Lost Profits in Nebraska

by

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**The law of "lost profits" is vast,
and as with most areas of law
there are few cases from Nebraska.**

**Where appropriate this presentation
also will rely on cases from the Eighth Circuit.**

**This presentation is an overview of lost profits.
Because the rules of the UCC are nuanced,
this presentation does not address
issues related to the UCC.**

**Even though the law uses the term
"economic losses"
the law and economics differ
on the issue of lost profits.**

**The law relies upon objective proof of loss.
In contrast, subjective costs
are a center piece of economics.**

**Normal profit is the corner stone
of economic analysis of the firm
and is intensely subjective
as it is directly related to opportunity costs.**

**Opportunity costs are made up of both
subjective and objective components.**

**The law will not always allow recovery
of all objective economic losses.**

**Some objective damages
only are recoverable for some claims.
For example,
when a collateral transaction is foreseeable.**

**Other objective damages never are recoverable.
For example,
impairment of capital in addition to lost profits.**

Economic losses are viewed as part of contract law,
and
lost profits are viewed as part of economic losses.

Therefore,
lost profits, generally, are **not recoverable** for **negligent damage to a business;**
but are recoverable for
physical damage to property.

Some, but not all,
non-economic losses may be recovered,
even though some of these are
subjective, but objectively estimated.

For example, a plaintiff may recover the
reasonable monetary value of
pain and suffering
or of
loss of consortium.

The law requires objective proof.

The law will **not allow** recovery of losses
that are, objectively,
too speculative or too remote
(e.g., collateral transactions).

Hadley v. Baxendale,
156 Eng. Rep. 145 (1854).
Common carrier's delay caused lost profits.
Landmark case on requirement that
commercial damages must be **foreseeable.**

Hadley v. Baxendale
uses three tests for foreseeable

arising naturally
  i.e., no need for foreseeability;
objective standard
  i.e., appears to be within their contemplation;
subjective standard
  i.e., special circumstances both
  known and communicated.

Most courts, and Nebraska, use objective standard.

Proof of the
fact (i.e., causation) of lost profits
must be made to the level of a
reasonable certainty.

Causation of damages
is a question of law for the court.

Amount of damages
is a question of fact for the jury
and must be proved to the level of
preponderance of the evidence.

Expert (e.g., opinion) testimony
is permitted on both
causation and amount of damages.

Expert's opinion must have a foundation.
Must be based upon facts in evidence.

Courts split on basis needed to support the
expert's opinion of reasonable certainty.

- best available proof (Nebraska)
  - failure to use best available proof supports a summary judgement
- rational basis (8th Circuit)
  - more generous,
  - still feasible to fail

What is comparable?

- time
  - prior to cause
  - contemporaneous with cause
  - subsequent to cause
- location
  - same
  - others
    - chain
- person or entity
  - same
  - others
    - chain

What **adjustments** are needed?

To be comparable
adjustments must be made
or
justification to not make adjustments.

No presumption of comparability based solely on expert's opinion.

Foreseeability of lost profits is required.

With **privity** of contract
foreseeability is presumed.

Objectively foreseeable
means that under the circumstances it may be **reasonably assumed** that loss of profits were **within the contemplation** of the parties as a **probable result** of the breach at the time of making the contract:
need not prove actually knew.

Type of recovery depends on type of claim.
Economic losses associated with **contract law.**

Lost profits are a form of economic losses.

Therefore, an **ordinary tort** on business (e.g., negligence) typically does **not allow for recovery of lost profits.**

The courts are split
on one form of negligence against a business and whether lost profits may be recovered.

Negligence by a professional
fits within an **exception** for some courts.

Nebraska only faced this issue when the plaintiff had contractual privity.

Generically, Nebraska does not impose professional malpractice liability in the absence of **known and justifiable reliance.**

In contrast,
a tort on **property** (personal or real)
that results in **physical damage** does allow
recovery of lost profits.

Some business torts
do allow for recovery of lost profits.

Business torts, such as
- interference with business
- interference with subcontractor
- wrongful eviction
- unfair competition

allow for the recovery of lost profits.

Nebraska law
appears to have changed
with respect to recovery of lost profits due to
breach of a farm lease.

In fact,
the measure of damages was at issue.

Impermissible
was profit on mature crop.

Permissible
was difference in yields
between leased land and substitute land.

Always, physical damage to business property
(for example damage to crops)
supports recovery lost profits.

There are no Nebraska cases on
conversion of business property,
but all reported cases
allow recovery of lost profits

How may the plaintiff measure lost profits?

May the plaintiff use the defendant's gains?

This is a two fold question:
- **one of measurement**
- **and the**
- **other of recoupment**

Most courts do not allow the use of the defendant's profits to measure the plaintiff's lost profits. Nebraska, however, allows this use if comparable.

With respect to recoupment,
for the business torts of
- **unfair competition**
- **and**
- **breach of a covenant not to compete,**

courts allow the plaintiff to choose between the
- **plaintiff's lost profits**
- **and the**
- **defendant's inappropriate profits.**

The plaintiff is not allowed double recovery.

For actions to recover for fraud the courts have split on the appropriate measure of damages:
- **benefit-of-the-bargain losses (Neb)**
- **and**
- **out-of-pocket losses (8th Circuit).**

Both require proximate cause for lost profits

The results are very similar for proximately caused damages, whether
- **consequential damages**
- **under the out-of-pocket rule**
- **or**
- **benefit-of-the-bargain losses.**

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