DAMAGES

Practice Note: During the charge conference, the court should consult with counsel to identify what types of damages are being sought. Instructions may be tailored to the types of damages sought and to what is applicable to the case. For example, general damages instructions may be appropriate in addition to instructions for specific case-types, such as construction and real estate cases. For claims brought pursuant to the Uniform Commercial Code, use only the instructions marked as applicable to Uniform Commercial Code claims.

I am now going to instruct you on damages. Please understand that by instructing you on damages, I am not suggesting how you ought to decide this case; that is your responsibility. I am only informing you as to what the law is regarding the calculation of damages in the event that you get to that point.

If you find that the parties had a legally binding contract and that the defendant breached the contract, [*if affirmative defense alleged:* **and that the defendant has not proven a defense], your verdict will be in favor of the plaintiff. Once you make that decision, then you must determine the amount of damages, if any, that you will award to the plaintiff.**

In order to recover damages, a plaintiff must prove by a preponderance of the evidence that the defendant's breach of the contract caused the plaintiff to suffer a loss that can be compensated by an award of damages. If you find that plaintiff has proved by a preponderance of the evidence that the defendant is responsible for

the damages, you must go on to determine the amount of damages. The amount must be proved to a reasonable degree of certainty. While the plaintiff does not have to prove damages to a mathematical certainty, the plaintiff must show evidence of a damage amount that is reasonably certain so that you are not required to speculate.

A plaintiff may establish (his / her / their / its) damages by reference to some definite standard, such as market value, or industry standard. Damages may also be established from practical experience or by inference from the circumstances. Much of the determination of damages is left to your sound discretion as the jury.

The basic principle of contract damages is that the injured party should be put in as good a position as if the other party had fully performed (his / her / their / its) obligations under the contract.

An injured party is entitled to recover General Damages, which are comprised of two kinds of damages: expectation damages and consequential damages. Expectation damages are those commonly understood to naturally flow from a breach of contract. Consequential damages, on the other hand, are those that result from special circumstances known or presumed to have been known to the

parties at the time they entered into the contract. I will first discuss expectation damages.

Fernandes v. Union Bookbinding Co., 400 Mass. 27, 37-38 (1987); *Snelling & Snelling of Mass., Inc., v. Wall*, 345 Mass. 634, 636 (1963); *John Hetherington & Sons, Ltd v. William Firth Co.*, 210 Mass. 8 (1911); *Lease-It, Inc. v. Massachusetts Port Auth.*, 33 Mass App. Ct. 391, 397 (1992); *Sackett v. St. Mary's Church Soc'y*, 18 Mass. App. Ct. 186, 188 (1984).

I. GENERAL DAMAGES - EXPECTATION DAMAGES

Expectation damages are sometimes called compensatory or "benefit of the bargain" damages. To recover these damages, the plaintiff must show by a preponderance of the evidence that if the contract had not been breached, (he / she / they / it) would have received something or avoided losing something of value. If the defendant did not perform at all, then the plaintiff's damages are the value (he / she / they / it) would have received had the defendant fully performed. If the defendant's performance was defective or partial, then the plaintiff's damages are the difference between the value (he / she / they / it) would have received had the defendant properly performed and the diminished value (he / she / they / it) actually received from the defendant's improper performance. Of course, the plaintiff is not entitled to recover damages that would put (him / her / them / it) in a better position than (he / she / they / it) would have been in if the defendant had fully performed the contract.

Expectation damages are also known as compensatory damages. *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 412 (2013), quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'"); *Situation Management Systems, Inc. v. Malouf, Inc.*, 430 Mass. 875, 880 (2000); *Productora E Importadora De Papel v. Fleming*, 376 Mass. 826, 837-38 (1978); *White Spot Constr. v. Jetspray Cooler, Inc.,* 344 Mass. 632, 635 (1962); *John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8 (1911); *Normandin v. Eastland Partners, Inc.,* 68 Mass. App. Ct. 377, 392 (2007) ("It is a well-settled rule that a plaintiff in an action for breach of contract is entitled to damages in an amount sufficient to put him in as good as, but not better than, the financial position he would have been in had there been no breach.").

A. ALTERNATIVES TO EXPECTATION DAMAGES

1. RELIANCE DAMAGES

In circumstances where expectation damages are either speculative or grossly disproportionate to the plaintiff's actual harm, damages may instead be awarded to compensate the plaintiff for expenditures made in reliance on the contract after it was formed but before it was breached. The purpose of these damages is to place the plaintiff in as good a position as (he / she / they / it) would have been had the contract not been made.

As an example, if a jury determined that a defendant breached a contract to sell the plaintiff a home, reliance damages might include such things as the expense the plaintiff incurred to have the home inspected or the cost of an appraisal and other costs incurred that were made in reliance on the contract after it was formed.

Lord and Lady's Enterprises, Inc. v. John Paul Mitchell Systems, 46 Mass. App. Ct. 262, 270 at n. 9 (1999); *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 611 at n. 2 (1994). Compare *Doering Equipment Co. v. John Deere Co.,* 61 Mass. App. Ct. 850, 856-

57 (2004) (reliance damages appropriately not awarded where there was no causal connection between the reliance damages sought and the contractual obligations not performed).

2. RESTITUTION*

When a plaintiff has partly performed (his / her / their / its) side of the contract but the defendant has materially breached the contract by nonperformance, then the plaintiff is entitled to cancel the contract and recover for (his / her / their / its) partial performance. This is called "restitution" and it is meant to restore to the plaintiff any benefit (he / she / they / it) gave the other party by (his / her / their / its) performance. Restitution is measured by the gains received by the defendant as a result of the plaintiff's performance and not by the plaintiff's losses.

*NOTE: Restitution is an Equitable Remedy that may not be appropriate for a jury. Restitution is available when the injured party has partially performed under the contract at the time the other side materially breached it. Under this theory, the injured party can cancel the contract and recover what he has given to the other side. The measure of damages is the value of the benefit the injured party conferred upon the other side. However, the injured party must return any property he received from the breaching party. The court has the power to impose as part of the judgment of restitution whatever conditions are necessary to protect the rights of the breaching party.

Bonina v. Sheppard, 91 Mass. App. Ct. 622, 626 (2017) ("We recognize that restitution cannot be measured by the plaintiff's losses, only by the defendant's gains. Restitution is distinct from damages, which measures compensation for loss rather than disgorgement of the defendant's gain.") (citations and quotations omitted).

II. GENERAL DAMGES - CONSEQUENTIAL DAMAGES

I am now going to instruct you on the other kind of general contract damages, called "consequential" damages. These damages

result from special circumstances known or presumed to have been known by the parties at the time they entered into the contract. In order to recover consequential damages, the plaintiff must prove that these damages were foreseeable to the defendant at the time the contract was made. They may include costs the plaintiff incurred when he made a reasonable effort, whether successful or not, to avoid a loss after the defendant breached the contract. These damages must be reduced by the amount of money, if any, the plaintiff saved because (he she / they / it) did not have to perform the contract.

Consequential damages can be distinguished from expectation damages. As I stated earlier, expectation damages result naturally from the breach of contract itself and are meant to give the plaintiff the benefit of (his / her / their / its) expected bargain that (he / she / they / it) would have received had the defendant fully performed.

Consequential damages arise from or are a "consequence" of special facts and circumstances occurring after the breach that the defendant would have reason to know about or foresee at the time (he / she / they / it) entered into the contract. It is not necessary that the defendant anticipated a particular or specific loss to the plaintiff for

the loss to be considered "consequential". It is enough that, when looking at the parties' contract objectively, the loss would have been reasonably contemplated.

Just for example, imagine that a toy manufacturer contracted with a department store to deliver a specified number of dolls by the end of November. When the toy manufacturer did not deliver the specified number of dolls as agreed, it committed a breach of contract. The amount of money the department store paid the toy manufacturer for the dolls it did not receive would be considered expectation damages. These damages are the natural and probable result of the toy manufacturer's breach of contract.

Now let's imagine that the department store had to pay a different toy manufacturer a higher price for each doll that the initial toy manufacturer failed to deliver. That extra expense would be a form of consequential damages because at the time the contract was made, it was reasonable for the toy manufacturer to foresee that failing to deliver the dolls as promised could result in the department store paying a higher price for the dolls from another manufacturer. As you might imagine, there could be other types of consequential damages under this example, such as lost profits that accrued during

the time when there were no dolls in stock to sell or a loss of customers whose doll orders were cancelled.

H1 Lincoln, Inc. v. S. Washington St., LLC, 489 Mass.1, 22 n. 13 (2022) ("This definition of consequential damages aligns with how consequential damages have been understood in the context of actions for breach of contract, namely as items of loss other than loss in value of the other party's performance, provided that these losses arise naturally from the breach or were reasonably contemplated by the parties' as consequences of the breach") (internal quotations and citations omitted); *Selmark Associates, Inc. v. Ehrlich*, 467 Mass. 525, 545 (2014) (expectation damages for breach of contract include consequential damages, i.e., "those that cannot be reasonably prevented and arise naturally from the breach, or which are reasonably contemplated by the parties."); *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 680 (1985).

Consequential damages must be specifically pled in the complaint. See Mass. R. Civ. P. 9(g); *Boylston Hous. Corp. v. O'Toole*, 321 Mass. 538, 562-563 (1947) (special or consequential damages compensated for loss of rents of apartments due to failure of timely installation of elevator); *Lynch v. Lyons*, 303 Mass. 116, 119 (1937). See also *First Pennsylvania Mortgage and Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 627 (1985).

A. LOST PROFITS

Lost net profits are a specific type of consequential damages. Net profits are funds that are left after expenses have been subtracted from income. For the plaintiff to recover alleged lost net profits, three elements must be shown by a preponderance of the evidence. The plaintiff must demonstrate that: (1) the lost profits were caused by the defendant's breach of contract; (2) the loss was foreseeable; and (3) the lost profits can be calculated with reasonable certainty.

Lost net profits may be difficult to prove with mathematical precision and so you may consider estimates. Expert testimony, economic and financial data, market surveys, and business records of

similar businesses may be considered. Evidence of an established earnings record may also be considered. An estimation of expected future lost profits based on past performance is acceptable as long as the evidence affords a basis for you to make a reasonable judgment. There must be some evidence to allow you to infer that the nature of the plaintiff's business would generate a definite amount of profits.

Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 612 (2007).

III. CONSTRUCTION CONTRACTS

This case involves a claim that a construction contract has been breached.

A. DAMAGES AGAINST A CONTRACTOR

1. WORK NOT FULLY PERFORMED

When a defendant building contractor does not fully perform all the services required by a contract, the plaintiff is entitled to be put in as good a position as if there had been no breach and the contract had been completed. These damages are calculated as the reasonable cost of completing the contract, less any part of the contract price that the plaintiff has not yet paid.

For example, a builder contracts with an owner to build a house for $400,000 and begins construction. After being paid $300,000, the

builder, without lawful excuse, leaves the job unfinished. The owner then finds another builder to complete the house for $120,000. The first builder would be liable to the owner for damages in the amount of $20,000, which is the difference between the price the owner expected to pay – that is, $400,000 - and the price the owner actually paid, that is, $420,000 plus any other damages relating to the delay in construction.

2. DEFECTIVE WORK

If a building contractor completes a contract but the work or materials the builder supplies are defective, the plaintiff's damages are the reasonable cost of repairing the defect, less any part of the contract price that the plaintiff has not yet paid.

If you find that it is difficult or impracticable to correct defective work, or the cost of correction might greatly exceed the loss in property value to the owner, then you may calculate the damages another way. You can instead determine the damages as the difference between the property value if the contract had been followed correctly and the property value in its defective condition, less any money that the plaintiff has not yet paid under the contract. This calculation ensures fairness in that the owner is not put in a

better position than he would be in if the builder had performed the contract correctly. Remember, this calculation is used only if you find by a preponderance of the evidence that the cost of remedying the defects greatly exceeds the loss in the property value.

3. DELAY IN COMPLETION OF CONSTRUCTION

If you find by a preponderance of the evidence that the breach of contract is solely one of delay in completing construction, damages can be measured by what would be a fair rental value of the structure during the delay, even though the plaintiff had no intention to rent the structure and in fact did not rent it.

Morgan-National Woodworking, Co. v. Cline, 324 Mass. 15, 17 (1949)

B. DAMAGES AVAILABLE TO A CONTRACTOR

If a property owner breaches a construction contract before a building contractor completes (his / her / their / its) work, then the contractor may recover the entire balance owed under the contract, less the costs the contractor expected to pay to complete the job had the owner not breached the contract. An example of this type of breach of contract would be if the property owner failed to make required payments to the builder. Alternatively, the contractor may

choose to pursue recovery for the fair value of the work that was done and the materials that were furnished before work was terminated.

Louise Caroline Nursing Home, Inc. v. Dix Constr. Corp., 362 Mass. 306, 310-311 (1972); *Providence Washington Ins. Co. v. Beck*, 356 Mass. 739, 740 (1970); *Rombola v. Cosindas,* 351 Mass. 382, 385 (1966); *Concannon v. Galanti*, 348 Mass. 71, 74 (1964); *Ficara v. Belleau*, 331 Mass. 80, 81 (1954); *Morgan-Nat'l Woodworking Co. v. Cline*, 324 Mass. 15, 17 (1980); *Roblin Hope Indus., Inc. v. J.A. Sullivan Corp.,* 11 Mass. App. Ct. 76, 80-81 (1980).

IV. REAL ESTATE SELLER AND BUYER

This case involves a claim that an agreement to purchase real estate has been breached.

A. SELLER'S DAMAGES

The measure of recovery when a prospective buyer breaches a contract for the purchase of real estate is the difference between the contract price and the market value of the property at the time of breach. The seller may also recover consequential damages, including the costs of continued ownership following the breach, on which I have already instructed you. These may include such things as the cost of insurance, maintenance, property taxes, utilities, and mortgage interest.

However, if the seller resells the property shortly after the breach for a price that is higher than the contract price, the sale price is considered to reflect the actual value of the property at the time of

the breach, and any consequential damages are offset by the higher resale price. If the seller resells the property to another buyer at a price that is higher than the contract price, (he / she / they / it) has not lost the benefit of (his / her / their / its) bargain and may recover only nominal damages.

B. BUYER'S DAMAGES

When a seller breaches a contract for the purchase of real estate, the measure of damages is the difference between the contract price of the property and the market value of the property as of the date that the deed to the property was to have been delivered, usually the closing date. Consequential damages, on which I have already instructed you, may also be awarded.

NOTE: A contract for the sale of real estate may limit the Seller's damages to liquidated damages. See the Liquidated Damages Instruction below.

Seller's damages: See *Normandin v. Eastland Partners, Inc.*, 68 Mass. App. Ct. 377, 393 (2007); *American Mechanical Corp. v. Union Mach. Co. of Lynn, Inc.,* 21 Mass App. Ct. 97, 101-102 (1985) (awarded actual loss: difference between contract price and amount received from foreclosure sale).

Buyer's damages: See *Widebeck v. Sullivan*, 327 Mass. 429, 434 (1951). See also *Capaldi v. Burlwood Realty Corp.*, 350 Mass. 765 (1966); *Zolner v. THN Invs, Inc.,* 21 Mass. App. Ct. 927, 928 (1985); *Rozene v. Sverid*, 4 Mass. App. Ct. 461, 465-66 (1976). But see *Foster v. Bartolomeo*, 31 Mass. App. Ct. 592, 595-596 (1991) (holding that the standard measure of recovery in a breach of real estate contract case is "not a rigid rule" but a "variation" on the basic principle of damages that a party should be "as well of as if the transaction had gone through" and that in this case, the appropriate measure of damages was the plaintiff buyers' anticipated profit margin and not the change in market value of the property.)

V. DAMAGES UNDER THE UNIFORM COMMERCIAL CODE

This case involves a claim for relief involving the sale of goods, which is governed by the Massachusetts Uniform Commercial Code.

Note: Article 2 of the Uniform Commercial Code governs transactions in goods. The law on damages for breach of a contract for the sale of goods is found in Section 2 of Chapter 106. If a transaction involves only the sale of goods or only the sale of something else, e.g. an interest in land or a service, the determination of whether Article 2 or Massachusetts common law applies is not difficult. Some contracts, however, are hybrids and involve both the sale of goods and something else, often a service. In these cases, a decision must be made whether Article 2 applies to a particular transaction. Generally, this is a question of law for the judge. There may, however, be instances where factual disputes must be resolved for this issue to be decided.

The policy of both the common law and the Uniform Commercial Code is to place the aggrieved party in as good a position as if the breaching party had fully performed. G.L. c. 106, § 1-106. See generally *Cesco Mfg. v. Norcross, Inc.*, 7 Mass. App. Ct. 837, 841-842 (1979) (measure of damages pursuant to 2-708(2) when buyer breaches agreement during manufacture of goods by seller).

Seller's Damages: The seller's damage remedies are contained in G.L. c. 106, § 2-703. The seller may either refuse to make delivery, complete the process of manufacturing unfinished good prior to attempting resale, resell the goods and then attempt to recover any resulting loss, seek recovery for damages due to the buyer's nonacceptance of the good are repudiation, or cancel the contract.

Buyer's Damages: The buyer's damage remedies are contained in G.L. c. 106 § 2-711. Among the available remedies, the buyer may choose to purchase substitute goods or seek recovery for damages resulting from non-delivery of repudiation.

A. SELLER'S REMEDIES

1. UNFINISHED GOODS

When a buyer breaches a contract with a seller who manufactures goods, the seller may in good faith salvage the goods that are unfinished in order to sell them to another purchaser, and in doing so, (he / she / they / it) may incur costs. In this instance, the seller's damages are the difference between the contract sale price

and the price paid by the new purchaser, plus any incidental damages. "Incidental damages" include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach, less any expenses the seller saved as a result of the breach. The breaching buyer has the burden of proving the unreasonableness of the seller's actions by a preponderance of the evidence.

See G.L. c. 106 § 2-704; § 2-710 and Official Comment to § 2-704.; *Cesco Mfg. v. Norcross, Inc.*, 7 Mass. App. Ct. 837, 841-842 (1979).

2. RESALE

When a buyer breaches a contract for the sale of goods, the seller may resell the goods, publicly or privately, in good faith and in a commercially reasonable manner. The seller's damages are the difference between the contract price and resale price, plus any incidental damages. The breaching buyer has the burden of proving that the resale of the goods was performed in good faith and in a commercially reasonable manner.

"Incidental damages" include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in

the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach, less any expenses the seller saved as a result of the breach.

See G.L. c. 106 § 2-706, 2-710; *Bevel-Fold, Inc. v. Bose Corp.*, 9 Mass. App. Ct. 576, 584-585 (1980).

3. CONTRACT-MARKET PRICE

When the buyer in a contract for the sale of goods wrongfully rejects the goods or rejects the contract, the seller is entitled to damages in the amount of the difference between the contract price and the market price at the time and place for tender or delivery of the goods, plus any incidental damages and less expenses saved because of buyer's breach.

"Incidental damages" include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach, less any expenses the seller saved as a result of the breach.

See G.L. c. 106 § 2-708(1), § 2-710; *Cesco Mfg. v. Norcross, Inc.*, 7 Mass. App. Ct. 837, 841-842 (1979).

See also G. L. c. 106, § 2-708(2): If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then

the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

B. BUYER'S REMEDIES

1. COVER COSTS

When the seller in a contract for the sale of goods wrongfully withholds delivery of the goods or rejects the contract, the buyer can, in good faith and without unreasonable delay, choose to obtain substitute goods from another seller. This is called "cover." The buyer's damages are the difference between the contract price and the cost of purchasing reasonable substitute goods on "cover," plus any incidental and consequential damages. You must find by a preponderance of the evidence that the cost of the substitute goods were reasonable.

"Incidental damages" include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions incurred in obtaining cover goods, and any other reasonable expense relating to the delay or breach. "Consequential" damages include any loss suffered by the buyer that the seller had reason to know about at the time the contract was entered into and

which could not reasonably be prevented by covering with substituting goods.

In calculating these damages, you must subtract any expenses the buyer saved as a result of the seller's breach.

See G.L. c. 106 § 2-712, 2-715; *Productora E Importadora De Papel v. Fleming*, 376 Mass. 826, 839 (1978) ("Calculation of cover damages under § 2-712 should, therefore, embody three steps. First, the judge should determine the aggregate difference between the cover price and the contract price. Second, the damage award should be increased by the incidental and consequential damages recoverable under § 2-715. Third, the award should be reduced, even to extinction, by the expenses that the breach enabled the buyer to avoid.")

2. CONTRACT-MARKET PRICE

When the seller in a contract for the sale of goods wrongfully withholds delivery of the goods or rejects the contract, the buyer may recover his economic loss. The buyer's damages are the difference between the market price at the time of the breach and the contract price, plus any incidental or consequential damages. The buyer must establish this by a preponderance of the evidence.

"Incidental damages" include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions incurred in obtaining cover goods, and any other reasonable expense relating to the delay or breach. "Consequential" damages include any loss suffered by the buyer that the seller had

reason to know about at the time the contract was entered and which could not reasonably be prevented by covering with substituting goods.

In calculating these damages, you must subtract any expenses the buyer saved as a result of the seller's breach.

See G.L. c. 106 § 2-712, 2-713; 2-715; *Productora E Importadora De Papel v. Fleming*, 376 Mass. 826, 839 (1978).

3. WARRANTY DAMAGES

In a claim for breach of warranty, when the buyer chooses to keep the defective goods, the damages are the difference between the value of the goods accepted as of the time and place they were accepted and the value they would have been if their condition was as warranted, plus any incidental or consequential damages.

"Incidental damages" include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions incurred in obtaining cover goods, and any other reasonable expense relating to the delay or breach. "Consequential" damages include any loss suffered by the buyer that the seller had reason to know about at the time they entered into the contract and

which could not reasonably be prevented by covering with substituting goods.

In calculating these damages, you must subtract any expenses the buyer saved as a result of the seller's breach.

See G.L. c. 106 § 2-714(2); *Regina Grape Products Co. v. Supreme Wine Co.*, 357 Mass. 631, 635 (1970)

VI. EMPLOYMENT CONTRACTS

Practice Note: This instruction can be modified where the parties agree that the employment is for a definite term or is at-will.

This case involves a claim that the plaintiff's employer breached a contract of employment. The measure of damages that an employee can recover from an employer for wrongful termination depends on whether the employment contract was for a definite period of time or was at-will.

If an employee is wrongfully discharged before the expiration of a definite period of time of employment under a contract, the measure of damages is the wages the employee would have earned under the contract, less the wages the employee did in fact earn, or, in the exercise of reasonable effort, could have earned in another employment. The employer has the burden of proving by a preponderance of the evidence that the employee found, or in the

exercise of reasonable effort, could have found other employment. In the absence of such proof, the employee is entitled to receive the full amount of his salary under the contract.

If you are considering whether the employee exercised reasonable effort in trying to find other employment, you should keep in mind that a discharged employee's duty to mitigate or reduce (his / her / their / its) losses is not absolute. The employee is not required to take a job that is different from the one (he / she / they / it) had with the defendant employer, or a job that pays substantially less money, or one that is located in a distant location from (his / her / their / its) former place of employment.

The plaintiff's employment was at-will if it had no definite period of time and could be terminated by either the employer or the employee without notice. An at-will employee can be terminated for any reason or for no reason at all, except an at-will employee may not be terminated in violation of a statute, public policy, or the implied covenant of good faith and fair dealing. Since a contract of employment at-will is not a contract for life or for any specific period of time, there can be no recovery for future lost wages or benefits. An at-will employee is wrongfully discharged when the discharge is

based on a violation of a statute, public policy, or the implied covenant of good faith and fair dealing. The employee may recover as damages the amount of compensation the employee fairly earned and legitimately expected for work (he / she / they / it) already performed for the defendant employer.

VII. LIQUIDATED DAMAGES

Practice Note: It is a matter of law reserved for a judge as to whether a liquidated damages provision is an unenforceable penalty. Such a provision is enforceable if, at the time the contract was formed: (1) it would have been difficult to ascertain actual damages and (2) the agreed upon sum of the liquidated damages is a "reasonable forecast" of damages that would occur in the event of a breach. The burden of showing the unenforceability of the liquidated damages provision lies with the party contesting the enforcement. If the judge determines that this provision of the contract is an unenforceable penalty, the judge must instruct the jury to disregard the liquidated damages clause and give common law instructions on damages.

The contract in this case provides for liquidated damages. The purpose of a liquidated damage clause in a contract is to forecast or estimate the damages that the potentially injured party will suffer in the event of a contract breach. You must follow the formula set forth in that clause when calculating damages.

Cummings Properties, LLC v. Hines, 492 Mass. 867, 870-871 (2023); *George v. National Water Main Cleaning Company*, 477 Mass. 371, 375-76 (2017); *NPS, LLC v. Minihane*, 451 Mass. 417, 423 (2008) (mitigation of damages is irrelevant in calculating an enforceable liquidated damages provision); *Cummings Properties, LLC v. Natl. Commun. Corp.*, 449 Mass. 490, 494 (2007); *Nantasket Beachfront Condominiums, LLC v. Hull Redev. Auth.*, 87 Mass. App. Ct. 455, 469-70 (2015) (a liquidated damages provision is entitled to a presumption of validity, especially between two sophisticated parties).

Actual damages: *A-Z Servicenter, Inc. v. Segall*, 334 Mass. 672, 675 (1956) (where actual damages are difficult to ascertain and where the sum agreed upon by the parties at the

time of the execution of the contract represents a reasonable estimate of the actual damages, such a contract will be enforced. But where the actual damages are easily ascertainable and the stipulated sum is unreasonably and grossly disproportionate to the real damages from a breach, or is unconscionably excessive, the court will award the aggrieved party no more than his actual damages). See also *NPS, LLC v. Minihane*, 451 Mass. 417, 420 (2008).

VIII. NOMINAL DAMAGES

As I have already told you, the plaintiff has the burden of proving the amount of (his / her / their / its) damages. If the plaintiff does not prove any actual damages, (he / she / they / it) is still entitled to be awarded nominal or token damages - for example, $1, because the defendant breached the contract. An award of nominal damages is a symbolic recognition of the wrong that has been done to the plaintiff by the defendant's breach of contract.

Page v. New England Tel & Tel. Co., 383 Mass. 250, 252 (1981) (where jury returned a verdict stating simply an award of "nominal damages", the judge could have accepted the verdict and added $1 himself); *McTernan v. LeTendre*, 4 Mass. App. Ct. 502, 505 (1976).

IX. DELAY DAMAGES

If you find by a preponderance of the evidence the defendant wrongfully caused a delay in the performance of the contract and that the plaintiff did not contribute to that delay, then the plaintiff is entitled to recover for loss caused by the delay.

Morgan-National Woodworking Co., Inc. v. Cline, 324 Mass. 15, 17 (1949); *PDM Plumbing & Heating, Inc. v. Findlen*, 13 Mass. App. Ct. 950, 951 (1982) (award of increased overhead expenses caused by delay). See also *City of Boston v. New England Sales & Mfg Corp.*, 386 Mass. 820, 824 (1982) (damages for delay included as part of liquidated damages calculation).

X. LIMITATION ON DAMAGES

A plaintiff is not entitled to be compensated for any mental anxiety, emotional distress, or disappointment because of a breach of contract. Additionally, you may not include any sum for court costs, interest, or any amount for attorney's fees.

There are, however, three types of breach of contract actions that may result in damages for emotional or mental distress. They involve contracts between an innkeeper and a guest, where the innkeeper causes physical discomfort or distress; contracts between common carriers and passengers, where the passenger is mistreated or wrongfully ejected; and contracts between a physician and a patient where a physician breaches a promise to achieve a particular result in a manner likely to produce a psychological injury, as in cosmetic surgery. See *Sullivan v. O'Connor*, 363 Mass. 579, 588-589 (1973); *McClean v. University Club*, 327 Mass. 68, 76 (1951).

Attorney fees: *Harrison v. Textron, Inc.*, 367 Mass. 540, 555 (1975); *Chartrand v. Riley*, 354 Mass. 242, 244-45 (1968); *Boott Mills v. Boston & M.R.R.,* 218 Mass. 582, 589 (1914).

Note: Some contracts include a provision for recovery of attorney fees in the event of a breach. Typically, the amount of fees to be recovered would be determined by the judge without a jury, upon affidavit or an evidentiary hearing, if necessary. *Howe v. Tarvezian*, 73 Mass. App. Ct. 10, 13 (2008)

In contracts that provide for interest at a rate different from the statutory rate, the contract rate prevails.

XI. MITIGATION OF DAMAGES

The plaintiff must use reasonable efforts to keep (his / her / their / its) damages to a minimum. The plaintiff may not recover for losses that could have been prevented by reasonable efforts on (his / her / their / its) part. The plaintiff, however, is not precluded from recovery if (his / her / their / its) reasonable efforts to avoid loss were unsuccessful.

The burden of proving by a preponderance of the evidence that losses could have been avoided by reasonable effort rests with the defendant, the party in breach.

Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 612 (2007); *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 585-586 (1982).