

## **DAMAGES UPDATE 2009**

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## 1. MENTAL ANGUISH DAMAGES

Mental anguish is the emotional response of the plaintiff caused by the tortfeasor's conduct. *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361 (Tex.1987). In order to recover mental anguish damages, the emotional response must be something more than mere worry, anxiety, vexation or anger. *Hicks v. Ricardo*, 834 S.W.2d 587 (Tex. App.—Houston [1st Dist.] 1992, no writ). Mental suffering or distress that is not the foreseeable or natural result of the defendant's wrongful conduct is not recoverable. *Kaufman v. Miller*, 414 S.W.2d 164 (Tex. 1967). In general, mental anguish damages are not recoverable as a matter of law for the negligent destruction of property or for a breach of contract. *Beaumont v. Basham*, 205 S.W.3d 608 (Tex. App.—Waco 2006, pet. denied); *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604 (Tex. App.—Fort Worth 2006, pet. denied).

The Supreme Court in *Adams v. YMCA of San Antonio*, 265 S.W.3d 915 (Tex. September 26, 2008), reversed the court of appeals, holding that the jury's failure to award damages for past mental anguish did not necessarily preclude recovery of damages for future mental anguish where legally sufficient evidence was presented to support such an award. This case involved a child that was sexually abused by a camp counselor while attending a YMCA camp. The child's parents, individually and as next friends, sued YMCA for negligently hiring, retaining, and supervising the perpetrator. The jury awarded damages for future mental anguish, but awarded no damages

for past mental anguish. The trial court rendered judgment on the jury's award.

The court of appeals reversed, concluding that the jury's denial of past mental anguish damages meant there was insufficient evidence of a compensable injury in the future. The Supreme Court found that the evidence presented of the child's emotional outbursts and phobic anxiety, coupled with the expert testimony, supported a reasonable inference that an enormous reaction was likely when the "vault" of the child's memory opens. The Court remanded the case to the court of appeals for consideration of YMCA's additional issues.

In *Hyde Park Baptist Church v. Turner*, 2009 WL 211586 (Tex. App.—Austin Jan. 30, 2009, no pet. h.), the Austin court of appeals overruled Hyde Park's appeal and upheld the jury's award of future mental anguish damages. Turner, individually and as next friends of their son, P.C., brought suit against Hyde Park Baptist Church and a Hyde Park employee, Lowry, alleging that P.C. had been physically, emotionally, and verbally abused by Lowry while enrolled in the church's day care program. The jury found that Lowry intentionally injured P.C. and that Hyde Park's negligence contributed to his injuries.

On appeal, Hyde Park argued that mental anguish damages are not available as a matter of law unless there is evidence of serious bodily injury, a "special relationship" between the parties, injuries of a shocking and disturbing nature, or intent or malice by the defendant. See *City of Tyler v. Likes*, 962 S.W.2d 489, 495-96 (Tex. 1997). Hyde Park contended that none of these objective factors were present in this case. The court disagreed with Hyde Park's interpretation of *Likes*, holding that *Likes* does

not set forth an exhaustive list of the types of cases in which future mental anguish damages are available. *See Likes* at 496. The court went on to conclude that even if a party were required to show the existence of one of the factors described in *Likes* in order to recover mental anguish damages, one such factor did exist in the present case. Lowry's actions involved a sufficient level of intent or malice to trigger mental anguish damages under *Likes*. Thus, Texas law did not bar recovery of mental anguish damages in this case.

Recently, in *Ibrahim v. Young*, 253 S.W.3d 790 (Tex. App.—Eastland 2008, pet. denied), a personal injury suit, Young sued her employer, Dr. Kreit, and a furniture manufacturer for injuries she sustained when her office chair broke causing her to fall. Dr. Kreit argued that the evidence was legally and factually insufficient to support the trial court's \$150,000 mental anguish award. Young asserted that Dr. Kreit waived this issue because the trial court's mental anguish award and pain and suffering awards were combined and because Dr. Kreit did not challenge her pain and suffering damages. The trial court found damages of \$104,527.80 for past and future medical, \$138,112 for past and future lost wages, \$1,600 for fraud, and \$150,000 for past and future mental anguish and pain and suffering. The trial court's oral findings and the written findings of fact both confirmed that it did not award any physical pain and suffering damages but, instead, found only mental anguish damages. Consequently, Dr. Kreit did not waive this issue.

Young likened her physical injuries with those suffered by the plaintiff in *Fifth Club Inc. v. Ramirez*, 196 S.W.3d 788, 797 (Tex. 2006). In *Fifth Club*, the plaintiff was beaten at a nightclub by a security officer. His head was slammed against a concrete wall, knocking him unconscious and fracturing his skull. The court of appeals, distinguished *Fifth Club* from the present case, holding that *Fifth Club* did not stand for the proposition that mental anguish damages can be inferred in all personal injury cases. *Id.* at 807. The court's holding in *Fifth Club* was premised on the existence of a disturbing or shocking injury. 196 S.W.3d at 797. The court found that falling off of an office

chair was not the type of shocking or disturbing injury that the Supreme Court had in mind in deciding *Fifth Club*. Furthermore, the court held that Young's testimony did not distinguish a mental anguish claim from physical injuries, such as pain and suffering or other forms of damage such as lost earnings and lost earning capacity. Consequently, the court found that the trial court's award of \$150,000 against the great weight and preponderance of the evidence.

In *Las Palmas Medical Center v. Rodriguez*, 2009 WL 214753 (Tex. App.—El Paso Jan. 30, 2009, no pet. h.), the court of appeals upheld a \$50,000 mental anguish award to the estate of a woman who died in the hospital after the medical staff declined to resuscitate her. Prior to her decline, she had not been alert, oriented or cognitive. The hospital argued that mental anguish damages were not justified in the absence of conscious pain and suffering. The court of appeals held that the evidence of the decedent's "agonal" breaths, prior to death, was legally sufficient to support the award of mental anguish damages. The fact that she was trying to breath constituted evidence of her suffering.

## 2. MEDICAL MALPRACTICE DAMAGES

Chapter 74 of the Texas Civil Practices & Remedies Code caps all noneconomic damages awarded to a plaintiff in all common law negligence claims, but does not cap the plaintiff's economic damages. *See* TEX. CIV. PRAC. REM. CODE §74.301. Thus, to calculate damages subject to the cap, the plaintiff must segregate economic and noneconomic damages in the jury charge. A plaintiff, moreover, must segregate past damages from future damages in the jury charge in order to recover prejudgment interest on past damages. *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 223 (Tex. App.—Amarillo 2003, no pet.).

In *Rivera v. United States*, 2007 WL 1113034 (W.D. Tex. Mar. 7, 2007), the court held that the damages cap limiting tort recovery in Chapter 74 of the Texas Civil Practice and Remedies Code, did not violate the Texas Constitution because the Constitution directs the

legislature to provide damage caps on healthcare liability claims.

After undergoing two blood transfusions, Rivera died as a result of receiving the wrong blood type. Rivera's heirs brought a motion for partial summary judgment on the defendant's affirmative defenses. Rivera's heirs claimed that the damages cap in Chapter 74 which limits a plaintiff's recovery to \$1.5 million (not including medical costs) against healthcare providers violated the Constitution because it "provides health care providers with exclusive privileges in violation of the equal protection provisions of the Texas Constitution." The court rejected Rivera's heirs' argument, concluding that Chapter 74 did not violate the Constitution and, therefore, the defendants had a right to base their affirmative defense on the damages cap provided.

In *Phillips v. Bramlett*, 258 S.W.3d 158 (Tex. App.—Amarillo 2007), *pet. granted*, 51 Tex. Sup. Ct. J. 329 (January 25, 2008), the court of appeals reviewed whether the statutory damages cap on medical malpractice damages applied to a judgment against a physician when the physician's liability insurer would be subject to a *Stowers* action. Bramlett sued Dr. Phillips alleging that Phillips's malpractice led to his wife's death from post-surgery complications. The jury found that Phillips was grossly negligent and 75% responsible for Bramlett's wife's death and awarded Bramlett \$11 million in compensatory damages and \$3 million in punitive damages.

After the return of the jury verdict, Phillips filed a motion for judgment notwithstanding the verdict requesting that the trial court disregard the jury findings and enter judgment consistent with the damage caps. The trial court denied the motion and Phillips subsequently filed a motion to correct, modify, or reform the judgment along with a motion for new trial requesting the same relief. Again, the trial court denied the motions.

The court of appeals upheld the verdict, holding that section 11.02(c) of the Medical Liability and Insurance Improvement Act (MLIIA) provided an exception to the cap in cases, like this one, where the doctor's liability insurer would be subject to a *Stowers* claim. In fact, the court recognized that the "*Stowers*

Doctrine" served to ensure that a physician's insurance carrier bargained with a plaintiff in good faith. The *Stowers* Doctrine is a common law theory that "permits an insured to maintain a cause of action against his insurer to settle a claim within applicable policy limits." Section 11.02(c) states that the liability limitations of "this section" shall not apply to "any insurer where facts exist that would enable a party to invoke" the *Stowers* doctrine. Phillips argued that applying Section 11.02(c) to a physician's liability contravenes the plain language of the statute. The Supreme Court granted Phillip's petition for review and heard oral argument on April 22, 2008. No decision has been issued.

### 3. EXEMPLARY DAMAGES

A plaintiff seeking exemplary damages must prove the necessary level of culpability by clear and convincing evidence. To recover exemplary damages, the plaintiff must prove the defendant cause the injury by a type of aggravated conduct that supports exemplary damages. The three types of aggravated conduct that will support exemplary damages are gross negligence, malice, and fraud.

The general rule is that punitive damages are not available for breach of contract even if the breach was intentional, or grossly negligent. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). However, the mere fact that a plaintiff has been injured as a result of a breach of contract does not necessarily preclude punitive damages if the injured party can also demonstrate the occurrence of an independent tort. *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995). In most cases, the plaintiff must recover actual damages against the defendant to recover exemplary damages. *Rancho La Valencia, Inc. v. Aquaplex, Inc.* 253 S.W.3d 728, 736 (Tex. App.—Amarillo 2007, *pet. filed*).

In *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653 (Tex. February 15, 2008), the Supreme Court addressed the following question: Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross



negligence? In the underlying case, Fairfield Insurance Company sued Stephens Martin Paving for a declaratory judgment that it owed no duty to defend or indemnify a claim for exemplary damages under a workers' compensation and employer's liability insurance policy held by Stephens Martin Paving. The Court held that Texas public policy did not prohibit coverage of exemplary damages in the case presented and described some circumstances for analyzing public policy in other cases.

The Court noted that under workers' compensation law, the Texas Department of Insurance is given the authority to promulgate insurance policies that are to be used by every employer seeking workers' compensation coverage. Those policies, including the one at issue in this case, contain expressed coverage for exemplary damages arising from gross negligence. As such, the Court held that public policy, expressed through legislative enactments, did not prohibit coverage of exemplary damages in the workers' compensation context. The Court noted that in the absence of an expressed legislative policy, courts faced with the question of insurance of exemplary damages should balance the interests of freedom of contract against the purpose of exemplary damages, which is to punish a wrongdoer.

In *Murphy* the court found that a jury's verdict did not have to be unanimous to award exemplary damages in excess of the statutory cap. *Murphy v. American Rice, Inc.*, 2007 WL 766016 (Tex. App.—Houston [1st Dist] Mar. 9, 2007, no pet.). ARI brought suit against Murphy claiming breach of fiduciary duty, conversion, actual fraud, and constructive fraud. The trial court found in favor of ARI and awarded \$4,404,171 in actual damages and \$10 million in exemplary damages. The jury found that Murphy had also committed three Penal Code offenses, which allowed them to avoid the cap on exemplary damages.

Murphy appealed, claiming that the award should be reduced to the statutory cap because the jury's verdict was not unanimous. Murphy argued that a jury's verdict must be unanimous in order to find a violation of the Penal Code.

The appellate court concluded that there is "no case law requiring that, in a civil case, for purposes of determining whether the cap on exemplary damages can be exceeded under the law in effect at the time that this case was tried, a jury's findings that a criminal offense was committed must be unanimous."

#### 4. CONDEMNATION DAMAGES

In condemnation proceedings, the measure of damages is usually rigidly fixed by either the provisions of the eminent domain statutes governing damages or some other special statute applicable to the case. *See, e.g.*, TEX. PROP. CODE ANN. §§ 21.041 to 21.044. In proceedings to condemn only part of a tract, however, if the work is essentially of such a character that depreciation of the tract is inevitable regardless of the skill and care used in constructing and operating the work, damages are recoverable, under the ordinary rule as to the measure of damages, for diminution of the present value of the land. *Fort Worth & D.S.P. Ry. Co. v. Gilmore*, 2 S.W.2d 543 (Tex. Civ. App.—Amarillo 1928, no writ).

In *State v. Cent. Expressway Sign Assoc.*, 238 S.W.3d 800 (Tex. App.—Dallas 2007), *pet. granted*, 52 Tex. Sup. Ct. J. 84 (November 14, 2008), the State condemned land on which Central Expressway Sign Associates held an easement that it rented to Viacom Outdoor, Inc. The disputed issue in this case concerned the proper method for calculating the condemnation value of property that was the site of an income producing billboard. Viacom maintained a billboard on the property and sold space on the billboard to advertisers. The trial court excluded testimony of the State's expert appraiser because he estimated the property's fair market value by capitalizing the rental income Viacom paid to Central Expressway, but did not include a capitalized value for the income Viacom received from billboard advertisers. The court of appeals affirmed. The State argued that income from billboards is business income, which is not compensable in a condemnation proceeding. The Supreme Court granted argument on the State's petition and heard oral argument on January 13,

2009. A decision has not been issued by the Court.

In another recent condemnation case, the Supreme Court held that landowners were not entitled to compensation for the diminished value of the remainder of their land because the owners did not suffer a material and substantial impairment of access. *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875 (Tex. September 26, 2008). In this condemnation case, the State of Texas challenged both the amount awarded for land taken as part of a highway improvement project and the compensability of severance damages to the remainder.

At the time of the taking, the land at issue was unimproved and zoned for residential use. No evidence was presented of any existing development plans for commercial use or pending requests for a zoning change. The principal issue was whether the landowners were entitled to severance damages resulting from the permanent denial of direct access to the highway in light of evidence that the restrictions on access changed the “highest and best use” of an economic unit on the property from commercial to residential.

The Supreme Court held that, although the tract of land no longer had direct access to the highway or its frontage roads, there was considerable access to two other public roads, both of which intersected the highway. Thus, the Court held that the diminished value resulting exclusively from diminished access was only compensable if there is a material and substantial impairment of access.

## 5. BREACH OF FIDUCIARY DUTY DAMAGES

In an action for breach of fiduciary duty, the plaintiff can recover actual damages, out of pocket losses, lost profits, and mental anguish damages. Exemplary damages can be recovered if the breach was intentional. *Brosseau v. Ranzau*, 81 S.W.3d 381, 396 (Tex. App.—Beaumont 2002, pet. denied). In addition, a court may place a constructive trust on proceeds, funds, or property obtained as a result of a breach of fiduciary duty. *Omohundro v. Matthews*, 341 S.W.2d 410, 404-05 (Tex. 1960).

A plaintiff may seek forfeiture all or part of the fees collected by the fiduciary; however, this equitable remedy must be specifically pled. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

*Norwood v. Norwood*, 2008 WL 4926008 (Tex. App.—Fort Worth Nov. 13, 2008, no pet.), involved a divorce that included litigation between not only the husband and wife, but also a closely-held corporation owned solely by the husband and wife and a competing corporation for which the wife went to work after the divorce proceedings began. Nor Dubois was the catering company Kimberly and Tracy Norwood formed before marrying. The trial court awarded Nor Dubois \$235,000 in damages, but did not specify which of Nor Dubois’s claims supported the damage award. Kimberly Norwood appealed the trial court’s granting of Tracy Norwood and Nor Dubois, Inc.’s motion for sanctions and the entry of a directed verdict in Nor Dubois’s favor on its claims for breach of fiduciary duty, conspiracy to breach fiduciary duty, and tortious interference with contracts.

Evidence was presented at trial that Nor Dubois was worth \$236,773 in December 2004 and \$0 in January 2005 when Kimberly resigned. Tracy Norwood testified that Kimberly took all of Nor Dubois’s customers, supplies, employees, including the chef, with her when she left. Therefore, he was unable to continue operating the business on his own.

On appeal, Kimberly challenged the legal sufficiency of the evidence to support the damage award of \$235,000 to Nor Dubois under either a breach of fiduciary duty or tortious interference theory. She contended that the damage award was based solely on the diminution in value of Nor Dubois as a result of appellants’ actions. Relying on *Texas Instruments Inc. v. Teletron Energy Mgmt.*, 877 S.W.2d 276 (Tex. 1994) and *Duncan v. Lichtenberger*, 671 S.W.2d 948 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e.), she claimed that a plaintiff may only recover out-of-pocket losses or lost profits for breach of fiduciary duty. The court of appeals disagreed, holding that those cases did not stand for the proposition that those measures of damages were the exclusive remedies for breach of fiduciary duty. *Id.* \*9.

The court found nothing in either case which restricted the types of damages that can be awarded on a breach of fiduciary duty claim. Thus, appellate court held that the evidence was sufficient to support the \$235,000 damage award to Nor Dubois.

## 6. PROVING DAMAGES IN A START-UP COMPANY

Texas courts have always viewed “new business” damages with skepticism. Historically, the general rule was that the loss of anticipated profits from a new business was too speculative and conjectural to support a recovery of damages. *Southwest Battery Corp. v. Owen*, 131 Tex. 423, 115 S.W.2d 1097 (1938). Older cases focused on “factual data” or, more appropriately, the “absence” of factual data as a controlling factor. *Barbier v. Barry*, 345 S.W.2d 557 (Tex. Civ. App.—Dallas 1961, no writ) and *Universal Commodities, Inc. v. Weed*, 449 S.W.2d 106 (Tex. Civ. App.—Dallas Dec 12, 1969, writ ref’d n.r.e.) are two examples of these older cases. In *Barbier*, the Dallas court of appeals held that lost profits will not be denied merely because a business is new *if* there is *factual data* available to furnish a basis for computation of probable losses. *Barbier*, 345 S.W.2d at 563 (emphasis added). In *Universal Commodities* the court held that “loss of anticipated profits from new business is too speculative and conjectural to support recovery of damages in absence of *factual data* to furnish sound basis for computation of probable loss.” *Universal Commodities*, 449 S.W.2d at 113.

The newer cases in Texas have a broader and slightly different focus. Now, Texas courts allow plaintiffs to recover damages for lost profits when they are proved with “reasonable certainty.” *Holt Atherton Ind., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). The Court in *Holt* made it clear that calculating lost profits is “a fact intensive determination.” *Id.* at 84. *Orchid Software* is another case indicative of these newer cases. *Orchid Software, Inc. v. Prentice-Hall, Inc.*, 804 S.W.2d 208 (Tex. App.—Austin 1991, writ denied). The court in *Orchid* held that an absence of a history of profits does not by

itself preclude new business from recovering damages for lost future profits.

Calculating lost profits for a start up company has been described by Texas courts as an “innately speculative” activity and is even more difficult than proving lost profits for an ongoing business. *Natural Gas Clearinghouse v. Midgard Energy Co.*, 23 S.W.3d 372, 378 (Tex. App.—Amarillo 1999, pet. denied). Unlike well-established businesses, most start-ups typically have little or no track record, ongoing losses, few revenues, untested products, unknown cost structures, unknown implementation timing, unknown market acceptance, unknown product demand, unknown competition, inexperienced management, an untested business model, and high development or infrastructure costs.

For that reason, a plaintiff has unique challenges when fighting the battle to establish lost profits from a new business or product. In *Texas Instruments*, the Texas Supreme Court gave plaintiffs with start-up companies some direction as to how to recover damages for lost profits. The Court held that “where there are *firmer reasons* to expect a business to yield a profit, the enterprise is not prohibited from recovering merely because it is new.” *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 281 (Tex. 1994) (emphasis added). The Court set out three factors for proving lost profits for a start-up company: (1) the experience of the persons involved in the enterprise, (2) the nature of the business activity, and (3) the relevant market. *Id.* at 279-80. In addition, lost profits must be proved by competent evidence, such as “objective facts, figures or data from which the amount of lost profits may be ascertained.” *Holland v. Hayden*, 901 S.W.2d 763, 766 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (*citing Holt Atherton*, 835 S.W.2d at 84).

“Reasonable certainty” is an elusive standard that has been interpreted numerous ways by Texas courts. By intentionally leaving the requirement for proving lost profits for a start-up “flexible enough to accommodate the myriad circumstances in which claims for lost profits arise,” the Court has provided plaintiffs with little assistance as to what is required. *Texas Instruments* at 279.

Recently, in *Fluor Enterprises, Inc. v. Conex Intern. Corp.*, 273 S.W.3d 426 (Tex. App.—Beaumont 2008, pet. filed), the court of appeals held that expert testimony employing mixed methodologies and piecemeal computation was unreliable. *Id.* at 448. The expert in this case did not consistently apply his methodology. In addition, the expert based his opinion of lost future profits on past performance only when it benefited Conex. The court stated that recovery of lost profits must be predicated on one complete calculation. *Id.*

In *McClure v. Biesenbach*, 2008 WL 3978062 (W.D. Tex. July 25, 2008), plaintiff, a founder of a concert production company, brought suit after the cancellation of his three day outdoor rock concert in San Antonio. Plaintiff had secured bands, national sponsors, advertising, and local advertising to promote the event. Defendants sought to exclude plaintiff's expert's testimony, contending it was unreliable regarding lost profits, future profits, and the success and credibility of plaintiff McClure as a promoter of the concert. *Id.* at \*2.

The defendants in *McClure* stressed the expert's lack of experience in the concert promotion business. Nevertheless, the court was persuaded by the fact that the expert had thirty years of experience in concert promoting and had served as an expert witness on the subject of concert promotion, venue construction, and concert production. Furthermore, the expert formed opinions regarding the lost profits from the cancelled rock concert by reviewing Pollstar records, sponsorship agreements, and detailed records involving contracts and expenses for the concert. The court held that the expert was qualified and denied the motion to exclude, but reserved the right to curtail the expert's testimony during trial. *Id.* at \*5.

The court in *McClure* distinguished that case from the *Gilmore* case. In *Gilmore* the plaintiff's lay witness testified about the projected future earnings for the plaintiff if she were to become a professional dancer in New York City and earn a salary until she was seventy. *Gilmore v. WWL-TV, Inc.*, 2002 WL 31819135 (E.D. La. Dec. 12, 2002). The court stressed the "quantum leap" from the plaintiff's status at that time as a dancer/ballet teacher to a prima ballerina. *Id.* at

\*10. The *McClure* court found that the plaintiff's expert witness testimony did not reach the level of speculation of the lay witness in the *Gilmore* case. The court explained that with regard to future earning potential, "aspiration alone does not provide sufficient basis to support an expert opinion." *Id.* at \*17.

In *Roehrs v. Conesys, Inc.*, 2007 WL 2125654 (N.D. Tex. July 25, 2007), the defendants moved for summary judgment as to all of the plaintiff's claims, arguing that the plaintiff's damage model for lost profits was too speculative to be submitted to the jury. In this case, the plaintiff's damages model accounted for the prospective business relationship with two other companies that the defendants' interference allegedly sabotaged. The Plaintiff claimed that if either of the deals with the other two companies had worked out he would have made profits from the transaction.

The court found that the plaintiff's damages calculation was too speculative because it did not take into account the difference between what the purchase price of a company would have been in 2003 and the actual purchase price of the company in 2005. *Id.* at \*7. The court held that there was no data from which a jury might reasonably deduce the amount, if any, the plaintiff was actually injured. *Id.*

In *In re Bob Nicholas Enterprise, Inc. v. Nicholas/Earth Printing, L.L.C.*, 358 B.R. 693 (S.D. Tex. 2007), the court held that the plaintiff's expert testimony should be excluded because it was based on a document with no actual financial data. The expert testimony regarding the value of intangible assets and damages was based on historical financial information about a company before it created the joint venture. All the projections in the documents were hypothetical and contained no factual information as to loss of net profits to the new joint venture. Thus, the court excluded the expert testimony.

In *Mood v. Kronos Products, Inc.*, 245 S.W.3d 8 (Tex. App.—Dallas 2007, pet. denied), the Dallas court of appeals affirmed the trial court's decision to disregard the jury's award for lost profits. The court found that the expert's methodology was based on speculative facts and assumptions. In this case, the expert based his

lost profits analysis on figures that assumed 10 years of profits and the continuation of a distributorship agreement that had a 60 day notice of termination. The court found both of these assumptions unfounded; as a result, the court held the damage model was no evidence of direct or consequential lost profits. *Id.*

## 7. FRAUD DAMAGES

Traditionally, in an action for common law fraud courts recognize two measures of actual damages: the out-of-pocket measure and the benefit-of-the-bargain measure. *Baylor Univ. v. Sonichsen*, 221 S.W.3d 632, 636 (Tex. 2007); *Formosa Plastics Corp. v. Presidio Engineers*, 960 S.W.2d 41, 49 (Tex. 1998); *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997). The out-of-pocket measure allows the injured party to recover the differences between the value of that with which he has parted and the value of that which he has received. *Leyendecker & Assoc., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984). The benefit of the bargain measure can include lost profits that would have been earned if the bargain had been performed as promised. *Formosa Plastics*, 960 S.W.2d at 50. In addition, consequential damages that are foreseeable and directly traceable to the breach, such as lost profits from other business opportunities, can be recoverable under the proper circumstances. *Id.* at 40 fn. 1; *Swinnea v. ERI Consulting Engineers, Inc.* 236 S.W.3d 825, 838 (Tex. App.—Tyler 2007, no pet. h).

In *THPD, Inc. v. Continental Imports, Inc.*, 260 S.W.3d 593 (Tex. App.—Austin 2008, no pet.), THPD and Continental Imports, Inc. each appealed a judgment that awarded THPD \$83,932 on causes of action against Continental for conversion, theft, and negligence. On appeal, THPD urged that the district court erred in refusing to impose joint and several liability on Continental for a much larger damages award the jury imposed against a co-defendant. Continental asserted that there is no legal support for any of the relief awarded against it. The Austin court of appeals held that THPD could not demonstrate that the evidence conclusively established that all the fraud

damages the jury awarded against the co-defendant were proximately caused by Continental. *Id.* at 607. Thus, the jury's verdict could not support a judgment imposing liability against Continental for conspiracy, much less holding Continental jointly and severally liable as a co-conspirator for all damages that the jury awarded against the co-defendant. Consequently, the district court did not err in declining to impose joint and several liability on Continental for damages awarded against the co-defendant. *Id.* at 608.

## 8. CONTRACTUAL LIMITATIONS ON DAMAGES

In *Chaparral Texas, LP v. W. Dale Morris, Inc.* 2007 WL 2455295 (S.D. Tex. August 24, 2007), the court held that parties may stipulate to notice of claim provisions, as opposed to limitations periods, as long as the provisions are reasonable. On July 24, 2004, Chaparral, the buyer, and Morris, the seller, entered into an Agreement to purchase oil and gas wells, leases, and properties located in Texas. The Agreement contained the following provision:

*“Limitation on Seller Liability.* After the Closing, any assertion by Buyer that Seller is liable under this Agreement or for any other reason must be given to Seller on or prior to the last business day preceding the first anniversary of the Closing Date. The notice shall state the facts known to Buyer that give rise to such notice in sufficient detail to allow Seller to evaluate the assertion by Buyer.”

On April 26, 2006, counsel for Chaparral sent a letter to counsel for Morris invoking the Agreement's arbitration clause because a particular well as sold violated the rules and regulations of the Texas Railroad Commission. The letter also stated that Chaparral had already spent in excess of \$100,000 to bring the well into compliance and sought to recover those damages under the terms of the Agreement.

Morris responded stating that the claim was time barred under the *Limitation on Seller Liability* clause. Morris also contended that Chaparral failed to provide timely notice of its claim under the provision.

The court held that the provision was similar to a clause in an insurance contract requiring notice of a loss or claim within a certain time period after it occurs. The purpose of such a provision is to give Morris enough information about Chaparral's asserted claim to allow Morris to investigate within a reasonable time after such assets were sold. Using the heading of the provision as guidance, the court noted that the consequence of Chaparral's failure to give Morris timely and proper notice of a claim was that Morris was not liable for the claim. "This construction is consistent with the language of the Agreement and is permitted by Texas law, which allows contracting parties to stipulate that a claimant must give notice of a claim for damages as a condition precedent to the right to sue on a claim, if the stipulation is reasonable." As a result, Chaparral's claim was denied due to untimely notice.

## 9. DISCRIMINATION

The Americans With Disabilities Act ("ADA") prohibits any covered employer from discriminating against a qualified individual with a disability because of the disability of that individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C.A. § 12112.

In *E.E.O.C. v. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007), the Fifth Circuit held that the front and back pay awards served a compensatory function, thus, they were sufficient to sustain an award for punitive damages. The E.E.O.C brought an action on behalf of Barrios, a discharged employee, against Du Pont under the ADA. The jury found that Barrios was discharged in violation of the ADA and awarded her \$91,000 in back-pay, \$200,000 in front-pay, and \$1 million in punitive damages. Du Pont appealed.

Du Pont argued that there was not sufficient evidence to support a finding of malice or reckless indifference to support the punitive damages claim. The appellate court disagreed, finding that the working conditions and attitude

of management towards Barrios was sufficient to allow a reasonable jury to believe that Du Pont intentionally discriminated.

In addition, Du Pont contended that punitive damages were not recoverable in the absence of compensatory damages. The court was not persuaded by Du Pont's attempt to characterize the front-pay and back-pay awards as solely equitable remedies. Under section 1981a of the ADA, front-pay and back-pay serve a compensatory function. The court also looked to the fact that Barrios' back-pay award was intended to remedy her wage loss following illegal termination by Du Pont. Accordingly, the court concluded that although front and back-pay were not compensatory damages, they served a compensatory function and therefore were sufficient to sustain an award for punitive damages.

In *Arismendez v. Nightingale Home Health Care, Inc.*, 2007 WL 2083710 (5th Cir. 2007), the court held that the defendant did not waive his right to the statutory cap's protection by not pleading it because the defendant raised the cap "at a pragmatically sufficient time" and the plaintiff was not prejudiced.

Arismendez brought a gender discrimination suit against Nightingale Home Health Care alleging pregnancy discrimination under the Texas Commission on Human Rights Act. The jury found that Arismendez's pregnancy was a motivating factor in her discharge and awarded damages for back pay, compensatory damages, and \$1,000,000 in punitive damages. The court remitted the damages to \$200,000, sustaining Nightingale's objection that the jury failed to apply the statutory cap on punitive damages.

On appeal, Arismendez argued that Nightingale waived any statutory cap by failing to timely plead it. The appellate court found that although Nightingale failed to plead the statutory cap in their answer, they had not waived the right to the cap's protection. The court noted that Nightingale raised the argument prior to the entry of judgment, that there were no factual issues to determine, and Arismendez made no showing of prejudice from delay. The court concluded that Nightingale had raised the cap at a "pragmatically sufficient time" and that Arismendez was not prejudice.

## 10. DECEPTIVE TRADE PRACTICES ACT

In an action for violation of the DTPA, the plaintiff can recover economic damages if the damages arise from the plaintiff's reliance on false, misleading, or deceptive acts or practices plus mental anguish damages. *Gill v. Boyd Distrib. Ctr.*, 64 S.W.3d 601, 604 (Tex. App.—Texarkana 2001, pet. denied). The plaintiff can recover mental anguish damages if the defendant acted knowingly and intentionally. *City of Tyler v. Likes*, 962 S.W.2d 489, 498 n. 1 (Tex. 1997).

The court in *Bossier Chrysler-Dodge II, Inc. v. Riley*, 221 S.W.3d 749, 759 (Tex. App.—Waco 2007, pet. denied), held that the Deceptive Trade and Practices Act (DTPA) did not impose a cap on mental anguish damages. *Bossier Chrysler-Dodge* brought a breach of contract claim against Riley for failure to deliver his pickup truck as a trade in for a used car. Riley counterclaimed, alleging that Bossier had committed fraud and DTPA violations. The jury failed to find that Bossier and Riley had entered into a contract, but awarded Riley damages on his claims of fraud and DTPA violations plus additional damages after finding that Bossier acted knowingly.

Bossier appealed alleging that the court erred in failing to cap the jury's award for mental anguish damages at three times the amount of economic damages awarded, as provided in Section 17.05(b)(1) of the DTPA. That section provides that a plaintiff may recover: "the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages."

The court interpreted this section to provide that, while the plaintiff's "additional damages" were subject to the damages cap, the plaintiff's recovery for economic damages and mental anguish damages was not limited when the defendant's conduct was committed knowingly. "The statute imposes no cap on the amount of damages the jury may award for mental anguish." *Id.* at 759.

## 11. PRE-JUDGMENT INTEREST

In *SAP Trading, Inc. v. Sohani*, 2007 WL 1599719 (Tex. App.—Houston [14th Dist.] June 5, 2007, no pet.), the 14th District Court of Appeals recognized the split of authority among Texas Courts of Appeals, and among the Court's own cases, concerning whether an award of pre-judgment interest is mandatory.

*SAP Trading* involved a suit on sworn account. SAP argued that it was due pre-judgment interest under section 302.002 of the Texas Finance Code. That section prescribes the rate of "legal interest" a "creditor" may charge. The definitions of "legal interest" and "creditor" specifically exclude judgment creditor and pre-judgment interest. Thus, the Court held that SAP was not entitled to pre-judgment interest.

In *Baker Hughes Oilfield Operations, Inc v. Hennig Production Co.*, 164 S.W.3d 438, 447 (Tex. App.—Houston [14th Dist.] 2005, no pet.), the 14th District stated that a "prevailing party is awarded pre-judgment interest as a matter of course." The majority of Texas courts, including the 14th District, have held that an award of pre-judgment interest is within the trial court's discretion. *See Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex. App.—Houston [14th Dist.] 1997, no writ). Alternatively, the 14th District Court has also held that a trial court is permitted, but not required, to award pre-judgment interest under the authority of a statute, an equitable theory, or both. *Larcon Petro., v. Autotronic Sys., Inc.*, 576 S.W.2d 873, 879 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).