that the plaintiff suffered harm as a result of this reliance.”⁵⁸

To state a claim under the UTPCPL, a plaintiff must plead and prove the elements of common law fraud.⁵⁹ The requirements for pleading fraud in the federal courts are outlined in Federal Rule of Civil Procedure 9(b), which states in relevant part that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” In order to satisfy this exacting standard, the plaintiff must plead (1) a specific false representation of material fact, (2) knowledge by the person who made it of its falsity, (3) ignorance of its falsity by the person to whom it was made, (4) the intention that it should be acted upon, and (5) that the plaintiff acted upon it to his damage.⁶⁰

If a plaintiff succeeds on a UTPCPL claim, then under the statute, the plaintiff may recover actual damages or one hundred dollars (\$100), whichever is greater.⁶¹ The court may also, in its discretion, award treble damages up to three times the actual damages

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Schenck v. K.E. David, Ltd.*, 666 A.2d 327, 328-329 (Pa. Super. 1995)).

⁵⁷ 73 P.S. § 201-9.2(a).

⁵⁸ *Toy v. Metro. Life Ins. Co.*, 863 A.2d 1, 9 (Pa. Super. 2004), *appeal granted*, 882 A.2d 479 (Pa. 2005) (citing *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001)); *see also* *Yocca v. Pitt. Steelers Sports, Inc.*, 854 A.2d 425, 438-439 (Pa. 2004) (“To bring a private cause of action under the UTPCPL, a plaintiff must show that he justifiably relied on the defendant’s wrongful conduct or

representation and that he suffered harm as a result of that reliance.”) (internal citations omitted).

⁵⁹ *Glatthorn v. Independence Blue Cross*, 34 Fed. Appx. 420, 422-423 (3d Cir. 2002); *Booze v. Allstate Insurance Co.*, 750 A.2d 877, 880 (Pa. Super. 2000).

⁶⁰ *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 255 F. Supp.2d 351, 407 (E.D. Pa. 2002); *Sun Co., Inc. v. Badger Design & Constructors, Inc.*, 939 F. Supp. 365, 369 (E.D. Pa. 1996).

⁶¹ 73 P.S. § 201-9.2(a).

sustained, but not less than one hundred dollars (\$100).⁶² In determining whether to award treble damages, trial courts are to be guided by Pennsylvania's punitive damages law, requiring a finding that the defendant's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others.⁶³ The court may further provide such additional relief as it deems necessary or proper, which could include incidental and

consequential damages.⁶⁴ Finally, the court may, in its discretion, award plaintiff costs and reasonable attorney's fees under the UTPCPL.⁶⁵

⁶² *Id.*

⁶³ *Johnson*, 698 A.2d at 639-640.

⁶⁴ 73 P.S. § 201-9.2(a); *see also* *Young v. Dart*, 630 A.2d 22 (Pa. Super. 1993).

⁶⁵ 73 P.S. § 201-9.2(a).