

# Wisconsin

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## **A. Adoption of the Uniform Commercial Code**

Wisconsin adopted the Uniform Commercial Code (U.C.C) to resolve commercial disputes between parties.<sup>1</sup> “Adopted by the legislature

in 1963, the U.C.C. sets forth the rights and remedies that govern a transaction between two commercial parties of relatively equal bargaining power.”<sup>2</sup>

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<sup>1</sup> Wis. STAT. §§ 401.101 to 411.101, *et seq.*; *Kraenzler v. Brace*, 773 N.W.2d 481 (Wis. Ct. App. 2009).

<sup>2</sup> See *Ins. Co. of N.A. v. Cease Elec. Inc.*, 688 N.W.2d 462, 468 (Wis. 2004) (providing historical reference for Wisconsin’s adoption of the U.C.C.).

## B. Compensatory Damages<sup>3</sup>

“The fundamental basis for an award of damages for breach of contract is just compensation for losses necessarily flowing from the breach.”<sup>4</sup> In Wisconsin, contract damages are compensatory, and a “party is not entitled to be placed in a better position because of a breach than [it] would have if the contract had been performed.”<sup>5</sup> Damages are “given to make whole the damage or injury suffered by the injured party.”<sup>6</sup> “[T]he plaintiffs are not required to ascertain their damages with mathematical precision, but rather the trier of fact must set damages at a reasonable amount.”<sup>7</sup>

“Compensation involves not only [the] assessment of gains prevented by the breach but also of losses ensuing which would not have occurred had the contract been performed.”<sup>8</sup> A party alleging breach of a contract has a duty to mitigate damages and use reasonable means to avoid or minimize the damages.<sup>9</sup> An injured party cannot recover for any item that could have been, or was avoided.<sup>10</sup> Compensatory damages may be recoverable under the following claims in Wisconsin, among others:

- breach of contract;<sup>11</sup>
- breach of warranty;<sup>12</sup>
- fraud;<sup>13</sup>

<sup>3</sup> This discussion excludes claims relating to restrictive covenants, securities fraud, conspiracy, and civil Racketeer Influence and Corrupt Organizations (RICO).

<sup>4</sup> *Dehnart v. Waukesha Brewing Co.*, 124 N.W.2d 664, 670 (Wis. 1963)) (defining purpose of compensatory damages).

<sup>5</sup> *Hanz Trucking, Inc. v. Harris Bros. Co.*, 138 N.W.2d 238, 246 (Wis. 1965) (reversing and remanding for a new trial on the issue of damages because evidence supported finding that a truck rental company did not agree to an annual minimum mileage agreement that affected damages calculations).

<sup>6</sup> *Cords v. Anderson*, 259 N.W.2d 672, 684 (Wis. 1977) (quoting *White v. Benkowski*, 155 N.W.2d 74, 77 (Wis. 1967)) (affirming damages award and explaining how damages are calculated).

<sup>7</sup> *Id.*

<sup>8</sup> *Hanz Trucking, Inc.*, 138 N.W.2d at 269 (internal references omitted).

<sup>9</sup> *Peterson v. Cornerstone Prop. Dev., LLC*, 720 N.W.2d 716, 719 (Wis. Ct. App. 2006) (affirming plaintiff’s damage award for breach of contract).

<sup>10</sup> *Id.*

<sup>11</sup> *Dan Samp Agency, Inc. v. Am. Fam. Mut. Ins. Co.*, No. 2009AP670, 2010 WL 3001398, at \*2 (Wis. Ct. App. Aug. 3, 2010) (advising “in addition to compensatory damages, a person damaged by a breach of contract is entitled to recover for all losses that are the natural and probable result of the [contract] breach”).

<sup>12</sup> *Mayberry v. Volkswagen of Am., Inc.*, 692 N.W.2d 226, 232 (Wis. 2005) (reversing circuit court determination of damages. For breach of warranty claims, “the measure of damages is the difference at the time and place of acceptance between the value if the goods accepted and the value they would have had if they had been as warranted”).

<sup>13</sup> *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 211 (Wis. 2005) (three

- civil conversion;<sup>14</sup>
- misrepresentation of trade secret;<sup>15</sup>
- defamation;<sup>16</sup>
- account stated;<sup>17</sup>
- unfair competition;<sup>18</sup>
- breach of fiduciary duty of officers;<sup>19</sup> and
- intentional interference with contractual relationships.<sup>20</sup>

categories of common law misrepresentation: intentional, negligent, and strict liability misrepresentation, and noting intentional misrepresentation is sometimes referred to as common law fraud and may arise either from a “failure to disclose a material fact’ or from a ‘statement of a material fact which is untrue’” (internal references omitted)).

<sup>14</sup> RREF II BHB-WI SKI, LLC v. S & K, Inc., No. 2017AP410, 2018 WL 3244165, at 3\* (Wis. Ct. App. July 3, 2018) (damages recoverable for civil conversion are specified by statute, Wis. Stat. § 895.446(3)(a)-(c), and compensatory damages are limited to actual damages incurred by plaintiff, including retail or replacement value of equipment).

<sup>15</sup> World Wide Prosthetic Supply, Inc. v. Mikulsky, 640 N.W.2d 764, 769 (Wis. 2002) (plaintiff may recover any proven pecuniary loss attributable to a misappropriation of trade secrets).

<sup>16</sup> Morrissey Agency, Inc. v. Branch, 401 N.W.2d 183, 183 (Wis. Ct. App. 1986) (explaining Wisconsin recognizes a defamation claim based on words which “charge an individual or a corporation with dishonorable, unethical, or unprofessional conduct in a trade, business, or profession”); Laughland v. Beckett, 870 N.W.2d 466, 475 (Wis. Ct. App. 2015) (“a communication defames if it tends to damage one’s reputation in the community or to deter other persons from associating with the defamed individual” and that proof of specific economic loss by defamation is not required”).

<sup>17</sup> Onalaska Elec. Heating, Inc. v. Schaller, 288 N.W.2d 829, 832 (Wis. 1980) (defining accounts stated as “[an] agreement between debtor and creditor that the items of the transaction between them are correctly stated in a statement rendered, that the balance shown is owing by the one party to the other, and that the one promises to pay that balance to the other,” and stating that the document creates a presumption for plaintiff that can only be overcome by mistake or fraud).

<sup>18</sup> Wis. STAT. § 100.20 (common law concept of unfair competition is a statutory mandate); Spheeris Sporting Goods, Inc. v. Spheeris on Capitol, 459 N.W.2d 581, 585–587 (Wis. Ct. App. 1990) (trade names are valid examples of what it means to protect against unfair competition because names should not imitate, or be confusingly similar to, those of competitors).

<sup>19</sup> Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck, 377 N.W.2d 605, 609 (Wis. 1985) (advising fiduciary duty arises from “formal commitment to act for the benefit of another . . . or from special circumstances from which the law will assume an obligation to act for another’s benefit”).

<sup>20</sup> Liturgical Publ’ns., Inc. v. Karides, No. 2004AP478, 2006 WL 931892, at \*3 (Wis. Ct. App. Apr. 12, 2006) (affirming dismissal of tortious interference with a contract, finding no evidence employee directly competed with employer while working at competitor nor did employee profit from any competitive venture during employment. “[T]ortious interference with a contract occurs when: (1) the plaintiff had a contract or prospective contractual relationship with a third party, (2) the defendant interfered

### C. Consequential Damages

Consequential damages provide relief for any loss caused by any general or particular need of the contracting parties “which could not reasonably be prevented by cover[.]”<sup>21</sup> In a breach of contract claim, the amount of consequential damages a party might be entitled to is limited to damages that are natural and probable consequences.<sup>22</sup> Damages must also be “reasonably foreseeable at the

time the contract was made as a probable result of the breach.”<sup>23</sup> The court “may award consequential damages such as loss of profits [or] travel expenses . . . provided they do not duplicate a recovery already gained.”<sup>24</sup> “Prospective profits must be diminished by charges composing an essential element in the cost of manufacture or service.”<sup>25</sup> “An injured party is only entitled to the benefit of his or her agreement, which is the *net* gain he or she would have realized from the contract but for the breach.”<sup>26</sup>

“If all consequential damages are barred, then all lost profits would be barred regardless of how they arise.”<sup>27</sup> Contracting parties may also limit or exclude

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with the relationship, (3) the interference was intentional, (4) a causal connection exists between the interference and the damages, and (5) the defendant was not justified or privileged to interfere”); *Dorr v. Sacred Heart Hosp.*, 597 N.W.2d 462, 478–479 (Wis. Ct. App. 1999) (affirming trial court properly awarded damages).

<sup>21</sup> *Murray v. Holiday Rambler, Inc.*, 265 N.W.2d 513, 525 (Wis. 1978) (reversing damages award and holding evidence failed to support an award of damages for loss of use); WIS. STAT. § 402.715 (U.C.C. defining consequential damages for buyers).

<sup>22</sup> *Kramer v. Bd. of Educ. of Sch. Dist. of Menomonie Area*, 635 N.W.2d 857, 860 (Wis. Ct. App. 2001) (affirming denial of consequential and incidental damages because award of both would place the plaintiff in a better position than they would have been in if the contract had been performed, which is contrary to the basic principles of contract law); Wis JI-Civil 3710 (providing civil jury instructions on

consequential damages for breach of contract).

<sup>23</sup> *Peterson v. Cornerstone Prop. Dev., LLC*, 720 N.W.2d 716, 719 (Wis. Ct. App. 2006) (quoting *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 306 N.W.2d 292 (Wis. Ct. App. 1981)) (affirming trial court order dismissing purchaser’s statutory claim and awarding consequential damages for breach of contract).

<sup>24</sup> *Pagenkopf v. DTL of Sturgeon Bay, Inc., No. 94-2617*, 1995 WL 449547, at \*3 (Wis. Ct. App. Aug. 1, 1995) (reversing award for consequential damages and noting recovery cannot be too remote).

<sup>25</sup> *Magestro v. N. Star Envtl. Const.*, 649 N.W.2d 722, 726 (Wis. Ct. App. 2002) (citation omitted).

<sup>26</sup> *Id.* (citing *Thorp Sales Corp. v. Gyuro Grading Co.*, 331 N.W.2d 342 (Wis. 1983)).

<sup>27</sup> *Appleton Papers Inc. v. Andritz BMB AG*, No. 2009AP2295, 2011 WL 867754, at \*4 (Wis. Ct. App. Mar. 5, 2011) (lost profits are a subset of consequential damages).

consequential damages in their agreement.<sup>28</sup>

#### D. Incidental Damages

Incidental damages resulting from a seller's breach include any "reasonable expense incident to the delay or other breach."<sup>29</sup> The U.C.C. allows incidental damages to an aggrieved buyer upon expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected.<sup>30</sup> Similarly, the U.C.C. provides "[i]ncidental damages to an aggrieved seller [which] include[s] 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."<sup>31</sup> Contracting parties may also limit incidental damages in their agreement.<sup>32</sup>

#### E. Punitive Damages

In Wisconsin, punitive damages are authorized by statute<sup>33</sup> and may be awarded "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."<sup>34</sup> The purposes of punitive damages are to punish the wrongdoer and to deter others from like conduct.<sup>35</sup> "Wisconsin courts

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<sup>28</sup> Est. of Kriefall v. Sizzler USA Fran., Inc., 816 N.W.2d 853, 863 (Wis. 2012) (consequential damages can be limited or excluded by stipulation) (citing Wis. STAT. § 402.719).

<sup>29</sup> Wis. STAT. § 402.715(1) (U.C.C. providing incidental damages to buyer); *Kramer*, 635 N.W.2d at 860; Wis. JI-Civil 3720 (discussing civil jury instructions and incidental damages for breach of contract provided by the Wisconsin State Law Library).

<sup>30</sup> Wis. STAT. § 402.715(1) (U.C.C. provides incidental damages to buyer).

<sup>31</sup> *Jensen v. A Complete Spa & Pool Supply Ctr., Inc.*, No. 99-2073, 2000 WL 895071, at \*3 (Wis. Ct. App. July 6, 2000) (affirming judgment and noting defendant failed to demonstrate they were entitled to any damages for plaintiff's breach because defendant failed to present evidence of the resale price of the pool) (internal citations omitted); Wis. STAT. § 402.710.

<sup>32</sup> See generally *Rural Mut. Ins. Co. v. Lester Bldgs., LLC*, 929 N.W.2d 180 (Wis. 2019) (incidental damages barred by previous contract agreement).

<sup>33</sup> Wis. STAT. § 895.043.

<sup>34</sup> *Id.*; *Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 406-411 (Wis. 2014) (reversing award for punitive damages because degree of reprehensibility did not support amount and award did not bear reasonable relationship to compensatory damages).

<sup>35</sup> See *Loehrke v. Wanta Builders, Inc.*, 445 N.W.2d 717, 721 (Wis. Ct. App. 1989) (reversing award for punitive damages and

have consistently held that punitive damages are unavailable in a breach of contract action” and are only recoverable if the “conduct constituting the breach is also a tort for which punitive damages are recoverable.”<sup>36</sup> If punitive damages are appropriate, the “factors to be considered in determining whether punitive damages should be awarded are: [(1)] the grievousness of defendant’s act [and], [(2)] the outrageousness of defendant’s conduct and the degree of malicious intention.”<sup>37</sup>

#### F. Liquidated Damages

Also known as stipulated damages, “liquidated damages are ‘contractually stipulated as a reasonable estimation of actual damages to be recovered by on

party if the other party breaches.’”<sup>38</sup> “In deciding whether a [liquidated] damages clause is valid, . . . [a] judge should inquire into all relevant circumstances, including . . . the existence and extent of the anticipated and actual injury to the nonbreaching party.”<sup>39</sup> “The overall single test” to determine the validity of a liquidated damages provision is “whether the clause is reasonable under the totality of circumstances.”<sup>40</sup> Wisconsin has established “several factors to help determine whether a particular clause is reasonable [including]: (1) [d]id the parties intend to provide for damages or for a penalty; (2) [i]s the injury caused by the breach one that is difficult or incapable of accurate estimation at the time of contract; and (3) [a]re the stipulated damages a reasonable forecast of the harm caused by the breach[.]”<sup>41</sup> “[W]here the stipulated damages clause is a valid provision for liquidated damages, the doctrine of mitigation of damages is not applicable to determine the

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pre-verdict interest, finding that although a fiduciary relationship existed between the contractor and subcontractor, which would ordinarily have allowed for punitive damages for a breach of the duty arising thereunder, the contractor had good cause).  
<sup>36</sup> *Id.* (internal references omitted).

<sup>37</sup> *Lundin v. Shimanski*, 368 N.W.2d 676, 686–687 (Wis. 1985) (affirming damages award and providing factors courts should consider. “Punitive damages maybe awarded where a fraudulent representation is made and relied in to induce a contract in willful, wanton, or reckless disregard of the

plaintiff’s rights.”) (internal references omitted).

<sup>38</sup> *Osborn v. Dennison*, 768 N.W.2d 20, 31 (Wis. 2009) (affirming court of appeals finding that plaintiffs have option of seeking liquidated damages or actual damages, but not both) (internal citation omitted).

<sup>39</sup> *Wassenaar v. Panos*, 331 N.W.2d 357, 361 (Wis. 1983) (reversing court of appeals finding that stipulated damages clause was valid liquidated damages provision).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 362–363.

damages awarded to the nonbreaching party.”<sup>42</sup>

### **G. Pre- and Post-Judgment Interest**

Wisconsin statutes provide for the recovery of both pre- and post-judgment interest.<sup>43</sup> The rate of interest under these statutes is set at 1% plus the prime interest rate in effect on January 1 of the year in which the judgment is entered if the judgment is entered on or before June 30 of that year, or alternatively, the rate in effect on July 1 of the year in which the judgment is entered if the judgment is entered after June 30 of that year, as reported in the federal reserve statistical release H. 15.<sup>44</sup> The interest rate remains in effect from the date of entry of judgment until the judgment is paid.<sup>45</sup>

If an offer of settlement is made pursuant to Wisconsin Statutes Section 807.01(4), and the offer is not accepted and the party recovers

a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest as calculated above on the amount recovered from the date of the offer of settlement until the amount is paid. Interest is in lieu of interest computed under Wisconsin Statutes Sections 814.04(4) and 815.05(8).<sup>46</sup>

### **H. Attorney’s Fees**

Generally, Wisconsin follows the “American Rule,” and a “prevailing party is not entitled to collect attorney fees from the opposing party as a part of his or her damages or costs.”<sup>47</sup> However, this may be modified by statute.<sup>48</sup> Attorney’s fees may be recoverable by an enforceable contract that provides for attorney’s fees.<sup>49</sup> When such provisions are reasonable, “it is well-settled that specific contractual provisions for reimbursement of attorney’s fees and cost are valid and enforceable.”<sup>50</sup> The Wisconsin

<sup>42</sup> *Id.* at 361.

<sup>43</sup> WIS. STAT. §§ 807.01(4), 814.04(4), 815.05(8).

<sup>44</sup> 2011 Wisconsin Act 69.

<sup>45</sup> *Id.*

<sup>46</sup> WIS. STAT. § 807.01(4).

<sup>47</sup> *Lewis v. Village of Hobart*, No. 2013AP2048, 2014 WL 2932346, at \*3 (Wis. Ct. App. July 1, 2014) (asserting attorney fees available when prescribed by statute).

<sup>48</sup> *Id.*

<sup>49</sup> *Kremers-Urb. Co. v. Am. Emps. Ins. Co.*, 351 N.W.2d 156, 167–168 (Wis. 1984) (discussing attorney’s fees in context of third-party litigation).

<sup>50</sup> *Adv. Mech. Contractors, Inc. v. S.E. Wisconsin Prof. Baseball Park Dist.*, No. 2004AP2396, 2007 WL 259854, at \*8 (Wis. Ct. App. Jan. 30, 2007) (noting attorney’s fees can be awarded through contract stipulation).

Supreme Court has set forth a non-exhaustive list of factors to be considered in determining whether attorney's fees are reasonable including:

(1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and result obtained; (9) counsel's experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the clients; and (12) awards in similar cases.<sup>51</sup>

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<sup>51</sup> *Id.* at \*12. (quoting *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 683 N.W.2d 58, 67 n.5 (Wis. 2004) (affirming award for attorney's fees and explaining function by providing elements of consideration and methodology of calculation) (internal quotations omitted)).

## I. Economic Loss Doctrine

"The economic loss doctrine is a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship."<sup>52</sup> "The economic loss doctrine is 'based on an understanding that contract law . . . is better suited than tort law for dealing with purely economic loss in the commercial arena.'"<sup>53</sup> "The economic loss doctrine in no way limits a party's ability to seek breach of contract damages but merely prohibits a party from seeking a tort remedy when the damages are purely economic in nature."<sup>54</sup>

This doctrine mainly applies to claims for breach of contract and warranty along with claims of misrepresentation.<sup>55</sup> Fraud in the inducement is an exception to the economic loss doctrine.<sup>56</sup> The doctrine's purpose is to "preserve

<sup>52</sup> *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 241-242 (Wis. 2004) (citing *Digicorp, Inc. v. Ameritech Corp.*, 662 N.W.2d 652 (Wis. 2003)).

<sup>53</sup> *Id.* (quoting *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998)).

<sup>54</sup> *Magestro*, 649 N.W.2d at 725.

<sup>55</sup> *Tietsworth*, 677 N.W.2d at 242-244.

<sup>56</sup> *Kaloti Enters.* 699 N.W.2d at 216 (announcing a narrow fraud in the inducement exception to economic loss doctrine when food wholesaler's alleged intentional misrepresentation by a food manufacturer).

the distinction between contract and tort by requiring transacting parties to pursue only their contractual remedies when asserting an economic loss claim.”<sup>57</sup>

## J. Unjust Enrichment

“Unjust enrichment is an equitable doctrine.”<sup>58</sup> “A circuit court’s decision to grant relief due to unjust enrichment is discretionary.”<sup>59</sup> “Unjust enrichment is grounded upon the moral principle that a party who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.”<sup>60</sup> A claim for “unjust enrichment requires proof of three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable to do so.”<sup>61</sup>

<sup>57</sup> *Id.* (internal references omitted).

<sup>58</sup> *Abbott v. Marker*, 722 N.W.2d 162, 167 (Wis. Ct. App. 2006) (affirming denial of damages as defendant did not receive benefit that had marketable value, thus plaintiff could not recover percentage of the attorney fees on unjust enrichment grounds).

<sup>59</sup> *Id.* at 168.

<sup>60</sup> *Id.*

<sup>61</sup> *Sands v. Menard*, 904 N.W.2d 789, 798 (Wis. 2017) (affirming court of appeals decision because party failed to state claim for unjust enrichment); see *Watts v. Watts*, 405 N.W.2d 303, 315–316 (Wis. 1987) (finding complaint stated claim upon which

Since unjust enrichment is based on equitable principles, damages are “measured by the benefit conferred upon the defendant [and] not the plaintiff’s loss.”<sup>62</sup>

## K. Unique Remedies

Pursuant to Wisconsin Statutes Section 811.01, Wisconsin authorizes prejudgment attachment to any creditor regarding the property of the debtor.<sup>63</sup> Section 811.03 allows a plaintiff to execute a writ of attachment to a property of the defendant under certain enumerated circumstances, such as when defendant has disposed of or concealed or is about to dispose of or conceal the defendant’s property or some part thereof with intent to defraud the defendant’s creditors.<sup>64</sup> Before a writ of attachment can be executed, the plaintiff must provide an affidavit setting forth factual

relief could be granted on unjust enrichment).

<sup>62</sup> *Mgt. Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 79–80 (Wis. 1996) (explaining difference between conversion and unjust enrichment. “Conversion is distinct from unjust enrichment. An action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust. Establishing a loss of profit by plaintiff does not prove unjust enrichment of defendant[.]”).

<sup>63</sup> WIS. STAT. § 811.01.

<sup>64</sup> *Id.* § 811.03(1).

allegations.<sup>65</sup> No writ of attachment shall issue against a municipal corporation.<sup>66</sup>

However, be advised that Wisconsin courts may be hesitant to permit prejudgment attachment. “[T]he law generally prohibits prejudgment attachments,” when the “taking of one’s property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing[, the] procedure violates . . . due process.”<sup>67</sup> However, the Wisconsin legislature amended the attachment statutes in 1977, addressing the statutes due process concerns.<sup>68</sup> While a court may be cautious in dealing with Wisconsin Statutes § 811 *et seq.*, the legislature has

“added safeguards to diminish the possibility of a mistaken seizure.”<sup>69</sup>

#### L. Public Policy Prohibitions

“Generally, contractual provisions agreed to by competent parties are valid and enforceable assuming they do not violate public policy.”<sup>70</sup> Public policy may be expressed by a statute, regulation, or judicial opinion.<sup>71</sup> “A contract is considered illegal when its formation or performance is forbidden by statute or where a penalty is imposed for the action agreed to.”<sup>72</sup> “A court may declare a contract void on public policy grounds only if it determines, after weighing the interests, that the interests in enforcing the contract are clearly outweighed by the interests in upholding the policy that the contract violates.”<sup>73</sup> The factors a Wisconsin court may consider in determining whether a

<sup>65</sup> *Id.* § 811.03.

<sup>66</sup> *Id.* § 811.01.

<sup>67</sup> *Capitol Indem. Corp. v. Reasbeck*, 479 N.W.2d 247, 250 (Wis. Ct. App. 1991) (discussing constructive trust as form of pre-judgment attachment); *Larson v. Fetherston*, 172 N.W.2d 712, 718 (Wis. 1969) (reversing lower court decision permitting pre-judgment attachment in garnishment action).

<sup>68</sup> *Eurochem Trading USA Corp. v. Ganske*, No. 18-CV-16-SLC, 2018 WL 3611982, at \*2-4 (W.D. Wis. July 27, 2018) (addressing defendant’s argument that pre-judgment attachment is an unconstitutional violation

of due process); *see U.S. Gen., Inc. v. Arndt*, 417 F. Supp. 1300 (E.D. Wis. 1976) (finding early versions of Wis. STAT. § 811 *et seq.* violated due process).

<sup>69</sup> *Eurochem Trading USA Corp.*, 2018 WL 3611982, at \*4.

<sup>70</sup> *Abbott*, 722 N.W.2d at 164 (Wis. Ct. App. 2006) (affirming dismissal because contract was illegal and therefore void).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 164-165.

<sup>73</sup> *Rosecky v. Schissel*, 833 N.W.2d 634, 649 (Wis. 2013) (discussing general elements of contract law and how contracts may be voidable, severable, or illegal).

contract is contrary to declared public policy include:

(1) the nature of the subject matter of the agreement; (2) the strength of the public policy underlying the statute; (3) the likelihood the refusal to enforce the bargain will further the applicable public policy; (4) how serious or deserved is the forfeiture suffered by the party attempting to enforce the bargain; and (5) the parties' relative bargaining power and freedom to contract.<sup>74</sup>

"[P]ublic policy is [the] principle of law under which freedom of contract or private dealings is restricted by law for the good of the community."<sup>75</sup> Wisconsin has recognized that a contract may be void by public policy for reasons including the following:

- unconscionable contracts;<sup>76</sup>
- lack of capacity;<sup>77</sup>

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<sup>74</sup> *Abbott*, 722 N.W.2d at 165–166. (internal quotations omitted).

<sup>75</sup> See *Carr v. Heart of N. Home Inspection, Inc.*, No. 2020AP984, 2021 WL 3043356, at \*6 (Wis. Ct. App. July 20, 2021) (affirming circuit court decision that contract was not unconscionable nor against public policy) (quoting *Merten v. Nathan*, 321 N.W.2d 173, 178 (Wis. 1982)).

<sup>76</sup> *Id.*

<sup>77</sup> *Jones by Jones v. Pizon*, No., 2018 WL 4179028, at \*4–5 (Wis. Ct. App. Aug. 29, 2018) (advising that under Wisconsin law, party seeking to assert lack of capacity must prove lack of competence by preponderance of the evidence) (internal quotations omitted)).

- indefiniteness;<sup>78</sup>
- contracts with minors;<sup>79</sup>
- contracts made in violation of a statute;<sup>80</sup> and
- contracts induced by fraud<sup>81</sup> or duress.<sup>82</sup>

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<sup>78</sup> *Hoffman v. Midwest Motors, LLC*, No. 2007 WL 2386487, at \*2 (Wis. Ct. App. Aug. 23, 2007) (“A contract is too indefinite to be enforceable . . . [when its] essential terms of . . . agreement [are] so vague or indefinite that the agreement is not definite as to the parties basic commitments and obligations thus preventing the formation of a contract” (internal references omitted)).

<sup>79</sup> *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 290 (Wis. 1968) (explaining the general rule is “the contract of a minor, other than for necessities, is either void or voidable at [their] option” (internal references omitted)).

<sup>80</sup> *Felland v. Sauvey*, 637 N.W.2d 403, 408 (Wis. Ct. App. 2001) (noting “contracts made in violation of a statute will not be enforced. However, not all contracts made in violation of a statute are void. [An appellate court] look[s] to the intent of the legislature in enacting the statute to ascertain whether a violation makes the agreement

unenforceable” (internal references omitted)).

<sup>81</sup> *Tietsworth*, 677 N.W.2d at 244 (“[a] contract fraudulently induced is void or voidable [but] a party fraudulently induced to enter a contract may affirm the contract and seek damages for breach or pursue the equitable remedy of rescission and seek restitutionary damages, including sums necessary to restore the party fraudulently induced to his position prior to the making of the contract”).

<sup>82</sup> *Doocy v. Zohimsky*, No. 2008AP2702, 2010 WL 144983, at \*2–3 (Wis. Ct. App. Jan. 14, 2010) (“A contract signed by a party who was under duress and did not ratify or affirm the terms of the contract, would result in the contract being voidable. Duress involves wrongful acts that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction.” (internal references omitted)).