

# Defending Commercial Damages<sup>†</sup>

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## I. INTRODUCTION

The devil is in the details of commercial loss damages. Minimizing damages in a commercial loss case requires three core competencies, the last of which can be stated as a contingency:

- (1) knowledge of the permissible measures of damages in the applicable jurisdiction;
- (2) knowledge of financial terms; and
- (3) knowledge of how to read and dissect financial documents to identify the basis and flaws in the sums asserted as damages. But, failing that competency, minimizing damages then requires
- (4) knowledge of and access to experts who can assist in the dissection of financial documents.

This article addresses commonly asserted damages in commercial litigation and offers strategies for preparing and arguing defenses to various types of damages. A brief discussion regarding insurance exclusions and how those exclusions interface with damages claims is included in this analysis. However, defense counsel are encouraged to discuss any coverage concerns with coverage counsel, armed with full knowledge of the specific terms of any applicable insurance policy.

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<sup>†</sup> Submitted by the author on behalf of the FDCC Commercial Law Section.



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## II.

### TYPES OF DAMAGES CLAIMED IN COMMERCIAL LITIGATION

Commercial litigation is an expansive substantive area. Nonetheless, the types of damages claimed can be categorized into broad groupings that assist in understanding the strategy to employ when attacking these damages:

- Business Interruption
- Loss of Use
- Out of Pocket and Clean-Up Costs
- Finished and Unfinished Material Costs
- Cost of Repair
- Extra Expense for Mitigation of Losses
- Benefit of the Bargain
- Equitable Relief – Constructive Trust.

The foregoing categories are discussed below. The plaintiff, however, is not limited to just one category of damages in a property damage case. The important point to bear in mind when considering types of damages is that the theory of liability determines which categories of damages are permissible, as well as the date on which the damage category is valued.

As a general rule, commercial losses are valued on the date of the damage. Various jurisdictions may provide for prejudgment interest on the damages but the application of prejudgment interest does not change the valuation date. Also, as a general rule, the burden of proof is on the plaintiff to establish the damages proximately caused by the defendant. Two notable exceptions to these general rules are found in cases alleging a breach of fiduciary duty.

In fiduciary duty cases, particularly those seeking equitable relief in the form of a constructive trust, the trial date is used as the valuation date, and the defendant bears the burden of proof to establish those profits or gains that cannot be traced back to the breach of fiduciary duty. A defendant's failure to allocate or segregate the damages in order to isolate the gains from the breach of fiduciary duty results in a presumption in favor of plaintiff that all gains are attributable to the breach.

Before undertaking the defense of damages in any case, counsel should obtain and review the jury instructions regarding damages for the applicable jurisdiction. The court-approved jury instructions establish the boundaries for identifying which losses may be claimed in the litigation. For example, in a property damage case, it is rare to find a jurisdiction that permits recovery of replacement costs. And in a breach of contract case, the plaintiff can recover only the benefit of the bargain as measured at the time of breach; any subsequent profit or gain to the defendant, or other measure of damages, is not recoverable. Armed with an outline of which damages are allowed, defense counsel then can focus the attack.

#### *A. Business Interruption*

Business interruption damages seek to compensate for the difference between what happened to the plaintiff's profits or value and what would have happened but for the disruption caused by the defendant. The concept is a simple one but the methods of calculation vary. These can produce widely different numbers between the plaintiff and defense experts if counsel is unaware of the proper methodologies for calculating business interruption losses. The types of cases in which these damages are asserted include fire, nuisance, product liability, negligence, loss of access, loss of use of services, fraud, and tortious interference with a business relationship. These damages can be found in non-tort claims such as breach of contract as well.

The methods for calculating business interruption damages fall into two categories: lost profits and lost value (capital). The lost profits method calculates the losses based on pre-tax net profits rather than sales or gross profits. In calculating net profits, the analysis must distinguish variable from fixed costs and adjust accordingly. The predominant view is that fixed costs (such as overhead, depreciation and interest) are not deducted, but there is an accounting allocation view that takes the opposite approach. Variable costs include items such as sales costs, goods sold costs, and other expenses that vary depending on volume. The lost profits method examines the past pre-tax net profits and endeavors to predict the future pre-tax net profits, but for the interruption.

In contrast, the lost value method focuses on valuing the company to measure the reduction in capital due to the interrupting event. Damages sustained that outlive the interruption

can include reduced working capital, lost opportunity, and permanently lost customers. The company should be assessed both as to its value as an ongoing concern (value alive) and as if the company assets (liquid assets, real estate, franchise value, goodwill) were put to another use or liquidated (value dead).

Business valuation involves two approaches: the income approach and the market approach. The income approach has four recognized methods of calculating lost value: (1) capitalization of earnings method, which measures the economic benefit converted to value by dividing by a capitalization rate; (2) discounted cash flow method, which is the present value of future expected net cash flows that is calculated using a discount rate; (3) discounted future earnings method, which is the present value of expected future earnings discounted by using a discount rate; and (4) excess earnings method, which is the sum of the value of the assets, derived by capitalizing excess earnings and the value of the selected asset base. The market approach to business valuation has two recognized methods: (1) the guideline public company method, which uses market multiples derived from the market price of similar publicly traded companies, and (2) the merger and acquisition method, which seeks to assess value by using market multiples derived from the acquisition price of similar companies.

The field of business valuation recognizes only the methodologies described above. However, the ability to manipulate the value based on the comparative data of other companies, the time period used, the selection of discount rates and/or multiples, and adjusting for the particularities of the plaintiff company allows a valuation expert to present just about any value, high or low, that serves the client's purpose.

#### B. *Loss of Use*

The loss of use category of damages covers the value of the item while it is unavailable to the plaintiff. For example, if a machine is damaged in a fire and sent for restoration and repair, plaintiff can claim the value of the loss of use provided a non-speculative means of valuing the loss can be established. That might occur if the loss is measured by the cost of renting a similar product.

#### C. *Clean-Up Costs*

To the extent the loss involves property damage, such as a fire or building collapse, there necessarily will be a category of damages consisting of the clean-up costs. Typically these costs include removal of the debris, compensation of the responding fire and police departments, and the expenses associated with hiring personnel to sort through the damage and identify and dispose of items that suffer total loss.

#### D. *Finished and Unfinished Material Costs*

A property loss at a business usually will involve damage to finished and unfinished materials. The fair market value of those materials becomes part of the damages. The transportation costs to bring new unfinished materials to the company also are properly included. Lost profits on the goods should not be part of this element of damages, however.

### E. *Cost of Repair*

The cost of repairing to the condition in which the product or site was found before the event is a recoverable element of damages. However, where the cost of repair exceeds the value of the property, then alternative measures of damages must be considered as permitted by the jurisdiction where the loss occurred. Cost of repair properly includes the costs to ship the product to a repair facility, if necessary.

### F. *Extra Expense for Mitigation of Losses*

If the plaintiff spent money to avoid further damage or loss, then the amount spent or the equivalent value is compensable. The plaintiff must establish the value of the expense attributable to the mitigation and must establish that the extra expense was reasonable and necessary to avoid further loss.

### G. *Benefit of the Bargain*

The “benefit of the bargain” rule applies to contract damages. A successful plaintiff is entitled to the value of what was bargained for in the contract, measured at the time of the breach. For example, if the plaintiff contracted for a one-story building but it collapsed near completion, then the plaintiff is entitled to the cost of building a one-story building to the point of near completion. The plaintiff is not entitled to a completed one-story building as damages, however.

### H. *Equitable Relief – Constructive Trust*

In cases alleging breach of fiduciary duty or in cases alleging unjust enrichment through the acquisition of ill-gotten gains, plaintiffs often seek equitable relief in the form of a constructive trust. A constructive trust imposes on the defendant the fiduciary duties to account for and trace the funds that were allegedly improperly diverted or acquired through ill-gotten gains. These are identified through to the trial date. The defendant must then disgorge the original sum of money and all the appreciated value on those funds to the date of trial. Defendant bears the burden to isolate the allegedly diverted monies and trace them through proper accounting techniques to determine the value. Using this form of relief, the plaintiff is allowed to recover the original funds as well as any profit on the funds acquired by the defendant. For example, if the defendant used the assets of a business jointly owned with other partners to start his own company, and the company’s value is now one hundred times the value of the original asset, then the defendant must disgorge the original asset value and the one hundred-fold increase in company value—unless the defendant can establish that the company growth was attributable to other assets contributed to the company.

## III. TERMINOLOGY

One of the obstacles that must be overcome in defending commercial damages is the obfuscation caused by the use of unfamiliar financial terms. Oftentimes, companies do not

account for net profits, overhead, fixed and variable costs, sales data and the like in a universal format. Similarly, plaintiffs' experts use and define terms to suit their own purpose.

Counsel must be alert to these potential manipulations of the terms and the data. One reliable way to begin the analysis is by learning and using the terms contained in the *International Glossary of Business Valuation Terms 2001*.<sup>1</sup> The *Glossary* was developed to guide business valuation practitioners by memorializing the body of knowledge that constitutes the competent and careful determination of value, including how that value was determined. The *Glossary* is the joint product of the American Institute of Certified Public Accountants, the American Society of Appraisers, the Canadian Institute of Chartered Business Valuators, the National Association of Certified Valuation Analysts, and The Institute of Business Appraisers. Each of these organizations has adopted a code of ethics, which includes the duty to communicate the valuation process and conclusion in a manner that is clear and not misleading. The duty is advanced through the use of terms whose meanings are clearly established and consistently applied throughout the valuation profession.

Similarly, the accounting profession standards define the basic terminology used in financial statements. Counsel is encouraged to obtain a basic accounting text and work with the standardized definitions for those terms found in financial statements. For example, the usual insurance definition of "net profit" measures the net profit or loss before taxes, in contrast to the accounting definition of net profit or loss, which denotes the net profit after taxes.

#### IV. STRATEGIES FOR DEFENDING DAMAGES

##### A. *Documentation*

A thorough attack on damages cannot begin until defendant has obtained all the pertinent documents from the plaintiff. Too often, the defense is content with the plaintiff's independent adjuster's report or the plaintiff-company's report on the extent of the financial loss suffered by the company. It is unacceptable to rely without question on the plaintiff's loss and value calculations, however. Instead, the items described below should be obtained to thoroughly analyze the plaintiff-company's status pre- and post-loss. Most of these items must be obtained from the plaintiff, but information on the economy, the industry, and the competition can and should be researched independent of and in addition to the plaintiff's production of data in discovery. The following is a list of items that counsel should obtain:

- Company financial records: balance sheets, income statements, cash flow statements, sales histories and breakdowns, cost histories and breakdowns, general ledgers for at least five years pre-loss and for all years post-loss. Request data

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<sup>1</sup> Business Valuation Resources, LLC, [www.BVLibrary.com](http://www.BVLibrary.com), (last visited Nov. 2006).

identifying variable and fixed costs, and information explaining how to understand the data (such as how sales are booked, as well as the marketing, purchasing, inventory and sales processes). The interval of the data may be important to the litigation so be sure to specify whether daily, weekly, monthly or annual data is required.

- Company operating information: descriptions of operations, budgets and projections, marketing plans, market research, brochures as well as product descriptions, company recalls or regulatory actions (product or financial) that may skew financial results for any year in question. The request also should include company information regarding its competition.
- Sales projections: pro formas, bases for projections, description of products and services and competitive differences, customer profiles and demographics, sales history analysis including patterns, growth, product and market shifts, and seasonal and other variations.
- Company financial projections prior to the loss: data regarding costs and their relationship to sales, historical ratios, industry norms, and management experience compared to the competition.
- Information to identify the disruption period: closings, openings, outsourcings, out of business determinations, expansions, new product lines, and closure of old product lines.
- Audited and regulated information: annual reports, SEC filings if plaintiff is a publicly traded company, auditor files, and counsel's letters to the auditors.
- Inventory of losses claimed, with depreciation information for each tangible item claimed.
- Independent adjuster evaluation of the loss and identification of the inventory, as well as all documents relied on by the same, including receipts for any item.
- Insurance payments for the loss and supporting schedules for deductions and adjustments made.
- Plaintiff's bank loan applications to determine if appraisals or valuations were conducted on the business or assets.
- Plaintiff's insurance underwriting files, to determine if appraisals or valuations were conducted on the business or assets, and to determine inventories of assets.

- Customer lists for verification of the change in customers pre- and post-occurrence, including any change in customer demographics.
- Records of all costs incurred to mitigate damages.
- In the event the loss includes rebuilding or repairing premises, the plans for the rebuild and/or repair, to determine if a betterment has occurred or the design was changed, including bids obtained and information concerning the timing of the rebuild/repair.

### B. *Analysis of the Data*

Plaintiffs in the insured loss arena typically submit the appraisal on the inventory performed by an “independent adjuster.” But this title can be misleading. The adjuster often is anything but independent since the company typically is hired by the insured to gather documentation in order to present a claim. Equally often, a fluff-factor is built into the inventory counts, original costs, and replacements costs, sometimes justified by the adjuster because the actual data was destroyed in the loss. If plaintiff is relying on an independent adjuster report, then a line-by-line analysis should be undertaken to identify obsolete equipment, overstatements in value, duplication, inventory counts with no basis in fact, and the absence of depreciation calculations.

If the plaintiff is relying on an insurance company’s adjustment of the loss for the damage claim, the analysis should follow the same lines as the analysis of the “independent adjuster” report. The insurance company-retained adjuster is more likely to use conservative figures. However, the insurance company adjuster typically will evaluate the claim for replacement costs rather than actual fair market value at the time of the loss. It is unlikely that the adjuster has gathered the information on the fixed assets to value actual cash value. The replacement cost analysis can overstate the damages by fifty percent or more, depending on the age and use of the fixed assets, and the quantity of work in process on the premises.

If business interruption damages or sale or merger damages are being asserted, then the defense must retain a valuation expert to analyze the data and assist counsel in preparing the cross-examination of the plaintiff’s valuation expert. A valuation expert is expensive, however, and costs in the six figures are not unusual to retain this type of expert.

### C. *The Use of Experts*

The foregoing analysis focused on retention of a valuation expert if business interruption damages are being asserted or if the case involves the sale or merger of a business. Other types of experts have proven very useful in minimizing damages in a commercial loss case. If the case involves significant destruction to the premises or fixed assets, the following experts should be considered.

Of primary importance is an expert regarding the value of the industry-specific production equipment. This type of expert can assist in determining whether the production equipment should be repaired, and if so, at what cost. The expert can advise whether replacement can

occur via the secondary used equipment market—which is highly likely—or whether the production process is obsolete such that there is no fair market value to the fully depreciated equipment. For example, a fire loss in a printing company might damage an old color press but that process for color printing has been replaced with high-speed digital printing. An expert in the printing business or in the secondary market for buying and selling color printers can establish fair market value (or the lack thereof).

An expert regarding the value of work in process or stored finished goods is also critical. This type of expert can assist in determining whether there is a market for the inventory that was damaged, whether it can be reworked and sold (and if so at what price), or whether the inventory was excess with no market value. For example, a manufacturer might have an inventory of thousands of new service uniforms at the time of loss. Though there was no willing buyer for the uniforms at the time, the manufacturer attempts to obtain the full cost and profit on the unsold items. An expert can be used to refute the claim. In a second example, an iron foundry stores its customers' molds and forms on its premises, in many cases dating back decades of years. A fire then destroys the foundry and the molds, leaving the forms unusable. In many instances, however, the molds and forms were held for obsolete parts and had been abandoned by their original owners. An expert can be used to refute the claim for the full replacement value of the unique forms and molds.

#### D. *Expert Depositions*

It is recommended practice to work with retained experts in preparing for the deposition of the plaintiff's expert and, if possible, to have the defense expert in attendance. As noted above, the ability to obfuscate the opinions, data, and bases through the misuse of terminology or the manipulation of data works to the expert's advantage in the deposition unless defense counsel is well-armed with questions, terminology and an understanding of the opinions.

One of the earliest areas of inquiry should involve defining the terms used by the expert in the analysis and opinions. If the expert deviates from standardized terminology, successive questions should be asked concerning how the analysis would differ if the terms were defined according to the standards and ethics of the profession.

Another area of inquiry should focus on the expert's background. Too often, the independent adjuster attempts to testify regarding inventory, valuation and depreciation without any personal knowledge of what was present at the time of the event, and without any expertise into the value of that industry's assets and goods.

A third area of inquiry should involve the calculations and formulas used and the source of the information. Particular attention should be focused on whether pre-tax or after-tax numbers are being used and then compared to other companies or other company records, measured by a different standard.

If a business valuation is involved, the selection of comparable companies should be fully explored as well, with particular attention paid to those companies considered by the expert but then omitted in the analysis. Oftentimes, the expert will discard highly successful companies relative to the plaintiff because including such companies would connote poor

performance by the plaintiff company, thereby lowering its value. A valuation expert can explain how comparable companies are identified in a business valuation.

Likewise, counsel should explore the discount rates applied if business interruption loss is based on future sales or income projections. Selection of the discount rate should be tailored to the plaintiff-company's actual historic data as well as the industry and macro-economic trends. Deviations from these benchmarks should be identified and explored with the expert. Additionally, if the jurisdiction permits prejudgment interest, it is important to determine if the expert has adjusted the costs to the date of trial. In doing so, the plaintiff could be getting a double recovery by submitting the value between the occurrence date and the trial through the expert's testimony, and then seeking prejudgment interest.

A further area of inquiry covers mitigation of damages and set-offs. These issues likely will be raised as affirmative defenses. Counsel should determine if the plaintiff's expert adjusted for the failure to mitigate the loss or for set-offs not attributable to collateral sources.

Finally, if the plaintiff's expert appears to have valued the real estate, fixed assets, or inventory on a replacement cost basis, the examiner should identify the bases for the values. Included are the data consulted to obtain costs, and the bases on which the expert determined the depreciated value of the items destroyed.

#### *E. Legal Limitations on Commercial Damages*

As a matter of general rule, the "economic loss" rule limits damages in commercial litigation. The economic loss rule provides that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim absent an independent duty of care under tort law. The economic loss rule does not focus on the type of damages sought, but on the source of the duty. The rule exists to preserve the distinction between tort and contract law, and to allow parties in commercial transactions to allocate any incidental risks as they see fit. Therefore, economic damages caused to a plaintiff by a product are limited to recovery pursuant to the contractual remedies and warranty claims (to the extent those warranties have not been disclaimed).

Damages that are consequential to the alleged product defect are within the scope of the economic loss rule. Similarly, damages incurred to remediate the risks of personal injury created by the product defect are covered by the economic loss rule. Even a contract that contains a provision for the assertion of tort claims falls within the economic loss rule if the clause does not indicate that the defendant owed a duty independent of any contractual obligations.

The term "product," as used throughout this article, has been applied expansively to any contractual relationship through which the parties sustain an economic loss. Strict liability and negligence claims cannot be brought against the manufacturer by the purchaser of the product. Similarly, construction defect claims cannot be made outside the economic loss rule among contracting parties. However, third parties who do not have a contractual relationship with the alleged tortfeasor are not limited in the liability theories that may be asserted or the damages sought, which may be collected if proximately caused by the defendant. For

example, in the case where an aircraft was damaged as a result of an emergency landing due to an allegedly defective engine, the only available remedy was breach of warranty where there was no allegation of personal injury or damage to property other than the aircraft. If a passenger had been injured during the landing, however, the passenger could have filed a product liability and negligence action against the engine manufacturer and would not be limited to economic losses.

To offer a different example, assume that a city entered into a contract with a construction company to expand the city's water treatment plant. The project was delayed because water leakage from the underground holding tank destabilized the bedrock and caused the tank to move. The city terminated the contract, hired new engineers, and then sued for the cost of demolishing the original installation and the cost of installing the redesigned system. The construction company in that situation is entitled to lost profits from its termination and for nonpayment for the work performed. The city, however, is entitled only to the monies required to return it to its original position (had the breach of contract not occurred). The city cannot recover damages for negligence and cannot recover the cost of demolishing the original design or the cost and benefit from rebuilding to the new specifications. The economic loss rule bars the former, and contract damage limitations bar the latter.

The lesson here is to carefully scrutinize the damages claimed by the plaintiff contracting party to determine if the plaintiff is attempting to shift the cost of its betterment to the defendant. It is also important to determine if the plaintiff's damage claim attempts to recover more than the benefit of its bargain. Finally, plaintiff must present evidence that connects the specific loss to conduct by the defendant. If plaintiff is unable to allocate the cost of the loss specifically attributable to the defendant, then plaintiff has failed to meet the burden of proof for economic loss damages.

#### F. *Avoid Legal Confusion*

Two potential areas of confusion in the preparation of a commercial damages defense should be noted. Specifically, these are: (1) indemnity contracts with provisions for limits on recoveries, and indemnification provisions potentially covering the plaintiff for its own negligence; and (2) the erroneous application of insurance policy damage exclusions to an analysis of the verdict potential for the litigation. These two areas are discussed below.

##### 1. Indemnity Contracts

As a general rule, parties can contract to indemnify another party in the event a loss is asserted. However, an indemnification agreement generally will not be construed to cover an indemnitee for its own negligent acts with respect to claims by third parties, absent a specific and express statement in the contract to that effect. Therefore, if the contract does not specifically indemnify the plaintiff for its own negligence, then the defense should plead the affirmative defense that acts and omissions on the plaintiff's part caused the loss or specific aspects of the damages claim, to the extent specific claims can be isolated. If the contract does indemnify the plaintiff for its own acts and omissions, then those damages, losses, and expenses must be included in preparing the damages defense.

## 2. Insurance Policy Exclusions

In determining verdict potential and defending damages, counsel must be careful not to overlook damages that will be presented at trial by the plaintiff. The potential for this mistake occurs when counsel confuses policy exclusions with admissible damages in the litigation. To insure against that possibility, no damage claim should be ignored.

An analysis of what damages are covered by the policy is warranted only in two situations: (1) in a settlement conference where the obligation to pay damages is limited to the covered claims; and (2) after a verdict and exhaustion of appeals if a judgment must be paid. The potential policy exclusions commonly found in construction defect litigation are several:

- the “your product” exclusion that eliminates coverage to the extent the property that was damaged was the insured’s product or the damage arises out of such product, unless the product is real property;
- the “your work” exclusion that eliminates coverage for the insured’s completed work or operations, unless the work was performed by a subcontractor;
- the “professional services” exclusion, which eliminates coverage if the insured’s contribution to the project constitutes a service or a product; and
- the “impaired property” exclusion, which excludes certain defined property that has not been physically injured.

The economic loss rule has nothing to do with coverage; it is purely a tort remedial doctrine and should not be confused with policy limitations. Thus, it is not true that a loss giving rise to a breach of contract or warranty claim can never constitute “property damage.”

A loss actionable as a breach of contract can be an “occurrence.” While it is true that Comprehensive General Liability policies usually do not cover claims arising out of an insured’s defective work or products, this situation results from the application of the business risk exclusions, not because there is no “occurrence.”

### *G. Attorneys’ Fees, Costs and Prejudgment Interest*

Counsel should not overlook claims for attorneys’ fees and costs when preparing the defense to damages. The plaintiff has the burden of proving the reasonableness of the fees and costs. Counsel should insist upon documentation during discovery and fully explore the matter at deposition, if necessary, to determine the relationship between the work billed and the claims in the litigation. The mere insistence on discovery concerning these damages can sometimes chill the plaintiff’s pursuit of these sums.

Additionally, when calculating the potential judgment in the case, do not overlook pre-judgment interest. An analysis of the local jurisdiction's interest provisions is required to determine whether all elements of damages are eligible for pre-judgment interest or whether they are limited to only certain categories of damages.

V.  
CONCLUSION

Commercial litigation damages can be effectively minimized. With adequate preparation and attention to the details of claimed losses and the bases for assigning costs, counsel will insure that the defendant pays only those sums that are properly allocable to its conduct.

# FUTURE MEETINGS

2008

## **WINTER 2008**

**Sunday, February 24 – Sunday, March 2**

Westin Our Lucaya

Grand Bahama Island, Bahamas

## **ANNUAL 2008**

**Sunday, July 27 – Sunday, August 3**

Fairmont Banff Springs

Banff, Alberta

## **WINTER 2009**

**Saturday, February 21 – Saturday, February 28**

Grand Hyatt Kauai Resort & Spa

Kauai, Hawaii

## **ANNUAL 2009**

**Sunday, July 26 – Sunday, August 2**

The Greenbriar

West Sulfur Springs, West Virginia

2009