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Michigan Causes of Action Formbook

Chapter 18: Contract and Related Actions

Frederick A. Acomb Miller Canfield PLC ; Russell J. Bucher Miller Canfield PLC ; Robert F. Magill Jr. Magill & Rumsey PC ; David A. Wolfe Weltman Weinberg & Reis Co LPA

During the current COVID-19 pandemic, several temporary orders alter certain procedures and filing deadlines in Michigan courts. *See* AO 2020-1, AO 2020-2, and AO 2020-3. Follow blog posts and discussion in the ICLE Community for details, and check with your local court about their emergency protocols.

I. Introduction

§18.1 Commercial dispute resolution is deeply rooted in contract law and often involves the application of basic and long-standing contract principles. However, many facets of commercial litigation practice have been codified.

The broadest-ranging statutory scheme dealing with commercial litigation practice is unquestionably the Uniform Commercial Code (UCC), MCL 440.1101 et seq. Thoroughly explore any potential impact of the UCC before beginning an action. For instance, the period of limitations for general breach of contract (six years, MCL 600.5807(9)) does not apply to a claim regarding a sale of goods under the UCC. Rather, the UCC establishes a four-year limitation period but also provides that "[b]y the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it." MCL 440.2725(1). If seeking damages regarding a sale of goods, consider the UCC's limitations of remedies in MCL 440.2719 as well as Michigan's version of the economic-loss doctrine. *See GMC v Alumi-Bunk, Inc*, 482 Mich 1080, 757 NW2d 859 (2008); *Neibarger v Universal Coops*, 439 Mich 512, 486 NW2d 612, (1991); *Quest Diagnostics, Inc, v MCI Worldcom, Inc*, 254 Mich App 372, 656 NW2d 858 (2003). Except in those situations in which tort elements enter into commercial disputes, the range of damages recoverable in most

commercial cases is rather strictly limited to traditional contract principles.

This chapter covers common-law breach of contract and several assorted related commercial actions. A number of related actions are also covered in other chapters. See in particular chapter 12 for consumer protection actions, chapter 13 for lemon law and related actions, including breach of UCC warranties, chapter 14 for debtor-creditor actions, chapter 15 for bankruptcy adversary proceedings, chapter 16 for business torts actions, and chapter 17 for intellectual property actions, all of which can be related to actions based in contract.

II. Account Stated, Mutual and Open Account Current, and Open Account

A. Cause of Action

1. Account Stated

§18.2 An account stated is a common-law action that converts an underlying series of transactions (such as a series of sales of goods or services over time) into a new cause of action for the amount due for the whole series; that is, one sum rather than many individual items and a new contract for the payment of that sum. The statute of limitations will run from the last item in the series or later if the account is settled later. The creditor alleges that the parties actually agreed on the amount due and the debtor promised to pay that amount; or the creditor alleges that, because of circumstances (e.g., the debtor received and retained the bill on the account without objection or made some payments on the account), an agreement and promise to pay are implied.

A statutory option, MCL 600.2145, allows an affidavit to be used to create prima facie evidence of the amount due and shift the burden of proof to the defendant. This statute also applies to an open account.

See form 18.1 for a complaint-drafting checklist and form 18.2 for a sample complaint.

2. Mutual and Open Account Current

§18.3 A "mutual and open account current" theory also exists under common law, giving the same protection against the statute of limitations so that "[i]n actions brought to recover the balance due upon a mutual and open account current, the claim accrues at the time of the last item proved in the account." MCL 600.5831. The last item drags along with it all the earlier entries. The account is "open" because it has not been closed, settled, or stated and implies

that future dealings between the parties are possible as well.

3. Open Account

§18.4 There is also a third theory, *open account,* which is the same, but the transactions are not mutual: credit has been extended only by one party.

Both the mutual and the open accounts can be converted into an account stated by an express or implied agreement regarding the amount due. The conversion can be this simple: an open account is billed several times by the creditor, no payment and no objection from the debtor is received, and the creditor then argues that the open account has been converted into an account stated.

B. Controlling Law

1. Account Stated

§18.5 The common law controls in account stated actions, with the optional statutory device under MCL 600.2145 allowing the plaintiff to attach an affidavit of account to the complaint. For cases decided under common law, see *Hawley v Professional Credit Bureau, Inc*, 345 Mich 500, 76 NW2d 835 (1956); *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 295 NW 215 (1940); and *Dunn v Bennett*, 303 Mich App 767, 773, 846 NW2d 75 (2014) (affirming account-stated judgment for attorney fees when bills were sent to client, client made partial payments, and client never objected to bills: "[u]nder the circumstances presented, the reasonable inference from defendant's inaction and partial payment was that he assented to the amount due and, thus, an account stated was established"). *See also Velardo & Assocs v Oram*, No 279801 (Mich Ct App Oct 7, 2008) (unpublished); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 657 NW2d 759 (2002); *Young & Assocs, PC v Rocar Precision, Inc*, No 218417 (Mich Ct App May 25, 2001) (unpublished); Annotation, *Account Stated Based upon Check or Note Tendered in Payment of Debt*, 46 ALR3d 1325; *Handling the Collection Case in Michigan: A Creditor's Guide* ch 5 (Steven A. Harms et al eds, ICLE 5th ed). See a lengthy discussion in *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 837 NW2d 244 (2013).

2. Mutual and Open Account Current and Open Account

§18.6 The common law also controls in mutual and open account current and open account cases. See *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 837 NW2d 244 (2013), and *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 357, 771 NW2d 411 (2009) (quoting *Goodsole v Jeffery*, 202 Mich 201, 203, 168 NW 461 (1918)), involving a suit for

attorney fees, which held that the existence of a written contract with credit terms "rules out the existence of a mutual and open account." The same reasoning should apply to an open account as well, but possibly not to an account stated, since *Dunn v Bennett*, 303 Mich App 767, 773, 846 NW2d 75 (2014), affirmed judgment under both an account stated and a written fee agreement. The *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin* case involved a statute of limitations question in which the statute would not have run under the mutual account theory but did under the written contract theory; no such issue was involved in *Dunn*. The argument for applying both theories (contract and account stated) in an attorney fee dispute or a similar context would be that the fee agreement provides only the rates and the services but does not specify the final sum to be paid, which can only be ascertained later, while the account stated theory provides a separate agreement regarding the final sum to be paid. Support for this analysis is in *Star Constr & Restoration, LLC v Gratiot Ctr LLC*, No 16-CV-12413 (ED Mich Dec 14, 2016). Practitioners for creditors often plead three theories when available: breach of contract, account stated, and open account.

C. Elements

1. Account Stated

§18.7

- a series of monetary transactions between the parties over time
- agreement on the amount due (express or implied by circumstances)
- a promise to pay the amount due (express or implied by circumstances)

2. Mutual and Open Account Current and Open Account

§18.8

- mutual credit transactions between the parties or credit supplied by one party only
- an account that is still open and unpaid and not stated (i.e., no amount was agreed on either expressly or by implication)

D. Damages and Remedies

1. Relief Available

§18.9 Damages available are the amounts claimed due, plus interest and costs. Arguably, as in breach of contract actions, consequential damages may also be available in an account stated action. *See Contract Design Grp, Inc v Wayne*

State Univ, No 2:10-cv-14702 (ED Mich Aug 7, 2014), *rev'd in part*, Nos 14-2148, 14-2206 (6th Cir Dec 16, 2015) (reversed in part as consequential damages were not properly before jury).

2. Attorney Fees

§18.10 An account stated claim is often used in suits to collect attorney fees, along with a standard contract claim based on an oral or written fee agreement. When clients receive and retain bills without objection or make partial payments, the courts may find from those facts that an account stated has arisen. Many of the account stated cases, both published and unpublished, are attorney fee cases. *See, e.g., Dunn v Bennett*, 303 Mich App 767, 846 NW2d 75 (2014); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 657 NW2d 759 (2002). An interesting recent unpublished case is *Strobl & Sharp, PC v Rivait*, No 343659 (Mich Ct App Aug 22, 2019) (unpublished). In that case the court of appeals reversed a summary disposition in favor of the law firm and sent it back to the trial court, saying there was a dispute of material fact regarding whether there was any agreement on the sum owed or whether fees were supposed to be contingent or whether the firm's bills had actually been delivered. The court of appeals also wanted the trial court to determine whether or not the alleged fee agreement was really, as alleged by the client, a sham, noting that it had been signed six months after representation had begun.

Unfortunately, recovering the attorney fees incurred to sue for unpaid fees is subject to the limits that apply to all actions: unless there is a contractual provision for attorney fees (see §18.24), there must be either a statute to allow such a recovery, such as the Michigan Consumer Protection Act, or a court rule allowing such a recovery. No such statute exists for helping attorneys recover their unpaid fees, but one or more court rules might come into play, for example, MCR 2.403 for case evaluation sanctions; MCR 1.109 for filing a document to harass, delay, or cause an increase in expense; and MCR 2.625 for frivolous defenses.

E. Jury Instructions

§18.11 None. But see William B. Murphy & John VandenHombergh, *Michigan Nonstandard Jury Instructions Civil* §§5:1, 5:2 (2019) for a special situation relating to the statute of limitations on open accounts.

F. Statute of Limitations

1. Account Stated

§18.12 Since a contract is implied, the residual contract limitation period is

applied: six years, MCL 600.5807(9), calculated from the date the cause accrues, which may be in doubt, although logically the accrual date for an implied contract to pay (e.g., after retaining bills without objection) should be the date the account becomes stated. Unless the account becomes stated in writing, signed by the party to be charged, the six-year period appears to run from the date of the last entry in the account. *See White v Campbell*, 25 Mich 462, 463 n1 (1872). See also MCL 600.5866 for revival of a stale claim by a signed promise. *See also* Annotation, *Limitation of Actions as Applied to Account Stated*, 51 ALR 2d 331.

In *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 837 NW2d 244 (2013), the supreme court, reversing the court of appeals, held that the UCC's four-year statute of limitations for the sale of goods, MCL 440.2725, does not apply to open-account or account-stated actions, even when the underlying debt results from the sale of goods. The court reasoned that an account-stated action is an action on a promise to pay a certain amount, and an open-account action is a collection action on the single liability resulting from the parties' credit relationship. Both actions are distinct from the underlying transaction. Because MCL 440.2725 applies only to breach-of-contract actions for the sale of goods, open-account and account-stated actions are governed by MCL 600.5807(9), the general six-year limitation period that applies to contract actions.

2. Mutual and Open Account Current

§18.13 The statute of limitations is six years. *See Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 837 NW2d 244 (2013). If the account is not stated, it might be a mutual and open account current. In that case, MCL 600.5831 provides that the claim accrues at the time of the last item in the account. Such an account must have at least one transaction on the other side of the ledger to make it mutual. That is, the debtor must have paid or been given a credit to convert the open account or account rendered into a mutual and open account. *See also* MCL 600.5865 (memorandum of part payment to extend statute of limitations must be signed by party to be charged).

3. Open Account

§18.14 The statute of limitations is also six years. It accrues on the date of each item separately, with any partial payment restarting the statute of limitations for the whole account. *See Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 837 NW2d 244 (2013).

G. Proper Parties

1. Proper Plaintiff

§18.15 A proper plaintiff is an alleged creditor who is owed money for goods or services.

2. Proper Defendant

§18.16 A proper defendant is an alleged debtor who has failed to pay the plaintiff's bills.

H. Special Considerations

§18.17 Once an account is stated, the plaintiff need not provide proof of any of the items in the account since an account stated is a new cause of action and serves in the place of the original transactions. Thus the original entries may be attacked only for fraud or mistake. But an open account has no implied contract for the whole account, so each item may need to be proved by the creditor. For both actions, however, the statutory option, MCL 600.2145, makes the filing more simple and says that prima facie evidence of indebtedness is established if, within 10 days before the filing of the complaint, the plaintiff (1) makes an affidavit of the amount due "over and above all legal counterclaims," (2) attaches to the affidavit a copy of the account, and (3) serves these two documents with the complaint. However, prima facie evidence is not established under these circumstances if the defendant files a counteraffidavit. Note that under MCR 1.109(E), a false affidavit carries serious consequences. Also note that the form of the affidavit should conform to MCR 2.119(B).

Note that the plaintiff's affidavit, even if not rebutted, does not provide conclusive proof, just a presumption that is rebuttable. *See Velardo & Assocs v Oram*, No 279801 (Mich Ct App Oct 7, 2008) (unpublished). But it would support a motion for summary disposition. *See Lease Corp of America v EZ Three Co*, No 297704 (Mich Ct App Oct 4, 2011) (unpublished).

An account stated may be used to overcome evidentiary or procedural deficiencies that might be found in the underlying transactions. For example, clever use of it was made in *Zinn v Fred R Bright Co*, 76 Cal Rptr 663 (Cal Ct App 1969), which is annotated at 46 ALR 3d 1317, to overcome problems with a statute of limitations and a void check.

An account may also become stated by implication as a result of a debtor's payment or inaction. For example, if a debtor does not object within a reasonable time after receiving a statement of the account, the account may be deemed to be stated and conclusive. What constitutes a reasonable time depends on the circumstances of the case and is a jury question. *See Leonard*

Refineries, Inc v Gregory, 295 Mich 432, 295 NW 215 (1940). The time required could be as little as six months. *See Newmeyer v Frantz-Hager*, No 313847 (Mich Ct App Apr 22, 2014) (unpublished); *see also* Annotation, *What Is a Reasonable Time Within Which to Object to an Account so as to Prevent Its Becoming an Account Stated?*, 18 ALR 887.

Regarding accrual, *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 562 n53, 837 NW2d 244, 255 (2013), held:

> A cause of action on an account stated accrues upon an adjustment of the parties' respective claims against one another. [*White v Campbell*, 25 Mich 462, 468 (1872)] ("The creditor becomes entitled to recover the agreed balance, in an action based on the fact of its acknowledgement by the debtor, *upon an adjustment of their respective claims*[.]") (emphasis added). In other words, the accrual of an account stated claim "occurs when assent to the statement of account is either expressed or implied ... ." 13 Corbin, Contracts (rev. ed.), §72.4(2), p. 473. Further, it has also long been established in Michigan law that *payment on an account stated renews the running of the period of limitations.* [*Miner v Lorman*, 56 Mich 212, 216, 22 NW 265 (1885)]. In *Miner*, Chief Justice COOLEY opined:
>
> > [Partial payment of a demand] operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such lapse of time as may have occurred previous to the payment being made. The payment is not a contract; it is not in itself even a promise; but it furnishes ground for implying a promise in renewal from its date, of any right of action which before may have existed. [*Id.*]

(Emphasis added.)

I. Affirmative Defenses

§18.18

- Under MCL 600.2145:
  - The plaintiff failed to provide a copy of the account or an affidavit.
  - Arguably, the affidavit does not meet the requirements of MCR 2.119(B).
  - The plaintiff failed to make the affidavit within 10 days before it was filed.

- Under common law:
  - There is fraud, mistake, omission, or other inaccuracy in the account or in one of the items, including a dispute regarding the terms of any underlying contract; for example, in attorney fee claims, an allegation that the fee agreement was meant to be contingent rather than hourly or that there was a subsequent oral modification of the fee agreement regarding amounts or character.
  - The creditor did not send bills, or the debtor did not receive them.
  - The defendant objected to the statement of account.
  - The account the plaintiff presented combines several accounts, one or more of which is barred or deficient in some manner, for example, barred by the statute of limitations.
  - The statute of limitations bars the entire action or certain items in the account before the account became stated.
  - There is a contract that controls.

J. Related Actions

§18.19 Mutual and open account current, open account, and implied contract to pay are all actions related to an account stated. *See RG Moeller Co v Van Kampen Constr Co*, 57 Mich App 308, 312, 225 NW2d 742 (1975).

Breach of contract is often pled along with account stated as an alternative or additional count. *See, e.g., Carpenter v Monroe Fin Recovery Grp, LLC*, 119 F Supp 3d 623, 634 (ED Mich 2015). Pleading both can be very useful if the defendant later claims that there was not a contract, as in *Star Constr & Restoration, LLC v Gratiot Ctr LLC*, No 16-cv-12413 (ED Mich Dec 14, 2016). See §18.20 for more on breach of contract actions.

III. Breach of Contract

A. Cause of Action

§18.20 This is a common-law action for damages or for specific performance to enforce a private oral or written agreement. The UCC, MCL 440.1101 et seq., governs certain types of contracts, such as sale of goods, negotiable instruments, and security agreements.

See form 18.3 for a complaint-drafting checklist and form 18.4 for a sample complaint.

B. Controlling Law

§18.21 Common law. Statutes mentioned throughout this summary place

limits on the types of contracts courts will enforce.

C. Elements

§18.22

- There is a valid, enforceable contract, which requires
  - parties competent to contract, *In re Erickson Estate*, 202 Mich App 329, 332, 508 NW2d 181 (1993);
  - offer and acceptance, *Kamalnath v Mercy Mem'l Hosp Corp*, 194 Mich App 543, 548–549, 487 NW2d 499 (1992);
  - consideration, *Pittsburgh Tube Co v Tri-Bend, Inc*, 185 Mich App 581, 586, 463 NW2d 161 (1990); and
  - mutuality of obligation, *Reed v Citizens Ins Co*, 198 Mich App 443, 449, 499 NW2d 22 (1993).
- The defendant breached the contract by either
  - refusal to perform, *Carpenter v Smith*, 147 Mich App 560, 564–565, 383 NW2d 248 (1985), or
  - performance that does not conform to the contract's requirements, *Woody v Tamer*, 158 Mich App 764, 772, 405 NW2d 213 (1987).
- Damages resulted from the breach.

D. Damages and Remedies

1. Relief Available

§18.23 Money damages, restitution, rescission, reformation, and specific performance.

2. Attorney Fees

§18.24 "[A] contractual clause providing that in the event of a dispute the prevailing party is entitled to recover attorney fees is valid." *Fleet Bus Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589, 735 NW2d 644 (2007). A contractual attorney fee provision does not automatically entitle a creditor to reimbursement for all its legal expenses. "[W]hen a contract specifies that a breaching party is required to pay the other side's attorney fees, only reasonable, not actual, attorney fees should be awarded." *Papo v Aglo Rests of San Jose, Inc*, 149 Mich App 285, 299, 386 NW2d 177 (1986). The reasonableness of an attorney fee has most often been determined by reference to the factors cited in *Wood v DAIIE*, 413 Mich 573, 588, 321 NW2d 653 (1982):

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the

results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client."

E. Jury Instructions

§18.25 M Civ JI 142.01–.55.

M Civ JI 140.01–.15 deal with contracts for the sale of goods that fall within the scope of the UCC.

F. Statute of Limitations

§18.26 Generally, six years. MCL 600.5807(9). However, the statute of limitations is four years for sale of goods unless a shorter time is agreed to in the contract. MCL 440.2725(1).

G. Proper Parties

1. Proper Plaintiff

§18.27 A proper plaintiff is one who is a nonbreaching party to the contract; a third-party beneficiary of the contract, MCL 600.1405; or the assignee or other lawful successor to the nonbreaching party or a third-party beneficiary.

2. Proper Defendant

§18.28 A proper defendant is the other (or another) party to the contract or that party's assignee or successor, who has allegedly breached the contract.

H. Special Considerations

§18.29 The primary issue in most breach-of-contract cases is interpretation of the contract. Discussion of the numerous rules concerning the construction of contracts is beyond the scope of this chapter. *See, e.g., Michigan Civil Jurisprudence,* Contracts §156–§219 (1991); *Michigan Contract Law* ch 12 (John R. Trentacosta ed, ICLE 2d ed). The following are some general guidelines:

- An unambiguous contract is to be given its plain meaning. *Independence Twp v Reliance Bldg Co*, 175 Mich App 48, 53, 437 NW2d 22 (1989); *Roseborough v Empire of America*, 168 Mich App 92, 96, 423 NW2d 578 (1987).
- A contract is ambiguous if it is reasonably susceptible to more than one meaning. *Adkins v Home Life Ins Co*, 143 Mich App 824, 829, 372 NW2d

671 (1985); *Petovello v Murray*, 139 Mich App 639, 645, 362 NW2d 857 (1984). Moreover, if two provisions of the same contract *irreconcilably conflict* with each other, the language of the contract is ambiguous according to *Klapp v United Ins Grp Agency, Inc*, 468 Mich 459, 467, 663 NW2d 447 (2003). In *Klapp*, the court reasoned that a contract with two or more provisions reasonably susceptible to more than one meaning is nonetheless unambiguous if the court can reasonably read it in a way to avoid the conflict (i.e., to reconcile the ostensible conflict). This may signal a trend toward stronger efforts to have contracts interpreted to be unambiguous, or to merely recognize that different standards apply if one is considering whether a single clause is ambiguous (reasonably susceptible to more than one meaning) versus trying to solve an ambiguity that might arise between two apparently conflicting provisions (irreconcilable conflict).

- The parol-evidence rule prohibits the introduction of evidence concerning conversations and circumstances before or contemporaneous with the creation of a written contract to vary the contract's meaning. *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536, 544, 362 NW2d 823 (1984).
- Under Michigan law, a contract that appears on its surface to be unambiguous may nonetheless be ambiguous, and parol evidence may be admitted to help the court determine whether a latent ambiguity exists. *Goodwin, Inc v Coe*, 392 Mich 195, 209–210, 220 NW2d 664 (1974).
- Certain contracts are required to be in writing to be enforceable. These restrictions are statutory and are collectively referred to as the statute of frauds. See §18.30.
- The enforceability of oral contracts is subject to the statute of frauds. MCL 566.132.

I. Affirmative Defenses

§18.30

- Statute of frauds. MCL 566.132(1)(a)–(g). See also MCL 440.1206, .2201, 566.1, .106, .135, .222, which describe contracts that must be in writing (and signed by the party to be charged) to be enforceable.
- Rescission or release. *Holtzlander v Brownell*, 182 Mich App 716, 721, 453 NW2d 295 (1990); *Rowady v K Mart Corp*, 170 Mich App 54, 428 NW2d 22 (1988).
- Mistake, innocent misrepresentation, or impossibility of performance. *Gordon v City of Warren Planning & Urban Renewal Comm'n*, 29 Mich App 309, 317–318, 185 NW2d 161 (1971), *aff'd*, 388 Mich 82, 199 NW2d 465 (1972).

- The absence of any of the required elements that might need factual development.

J. Related Actions

§18.31 Promissory estoppel is a related action, as in the absence of a valid contract, reliance on a promise may create a cause of action. See §18.62. The UCC governs breach of a contract for the sale of goods, negotiable instruments (promissory notes), and security agreements. The Michigan Consumer Protection Act, MCL 445.901 et seq., may also provide additional rights and remedies for consumers in contractual dealings. See §12.2. Specialized rules have been developed for certain types of contracts, such as insurance contracts, indemnification contracts, and certain types of business accounts. See chapters 16, 19, and 25. Employment contracts, while governed by the same general rules, also have a whole body of caselaw that you must consider. See chapter 20.

IV. Claim and Delivery

A. Cause of Action

§18.32 This is a statutory action to recover "possession of goods or chattels which have been unlawfully taken or unlawfully detained" and to recover any resulting damages. MCL 600.2920; MCR 3.105(A). Historically called *replevin,* this action is now referred to as an action for *claim and delivery.*

See form 18.5 for a complaint-drafting checklist and form 18.6 for a sample complaint.

B. Controlling Law

§18.33 MCL 600.2920 and MCR 3.105.

MCL 600.8308 governs a district court's ability to entertain claim and delivery actions, including motions for possession pending final judgment.

C. Elements

§18.34

- the plaintiff's right to possession of goods or chattels
- the defendant's unlawful taking or detention of goods or chattels
- property under the defendant's possession or control or the defendant's involvement in concealment
- damages

D. Damages and Remedies

1. Relief Available

§18.35 A prevailing party "is entitled not only to a return of the unlawfully detained property but also to any damages that arose as a direct consequence of the unlawful detention of its property." *Jay Dee Contractors, Inc v Fattore Constr Co*, 96 Mich App 519, 523, 293 NW2d 620 (1980); *see also Multiplex Concrete Mach Co v Saxer*, 310 Mich 243, 250, 17 NW2d 169 (1945); *Theatre Equip Acceptance Corp v Betman*, 266 Mich 22, 253 NW 201 (1923).

On the default of a debtor under a security agreement, a creditor's rights are not limited but are cumulative and "may be exercised simultaneously." MCL 440.9601(3). For this reason, a creditor may properly reduce a claim to judgment, foreclose, or otherwise enforce a security interest by any available judicial procedure, as well as take possession of collateral unless otherwise agreed. *Gorham v Denha*, 77 Mich App 264, 258 NW2d 196 (1977).

Costs may be taxed at the court's discretion. MCR 3.105(I).

2. Attorney Fees

§18.36 See §18.24.

E. Jury Instructions

§18.37 M Civ JI 142.01–.55.

F. Statute of Limitations

§18.38 No statute expressly provides for a limitation period in claim and delivery actions. However, in *Jay Dee Contractors, Inc v Fattore Constr Co*, 96 Mich App 519, 522, 293 NW2d 620 (1980), the court stated that actions brought under MCL 600.2920 "sound in tort and not contract." The Michigan Court of Appeals has addressed the issue in an unpublished opinion, stating that "[t]he replevin statute, MCL 600.2920, does not contain a specific statute of limitations. Accordingly, the general six-year limitation period of MCL 600.5813 applies." *Geiger v Geiger*, No 311482 (Mich Ct App Nov 19, 2013) (unpublished). Conversely, the Michigan Court of Appeals has held "that a deficiency action, although arising from both a sale of goods and a secured transaction, relates primarily to the sales aspect of the transaction and is thus subject to Article 2's four-year statute of limitations." *First of America Bank v Thompson*, 217 Mich App 581, 582, 552 NW2d 516 (1996).

G. Proper Parties

1. Proper Plaintiff

§18.39 A proper plaintiff is one who has a present right of possession. MCL 600.2920(1)(c). An owner may not sue if another has the sole right to possession. *See generally Garner v Highland Park*, 280 Mich 200, 273 NW 446 (1937).

2. Proper Defendant

§18.40 A proper defendant is one who has the claimed property in his or her possession or under his or her control or who has been a party to its concealment. *First of America Bank—Oscoda v Volpe*, 189 Mich App 283, 472 NW2d 66 (1991); *Hall v Kalamazoo*, 131 Mich 404, 91 NW 615 (1902).

H. Special Considerations

1. Answers

§18.41 An answer may admit possession but contest other claims or counts. MCR 3.105(D).

2. Business Court Considerations

§18.42 Many claim and delivery actions involve commercial parties, and Michigan legislation has created business court dockets in every circuit court with three or more judges. While not required, circuits with fewer than three judges may also implement a business court docket. MCL 600.8033(3) states that the purpose of the business court is threefold:

> (a) Establish judicial structures that will help all court users by improving the efficiency of the courts.
>
> (b) Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy.
>
> (c) Enhance the accuracy, consistency, and predictability of decisions in business and commercial cases.

If a claim and delivery action meets the requirements of a business or commercial dispute as set forth in MCL 600.8031(1)(c) and (2), MCR 2.112(O) requires the plaintiff to "verify on the face of the party's initial pleading that the case meets the statutory requirements to be assigned to the business court." In addition, many courts require the plaintiff to prepare and file a notice of assignment to the business court, which is a single-page document showing that

the case qualifies as a business dispute.

3. Motion for Possession Pending Final Judgment

§18.43 After filing a complaint, the plaintiff may also file a *verified* motion for possession pending final judgment. MCR 1.109(D)(3), 3.105(E). This may be filed with a request for a show-cause order, which must be granted if good cause is shown. The show-cause order may prohibit damage, destruction, concealment, disposal, or a substantial reduction in value until a hearing can be held on the motion. MCR 3.105(E)(2). This initial request is often made ex parte because notice could precipitate adverse action.

At least seven days before the hearing date, the defendant must be served with the motion for possession and any order. MCR 3.105(E)(3)(a). At the hearing, the plaintiff must establish that its claim is "probably valid" and that, before trial, the property will be damaged, destroyed, concealed, or disposed of or that it will substantially decline in value due to use. MCR 3.105(E)(3)(b). Because actual testimony may be taken, the client should be present at the hearing. Based on the findings made at the hearing, the court may then fashion any number of remedies. MCR 3.105(E)(4). *See generally First of America Bank—Oscoda v Volpe*, 189 Mich App 283, 472 NW2d 66 (1991).

The court may condition possession by either party on the furnishing of a bond of not less than $100 but at least twice the stated value of the property. *See* MCL 600.2920(1); MCR 3.105(E)(4).

I. Affirmative Defenses

§18.44 See §18.30.

J. Related Actions

§18.45

- A conversion claim may be appropriate. See §2.69.
- A count on the debt may be brought with the claim and delivery action. Claims against guarantors are frequently brought in the same action.
- A contract claim may be appropriate for the sale of items or goods that are secured and are being claimed under the claim and delivery action.
- If the action is based on a secured transaction, a claim for the debt may be joined as a separate count in the complaint. MCR 3.105(C). In fact, MCR 2.203(A) requires a plaintiff to "join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the

action."

V. Sales Representative Termination

A. Cause of Action

§18.46 This a breach-of-contract action seeking damages after termination of a sales representative. Damages are typically in the form of unpaid commissions, in which case statutory penalty damages may be available under MCL 600.2961, commonly known as the Sales Representative Commission Act (SRCA).

See form 18.7 for a complaint-drafting checklist and form 18.8 for a sample complaint.

B. Controlling Law

§18.47 Common law of contracts, supplemented as applicable by the common-law doctrine of procuring cause, as well as MCL 600.2961.

C. Elements

§18.48 In general actions, either or both of the following:

- unpaid pretermination commissions pursuant to an express or implied-in-fact contract or unpaid posttermination commissions for sales procured by the representative
- other damages (i.e., not unpaid commissions) caused by a breach of an express or implied-in-fact contract

For violation of the SRCA:

- termination of a contract between a "sales representative" and a "principal," as defined at MCL 600.2961(1)(e) and MCL 600.2961(1)(d)
- a "commission" as defined in MCL 600.2961(1)(a) that has become "due" as determined under MCL 600.2961(2)–(3)
- the principal's failure to pay pretermination commissions within 45 days after termination or to pay posttermination commissions within 45 days after the commissions became due, MCL 600.2961(4)–(5)
- for statutory penalty damages, the principal's intentional failure to pay the commission when due, MCL 600.2961(5)(b)

D. Damages and Remedies

1. Relief Available

§18.49 In addition to standard remedies for breach of contract, special remedial principles may apply when determining damages for unpaid commissions. The sales-agency or employment agreement determines the representative's right to commissions on sales consummated before the principal has terminated the sales representative. That same agreement will also determine the representative's right to posttermination commissions if the agreement addresses posttermination commissions. But when no explicit agreement exists addressing the payment of posttermination commissions, then "if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause." *Reed v Kurdziel*, 352 Mich 287, 295, 89 NW2d 479 (1958). This is known as the *procuring-cause doctrine*. The doctrine may not apply when the principal terminates the agent for reasons other than to avoid paying commissions. *See KBD & Assocs, Inc v Great Lakes Foam Techs, Inc*, 295 Mich App 666, 675, 816 NW2d 464 (2012). For more on the meaning of *procuring cause*, see §18.55.

Under the SRCA, the damages available include the following:

- Actual damages caused by the failure to pay commissions when due. Actual damages are the unpaid commissions.
- If the principal intentionally failed to pay the commissions when due, penalty damages amounting to the lesser of $100,000 or twice the amount of commissions due but not paid. MCL 600.2961(5). For penalty damages to be available, the SRCA requires a finding that the principal has "intentionally failed" to pay a commission when due. *Id.* This does not require a showing that the principal acted in bad faith. *In re Certified Question from US Court of Appeals for 6th Circuit*, 468 Mich 109, 118, 659 NW2d 597 (2003) (adding that "it appears that the only cognizable defense to a double-damages claim is if the failure to pay the commission were based on inadvertence or oversight").

  Penalty damages are limited to a single award of the lesser of $100,000 or double the amount of commissions due but not paid; penalty damages are not available separately for each commission that comes due and is not paid. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 697 NW2d 913 (2005).
- An award of reasonable attorney fees and court costs to the prevailing party, if a sales representative brings a cause of action pursuant to the SRCA. MCL 600.2961(6).

Although the SRCA provides an additional remedy for failure to pay sales commissions, it does not impose new duties or create new obligations. *See, e.g.*,

Dikker v 5-Star Team Leasing, LLC, 243 F Supp 3d 844, 858 (WD Mich 2017). So if a sales representative is not owed any commissions under common law, he or she has no claim under the SCRA. *Id.*

2. Attorney Fees

§18.50 Reasonable attorney fees and court costs under the SRCA are mandatory but are to be awarded only when a sales representative (as opposed to a principal) has brought a cause of action pursuant to the SRCA and either the plaintiff or defendant is "the prevailing party." MCL 600.2961(6). So if the purported sales agent is not actually a "sales representative" under the SRCA's definition, attorney fees are not available to either party. *See Intelligent Solutions, Inc v Girocheck Fin, Inc*, No 18-11687 (ED Mich Nov 26, 2018) (unpublished). For more on the SCRA's definition of "sales representative," see §18.57.

"Prevailing party" means "a party who wins on all the allegations of the complaint or all of the responses to the complaint." MCL 600.2961(1)(c). By including the word "all" in this definition, the legislature "severely limit[ed]" fee shifting: a party must have "prevailed fully on each and every aspect of the claim or defense asserted under the SRCA." *Peters v Gunnell, Inc*, 253 Mich App 211, 223, 655 NW2d 582 (2002). On the other hand, a plaintiff who pleads several claims—some related to the SRCA, others unrelated—may be considered a "prevailing party" despite failing to prevail on all its claims, *see HJ Tucker & Assocs, Inc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 595 NW2d 176 (1999), or despite failing to defend against a counterclaim, *see Peters*. In particular, when a plaintiff pleads alternative theories of liability for the same injury, the plaintiff need only prevail on one of them to be the prevailing party, at least so long as he or she recovers the full measure of his or her damages under that theory. *See HJ Tucker & Assocs, Inc*, 234 Mich App at 560–561. And a plaintiff may be a prevailing party even if it recovers less than it sought at trial. *See Gradco, Inc v Zebra Skimmers Corp*, No 335650 (Mich Ct App Nov 21, 2017) (unpublished).

It is unclear whether attorney fees are available for work on appeal. *Compare DePriest v Print Techs & Servs, Inc*, No 252437 (Mich Ct App Mar 8, 2005) (unpublished) (appellate fees are not available under SRCA), *with Eungard v Open Solutions, Inc*, No 05-60272 (ED Mich Apr 28, 2009) (unpublished) (rejecting *DePriest* as inconsistent with later published caselaw from Michigan Court of Appeals interpreting similarly worded statutes and awarding appellate attorney fees under SRCA).

E. Jury Instructions

§18.51 For breach of contract, M Civ JI 142.01–.55. For the SRCA, see M Civ JI 143.01–.03, .10–.12, and .20–.22.

F. Statute of Limitations

§18.52 Six years for a breach of contract. MCL 600.5807(9). A catchall cause of action for unpaid commissions should be broken down by accrual date: recovery of an unpaid commission is time-barred if and only if six years have passed since that individual commission became due. *See HJ Tucker & Assocs, Inc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 562–563, 595 NW2d 176 (1999).

G. Proper Parties

1. Proper Plaintiff

§18.53 A proper plaintiff is an employee or nonemployee sales representative whose contract with the principal has been terminated and who allegedly has not been paid commissions when due. See the definition of *sales representative* in §18.57.

2. Proper Defendant

§18.54 A proper defendant is a principal who, after termination of the contract between it and the plaintiff, has failed to pay the plaintiff either pretermination commissions within 45 days after termination or posttermination commissions within 45 days after the date on which the commission became due. MCL 600.2961(4), (5). The SRCA defines a "principal" as a person who either "(i) [m]anufactures, produces, imports, sells, or distributes a product in [Michigan]" or "(ii) [c]ontracts with a sales representative to solicit orders for or sell a product in [Michigan]." MCL 600.2961(1)(d). Due to inartful drafting, the exact coverage of subsection (d)(ii) is unclear. *See Kenneth Henes Special Projects Procurement v Contintental Biomass Indus, Inc*, 86 F Supp 2d 721, 728–730 (ED Mich 2000).

H. Special Considerations

1. The Common-Law Definition of *Procuring Cause*

§18.55 A sales representative may be entitled to a commission on a sale consummated after termination of the contract between the agent and the principal notwithstanding the contract's silence regarding posttermination commissions, but only when the agent is the procuring cause. The agent bears the burden of proving that he or she was the procuring cause. *Bailey v Fast*

Model Techs, LLC, No 10-15118 (ED Mich July 5, 2012).

The terms of the contract regarding pretermination commissions define the scope of posttermination commissions allowable under the procuring-cause doctrine. *See id.* Generally speaking, a sales-agency contract will call for the agent to receive commissions either on all sales to a customer the agent has procured—regardless of whether the agent is involved in any particular sale to the customer—or only on those sales the agent specifically procures. Sometimes, the contract will provide for some combination of customer-procurement and sales-procurement commissions. But if a sales agent and principal did not have a customer-procurement contract (or a contractual provision calling for customer-procurement commissions to the particular customer in question), the agent may recover a commission on a sale that the principal consummates with a customer after the agent's termination only when the agent was the procuring cause of that specific sale; it is not enough that the agent originally procured the customer. *See Lilley v BTM Corp*, 958 F2d 746, 751–752 (6th Cir 1992).

To be the procuring cause of a specific posttermination sale, in turn, it is not enough that the sale was "due in some part to the [sales agent's] previous efforts." *APJ Assocs, Inc v North American Philips Corp*, 317 F3d 610, 616 (6th Cir 2003). In particular, when "the agent does not participate in the negotiation of a given contract of sale, the agent is not the 'procuring cause' of post-termination sales, even though [the agent] may have originally introduced" the principal and the customer. *Id.* The agent must have "generated" the sale. *See Pfam, Inc v Indiana Tube Corp*, No 06-11015 (ED Mich Nov 15, 2006); *see also Roberts Assocs v Blazer Int'l Corp*, 741 F Supp 650, 655 (ED Mich 1990) (holding that procuring-cause doctrine entitled agent to posttermination commissions "only on sales which were the subject or the result of discussions, negotiations, quotations, or pre-sale customer services in which [the agent] actually participated").

2. Waivable and Nonwaivable Rights Under the SCRA

§18.56 The SRCA provides that "[a] provision in a contract between a principal and a sales representative purporting to waive any right under this section is void." MCL 600.2961(8). In a case decided six years after enactment of the SCRA, a Michigan Court of Appeals opinion contained broad dicta indicating that this provision might void any contract provisions purporting to abrogate a sales representative's right to posttermination commissions. *See Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 577 NW2d 206 (1998). Later state and federal decisions, however, declined to cite *Walters* favorably. *See Aidamark, Inc v Roll Forming Corp*, No 1-12-cv-297 (WD Mich

Dec 27, 2013) (unpublished) ("this Court is not aware of any case that has cited the relevant holding in *Walters* favorably"). Accordingly, the SCRA does not prevent a sales representative and a principal from agreeing at the outset that the sales representative will not receive any posttermination commissions. *See Eungard v Open Solutions, Inc*, 517 F3d 891, 899 (6th Cir 2008).

3. The SCRA's Definition of *Sales Representative*

§18.57 The SRCA applies only to a person who "contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or part, by commission." MCL 600.2961(1)(e). "Goods" means tangible goods only, so the SRCA does not apply when the agent deals in intangibles, such as insurance contracts. *Klapp v United Ins Grp Agency*, 259 Mich App 467, 674 NW2d 736 (2003). Similarly, the SRCA does not apply to services. *Mahnick v Bell Co*, 256 Mich App 154, 662 NW2d 830 (2003). Note, however, that because the SRCA does not require a transfer of title, a plaintiff retained by a principal to solicit leases of goods may be a sales representative entitled to remedies under the SRCA. *Radina v Wieland Sales, Inc*, 297 Mich App 369, 824 NW2d 587 (2012).

4. The SCRA's Definition of *Commission*

§18.58 A number of SRCA cases have turned on whether the compensation arrangement between the principal and the agent actually calls for payment of "commissions" as defined by statute. Answering that question may involve looking into the nature of the principal's business, the way the compensation arrangement is structured, or both.

If the agent is not entitled to commissions until a set quota has been exceeded, "[s]uch an arrangement constitutes a 'bonus' plan, not commissions." *Estate of Sienkiewicz by Sienkiewicz v Creative Techniques, Inc*, No 17-12705 (ED Mich Oct 18, 2018) (unpublished). Several Michigan federal courts have also held that payments structured on a flat per-part or per-piece basis are not SRCA commissions. *See, e.g., Dikker v 5-Star Team Leasing, LLC*, 243 F Supp 3d 844 (WD Mich 2017).

5. Conflict of Law

§18.59 Cases brought under the SRCA commonly involve non-Michigan principals who contracted with Michigan-based sales representatives to manage a sales territory that may or may not extend beyond the state's borders. This can raise nuanced conflict-of-law issues—even when the parties' agreement expressly calls for the application of non-Michigan law and even when such law is that of the principal's home. *See, e.g., Wallace Sales & Consulting, LLC v*

Tuopu N America, Ltd, No 15-cv-10748 (ED Mich Apr 12, 2016) (unpublished). Counsel for both sides should be attuned to these nuances, both because of the SRCA's unique penalty-damages and fee-shifting provisions and because not all states adhere to Michigan's version of the procuring-cause doctrine.

I. Affirmative Defenses

§18.60 There are no special affirmative defenses; affirmative defenses in sales-agency cases are those that apply to any breach-of-contract claim, with accord and satisfaction being particularly common. The statute of frauds may apply to bar a claim by a sales agent that is based on an alleged oral contract or contract implied in fact. And under the faithless-servant doctrine, an agent who engages in misconduct or grossly mismanages the principal's affairs forfeits the right to related compensation.

The chief defense to claims under the SRCA, which is not an affirmative defense, is simply that the parties or their arrangement falls outside the statutory definitions. For some of the most common ways this defense is invoked, see §§18.55–18.59

A sales agent who commits the first substantial breach of a commission contract may not avail himself or herself of the procuring-cause doctrine to recover posttermination commissions. *KBD & Assocs, Inc v Great Lakes Foam Techs, Inc*, 295 Mich App 666, 676, 816 NW2d 464 (2012). Many sales-agency agreements require that the agent service customer accounts in various ways. If these servicing obligations are substantial and the plaintiff fails to perform them—even as a result of the customer's actions—the plaintiff may lose any right it has to commissions. *See id.*

J. Related Actions

§18.61 Particularly when the plaintiff alleges a contract implied in fact, a claim for sales representative termination is frequently combined with a claim in the alternative for unjust enrichment, quantum meruit, or another quasi-contract theory. See chapter 25. Plaintiffs often seek a declaratory judgment regarding their rights to ongoing posttermination commissions on sales they allege to have procured. See chapter 19. When the sales representative is an employee who receives salary and commissions, a claim for sales representative termination may be combined with a claim for wrongful discharge. Note, though, that the SRCA does not create an exception to the general rule of at-will employment. *See Psaila v Shiloh Indus, Inc*, 258 Mich App 388, 671 NW2d 563 (2003).

VI. Promissory Estoppel

A. Cause of Action

§18.62 This is a common-law action to enforce a noncontractual promise that the defendant should have expected to—and did—induce reasonable detrimental reliance by the plaintiff, when the failure to enforce the promise would cause an injustice.

"Michigan courts have characterized a claim for promissory estoppel as both one 'akin to a contract claim' and as a tort." *1200 Sixth St, LLC v United States ex rel Gen Servs Admin*, 848 F Supp 2d 767, 777 (ED Mich 2012). They have also characterized it as an "equitable claim." *See, e.g., Taizhou Golden Sun Arts & Crafts, Co Ltd v Colorbök, LLC*, No 320129 (Mich Ct App Aug 18, 2015) (unpublished).

See form 18.9 for a complaint-drafting checklist and form 18.10 for a sample complaint.

B. Controlling Law

§18.63 Common law arising out of the Restatement of Contracts. *See, e.g., State Bank of Standish v Curry*, 442 Mich 76, 500 NW2d 104 (1993).

C. Elements

§18.64

- a promise
  - that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and
  - that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided

Bodnar v St John Providence, Inc, 327 Mich App 203, 227, 933 NW2d 363 (2019). *But see* §§18.71–18.74.

"[T]he matter of avoidance of injustice might seem to be a question of law." *State Bank of Standish v Curry*, 442 Mich 76, 84 n6, 500 NW2d 104 (1993) (quoting *RS Bennet & Co v Economy Mech Indus, Inc*, 606 F2d 182, 186 (7th Cir 1979)). The existence and scope of the promise are questions of fact. *State Bank of Standish*, 442 Mich at 84 (1993). And although the elements of a promissory-estoppel claim are "straightforward, they necessarily involve a threshold inquiry into the circumstances surrounding both the making of the

promise and the promisee's reliance as a question of law." *Id.*

In particular, if the court is not satisfied that the alleged promise is "clear and definite," the claim is subject to dismissal for failure to state a claim on which relief can be granted. *See, e.g., Teall v One W Bank*, No 318815 (Mich Ct App Feb 19, 2015) (unpublished). The same is true if the plaintiff's alleged reliance appears unreasonable, *see, e.g., Gamrat v Allard*, 320 F Supp 3d 927, 939 (WD Mich 2018), because the reliance interest the promissory-estoppel doctrine protects is "*reasonable reliance*," *State Bank of Standish*, 442 Mich at 84 (emphasis in original). For that reason,

- reasonable reliance by the plaintiff and
- a clear and definite promise

appear to be additional elements of a prima facie case for promissory estoppel. *See also Brisette v Lansing 53, Inc*, No 207525 (Mich Ct App June 11, 1999) (unpublished) ("an actual, clear, and definite promise" is part of prima facie case).

It appears that, in line with the approach of Restatement (Second) of Contracts §90 (but not the first Restatement), Michigan recognizes a cause of action for "third-party promissory estoppel," analogous to a third-party-beneficiary claim of breach of contract. *See First Sec Sav Bank v Aitken*, 226 Mich App 291, 312, 573 NW2d 307 (1997) (person other than promisee may prevail on claim for promissory estoppel if (among other things) promisor made promise that promisor intended, or should have reasonably expected, that nonpromisee would rely on) (citing *Charter Twp of Ypsilanti v GMC*, 201 Mich App 128, 133–134, 506 NW2d 556 (1993)), *overruled on other grounds by Smith v Globe Life Ins Co*, 460 Mich 446, 597 NW2d 28 (1999).

D. Damages and Remedies

1. Relief Available

§18.65 Generally, "[i]n a promissory estoppel action, the 'remedy granted for breach may be limited as justice requires.'" *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 173, 568 NW2d 365 (1997) (quoting *State Bank of Standish v Curry*, 442 Mich 76, 83, 500 NW2d 104 (1993), quoting in turn 1 Restatement (Second) of Contracts §90 at 242).

The "guiding principle" in determining damages in an action based on promissory estoppel is "to ensure that the promisee is compensated for the loss suffered to the extent of the promisee's reliance." *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 173–174, 568 NW2d 365 (1997) (citing federal cases).

Yet damages awarded in promissory-estoppel cases may include an award of lost profits. *Id.* at 174. The exact way in which these directly adjacent statements from *Joerger* are best reconciled remains to be worked out. *Compare Woodland Harvesting, Inc v Georgia Pac Corp*, No 09-10736 (ED Mich Oct 4, 2011) (standard measure of recovery is reliance damages, but in "exceptional circumstances," interests of justice may require award of lost profits), *with Reinhart v Cendrowski Selecky, PC*, Nos 239540, 239584 (Mich Ct App Dec 30, 2003) (unpublished) ("while it is proper in a given case to award only reliance damages, 'full-scale enforcement by normal [contract] remedies is often appropriate'") (citing Restatement (Second) of Contracts §90 and comments). In cases "where promissory estoppel is used to avoid the Statute of Frauds," there is "substantial merit in limiting the remedy" to reliance damages. David J. Gass, *Michigan's UCC Statute of Frauds and Promissory Estoppel*, 74 Mich BJ 524, 530 (1995) (discussing, among other cases, *Merex AG v Fairchild, Weston Sys, Inc*, 29 F3d 821 (2d Cir 1994)). *See generally* Mary E. Becker, *Promissory Estoppel Damages*, 16 Hofstra L Rev 131 (1987); Tory A. Weigand, *Promissory Estoppel's Avoidance of Injustice and Measure of Damages: The Final Frontier*, 23 Suffolk J Trial & App Advoc 1 (2017).

Insofar as specific performance is analogous to expectancy damages for the benefit of the bargain, the availability of specific performance for a claim of promissory estoppel will turn on considerations analogous to those for expectancy damages.

2. Attorney Fees

§18.66 Not available.

E. Jury Instructions

§18.67 M Civ JI 130.01–.05; *see also* William B. Murphy & John VandenHombergh, *Michigan Nonstandard Jury Instructions Civil* ch 44 (2019).

F. Statute of Limitations

§18.68 Six years, under MCL 600.5807. *Huhtala v Travelers Ins Co*, 401 Mich 118, 126, 257 NW2d 640 (1977). Laches will also apply when equity jurisdiction exists over the promissory-estoppel claim, which will occur when the plaintiff seeks only equitable remedies or seeks damages incidental to a form of equitable relief. *See* MCL 600.5815; *ECCO Ltd v Balimoy Mfg Co*, 179 Mich App 748, 750–751, 446 NW2d 546 (1989).

G. Proper Parties

1. Proper Plaintiff

§18.69 A proper plaintiff is one who reasonably relied on a promise to his or her detriment.

2. Proper Defendant

§18.70 A proper defendant is a promisor who intended or should reasonably have expected the plaintiff to rely on the promise.

H. Special Considerations

1. Divergences Between the Michigan Supreme Court and Court of Appeals

§18.71 In *State Bank of Standish v Curry*, 442 Mich 76, 83, 500 NW2d 104 (1993), the supreme court unequivocally stated:

> The doctrine of promissory estoppel is set forth in 1 Restatement Contracts, 2d, § 90, p 242:
>
> > "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

Yet the court of appeals currently formulates the elements of promissory estoppel as set forth in §90 of the first Restatement. *Compare Bodnar v St John Providence, Inc*, 327 Mich App 203, 227, 933 NW2d 363 (2019), *with* 1 Restatement (Second) Contracts §90 at 242. This despite the fact that, in a binding and frequently cited decision published shortly after *State Bank of Standish,* the court of appeals itself followed the second Restatement. *See Charter Twp of Ypsilanti v GMC*, 201 Mich App 128, 133–134, 506 NW2d 556 (1993).

This divergence is of more than academic interest, for at least three reasons. First, the second Restatement deleted the first Restatement's requirement that the plaintiff's reliance must be "definite and substantial," while adding that the remedy for promissory estoppel may be limited as justice requires. Together, those two changes represent an express recognition of the possibility of partial enforcement. Second, the comments to the new §90 give further content to the amorphous statement that enforcement is limited to cases in which "injustice

can be avoided only by enforcement of the promise." Third, the second Restatement and its comments expressly contemplate the possibility of third-party promissory-estoppel claims analogous to third-party-beneficiary actions for breach of contract. The first Restatement did not.

Federal courts applying Michigan law are required to anticipate how the Michigan Supreme Court would rule in the case; they are not required to follow the decisions of the court of appeals if they are presented with persuasive data that the supreme court would rule otherwise. *See United Specialty Ins Co v Cole's Place, Inc*, 936 F3d 386 (6th Cir 2019). In the almost three decades since issuing *State Bank of Standish*, the supreme court has never followed the first Restatement. That could be sufficiently persuasive data that a federal court should apply §90 of the second Restatement, not the first. The 6th Circuit when applying Michigan law has at least sometimes followed *State Bank of Standish* and the second Restatement, *see, e.g., DBI Invs, LLC v Blavin*, No 14-1398 (6th Cir Mar 26, 2015), so parties may get a different test for promissory estoppel depending on whether the claim is pending in Wayne County Circuit Court or across the street in the Eastern District.

2. The Character of the Promise

§18.72 The "sine qua non" of a claim of promissory estoppel "is that the promise be clear and definite." *State Bank of Standish v Curry*, 442 Mich 76, 85, 500 NW2d 104 (1993). Mere "words of assurance or statements of belief" are insufficient. *Id.* at 90.

The requirement that the promise must be "clear and definite" appears to mean that promissory estoppel tracks traditional contract law: to be enforceable under a claim of promissory estoppel, the terms of the alleged promise must be as clear as those sufficient to constitute a legally valid offer. *See id.* at 87–89. Accordingly, it can be error to look solely to the words used by the promisor without also giving proper weight to the surrounding facts, the parties' course of dealing, and other objective indications of the existence and meaning of any unspoken terms of the alleged promise. *See id.* at 90–92; *see also Gason v Dow Corning Corp*, No 16-1443 (6th Cir Jan 6, 2017) (finding that defendant made clear and definite promise to sponsor plaintiff's green-card application, because defendant's offer to localize plaintiff's employment in United States "necessarily implied" such promise under circumstances).

3. Statute of Frauds

§18.73 As a general principle, recovery based on a noncontractual promise falls outside the scope of the statute of frauds. *Opdyke Inv Co v Norris Grain*

Co, 413 Mich 354, 370, 320 NW2d 836 (1982); *see also Lovely v Dierkes*, 132 Mich App 485, 489, 347 NW2d 752 (1984) (when it would be inequitable to apply statute of frauds, statute of frauds will not bar claim of promissory estoppel). MCL 566.132(2), however, is an exception to this rule. *See Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 619 NW2d 66 (2000). Accordingly, Michigan law does not recognize a promissory-estoppel cause of action based on an oral agreement to modify a loan. *See Polidori v Bank of America, NA*, 977 F Supp 2d 754, 762–763 (ED Mich 2013).

4. Conditional Promises

§18.74 The second Restatement allows conditional promises to be enforced, but the promisor's "performance becomes due only upon the happening of the condition." *See* Restatement (Second) of Contracts §91. The first Restatement provides the same. *See* Restatement (First) of Contracts §91. Michigan may follow the distinctly minority contrary position, that a claim for promissory estoppel simply may not be predicated on a conditional promise. *See Olson v Merrill Lynch Credit Corp*, No 13-1981 (6th Cir Aug 8, 2014) ("a conditional promise will not do," citing *Gore v Flagstar Bank, FSB*, 474 Mich 1075, 711 NW2d 330 (2006) (Taylor, J, concurring)); *El-Seblani v IndyMac Mortg Servs*, No 12-1046 (6th Cir Jan 7, 2013) ("[u]nder Michigan law, one 'cannot construct a detrimental reliance or estoppel theory on a conditional promise, especially when the condition did not take place,'" quoting *Bivans Corp v Community Nat'l Bank of Pontiac*, 15 Mich App 178, 166 NW2d 270 (1968)). But no published case has squarely confronted the issue; this dicta from *Bivans Corp* has been consistently cited only in cases in which the condition in question simply failed to materialize. *See, e.g., First Sec Sav Bank v Aitken*, 226 Mich App 291, 316, 573 NW2d 307 (1997), *overruled on other grounds, Smith v Globe Life Ins Co*, 460 Mich 446, 597 NW2d 28 (1999).

5. Right to Jury Trial

§18.75 In Michigan, unlike some other states, there is a right to jury trial on a promissory-estoppel claim for money damages. *See ECCO Ltd v Balimoy Mfg Co*, 179 Mich App 748, 446 NW2d 546 (1989). Even in a diversity case, however, federal rather than Michigan law will determine whether a party is entitled to a jury trial on a promissory-estoppel claim pending before a Michigan federal district court. *See Simler v Conner*, 372 US 221, 222 (1963).

I. Affirmative Defenses

§18.76 A valid, enforceable contract between the parties. A party may not premise a promissory-estoppel claim on precontractual representations when

the parties reduce their agreement to a written contract and the contract contains an integration clause. *Northern Warehousing, Inc v State, Dep't of Educ*, 475 Mich 859, 714 NW2d 287 (2006); *see also Raby v Board of Trs of Police & Fire Ret Sys of Detroit*, No 293570 (Mich Ct App Mar 17, 2011) (unpublished) (holding that existence of enforceable contract between parties precludes claim of promissory estoppel "only" when "the performance that creates the consideration for the contract is the same performance that evidences detrimental reliance in a promissory estoppel claim" and refusing to dismiss promissory-estoppel claim despite existence of contract between parties); *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41, 761 NW2d 151 (2008) ("no action for promissory estoppel may lie when an oral promise expressly contradicts the language of a binding contract").

Federal preemption. A number of federal statutes may preempt state-law claims of promissory estoppel. Among the more important of these statutes are the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 et seq., and the Labor Management Relations Act, 1947, 29 USC 141 et seq.*See Ramsey v Formica Corp*, 398 F3d 421 (6th Cir 2005) (ERISA preemption); *Alongi v Ford Motor Co*, 386 F3d 716 (6th Cir 2004) (Labor Management Relations Act preemption). ERISA preemption may be waived if not timely raised. *Old Line Life Ins Co of America v Garcia*, No 02-40239 (ED Mich Nov 19, 2007) (unpublished) (citing cases).

It is not entirely clear whether and when equitable defenses are available. At least one federal court applying Michigan law has held that unclean hands is a valid defense to promissory estoppel. *See Potluri v Ypsilanti*, No 06-13517 (ED Mich Nov 3, 2008) (unpublished); *cf. ECCO Ltd v Balimoy Mfg Co*, 179 Mich App 748, 750–751, 446 NW2d 546 (1989).

Statute of frauds. See §18.73.

J. Related Actions

§18.77

- Breach of contract, particularly breach of oral contract, whether express or implied in fact. See §18.20.
- Restitutionary actions for unjust enrichment, including quasi-contract actions such as quantum meruit. See §25.20.
- Fraudulent inducement. This tort claim is available "where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639,

534 NW2d 217 (1995) (citing *Kefuss v Whitley*, 220 Mich 67, 82–83, 189 NW 76 (1922)).

- Tort action for promise made in bad faith. Generally, misrepresentations must relate to an existing or past fact to be actionable as fraud. But a promisor may be held liable in tort for breaking a promise if the promisor had no intention of keeping it when he or she made the promise. *See Dugan v Vlcko*, 307 F Supp 3d 684 (ED Mich 2018). See §16.39.

There is no cause of action under Michigan law for equitable estoppel. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 389, 729 NW2d 277 (2006). Nor does Michigan recognize an independent cause of action for detrimental reliance. *Kostanko v MVM, Inc*, 365 F Supp 3d 881, 886 n3 (WD Mich 2018) (citing cases).

VII. Uniform Voidable Transactions Act

A. Cause of Action

§18.78 This is a claim by a creditor to reach assets transferred by a debtor who appears to be insolvent and judgment proof. Transfers may be with or without intent to defraud and before or after the creditor's claim arose, depending on circumstances. Badges of fraud and common law are now codified by statute. For other consumer and debtor-creditor actions, see chapters 12, 13, and 14.

See form 18.11 for a complaint-drafting checklist and form 18.12 for a sample complaint.

B. Controlling Law

§18.79 MCL 566.31–.43.

C. Elements

§18.80 These simplified elements provide a quick review. Be sure to reference the statutory language in MCL 566.34 and .35 to ensure your case actually complies with all requirements.

Pursuant to MCL 566.34(1), a transfer is voidable regarding a creditor if

- it is done with actual intent to hinder, delay, or defraud any creditor or
- the debtor received nothing for the transfer and either
    - was engaged or was about to engage in business and the debtor's remaining assets were unreasonably small after transfer or
    - intended to incur debts beyond the debtor's ability to pay or should have known that the debtor would incur debts beyond the ability to

pay.

Note that actual intent may be inferred by using badges of fraud, which are codified and defined in the statute, such as transfers to insiders, concealments, transfer of all assets, the debtor's insolvency, or transfers for no or small value. MCL 566.34(2).

Creditors claiming relief under MCL 566.34(1) have the burden of proving the elements of the claim for relief by a preponderance of the evidence. MCL 566.34(3).

Pursuant to MCL 566.35, if the creditor's claim arose before a transfer was made, the transfer is voidable if

- the debtor received nothing in exchange and was insolvent at the time or became insolvent as a result of the transfer or
- the transfer was made to an insider for antecedent debt, the debtor was insolvent at that time, and the insider had cause to believe the debtor was insolvent.

D. Damages and Remedies

1. Relief Available

§18.81

- avoidance of the transfer to the extent necessary to satisfy the creditor's claim, MCL 566.37(1)(a)
- attachment or another provisional remedy against the asset transferred, MCL 566.37(1)(b)
- injunction against further disposition by the debtor, a transferee, or both of the asset transferred or other property, MCL 566.37(1)(c)(i)
- appointment of a receiver to take charge of the asset transferred or other property of the transferee, MCL 566.37(1)(c)(ii)
- levy execution on the asset transferred or its proceeds, if judgment has been obtained against the debtor, MCL 566.37(2)
- judgment for the value of the asset transferred or an amount necessary to satisfy the creditor's claim, whichever less, against either
    - the transferee of the asset or
    - an immediate or mediate transferee of the first transferee if there was no good-faith transferee who took for value

MCL 566.38(2)

- any other relief the court deems appropriate, MCL 566.37(1)(c)(iii)

2. Attorney Fees

§18.82 Although the Uniform Voidable Transactions Act does not specifically allow recovery of attorney fees, MCL 566.42 provides that the "principles of law and equity, including ... fraud, misrepresentation, duress, ... supplement the provisions of this act," and those principles may provide the basis for recovery of attorney fees.

E. Jury Instructions

§18.83 M Civ JI 128.01–.11 may be helpful.

F. Statute of Limitations

§18.84 In the case of a transfer made by a debtor to an insider for an antecedent debt when the debtor was insolvent at the time of the transfer and the insider had reason to believe the debtor was insolvent and the creditor's claim arose before the transfer, an action must be brought within one year after the transfer was made or the obligation was incurred. MCL 566.39(b).

In all other cases, the statute of limitations is six years unless there is fraudulent concealment of the claim under MCL 600.5855. In that case, there are an additional two years to commence an action. MCL 566.39(a), 600.5855; *see Dillard v Schlussel*, 308 Mich App 429, 865 NW2d 648 (2014) (rejecting plaintiff Dillard's argument that transfers by debtor Schlussel to his wife's checking account were concealed and therefore extended statute of limitations beyond six years).

G. Proper Parties

1. Proper Plaintiff

§18.85 A proper plaintiff is a creditor, which under the statute is a "person" that has a "claim." MCL 566.31(d). A "person," MCL 566.31(k), means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, instrumentality, or any other legal or commercial entity. A "claim," MCL 566.31(c), means a right to payment, whether or not the right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

2. Proper Defendant

§18.86 The plain language of the Uniform Voidable Transactions Act does not require the creditor to join the debtor alleged to have made the fraudulent transfer. The statute allows for a judgment sufficient to satisfy the creditor's claim against the first transferee of the asset, the person for whose benefit the transfer was made, or under certain circumstances an immediate or mediate transferee of the first transferee. MCL 566.38(2)(a). Other remedies are enumerated in MCL 566.37. However, if the creditor does not already have a judgment against the debtor, the transferee (debtor) must be joined as a party to the action to establish liability by the debtor in favor of the creditor. *Mather Inv'rs, LLC v Larson*, 271 Mich App 254, 720 NW2d 575 (2006).

H. Special Considerations

§18.87

- *Proper defendant.* See §18.86. A judgment is needed against the debtor, or the debtor must be joined in the action. *Mather Inv'rs, LLC v Larson*, 271 Mich App 254, 720 NW2d 575 (2006).
- *Judgment debtor.* If you already have a judgment, consider using a motion for proceedings supplemental to judgment to bring in the transferee with an order to show cause or asking the judge to issue a new summons and serve the transferee. MCL 600.6128.
- *Deceased debtor. Mather Inv'rs, LLC,* indicates that if you do not have a judgment against the debtor (or patient) before the debtor dies, you must join the debtor's estate in the lawsuit. If there is no estate, the creditor has the right to open an estate under the probate statute, MCL 700.3301(1), 28 days after the debtor's death. Counsel should obtain a copy of the death certificate and give notice to interested parties. Request that the creditor be appointed as personal representative, and you will get that appointment if no one objects. You must then file a lawsuit against the personal representative and the transferee of assets. Note that this procedure puts the creditor in the awkward position of filing a lawsuit against itself. See form 18.12 for a sample complaint for use in such an instance.
- *Ordinary household expenses.* The merits of *Dillard v Schlussel*, 308 Mich App 429, 865 NW2d 648 (2014), are more interesting than the statute of limitations issue. In *Dillard,* the court provides a nice analysis of fraudulent conveyance law, including both actual intent and constructive fraud, which anyone pursuing a fraudulent conveyance claim should read. The court analyzes most of the statutory badges of fraud that have been derived from the common law. In the *Dillard* case, defendant transferred all his substantial earnings in the amount of at least $250,000 each year to his wife's bank account. The court found evidence of at least seven of

the eleven factors that indicate actual intent to defraud. The only defense provided by the debtor was that the transfer of earnings to his wife were a means for paying ordinary household expenses. The court provided a good explanation of the difference between a fraudulent transfer and avoidance of that transfer, MCL 566.34. Accordingly, the court reversed the lower court's grant of summary disposition on the issue of intent. The court also reversed the lower court on the issue of constructive fraud, MCL 566.35(1), or transfers made without receiving a reasonably equivalent value in exchange for the transfer. The court noted that this provision is concerned with the economic realities of a transfer rather than the intent of the transferor. The court found substantial questions of fact precluding summary disposition.

- *Intent.* The language used in these cases is sometimes unfortunate. Transfers are called "fraudulent" even when they are done for other reasons and the debtors are not thinking about their creditors or debt. For example, debtors transfer real estate to their children, thinking they are doing estate planning or avoiding probate. These transfers may or may not occur just before a serious illness requiring substantial hospitalization or even a fatal illness. Debtors may be thinking only about their offspring and not considering the substantial bill for medical expenses that they may incur. Nevertheless, these transfers generally are fraudulent even though made with the best intentions. These transfers are generally real estate, which is the only substantial asset a debtor may have. Afterward, the debtor has no ability to pay, and the transfer renders the debtor insolvent. The transfer is usually for no consideration. Note that a debtor's transfer of assets for the purpose of paying the debtor's "ordinary household expenses" does not preclude a challenge under the Uniform Voidable Transactions Act. *Dillard* (reversing and remanding trial court's grant of summary judgment for defendant and holding that plaintiff provided enough evidence of badges of fraud to establish prima facie case, which defendants did not negate).

I. Affirmative Defenses

§18.88

- Statute of limitations, MCL 566.39.
- Good faith, when the defendant acted without actual fraudulent intent and did not conspire or otherwise actively participate in any fraudulent scheme. There are two parts to this test:
  1. The transfer was in good faith.
  2. The transferee gave the debtor "reasonably equivalent value" for the asset.

MCL 566.38(1).

- The absence of any of the required elements that might need factual development.

J. Related Actions

§18.89 Given that this section is specifically supplemented by traditional principles of fraud, misrepresentation, duress, and other equitable actions, related tort-based claims often accompany claims under the Uniform Voidable Transactions Act. See chapters 2, 16, and 25.

Forms and Exhibits

Form 18.01 Checklist for Account Stated Complaint

Form 18.02 Account Stated Complaint

Form 18.03 Checklist for Breach of Contract Complaint

Form 18.04 Breach of Contract Complaint

Form 18.05 Checklist for Claim and Delivery Complaint

Form 18.06 Claim and Delivery Complaint

Form 18.07 Checklist for Sales Representative Termination Complaint

Form 18.08 Sales Representative Termination Complaint

Form 18.09 Checklist for Promissory Estoppel Complaint

Form 18.10 Promissory Estoppel Complaint

Form 18.11 Checklist for Uniform Voidable Transactions Act Complaint

Form 18.12 Uniform Voidable Transactions Act Complaint