

***SUBSTANTIVE AND PROCEDURAL ASPECTS OF
ASSESSING DAMAGES IN COMMERCIAL LITIGATION***

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By Frederick W. Rose*

INTRODUCTION

Damages should be the focal point of every plaintiff's lawsuit. Determination of what monetary remedies are available should be the one element around which all other aspects of the litigation revolve. Ironically, however, litigators often spend most of their time establishing the liabilities of opposing parties to the degree where short-shrift is ultimately paid to strategies necessary for determining the final amounts of recovery.¹ Thus, early identification as to which types of damages may be available in various commercial contexts is invaluable for charting an effective course through the litigation process. Such efforts at identification will to a large extent dictate the course of the trial and will, in the end, maximize results for a client.²

The purpose of this review is to highlight the circumstances under which various damage remedies are available in a commercial context and to identify what steps are required in order to effectively recover such damage awards.

There are basically three types of legal damages, specifically (a) compensatory damages inclusive of consequential and incidental damages in the minds of many but distinguished in the Uniform Commercial Code, (b) punitive damages and (c) nominal damages, each of which is addressed hereinafter.³

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I. Compensatory Damages Inclusive of Consequential and Incidental Damages.

(a) Direct Damages.

Compensatory damages are the types of damages that arise perhaps most often in the context of commercial claims. Compensatory damages are intended “to compensate a plaintiff for actual injury or loss,” and are designed “to restore the injured party to as good a position as he would have been in if performance had been rendered as promised.”⁴

One need only hark back to law school days for the underlying concept which has been carried forward into the law today:

Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach, should be such as may fairly be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854).

The Uniform Commercial Code, which governs numerous transactions in commercial settings, essentially cites the same rationale for the award of damages under the Code. The U.C.C. provides:

The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . .

N.J.S.A. § 12A:1-106 (West 1962 & supp. 1996). See also official Comment to the U.C.C. § 1-106 (“[the above subsection] is intended to . . . make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages or penal damages”). Consequential and incidental damage recovery are covered by other sections of the U.C.C. See generally infra notes 34-39 and accompanying text.

Before New Jersey's adoption of the U.C.C., the New Jersey Supreme Court had allowed recovery for purely economic loss in a commercial sale of goods setting under a theory of strict liability in tort. The current state of the law is not yet certain as to whether the adoption of the U.C.C. has preempted such a cause of action, regardless of the circumstances surrounding the transaction, in favor of confining the avenues of recovery to those enumerated under the provisions of the Code. See generally discussion infra at notes 40-43 and accompanying text.

In order to recover compensatory damages, a plaintiff must prove⁵ that he/she "has suffered some loss or injury and [that] he has given the jury some basic information from which to estimate the amount of damages."⁶ The scope and extent of the damages need not be proven with absolute certainty. In Kozlowski v. Kozlowski, 80 N.J. 378 (1979), a woman sued a male cohabitant, seeking recovery of a share in the assets the defendant had accumulated over the years of their cohabitation, as well as value for services rendered in their relationship and future support. In holding in favor of the plaintiff under a breach of contract theory, the New Jersey Supreme Court held:

While the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery - courts will fashion a remedy even though the proof on damages is inexact.

Id. at 388 (citations omitted).⁷ Thus, the plaintiff need only present sufficient evidence upon which a jury could reasonably base a damage award.⁸

- Liquidated Damage Provisions.

In the specific context of damages based on breach of contract, parties will often attempt to negotiate in advance of the breach the remedies available to either party. There may be contract provisions, most often in the form of “liquidated damage” provisions, which will govern the recovery of damages for the parties.

When the parties have agreed upon the precise method by which damages shall be computed and assessed, the court is bound by their contract.

Utica Mut. Ins. Co. v. DiDonato, 187 N.J. Super. 30, 43 (App. Div. 1982).

Generally, liquidated damage clauses are enforceable where the actual damages that would be sustained upon breach are difficult to project and are not readily susceptible of proof under the rules of evidence.⁹ Before being given their express effect, however, liquidated damage provisions in a contract will be scrutinized to ensure that the provision is not a penalty provision.¹⁰ Rather, the damages must be reasonably related to that which the parties anticipated to be the effect of a breach.¹¹ Furthermore, a liquidated damages provision that merely allows for a nominal amount of damages, effectively limiting the amount of recovery to a sum that is clearly not an attempt to approximate actual damages, has been treated by the Appellate Division as an exculpatory clause.¹²

(b) Consequential and Incidental Damages.

Until this point, the discussion has encompassed the type of compensatory damages known as “direct” damages.¹³ However, in addition to direct damages, as noted at the outset, compensatory damages also encompass consequential and incidental damages. Thus, consequential and incidental damages are essentially “subsets” of compensatory damages and are described as follows:

[A] breach may cause the injured party loss other than loss in value, and the party is also entitled to recovery for this, subject again to

limitations such as that of unforeseeability. Such loss will be referred to as other loss and is sometimes said to give rise to “incidental” and “consequential” damages. Incidental damages include additional costs incurred after the breach in reasonable attempt to avoid loss, even if the attempt is unsuccessful. . . . Consequential damages include such items as injury to person or property caused by the breach.

E. Allan Farnsworth, *Contract*, § 12.9, at 880-81 (2d ed. 1990).¹⁴

Consequential damages are only recoverable where they:

[A]re reasonably foreseeable at the time the contract was entered into . . . [and] to impose liability the defendant must have had reason to foresee the injury at the time the contract was made, not at the time of the breach. Plaintiff need only demonstrate, however, that the damage was of a type that a reasonable man would realize to be a probable result of his breach. Plaintiff need not establish that the defendant had reason to foresee the specific injury that occurred.

Swatek, Inc. v. North Star Graphics, 246 N.J. Super. 281, 285-86 (App. Div. 1991) (citations omitted).

One of the more frequent contexts in which “consequential damages” are sought in commercial litigation is by way of “lost profits.”¹⁵ Recovery based on “lost profits” is defined as the difference between gross income and the costs or expenses that had to be expended to produce the income.¹⁶ To recover for lost profits, a plaintiff must demonstrate “[1] the amount of damages with a reasonable degree of certainty, [2] that the wrongful acts of the defendant caused the loss of profit, and [3] that the profits were reasonably within the contemplation of the parties at the time the contract was entered into.”¹⁷

In addition to consequential damages based on lost profits, other forms of consequential damage could result from losses due to excesses and deficiencies in inventory.¹⁸ Such damages could also be in the form of increased labor costs, such as employee salaries, overtime and executive salaries, and additional accounting and computer costs.¹⁹

- Contractual Limitations on Consequential Damages.

In the current environment of commercial litigation, no review of the subject of consequential damages would be complete without addressing, even in a limited fashion, the subject of contractual limitations of consequential damages. It is possible for parties to contractually limit consequential damages as an available remedy for a breach of contract.²⁰ In a Third Circuit case, Chatlos Systems v. National Cash Register Co., 635 F.2d 1081, 1087 (3rd Cir. 1980), rev'g 479 F. Supp. 738 (D.N.J. 1979), cert. dismissed, 457 U.S. 1112, 102 S. Ct. 2918 (1982) (applying New Jersey law) (“the provision of the agreement excluding consequential damages should be enforced, and the district court erred in making an award for such losses”), the policy behind upholding consequential damages disclaimers was explained as follows:

Limitations on damages for personal injuries are not favored, but no such prejudice applies to property losses. It is also important that the claim is for commercial loss and the adversaries are substantial business concerns. We find no great disparity in the parties' bargaining power or sophistication. Apparently, Chatlos, a manufacturer of complex electronic equipment, had some appreciation of the problems that might be encountered with a computer system. Nor is there a “surprise” element present here. The limitation was clearly expressed in a short, easily understandable sales contract. This is not an instance of an ordinary consumer being misled by a disclaimer hidden in a “linguistic maze.”

Thus, at the time the contract was signed there was no reason to conclude that the parties could not completely agree upon the allocation of the risk involved in the installation of the computer system.

... We conclude, therefore, that the provision of the agreement excluding consequential damages should be enforced, and the district court erred in making an award for such losses.

Chatlos, 635 F.2d at 1087 (citation omitted).

The New Jersey Supreme Court has similarly upheld the exclusion of consequential damages.²¹ In Kearney & Trecker, the Court noted that the Third Circuit's reasoning in Chatlos was consistent with the policy expressed by the Court in Spring Motors Distribution, Inc. v. Ford Motor Co., 98 N.J. 555 (1985), that "between commercial parties, then, the allocation of risks in accordance with their agreement better serves the public interest than an allocation achieved as a matter of policy without reference to that agreement."²²

The Kearney & Trecker Court further noted:

[T]he potential significance of liability for consequential damages in commercial transactions undoubtedly prompted the Code's drafters, consistent with the Code's endorsement of the principle of freedom of contract, to make express provision for the limitation or exclusion of such damages. For certain sellers, exposure to liability for consequential damages could drastically affect the conduct of their business, causing them to increase their prices or limit their markets.

...

In a commercial setting, the seller's right to exclusion of consequential damages is recognized as a beneficial risk-allocation device that reduces the seller's exposure in the event of breach.

Kearney & Trecker, 107 N.J. at 591-92 (citations omitted).²³

Even if the essential purpose of the exclusive remedy of repair or replacement has failed, the exclusion of consequential damages should still be enforced.²⁴ In Chatlos, the Third Circuit held:

It appears to us that the better reasoned approach is to treat the consequential damage disclaimer as an independent provision, valid unless unconscionable. . . . We therefore see no reason to hold, as a general proposition, that this failure of the limited remedy provided in the contract, without more, invalidates a wholly distinct term in the agreement excluding consequential damages.

Chatlos, 635 F.2d at 1086.

Similarly, in Kearney & Trecker, the New Jersey Supreme Court held:

[M]any routine business transactions would be dislocated by a rule requiring the invalidation of a consequential damage exclusion

whenever the prescribed contractual remedy fails to operate as intended. Concededly, well-counseled businesses could avoid the problem posed by better draftsmanship of their sales contracts. But the commercial reality is that for many sellers, immunity from liability for their customers' consequential damages may be indispensable to their pricing structure and, in extreme cases, to their solvency.

Nor do we find that enforcement of a consequential damages limitation when a limited remedy has failed of its essential purpose is necessarily inequitable to the buyer. As noted earlier, the Code affords remedies other than consequential damages when a warranty is breached. Ordinarily, the availability of such remedies will assure the buyer of "a fair quantum of remedy for breach of the obligations or duties outlined in the contract."

Accordingly, we conclude that N.J.S.A. 12A:2-719 does not require the invalidation of an exclusion of consequential damages when limited contractual remedies fail of their essential purpose. It is only when the circumstances of the transaction, including the seller's breach, cause the consequential damage exclusion to be inconsistent with the intent and reasonable commercial expectations of the parties that invalidation of the exclusionary clause would be appropriate under the Code. . . .

107 N.J. at 599-600.

- Lost Profits for New Business.

In the specific context of recovery of lost profits for unestablished business, New Jersey may be in the process of departing from what has been its traditional position.²⁵ New Jersey has adhered to what is generally known as the "new business rule," which directs that lost profits of a new business are too speculative and remote to permit an award of damages.²⁶ The departure from this rule, however, may have been abandoned in accordance with a more recent decision by the Appellate Division of the New Jersey Superior Court in Bell Atlantic Network Services, Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 98-100 (App. Div.), certif. denied, 162 N.J. 130 (1999). In particular, although the Bell Atlantic court found the arguments supporting abandonment of the

new business rule to be persuasive, such an abandonment has not yet been directed by a majority of the New Jersey Supreme Court. Thus, the Appellate Division reluctantly adhered to the new business rule, which is apparently still the law in this state.²⁷

II. Punitive Damages.

Under New Jersey law, it is well-established that punitive damages are available only in exceptionally limited circumstances.²⁸ Punitive damages are used as a means for deterring outrageous, aggravated and particularly egregious misconduct. As the New Jersey Supreme Court has explained:

To warrant a punitive award, the defendant's conduct must have been wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an "evil-minded act" or an act accompanied by a wanton and wilful disregard of the rights of another.

Nappe, 97 N.J. at 49.²⁹

- Punitive Damages Act.

For causes of action filed on or after October 27, 1995, punitive damages are governed by the New Jersey Punitive Damages Act.³⁰ Under the statute, which essentially codifies the common law, punitive damages are available if:

- (1) the plaintiff specifically demands punitive damages in the complaint (2A:15-5.11);
- (2) compensatory damages are awarded (nominal damages are insufficient) (2A:15-5.13); and
- (3) the plaintiff proves, by clear and convincing evidence, that the defendant's acts were accompanied by actual malice (intentional wrongdoing in the sense of an evil-minded act) or a willful and wanton disregard (a deliberate

act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission) of persons who could be harmed by the acts (2A:15-5.12).

Proof of negligence or gross negligence is insufficient to support an award of punitive damages (2A:15-5.12). The amount of the punitive damage award is capped at the greater of: (a) \$350,000, or (b) five times the amount of the compensatory damages (2A:15-5.14). The cap does not apply to cases involving bias crimes, discrimination, AIDS testing disclosure, sexual abuse or drunk driving (2A:15-5.14).

In New Jersey, the general rule is that punitive damages may not be recovered for breach of contract, even if the breach is intentional, unless the plaintiff can establish that the defendant also breached a duty independent of that created by the contract.³¹ Note, too, that awards of punitive damages entails a fact-sensitive inquiry and thus such awards are rarely granted on summary judgment motions.³²

III. Nominal Damages.

Nominal damages “are a trivial amount ‘awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage. . . . The award of nominal damages is made as a judicial declaration that the plaintiff’s right has been violated.’”³³ An award of nominal damages may be appropriate in a situation where a plaintiff fails to come forward with sufficient evidence to enable a jury to estimate the amount of money that would fairly compensate the plaintiff for his loss.³⁴

IV. Other Vehicles for Recovery of “Damages” (Dollars).

(a) Statutory and Treble Damages.

Under numerous statutes, plaintiffs may recover statutory damages in which the actual losses may be doubled or trebled. Such statutes include the New Jersey Franchise Practices Act,³⁵ the Consumer Fraud Act,³⁶ and the antitrust statutes. It should be noted that enhanced damages under a statutory scheme will satisfy the jurisdictional amount for the purposes of conferring federal jurisdiction. However, a federal court will closely scrutinize a claim for punitive damages as a method for satisfying the federal jurisdictional amount.

(b) U.C.C. Remedies.

Both buyers and sellers can recover incidental damages under the U.C.C. Buyers can recover incidental and/or consequential damages.³⁷

Under the U.C.C., a buyer’s damage remedies are as follows:

[Under circumstances constituting breach, a buyer may recover] . . .
In addition to recovering so much of the price as has been paid (a)
“cover” [pursuant to 12A:2-712]³⁸

Under the U.C.C., a seller’s damage remedies are as follows:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make payment due on or before delivery or repudiates with respect to a part or a whole, then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may . . .
. (d) resell and recover damages as hereafter provided (12A:2-706);
(e) recover damages for non-acceptance (12A:2-708) or in a proper case the price (12A:2-709).

- Tort vs. Contract in U.C.C. Context.

Despite some longstanding uncertainty, it is now clear that, in most instances, a plaintiff’s remedies for purely economic losses arising from a defective product are limited to those

enumerated in the U.C.C. This is true whether the plaintiff may be categorized as a commercial purchaser or a consumer purchaser.

In the commercial context, the Court has recognized for a number of years that a commercial purchaser could not pursue a tort action for economic losses caused by a defective product. Rather, in Spring Motors Distrib., Inc. v. Ford Motor Co.³⁹ the Court held that any such claims must be pursued under the U.C.C.⁴⁰ The Court, however, did not discuss whether the same rule applied to consumer purchasers.

The Court resolved this issue in its recent opinion in Alloway v. General Marine Indus., L.P.⁴¹ wherein the court held that a consumer purchaser seeking recovery of purely economic losses caused by a defective product is limited to his/her remedies under the U.C.C. and may not pursue a separate tort cause of action.⁴² Nevertheless, the Court tempered its ruling somewhat by limiting it to the specific facts of the case. In Alloway, plaintiff was suing for economic losses caused when his luxury yacht sank at dock. No one was injured and no property, other than the yacht itself, was damaged.

In Alloway, the Court noted that it was not resolving the issue of whether tort or contract law applies to a product that poses a risk of personal injury or property damage, but only causes economic loss to the product itself.⁴³ The Appellate Division expressly tackled this issue in Goldson v. Carver Boat Corp.,⁴⁴ treating the serious risk of personal injury as immaterial, since the only actual injury was to the product itself.

The Alloway Court also noted that it was not deciding whether tort causes of action were precluded where the parties to the subject transaction were of unequal bargaining power, the product in question is a necessity, no alternative source for the product is readily available and the purchaser cannot reasonably insure against consequential damages.⁴⁵ The Appellate Division, as

well as federal courts sitting in New Jersey, have apparently followed suit, expressly leaving open the issue of whether a party of substantially inferior bargaining power may sue in tort for purely economic losses. These courts have strongly implied that such a cause of action exists, notwithstanding adoption of the U.C.C. and what has since been called the Alloway Court's "economic loss doctrine."⁴⁶

(c) Tortious Interference Claims.

There are various ways to calculate damages resulting from tortious interference with a contractual relationship or prospective economic advantage. The general rule is that one who willfully induces a breach of a contract is liable for "the damages resulting from such breach' . . . and for the 'ensuing damage'."⁴⁷ Thus, a defendant who induces a breach of a contract is liable for all reasonably foreseeable consequential damages that proximately result from the defendant's conduct, regardless of whether the defendant specifically intended to cause the extent of the harm which results.⁴⁸ Two Third Circuit cases, Lightning Lube, Inc. v. Witco Corp. and Zippertubing Co. v. Teleflex Inc., provide informative, comprehensive discussions on damages in tortious interference cases.⁴⁹

(d) Attorneys' Fees.

Recovery of attorneys fees as damages in New Jersey is governed by the Rules of Civil Practice.⁵⁰ Beyond these rules, however, the recovery of attorney fees may, in fact, be determined by express contractual provisions negotiated by the parties.⁵¹

(e) Prejudgment and Postjudgment Interest.

In submitting a case on damages, a plaintiff should not ignore the opportunity to seek prejudgment interest as well. New Jersey Court Rule 4:42-11(b) addresses recovery of prejudgment

interest.⁵² Although the Rule specifically deals with tort claims, case law has extended recovery of prejudgment interest to contract claims.

Generally, whether a court awards prejudgment interest as part of liquidated damages will lie within “the sound discretion of the trial court” and should be decided based on general principles of equity.⁵³ Prejudgment interest awards are compensatory in nature and (like counsel fees, discussed supra) are not dependent on acts of bad faith by the defendant.⁵⁴ Additionally, the determination of prejudgment interest awards may be dictated by contractual provisions.⁵⁵

Postjudgment interest is governed by R. 4:42-11, which provides that judgments, awards and orders “shall” bear simple interest at the rate specified in the Rule, with the rate being dependent upon the year.

V. Procedural Aspects of Damage Recovery - “Proving the Case”.

(a) Valuation of Loss and/or Lost Profits - Examples.

The two Third Circuit cases referenced earlier prove instructive in explaining methods for computation of damages in commercial litigation.⁵⁶ In Lightning Lube, Inc. v. Witco Corp., the defendant oil supplier interfered with plaintiff quick lube franchisor’s contracts with three franchisees. The three franchisees then spoke with other franchisees and potential franchisees, causing them to cease royalty payments to plaintiff or to refuse to deal with plaintiff altogether. As a result, plaintiff’s entire quick lube franchise business collapsed.

At the time of the interference, 34 franchises were operational, approximately 117 more were under contract, and plaintiff estimated that it would open 37 per year for the next 10 years. Plaintiff submitted evidence that over this time period, the business would have generated \$75,000,000 in royalties and profits from the existing and anticipated future franchises. A jury awarded the plaintiff \$2,500,000 for breach of contract and \$7,045,500 in compensatory damages

for the defendant's tortious interference with the plaintiff's relations with its franchisees and prospective franchisees. The jury also awarded \$50,000,000 in punitive damages on the plaintiff's tortious interference and fraud claims (without differentiating between the two).

The Third Circuit upheld the jury's \$2,500,000 breach of contract and \$7,045,500 tortious interference compensatory damages awards and affirmed the trial court's entry of judgment as a matter of law in favor of defendant on the punitive damage claims. The Third Circuit found the \$7,045,500 figure could have been derived solely from plaintiff's loss of existing franchises and their concomitant royalty payments. The figure could also have been derived from the amounts that the plaintiff was forced to refund to existing franchisees and amounts plaintiff lost from anticipated future franchises. Finally, the Third Circuit found that even if the jury completely disregarded the plaintiff's damage estimates and projections of lost profits from existing and anticipated franchises, the jury could have derived the \$7,045,500 figure from testimony offered by plaintiff that a third party considered purchasing plaintiff's business outright for \$7,000,000 at the approximate time that the interference occurred.

Lightning Lube is significant because the defendant only interfered with three franchisees, yet ultimately was liable for \$7,045,500 in lost profits due to the collapse of the plaintiff's entire business. Thus, Lightning Lube provides an excellent example of a court's reluctance to intrude upon a jury's calculation of damages. It also provides a thorough discussion of various methods of calculating damages based on lost profits.⁵⁷

Unlike Lightning Lube, which calculated the plaintiff's damages based on the plaintiff's lost profits, Zippertubing Co. v. Teleflex Inc. calculates the plaintiffs' damages based on the defendant's improper gains. In Zippertubing, The Zippertubing Co. ("Zippertubing"), was approached by Nab Construction ("Nab") to supply closeable insulation for Nab to install as part of its contract to

reinsulate subway cars for the New York City Transit Authority. Zippertubing approached Surf Chemical, Inc. (“Surf”), an extruding house, to manufacture the insulation for Zippertubing. Surf, however, lacked the capacity to supply the entire amount of insulation required, so Surf approached Teleflex Inc. (“Teleflex”) about manufacturing the insulation for Surf. Teleflex quoted a price to Surf, who quoted a price to Zippertubing, who quoted a price to Nab. Believing that Teleflex had agreed to perform the extrusions for Surf and Zippertubing, Zippertubing revealed to Teleflex the identity of the customer (Nab). Thereafter, Teleflex improperly bypassed Surf and Zippertubing and dealt directly with Nab. Under its proposed deal with Surf and Zippertubing, Teleflex would have received \$1,100,320 and made a net profit of \$715,205. Under its direct contract with Nab, Teleflex ultimately received \$3,259,248, with a net profit in excess of \$2,000,000.

Zippertubing and Surf commenced an action for tortious interference with a prospective economic advantage against Teleflex, and a jury found in favor of the plaintiffs, awarding Zippertubing and Surf \$2,000,000 in compensatory damages and \$750,000 in punitive damages. The trial court added \$345,863 in prejudgment interest to the compensatory damages award.

In presenting evidence on damages, Zippertubing and Surf did not attempt to establish the amount of their lost profits. Instead, they proved the amount of profits made by Teleflex as a result of its wrongdoing (\$2,000,000). On appeal, Teleflex argued that plaintiffs’ disgorgement of profits theory was improper. The Court rejected this argument and upheld the damages award.

First, the Court recognized that while the typical damage recovery by a plaintiff in a tortious interference case is the amount of lost profits, this is so because the amount of the plaintiff’s loss and the defendant’s gain is usually the same. In Zippertubing, however, the amount of defendant’s improper gain was greater than the plaintiffs’ lost profits. The Court approved the plaintiffs’ use of the constructive trust theory (which was based on Teleflex’s gain) as consistent with the policy of

discouraging tortious conduct by depriving the tortfeasor of the opportunity to profit from its wrongdoing. Specifically, the Third Circuit approved the following jury charge by the trial court:

The law says that when one has unlawfully deprived another of a contract or a business opportunity and has made that opportunity his own, he is not to be permitted to retain any of the profits, any of the benefits of his unlawful conduct.

Therefore, if you were to find that the plaintiff has met its burden of proof as I have defined it to you on each and every one of the elements of the case, it would be your job to award such damages as would deprive the defendant of any unlawful benefit of its unlawful conduct.

757 F.2d at 1412.

With regard to calculating the amount of Teleflex's improper gain, the court charged the jury as follows:

In determining the amount of Teleflex's profits, I instruct you that profits equal the total amount of money that Teleflex earned as a result of the Nab contract, less any direct expenses that were incurred with respect to this particular conduct [contract]. Thus, any direct costs of this project should be subtracted from Teleflex's gross receipts in computing Teleflex's profits. . . . You should not deduct from their gross receipts any expenses of running the business which they would have had anyway.

Id.

Teleflex argued that this charge was improper because it precluded the jury from deducting Teleflex's indirect business costs. The Third Circuit rejected Teleflex's argument and held that in disgorging profits, "the wrongdoer should not be permitted, by misappropriating another's opportunity, to use that opportunity in order to help absorb fixed expenses of its own business."

Teleflex next argued that because its negotiations with Zippertubing only involved five specific diameters of closeable insulation, and it later contracted with Nab to supply not only the closeable insulation but also some seamless insulation and tie-wraps for closeable insulation, it

should not be required to disgorge profits from the sale of the seamless insulation and tie-wraps as part of the damages award. Again, the Court rejected this argument. The Court noted that the measure of damages in tort cases includes those damages reasonably foreseeable at the time of the commission of the tortious act. Here, it was foreseeable that Nab would elect to deal with a single source of supply, and that, but for the tort, that source of supply would have been Zippertubing. Furthermore, Nab ultimately purchased the seamless insulation and tie wraps from its closeable insulation supplier (Teleflex). Thus, the Third Circuit held that the trial court was correct in permitting the jury to base its award on the entire Teleflex-Nab transaction.

Teleflex also argued that the damage award should have been reduced by the amount of profit which Teleflex would have received had it gone forward with the Zippertubing-Surf-Teleflex transaction. The Third Circuit was unable to consider this argument, however, because Teleflex failed to raise it below.

With regard to the award of punitive damages, Teleflex argued that such an award was impermissibly duplicative because it was already being forced to disgorge profits. The Court rejected this argument as equally applicable to any case in which both compensatory and punitive damages are awarded. The Court found that malice could be inferred from Teleflex's conduct and consequently upheld the jury's award of punitive damages. Finally, the Court upheld the trial court's award of \$345,863 in prejudgment interest as consistent with R. 4:42-11(b).

(b) Evidentiary Considerations Generally.

(i) Burden of Proof.

With respect to the burden of proof, a plaintiff wishing to prove damages obviously bears this burden in securing recovery.⁵⁸ Generally, the party breaching the contract has the burden of proving that the losses could have been avoided through mitigation of damages.⁵⁹ In a case

involving liquidated damage provisions, the party asserting a right to such damages bears the burden of showing the existence of a valid provision, while the party being assessed the liquidated damages will bear the burden of proving the existence of a contractually acceptable excuse to the assessment.⁶⁰

(ii) Use of Experts.

At the outset, counsel for the plaintiff must make a determination as to whether expert testimony is necessary in order to prove the losses sustained by the plaintiff and insure significant damage recovery. Clearly, if the damages sought involve any complexity, counsel for the plaintiff should not hesitate to retain suitable experts to insure the appropriate recovery through the laying of a proper foundation to justify a jury award.⁶¹ Experts can be in the fields of accounting, economics and actuarial sciences. It is crucial that a determination be made early as to whether or not it is commercially viable to pursue various avenues of damage recovery, balancing the recovery sought against the costs of experts and the companion expense of defending against experts. On occasion, a fact witness may be permitted by the court to testify as an expert witness, and counsel should clearly define those areas where expert testimony may or may not be required.⁶²

(c) Admissibility of Evidence.

Particularly in the context of lost profits, commercial damages can be determined by a variety of methods. As an example, damages can be ascertained by evaluating the plaintiff's experience in a given industry or commercial sector either before or subsequent to the commercial breach.⁶³ Alternatively, the value of lost profits can be determined by focusing on businesses belonging to someone other than the plaintiff as a means of gauging how the plaintiff's business would have proceeded had the defendant's breach or tortious act not occurred. Further, industry averages also are available as a method for proving damages.

As mentioned previously, certain elements of proving damages are ripe for expert testimony, while other elements can be shown by lay testimony. Evidentiary aids, such as charts and graphs, can be useful for showing trends and/or impacts of various economic events. Testimony will be necessary with regard to overhead and other usual costs of business, inasmuch as loss of profit damages are based on net profits as opposed to gross profits. Finally, evidence will be admitted with respect to tax liabilities, depreciation and inflation in order to arrive at conclusive present values.

VI. Other Areas of Consideration: Damages in Securities, Patent and Anti-Trust Litigation.

While a comprehensive discussion concerning the types of damages available in securities, patent and anti-trust litigation is beyond the scope of this discussion, practitioners should be generally aware of the criteria for the recovery of money damages which are available in these types of cases. Often, the methodology of calculating the damages sustained in such cases will vary little from that already mentioned. Nevertheless, a brief description of the damages available in these specific types of litigation is warranted.

(a) Patent Litigation

A patent holder is entitled to compensatory damages for infringement of his/her patent. Federal law provides that “[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer”⁶⁴ Thus, there are two methods by which damages for patent infringement are calculated.

First, damages will be calculated by assessing the actual damages sustained by the patent holder as a result of the infringement. This would normally be accomplished by calculating the

holder's lost profits caused by the infringement.⁶⁵ Alternatively, if actual damages cannot be ascertained, the court will award the holder a reasonable royalty for the use of his/her invention.⁶⁶

(b) Securities Litigation

One of the most common type of securities litigation is one brought pursuant to Section 10(b) of the Securities Exchange Act of 1934⁶⁷ for false or misleading statements or omissions concerning a publicly-traded company. Damages in these cases is normally computed by reference to the "out-of-pocket" rule.⁶⁸ This rule provides that a plaintiff's damages will be the difference between the price paid for the security and the "real" value of the security, *i.e.*, the fair market value of the security absent the misrepresentations or omissions at the time of the initial purchase.⁶⁹

Damages are also available in an action brought pursuant to Section 11 of the Securities Act of 1933⁷⁰ for false or misleading statements made in registration statements. In such cases, the plaintiff is entitled to the difference between the amount paid for the security and: (1) the value of the security at the time suit was brought; (2) the price the security was disposed of in the market prior to suit; or (3) the price the security was disposed of after suit but before judgment if such damages are less than those as calculated under the first option.⁷¹

(c) Antitrust Litigation

Generally, an anti-trust claimant is entitled to three types of damages. First, the aggrieved party may recover damages for increased costs caused by the anti-trust violation. Second, the claimant may recover lost past profits. Third, a plaintiff may recover for the reduction in value of the affected business.⁷² These types of damages would presumably be recoverable under New Jersey's Anti-trust Act as well, as interpretation of that statute generally mirrors the federal statute.⁷³

CONCLUSION

The numerous and complex issues involved with computing and proving commercial damages require more attention than litigators often devote in the course of their litigation. It is imperative, especially in light of the court's apparent recognition of lost profit claims for unestablished businesses, that those involved in commercial litigation address commercial damage issues at the outset of litigation. There will often be a need for retention of experts both for purposes of initial consultation and for testimony at trial.

As with any litigation, the goal and responsibility of the litigator is to secure the optimum result for his or her client. Plaintiff's counsel may be successful in "baking the cake" of liability, but it is the recovery of substantial damages which will be "the icing," a sweet ending for an ecstatic client.

ENDNOTES

1. It has been recognized as a common pitfall to give attention to liability issues at the expense of damages. See, e.g., Federal Judicial Center, Manual for Complex Litigation, § 33.1, at 303 (West 1995) (speaking in the specific context of antitrust cases, but nonetheless applicable to other areas of the law, “[t]he attention given to liability issues . . . may lead to neglect of injury and damage issues”).
2. Complex Litigation Manual, supra § 33.1, at 303 (“[e]arly scrutiny of the claimed damages can facilitate settlement, either because of the magnitude of the potential exposure or because provable damages are too small to justify the cost of pursuing the litigation”).
3. Nappe v. Anschlewitz, Barr, Ansell & Bonello, 97 N.J. 37, 48 (1984).
4. Nappe v. Anschlewitz, Barr, Ansell & Bonello, 97 N.J. 37, 48 (1984); Donovan v. Bachstadt, 91 N.J. 434, 444 (1982) (citing 5 Corbin, Contracts §, p. 5 (1951)). See also Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 498 (1992).
5. The standard of proof for showing the amount of damages that are appropriate is by no means stringent, once it is shown that damage did occur. See Apex Metal Stamping Co., Inc. v. Alexander & Sawyer, Inc., 48 N.J. Super. 476, 481-82 (App. Div. 1958) (stating that once damage is shown, “the amount of the loss may be calculated with reasonable certainty, though not precisely”) (emphasis added); see also id. at 482 (“Where it is certain that damage has resulted and the evidence affords a basis for estimating the damage with some degree of certainty, recovery is allowed”) (citations omitted); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1176 (3rd Cir. 1993) (“[I]t is well-settled in New Jersey that although the plaintiff bears the burden of proving that it has in fact been damaged, after the plaintiff has established an injury, it need prove the amount of damages only to a reasonable degree of certainty”) (citations omitted); In re Auricchio, 196 B.R. 279 (Bankr. D.N.J. 1996).
6. Nappe, 97 N.J. at 41 n.1.
7. See also, In re Estate of Roccamonte, Sr., 174 N.J. 381 (2002).
8. See id. (“The plaintiff need not prove the exact amount of damages with mathematical precision”); Huddell v. Levin, 537 F.2d 726, 743-44 (1976) (with respect to proving compensatory damages - albeit in context of torts case - “mathematical exactitude is not required . . . [t]he plaintiff, however, bears the burden of proof and it is the responsibility of the plaintiff to provide to the jury some evidentiary and logical basis for calculating or, at least, rationally estimating a compensatory award.”); id. at 744 (“Sheer conjecture cannot be the basis of a jury finding” for an award of compensatory damages”) (quotation omitted).
9. J.L. Davis & Assoc. v. Heidler, 263 N.J. Super. 264, 273 (App. Div. 1993); United States v. Bills, 639 F. Supp. 825 (D.N.J. 1986).
10. Westmount Country Club v. Kameny, 82 N.J. Super. 200, 206 (App. Div. 1964) (“[a] penalty

is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach”); Wasserman’s Inc. v. Middletown, 137 N.J. 238, 254 (1994) (“The purpose of a stipulated damage clause is not to compel the promisor to perform, but to compensate the promisee for non-performance”); see also id. (holding a provision determining liquidated damages based on “gross receipts” to be unenforceable because it did not reasonably forecast actual anticipated damages); see also Monsen Engineering Co. v. Tami-Githens, Inc., 219 N.J. Super. 241, 252 (App. Div. 1987) (“a liquidated damage clause is unenforceable if it operates as an ‘in terrorem’ provision to penalize or punish the breaching party”).

Note too, that in Monsen Engineering the Appellate Division clarified that a proponent of a liquidated damage provision need only show the existence of the provision. Id. at 249-50. Consequently challenges to such provisions are analogous to affirmative defenses, whereby those challenging the provision’s effect bear the burden of demonstrating its inapplicability. See generally id. (citing as binding authority Ferber Construction Co. v. Hasbrouck Heights, 90 N.J.L. 193 (E. & A. 1916)). Several years later, the New Jersey Supreme Court endorsed the Monsen court’s statement of the burden of proof with respect to “commercial transactions between parties with comparable bargaining power.” Wasserman’s Inc., 137 N.J. at 252-53 (expressly reserving judgment with regard to consumer transactions).

11. The Appellate Division in Westmount Country Club v. Kameny wrote:

Liquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs.

82 N.J. Super. at 205-06. See also Monsen Engineering, 219 N.J. Super. at 252; Wasserman’s Inc., 137 N.J. at 250; J.L. Davis, 263 N.J. Super. at 273-74 (stating that a liquidated damage provision must be the result of a good faith effort by the parties to estimate in advance the actual damages that would likely result from a breach). See also, Westmark Commercial Mortgage Fund IV v. Teenform Assoc., L.P., 362 N.J. Super. 336 (App. Div. 2003).

12. See Tessler and Son, Inc. v. Sonitrol Security Systems of Northern New Jersey, Inc., 203 N.J. Super. 477, 482 (App. Div. 1985) (holding that a purported liquidated damages clause was actually an exculpatory clause, that the clause was enforceable, and that plaintiff’s damages were accordingly properly limited).

13. In the commercial context, direct damages reflect the diminution in the value of the goods as represented to the purchaser and the value of the goods after discovery of the defect. This type of damage is known as the loss of the bargain. See generally Comment, The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy, 4 Seton Hall L. Rev. 145 (1972).

14. See also Oritani Sav. & Loan Assoc. v. Fidelity & Deposit Co. of Maryland, 744 F. Supp. 1311 (D.N.J. 1990), rev'd on other grounds, 989 F.2d 635 (3d Cir. 1993); People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246 (1985).
15. See Swatek, 246 N.J. Super. at 285 (citing Seaman v. U.S. Steel Corp., 166 N.J. Super. 467, 471 (App. Div.), certif. denied, 81 N.J. 282 (1979)); Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 498 (1992) (citing Seaman v. United States Steel Corp., 166 N.J. Super. 467, 471 (App. Div.), certif. denied, 81 N.J. 282 (1979)), Perini abrogated on other grounds, Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349, 358-59 (1994) (reversing Perini insofar as Perini articulated the standard for review of an arbitrator's decision). Cf. N.J.S.A. 12A:1-106 (distinguishing U.C.C. damage compensatory provisions from consequential damages).
16. Cromartie v. Carteret Sav. & Loan, 277 N.J. Super. 88, 103 (App. Div. 1994); see also J.L. Davis & Assocs. v. Heidler, 263 N.J. Super. 264, 275-77 (App. Div. 1993); Olefins Trading, Inc. v. Han Yang Chemical Corp., 813 F. Supp. 310, 317 (D.N.J. 1993) (“[i]t is well-settled that when a contract has been breached, the non-breaching party has a right to recover the lost profits it reasonably expected to earn under the contract”) (citing Bak-A-Lum Corp. v. Alcon Buildings Products, 69 N.J. 123 (1976)); Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 425-27 (1997) (upholding award of lost profits for breach of implied covenant of good faith and fair dealing).
17. Sons of Thunder, Inc., 148 N.J. at 427 (citations omitted).
18. See, e.g., Chatlos Systems v. National Cash Register Corp., 479 F. Supp. 738, 747 (D.N.J. 1979), rev'd on other grounds, 635 F.2d 1081 (3d Cir. 1980).
19. See generally id.; Carl Beasley Ford, Inc. v. Burroughs Corp., 361 F. Supp. 325, 329 (E.D. Pa. 1973), aff'd mem., 493 F.2d 1400 (3rd Cir. 1974).
20. Kearney & Trecker v. Master Engraving, 107 N.J. 584, 599-600 (1987) (citations omitted); Werner & Pfleiderer Corp. v. Gary Chemical Corp., 697 F. Supp. 808 (D.N.J. 1988) (where the exclusive remedy of repair or replacement failed, the court nevertheless enforced the disclaimer of consequential damages), abrogated on other grounds, Lo Bosco v. Kure Engineering Limited, 891 F. Supp. 1020, 1032-33 (D.N.J. 1995). See also U.C.C. provision N.J.S.A. 12A:2-719(3) (specifically permitting limitations on consequential and incidental damages “unless unconscionable”).
21. See Kearney & Trecker, 107 N.J. 584 (adopting the reasoning of Chatlos).
22. Kearney & Trecker, 107 N.J. at 599 (quoting Spring Motors, 98 N.J. at 577). See also Tessler and Sons, Inc., 203 N.J. Super. at 482-83 (holding that exculpatory clauses are enforceable where (1) they do not adversely affect the public interest; (2) the exculpated party is not under a public duty to perform which arises outside of the contractual obligation; and (3) where the contract does not arise out of unequal bargaining power or is otherwise unconscionable).
23. See also Werner & Pfleiderer Corp. v. Gary Chemical Corp., 697 F. Supp. 808 (D.N.J. 1988)

(applying New Jersey law, a claim for incidental and consequential damages was barred by contractual provision excluding such damages), abrogated on other grounds, Lo Bosco v. Kure Engineering Limited, 891 F. Supp. 1020, 1032-33 (D.N.J. 1995).

24. See Kearney & Trecker v. Master Engraving, 107 N.J. 584 (1987); Chatlos Systems, Inc. v. National Cash Register Corp., 635 F.2d 1081 (3rd Cir. 1980); Werner & Pfleiderer Corp. v. Gary Chemical Corp., 697 F. Supp. 808 (D.N.J. 1988), abrogated on other grounds, Lo Bosco v. Kure Engineering Limited, 891 F. Supp. 1020, 1032-33 (D.N.J. 1995). See also infra note 19.

25. The New Jersey judiciary had not previously allowed recovery for lost profits in the context of unestablished businesses. See In re Merritt Logan, Inc., 901 F.2d 349, 356 (3rd Cir. 1990) (noting that the defendants asserted that “New Jersey law precludes [plaintiff] from recovering damages for lost profits[,] . . . rely[ing] on the ‘new business rule’ embodied in several older cases holding that lost profits of a new business are too remote and speculative to permit an award of damages”).

In an early state breach of contract action, a lessee sued a lessor for renegeing on an option to lease a second property. See Weiss v. Revenue B & L Assoc., 116 N.J.L. 208 (Ct. E. & A. 1935). The plaintiff ran rooming houses and attempted to recover for the lost profits that would have been available had the lease option been executed as negotiated.

First the court recounted the standard that the damages be “those arising naturally, *i.e.*, according to the usual course of things, from the breach of the contract, or such as may fairly and reasonably be supposed to have been in the contemplation of the parties to the contract at the time it was made.” Id. at 210. Then, in refusing to allow recovery for the “anticipated profits” of the rooming house that had never been in operation, Justice Heher wrote that, in order to recover, “the damages shall be . . . the reasonably certain and definite consequences of the breach, as distinguished from mere quantitative uncertainty.” Id. (emphasis added). See also Seaman v. United States steel Corp., 166 N.J. 467, 475 (App. Div. 1979) (reversing trial court’s award for lost profits of new rental crane).

26. See Lightning Lube, Inc. v. Witco, Corp., 4 F.3d 1153, 1176 (3rd Cir. 1993). In Lightning Lube a franchisor brought claims against a supplier alleging, inter alia, fraud and tortious interference with contractual relations. Part of the recovery was predicated on estimates of lost profit damages based on the anticipated performance of various unestablished franchises.

The Third Circuit first noted its prediction in In re Merritt Logan (see discussion at note 13, supra) that the New Jersey Supreme Court would not continue to adhere to the new business rule. Then, the federal appeals court viewed the state Supreme Court’s decision in Perini Corp. v. Grete Bay Hotel & Casino, Inc. as an endorsement of this proposition. In Perini, the Third Circuit noted, the New Jersey Supreme Court cited In re Logan and “permitted a renovated casino to recover lost future profits as a new business.” Lightning Lube, 4 F.3d at 1176 (citing Perini, 129 N.J. 479 (1992)). See generally infra discussing the Lightning Lube case in greater detail.

27. Id. at 99-100. See also, Kazlow, Klepper & Kim, *Improving a New Business’ Odds of*

Recovering Lost Profits, 156 N.J.L.J. 388 (May 3, 1999).

28. Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504 (App. Div. 1996), aff'd as modified, 148 N.J. 582 (1997); Nappe, 97 N.J. at 48 (noting that punitive damages are awarded as punishment or deterrence for particularly egregious conduct). See also generally Herman v. Sunshine Chemical Specialties, Inc., 257 N.J. Super. 533 (App. Div.), rev'd on other grounds, 133 N.J. 329 (1992); Bartolo v. Boardwalk Regency Hotel Casino, Inc., 185 N.J. Super. 540 (Law Div. 1982).

29. See also Zippertubing Co. v. Teleflex Inc., 757 F.2d 1401, 1413 (3rd Cir. 1985) (“[u]nder [New Jersey] law a tortfeasor may be assessed punitive damages if there is evidence from which the factfinder may infer ‘actual malice’”) (citing Sandler v. Lawn-A-Mat Chemical & Equipment Corp., 141 N.J. Super. 437, 448 (App. Div. 1976)).

30. N.J.S.A. 2A:15-5.9 et seq.

31. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1194 (3rd Cir. 1993).

32. In assessing the availability of punitive damages:

[T]he trier of fact should take into consideration all of the circumstances surrounding the particular occurrence including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages.

Leimgruber v. Claridge Assocs. Ltd., 73 N.J. 450, 454 (1977).

33. Nappe v. Anschlewitz, Barr, Ansell & Bonello, 97 N.J. 37, 48 (1984) (quotation omitted).

34. See id. at 42 n.1.

35. Section 56:10-10 of the New Jersey statutes awards damages and costs, including attorneys fees, to a franchisee whose franchise is terminated in violation of the Franchise Practices Act. A franchisor who terminates the franchise in good faith and for bona-fide reasons other than the franchisee’s breach of the franchise agreement (i.e., the franchise is simply not profitable enough) is liable to the franchisee for damages in the amount of the reasonable value of the franchise business (the price upon which a willing buyer and seller would agree for the sale of the franchisee’s business as a going concern) minus the amount realizable by the franchisee on liquidation of the assets of the franchise. See generally Westfield Center Serv. v. Cities Serv. Oil Co., 86 N.J. 453, 466, 469 (1981).

36. N.J.S.A. 56:8-1 et seq.

37. See N.J.S.A. 12A:2-710 (“[i]ncidental damages to an aggrieved seller include any

commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach"). With respect to a buyer's recovery of incidental and consequential damages, the U.C.C. provides:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in the inspection, receipt, transportation and care and custody of goods rightfully rejected, any reasonable commercial charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach. (2) Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

N.J.S.A. 12A:2-715.

38. "Cover" entails a substitute purchase, wherein the "[t]he buyer may recover from the seller . . . the difference between the cost [of the substitute purchase]" together with incidental and/or consequential damages. See generally N.J.S.A. 12A:2-712.

39. 98 N.J. 555 (1985).

40. Id. at 578. See also Perth Amboy Iron Works v. American Home, 226 N.J. Super. 200, 226-27 (1988), aff'd, 118 N.J. 249 (1990); Coastal Group, Inc. v. Dryvit Systems, Inc., 274 N.J. Super. 171 (App. Div. 1994); Delgozzo v. Kenney, 266 N.J. Super. 169 (App. Div. 1993). The United States Supreme Court has likewise limited a commercial purchasers to its contractual remedies for economic loss caused by a defective product. East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986).

41. 149 N.J. 620 (1997).

42. Id. at 641; see also D'Angelo v. Miller Yacht Sales, 261 N.J. Super. 683 (App. Div. 1993) (holding that where a consumer purchased a yacht that was not as represented, he could sue the manufacturer under the U.C.C. for breach of warranty, but he could not sue under a theory of strict liability; the U.C.C. provides consumers with the exclusive remedy for economic loss resulting from express or implied warranties). In so holding, the court overruled its pre-U.C.C. opinion in Santor v. A & M Karagheusian, Inc. 44 N.J. 52 (1965), in which the court had held that a consumer may pursue a claim in strict liability for economic losses cause by a defective product. The position adopted by the court in Santor had long been the minority position among other jurisdictions.

43. Id. at 639.

44. 309 N.J. Super. 384, 396-99 (App. Div. 1998).

45. Id. Indeed, Justice Handler specifically stated that because tort causes of action may still be available to consumers under such circumstances he was able to join the majority's opinion. Id. at 644 (Handler, J., concurring).

46. See Goldson, 309 N.J. Super. at 397 (holding that “where, as here, there is no substantial disparity in bargaining power, and the only damage caused by the defective product is to the product itself, contract law, and the law of warranty in particular, is best suited to set the metes and bounds of appropriate remedies”); Naporano Iron & Metal Co. v. American Crane Corp., 79 F.2d 494, 503-04 (D.N.J. 1999) (holding that the economic loss doctrine controls absent a substantial disparity in bargaining position between the parties, and that there is no “sudden and calamitous” loss exception to the economic loss doctrine).

47. Norwood Easthill Assoc. v. N.E. Watch, 222 N.J. Super. 378, 384 (App. Div. 1988) (quotation omitted).

48. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1170-71 (3rd Cir. 1993).

49. See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993); Zippertubing Co. v. Teleflex Inc., 757 F.2d 1401 (3d Cir. 1985).

50. R. 4:42-9(a) states:

No fee for legal services shall be allowed . . . , except . . . (7) as expressly provided by these rules with respect to any action . . . [or] . . . (8) in all cases where counsel fees are permitted by statute.

See generally Pressler, supra, comment to R. 4:42-9 for lists of rules and statutes expressly allowing recovery of attorney fees.

51. Center Grove Assoc. v. Hoerr, 146 N.J. Super. 472 (App. Div. 1977); Johnson v. Johnson, 92 N.J. Super. 457 (App. Div. 1966). See also John Leubsdorf, Recovering Attorneys Fees as Damages, 39 RUTGERS L. REV. 439 (1986).

52. See generally Pressler, New Jersey Court Rules Annotated, comment to R. 4:42-11, at 1262-63, and cases cited therein.

53. AGS Computers v. Bear, Stearns Co., 244 N.J. Super. 1, 4 (App. Div. 1990) (“Prejudgment interest is awarded in contract cases to compensate the claimant for the loss of income the money owed would have earned had payment not been delayed”). See also Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464 (1988); Sulcov v. 2100 Linwood Owners, Inc., 303 N.J. Super. 13, 38-39 (App. Div. 1997); Gilbert v. Durand Glass, Mfg., 258 N.J. Super. 320 (App. Div. 1992); Aqua Marine Products, Inc. v. Pathe Computer Control Systems, Inc., 229 N.J. Super. 264 (App. Div. 1988); Cinnaminson Motel Owners Assoc. v. Township of Cinnaminson, 231 N.J. Super. 163 (Law

Div. 1987); Kislak Co., Inc. v. Geldzahler, 210 N.J. Super. 255 (Law Div. 1985); Miller v. N.J. Ins. Underwriting Ass'n, 177 N.J. Super. 584 (Law Div. 1980). See also Polito v. Continental Cas. Co., 689 F.2d 457 (3rd Cir. 1983).

54. See Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 506 (1974) (“[i]nterest has been imposed even where, as here, the [insurer] had in good faith contested the validity of the claim”).

55. See Pressler, supra, comment 9 to R. 4:42-11 (“[t]he allowance of prejudgment damages in commercial cases may also be a matter determined by contract”); AGS Computers, 244 N.J. Super. at 4 (specifically noting that the absence of a contractual provision dealing with prejudgment interest will not necessarily preclude recovery of prejudgment interest).

56. See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3rd Cir. 1993); Zippertubing Co. v. Teleflex Inc., 757 F.2d 1401 (3rd Cir. 1985).

57. For a discussion as to the burden of proof required in New Jersey for a legal fraud claim, see, Lithuanian Commerce Corporation, Ltd. v. Sara Lee Hosiery, 214 F. Supp. 2d 453 (D.N.J. 2002).

58. Cromartie v. Carteret Savings & Loan, 277 N.J. Super. 88 (App. Div. 1994) (“[a] party claiming damages for breach of contract has the burden of showing that the breach caused loss or prevented gain”); Olefins Trading, Inc. v. Han Yang Chemical Corp., 813 F. Supp. 310, 317 (D.N.J. 1993) (stating in the context of recovery for lost profits, “[t]he non-breaching party has the burden of proving the amount of damages it has suffered, and also that the damages are the direct and proximate result of the breach”), rev'd on other grounds, 9 F.3d 282 (1993); Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976). See also Ellsworth Dobbs, Inc. v. Johnson, 92 N.J. Super. 271 (App. Div.), rev'd on other grounds, 50 N.J. 528 (1966) (holding that where proof of damages is not shown, dismissal of the claim (and/or counterclaim) is appropriate).

59. See Sommer v. Kridel, 74 N.J. 446 (1977); Ingraham v. Trowbridge Builders, 297 N.J. Super. 72, 83 (App. Div. 1997) (burden of proving facts in mitigation of damages rests on breaching party); Banco di Roma v. Fidelity Union Trust, 464 F. Supp. 817 (D.N.J. 1979); Fashauer v. New Jersey Transit Rail Operations, Inc., 57 F.3d 1269 (3rd Cir. 1995); Storage Technology Corp. v. Trust Co. of New Jersey, 842 F.2d 54 (3rd Cir. 1988).

60. Wasserman's Inc. v. Middletown, 137 N.J. 238 (1994); J.L. Davis & Assocs., 263 N.J. Super. at 274; Central Steel Drum Co. v. Gold Cooperge, Inc., 200 N.J. Super. 251, 265 (App. Div. 1985), abrogated on other grounds, Kutzin v. Pirnie, 124 N.J. 500, 510-17 (1991). See also notes 9 & 10 (discussing the validity of liquidated damage provisions).

61. For example, besides difficulties associated with proving the scope of damages, other issues are likely to lead to jury confusion such as estimating the present value of future gains or losses. See, e.g., Russell v. City of Wildwood, 428 F.2d 1176, 1183 (3d Cir. 1970) (holding that where a jury was instructed to reduce its award to reflect future value, but was not instructed with regard to interest rates, any reduction would be “sheer conjecture.”); but see Universal Computers v. Datamedia Corp., 653 F.Supp. 518, 529 (D.N.J. 1987) (holding that under Fed. R. Civ. Proc. 51,

after the jury retired, it was too late to object on such basis), aff'd, 838 F.2d 1208 (3d Cir. 1988).

62. See, e.g., Universal Computers v. Datamedia Corp., 653 F. Supp. 518 (D.N.J. 1987) (stating that it is not necessary “to present expert testimony on the future rate of inflation”).

63. See also Robert L. Dunn, Recovery of Damages for Lost Profits, § 5.5, at 256 (3d ed. 1987) (“Perhaps the best evidence of lost profits is a comparison of the experience of plaintiff’s own business before and after the interruption of its progress by the wrongful act of defendant”).

64. 35 U.S.C. § 284.

65. Trell v. Marlee Elec. Corp., 912 F.2d 1443, 1445 (Fed. Cir. 1990).

66. Id. (reasonable royalty calculated based upon established royalty or, if none exists, a hypothetical royalty resulting from an arm’s length transaction); see, e.g., Datascope Corp. v. SMEC, Inc., 879 F.2d 820 (Fed. Cir. 1989) (applying both lost profit and reasonable royalty measure of damages to separate components of patent infringement claim), cert. denied, 493 U.S. 1024, 110 S.Ct. 729, 107 L.Ed.2d 747 (1990).

67. 15 U.S.C. § 78j(b)

68. Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 298 (D.N.J. 1989).

69. Id.

70. 15 U.S.C. § 77k

71. 15 U.S.C. §77k(e); see, e.g., McMahan & Co. v. Warehouse Entertainment, Inc., 65 F.3d 1044 (2d Cir. 1995), cert. denied, 517 U.S. 1190, 116 S.Ct. 1678, 134 L.Ed.2d 781 (1996).

72. See generally John P. Ludington, Annotation, Measure and Elements of Damages Under 15 U.S.C.S. § 15 Entitling Person Injured in Its Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages, 16 A.L.R. Fed. 14 (1973 and supp. 1997)

73. N.J.S.A. 56:9-18 (New Jersey Anti-Trust Act should be construed in “harmony” with its federal counterpart); see also Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 186-87 (App. Div.) (“our antitrust statute should be construed in consonance with federal law. . .”), certif. denied, 141 N.J. 99 (1945).