

Virginia

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A. Adoption of the UCC

Virginia adopted the Uniform Commercial Code in 1964, but it applies only to “transactions entered into and events occurring after January 1, 1966.” The effective date may be material in a products liability context in warranty disputes and other disputes against sellers and manufacturers.¹

B. Compensatory Damages

Generally, recoverable damages for breach of contract actions are limited to actual, pecuniary loss.² “Proof of damages is an essential element of a breach of contract claim, and failure to prove that element warrants dismissal of the claim.”³ However, compensatory damages are available if a party can prove “with reasonable certainty the amount of damages and the cause from which they resulted; speculation and conjecture cannot form the basis of recovery.”⁴

A party may sue for expectancy interest in breach of contract cases in Virginia. “The Restatement (Second) of Contracts defines the expectancy interest for a complaining party as ‘(a) the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less any costs or other loss that he has avoided by not having to perform.’”⁵

The collateral source rule may also be applicable in certain breach of contract actions. “The same rationales supporting [the Supreme Court of Virginia’s] long recognition of the collateral source rule in tort cases also support the rule’s application in certain breach-of contract actions. Whether the rule applies to a given case, however, requires a case-specific determination of whether the parties’ expectations, in light of those rationales, support the rule’s application.”⁶

¹ See VA. CODE ANN. § 8.10-101; §§ 8.1A-8.10.

² *Kamlar Corp. v. Haley*, 224 Va. 699, 705, 299 S.E.2d 514, 517 (Va. 1983).

³ *Microstrategy Servs. Corp. v. Openrisk, LLC*, No. 1:14-cv-1244, 2015 WL 3774485 at *5 (E.D. Va. Jun. 17, 2015); see also *Filak v. George*, 267 Va. 612, 619-620, 594 S.E.2d 610, 614-615 (Va. 2004).

⁴ *Shepherd v. Davis*, 265 Va.108, 125, 574 S.E.2d 514, 524 (Va. 2003); see also *Sunrise Continuing Care, LLC v. Wright*, 277 Va. 148, 671 S.E.2d 132 (Va. 2009) (reversing trial court’s denial of appellant’s motion to strike when appellee/plaintiff failed to present

evidence to support compensatory damage award).

⁵ *Microstrategy Servs. Corp.*, 2015 WL 3774485 at *5 (quoting Restatement (Second) of Contracts § 347).

⁶ *Dominion Res., Inc., v. Alstom Power, Inc.*, 297 Va. 262, 274, 825 S.E.2d 752, 757 (Va. 2019) (Dominion could seek recovery from Alstom’s breach of indemnity clause in contract even though insurance policies covered defense costs and settlements paid as a result of losses sustained at Dominion’s facility).

C. Consequential Damages

“Consequential damages resulting from the seller’s breach include: (a) any loss resulting from the general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not be reasonably prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.”⁷ Even though Virginia’s statutory definition dictates the measure of damages for breaches of contract under the UCC, “the Supreme Court of Virginia continues to use the common law definition of direct and consequential damages.”⁸

Parties may contract around consequential damages, and such limiting clauses are valid unless they are unconscionable.⁹ Unconscionability primarily refers to grossly unequal bargaining power at the time the contract is formed to

prevent “unfair surprise” to the parties.¹⁰ “Ordinarily, the Court must determine whether a contractual provision is unconscionable by considering the particular facts and circumstances surrounding a transaction,”¹¹ but case law suggests that there must be a obvious demonstration of one-sidedness to rise to the level of unconscionability.

D. Incidental Damages

“Incidental damages resulting from 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 expenses incident to the delay or other breach.”¹² Examples provided under the statute are not intended to be exhaustive, and the statute is geared toward protecting buyers who incur certain expenses in the course of handling goods when their acceptance is justifiably revoked.¹³

⁷ VA. CODE ANN. § 8.2-715(2).

⁸ *Kraft Foods No. Am., Inc., v. Banner Eng’g Sales, Inc.*, 446 F. Supp.2d 551, 572 (E.D. Va. 2006) (Kraft Foods could recover consequential damages for contaminated product from engineering company because the contamination naturally flowed from improperly-installed pipe system).

⁹ *What Hurts, LLC v. Volvo Penta of the Americas, LLC*, 710 F. Supp.3d 502, 525 (E.D.

Va. 2024) (granting defendant’s summary judgment motion precluding recovery of consequential damages in absence of facts showing unequal bargaining power).

¹⁰ *Id.* (quoting 1 KENT SINCLAIR, SINCLAIR ON VIRGINIA REMEDIES § 36.8 (2022)).

¹¹ *Id.*

¹² VA. CODE ANN. § 8.2-715(1).

¹³ *See Kruglyak v. Home Depot U.S.A, Inc.*, 750 F. Supp.3d 644, 663 (W.D. Va. 2024)

Buyers are rightfully allowed to seek damages that would put them the positions they “would hold if the contract had been fulfilled rather than the position [they] would hold if the contract had never been formed.”¹⁴

Incidental damages resulting from a buyer’s breach “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.”¹⁵

In considering an award for incidental damages, Virginia courts examine whether the contract failed its “essential purpose.”¹⁶

E. Punitive Damages

In Virginia, punitive damages awards are capped at \$350,000.00 by statute. Although a jury may return a punitive damages award in excess of \$350,000.00, the presiding judge must reduce the award in accordance with the statutory maximum.¹⁷

Punitive damages are not allowed in pure breach of contract actions. There must be proof of an independent, willful tort in combination with a breach of contract, regardless of the motives underlying the contract breach, to support a punitive damages award.¹⁸ Punitive damages awards are allowed in certain tort cases not to compensate a plaintiff, “but to punish the wrongdoer and to deter similar conduct.”¹⁹ This stands in contrast to principles of contract

(allowing recovery for transportation costs associated with returning bathtub after buyer’s revocation of acceptance was accepted by seller).

¹⁴ *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp.187, 191 (W.D. Va. 1997).

¹⁵ VA. CODE ANN. § 8.2-710; *see also* *Akzo Nobel Coatings, Inc., v. Pearl Avenue USA, Ltd.*, No. 2:09-cv-540, 2010 WL 11564919 at *3 (E.D. Va. 2010) (granting seller’s motion for summary judgment based on Virginia Code § 8.2-710 when buyer failed to pay for goods accepted).

¹⁶ *What Hurts LLC*, 710 F. Supp.3d at 527 (denying summary judgment motion as to availability of incidental damages because genuine issue of material fact existed as to whether contract failed its essential purpose).

¹⁷ *See* VA. CODE ANN. § 8.01-38.1.

¹⁸ *Haley*, 224 Va. At 707 (punitive damages in a breach of contract action are only justified when there is proof of an “independent, willful tort, beyond the mere breach of a duty imposed by contract.”).

¹⁹ *Id.* at 706.

law, in which damages for breach are “within the contemplation and control of the parties in framing their agreement. They are limited to those losses which are reasonably foreseeable when the contract is made.”²⁰

F. Liquidated Damages

Liquidated damages clauses are valid in Virginia unless “the actual damages contemplated *at the time of the agreement* are shown to be certain and not difficult to determine or the stipulated amount is out of all proportion to the actual damages.”²¹

For example, a liquidated damages clause in a commercial real estate contract that made a twenty-percent deposit non-refundable if a buyer did not secure financing by a certain date has been deemed valid under Virginia law.²² In that context, the buyer had the burden to prove that the “damages in the event of default were certain and not difficult to determine,” thus making the twenty-percent deposit an inaccurate reflection of the seller’s actual damages.²³ Alternatively, the

buyer needed to show that the twenty-percent deposit was “out of all proportion to any probable loss.”²⁴

In assessing whether the damages are “not difficult to determine,” the party challenging the enforceability of a liquidated damages provision must put forth evidence of the damages contemplated by the parties at the time the contract was formed.²⁵

The fact that a party enters into a contract containing a liquidated damages clause does not prevent that party from later litigating the validity of the clause.²⁶ A party opposing the imposition of liquidated damages has the burden of proving the clause is an unenforceable penalty.²⁷ A party opposing the imposition of liquidated damages has the right to conduct discovery and present evidence that the damages resulting from the breach are susceptible of definite measurement or that the liquidated damages are grossly in excess of the actual damages.²⁸

²⁰ *Id.*

²¹ *Boots Inc., v. Prempal Singh*, 274 Va. 513, 518, 649 S.E.2d 695, 698 (Va. 2007) (enforcing liquidated damages clause when buyer failed to present evidence that damages were not difficult to determine and/or the stipulated amount was out of proportion to the actual damages).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *See Aery Aviation, LLC v. Prime Alliance Bank, Inc.*, No. 4:24-cv-29, 2025 WL 3780657 at *7 (E.D. Va. Sept. 26, 2025); *see also Taylor v. Sanders*, 233 Va. 73, 75, 353 S.E.2d 745, 747 (Va. 1987).

²⁶ *O’Brian v. Langley School*, 256 Va. 547, 551, 507 S.E.2d 363, 365 (Va. 1998).

²⁷ *Id.*

²⁸ *Id.*

G. Pre- and Post-Judgment Interest

The judgment interest rate is six percent.²⁹ In some circumstances, an action arising from a contract shall carry interest at the rate lawfully charged on such contract, or at six percent annually, whichever is higher.³⁰

By its terms, Virginia Code Section 8.01-382 draws an important distinction between pre-judgment and post-judgment interest. This section provides for the discretionary award of pre-judgment interest by the trial of fact, who “may provide for” such interest and fix the time of its commencement.³¹ The accrual of post-judgment interest, however, is mandatory; the entire amount of a judgment or decree “shall bear interest” from its date of entry.³² Underlying the distinction is the principle that prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered.³³ In contrast, post-judgment interest is not an element

of damages, but is a statutory award for delay in the payment of money actually due.³⁴

H. Attorney’s Fees

Virginia follows the “American Rule” that the prevailing party is not entitled to its attorney’s fees absent applicable contractual or statutory provision.³⁵ Even when a contract or statute provide for the recovery of attorney’s fees, the award of those fees is within the sound discretion of the trial court.³⁶ Recoverable fees may include the cost of prosecuting affirmative claims and claims defense. The prevailing party has the burden of presenting a prima facie case that the requested fees are reasonable and necessary.³⁷ “Where [a contract] provide[s] for attorney’s fees, but [does] not fix the amount thereof, a fact finder is required to determine from the evidence what are reasonable fees under the facts and circumstances of the particular case ...”³⁸

Although not exhaustive, the Supreme Court of Virginia articulated seven factors that will be

²⁹ VA. CODE ANN. §§ 8.01-382; 6.2-302.

³⁰ See VA. CODE ANN. § 6.2-302.

³¹ Dairyland Ins. Co. v. Douthat, 248 Va. 627, 631, 449 S.E.2d 799, 801 (Va. 1994).

³² *Id.*

³³ *Id.*

³⁴ Nationwide Mut. Ins. Co. v. Finley, 215 Va. 700, 214 S.E.2d 129 (Va. 1975).

³⁵ West Square, LLC v. Communication Technologies, Inc., 274 Va. 425, 649 S.E.2d 698 (Va. 2007).

³⁶ Lane Const. Corp. Co. v. Trading Merchandising Co., 36 Va. Cir. 399 (Va. Cir. Ct. 1995).

³⁷ See, for example, Ebadom VA, LLC v. Lee, 105 Va. Cir. 21 (Va. Cir. Ct. 2020).

³⁸ Mullins v. Richlands Nat’l Bank, 241 Va. 447, 449, 403 S.E.2d 334, 335 (Va. 1991).

considered in determining whether fees are reasonable: (1) the time and effort expended by the attorney, (2) the nature of the services rendered, (3) the complexity of the services, (4) the value of the services to the client, (5) the results obtained, (6) whether the fees incurred were consistent with those generally charged for similar services, and (7) whether the services were necessary and appropriate.³⁹

The prevailing party will generally need to establish the reasonableness of its attorney's fees through expert testimony.⁴⁰ Fees may be awarded without expert testimony in limited circumstances if lay testimony or other evidence is sufficient to establish the reasonableness of the fees.⁴¹

The exception to the American Rule is a breach of contract which

forces the plaintiff to maintain or defend a suit with a third person.⁴² In this situation, the plaintiff may recover the reasonable attorney's fees reasonably incurred.⁴³ The fees recoverable are only those in the suit with the third person, not that with the defendant.⁴⁴ The party asserting attorney's fees at trial has the burden of establishing the reasonableness of the fees and their necessity.⁴⁵ Courts will also allow for the recovery of attorney's fees in cases involving fraud.⁴⁶

I. Reliance Damages

Virginia does not recognize a cause of action for promissory estoppel.⁴⁷ Virginia does recognize a cause of action for quantum meruit, which is based upon an implied contract to pay the reasonable value of services rendered.⁴⁸ In this

³⁹ *Lambert v. Sea Oats Condominium Association, Inc* 293 Va. 245, 254, 798 S.E.2d 177, 183 (Va. 2017) (quoting *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 430, 732 S.E.2d 690, 702 (Va. 2012)).

⁴⁰ *Mullins*, 241 Va. at 449.

⁴¹ *See, for example*, *Tazwell Oil Co., Inc. v. United Virginia Bank/Crestar Bank*, 243 Va. 94, 413 S.E.2d 611 (Va. 1992).

⁴² *Hiss v. Friedberg*, 201 Va. 572, 112 S.E.2d 871 (Va. 1960).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 499 S.E.2d 829 (Va. 1998).

⁴⁶ *See Prospect Development Co., Inc. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291 301 (Va. 1999); *St. John v. Thompson*, 299 Va. 431, 436, 854 S.E.2d 648 (Va. 2021).

⁴⁷ *W.J. Schafer Associates v. Cordant, Inc.*, 254 Va. 514, 493 S.E.2d 512, 516 (Va. 1997); *Virginia School of the Arts v. Eichelbaum*, 254 Va. 373, 377, 493 S.E.2d 510, 512 (Va. 1997); *Ward's Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 385, 493 S.E.2d 516, 520 (Va. 1997); *Mongold v. Woods*, 278 Va. 196, 203, 677 S.E.2d 288, 292 (Va. 2009).

⁴⁸ *Mongold*, 278 Va. at 203; *Hendrickson v. Meredith*, 161 Va. 193, 198, 170 S.E. 602, 604 (Va. 1933); *Marine Development Corp. v.*

context, “[w]here service is performed by one, at the instance and request of another, and ... nothing is said between the parties as to compensation for such service, the law implies a contract, that the party who performs the service shall be paid a reasonable compensation therefore.”⁴⁹ The remedy available to the plaintiff is an award of damages amounting to the reasonable value of the work performed, less the compensation actually received for that work.⁵⁰ Quantum meruit will not be available where there is an express, enforceable contract between the parties covering the services for which quantum meruit recover is claimed.⁵¹

J. Unjust Enrichment

In order to state a claim for unjust enrichment, a plaintiff must allege that: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant knew of the benefit and should reasonably have expected to repay the benefit; and (3)

the defendant accepted or retained the benefit in circumstances that render it inequitable without the defendant paying for its value.⁵² However, “[i]f there is an express enforceable contract that resolves the issue, the unjust enrichment claim is not available.”⁵³

K. Unique Remedies

There are several equitable remedies available to litigants in Virginia. These include detinue, specific performance, injunction, and rescission.

Courts in Virginia recognize a cause of action for detinue.⁵⁴ The object of a detinue action is to recover specific personal property and damages for its detention.⁵⁵ The action is employed to recover a chattel from one in possession who unlawfully detains it from either the true owner or one lawfully entitled to its possession.⁵⁶ If the specific property cannot be returned, judgment is rendered for its value.⁵⁷

Rodak, 225 Va. 137, 140-141, 300 S.E.2d 763, 765 (Va. 1983).

⁴⁹ Rea v. Trotter, 67 Va. 585, 592 (Va. 1875).

⁵⁰ *Hendrickson*, 161 Va. at 198.

⁵¹ Nedrich v. Jones, 245 Va. 465, 477, 429 S.E.2d 201, 207 (Va. 1993); Royer v. Bd. of Supervisors, 176 Va. 268, 280, 10 S.E.2d 876, 881 (Va. 1940).

⁵² *Schmidt v. Household Finance Corp.*, II, 276 Va. 108, 116, 661 S.E.2d 834, 838 (Va. 2008); *Sevilla v. Del Castillo*, 28 Va. Cir. 164 (Va. Cir. Ct. 1992).

⁵³ *Loudoun County Day School v. Ridenhour*, 107 Va. Cir. 92 (Va. Cir. Ct. 2021).

⁵⁴ *Broad Street Auto Sales, Inc. v. Baxter*, 230 Va. 1, 2-3, 334 S.E.2d 293, 294 (Va. 1985).

⁵⁵ *MacPherson v. Green*, 197 Va. 27, 32, 87 S.E.2d 785, 789 (Va. 1955).

⁵⁶ *Sinclair v. Young*, 100 Va. 284, 287, 40 S.E. 907, 908 (Va. 1902).

⁵⁷ *Id.*

One cannot sue in detinue and recover for breach of contract.⁵⁸

Virginia courts will allow for specific performance of a contract. This remedy is commonly applied in contracts involving unique items, such as antiques, custom-made goods, or real estate. Specific performance is an equitable remedy.⁵⁹ A suit in equity for specific performance is distinct from an action at law for breach of contract.⁶⁰ There is no right to specific performance that a court is obligated to enforce.⁶¹ The party seeking specific performance bears the burden of proving both that there is a definite contract and that he has performed all that is required of him (or that he is ready and willing to perform at the time of his suit), and that all conditions precedent have been fulfilled.⁶² Even if all the required proofs are

made, the court in equity is not required to grant the relief sought.⁶³

Courts will also permit injunctive relief. This is often used to prevent a contracting party from taking an action that would violate the terms of the agreement. Examples include preventing the disclosure or use of another party's confidential information or preventing a party from competing or soliciting the other party's customers in violation of a non-compete clause.⁶⁴ "The granting of an injunction is an extraordinary remedy and rests within the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case."⁶⁵ A plaintiff seeking injunctive relief must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of relief; (3) that the balance of equities tip in his favor; and (4) that the injunction is in the public interest.⁶⁶ The plaintiff must show that all four requirements are satisfied.⁶⁷ An injunction is an extraordinary remedy that is never awarded as of

⁵⁸ *MacPherson*, 197 Va. at 32-33.

⁵⁹ *Denton v. Browntown Valley Associate, Inc.*, 294 Va. 76, 82, 803 S.E.2d 490, 494 (Va. 2017).

⁶⁰ *Id.*

⁶¹ *Id.*; see also *Shepherd*, 265 Va. at 122 ("Specific performance of a contract is not a matter or right, but rests in the discretion of the trial court to be granted or refused according to established principles and the facts of each case.").

⁶² *Denton*, 294 Va. at 82.

⁶³ *Id.*

⁶⁴ See, for example, *Preferred Systems Solutions, Inc. v. FP Consulting, LLC*, 284 Va. 382, 732 S.E.2d 676 (Va. 2012).

⁶⁵ *Id.* (citing *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44, 53 (Va. 2008)).

⁶⁶ *Zachary Piper, LLC v. Popelka*, 109 Va. Cir. 71 (Va. Cir. Ct. 2021).

⁶⁷ *Id.*

right. Instead, courts must balance the competing claims of injury and must consider the effect on each party of granting or withholding of the requested relief.⁶⁸

Courts will also permit rescission in limited circumstances. The equitable rescission is “a remedy which call for the highest and most drastic exercise of power of a court of chancery – to annul and set at naught the solemn contracts of parties.”⁶⁹ “If rescission is granted, the contract is terminated for all purposes, and the parties are restored to the status quo ante.”⁷⁰ Rescission based upon a breach of contract is not a cause of action in itself, but rather a remedy.⁷¹ Thus, claims requesting the remedy of equitable rescission presupposes a breach of contract that has caused

the plaintiff some form of harm.⁷² Further, the remedy of equitable rescission is only available when the underlying breach of contract is “substantial” or “material.”⁷³

L. Public Policy Prohibitions

Although contracts that violate public policy are void, courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain.⁷⁴ Decisions regarding the invalidity of contracts due to violations of public policy are varied and highly dependent upon the facts and the specific illegality at issue.⁷⁵

⁶⁸ *Id.*

⁶⁹ *Schmidt*, 276 Va. at 115.

⁷⁰ *Id.*

⁷¹ *Young-Allen v. Bank of America, N.A.*, 298 Va. 462, 469, 839 S.E.2d 897, 901 (Va. 2020).

⁷² *Id.*

⁷³ *Id.* (quoting *Bolling v. King Coal Theatres, Inc.*, 185 Va. 991, 996, 41 S.E.2d 59 (Va. 1947)).

⁷⁴ *Estes Exp. Lines, Inc. v. Chopper Exp., Inc.*, 273 Va. 358, 364, 641 S.E.2d 476, 478 (Va. 2007); *Jessee v. Smith*, 222 Va. 15, 17-18, 278 S.E.2d 793, 795 (Va. 1981); *Ryan v. Griffin*, 199 Va. 891, 895, 103 S.E.2d 240, 244 (Va. 1958).

⁷⁵ *See, for example, Estes Exp. Lines.*, 273 Va. at 364; *Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 587 S.E.2d 711 (Va. 2003); *Hiett v. Lake Barcroft Community Ass’n, Inc.*, 244 Va. 191, 418 S.E.2d 894 (Va. 1992); *Kelley v. Kelley*, 248 Va. 295, 298, 449 S.E.2d 55, 56 (Va. 1994); *Johnson’s Adm’x v. Richmond & D.R. Co.*, 86 Va. 975, 11 S.E. 829 (Va. 1890).