

Vermont

By: Walter E. Judge



Walter E. Judge is a director at Downs, Rachilin & Martin in Burlington, Vermont. He represents businesses in the state and federal courts of Vermont, Massachusetts, and Maine in commercial matters, intellectual property litigation, products liability, and personal injury defense.



A. Overview

In Vermont, business litigation damages are primarily compensatory, aimed at restoring the injured party to the position they would have occupied had the wrongful conduct not occurred. Courts in Vermont recognize a variety of damage types in commercial disputes, including direct and consequential damages, expectation and reliance damages, restitution, and in rare cases, punitive damages. Equitable remedies such as injunctive relief and specific performance are also available where monetary damages are inadequate. Vermont adheres to the “American Rule” on attorney’s

fees, with exceptions for statutory, contractual, or bad faith circumstances.

B. Compensatory Damages

Compensatory damages in Vermont are designed, “as nearly as possible, to restore a person to the position he would have been in had the wrong not been committed.”¹ These include direct damages, which are the “losses that naturally and usually flow from the breach itself.”² Consequential damages may also be awarded if they were reasonably foreseeable at the time of contracting and can be proven

¹ My Sister’s Place v. City of Burlington, 433 A.2d 275, 281 (Vt. 1981).

² A. Brown, Inc. v. Vt. Justin Corp., 148 Vt. 192, 196, 531 A.2d 899, 901 (Vt. 1987).

with reasonable certainty.³ For example, lost profits may be recoverable if they are not speculative and are supported by historical data or expert testimony. Vermont courts have emphasized the importance of foreseeability and certainty in awarding such damages.

C. Expectation Damages

Expectation damages “provide the plaintiff with an amount equal to the benefits of the parties’ bargain.”⁴ This benefit of the bargain may include anticipated profits or performance value, minus any costs saved due to the breach.⁵ Vermont courts require a clear and credible showing of the expected outcome, often necessitating detailed financial records or expert analysis. These damages are particularly relevant in commercial contract disputes. Vermont courts are cautious, however, to avoid awarding damages that are speculative or uncertain.

D. Reliance Damages

Reliance damages are awarded to reimburse a party for expenses incurred in reliance on a contract or

business relationship, particularly when expectation damages are too speculative.⁶ Reliance damages are intended to restore the plaintiff to the position they were in before the agreement was made.⁷ They may include costs for preparatory work, investments, or other expenditures made in anticipation of the contract’s performance. Vermont courts recognize reliance damages as a fair alternative when the benefit of the bargain cannot be reliably calculated.

E. Restitution

Restitution is an equitable remedy designed to prevent unjust enrichment by requiring a party to return benefits wrongfully retained. In Vermont, restitution shall be considered in every case in which a victim of a crime has suffered a material loss or has incurred medical expenses.⁸ Restitution may be awarded even in the absence of a formal contract, provided the plaintiff conferred a benefit on the defendant under circumstances that make it unjust for the defendant to retain it. When ordered, restitution may include return of property

³ Norton & Lamphere Construction Co. v. Blow & Cote, Inc., 183 A.2d 230, 236 (Vt. 1962).

⁴ Tour Costa Rica v. Country Walkers, Inc., 758 A.2d 795, 802 (Vt. 2000); *see also* Foti Fuels, Inc. v. Kurrle Corp., 90 A.3d 885 (Vt. 2013) (in lieu of requiring buyer of business to prove actual damages from seller’s violation of post-sale non-competition

agreement, seller could be liable for return of that portion of sale price specified in contract as value of non-competition agreement).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ 13 VT. STAT. ANN. § 7043 (West).

wrongfully taken from a victim, installment payments paid to the Restitution Unit, or payments in kind.⁹ The measure of damages is typically the value of the benefit conferred, not the plaintiff's loss.

F. Liquidated Damages

Vermont courts have held that “[t]he ultimate test for the validity of a liquidated damages clause is whether the clause is reasonable under the totality of the circumstances.”¹⁰ In Vermont, courts will enforce liquidated damages clauses in contracts if the stipulated amount is a reasonable forecast of just compensation for the harm caused by a breach.¹¹ The clause must reflect a genuine attempt to estimate potential damages at the time of contracting, and not serve as a penalty.¹² Courts will examine whether actual damages were difficult to ascertain and whether the amount agreed upon is proportionate to the anticipated loss and is a reasonable estimation of likely damages.¹³ If the clause is deemed punitive or unconscionable, it will be invalidated.¹⁴

⁹ *Id.*

¹⁰ *Highgate Associates, Ltd. v. Merryfield*, 597 A.2d 1280 (Vt. 1991).

¹¹ *New England Educ. Training Serv., Inc. v. Silver St. P'ship*, 528 A.2d 1341, 1346 (Vt. 1987).

¹² *Merryfield*, 597 A.2d at 1283.

¹³ *Id.*

¹⁴ *Id.*

G. Punitive Damages

Vermont courts reserve punitive damages for cases involving egregious misconduct. To justify punitive damages, the plaintiff must show that the defendant acted with actual malice, ill will, or reckless disregard for the rights of others.¹⁵ Malice may be shown by conduct manifesting personal ill will evidencing insult or oppression, or by conduct showing a reckless disregard of another's rights.¹⁶ Punitive damages require both: 1) wrongful conduct that is outrageously reprehensible; and 2) malice. Intentional, wrongful, and even illegal conduct will not justify punitive damages without evidence of malice.¹⁷

H. Equitable Remedies

The equitable doctrine of unjust enrichment holds that “a man shall not be allowed to enrich himself unjustly at the expense of another.”¹⁸ Vermont courts have adopted the view that “whether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated

¹⁵ *Shortle v. Central Vermont Public Service Corp.*, 399 A.2d 517, 518 (Vt. 1979).

¹⁶ *Sparrow v. Vermont Savings Bank*, 112 A.2d 205, 207 (Vt. 1921).

¹⁷ *Fly Fish Vermont, Inc. v. Chapin Hill Estates, Inc.*, 2010 VT 33, ¶ 18 (April 23, 2010).

¹⁸ *Morse v. Kenney*, 87 Vt. 445, 449, A. 865, 867 (Vt. 1914).

transaction.”¹⁹ Instead, it “must be a realistic determination based on a broad view of the human setting involved.”²⁰ In Vermont, specific performance of a contractual obligation follows almost as a matter of course from proof of its existence so long as the contractual obligation is mutual, clear, complete, and equitable.²¹

I. Attorney’s Fees and Costs

Vermont generally follows the “American Rule,” under which each party bears its own legal fees unless a statute, contract, or court rule provides otherwise.²² When departing from the American Rule, the court may only do so to the extent that the contract provides.²³ Statutory exceptions include consumer protection and employment statutes, such as the Vermont Consumer Protection Act, which allows prevailing plaintiffs to

recover reasonable attorney’s fees.²⁴ Courts may also award fees in cases involving bad faith litigation conduct or frivolous claims. This approach balances access to justice with discouragement of abusive litigation tactics. Where an award of attorney’s fees is called for, the court determines the reasonableness of the fee award.

J. Non-Compete Laws

In common law, a non-compete must be reasonable and justified. A non-compete is enforceable unless the agreement is contrary to public policy, unnecessary for the protection of the employer, or unnecessarily restrictive of the rights of the employee.²⁵ Other considerations that render a non-compete unenforceable include the contract’s subject matter or the circumstances and conditions under which it is to be performed.²⁶ Historically, Vermont courts disfavored non-competes as a restraint on trade and scrutinized them for reasonableness and justification.²⁷ Vermont courts have enforced non-competes that are reasonable tailored to protect the

¹⁹ McGrath v. Hilding, 41 N.Y.2d 625, 629 (N.Y. 1977).

²⁰ *Id.*

²¹ Sparrow v. Cimonetti, 115 Vt. 292, 304, 58 A.2d 875 (Vt. 1948).

²² Southwick v. City of Rutland, 30 A.3d 1298, 1300 (Vt. 2011) (quoting DJ Painting, Inc. v. Baraw Enters., Inc., 776 A.2d 413, 419 (Vt. 2001)).

²³ *Id.* at 1300 (Vt. 2011) (citing Mt. Everest Ski Shops, Inc. v. Nordica USA, Inc., 736 F. Supp. 523, 527 (D. Vt. 1989)).

²⁴ 9 VT. STAT. ANN. § 2453.

²⁵ Roy’s Orthopedic, Inc. v. Lavigne, 454 A.2d 1242, 1244 (Vt. 1982).

²⁶ *Id.*

²⁷ *Id.* at 1243-1244.

employer's legitimate interests.²⁸ Vermont courts have stated that the duration of a non-compete must not be greater than necessary to protect the employer's business interest.²⁹ In determining whether a non-compete is reasonable in geographic reach, Vermont courts focus on the type of business and the agreement's duration. Available remedies for employers enforcing non-competes include injunctive relief and damages.³⁰

K. Economic Loss Doctrine

The Vermont Supreme Court has historically strictly enforced the economic loss doctrine, prohibiting tort claims to recover for purely economic harms.³¹ In 2015, the court reaffirmed its policy of adherence to the rule. In *Walsh v.*

Cluba, the court dismissed a landlord's tort claims against a tenant even where the claim involved physical damage to the leased property.³² However, in a significant departure from this precedent, the court in *Sutton v. Vermont Regional Center*, recognized for the first time an exception to the rule based on a "special relationship" involving professional services.³³ This ruling not only reversed the trial court's dismissal but also signaled a shift in Vermont jurisprudence, potentially making it harder to dismiss similar claims at the pleading stage and leaving the existence of a special relationship to be resolved at summary judgment or trial.

²⁸ *Sys. & Software, Inc. v. Barnes*, 886 A.2d 762, 764 (Vt. 2005).

²⁹ *Dyar Sales & Mach Co. v. Bleiler*, 175 A. 27, 30 (Vt. 1934).

³⁰ *Foti Fuels*, 90 A.3d at 897.

³¹ See *Breslauer v. Fayston School District*, 163 Vt. 416, 659 A.2d 1129 (Vt. 1995) (dismissing tort claim against former employer by disappointed applicant seeking teaching job in new school district, and discussing need to "maintain a dividing line between contract and tort theories of recovery"); *Paquette v. Deere & Co.*, 168 Vt.

258, 719 A.2d 410 (Vt. 1998) (denying tort claims of purchasers of allegedly defective motor home); *Gus' Catering, Inc. v. Menusoft Sys.*, 171 Vt. 556, 762 A.2d 804 (Vt. 2000) ("[n]egligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one's conduct has inflicted some accompanying physical harm").

³² *Walsh v. Cluba*, 2015 VT 2, 117 A.3d 798 (2015).

³³ *Sutton v. Vermont Regional Center*, 2019 VT 71 (2019).