Damages In Business Cases

From a Business Litigator's Perspective

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Types Of Damages

1. Actual/Compensatory
2. Statutory
3. Incidental
4. Disgorgement
5. Restitution
6. Recission
7. Lost Chance
8. Nominal
9. Punitive
10. Attorney Fees

General Overview of Damages Proof and Evidence

1. Start your case with the end first
2. Under the *"certainty"* rule, which applies in both contract and tort actions, recovery is denied where fact of damages and extent of damages cannot be established with a reasonable degree of certainty.
3. Read the jury instruction **BEFORE** you file the lawsuit (Standard or Draft your own)

Actual/Compensatory

Contract Cases: These damages cover the loss the non-breaching party incurred as a result of the "breach of contract" (the benefit of the bargain".

-The natural and probable consequence of the breach

-Put the breaching part in the same non-economic positions if the non-breaching party would have performed

Reasonably foreseeable at the time of the contracting

Business Torts (Common Law): Lost profits, Tortious Interference, Fraud, Breach of Fiduciary Duty, Unfair Competition

Statutory

1. *False Advertising, Chapter 817.41, Florida Statutes*
2. *Florida's Unfair Deceptive Trade Practices Act, Chapter 501, Florida Statutes*
3. *Trademark, 15 USC 1051 (Lanham Act)*
4. *Trade Secret, Chapter 688, Florida Statutes*
5. *Contracts in Restraint of Trade/Non-Competition, Chapter 542.335, Florida Statutes*
6. *Florida's Consumer Credit Protection Act*
7. *Fair Debt Collection Practices Act*
8. *Telemarketing Sales Rule, 16 CFR 310 (Do Not Call Rule)*
9. *Fair Credit Reporting Act, 15 USC 1681*
10. *Uniform Commercial Code (Articles 2, 2a, 9)*

Consequential/Incidental

Covers the loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predicable.

-Actual losses caused by the breach, but not the direct and immediate way

-Breaching party knew of the special circumstances or requirements at the time of the breach

Disgorgement

- Disgorgement of defendant profits. Although profit disgorgement is recognized as a suitable remedy as a matter of both equity and deterrence.

Restitution

Equitable remedy for the value of the item lost or out of pocket cost incurred

Recission

- Chapter 517, Florida Statutes

Lost Chance

- Recovery under contract theory will be allowed where plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain.



Nominal

It is well established in Florida that where the allegations of a complaint show the invasion of a legal right, the plaintiff on the basis thereof may recover at least nominal damages, and a motion to dismiss should be overruled.

See Hutchison v. Tompkins, 259 So.2d 129 (Fla. 1972)

While there is a legal remedy for every legal wrong and, thus, a cause of action exists for every breach of contract, an aggrieved party who has suffered no damage is only entitled to a judgment for nominal damages.

See AMC/Jeep of Vero Beach, Inc. v. Funston, 403 So.2d 602, 605 (Fla. 4th DCA 1981)

Whenever the intentional invasion of a legal right occurs the law infers some damage to the party whose rights were violated and if no evidence is adduced as to any particular specific loss or damage, the law 'rights' or remedies the wrong by awarding nominal damages, usually in the amount of $1.00.").

See Dept. of Transp. v. Weisenfeld, 617 So.2d 1071, 1086 (Fla. 5th DCA 1993)



Punitive

The General Rule

In Florida, prior to pleading a claim for punitive damages a plaintiff must seek leave to amend to add such a claim and must make a profer that would demonstrate a reasonable basis for the recovery of punitive damages. Fla. Stat. 768.72(1) ("In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages…") Claims for punitive damages are often underutilized in the context of business litigation. However, it is important to acknowledge that punitive damages claims in business disputes are often disfavored by the courts.

A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence.

See Fla. Stat. 768.72 (2)

Generally, punitive damages claims are appropriate when there are allegations of gross negligence or intentional misconduct that are substantiated by a proffer of evidence.

It is rare that a business dispute would support amendment on the basis of gross negligence. The Florida Supreme Court has held that the conduct necessary to support a claim for punitive damages for gross negligence was the same as that necessary to support a conviction of manslaughter.

Punitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct. They are not intended as a means by which a plaintiff, to recover extra damages. Thus, punitive damages are warranted only where there is egregious wrongdoing of the defendant, although perhaps not covered by criminal law, nevertheless constitutes a public wrong.

Therefore, the questions that must be answered utilizing the Carraway standard is whether Chrysler exhibited a reckless disregard for human life equivalent to manslaughter by designing and marketing the Volare.

See *Chrysler Corp. v. Wolmer, 499 So.2d 823, 825 (Fla. 1986*) (citations omitted)

Lost Profits



I. DEFINITION OF PROFIT =

(1) Equals the difference between the price charged and the costs of the item (or service)

OR

(2) Net return (price – costs or expenses saved) [usually pretax]

a. Variable expenses

b. Fixed expenses

II. Formula in Calculating Lost Profits:

1. **Before and After** (Event Impact/Regression Analysis), See Securities Cases
2. **Sales projection** (Forecasting based on history)
3. **Accounting for Profits** (Typical where Defendant made the sales)
4. **Yardstick** –(comparing your sales with similar companies)
5. **Market Share** (Assumptions have to be made on market share)
6. **Economic Modeling/Certain Percentage** (catch all)

Ongoing business with established sales record is not imperative for recovery of **lost profits.**

North Dade Community Development Corp. v Dinners Place Inc., 827 So.2d 352 (Fla. 4th DCA 2002)

III. Calculating the Extent of Lost Profit factors:

a. Foreseeability-The expert needs to be able to defend their work by separating the results that were foreseeable and direct from those that were consequential

b. Reasonable Certainty-Damages must be proven proved with a reasonable degree of professional certainty

c. Mitigation-assessment of whether there was a duty to mitigate in the matter and if so, how can it be quantified

I. The two seminal Florida cases on recovery of prospective profits are ***Twyman v. Roell, 123 Fla. 2, 166 So. 215 (1936),*** and ***New Amsterdam Casualty Co. v. Utility Battery Manufacturing Co., 122 Fla. 718, 166 So. 856 (1935).*** In *New Amsterdam*, this Court held that prospective business profits are generally too **speculative** and dependent on changing circumstances to be recovered. *New Amsterdam* provided an exception allowing the plaintiff to show the amount of his loss by competent proof. However, this exception only applied to the interruption of an established business. *Twyman*, on the other hand, did not limit recovery to established businesses. There, the Court stated that, *if there is a "yardstick" by which prospective profits can be measured, they will be allowed if proven.*

An award of lost profits cannot be based on mere speculation or conjecture.

See ***Sampley Enterprises, Inc. v. Laurilla, 404 So.2d 841(Fla. 5th DCA 1981); Mori v. Matsushita Electric Corp. of America, 380 So.2d 461 (Fla. 3d DCA 1980).***

Lost Profits Must be Specifically Pled

See Newberry Square Development Corp. v. Southern Landmark, Inc., 578 So.2d 750 (Fla. 1st DCA 1991).

Typical Documents in a Lost Profits Case

- Financial statements from prior years
- Balance sheet
- Income statement
- Cash flow statement
- General Ledgers
- Tax returns from prior years
- Budgets and projections from prior years
- Business Plans
- Buy-Sell Agreements
- Significant Contracts
- Previous Appraisals
- Industry studies
- Product/Service Brochures



Wrongful Act Doctrine

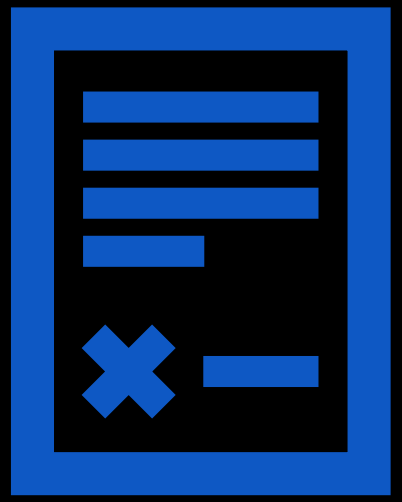
The wrongful act doctrine is a judicially created equitable principle that permits the recovery of attorneys' fees when a defendant's acts or omissions cause another party to incur attorneys' fees in maintaining or defending a lawsuit with a third party. Stated, differently, the doctrine permits "a plaintiff to recover third-party litigation expenses as special damages where the defendant's wrongful conduct caused the plaintiff to litigate with a third party.

- See FBJ Vol. 89, No. 10, December 2015



Nuts and Bolts of Damages in a "typical" business case

- Contractual
- Business Torts
- Statutory



Contractual

Business Torts



Statutory


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Liquidated Damages Clause Really a Penalty?

Liquidated Damages: Specifies a predetermined amount of damages owed to a party in the event of breach

-Determined by the parties at the time they execute a contract

-Intended to be their best estimate of the damages that would be incurred in the event of a breach of the agreement

It is necessary for the damages to be readily ascertainable at the time of the drawing of the contract in order for a liquidated damage clause to constitute a penalty.

Hutchison v. Tompkins, 259 So.2d 129 (Fla. 1972)

Pitfalls of Draftsmanship

Another pitfall into which contract draftsmen have plunged involves an attempt to fix damages in the event of a breach with an option on the part of the aggrieved party to sue for such additional actual damages as he may establish. These have been struck down as they do not involve a reasonable attempt definitively to estimate the loss

As noted by the Florida Supreme Court, “Have Your Cake and Eat it Too” types of Liquidated Damage provisions are unenforceable as an improper penalty.

See Lefemine v. Baron, 573 So. 2d 326, 329-30 (Fla. 1991); ["a 'worst case scenario' does not constitute a reasonable estimate of probable loss... 'in cases of doubt, the courts favor the construction which holds the stipulated sum to be a penalty, and limits the recovery to the amount of damage[s] actually shown'"



Don’t Forget

a. Read the jury instruction BEFORE you file the lawsuit
b. Dress for the jurisdiction;
c. Start your case with the end first
d. Hire the right expert
e. Don’t use pronouns or acronyms
f. Talk to you jury like you were talking to 8th graders
g. Don’t talk down to your jurors

h. Assume your jurors have limited knowledge of your subject matter(27% of America Adults can only perform only simple, one step operations.

   i. Counting, sorting, dates

   ii. Simple arithmetic operations

   iii. Common and simple percentages

i. Prepare a “trial binder” for the Court” and jurors is necessary

j. Tell the judge (or jury) what they need to know to reach a decision;

k. Don’t try and impress the judge (or jury) with how smart you are.

THE END.

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