

West Virginia

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A. Adoption of the UCC

West Virginia first adopted its version of the Uniform Commercial Code in 1963.¹ This included Article 2 of the UCC, which generally applies to transactions in goods, but that Article excludes secured transactions and does not impair or repeal any statute regulating, among other things, sales to consumers, farmers, or other specified classes of buyers.²

B. Compensatory Damages

In claims for breach of contract, the West Virginia Supreme Court

has stated that the compensatory damages recoverable “are those as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach.”³ Except in “extraordinary circumstances, such as a breach of a promise to marry, compensatory damages for emotional distress without an accompanying physical or economic loss cannot be awarded

¹ W. VA. CODE § 46-1-101 *et seq.*

² W. VA. CODE § 46-2-102.

³ Syl. Pt. 1, *Desco Corp. v. Harry W. Trushel Const. Co.*, 413 S.E.2d 85 (W.Va. 1991). Article VIII, § 4 of the West Virginia Constitution requires the Supreme Court to “prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case.”

in a contract action.”⁴ “Compensatory damages ... must be proved with reasonable certainty.”⁵

For contract claims governed by the UCC, the buyer’s measure of damages resulting from the seller’s breach of warranty with regard to accepted goods can include “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.”⁶ As discussed below, it can also include “any incidental and consequential damages.”⁷ The UCC also permits the parties to contract for an exclusive or limited remedy, such as by “limiting a buyer’s remedy to the return of the goods and repayment or the price or to repair and replacement of nonconforming goods or parts.”⁸ But when “an exclusive or limited warranty [fails] of its essential purpose,” such as when the seller refuses or is unable “to remedy the defect,” the full range of damages

recoverable under Article 2 are available.⁹

When the claim sounds in breach of warranty under the UCC and “[w]here it is extremely doubtful that a definite figure can be ascertained representing the actual value of the goods which are the subject of a breach of warranty action, either at the time of the transaction or at the time of delivery, special circumstances exist justifying the use of some other measure of damages than that ordinarily used”¹⁰ In *Mountaineer Contractors v. Mountain State Mack*, the transactions took place during a “coal boom” where the scarcity of the type of equipment involved meant the purchaser incurred costs to repair the purchased equipment as well as damages for the loss of use of the equipment during the repair period, justifying using the cost of repair as a basis for compensatory damages.¹¹ The court would later clarify that repair costs were not always limited to “special circumstances” and that in the proper case, the amount of repair bills could be “strong evidence of the difference between the value [the goods] would have had if they had

⁴ *Allen v. Smith*, 368 S.E.2d 924, 927 (W.Va. 1988).

⁵ Syl. Pt. 3, *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 214 S.E.2d 823 (W.Va. 1975).

⁶ W. VA.CODE § 46-2-714(2).

⁷ W. VA.CODE § 46-2-714(3).

⁸ W. VA.CODE § 46-2-719(1)(a).

⁹ *Appalachian Leasing, Inc. v. Mack Trucks, Inc.*, 765 S.E.2d 223, 229 (W.Va. 2014).

¹⁰ Syl. Pt. 3, *Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*, 268 S.E.2d 886 (W.Va. 1980).

¹¹ *Id.*

been as warranted” for the buyer’s general damages.¹²

For actions sounding in tort, the West Virginia Supreme Court has stated that, “[t]he basic goal in awarding damages is to fairly and adequately compensate the plaintiff for the injuries and losses sustained.”¹³ “[T]he aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant’s injurious conduct.”¹⁴ In the context of product liability cases, “[t]ort law traditionally has been concerned with compensating for physical injury to person or property.”¹⁵

To fulfill the overarching goal of making an injured party whole, compensatory damages “include not only actual losses but also the anticipated losses due to the future effects of an injury caused by negligence”¹⁶ To the extent the damages sought are noneconomic, certain provisions of the West Virginia Code limit the amount that

may be awarded in specific types of cases.¹⁷

C. Consequential Damages

In a breach of contract action, West Virginia also recognizes the right to recover indirect or consequential damages “that arise from the special circumstances of the contract.” Unlike direct damages which flow from the breach itself and for which there is no requirement that the parties must have actually anticipated them, the plaintiff must show that the consequential damages are of the sort that the “parties could reasonably have anticipated ... would be a probable result of a breach”¹⁸ The court has further held that, “[w]hether contract damages are direct or consequential is a question of law for the trial court. However, whether special circumstances exist to show that consequential damages were within the reasonable contemplation of the contracting parties is ordinarily a question of fact for the jury.”¹⁹

¹² *Nelson v. Logan Motor Sales, Inc.*, 370 S.E.2d 734, 737-738 and n.8 (W.Va. 1988).

¹³ *Flannery v. United States*, 171 W.Va. 27, 29, 297 S.E.2d 433, 435 (W.Va.1982).

¹⁴ *Kessel v. Leavitt*, 204 W.Va. 95, 187, 511 S.E.2d 720, 812 (W.Va. 1998).

¹⁵ *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 859 (W.Va. 1982).

¹⁶ *Cook v. Cook*, 607 S.E.2d 459, 462 (W.Va. 2004).

¹⁷ *See, for example*, W. VA. CODE § 29-12A-7 (capping at noneconomic loss damages for certain claims against political subdivisions or their employees); W. VA. CODE § 55-7B-8 (capping noneconomic loss damages for claims covered by the Medical Professional Liability Act); W. VA. CODE § 55-7-32 (capping noneconomic loss claims for certain types of accidents involving commercial vehicles).

¹⁸ *Desco Corp.*, 413 S.E.2d at Syl. Pt. 2.

¹⁹ *Id.* at Syl. Pt. 3.

Typically, lost profits are considered a species of consequential damages and must be predicated on a claim sounding in contract. While West Virginia recognizes a cause of action for strict liability in tort for product liability claims, “property damage to defective products which results from a sudden calamitous event is recoverable under a strict liability cause of action. Damages which result merely because of a ‘bad bargain’ are outside the scope of strict liability.”²⁰ For claims based on non-conforming or defective products, “[t]he proper relationship between tort law and the Uniform Commercial Code requires that lost profits be pursued under a warranty or contract theory cause of action rather than strict liability.”²¹

With respect to claims governed by the UCC, consequential damages arising from the seller’s breach include “(a) 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 (b) injury to person or property approximately resulting from any breach of warranty.”²² While the West Virginia Supreme Court has not spoken on the issue, the United States Court of Appeals for the Fourth Circuit has held that an aggrieved seller may not recover consequential damages.²³

“Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”²⁴ In *Adams v. Little Giant Ladder Systems*, where the product at issue – a ladder – was bought for a “business purpose,” the UCC provision did not apply and the court undertook a common law unconscionability analysis, ultimately concluding the contract’s effort to exclude consequential damages was both procedurally and substantively

²⁰ *Star Furniture Co.*, 297 S.E.2d at Syl. Pt. 3.

²¹ *Id.* at 859–860.

²² W. VA. CODE § 46-2-715(2)(a)-(b).

²³ *Abex Corp./Jetway Div. v. Controlled Sys., Inc.*, 22 UCC Rep.Serv.2d 166, 983 F.2d 1055 and n. 8 (4th Cir. 1993) (table decision) (citing a prior version of the act and stating that because the West Virginia version of the UCC only provides for an award of consequential damages to an aggrieved buyer, they are not recoverable by the seller).

²⁴ W. VA. CODE § 46-2-719(3). *See also Adams v. Little Giant Ladder Sys., LLC*, 765 F. Supp.3d 523, 528–529 (S.D. W.Va. 2025).

unconscionable and therefore unenforceable.²⁵

D. Incidental Damages

Incidental damages are also explicitly recoverable under the UCC by both aggrieved buyers and sellers. These include a buyer’s 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 delay or other breach.”²⁶ Seller’s remedies 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.”²⁷

E. Punitive and Exemplary Damages

West Virginia Code Section 55-7-29 “articulates the evidentiary standard and procedure for an award of punitive damages at trial and imposes a cap on such awards.”²⁸ In particular, Section 55-7-29 provides:

(a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

(b) Any civil action tried before a jury involving punitive damages may, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:

(1) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages, if any.

²⁵ *Adams*, 765 F. Supp.3d at 528–529.

²⁶ W. VA. CODE § 46-2-715(1).

²⁷ W. VA. CODE § 46-2-710.

²⁸ *Martinez v. Asplundh Tree Expert Co.*, 803 S.E.2d 582, 589 (W.Va. 2017).

(2) If the jury finds during the first stage of a bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages.

(3) If the court finds that sufficient evidence exists to proceed with a consideration of punitive damages, the same jury shall determine if a defendant is liable for punitive damages in the second stage of a bifurcated trial and may award such damages.

(4) If the jury returns an award for punitive damages that exceeds the amounts allowed under subsection (c) of this section, the court shall reduce any such award to comply with the limitations set forth therein.

(c) The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or \$500,000, whichever is greater.

F. Liquidated Damages

West Virginia permits parties to contract for liquidated damage provisions “(1) where such damages are uncertain and not readily capable of ascertainment in amount by any known or safe rule, whether such uncertainty lies in the nature of the subject, or in the particular circumstances of the case; or (2) where from the nature of the case and tenor of the agreement, it is apparent that the damages have already been the subject of actual fair estimate and adjustment between the parties.”²⁹ But, “[a] clause for damages in a contract is a penalty rather than a liquidated damage provision when the amount is grossly disproportional in comparison to the damages actually incurred. This is true even though the provision is denominated as liquidated damages in the contract.”³⁰ Moreover, “[i]n determining whether a clause in a contract stating a sum to be paid in the event of a breach of the contract

²⁹ Syl. Pt. 1, *Stonebraker v. Zinn*, 286 S.E.2d 911 (W.Va. 1982).

³⁰ *Id.* at Syl. Pt. 2.

is liquidated damages or a penalty, the important question is not the intention of the parties but rather the reasonableness in fact of the agreed sum when the contract was made.”³¹

Notwithstanding the fact that liquidated damages provisions are upheld where the damages are uncertain and not readily capable of ascertainment, the West Virginia Supreme Court has nonetheless held that “[a] liquidated damage clause for delay in completing contract work does not preclude an injured party from recovering compensatory damages under the contract unless the liquidated damage clause expressly limits the right to such other damages.”³² Although an earlier case, *Vecellio v. Bopst*,³³ stated that “[a] written agreement which contains both a clause providing that time shall be considered of the essence of the contract and one providing for liquidated damages in the event of delayed performance, the two provisions not being consistent, is not to be construed as making the time of performance of the essence

of the contract,”³⁴ a subsequent case from the Southern District of West Virginia held that rule later announced in *VanKirk* controlled.³⁵

For claims governed by the UCC, West Virginia Code Section 46-2-718 explicitly sets forth the basis for upholding a liquidated damages provision, as well as the remedies covered:

1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount

³¹ Syl. Pt. 5, *Wheeling Clinic v. Van Pelt*, 453 S.E.2d 603 (W.Va. 1994).

³² Syl. Pt. 3, *VanKirk v. Green Const. Co.*, 466 S.E.2d 782 (W.Va. 1995).

³³ 6 S.E.2d 708 (W. Va. 1939).

³⁴ *Id.* at Syl. Pt. 3.

³⁵ *Wolf Creek Contracting Co., LLC v. Nicholas Cnty. Solid Waste Auth.*, No. 2:19-CV-00672, 2020 WL 5604051, at *5 (S.D. W.Va. Sept. 18, 2020).

by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this article on resale by an aggrieved seller (section 2-706).

G. Pre- and Post-Judgment Interest

Prejudgment and post-judgment interest are governed by statute. The general judgment interest statute, West Virginia Code Section 56-6-31 provides that in most circumstances, "every judgment or decree for the payment of money, whether in an action sounding in tort, contract, or otherwise, entered by any court of this state shall bear simple, not compounding, interest, whether it is stated in the judgment decree or not."³⁶ The West Virginia Supreme Court has, however, recognized that another statute or an "express written agreement" could establish

³⁶ W. VA. CODE § 56-6-31(a).

“the type of prejudgment interest as being compound...”³⁷

Under West Virginia law, prejudgment interest is generally available for special or liquated damages, and special damages are defined as including “lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court[.]”³⁸ Special damages are damages that are “certain or capable of being rendered certain by reasonable calculation.”³⁹ Prejudgment interest is not generally recoverable for general damages.

The general judgment prejudgment interest statute, West Virginia Code Section 56-6-31(b), provides that where “an obligation is based upon a written agreement, the obligation bears prejudgment interest at the rate and terms set forth in the written agreement until the date the judgment or decree is

entered ...”⁴⁰ The West Virginia Supreme Court has referred to this as the statute “which controls awards of prejudgment interest in tort actions.”⁴¹ Another statute provides, states that “[t]he jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict.”⁴² In *Miller v. WesBanco Bank, Inc.*,⁴³ the Supreme Court held that “West Virginia Code section 56-6-27 (eff. 1923) provides the exclusive means by which to obtain prejudgment interest in any action founded on contract. Failure to submit the question of prejudgment interest to the jury results in waiver of the same.”⁴⁴ Read together, the two statutes appear to allow for contracting parties to provide a specified rate for prejudgment interest and even for compounding prejudgment interest, but where the action is founded on that contract, the question must be presented to the jury.

³⁷ Syl. Pt. 4, *Hensley v. West Virginia Dept. of Health and Human Resources*, 508 S.E.2d 616 (W.Va. 1998).

³⁸ W. VA. CODE § 56-6-31(b).

³⁹ *Dan’s Car World, LLC v. Delany*, 246 W. Va. 289, 300, 873 S.E.2d 820, 831 (W.Va. 2022).

⁴⁰ W. VA. CODE § 56-6-31(b).

⁴¹ *Tri-State Petroleum Corp. v. Coyne*, 814 S.E.2d 205, 229 (W.Va. 2018).

⁴² W. VA. CODE § 56-6-27.

⁴³ 859 S.E.2d 306 (W.Va. 2021).

⁴⁴ *Id.* at Syl. Pt. 1.

By statute, the rate of prejudgment interest is “two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the right to bring the action has accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree: Provided, That the rate of the prejudgment interest may not exceed nine percent per annum or be less than four percent per annum.”⁴⁵

Like prejudgment interest, the rate of rate of post-judgment interest on judgments and decrees for the payment of money is “two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the judgment or decree is entered: Provided, That the rate of post-judgment interest may not exceed nine percent per annum or be less than four percent per annum.”⁴⁶

The annual rate used for both pre- and post-judgment interest is determined and published annually by the administrative office of the West Virginia Supreme Court and, once set for a particular judgment or

decree, does not vary regardless of subsequent changes in the federal reserve discount rate.⁴⁷

H. Attorney’s Fees

As a general proposition, each party bears their own attorney’s fees in the absence of statutory authorization:

West Virginia generally follows the American rule, under which “each litigant bears his or her own attorney’s fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.” We do recognize a narrow, equitable exception to this general prohibition on the recovery of attorneys’ fees, however, “when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” A party may demonstrate the requisite bad faith “in conduct leading to the litigation or in conduct in connection with the litigation.”⁴⁸

A trial court’s decision to award attorney’s fees lies in the discretion

⁴⁵ W. VA. CODE § 56-6-31(b)(1).

⁴⁶ W. VA. CODE § 56-6-31(c).

⁴⁷ W. VA. CODE § 56-6-31(b)(1) and (c).

⁴⁸ *Coyne*, 814 S.E.2d at 227.

of the court, not the jury.⁴⁹ When fees are sought under the equitable exception, the trial judge is required to make specific post-trial findings as to the whether the standard has been met.⁵⁰

I. Unjust Enrichment

West Virginia recognizes an unjust enrichment claim sounds “neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law.”⁵¹ As a “species of quasi contract relief,” it does not exist “to provide an alternative means of recovery for breach of contract, nor does it exist to reduce contract disputes to a question of whether one party benefitted from the other party’s performance.”⁵² “The existence of a valid and enforceable

written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.”⁵³ Even though it has its roots in equity, a claim for money damages for unjust enrichment is an action at law and therefore triable to a jury.⁵⁴

One court has stated that the elements of an unjust enrichment claim under West Virginia law are:

- (1) a benefit conferred upon the [defendant];
- (2) an appreciation or knowledge by the defendant of such benefit; and
- (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. “[U]njust enrichment ... is but the equitable reason for requiring payment for value of goods and services received.”⁵⁵

⁴⁹ Syl. Pt. 5, *Harlow v. E. Elec., LLC*, 858 S.E.2d 445, 447 (W.Va. 2021).

⁵⁰ See *Justice Highwall Mining, Inc. v. Varney*, 890 S.E.2d 685, 697 (W.Va. Ct. App. 2023) (vacating trial court’s award of attorneys’ fees based on jury’s verdict and remanding for it to determine, in its discretion, whether the required standard had been met and, if so, to calculate the proper fee award).

⁵¹ *Webb v. N. Hills Grp., Inc.*, 914 S.E.2d 275, 288 (W.Va. 2025).

⁵² Syl. Pt. 3, *Gulfport Energy Corp. v. Harbert Priv. Equity Partners, LP*, 851 S.E.2d 817 (W.Va. 2020).

⁵³ *Id.* at Syl. Pt. 2.

⁵⁴ Syl. Pt. 1, *Realmark Devs., Inc. v. Ranson*, 588 S.E.2d 150 (W.Va. 2003).

⁵⁵ *Smith v. ExoMod Concepts, LLC*, 813 F. Supp.3d 587, 597 (N.D. W.Va. 2025) (internal citations omitted).

“In West Virginia, ‘restitution damages from a claim of unjust enrichment are measured in terms of the benefit the plaintiff conferred to the defendant.’ In addition, ‘a person may be unjustly enriched not only where he receives money or property but also where he otherwise receives a benefit. He receives a benefit ... where he has saved expense or loss.’”⁵⁶ As the West Virginia Supreme Court has noted, “[i]f benefits have been received and retained under such

circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving and retaining the benefits to pay their reasonable value.”⁵⁷

⁵⁶ LaPosta Oldsmobile, Inc. v. Gen. Motors Corp., 426 F. Supp. 2d 346, 356 (N.D. W.Va. 2006) (internal citations omitted).

⁵⁷ Copley v. Mingo Cnty. Bd. of Educ., 466 S.E.2d 139, 145 n. 17 (W.Va. 1995) (cleaned up).