

503.75 BREACH OF CONTRACT - SPECIAL DAMAGES - LOSS OF PROFITS.¹

NOTE WELL: This instruction previously was labeled "N.C.P.I.-Civil 517.20 Breach of Contract - Special Damages - Loss of Profits." It has been revised and renumbered as N.C.P.I.-Civil 503.75.

A party injured by a breach of contract may (also) be entitled to recover special or consequential damages, that is, actual economic losses that occur because of special circumstances or conditions attending a breach of contract,² such as loss of profits from other transactions.

Before you may award such damages, the [plaintiff] [defendant] must prove two things by the greater weight of the evidence:

First, *he* must prove that, as a result of the breach of contract, *he* has suffered a loss of profits from other transactions, and that this loss was within the contemplation of the parties at the time they made the contract.³ Loss of such profits would have been within the contemplation of the contracting parties if: (1) the parties were aware of the special circumstances or conditions that would give rise to a loss of profits, and (2) the loss of profits was reasonably foreseeable to one who was aware of these special circumstances or conditions.⁴

And Second, the [plaintiff] [defendant] must prove the amount of the loss of such profits with a reasonable degree of certainty.⁵ This does not mean that the [plaintiff] [defendant] must prove the amount of *his* loss with mathematical exactness or with absolute certainty. It does mean, however, that these damages, if any, may not be based upon conjecture, speculation, or guesswork.⁶ An award of damages for loss of profits must be based upon actual facts from which a reasonably accurate conclusion regarding the amount of the loss can be logically and rationally drawn.⁷

N.C.P.I.-Civil. 503.75
BREACH OF CONTRACT - SPECIAL DAMAGES - LOSS OF PROFITS.
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1. A party injured by a breach of contract may recover, as general damages, the profit he would have made on the contract. This type of loss of profit is also covered under N.C.P.I.-Civil 504.39 ("Seller's Lost Profit Damages"). This instruction deals with profits from other transactions which are lost as a consequence of the breach of contract.

2. *Penner v. Elliot*, 225 N.C. 33, 35, 33 S.E.2d 124, 125 (1945) ("Special damages are those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions.") (citations omitted).

3. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1845); *Seymour v. W.S. Boyd Sales Co.*, 257 N.C. 603, 609, 127 S.E.2d 265, 269 (1962) ("The loss of anticipated profits may not be recovered in the absence of allegation and proof that they were within the contemplation of the parties at the time of the execution of the contract of sale.") (citations omitted).

4. *Troitino v. Goodman*, 225 N.C. 406, 412-13, 35 S.E.2d 277, 282 (1945). For an example of a case in which a plaintiff alleged that the defendant was informed of the special circumstances out of which a breach of warranty would cause a loss of profits, see *Walston v. Whitley & Co.*, 226 N.C. 537, 539, 39 S.E.2d 375, 376 (1946),

5. *Plasma Cntrs of America, LLC v. Talecris Plasma Res., Inc.*, ___ N.C. App. ___, ___, 731 S.E.2d 837, 843 (2012) (locating "reasonable certainty" somewhere between "hypothetical or speculative forecasts" and "absolute certainty"); see also *Parris v. Fischer & Co.*, 221 N.C. 110, 112, 19 S.E.2d 128, 129 (1942).

6. *Plasma Cntrs of America*, ___ N.C. App. at ___, 731 S.E.2d at 843 ("[D]amages for lost profits will not be awarded upon hypothetical or speculative forecasts of losses.") (quoting *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 407-08, 466 S.E.2d 324, 329 (1996); see also *Castle McCulloch v. Freedman*, 169 N.C. App. 497, 501, 610 S.E.2d 416, 420 (2005) (quoting *Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847, 431 S.E.2d 767, 770 (1993)), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005)). "Damages may be established with *reasonable certainty* with the aid of expert testimony, economic and financial data, market surveys and analysis, and business records of similar enterprises." *Iron Steamer*, 110 N.C. App. at 849, 431 S.E.2d at 771 (emphasis added) (citations omitted). "Sales figures from businesses which are similar in size, location and type of product sold are important sources of such . . . evidence." *McNamara*, 121 N.C. App. at 411, 466 S.E.2d at 331.

7. *Transportation Co. v. Brotherhood*, 257 N.C. 18, 30, 125 S.E.2d 277, 286 (1962) ("Recovery for the loss of future profits may be had [when] . . . [t]he proof [of such losses] . . . pass[es] the realm of conjecture, speculation, or opinion not founded on facts, and . . . consist[s] of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn."). Note, however, that "the amount of damages is generally a question of fact, but whether that amount has been proven with reasonable certainty is a question of law [to be] review[ed] *de novo*." *Plasma Cntrs of America*, ___ N.C. App. at ___, 731 S.E.2d at 843 (citing *Matthews v. Davis*, 191 N.C. App. 545, 551, 664 S.E.2d 16, 21 (2008)).