

Covenants Not to Compete



*This manual was originally created for the seminar
"Covenants Not to Compete"
in Atlanta, Georgia, on April 22, 2008*

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Atlanta, Georgia

April 2007

**RECOVERY OF LOST PROFITS
FOR BREACH OF RESTRICTIVE COVENANTS**

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RECOVERY OF LOST PROFITS FOR BREACH OF RESTRICTIVE COVENANTS

The damages sought in a non-compete setting are often the lost profits of the plaintiff due to the allegedly improper actions of the defendant. Williamson v. Palmer, 199 Ga. App. 35, 404 S.E.2d 131 (1991)(Breach of a covenant not to compete gives rise to damages for lost profits, measured by plaintiff's losses, among other damages); Annis v. Tomberlin, 195 Ga. App. 27, 392 S.E.2d 717 (1990). Georgia law is clear that, as with any damages, lost profits must be proven with "reasonable certainty." Williamson, 404 S.E.2d at 133 (plaintiff must be able to estimate damages to a degree of "reasonable certainty" and difficulty fixing exact amount does not bar award); See also, Premier/Georgia Management Company, Inc. v. Realty Management Corporation, 272 Ga. App. 780, 613 S.E.2d 112 (2005); Boleta v. World Championship Wrestling, Inc., 271 Ga. App. 555, 610 S.E.2d 92 (2005); Annis 392 S.E.2d at 722 ("A party who has been injured by a breach of contract can recover profits that would have resulted from performance, when their amount and the fact that they have been prevented by the breach of the [party] can be proved with reasonable certainty"); Fidelity National v. Wood, 375 S.B.2d 228 (1988); Radlo of Georgia v. Little, 199 S.E.2d 835 (1973).

In Williamson, the court allowed a recovery of lost profits where plaintiff showed that its sales dropped during first two years of defendant's improper operation of competing flower shop and that it lost a number of customers. Likewise, in Annis the court held that an award of \$7,500 in lost profits for counter-defendant's breach of non-compete covenant was appropriate, because counter-plaintiff could prove damages with a reasonable certainty. By way of contrast, in Webster v. Purdy, 166 Ga. App. 183, 303 S.E.2d 521 (1983), the court denied recovery of lost profits where there was no evidence that to indicate that plaintiff lost any income or suffered any

other injury as the result of the defendants' conduct in helping former employees to start a competing employment agency.

A. PLAINTIFF MUST SHOW THAT LOSSES WERE CAUSED BY DEFENDANT'S WRONGFUL CONDUCT.

To be recoverable, a plaintiff's loss of profits must have been proximately caused by the actions of the defendant. Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957) ("The profits of a commercial business are dependent on so many hazards and chances, that unless the anticipated profits are capable of ascertainment, and the loss of them traceable directly to the defendant's wrongful act, they are too speculative to afford a basis for the computation of damages.") Brandenburg v. All-Fleet Refinishing, Inc., 252 Ga. App. 40, 555 S.E.2d 508(2001).

Where plaintiff can present no evidence of any loss of business as a result of any wrongful actions taken by the defendants, it cannot recover damages. Pendley Quality Trailer Supply, Inc. v. B&F Plastics, Inc., 260 Ga. App. 125, 578 S.E.2d 915 (2003). In Pendley, the plaintiff purchased horse trailer liners from the defendant manufacturer, and asked that a specific adhesive be used in manufacturing the liners. Plaintiff sold the liners to its customers. After plaintiff began receiving complaints from its customers that the liners were failing due to improper adhesion, it learned that the manufacturer had used a different adhesive. Plaintiff filed suit against the manufacturer for fraud, alleging that the failure of the liners caused it to lose credibility with customers, several of which stopped doing business with it. Id. at 917. The court directed a verdict for defendant, which the Court of Appeals affirmed, holding that the plaintiff failed to prove that its damages were caused by the defendant's actions. Even assuming that the change of adhesives caused the liners to fail, plaintiff failed to present any evidence that its

customers left due to the liner failures. The court specifically noted that plaintiff obtained no testimony from any of the allegedly lost customers about their reasons for leaving. Under these facts, the jury would have been forced to speculate as to why customers left, and therefore a directed verdict was proper. *Id.* at 918-19; See also, Coffee Butler Serv. v. Sacha, 208 Ga. App. 4, 430 S.E.2d 139 (1993)(where plaintiff produced no evidence that lost accounts were due to wrongful conduct of defendant and jury would have been left to speculate, lost profits from the accounts were not recoverable).

B. IN ORDER TO RECOVER FUTURE LOST PROFITS, PLAINTIFF MUST HAVE A TRACK RECORD OF PROFITABILITY.

Georgia courts have consistently required a track record of profitability before allowing a recovery of future lost profits. See, Springwell Dispensers, Inc. v. Hall China Co., 204 Ga. App. 245, 419 S.E.2d 112 (1992). In Springwell the court affirmed the trial court's dismissal of the defendant's counterclaim because, despite evidence raising an issue of fact on whether the contract was breached, the defendant was not entitled to recover lost profits because it had no track record of profitability. In Molly Pitcher Canning Co. v. Central of G. R. Co., 149 Ga. App. 5, 253 S.E.2d 392 (1979), the plaintiff sought recovery for lost profits of both an existing tomato and peach canning operation, as well as a new "cling" peach canning operation, after the defendant railroad collided with its plant and equipment. The court denied recovery for lost profits to the tomato and peach canning business, finding that, for the five years prior to the liasion, the losses had exceeded profits. See also, Johnson County School District v. Greater Savannah Lawn Care, 278 Ga. App. 110, 629 S.E.2d 271 (2006); Roboserve Ltd. v. Tom's Foods, Inc., 940 F.2d 1441 (11th Cir. 1991) ("Georgia law requires a track record before a business can recover lost future profits. That track record can be a history of profits, or a pattern of diminishing losses for a new business, so long as the evidence renders anticipated profits

reasonably ascertainable.”); Radio of Georgia, Inc. v. Little, 129 Ga. App. 530, 199 S.E.2d 835, 838 (1973) (Denying recovery of lost profits, stating: “If the past performance of the plaintiff here be used as the criterion, he proved no loss of profits because he was operating at a loss.”); Blue Ridge Mountain Fisheries v. Department of Natural Resources, 217 Ga. App. 89, 456 S.E.2d 651 (1995) (no recovery of anticipated future profits where business had not made profit in the past).

C. LOST PROFITS MUST NOT BE SPECULATIVE.

Georgia allows recovery for lost profits only where the profits are “ascertainable with reasonable certainty and are not too uncertain, speculative or remote to afford a reliable basis for computation.” Fidelity Nat’l Bank v. Wood, 189 Ga. App.109, 375 S E.2d 228 (1988). Where lost profits are too speculative or uncertain, they are not recoverable. Tn-State Systems, Inc. v. Village Outlet Stores, Inc., 135 Ga. App.81, 217 S.E.2d 299 (1975) (“In general, unless the lost profits are capable of definite ascertainment, and are traceable directly to the acts of the other party, they are not recoverable.”); Molly Pitcher, 253 S.E.2d 392 (“The rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. . .”)

D. CALCULATION OF LOST PROFITS

Generally, lost profits means lost net profits, which is gross profits minus all costs and expenses Kar Printing, Inc. v. Pierce, 276 Ga. App. 511, 623 S.E.2d 704 (2005); Grossberg v. Judson Gilmore Assoc., Inc., 196 Ga. App. 107, 395 S.E.2d 592 (1990) (“gross amount minus expenses equals the amount of recovery.”); Fidelity National Bank v. Wood, 189 Ga: App. 109, 375 S.E.2d 228 (1988)(“Profit is found by reducing revenues by the amount of all expenses.”);

Bennett v. Smith, 245 Ga. 725, 267 S.E.2d 19 (1980)(plaintiff must show both anticipated revenues and expenses with reasonable certainty to recover lost profits.)