



BOYAR & MILLER

PROVING COMMERCIAL DAMAGES

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COMMERCIAL DAMAGES

Benefit of the Bargain Damages

- The difference between what one expected to receive and what he actually received.
- Intended to put the party in the same economic condition he would have been in had the defendant performed as promised
- May include lost profits in some cases
- Measurement depends on facts of the case
- Available in cases for:
 - Violations of the DTPA
 - Breach of Contract
 - Common Law Fraud



COMMERCIAL DAMAGES

Benefit of the Bargain Damages (Examples)

- DTPA - The difference between the value as represented and actual value received. See *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997)
- Breach of Contract – Difference between the value of the performance promised and the value of the performance actually tendered. See *Reynolds Metal Co. v. Westinghouse Elec. Corp.*, 758 F.2d 1073, 1079 (5th Cir. 1985)
- UCC Contract actions – measure of damages depends on who is the breaching party. See Tex. Bus. & Com. Code § 2.713(a); 2.708(a).



COMMERCIAL DAMAGES

Proving Benefit of the Bargain Damages

- Lay Testimony – i.e. testimony by plaintiff and/or defendant about value; evidence of purchase price, contract price, fair market value, etc. See, e.g., *Integrated Title Data Systems v. Dulaney*, 800 S.W.2d 336 (Tex. App.—El Paso 1990, no writ).
- Expert Testimony – generally necessary in cases involving real estate or commercial property to show the difference between the value represented and value received.



COMMERCIAL DAMAGES

Out-of-Pocket Damages

- The difference in value between what was paid and what was received
- Compensates for what was actually paid, not lost profit



COMMERCIAL DAMAGES

Proving Out-of-Pocket Damages

- Amount paid by plaintiff can be used in place of the value as represented by the defendant. See *Arkoma Basin Explor. Co., Inc. v. FMF Assocs. 1990-A, Ltd.*, 118 S.W.3d 445, 459 (Tex. App.—Dallas 2003)
- Value of Plaintiff received is determined by fair market value. See *Traylor v. Gray*, 547 S.W.2d 644, 657 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.)
- Both lay and expert testimony can be used.



COMMERCIAL DAMAGES

Loss of Goodwill

- Defined as “the advantage or benefits...acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant and habitual customers on account of its local position, or common influence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.” *Taormina v. Culicchia*, 355 S.W.2d 569, 573 (Tex.Civ.App.—El Paso 1962, writ ref’d n.r.e.)
- May be sold, damaged, or destroyed. *Id.*
- Property of the business and not the personal property of the owner or director of the company. *Id.*



COMMERCIAL DAMAGES

Proving Loss of Goodwill

- Present evidence of existence and value of goodwill
- History of Business
- Lay testimony can be used to prove existence of goodwill and sometimes sufficient to prove value of goodwill. See, e.g., *Scott v. Doggett*, 226 S.W.2d 183, 188 (Tex.Civ.App.—Amarillo 1949, writ ref'd n.r.e.)
- Expert testimony may be used to prove value of goodwill, for example use of IRS formula for goodwill by expert



COMMERCIAL DAMAGES

Loss of Credit/Damage to Credit Reputation

- To recover, plaintiff must show that its inability to obtain a loan “resulted in injury and proof of the amount of that injury.” *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53 (Tex. 1998)
- Damages must be a “natural, probable, and foreseeable consequence” of the defendant’s conduct. *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 688 (Tex. 1981)
- Amount of damages must be established with the degree of certainty to which it is susceptible, i.e. they do not have to be proven by exact calculation. *Commonwealth Lloyd’s Ins. Co. v. Thomas*, 825 S.W.2d 135, 146 (Tex.App.—Dallas 1992).



COMMERCIAL DAMAGES

Loss of Credit/Damage to Credit Reputation

• Damages are shown when:

- 1) A party's loan is actually denied or a higher interest rate is charged;
or
- 2) Where a party who could obtain a loan from a bank without collateral before a disagreement with a creditor may afterwards only obtain a loan if collateral or some other condition is imposed.
Citizens Nat'l Bank v. Allen Rae Invs., Inc., 142 S.W.3d 459, 481
(Tex.App.—Fort Worth 2004, no pet.)



COMMERCIAL DAMAGES

Direct vs. Consequential Damages

- Actual damages can be direct or consequential.
- Direct damages “compensate the plaintiff for the loss, damage, or injury that is conclusively presumed to have been foreseen or contemplated by the party as a consequence of the breach.” *Wade & Sons Inc. v. Am. Standard, Inc.*, 127 S.W.3d 814, 823 (Tex.App.—San Antonio 2003, pet. denied).
- Consequential damages “arise naturally, but not necessarily from the breach, are so unusual as to normally vary with the circumstances of each individual case, and must be shown to have been contemplated or foreseen by the parties.” *Hess Die Mold, Inc. v. American Plasti-Plate Corp.*, 653 S.W.2d 927 (Tex.App.—Tyler 1983, no pet).



COMMERCIAL DAMAGES

Direct vs. Consequential Damages

- Contractual provisions waiving or limiting consequential damages are common.
- Recovery of consequential damages prohibited by statute in certain circumstances.



COMMERCIAL DAMAGES

Direct vs. Consequential Damages

- Out-of-Pocket Delay Costs
 - Recoverable as direct and foreseeable damages. *See, e.g., Anderson Dev. Corp. v. Coastal States Crude Gathering Co.*, 543 S.W.2d 402, 405 (Tex.Civ.App.—Houston [14th Dist.] 1976)
- Interest Expense
 - Considered direct damages in Texas. *See, e.g., Baldwin v. Smith*, 586 S.W.2d 624, 631 (Tex.Civ.App.—Tyler 1979)
 - Other jurisdictions disagree.



RISKY BUSINESS:

Proving Lost Profits to a Reasonable Certainty

Reasonable Certainty – A National Standard

- “Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”
Restatement of Contracts (Second) § 352.
- Proposition that one need not prove the exact amount of earnings lost, but the evidence must not be speculative
- Amount of lost profits must be shown by competent evidence with reasonable certainty.
- Problems arise due to various circumstances of different types of businesses and life cycle of business.



RISKY BUSINESS:

Proving Lost Profits to a Reasonable Certainty

- Numerous opportunities for defendant to derail lost profits claim
- Many challenges to expert testimony
- Lost profits claims rejected on no evidence standard on multiple occasions. *See, e.g., Teletron Energy Mgmt., Inc. v. Texas Instruments, Inc.*, 838 S.W.2d 305, 310 (Tex.App.—Houston [14th Dist. 1992).
- Evidence must be probative and sufficient – reasonable certain evidence of lost profits is a fact intensive determination.



RISKY BUSINESS:

Proving Lost Profits to a Reasonable Certainty

Tort v. Contract

- Tort – Claimant must prove lost profits were foreseeable and actually caused by the defendant's conduct.
- Contract – Claimant must prove lost profits were within the contemplation of the parties at the time of contracting.



RISKY BUSINESS:

Proving Lost Profits to a Reasonable Certainty

Defining the Parameters: Southwest Battery and Texas Instruments

- *Southwest Battery v. Owen* – new and unestablished enterprises
- *Texas Instruments, Inc. v. Teletron Energy Management* – experimental technology
- *VinCard A.S. v. Merrimac Hospitality Systems, Inc.* – exclusive manufacturers



RISKY BUSINESS:

Proving Lost Profits to a Reasonable Certainty

The Uncertainty of Reasonable Certainty

- What constitutes reasonable certain evidence of lost profits is a fact intensive determination.



BENCHMARKS & HYPOTHETICALS

Analytical Approaches to Proof of Lost Profits

A Fact Intensive Determination

- Lost profits may be calculated in many ways
- Ex. Multiplying expected revenues by gross profit margin, subtracting incremental expenses, and applying a discount rate
- Critical to understand that the *net* profit loss is the correct measure of damages.



BENCHMARKS & HYPOTHETICALS

Analytical Approaches to Proof of Lost Profits

Some Real Business Records to Review

- Management Experience and Expertise
- Availability of Capital
- The Business Plan
- The Competition
- Is It an Established Business Activity?



BENCHMARKS & HYPOTHETICALS

Analytical Approaches to Proof of Lost Profits

A Tool: To Regress or Not

- Statistical techniques can assist in assessing the relative influence of multiple variables on a single variable, such as lost profits
- May help jury to analyze and evaluate large volumes of financial and market data to reach a finding on lost profits



BENCHMARKS & HYPOTHETICALS

Analytical Approaches to Proof of Lost Profits

Discounted Cash Flow Model

- Most commonly-used accounting method used to calculate lost profits
- Important assumptions:
 - Growth Rates – Will it Grow?
 - Discount Rates



BENCHMARKS & HYPOTHETICALS

Analytical Approaches to Proof of Lost Profits

Discounted Cash Flow Model

- Three Model Types
 - 1) Before and After – calculates lost earnings by comparing profit history before and after a damaging event
 - 2) The Yardstick – comparative approach; relies on evidence of comparable companies in comparable industries
 - 3) Loss of Business Opportunity or Lost Market Share – used for companies without an established history or without a history of losses



CRITICAL REVIEW OF UNDERLYING ASSUMPTIONS

Drill Deep into the Facts

Methodology chosen must utilize objective facts and data to show a complete calculation of net profits lost



CRITICAL REVIEW OF UNDERLYING ASSUMPTIONS

Drill Deep into the Facts

Holt Atherton – Show Your Work

- Must provide evidence of one complete calculation of lost profits
- Be careful not to provide only pieces of several different methods



CRITICAL REVIEW OF UNDERLYING ASSUMPTIONS

Drill Deep into the Facts

Szczepanik – How Do You Know Your Customers Will Stay?

- Must present evidence to demonstrate that clients would have stayed or at least what percentage would have stayed and for how long



CRITICAL REVIEW OF UNDERLYING ASSUMPTIONS

Drill Deep into the Facts

Capital Metro – Can They Even Do It?

- Experts must support their opinions and conclusion with actual data.
- Courts will critically review an expert's underlying assumptions to determine if they are based on objective facts.
- Experts must independently verify assumptions.



CRITICAL REVIEW OF UNDERLYING ASSUMPTIONS

Drill Deep into the Facts

Bright v. Addison

- Illustrates the use of relevant, competent evidence to support a lost profits calculation



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