



Damages 101

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Litigation is inherently results-oriented. Too often, however, even those experienced in litigation tend to blur the lines between subtly different categories of damages. Perhaps it's time to go back to Damages 101.

- Compensatory Damages:

Compensatory damages, as the name implies, are intended to compensate a claimant for the actual loss, injury, or harm sustained. Compensatory damages are generally subdivided into two broad categories: general and special. Simply stated, general damages flow naturally from the defendant's wrongful conduct, while special damages are unique to the individual claimant and must therefore be proved with specificity.

Whether you're talking about a tort action or an action for breach of contract, a claimant is usually entitled to recover both general and special damages. For the tort plaintiff, this means she can recover both special damages (e.g., medical expenses, which must be proved with specificity) and general damages (e.g., pain and suffering, for which no specific dollar amount need be assigned as a jury will eventually make that decision), provided such general damages were proximately caused by the defendant's negligence. In a breach of contract action, the nonbreaching party is generally entitled to recover an amount of damages that will place her in the same position she would have enjoyed had the contract been fulfilled. This measure of damages, which is often referred to as "expectation damages," can also be a combination of both general and special damages. For example, if a business had contracted to purchase a piece of equipment—and the seller fails to deliver, thus breaching the contract—the business would be entitled to recover any payments made under the contract (general damages) plus any lost profits that would have been generated from the use of the equipment (special damages) if the profits were in the contemplation of the parties when they signed the contract.

- Consequential Damages:

The term "consequential damages" is meant to indicate that the damages sought are merely an indirect "consequence" of the defendant's conduct. For this reason, the term is often used interchangeably with the term "special damages," and indeed there is very little, if any, practical difference between the two concepts. In contract cases, consequential damages are typically disallowed unless they were within the contemplation of the parties at the time the contract was entered into and can be traced solely to the defendant's breach.

One of the most commonly sought types of consequential damages in a breach of contract case is lost profits. If the possibility that the nonbreaching party would suffer a loss of profits in the event of the defendant's breach was within the parties' contemplation at the time of contracting, then such damages will likely be recoverable. However, even where a claimant is theoretically entitled to an award of lost profits—because they were within the parties' contemplation—that does not mean that such an award is guaranteed. Far from it. In fact, it can be exceedingly difficult to prove up a claim for lost profits because this element of damages must be capable of definite ascertainment and traceable directly to the acts of

the breaching party. Also, many contracts expressly prohibit either party from recovering consequential damages, including lost profits.

For tort actions, consequential damages may be recovered where the damages are the necessary and connected effect of the harm done. If the damages are only a possible result of the tortious act, or if other circumstances contributed to the injury, the damages may be deemed too remote. For example, if the claimant is defamed and later loses a political election—any alleged damages for the loss of that election are probably too remote and thus unrecoverable.

- Punitive Damages:

Punitive damages (which are synonymous with vindictive or exemplary damages) are different from compensatory damages because they are not intended to compensate the claimant for actual harm suffered. Instead, they are intended to punish, reform, or deter a defendant and others from engaging in similar conduct. Thus, an award of punitive damages is typically dependent upon a finding of some type of willful misconduct, conscious indifference, or fraud—and a finding of actual harm.

In addition, punitive damages are typically available only in tort actions—not contract. Even a bad faith breach of contract will not justify an award of punitive damages.

- Liquidated Damages:

Liquidated damages are any amount that is fixed by an agreement of the parties or by operation of law. Most frequently, liquidated damages are expressly provided for by contract. Thus, these damages are the amount the parties agreed during the formation of a contract the nonbreaching party would be entitled to collect as compensation for a breach. Because a liquidated damages clause is intended to give the parties a degree of certainty should any litigation ensue, it is not at all uncommon for a contract to contain such a provision. The enforceability of the clause, however, is virtually always a contested issue in large part because the standard of enforceability is nebulous.

To be enforceable, the amount set must be roughly approximate to the damages likely to occur upon a breach—but the actual amount of those likely damages must be somewhat uncertain at the time the contract was made. Failing that, the liquidated damages are likely to be deemed an unenforceable penalty. Therefore, drafting enforceable liquidated damages provisions requires walking a fine line of approximating damages that are inherently uncertain.

- Statutory Damages:

Statutory damages are an amount provided for by a statute rather than calculated based on the actual harm suffered by the plaintiff. For example, the Fair Debt Collection Practices Act imposes statutory damages of up to \$1,000 for each violation of its provisions. And the Lanham Act (the federal trademark statute) provides for a minimum of \$1,000 and a maximum of \$2,000,000 for willfully using a counterfeit trademark in commerce. Statutory damages provisions are often provided for in intellectual property cases because it can be difficult—if not impossible—for plaintiffs to determine the exact volume of any infringement.

Another specific type of statutory damages—one that is more punitive in nature—is treble damages, available where a statute permits a court to triple the amount of the actual or compensatory damages awarded to a prevailing plaintiff. Statutes that authorize an award of treble damages include the federal False Claims Act, state and federal RICO statutes, and the antitrust statutes.

- Nominal Damages:

The concept of nominal damages refers to a small damages award most typically awarded in cases where a wrong has occurred but the plaintiff cannot be shown to have suffered any actual loss. For example, a plaintiff who has been the victim of an intentional tort will be entitled to recover nominal damages even without a showing of actual harm. In case you're wondering why a plaintiff who hasn't suffered any actual damages might pursue an award of nominal damages, the answer lies in the fact that an award of nominal damages will support an award of punitive damages, provided the other requirements for such an award (willfulness, malice, etc.) have been satisfied.

Unfortunately, many people have grown accustomed to using these concepts without properly distinguishing between them. Now you don't have to be one of those people. Class dismissed.

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