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The Basics of Claiming and Proving Damages for Lost Profits

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Damages for lost profits are a common tool in business litigation, used by litigants to increase a defendant's potential exposure, particularly in cases in which the plaintiff's provable, out-of-pocket expenses may be limited. Damages for lost profits can be awarded to established businesses with a track record of profits, and also even in cases involving businesses without a proven history of profits.

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The Florida Supreme Court, and cases from the Florida District Courts of Appeal, have set forth the standard for entitlement to lost profits damages. The elements for a claimant to prove such damages are that: (1) the breaching party caused the loss and lost profits were a direct result of the defendant's actions; and (2) the amount of the lost profits can be adequately determined by some standard so as to be shown with a reasonable degree of certainty, see, e.g., *WW Gay Mechanical Contractor v. Wharfside Two* from the Florida Supreme Court in 1989.

SHUTTERSTOCK

PROVING LOSSES

As the Fourth District Court of Appeal has explained, "lost profits are typically proven by one of two methods: (1) the before and after theory; or (2) the yardstick test," as in *Victoriana Building v. Fort Lauderdale Surgical Center* from the Fourth District Court of Appeal in 2015..

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The before and after theory works just the way it sounds—by utilizing a comparison of the business before versus after the breach of contract or negligent act complained of by the plaintiff. This test applies to circumstances where a business is paused or put on hold due to an act by the defendant, and not when the business fails to open or is shut down permanently.

The yardstick test, on the other hand, is used when a business has not been established long enough to compile an earnings record to adequately show lost profits. This test compares the profits of businesses that are closely comparable to the plaintiff's business in order to arrive at an amount of lost profit damages awardable to the plaintiff. However, even when using the yardstick test, the amount of claimed lost profit damages still "must be established with a reasonable degree of certainty and must be a natural consequence of the wrong," and also "cannot be mere speculation or conjecture," as in *Katz Deli of Aventura v. Waterways Plaza*, in 2013.

Ultimately, the claimant must use a reasonable "yardstick" to "provide competent evidence sufficient to satisfy the mind of a prudent impartial person as to the amount of profits lost as a result" of the claimed breach or act of negligence, as in *Sostchin v. Doll Enterprises* in 2003.

ALLEGING LOST PROFITS

When considering whether to assert a claim for lost profits, it is important to remember that lost profits are generally considered to be special or consequential damages that must be specifically alleged in the complaint. Indeed, there are cases holding that if lost profits are not specifically alleged in the complaint, they cannot be awarded as damages. See, e.g., *Safeco Title Insurance v. Reynolds* from the Second District Court of Appeal in 1984. However, lost profits may sometimes be recoverable as general, rather than special or consequential, damages if "they flow directly and immediately from the breach of a contract." See *HCA Health Services of Florida v. CyberKnife Center of Treasure Coast* from the Fourth DCA last year. Therefore, this issue should be fully analyzed before the filing of a complaint seeking any sort of lost profits damages.

Finally, crucial to a lost profits case is the selection of a proper expert witness to testify as to the claimed lost profits. Some certified public accountants are qualified to testify as expert witnesses, and are often appropriate to testify as to amounts lost in a lost profits case. Additionally, depending on the substantive nature of the claimed lost profits, it may be appropriate to retain an expert specializing in the same field as the business which is claiming lost profits.

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