

# LOST PROFIT DAMAGES

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## LOST PROFIT DAMAGES

### I. INTRODUCTION

The purpose of this paper is to provide an overview of various issues involved with seeking or defending lost profits in Texas. Proving lost profits is a fact intensive determination and numerous issues must be considered by practitioners.

Other Texas Bar CLEs were referenced and provided helpful additional resources. An appendix containing a non-exclusive list of material which a practitioner should request to support or defend a claim of loss profits is attached as Appendix A. Additionally, a list of recent representative cases which have been either upheld or denied on appeal is attached as Appendix B.

#### A. Lost profits defined

“Lost profits are damages for the loss of net income to a business measured by reasonable certainty.” *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002). Net income or “net profits” is the difference between a business’s total receipts and all of the expenses incurred in carrying on the business. *Exel Transp. Servs., Inc. v. Aim High Logistics Servs., LLC*, 323 S.W.3d 224, 232 (Tex. App.–Dallas 2010, pet. denied); *Barton v. Resort Dev. Latin Am., Inc.*, 413 S.W.3d 232, 235-36 (Tex. App. – Dallas 2013, pet. denied).

#### B. Claims supporting lost profits recovery

Lost profits are available for a number of contractual and tort claims, including fraud, fraudulent inducement, misrepresentation, conversion, tortious interference, breach of fiduciary duty, misappropriation and Deceptive Trade Practices Act (DTPA) actions. *See, e.g., Lamont v. Vaquillas Energy Lopeno Ltd., LLP*, 421 S.W.3d 198, 224 (Tex. App.–San Antonio 2013, pet. filed) (misappropriation of trade secrets and tortious interference with business contracts); *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 863-64 (Tex. App.–Fort Worth 2001, pet. denied) (breach of contract, tortious interference with contract, conspiracy, and fraud); *Howell Crude Oil Co. v. Donna Refinery Partners, Ltd.*, 928 S.W.2d 100 (Tex. App.–Houston [14th Dist.] 1996, writ denied) (violations of DTPA, negligent misrepresentation, fraud, and breach of contract); *Rusty's Weigh Scales & Serv., Inc. v. N. Texas Scales, Inc.*, 314 S.W.3d 105 (Tex. App. – El Paso 2010, no pet.) (misappropriation of trade secrets); *Wiese v. Pro Am Servs., Inc.*, 317 S.W.3d 857 (Tex. App.–Houston [14th Dist.] 2010, no pet.) (conversion); and *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 877 (Tex. 2010) (breach of fiduciary duty, fraud, breach of contract).

#### C. Lost profits can be direct or special/consequential

#### damages

Depending on their nature, lost profits may be considered either direct damages or special/consequential damages (also called indirect). *DaimlerChrysler Motors Co., LLC v. Manuel*, 362 S.W.3d 160, 181 (Tex. App.–Fort Worth 2012, no pet.). Direct damages are profits lost on the contract itself.

[1]lost profits that represent the benefit-of-the-bargain measure of damages required to restore the plaintiff to the economic position he would have enjoyed if the contract had been performed are “direct” damages when shown to be “conclusively presumed” to have been foreseen by the parties as a usual and necessary consequence of a breach.

*Id.* (citations omitted).

Indirect damages, often referred to as special/consequential damages, reflect profits lost on other contracts or relationships as a result of a breach of a duty or promise. *Mood v. Kronos Products, Inc.*, 245 S.W.3d 8, 12 (Tex. App. – Dallas 2007, pet. denied). When an expectation of a profit becomes incidental to the performance of a contractual promise or a duty owed, the loss of that expectancy becomes consequential. *Cherokee Cnty. Cogeneration Partners, L.P. v. Dynegy Mktg. & Trade*, 305 S.W.3d 309, 314 (Tex. App.–Houston [14th Dist.] 2009, no pet.).

Regardless of whether the lost profits are considered direct or consequential damages, the amount of the damages must be shown by competent evidence with reasonable certainty. *Mood*, 245 S.W.3d at 12. This standard is discussed in more detail below.

#### D. Lost profits as special damages must be specifically pleaded

Special damages must be specifically pleaded. Tex. R. Civ. P. 56; *Naegeli Transp. v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 739 (Tex. App.–Houston [14th Dist.] 1993, writ denied). Therefore, the plaintiff must set forth in the pleadings the various items giving rise to any lost profits and the amount of any special damages sought from the defendant. *Harvey v. Crockett Drilling Co.*, 242 S.W.2d 952, 954 (Tex. App.–Waco 1951, no writ).

#### E. Lost profits must have a causal link to the wrongful conduct or breach

Lost profit damages may not be recovered unless they are also foreseeable and traceable to the wrongful act or breach. *Mood*, 245 S.W.3d at 12; *see also Stuart v.*

*Bayless*, 964 S.W.2d 920, 921 (Tex.1998).

### **F. Lost profits must flow from competent evidence**

To recover for lost profits, a party must show by (1) competent evidence (2) with reasonable certainty the amount of the loss. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). A witness testifying from personal knowledge can provide competent lost profits evidence without supporting documents. See *White v. Southwestern Bell Telephone Co., Inc.*, 651 S.W.2d 260 (Tex.1983); *Naegeli Transp.*, 853 S.W.2d at 740. The extent of supporting documentation goes to the weight, not competency, of the evidence and a claimant need not introduce into evidence all the documents supporting the lost profit opinions and estimates. *Holt Atherton*, 835 S.W.2d at 84. When determining lost profits, a fact finder can consider the normal projected increase in business in light of past business increases and existing conditions. *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1099 (Tex. 1938).

### **G. Loss must be shown with reasonable certainty**

Reasonably certain evidence is a fact intensive determination and based on objective facts, figures, or data rather than on mere speculation. *Holt Atherton*, 835 S.W.2d at 84; *Hoechst Celanese Corp. v. Arthur Bros.*, 882 S.W.2d 917, 926 (Tex. App.– Corpus Christi 1994, writ denied). Lost profits may be shown by reasonable certainty by relying on such factors as: (1) the nature of the business, (2) the business principals' experience, (3) the client base, (4) the nature of the market, (5) the sales force, (6) the company's marketing plan, and (7) the company's track record for sales. *Toshiba Mach. Co., Am. v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 777 (Tex. App. – Fort Worth 2005, pet. granted, judgment vacated w.r.m.). A fact finder can consider business predating the wrongful conduct and postdating the wrongful conduct to arrive at reasonable certainty of lost profits. *Southwest Battery*, 115 S.W.2d at 1098-99.

### **H. Recovery must be based on one complete calculation**

The calculation of lost profits need not be exact. *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994); *Holt Atherton*, 835 S.W.2d at 84. In fact, discrepancies between two reasonably certain lost profit amounts will not defeat the recovery of such damages. *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 877 (Tex. 2010). However, while recovery of lost profits does not require that the loss be susceptible to an exact calculation, it must be based on one complete calculation. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex.1994). Therefore, in order to provide reasonably certain evidence, a party must show by objective evidence the amount of the loss,

less any costs and expenses, according to one method of calculation.

A defendant may seek to challenge a lost profits award as a result of a plaintiff's failure to base his/her damages on one complete calculation considering relevant credits and expenses. The defendant would then have the burden to provide at least some evidence that the calculation is incomplete and failed to account for relevant credits and expenses. *ERI Consulting*, 318 S.W.3d at 878.

### **I. Speculative profits cannot be recovered**

Reasonable certainty is not demonstrated when the profits claimed to be lost are largely speculative or uncertain. *Examination Mgmt. Serv., Inc. v. Kersh Risk Mgmt., Inc.*, 367 S.W.3d 835, 842 (Tex. App.– Dallas 2012, no pet.). Examples of when profits are largely speculative or uncertain include:

- activities dependent on uncertain or changing market conditions,
- chancy business opportunities,
- promotion of untested products,
- entry into unknown or unviable markets,
- on the success of a new and unproven enterprise.

*Tex. Instruments*, 877 S.W.2d at 279; *Examination Mgmt. Serv.*, 367 S.W.3d at 842-43.

Therefore, businesses with no track record or historical reference points for a regression analysis typically cannot recover lost profits as they are largely speculative. See *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1099 (Tex. 1938).

### **J. Lost profits present a question of fact**

Whether evidence of lost profits is speculative or reasonably certain is a factual issue within the exclusive province of the jury to determine. *Toshiba Machine Co., America v. SPM Flow Control, Inc.*, 180 S.W.3d 761 (Tex. App.–Fort Worth 2005, pet. granted, judgment vacated w.r.m.); see also *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 863-64 (Tex. App.– Fort Worth 2001, pet. denied). "[W]hen the evidence supports a range of awards, an award of damages within that range may be an appropriate exercise of the jury's discretion." *Hani v. Jimenez*, 264 S.W.3d 881, 888 (Tex. App.–Dallas 2008, pet. denied).

### **K. Type of business may affect recovery**

#### **1. New business**

Lost profits cannot be demonstrated with reasonable certainty for a "new and unproven enterprise" as it is largely speculative or uncertain. *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1099 (Tex. 1938). The Texas Supreme Court has clarified that "enterprise" in

this context refers to the activity which is alleged to have been damaged, not the business entity. *Tex. Instruments*, 877 S.W.2d at 280. Therefore, a newly formed subsidiary or successor of a company that has a history of profits in the industry could demonstrate lost profits by derived historical reference points. *See id.* (“For example, if lost profits were recoverable for damage to a business activity of the XYZ Corporation, they should not be denied simply because the activity was conducted by a subsidiary newly formed for that purpose which XYZ controlled and managed.”).

As lost profits are not recoverable when the loss is largely speculative, it is difficult for most new businesses to recover lost profit damages. However, recovery for lost profits will not be denied simply because the business is new when there are recognizable reasons to expect a business to yield a profit. *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 863 (Tex. App. – Fort Worth 2001, pet. denied). To determine whether profits are recoverable, courts will focus on the experience of the persons involved in the business, the nature of the business activity, and the relevant market. *Tex. Instruments*, 877 S.W.2d at 280. Simply stated, a newly formed business operated by principal(s) with established ties/customers in the industry and in the relevant market could demonstrate lost profits with reasonable certainty.

### 2. Continuation of an already existing business

If a new business is merely a continuation of an already existing business, lost profits may be shown with reasonable certainty. *Silberstein v. Laibovitz*, 200 S.W.2d 647, 650 (Tex. App. – Austin 1947, no writ.). In that case, “opinions or estimates of losses must be predicated upon factual data derived from the previous operation of such business, showing costs of operation, previous profits earned, and similar facts and circumstances, as affording a basis for the computation of such probable losses.” *Id.*

### 3. Established or going concern business

For an already established business that is making a profit at the time the tort was committed or contract was breached, such pre-existing profit, along with other facts and circumstances, may show the amount of profits lost with reasonable certainty. *Toshiba Mach. Co., Am. v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 777-78 (Tex. App. – Fort Worth 2005, pet. granted, judgment vacated w.r.m.). “An established business should be one that is in actual operation long enough to give it permanency and recognition. It should be one that has earned a profit which can reasonably be ascertained and approximated.” *Atomic Fuel Extraction Corp. v. Slick's Estate*, 386 S.W.2d 180, 189 (Tex. App. – San Antonio 1964, writ ref'd n.r.e.). Thus, profits not only have to be reasonably

ascertainable and approximable, but also must have occurred for a sufficient time period to allow for extrapolation.

The court may consider the amount of previous business done by the plaintiff during a similar period of time prior to the injury and the amount of business during the time recovery is sought. *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1099 (Tex. 1938). Additionally, in calculating lost profits, it is acceptable to consider the normal increase in business which the plaintiff might have expected in the light of past developments and existing conditions. *Id.*

### 4. Different line of business

If an already successful and established business changes into a different line of business, the business may become a new and unestablished venture and lost profits may be denied. *Atomic Fuel*, 386 S.W.2d at 189; *Harrison-Daniels Co. v. Aughtry*, 309 S.W.2d 879, 882 (Tex. App. – Dallas 1958, no writ). In that case, as with a new business, a court may permit a plaintiff to recover lost profits if there are reasons to expect a business to be profitable, taking into consideration the activity and market of the business and the experience of those involved. *VingCard*, 59 S.W.3d at 863; *Tex. Instruments*, 877 S.W.2d at 280.

### L. Competent witness testimony

To demonstrate reasonably certain evidence, opinions or estimates of lost profits must be based on objective facts, figures, or data rather than on mere speculation. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). Expert witness testimony is often offered to prove or refute lost profit calculations. As with any expert, an expert on lost profits must be qualified by his/her knowledge, experience, education, training or skill. TEX. R. EVID. 702.

Lay witness testimony may also be acceptable in establishing lost profits and courts have generally held that business owners are competent to testify regarding lost profits of their business. *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 876 (Tex. 2010); *Bowen v. Robinson*, 227 S.W.3d 86, 97 (Tex. App. –Houston [1st Dist.] 2006, pet. denied) (“Competent evidence of lost profits relating to property can be proved by the testimony of an expert or the owner of the property.”). A business owner’s ability to testify regarding lost profits of their company is apparently based on the “Property Owner Rule”. *See Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 157 (Tex. 2012); *Porrás v. Craig*, 675 S.W.2d 503, 504 (Tex.1984). The Court has determined in a series of cases that the “Property Owner Rule” falls under Texas Rule of Evidence 701, and permits a lay witness to provide opinion testimony if it is (a) rationally based on

the witness's perception and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 157 (Tex. 2012); TEX. R. EVID. 701. This concept is based on the "presumption that an owner is familiar with his property and its value, the Property Owner Rule is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values. Under the Rule, an owner's valuation testimony fulfills the same role that expert testimony does." *Natural Gas Pipeline*, 397 S.W.3d at 157. Therefore, a property or business owner's testimony cannot be based on mere conjecture or speculative factors, but must explain the basis of their opinions and be based on reasonable certainty. *See id.*

The Property Owner Rule has also been held to include "officers of the entity in managerial positions with duties related to the property, or employees of the entity with substantially equivalent positions and duties." *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 849 (Tex. 2011). In *HHT Ltd.*, the president of an established business with over twenty years' experience in the industry was held to have the "requisite management position" relating to the company's profits to testify as an owner. "An owner or qualified officer is competent to testify to a business's estimated profit margin for evidence of lost profits." *HHT Ltd. v. Nationwide Recovery Sys.*, 2013 Tex. App. LEXIS 6717 (Tex. App. –Dallas 2013, no pet.) (citing *ERI Consulting*, 318 S.W.3d at 876 (a long-time co-owner of company was competent to testify about company's estimated net profit margin); *Reid Rd. Mun. Util. Dist. No. 2*, 337 S.W.3d at 854-55 (a property owner, including an officer in a management position relating to the property, may testify about the property's value even if not an expert); *see also Park v. Payne*, 381 S.W.3d 615, 619 (Tex. App. – Eastland 2012, no pet.) (company's owner was competent to testify as to the profit margin on lost business). For more on this discussion, see John Volney, & Brian P. Lauten, *New Developments in Proving/Disproving Business Tort Damages: Lost Profits and Other Issues*, Ch. 22 at 3, in 27<sup>th</sup> Annual Advanced Evidence and Discovery Course (2014); and Hon. Martin Lowy, *Proving and Defending Lost Profit Damages*, Ch. 19 at 2-3 and 5-10, in 24<sup>th</sup> Annual Advanced Evidence and Discovery Course (2011).

### M. Method of calculation

There are multiple methods for calculating lost profits which have been approved by the courts. Which method is preferable will depend on the particular facts and issues involved. The two which are most generally accepted are the "before and after" method and the

"yardstick" method.

#### 1. "Before and After" Method

The before and after theory compares the plaintiff's profit record prior to the violation with that after the complained of incident occurred. *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974). "Contrasting revenue from a time period immediately before the period at issue is an established method of proving revenue for a lost profit damages calculation." *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 877 (Tex. 2010); *see also Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994). However, the before and after theory may not be the best method of calculation for a plaintiff who is driven out of business before he is able to amass an earnings record sufficient to allow estimation of lost profits. *Lehrman*, 500 F.2d at 667.

#### 2. "Yardstick" Method

The yardstick method is useful for new businesses in an established industry with owners that have experience in that industry. The yardstick method employs a study of the profits of business operations that are closely comparable to the plaintiff's. *Lehrman*, 500 F.2d at 667. While allowances can be made for differences between the companies, the business used as a standard must be as nearly identical to the plaintiff's as possible. *Id.*

### N. A few specific examples

- Courts have held that a plaintiff who loses the opportunity to accrue earnings from the use of damaged equipment may be entitled to recover loss-of-use damages in the form of lost profits. *Texas Farm Bureau Mut. Ins. Co. v. Wilde*, 385 S.W.3d 733, 737 (Tex. App. – El Paso 2012, no pet.); *Wells Fargo Bank Northwest, N.A. v. RPK Capital XVI, L.L.C.*, 360 S.W.3d 691, 710 (Tex. App. – Dallas 2012, no pet.); *Wiese v. Pro Am Services, Inc.*, 317 S.W.3d 857, 863 (Tex. App. – Houston [14th Dist.] 2010, no pet.).
- A party may be able to recover damages for loss of goodwill as a result of another's wrongful act. *Sherwin-Williams Co. v. Perry Co.*, 424 S.W.2d 940, 952 (Tex. App. – Austin 1968, writ ref'd n.r.e.) ("under a proper showing damages can be awarded for both loss of profits and loss of goodwill") (citing *Ewing v. Wm. L. Foley, Inc.*, 280 S.W. 499 (Tex. 1926); *Texas & P. Ry. Co. v. Mercer*, 90 S.W.2d 557 (Tex. 1936); *City of Dublin v. Hicks*, 120 S.W.2d 872 (Tex. App. – Eastland 1938, no writ)).
- While tortious interference with a letter of intent may support out-of-pocket damages, lost profit

damages would not be recoverable. *See COC Services, Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654 (Tex. App. – Dallas 2004, pet. denied).

- A plaintiff may not recover lost profits under promissory estoppel; only reliance damages. *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 305 (Tex. App. – Dallas 2009, no pet.).

#### **O. Alternative method of recovery: out-of-pocket damages**

As an alternative to seeking lost profit damages, particularly for a plaintiff with a new or unproven business or who cannot prove damages by reasonable certainty, may instead seek to recover out-of-pocket damages. Out-of-pocket damages compensates a plaintiff for the actual injury suffered. *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998). The measure of out-of-pocket damages is the difference between the value the plaintiff paid and the value actually received. *Id.*

## **II. CONCLUSION**

Proving lost profits is a fact intensive determination and numerous factors must be considered to avoid the risk of having the calculation excluded or a reversal on appeal including:

- the type of damages sought, whether direct or special/consequential;
- foreseeability and traceability to the wrongful act or breach;
- the competency and reasonable certainty of the evidence;
- whether one complete calculation has been employed;
- whether the profits sought are speculative or reasonably certain;
- the type of business for which lost profits are being sought and the experience of the persons involved;
- whether competent witness testimony has been based on objective facts, figures or data; and
- the method of calculation employed.

**APPENDIX A**

The practitioner (whether plaintiff or defendant) should ask for the following non-exclusive list of materials to support or defend a claim of loss profits:

1. Balance sheet along with all regularly kept supporting schedules:
  - (a) check register
  - (b) income statement
  - (c) depreciation schedules
  - (d) general ledger
  - (e) subsidiary ledger (Quickbooks)
  - (f) cash flow statements
  - (g) bank statements - including credit card debits and credits
2. Sales tax reports
3. Income Tax Returns for the business
4. Personal Income Tax Returns (in those situations in which the income flows through to the individual tax payer)
5. Books and records (regarding gross sales)
6. Books and records (regarding cost of goods sold)
7. Confirmation data from the Texas Workforce Commission (as to employees of the business concern which will show present and previously employed workers)
8. Key contracts supporting sales, cost of goods sold, fixed costs, and continuing expenses
9. Pending litigation pleadings
10. Disclosed financial statements

## APPENDIX B\*

(\*Appendix B from John Volney, & Brian P. Lauten, *New Developments in Proving/Disproving Business Tort Damages: Lost Profits and Other Issues*, Ch. 22, in 27<sup>th</sup> Annual Advanced Evidence and Discovery Course (2014) updated with cases to December 2014).

**Lost Profits Upheld on Appeal (representative cases from 2009-December 2014)**

*DaimlerChrysler Motors Co., LLC v. Manuel*, 362 S.W.3d 160, 189-93 (Tex. App.—Fort Worth 2012, no pet.) (breach of contract).

*Earth Biofuels, Inc. v. Airo Wireless Media, Inc.*, 2011 WL 3805516, \*3 (Tex. App.—Dallas Aug. 30, 2011, no pet.) (breach of contract).

*Elijah Ragira/VIP Lodging Group, Inc. v. VIP Lodging Group, Inc.*, 301 S.W. 3d 747, 759-61 (Tex. App.—El Paso 2009, pet. denied) (statutory fraud, breach of warranty).

*Farmers Ins. Exchange v. Hudson*, 2010 WL 1806660, \*6-8 (Tex. App.—Beaumont May 6, 2010, no pet.) (breach of contract).

*Heritage Operating, LP v. Rhine Brothers, LLC*, 2012 WL 2344864, \*7-10 (Tex. App.—Fort Worth, Jun. 21, 2012, no pet.) (breach of noncompete).

*HHT Ltd. v. Nationwide Recovery Sys.*, 2013 Tex. App. LEXIS 6717, \*1 (Tex. App.—Dallas 2013, no pet.) (tortious interference with a contract, and conspiracy).

*Park v. Payne*, 2012 WL 3135383, \*3 (Tex. App.—Eastland Aug. 2, 2012) (breach of contract).

*Sharifi v. Steen Automotive, LLC*, 370 S.W.3d 126, 149-52, (Tex. App.—Dallas, no pet.) (breach of contract).

*Southwest Texas HMO, Inc. v. Vista Health Plan, Inc.*, 2010 WL 4260976, \*4-7 (Tex. App.—Austin Oct. 28, 2010, pet. denied) (breach of contract).

*S&W Property Commerce, Inc. v. Southwest Pinnacle Properties, Inc.*, 328 S.W.3d 121, 159-62 (Tex. App.—Corpus Christi 2010, pet. denied) (fraud, breach of fiduciary duty, and tortious interference).

*Truman Arnold Companies, Inc. v. Hammond and Consultants Ents., Inc.*, 2010 WL 2982912, \*6-7 (Tex. App.—Tyler July 30, 2010, no pet.) (breach of contract).

*Tyre v. Yawn*, 2011 WL 662957, \*7 (Tex. App.—Houston [1st Dist.] Feb. 27, 2011, no pet.) (fraud and DTPA).

**Lost Profits Denied On Appeal (representative cases from 2009-December 2014)**

*Azad v. MRCO, Inc.*, No. 14-12-00165-CV, 2013 WL 6700285, at \*16 (Tex. App.—Houston [14th Dist.] Nov. 7, 2013, review denied).

*Columbia Med. Ctr. of Denton Subsidiary v. DFW Super Grp. II, L.L.C.*, No. 02-12-00507-CV, 2013 WL 5658185, at \*2-3 (Tex. App.—Fort Worth Oct. 17, 2013, review denied) (breach of lease, indemnification, conversion, and fraud).

*Davidson v. Tel W. Network Servs. Corp.*, 2014 Tex. App. LEXIS 4587, \*10-11 (Tex. App.—Houston [14th Dist.] Apr. 29, 2014, no pet.) (breach of contract and negligence).

*Examination Mgmt. Svcs. Inc. v. Kersh Risk Mgmt., Inc.*, 367 S.W.3d 835, 839-44 (Tex. App.—Dallas 2012, no pet.) (breach of contract).

*Exel Transportation Svcs., Inc. v. Aim High Logistics Svcs., LLC*, 323 S.W.3d 224, 231-34 (Tex. App.—Dallas 2010, pet. denied) (breach of contract and tortious interference).

*Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 630-35 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (misappropriation and tortious interference).

*Heat Shrink Innovations, LLC v. Medical Extrusion Technologies-Texas, Inc.*, 2014 Tex. App. LEXIS 11494, \*15-16 (Tex. App.—Fort Worth Oct. 16, 2014, no pet.) (misappropriation of trade secrets, breach of fiduciary duty, and conspiracy).

*Hernandez v. Sovereign Cherokee Nation Tejas*, 343 S.W.3d 162, 173-74 (Tex. App.—Dallas 2011, pet. denied) (fraud).

*Hoss v. Alardin*, 338 S.W.3d 635, 653-55 (Tex. App.—Dallas 2011, no pet.) (breach of contract).

*Kellman v. Workstation Integration, Inc.*, 332 S.W.3d 679, 686-87 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (misappropriation and breach of fiduciary duty).

*Lufkin Indus., Inc. v. Transportes De Nuevo Laredo, S.A.*, 2010 WL 3774202, \*2-4 (Tex. App.—San Antonio Sep. 29, 2010, no pet.) (conversion).

*M&A Technology, Inc. v. Ivalue Group, Inc.*, 295 S.W. 3d 356, 364-69 (Tex. App.—El Paso 2009, pet. denied) (conversion, breach of contract).

*Mustang Amusements, Inc. v. Sinclair*, 2009 WL 3487796, \*9-10 (Tex. App.—Waco, Oct. 28, 2009, no pet.) (tortious interference).

*Robertson v. Morin*, 2009 WL 2902720, \*7-8 (Tex. App.—Austin Aug. 27, 2009, no pet.) (breach of fiduciary duty and professional negligence).

*Rusty's Weigh Scales & Service, Inc. v. North Texas Scales, Inc.*, 314 S.W.3d 105, 110-111 (Tex. App.—El Paso 2010, no pet.) (misappropriation).

*Spin Doctor Golf, Inc. v. Paymentech, LP*, 296 S.W.3d 354, 359-61 (Tex. App.—Dallas 2009, pet. denied) (breach of contract, fraud, fraudulent inducement).

*Thomas v. Thomas*, 2014 Tex. App. LEXIS 1279, \*15-16 (Tex. App.—Dallas Feb. 4, 2014, pet. denied) (breach of fiduciary duty).

*Total Clean, LLC v. Cox Smith Matthews Inc.*, 330 S.W.3d 657, 663-67 (Tex. App.—San Antonio 2010, pet. denied) (breach of fiduciary duty, fraud, negligence).

*Univ. Gen. Hosp., LP v. Prexus Health Consultants, LLC*, 403 S.W.3d 547, 555-57 (Tex. App.—Houston [14th Dist.] 2013) (breach of contract).

*Upsilon L.P. v. New Car Concepts*, No. 04-12-00479-CV, 2013 WL 4686154, at \*1 (Tex. App.—San Antonio, Aug. 30, 2013, review denied) (breach of contract).

*Wells Fargo Bank Northwest, N.A. v. RPK Capital XVI, LLC*, 360 S.W.3d 691, 708-12 (Tex. App.—Dallas 2012, no pet.) (conversion).

*Wheeler v. Sajovich*, 2010 WL 2540689, \*6-7 (Tex. App.—Austin Jun. 23, 2010, no pet.) (breach of contract, breach of fiduciary duty, and statutory fraud).

*Wiese v. Pro Am Services, Inc.*, 317 S.W.3d 857, 862-64 (Tex. App.—Houston [14th Dist.] 2010, no pet.)

(conversion).

*Zeno Digital Solutions, LLC v. K Griff Investigations, Inc.*, 2010 WL 3547708, \*2-4 (Tex. App.—Houston [14th Dist.] Sept. 14, 2010, no pet.) (DTPA, fraud, breach of contract).