

8.45 BREACH OF CONTRACT (Approved 06/1993; Revised 12/2014)

A. General

A plaintiff who is awarded a verdict for breach of contract is entitled to compensatory damages for such losses as may fairly be considered to have arisen naturally from the defendant's breach of contract. Alternatively, plaintiff may be entitled to such damages as may reasonably be supposed to have been contemplated by both parties, at the time they made the contract, as the probable result of the breach of such contract.

Compensatory damages for breach of contract are designed under the law to place the injured party in as good a monetary position as he/she would have enjoyed if the contract had been performed as promised. What that position is depends upon what the parties reasonably expected at the time they made the contract. The defendant is not liable for a loss that the parties did not have reason to foresee as a probable result of any breach. While the loss must be a reasonably certain consequence of the breach, the exact amount of the loss need not be certain.

Cases:

Coyle v. Englander's 199 N.J. Super. 212 (App. Div. 1985); *Donovan v. Bachstadt*, 91 N.J. 434 (1982); *525 Main Street Corp. v. Eagle Roofing Co.*, 34 N.J. 251 (1961); *Marcus & Co, Inc. v. K.L.G. Baking Co., Inc.*, 122 N.J.L. 202 (E. & A. 1939); *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

NOTE TO JUDGE

There are specific subsidiary rules of damages formulated for various situations which are subordinate to the broad rule of damages expressed above. These subsidiary rules of damages as well as the broad rule are guides requiring considered judicial discretion as to applicability in a particular situation. *See 525 Main Street Corp. V. Eagle Roofing Co.*, 34 N.J. 251 (1961).

As to building contracts, the disappointed owner may recover the costs of completing the promised performance or making necessary repairs, unless under the facts it is impossible to do so or the costs of completion or repairs would constitute unreasonable economic waste, in which event the measure of damages is the difference in value formula. *Restatement, Contracts, Sec.*, 346 (1)(a). In the case of *Price v. B. Construction Co.*, 77 N.J. Super. 485 (App. Div. 1962) involving a clause in a contract warranting that the cellar in a new home being sold would be free from water for a period of one year from date of closing title, the court concluded that the parties bargained (1) not for a one-year result, but (2) for work of greater expectable life but supported by a guarantee for a portion of that period; and that the proper measure of damages was the “entirety of such sums of money as were required to be expended by (plaintiffs) in correcting the defect complained of.”

In cases involving a breach of contract for purchase of real estate there are various elements of damages. The charge must be molded to the facts of each case. *See Donovan v. Bachstadt*, 91 N.J. 434 (1982).

B. Loss of Profits

If you should determine that the plaintiff is entitled to a verdict, the law provides that the plaintiff is to be reasonably compensated for any damage sustained by him/her which was proximately caused by the defendant’s conduct in breach of the contract. In arriving at the amount of the award, you should include all damages suffered by the plaintiff because of lost profits within the reasonable contemplation of the parties at

the time of the making of the contract; that is to say, profits which the plaintiff would have made but for the breach of the contract by the defendant.

If you find that the plaintiff has in fact suffered loss of profits as a result of the defendant's breach of contract, then the fact that the precise amount of plaintiff's damages may be difficult to ascertain should not affect the plaintiff's recovery. The plaintiff is to be awarded damages for such loss of profits as is capable of determination with reasonable certainty.

In arriving at the amount of any loss of profits sustained by the plaintiff, you may consider any past earnings of the plaintiff in his/her business, as well as any other evidence bearing upon the issue.

Cases:

Van Dusen Aircraft Supplies, Inc. v. Terminal Const. Corp., 3 N.J. 321 (1949); *Feldman v. Jacob Brasfman & Son, Inc.*, 111 N.J.L. 37 (E. & A. 1933); *Interchemical Corp. v. Uncas Printing & Fin. Co., Inc.*, 39 N.J. Super. 318, 329 (App. Div. 1956) a defendant whose wrongful act creates the difficulty may not complain that the amount of damages cannot be accurately fixed; *Casler v. Weber*, 27 N.J. Super. 396 (App. Div. 1953); *De Ponte v. Mutual Contracting Co.*, 18 N.J. Super. 142, 147, 148 (App. Div. 1952); *Restatement, Contracts, Sec. 331* ("Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property.")

C. Mitigation of Damages

If you find that the defendant [breached the contract*] and that damages resulted, you must also determine if the plaintiff has made reasonable efforts to lessen or reduce his/her damages. The law requires that party who suffers injury or damage because of a [breach of contract*] to make a reasonable effort to avoid or minimize the loss by taking advantage of such reasonable business or employment opportunities he/she may have under the circumstances. A party cannot recover damages for a loss that he/she could have avoided by reasonable efforts.

If you find that the plaintiff could have avoided or minimized his/her loss by taking advantage of a business or employment opportunity that was reasonably available under the circumstances, you must subtract from plaintiff's award the damages which could have been avoided. For example, an employee who claims to have lost earnings because he/she was wrongfully fired is free to work elsewhere. Any subsequent earnings that employee could reasonably have earned if he/she had taken advantage of an available employment opportunity must be subtracted from the damages he/she claims to have suffered as a result of his/her wrongful termination.

* If the case is an employment case and there is no breach of contract involved, the words "breach of contract" and its variations should be replaced with "wrongful termination" as defined by this charge, or the appropriate variation.

The burden of proof is on the defendant to show that the plaintiff could reasonably have avoided or minimized his/her damages. In the employment example, the defendant employer has the burden of showing the earnings the employee could reasonably have realized had the employee taken advantage of available substitute employment. If the defendant satisfied that burden, then you must reduce the amount of damages the employee would otherwise receive by the amount of the loss that the employee could reasonably have avoided.

Cases:

Frank Stamato & Co. v. Borough of Lodi, 4 N.J. 14, 21 (1950); *Sandler v. Lawn-Mat Chemical & Equipment Corp.*, 141 N.J. Super. 437, 455 (App. Div.), *certif. denied*, 71 N.J. 503 (1976); *Harvard v. Bushberg Bros.*, 137 N.J. Super. 537, 542 (app. Div. 1975); *Henry Clay v. Jersey City*, 74 N.J. Super. 490 (Ch. Div. 1962), *aff'd*, 84 N.J. Super. 9 (App. Div. 1965). *See also* Restatement (Second) of Contracts § 350, comments a, b and c (1979).