

**NEW YORK**  
COMMERCIAL LITIGATION INSIDER  
COMPLETE COVERAGE YOU CAN ACCESS ANYWHERE

ACCESS NOW



@NYComLitInsider

# New York Law Journal

ALM Properties, Inc.

Page printed from: [New York Law Journal](#)

[Back to Article](#)

---

## The False Hope of Lost Profits Damages

Joshua S. Bauchner

New York Law Journal

2013-09-27 00:00:00.0

Lost profits damages are frequently sought by clients who have suffered a business interruption due to another's negligence or contractual breach. However, courts often are reluctant to award such damages finding they are speculative and "icing"—in that they do not make the prospective plaintiff whole, but instead permit a surplus recovery in addition to compensatory or consequential damages. For these reasons, courts have restricted lost profits damages, requiring plaintiffs to demonstrate their loss with "reasonable certainty" and ensuring such losses are not recoverable under other theories or in other ways. This article is intended to guide the practitioner through the pitfalls of lost profits damages and ensure the focus is on recovery, regardless of how it is characterized.

As an initial matter, cases addressing lost profits distinguish between damages resulting from tortious conduct and those arising from a breach of contract. Although in both situations a plaintiff has the burden of proving lost profits with reasonable certainty, the underlying causes of action recommend separate treatment.

### Tortious Conduct

To establish a claim for lost profits resulting from tortious conduct, a plaintiff must show: (1) the damages to a reasonable certainty, and (2) the causal relationship between defendant's negligence and the damage. See *Behrens v. Metro. Opera Ass'n*, 18 A.D.3d 47, 49, 794 N.Y.S.2d 301, 303 (1st Dept. 2005); *Dunlop Tire & Rubber v. FMC*, 53 A.D.2d 150, 155 (4th Dept. 1976). Cases addressing a claim for lost profits due to negligence primarily rely upon the general language found in *Steitz v. Gifford*, 280 N.Y. 15 (N.Y. 1939), in which an individual plaintiff who sustained personal injury relied on evidence of lost profits to show his diminished earning capacity. See, e.g., *Dunlop Tire & Rubber*, 53 A.D.2d at 155 n.4 (noting reliance on *Steitz*).

The *Steitz* court explained:

The damages cannot be remote, contingent or speculative. They need not be immediate, but need to be so near to the cause only that they may be reasonably traced to the event and be independent of other causes. The fact that they cannot be measured with absolute mathematical certainty does not bar substantial recovery if they may be approximately fixed. The damages must be compensatory only. Reasonable certainty as to the amount is all that is required. The mere fact that they are based upon loss of profits per se does not bar recovery, provided they are reasonably certain in amount and can be traced directly and with reasonable certainty to the accident, to the exclusion of other causes.

280 N.Y. at 20 (internal citations omitted). The court then affirmed the trial court's admission of evidence establishing lost profits due to plaintiff's inability to harvest a corn crop to meet his contractual obligations finding it "was directed solely to the question of the loss of the contracts based upon the contract price less the price of harvesting the corn and delivering it." *Id.* at 22.

Similarly, other courts have limited damage awards to instances where the plaintiff's loss was temporally fixed precluding future recovery. For example, the lost profits resulting from the negligent interference with a hotel owner's ability to rent a room for a night were forever lost, see *Turner v. Reynolds*, 271 A.D. 413 (3d Dept. 1946), as was the value of a mushroom crop destroyed due to an electrical failure caused by defendant's negligence. See *Newlin v. New England Tel.*, 316 Mass. 234 (1944); see also *Steitz*, 280 N.Y. at 17-18 (defendant's negligence prevented plaintiff from getting crops to buyer at contractually specified time). Both cases permitted recovery because the damages were fixed and identifiable with reasonable certainty, i.e., the rental price of the room and the value of the crop.

By contrast, in *Dunlop*, the defendant's chemical plant exploded knocking out the power to plaintiff's tire production facility for a period of 24 hours. 53 A.D.2d at 154. Plaintiff argued that its damages should equal the profits it generated over a 24-hour period. See *id.* The court rejected plaintiff's argument finding that "a stoppage in production, ...does not necessarily result in lost profits"; the tires could be manufactured and sold the next day. *Id.* at 155. The court then restricted plaintiff's claim to compensation "for materials damaged or destroyed as a result of the electrical interruption." *Id.*

Lost profits damages also are routinely rejected where they are too speculative. As the *Steitz* court explained, such damages only are proper where "they are reasonably certain in amount and can be traced directly and with reasonable certainty to the accident, to the exclusion of other causes." 280 N.Y. at 20. See also *Apollo Steel v. Melco Cranes*, 202 A.D.2d 1049 (4th Dept. 1994) (defendant's negligence causing injury to plaintiff contractor's employee resulting in increase to insurance premiums and disqualification of right to bid on certain contracts (lost profits) could not "be reasonably traced to the event" and were "not independent of other causes"); *Lee Kin Chiu v. City of New York*, 174 Misc.2d 422, 426 (2d Dept. 1997) (evidence relating to lost profits was too speculative in negligence case). As a result, establishing lost profits often requires expert opinion testimony (in multiple fields) with little guarantee of success.

### **Breach of Contract**

To establish a claim for lost profits resulting from a breach of contract, a plaintiff must show that: (1) such damages have been caused by the breach; (2) the alleged loss is capable of proof with reasonable certainty; and (3) the particular damages were fairly within the contemplation of the parties to the contract at the time it was made. See *Kenford v. County of Erie*, 67 N.Y.2d 257, 261 (N.Y. 1986).

In *Kenford*, a management company entered into a 20-year contract with Erie County to operate a domed stadium outside of Buffalo. See *id.* at 260. When the stadium was not built, the management company sued the county for lost profits extending over the 20-year contractual period. The court noted that the quantity of proof offered by plaintiff was "massive and, unquestionably represents business and industry's most advanced and sophisticated method for predicting the probable results of contemplated projects." *Id.* at 261. Nevertheless, the court rejected plaintiff's claim.

First, the Court of Appeals held that the liability for lost profits was not "in the contemplation of the parties at the time of the execution of the basic contract or at the time of its breach." *Id.* It reasoned that the provisions providing for remedy for a default did not impose such a "heavy responsibility" upon the county. *Id.*; compare *Spitz v. Lesser*, 302 N.Y. 490, 494 (1951) (damages calculated pursuant to "the stipulated royalties for the period within which the breach occurred").

In the absence of any provision for such an eventuality, the court noted that "the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject." *Id.* The court then concluded that the evidence failed to prove that liability for lost profits was in the contemplation of the parties upon entering the contract, or at the time of the breach. See *id.*; see also *Ecker v. Zwaik & Bernstein*, 240 A.D.2d 360, 362 (2d Dept. 1997) (lost profit damages were not "contemplated by the parties at the time the contract was executed").

Second, the court explained "that despite the massive quantity of expert proof submitted by" plaintiff, the ultimate conclusions were still merely projections subject to a myriad of commercial considerations impossible to calculate with any degree of reasonable certainty. *Id.* ("Quite simply, the multitude of assumptions required to establish projections of profitability over the life of this contract require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty"); see also *Lama Holding v. Smith Barney*, 88 N.Y.2d 413, 425 (1996) (claim for lost profits resulting from alleged breach of contract failed because it was "not susceptible to proof with certainty but is instead entirely speculative"); *Ecker*, 240 A.D.2d at 362 (rejecting claim arising from breach of contract because damages were "entirely speculative and the plaintiff has not presented any evidence to the contrary").

A third basis for rejecting a claim for lost profits arises when the "damages were [not] the natural and probable consequence of the breach." *Ecker*, 240 A.D.2d at 362. See also *Deutsch v. Health Ins. Plan*, 751 F.2d 59, 68 (2d Cir. 1984) (rejecting lost profit damages resulting from loss of value to a going concern because not foreseeable by parties and not a natural or probable consequence of the breach). The court reasoned that the alleged lost profits damages over a 20-year period were not foreseeable as a result of the county's decision to not build the stadium.

### Conclusion

Although frequently pleaded, the costs and burdens of establishing lost profits damages often outweigh a potential recovery. The concept of "lost profits," as an injury arising from another's tortious conduct or breach, is subject to innumerable variables outside of the parties' interaction rendering a damage calculation speculative and uncertain. However, the same recovery often may be achieved through standard compensatory and consequential damages, both of which are far more readily accepted by the courts.

**Joshua S. Bauchner** is counsel with Ansell Grimm & Aaron in Clifton, N.J.



---

Copyright 2013. ALM Media Properties, LLC. All rights reserved.