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Recovery of lost profits damages: all is not lost

by Paul McDonald
and Daniel J. Murphy

FOR THE TRIAL LAWYER, FEW AREAS OF THE LAW ARE AS NEBULOUS AS THE quantum and quality of proof sufficient to support the recovery of lost profits. On the one hand, it is black-letter law in Maine that damages need only be established with “reasonable” (as opposed to “mathematical”) certainty.¹

However, it is equally true that damages must be based on more than “mere guess or conjecture.”² The elusive character of these cryptic first principles is compounded when applied to proving damages based on lost profits. Proof of this kind of loss inherently involves a certain degree of speculation, especially when applied to future, unrealized profits. Despite their seeming opacity and even contradiction, these standards have been applied by Maine courts, in appropriate cases, to award lost profits as damages, even where a new business lacks a long track record of earnings.³

This article seeks to provide clarity to the principles applicable to the recovery of lost profits. It will survey the pertinent case law and examine the manner in which the Law Court has navigated the dueling concepts of “reasonable certainty” and “mere speculation” in this area of the law. This article also

examines two additional (but little known and often ignored) theories upon which a lost profits recovery may be based: The “Wrongdoer Rule” and the alternative, but related, claim of “Loss of Chance/Business Opportunity.” These doctrines may, in appropriate circumstances, be applied to lessen the evidentiary burden imposed on a plaintiff seeking an award of lost profits.

Under the Wrongdoer Rule, a defendant will not be heard to object to the plaintiff’s reasonable estimate of lost profits because it is not based on more accurate data, where the wrongdoer’s misconduct has rendered such evidence unavailable.⁴ The Loss of Chance/Business Opportunity Doctrine is technically distinct from a lost profits claim, and has been applied to claims where the plaintiff has been denied the value of the lost opportunity to earn profits. In such cases, where

lost profits cannot be ascertained with sufficient precision, a “reasonable approximation” of the value of the lost chance/opportunity is all that is required to allow recovery.⁵

Lost Profits Defined

“LOST PROFITS” MAY PROPERLY BE RECOVERED AS A COMPONENT of a consequential damages award under both contract and tort theories.⁶ Under Maine law, recovery of lost profits refers to the award of properly established lost *net* profits, as opposed to *gross* profits.⁷ The term “gross profits” is synonymous with gross income, referring to revenue received without accounting for expenses.⁸ Lost “net profits” are calculated by deducting from gross profits any direct expenses that would have been incurred in making the lost transaction.⁹ The Law Court also has held that claims seeking recovery of *prospective* lost profits must be discounted to present value.¹⁰

Although courts have disagreed about the range of expenses to be deducted from gross profits, the general rule is that variable expenses directly related to the lost sale should be deducted from gross income, while general fixed expenses, such as overhead, should not be deducted unless such expenses would have been directly attributable to the lost transaction.¹¹ Indeed, in a sale-of-goods case under the Uniform Commercial Code, an aggrieved seller is entitled to recover overhead as a component of damages, defined as “profit (including reasonable overhead),” based on breach of contract, while also deducting expenses saved in consequence of the buyer’s breach.¹² This approach is consistent with the notion that fixed overhead generally should not be deducted from gross income to arrive at net profits.¹³ On the other end of the spectrum, a few courts have embraced the minority view that apportioned overhead expenses must be deducted from an award of lost profits.¹⁴

Applicable Standards

PLAINTIFFS SEEKING TO RECOVER LOST PROFITS AS A COMPONENT of consequential damages face a number of legal and evidentiary hurdles. First, such profits must be shown to have been factually and legally caused by—and a reasonably fore-

seeable result of—the defendant’s wrongful conduct. Further, a plaintiff must prove his or her estimate of lost profits to a “reasonable certainty,” establishing such damages through an adequate evidentiary foundation. A review of selected cases addressing these issues provides a window into the required showing to recover lost profits under Maine law.

Causation/Foreseeability

The general rule for recovery of damages in tort actions is that a successful plaintiff is entitled “to all damages proximately caused by a wrongdoer’s actions[.]” with such an award aimed at making the plaintiff whole by providing compensation for injuries and losses proximately caused by the tortfeasor.¹⁵ Similarly, with respect to contract damages, the Law Court has written that “[s]ubject to limitations of avoidability and unforeseeability, an injured party is entitled to recover all loss actually suffered as a result of the breach [of contract].”¹⁶

Causation

Whether seeking a lost profits recovery under tort or contract theories, a plaintiff must establish that his or her lost profits were factually and legally caused by the defendant’s breach of duty. The factual or “but for” causation showing needed for recovery of lost profits damages— as with all damages— requires a plaintiff to prove by a preponderance of the evidence that there is “some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.”¹⁷ Proximate cause, or legal causation, has been described by the Law Court as requiring a showing that the breach of duty “played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the [... wrongful act or omission].”¹⁸ If the probabilities are evenly balanced or worse, a plaintiff cannot carry his or her burden of proving proximate cause.¹⁹

Reasonable Foreseeability

In contract actions, the reasonable foreseeability requirement receives additional scrutiny from courts because lost profits are analyzed as “special damages” subject to special proof, rather than as “general damages.” General damages are those damages that would “naturally flow from the breach claimed of such contract,” while special damages are damages that were reasonably “within the contemplation of both parties at the time of making the contract[.]”²⁰ This distinction has its

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genesis at common law in the seminal case of *Hadley v. Baxendale*, which holds that the special circumstances giving rise to special damages must have been reasonably communicated to the defendant.²¹

This common law rule has evolved over time, with the modern-day standard found in Section 351 of the Restatement (Second) of Contracts. In contrast to *Hadley v. Baxendale*'s exclusively subjective test of foreseeability, the Restatement's "special circumstances" test can be either subjective or objective in nature.²² The Law Court has not explicitly adopted the Restatement (Second)'s subjective/objective standard, but it has repeatedly analyzed recovery of special damages under the "reasonable foreseeability" analytical framework.²³ Further, the United States District Court for the District of Maine, applying Maine law, has cited Section 351 and ruled that, under Maine law, special damages are recoverable only if, at the time the contract was formed, such damages "were or should have been reasonably foreseeable or contemplated by both parties as a probable result of a breach."²⁴ Whether employing a purely subjective standard, an objective standard, or some combination of the two, the Law Court has subjected special damages to more rigorous scrutiny than general damages. Such scrutiny is addressed to foreseeability and whether the party in breach reasonably had cause to know of the special circumstances giving rise to the additional damages.²⁵

The Law Court has held that the foreseeability requirement applies with equal force to tort claims.²⁶ Under this standard, it would seem difficult, absent some prior business relationship between the parties, for a plaintiff to recover lost profits damages under a tort theory. For example, one would presume that in a standard negligence case, such as an automobile accident between strangers, the requirement of reasonable notice of special circumstances would bar the recovery of lost profits. However, it is worth noting that other categories of special damages, such as medical expenses, are routinely awarded in the same manner as general damages without any proof that the tortfeasor had reason to know of any special circumstances.²⁷ This suggests that the "special circumstances" requirement might properly be relaxed in certain tort cases. At a minimum, one could argue that, in appropriate cases, the court should apply an objective, rather than a subjective standard of foreseeability of special circumstances in evaluating a claim for lost profits based on a tort theory of recovery.

Reasonable Certainty

The Law Court also has held that lost profits may be awarded only where they can be estimated with "reasonable certainty."²⁸ A damages award based on lost profits may not be "uncertain, contingent, or speculative."²⁹ Damages must be founded upon "established positive facts or on evidence from which their existence and amount may be determined to a probability[]" [and] "... must not rest wholly on surmise and conjecture."³⁰

At the same time, the Law Court also has underscored that "reasonableness, not mathematical certainty, is the criteria for determining whether damages were awarded appropriately."³¹ "Damages are not fatally uncertain for the reason that the amount of the loss sustained is incapable of exact proof by mathematical demonstration."³² In this manner, an award of damages for lost profits may be based on "judgmental approximation[]" provided that "the evidence establishes facts from which the amount of damages may be determined to a probability."³³

Case Law on Recovery of Lost Profits

A REVIEW OF PERTINENT LAW COURT DECISIONS PROVIDES A window into the quantity and quality of evidence required to establish a claim for lost profits, as well as the scope of judgmental approximation permitted in relation to such claims.

Established Businesses

Cases where the plaintiff provides evidence of a successful past track record of business, along with evidence establishing anticipated future net profits, offer the greatest likelihood of recovering lost profits. For established businesses, damages based on lost profits are most effectively established through the use of expert testimony that is based upon a solid evidentiary foundation addressing the underlying economic data quantifying gross revenue and variable expenses. Although third party expert testimony is certainly not required to establish lost profits, when the plaintiff's testimony, or that of an outside expert, does not rest upon an adequate evidentiary foundation, a claim for lost profits will not succeed.

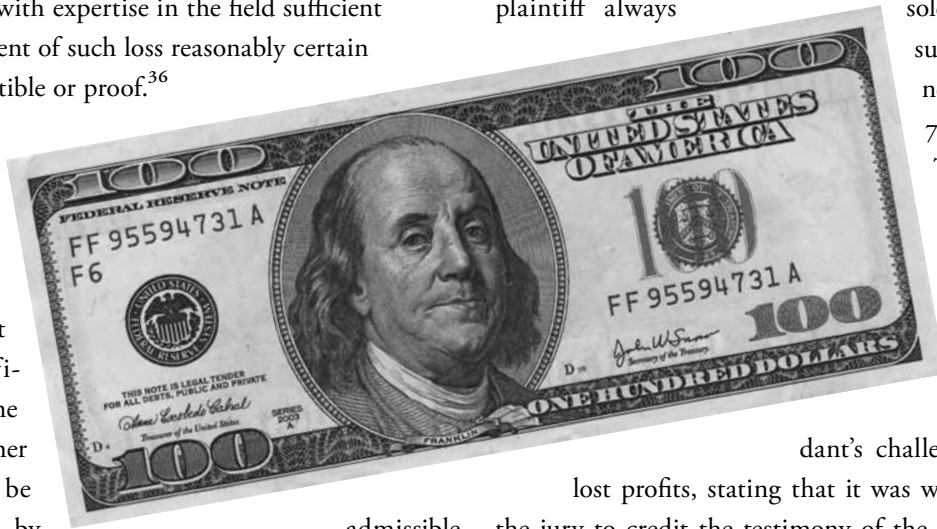
Ginn v. Penobscot Co.

In *Ginn v. Penobscot Co.*,³⁴ the Law Court provided a concise statement of its approach to recovery of lost profits for businesses with proven track records of performance. In that case, a logger who was injured owing to the negligence of the defendant asserted a claim for lost earnings/lost profits for his business, which ceased to exist following his injury.³⁵

Addressing the plaintiffs' claim for lost profits, the Court wrote:

Where an established business has been interrupted by reason of tortious injury to the operator, a resulting loss of prospective profits may become the basis of a recovery, provided there be evidence of past experience or from persons with expertise in the field sufficient to render the extent of such loss reasonably certain and fairly susceptible of proof.³⁶

In this manner, lost profits may be established by evidence of past experience or expert testimony sufficient to quantify the extent of loss, either of which must be properly supported by evidence.³⁷ However, in



admissible *Ginn*, the plaintiff relied only upon his testimony that he “could earn up to \$20,000 a year with my equipment and stuff.”³⁸ Holding that such opinion was not an “informed opinion” that was grounded upon any facts in evidence, the Law Court vacated the jury’s award of lost profits, granting plaintiff the option of *remittitur* of damages or a new trial on damages.³⁹

Tang of the Sea v. Bayley’s Quality Seafoods, Inc.

In *Tang of the Sea v. Bayley’s Quality Seafoods, Inc.*,⁴⁰ the Law Court upheld an award of lost profits based on business data corroborated by the owner’s testimony that the defendant’s conversion of business equipment caused his business to lose net profits on par with past sales. In this case, the plaintiff and the defendant were business associates collaborating in seafood processing. When their business relationship ended, the defendant refused to return certain seafood processing equipment owned by the plaintiff that the plaintiff could have used in its own business. In particular, the plaintiff established that it had a specifically identified buyer for a specific quantity of his products. Although the defendant was aware of the plaintiff’s business opportunity, it nevertheless retained plaintiff’s processing equipment for its own operations until the shrimp season had concluded. After missing a full season of business based on the defendant’s wrongdoing, the plaintiff

commenced an action against the defendant for conversion of his business equipment, while also seeking an award of damages based on lost profits.⁴¹ At trial, the plaintiff’s owner provided testimony and evidence establishing that the plaintiff had an offer from a customer to purchase at least one hundred thousand pounds of processed shrimp and that historically, plaintiff always

sold seafood at a price sufficient to generate a net profit of at least 75 cents per pound. The jury awarded plaintiff \$75,000 in damages based on lost profits.⁴²

On appeal, the Law Court rejected the defen-

nant’s challenge of the award of

lost profits, stating that it was within the province of the jury to credit the testimony of the plaintiff’s owner over that of the defendant’s expert witness. In particular, the Law Court noted that the plaintiff’s owner provided evidence of the company’s past experience and lost profits.⁴³ It also noted that the owner testified that he had “substantial experience in the business of selling processed shrimp, that he would set his price at a number that would garner a specific profit-per-pound, that he had done so in the past, that he had a buyer for his product, and that the buyer would have purchased up to five hundred thousand pounds of product.”⁴⁴ Affirming the jury’s award of damages based on lost profits, the Law Court underscored that a jury is “entitled to act upon probable and inferential ... proof in determining damages,” and that damages may be based on “judgmental approximation,” provided the evidence establishes facts from which the amount of damages may be determined to a probability.⁴⁵

Eckenrode v. Heritage Mgmt. Corp.

In contrast to *Tang of the Sea*, the Law Court, in *Eckenrode v. Heritage Mgmt. Corp.*,⁴⁶ reversed a jury’s award of lost profits damages on the grounds that no cognizable claim could have existed based on the record before it. In that case, a former manager of a golf club’s pro shop alleged that pursuant to his contract with the defendant, he was entitled to a share of the net profits from that business. Following the termination of his employment, the former manager filed an action

seeking, among other things, an award of lost profits from the shop.⁴⁷ Although this plaintiff was awarded such damages by the jury, the Law Court struck down the award, holding that insufficient evidence existed to allow the jury to consider any claim of lost profits. In particular, the Law Court noted that the plaintiff provided only his own unsupported opinion as to prospective profitability of the pro shop, while at the same time failing to provide any admissible evidence of the actual profitability of the golf shop during the operative season.⁴⁸ Because the plaintiff's own opinion of profitability lacked a sufficient evidentiary foundation, the Law Court held that it "was not an informed opinion based on relevant facts in evidence upon which the jury could rely in assessing damages for claimed lost profits."⁴⁹

It is clear from the foregoing cases that an award of lost profits will not succeed unless there is an adequate evidentiary foundation to support opinions and testimony offered to establish lost profits. In *Ginn*, the Law Court stated that lost profits could be established though "evidence of past experience *or* from persons with expertise in the field sufficient to render the extent of such loss reasonably certain and fairly susceptible or proof."⁵⁰ In addition, in *Tang of the Sea*, the Law Court upheld an award of lost profits based on a business owner's testimony, without expressly noting that such testimony was expert testimony. These cases make clear that, based on the right quantum and quality of evidence, lost profits can be successfully established without independent expert testimony.⁵¹ Other authorities provide support for this approach. In general, courts have held, and commentators have argued, that a plaintiff's own testimony on prospective lost profits may be admitted so long as such opinion is supported by a sufficient foundation of "credible evidence."⁵²

Although it does not appear that testimony of a duly qualified expert is absolutely *required* to establish lost profits for an existing business, the better practice is to utilize the testimony of an expert witness, whether internally or externally sourced, to assist in meeting the "reasonable certainty" standard applicable to lost profits recovery. *Ginn* and its progeny stand for the proposition that a plaintiff's own conclusory opinion regarding lost profits alone, without credible corroborating evidence, will be insufficient to permit a recovery of lost profits.⁵³ As demonstrated in *Tang of the Sea*, evidence offered in support of a plaintiff's lost profits claim must be reasonably specific in relation to the terms of the thwarted transaction, including relevance to gross revenues and variable expenses.

Recently Established or New Businesses

Special evidentiary challenges arise when seeking to prove the lost profits of a business that has a limited or non-existent track record. In such situations, historical business data—to the extent it even exists—likely will carry less weight because of the limited time periods involved. However, the lack of an earnings history is not necessarily fatal to a lost profits claim. On the contrary, the Law Court has approved (as have courts of other jurisdictions) the use of alternative forms of proof to establish lost profits, such as industry averages, which can be used in such cases. Nevertheless, the Law Court also has not hesitated to limit the scope of available damages, or to eliminate them outright, if such proof fails to meet the "reasonable certainty" standard.

Marquis v. Farm Family Mutual Ins. Co.

The Law Court approved an award of lost profits based on comparative industry data provided by an expert in *Marquis v. Farm Family Mutual Ins. Co.*⁵⁴ In that case, potato farmers whose crop was destroyed by fire brought a contract claim against their insurer based on failure to provide coverage.⁵⁵ A jury awarded the plaintiffs \$610,629 in lost profits, but that amount was stricken by the trial court following the defendants' motion for a new trial on damages or *remititur*.⁵⁶ The plaintiffs appealed the judgment as it pertained to their award of lost profits, asserting that such award was not speculative and was supported by the record.⁵⁷

On appeal, the Law Court sided with the plaintiffs, reinstating the jury's award of lost profits. While noting that damages for future lost profits "are allowable only if they can be estimated with reasonable certainty[.]" the Court determined that the evidence submitted by plaintiffs was not too speculative to support the jury's award.⁵⁸ In particular, the Court noted that the plaintiff's expert provided "carefully prepared data based on governmental statistics, including the average production cost for table stock potatoes in Aroostook County, and the average yield for Maine potatoes[.]"⁵⁹

Newbury v. Virgin

In other settings, the Law Court has refused to permit the recovery of lost profits for new or recently established businesses. In *Newbury v. Virgin*,⁶⁰ a nightclub operator tenant sued his landlord for illegal eviction and conversion of business equipment. Following three successful weeks of operation, the landlord in *Newbury* evicted his tenant so that he could open his own nightclub.⁶¹ The landlord also retained the plaintiff's

business equipment for a period of three weeks after the eviction, despite plaintiff's demand for return.⁶² Although the plaintiff attempted to open his nightclub in a different location, he was not able to recapture his prior business success, resulting in his claim for conversion and seeking damages based on lost profits.⁶³

At trial, the plaintiff himself provided testimony that, in the first three weeks of operation, the club took in \$4,600 in gross revenue and net profits of \$350 per week, which he testified he expected would have lasted indefinitely. A jury

awarded him damages of \$52,000 in lost profits. On appeal, the Law Court reduced the award to \$1,050, corresponding to the three weeks in which the plaintiff was without his business equipment.⁶⁴

Noting that an award of lost profits must be supported by credible evidence, the Law Court underscored that no corroborating evidence had been provided to establish that the plaintiff's profits would have been sustainable.⁶⁵ In addition, the Law Court relied on the traditional rule that damages for lost profits based on conversion are confined to the period in which it would take a reasonable person to replace the converted items.⁶⁶ On these bases, the Law Court greatly reduced the plaintiff's award of lost profits.

Other Tools for Seeking Recovery of Lost Profits

THE FOREGOING CASES DEMONSTRATE THE LEGAL AND EVIDENTIARY challenges in seeking damages based on lost profits. Beyond the traditional concepts discussed above, litigants should remain mindful of two less well known legal theories that can support the recovery of lost profits (or analogous) damages: the Wrongdoer Rule and the doctrine of Loss of Chance/Business Opportunity.

The Wrongdoer Rule

In appropriate circumstances, invocation of the Wrongdoer Rule can be an effective counter to the claim by a defendant that the plaintiff's lost profit damages are specu-

lative and cannot be proved with reasonable certainty. The Wrongdoer Rule has been expressly recognized and described by the United States Supreme Court as follows: "[A] wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury or its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."⁶⁷ The rationale for this rule is that

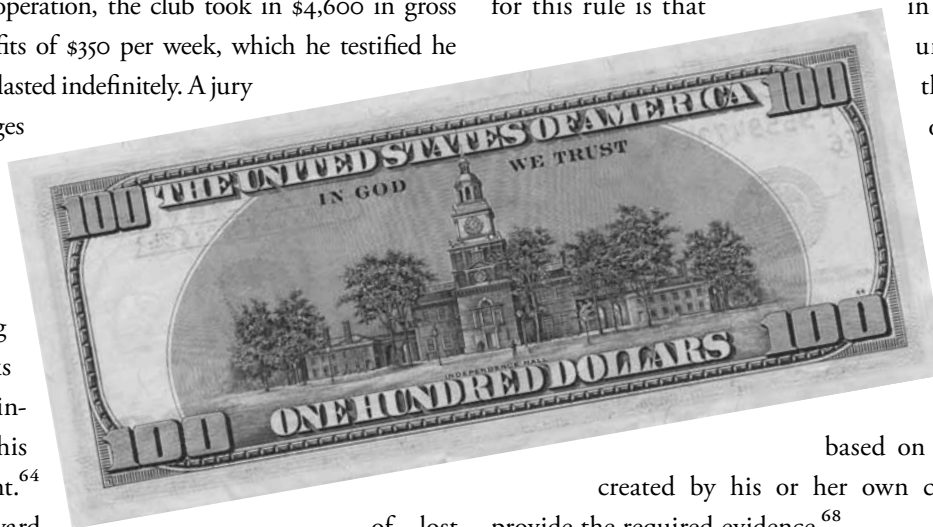
in those cases where uncertainty exists on the scope of damages owing to a defendant's wrongful conduct or the evidence of such damages in defendants' control, defendants should not be permitted to evade liability

based on the lack of certainty

created by his or her own conduct or failure to provide the required evidence.⁶⁸

The Wrongdoer Rule has been applied in various contexts to uphold lost profit and other damage awards in the face of defendants' arguments that the claim was not reasonably certain. It has been employed and approved by both the Law Court⁶⁹ and the First Circuit.⁷⁰ Application of the Wrongdoer Rule is most effective in cases where the relevant evidence concerning lost profits is in the control of defendant, rather than plaintiff, such as cases involving claims of antitrust, corporate freeze-out, usurpation of corporate opportunities, and trademark infringement.⁷¹ As applied in these types of cases, the Wrongdoer Rule effectively results in an informal burden of production imposed upon defendants to quantify the required profit and expense data.

Several courts have extended the Wrongdoer Rule as applied to lost profits claims, finding that less certainty is required to establish the *scope* of damages so long as a plaintiff can prove that damages in fact exist.⁷² For instance, in *Contemporary Mission, Inc. v. Famous Music Corp.*,⁷³ the Second Circuit, applying New York law, held that lost profits were recoverable where a music group sued its distributor for breach of contract for failure to promote the plaintiff's musical works. Notwithstanding the defendants' claim that the jury's award of lost profits was speculative, the Second Circuit upheld the award of lost profits, stating "when the existence of damage is certain,



and the only uncertainty is as to its amount ... the burden of uncertainty about the amount of damage is upon the wrongdoer.”⁷⁴ This analytical approach to lost profits, which amounts to a modern variant of the traditional Wrongdoer Rule,⁷⁵ has not been expressly accepted in Maine. However, neither has it been rejected.⁷⁶ In an appropriate case, this modern variant of the Wrongdoer Rule may be worthy of presenting in support of a plaintiff’s lost profits claim.

Lost Opportunity

The Law Court has yet to address damages based on lost business opportunities on a stand-alone basis, conceptually distinct from damages based on lost profits. However, the Massachusetts Supreme Judicial Court has approved the award of damages based on lost business opportunities, even where the plaintiff’s lost profits were acknowledged as uncertain.⁷⁷ In assigning a value to the *likelihood* that a profit would have been made, as opposed to valuing the lost profits themselves, the Massachusetts Supreme Judicial Court tapped into a line of “loss of chance” cases based on upon a landmark British case that first recognized the loss of chance as an independently recoverable component of contract damages.

Loss of Chance Doctrine

In *Chaplin v. Hicks*,⁷⁸ an entrant in a beauty contest was awarded damages based on the value of her “loss of chance” to actually compete in the contest. The contest involved fifty candidates, from whom twelve would be selected as winners and who would be awarded professional acting contracts. The plaintiff was one of the original fifty contestants. The defendant, a theatrical manager, failed to honor his contractual obligation to notify the plaintiff of the requirement that she participate in a personal interview, which was a precondition to participating in the actual beauty contest. Because the plaintiff did not complete the personal interview, she was denied the right to participate in the contest and thus the chance to be selected as one of the twelve winners.

Although the plaintiff could not prove that she would have been selected as one of the twelve contest winners, she did assert a claim for the value of the lost opportunity to compete in the contest, based on defendant’s breach of contract. Following a jury’s award of damages based on the value of the plaintiff’s lost opportunity, the defendant appealed the award as unduly speculative and contingent. On appeal, the Court of King’s Bench affirmed the award, determining that the value of

the plaintiff’s interest in her lost opportunity itself was recoverable. Thus, the plaintiff received damages in the amount of the value of the acting contract, which amount was discounted based on plaintiff’s probability of being selected for a contract, namely, twenty-five percent, since the average chance of each competitor was one in four.⁷⁹

In the wake of *Chaplin v. Hicks*, courts in the United Kingdom also have approved the award of damages based on loss of chance in tort cases.⁸⁰ Loss-of-chance cases are notable in that plaintiffs are held to a lower standard of proof for causation, rather than to the typical preponderance-of-the-evidence standard. Instead, a plaintiff need only show that a “real and substantial chance” existed that, but for the defendant’s breach of duty, an opportunity or transaction with a third party would have occurred and led to the plaintiff’s profits.⁸¹ A “real and substantial chance” is merely something more than a purely speculative or fanciful chance.⁸²

Loss of Business Opportunity

The Massachusetts Supreme Judicial Court has relied upon the loss of chance doctrine to award damages based on lost business opportunity. In *Air Technology Corp. v. General Electric Co.*,⁸³ the Supreme Judicial Court addressed a breach of contract case involving General Electric (“GE”) and another firm, Air Technology Corp (“AT”). In that case, GE obtained the assistance of AT in preparing bids for a government contract, but then subsequently breached its agreement to use AT as a subcontractor, instead opting to complete the work itself by utilizing the information provided by AT.

While acknowledging that a lost profits claim would be speculative, the Court nevertheless determined that GE breached its duties owed to AT, entitling AT to an award of damages, finding that “[w]hat AT lost by GE’s breaches of contract was a business opportunity.”⁸⁴ The Court stated that the “problem is to determine the value of the opportunity to which AT was entitled as a contract right, even if AT’s lost profits cannot be ascertained. A reasonable approximation will suffice.”⁸⁵ Addressing the calculation of damages, the Court held that a determination of the fair value of AT’s lost business opportunity also had to take into consideration “uncertainties” that could affect the award, including (1) the approximate net amount AT would realize from the subcontract and (2) the probability of successful negotiations and Air Force approval.⁸⁶ This approach is consistent with the current law of loss of opportunities under U.K. law, which subjects loss of chance damages to a lesser standard of proof.⁸⁷

Loss of Earnings Opportunity

Although the Law Court has yet to squarely consider a loss of business opportunity claim similar to that made in *Air Technology Corp.*, it has recognized, in an analogous context, that damages based on lost earning opportunities may be awarded in appropriate circumstances. In *Snow v. Villacci*,⁸⁸ an employee of an investment firm asserted a claim of negligence against the owner of an automobile repair shop after the plaintiff was struck by a motor vehicle operated by the defendant and lost fourteen weeks of employment and future earnings opportunities while recovering from his injuries.⁸⁹ The plaintiff had been in the twentieth month of a twenty-five-month training program to become qualified as a financial consultant.⁹⁰ Because his injuries prevented him from completing the program's goals on time, his employer did not invite him for an additional opportunity to become a financial consultant.⁹¹ The plaintiff asserted claims against the defendant based on his negligence, seeking recovery of damages, including the value of his lost earnings opportunity. The defendant obtained summary judgment on the grounds that claims based on lost earnings capacity were not cognizable under Maine law.

The Law Court, while acknowledging that recovery of prospective, hypothetical earnings presented special evidentiary challenges, rejected the defendant's arguments, holding that a plaintiff may recover damages based on lost earning opportunity if supported by an adequate evidentiary foundation.⁹² Wrote the Court:

[T]here is no logical or public policy reason to deny recovery to a person who has lost an opportunity due to the negligent acts of another person, as long as the elements necessary for recovery are proven by a preponderance of the evidence. If a plaintiff has in fact lost a unique opportunity to increase her earnings, and that loss was caused by defendant's actions, she should be able to recover those damages just as she would have if the defendant's wrongdoing has caused her to lose wages.⁹³


Accordingly, the Law Court held that recovery may be had for loss of an earning opportunity if the claimant proves, by a preponderance of the evidence, that: (i) the opportunity was real and not merely a hoped-for prospect; (2) the opportunity was available not just to the public in general but to

the plaintiff specifically; (3) the plaintiff was positioned to take advantage of the opportunity; (4) the income from the opportunity was measurable and demonstrable; and (5) the wrongdoer's negligence was a proximate cause of the plaintiff's inability to pursue the opportunity.⁹⁴ Although the Law Court in *Snow* imposed stringent evidentiary requirements for recovery of damages based on lost earnings opportunity, it is notable that the Law Court was fully cognizant of and supportive of the policy rationale for permitting recovery based the value of a lost opportunity.

Conclusions

THE AVOWED GOAL OF ANY DAMAGES AWARD IN THE TORT context is to make the injured party whole; in the contract setting, the goal is to put the non-breaching party in as good a position as he or she would have been if no breach had occurred.⁹⁵ Achieving these goals with respect to a claim for lost profits is sometimes easier said than done. The guiding first principle in this regard is that lost profits may be proved with judgmental approximation and do not need to be established with mathematical precision. However, whether the proof at trial on this issue is to be presented through the testimony of the plaintiff, an independent expert, or both, it is essential that it be based on a solid evidentiary foundation that adequately addresses the underlying economic data, including sufficiently quantified revenue and expenses. In cases where such evidence does not exist, comparative evidence—such as industry averages and official statistics—must be utilized. At a minimum, the Law Court has made it clear that it expects opinions seeking to establish lost profits to be “informed” opinions that rest upon “credible evidence.”⁹⁶

When facing these evidentiary requirements inherent in the imprecise business of reducing legal harms to monetary damages, litigants should remain mindful that, in appropriate circumstances, the Wrongdoer Rule and analogous Loss of Chance/Business Opportunity doctrine may assist plaintiffs in meeting their burden. Although these theories of recovery have taken various expressions in different cases, at their core, both are aimed at the same worthy goal of ensuring that parties in breach of their obligations are not shielded from the consequences of their wrongful actions. In situations where evidence of lost profits is limited or unavailable due to the wrongful acts of the defendant, the Wrongdoer Rule may be properly applied under Maine law and a jury instruction on the issue would be appropriate.⁹⁷ The Loss of Chance/Business Opportunity doctrine, as

first expressed in *Chaplin v. Hicks* and particularly its lower “substantial chance” burden of proof, has not yet gained any traction in Maine courts.⁹⁸ However, in a case seeking recovery based on lost profits or lost business opportunity, as in *Air Technology Corp.*, the modern variant of the Wrongdoer Rule could properly have application. That is, provided that the *fact* of damages can be established to a reasonable certainty, the *amount* of damages would be subject to lesser proof.⁹⁹ It remains to be seen whether these doctrines can and will be successfully applied in future cases in the courts of Maine. 

1. *Dairy Farm Leasing Co., Inc. v. Hartley*, 395 A.2d 1135, 1140–41 (Me. 1978).

2. *Id.* at 1140.

3. See, e.g., *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644 (Me. 1994); *Newbury v. Virgin*, 2002 ME 119, 802 A.2d 413.

4. *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 265 (1946).

5. *Air Technology Corp. v. General Electric Co.*, 347 Mass. 613, 627 (1964) (citing, *inter alia*, *Chaplin v. Hicks* [1911] 2 KB 786, 791–801; Restatement, Contracts, § 332, Williston, Contracts, § 1346; Corbin, Contracts, § 1030).

6. *Newbury v. Virgin*, 2002 ME 119, ¶1, 802 A.2d 413, 414 (acknowledging lost profits award as a component of consequential damages); *Tang of the Sea v. Bayley's Quality Seafoods, Inc.*, 1998 ME 264, 721 A.2d 648 (affirming lost profits award based on tort claim of conversion); *Northern Trading Co. v. Songo of Maine, Inc.*, 646 A.2d 356 (Me. 1994) (affirming lost profits award based on breach of oral contract).

7. See *McCain Foods, Inc. v. Gervais*, 657 A.2d 782, 783–84 (Me. 1995) (upholding jury determination of no damages for lost profits where net profit would have been zero); *Walters v. Petrolane-Northeast Gas Service*, 425 A.2d 968, 973 (Me. 1981) (upholding award of lost profits based on evidence establishing net profits over a three-year period).

8. See *id.* (considering evidence of gross income and determining net profit).

9. *Id.*

10. *Ginn v. Penobscot Co.*, 334 A.2d 874, 884 (Me. 1975) (holding that failure to discount future anticipated earnings to present value constitutes error).

11. See *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426 (1982) (“The prevailing rule is that damages for such profits must be reduced by any direct expenses that would have been incurred in making the lost sales, but fixed overhead expenses need not be deducted unless they were, or would have been, changed by the receipt of the lost business.”); Dunn, *Recovery of Lost Profits* (6th Ed. 2005), § 6.5 (“The weight of authority . . . holds that fixed overhead expenses need not be deducted from gross income to arrive at the net lost profits properly recoverable.”) (citing, *inter alia*, *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373 (7th Cir. 1998); *Cambridge Plating Co. Napco, Inc.*, 85 F.3d 757 (1st Cir. 1996)).

12. See 11 M.R.S. § 2-708 (1) & (2) (addressing seller’s damages for breach of contract).

13. An example of a fixed expense that would properly be subtracted from gross income would be a “saved expense,” such as an abandoned office lease that was specifically undertaken in relation to an opportunity for which lost profits have been claimed. See *John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.*, 787 A.2d 858 (N.H. 2001) (deducting overhead expenses from lost profits award where office expense eliminated by closure of office).

14. See, e.g., *Boca Developers v. Fine Decorators*, 862 So.2d 803, 805 (Fla. App. 4 Dist. 2003) (holding that apportioned overhead should be deducted from gross income figure for purposes of lost profits calculation); *Orkin Exterminating Co., Inc. v. Burnett*, 160 N.W.2d 427, 429–30 (Iowa 1968).

15. *Snow v. Villacci*, 2000 ME 127, ¶¶9–10, 754 A.2d 360, 363.

16. *Marquis*, 628 A.2d at 650.

17. *Houde v. Millett*, 2001 ME 183, ¶ 10, 787 A.2d 757, 759 (quotations and citations omitted).

18. *Crowe v. Shaw*, 2000 ME 136, ¶ 10, 755 A.2d 509, 512.

19. *Merriam v. Wanger*, 2000 ME 150, ¶ 10, 757 A.2d 778, 781.

20. *Susi v. Simonds*, 85 A.2d 178, 179 (Me. 1951) (“[F]or the plaintiff to recover the special damages he here claims to have suffered beyond what would naturally flow from the breach claimed of such contract, it must affirmatively appear that the special circumstances under which the contract was actually made which gave rise to such damages were communicated by the plaintiff to the defendant and were thus in the contemplation of both parties at the time of making the contract.”) (internal citations omitted); see also *Steamship Navigation Co. v. Camden Nat’l Bank*, 2006 ME 11, ¶9, 889 A.2d 1014, 1017 (stating that compensatory, or general, damages cover all losses actually suffered as a result of the breach, while “special damages cover additional losses contemplated by both parties at the time of contract formation[.]”) (internal citations omitted).

21. *Hadley v. Baxendale*, [1854] 9 Exchequer Rep. 341, upon which the distinction between general damages and special damages in contract is founded, provides some insight into the limits of proximate cause and foreseeability in relation to damages based on lost profits. In that case, plaintiffs, grain millers, entered into a contract with a common carrier to deliver a broken crankshaft to another party for repairs by a certain date. Delivery failed to occur on time, resulting in lost business for the plaintiffs and a resulting breach of contract claim against the carrier seeking recovery of lost profits. On appeal to the Court of the Exchequer, the plaintiffs’ award of lost profits was reversed. In particular, the Court noted that the common carrier was wholly unaware of any special circumstances that would have provided notice of the amount injury that would result based on failure to perform the contract in these special circumstances. Because damages based on lost profits were not foreseeable to the defendant, they were not recoverable.

22. See Restatement (Second) of Contracts, § 351, Comment A. Section 351 provides in full that:

I. Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

II. Loss may be foreseeable as a probable result of a breach because it follows from the breach

A. in the ordinary course of events or

B. as a result of special circumstances beyond the ordinary course of events, that the party in breach had reason to know.

23. See, e.g., *Williams v. Ubaldo*, 670 A.2d 913, 918 (Me. 1996) (holding that extra costs of snow removal could not be awarded as special damages because they were not a reasonably foreseeable consequence of breach of real estate contract); *Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646, 655 (Me. 1979) (applying “reasonable” contemplation standard and reversing award of special damages as speculative where damages were addressed to plans to develop commercial property in distant future); *Winship v. Brewer School Comm.*, 390 A.2d 1089, 1095 (Me. 1978) (“In actions premised on breach of contract the general rule allows recovery of those damages which were reasonably within the contemplation of the contracting parties when the agreement was made and which would naturally flow from a breach thereof.”).

24. See *Maine Rubber Int’l v. Environmental Mgmt. Grp.*, 324 F.Supp. 2d 32, 35–36 (D. Me. 2004).

25. Compare *Williams*, 670 A.2d at 918 (holding that special damages were not recoverable because they were not reasonably aware of special circumstances) and *Susi*, 85 A.2d at 179 (Me. 1951) (holding that lost profits were not recoverable because the plaintiff had not communicated the special circumstances giving rise to lost profits); see also *Winship*, 390 A.2d at 1095 (holding that special damages are recoverable where such damages were “reasonably within the contemplation of the contracting parties[.]”).

26. *Stubbs v. Bartlett*, 478 A.2d 690, 693 (Me. 1984) (“[W]hen when the injury for which damages are sought is not reasonably foreseeable, in

the exercise of due care, the party whose conduct is under investigation is not answerable for the same.”).

27. See, e.g., *Gilmore v. Central Maine Power Co.*, 665 A.2d 666, 670–71 (Me. 1995) (upholding award of special damages based on medical expenses, lost wages and property damage based on negligence claim arising out of automobile accident).

28. *Eckenrode v. Heritage Management Corp.*, 480 A.2d 759, 765 (Me. 1984).

29. *Michaud v. Steckino*, 390 A.2d 524, 530 (Me. 1978).

30. *Id.*

31. *Downeast Energy Corp. v. RMR, Inc.*, 1997 ME 148, ¶¶7, 697 A.2d 417, 420.

32. *Id.*

33. *Id.* (citing and quoting *Merrill Trust Co. v. State*, 417 A.2d 435, 440–41 (Me. 1980)); accord *Tang of the Sea, Inc.*, 1998 ME 264, ¶ 10, 721 A.2d 648, 650–51.

34. 334 A.2d 874 (Me. 1975).

35. *Id.* at 887.

36. *Id.*

37. *Id.*

38. *Id.* at 886.

39. *Id.* at 887.

40. 1998 ME 264, ¶¶8–9, 721 A.2d 648, 650.

41. *Id.* at ¶¶ 3–6, 721 A.2d at 649–50.

42. *Id.* at ¶¶8–10, 721 A.2d at 649.

43. *Id.* at ¶11, 721 A.2d at 651.

44. *Id.*

45. *Id.* at ¶11, 721 A.2d at 650–51.

46. 480 A.2d 759 (Me. 1984).

47. *Eckenrode*, 480 A.2d at 760–61.

48. *Id.* at 766.

49. *Id.*

50. *Ginn*, 334 A.2d at 887(emphasis added).

51. See *Rutland v. Mullen*, 2002 ME 98, ¶¶ 22–23, 798 A.2d 1104, 1112–13 (stating that opinion evidence reading lost profits is admissible, but noting that it must be an informed opinion based on facts that the fact-finder can evaluate, and concluding that it was error to permit the jury to consider lost profits because the plaintiff was unqualified to render opinions and no competent evidence supporting profit calculations).

52. See *Reardon v. Lovely Development, Inc.*, 2004 ME 74, ¶¶11, 14, 852 A.2d 66, 70 (holding that plaintiff’s opinion testimony regarding lost profits, without corroborating evidence, does not constitute “credible evidence” sufficient to support an award of lost profits); see generally *Ricky Smith Pontiac, Inc.*, 14 Mass. App. Ct. at 428–29 (permitting testimony of corporation’s president to establish lost profits); Dunn, *Recovery of Lost Profits* (6th Ed. 2005), § 7.3 (“One common pattern in lost profits damages cases is for either the plaintiff (if an individual plaintiff) or qualified officer or employee of the plaintiff (if a corporate or partnership plaintiff) to testify as to the facts and to give an expert opinion concerning the loss of profits. This evidence is ordinarily held adequate, without more, to make out a case.”).

53. *Ginn*, 334 A.2d at 887; see also *Reardon*, 2004 ME 74, ¶¶11, 14, 852 A.2d at 70.

54. 628 A.2d 644, 650 (Me. 1993).

55. *Id.* at 646.

56. *Id.* at 647.

57. *Id.* at 650–51.

58. *Id.* at 650.

59. *Id.* at 650–51.

60. 2002 ME 119, ¶ 6, 802 A.2d 413.

61. *Id.* at ¶¶7–8.

62. *Id.* at ¶ 8.

63. *Id.* at ¶ 10.

64. *Id.* at ¶ 20.

65. *Id.*

66. *Id.*

67. *Bigelow*, 327 U.S. at 265; see also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (“The wrongdoer is not

entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise[.]”)

68. In *Bigelow*, 327 U.S. 251, 265 (1946), the U.S. Supreme Court wrote:

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created. See *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972, 979. That principle is an ancient one, *Armory v. Delamare*, 1 Strange 505, [93 Eng. Rep. 664 (King’s Bench 1722)][.] ... [T]he wrongdoer may not object to the plaintiff’s reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer’s misconduct has rendered unavailable. And in cases where a wrongdoer has incorporated the subject of a plaintiff’s patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant’s profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits. *Westinghouse Co. v. Wagner Mfg. Co.*, 22 U.S. 604; *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251; see also *Sheldon v. Metro-Goldwyn Corp.* 309 U.S. 390, 406.

(emphasis added).

69. See *Dillingham v. Ryan*, 651 A.2d 833, 837 (Me. 1994)(applying Wrongdoer Rule in action awarding damages based on removal of timber and citing *Story Parchment Co.* for the proposition that doubts as to the scope of damages are resolved against the wrongdoer when his actions are the cause of uncertainty in determining the amount of damages).

70. See *Computer Sys. Eng’g, Inc. v. Qantel Corp.*, 740 F.2d 59, 66–67 (1st Cir.1984) (*Ginoux, J.*, sitting by designation) (upholding award of “hypothetical” lost profits and citing Wrongdoer Rule as referenced in *Jay Edwards v. New England Toyota Dist.*, 708 F.2d 814, 821 (1st Cir. 1983) (citing *Bigelow*, 327 U.S. at 265)).

71. *Story Parchment Co.*, 282 U.S. at 563 (applying Wrongdoer Rule in Sherman Act case); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 995–96 (5th Cir. 1983) (holding that in relation to a violation of the Clayton Act, “we do not require that plaintiff prove with exact particularity what its success might have been in the market in the absence of the illegal conduct of another.”); *O’Brien v. Pearson*, 449 Mass. 377, 388 n. 9 (2007) (citing *Story Parchment Co.* in relation to damages in breach of fiduciary duty/freeze-out action); *Lucini Italia Co. v. Grappolini*, 2003 WL 1989605, (N.D. Ill. 2003) (citing *Bigelow* and *Story Parchment Co.* in relation to damages in based on usurpation of corporate opportunity/misappropriation of trade secrets); *Broan Mfg. v. Associated Distributors, Inc.*, 923 F.2d 1232, 1236–38 (6th Cir. 1991) (citing *Bigelow* and holding that Wrongdoer Rule applies to evidence of lost profits based on trademark infringement; reversing trial court’s refusal to admit evidence of lost sales in support of damages).

72. See Dunn, *Recovery of Damages for Lost Profits*, §1.8 (“If plaintiff’s proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty is required in proof as to the amount of damages); *O’Brien*, 449 Mass. at 388 n. 9 (“In evaluating O’Brien’s claim, we are mindful of the distinction between the fact of damages arising directly from the fiduciary breach and the amount of those damages. The evidentiary burden on the fact of damages requires a more stringent degree of certainty).

73. 557 F.2d 918 (2nd Cir. 1977).

74. *Contemporary Mission, Inc.*, 557 F.2d at 926; see also Restatement (Second) of Contracts § 352, Comment a (“Doubts [concerning calculation of damages] are generally resolved against the party in breach.”).

75. See *Schonfeld v. Hilliard*, 218 F.3d 164, 174–75 (2nd Cir. 2000) (referring to the Wrongdoer Rule and holding that it had no application where the existence of lost profits could not be established with reason-

able certainty); see also O'Brien, 449 Mass. at 388 n. 9 (drawing distinction between existence and scope of damages).

76. See *Dillingham*, 651 A.2d at 837 (applying Wrongdoer Rule and holding that because defendants' actions created the uncertainty with respect to the amount of damages, they could not be heard to complain of imprecision in plaintiff's estimate for damages).

77. *Air Technology Corp. v. General Electric Co.*, 347 Mass. 613, 626-27 (1964).

78. [1911] 2 KB 786.

79. *Id.*

80. See, e.g., *East v. Maurer* [1991], 1 W.L.R. 1 (holding that in an action for deceit, lost profits could be recovered based on profit the plaintiffs might have expected to recover in a similar, hypothetical business that plaintiffs would have engaged but for the misrepresentation).

81. See *Allied Maples v. Simmons & Simmons*, [1995] 1 W.L.R. 1602, 1611.

82. *Id.* at 1614.

83. 347 Mass. 613 (1964).

84. *Id.* at 627 (citing, *inter alia*, *Chaplin v. Hicks* [1911] 2 KB 786, 791-801; Restatement, Contracts, § 332, Williston, Contracts, § 1346; Corbin, Contracts, §1030).

85. *Id.* In this case, the Court also expressly cited the Wrongdoer Rule, noting that a reasonable approximation of damages suffices "where the difficulties in determining damages arise in large part from

GE's own failure to negotiate with AT in accordance with the joint undertaking." *Id.*

86. *Id.* at 628.

87. See *Allied Maples*, [1995] 1 W.L.R. at 1614.

88. 2000 ME 12; 754 A.2d 360.

89. *Id.* at ¶¶1-2, 754 A.2d at 361-62.

90. *Id.* at ¶3, 754 A.2d at 362.

91. *Id.* at ¶¶3-4, 754 A.2d at 362.

92. *Id.* at ¶¶14-15, 754 A.2d at 365.

93. *Id.* at ¶15, 754 A.2d at 365.

94. *Id.* at ¶16, 754 A.2d at 365.

95. *Snow*, 2000 ME 127, ¶9, 754 A.2d at 363 (tort); *Downeast Energy Corp.*, 677 A.2d at 1073 (contract).

96. *Reardon* 2004 ME 74, ¶¶11, 14, 852 A.2d at 70.

97. See *Dillingham*, 651 A.2d at 837.

98. *Snow*, 2000 ME 127, ¶20, 754 A.2d at 365 (Expressing continued commitment to the preponderance of the evidence standard in award based on lost earnings opportunity).

99. See *supra*, note 72; see also *Renovator's v. Bank*, 72 Mass. App. Ct. 419, 436 (2008) ("The plaintiff [is] not required to prove its lost profits with mathematical precision. Under our cases, an element of uncertainty is permitted in calculating damages and an award of damages can stand on less than substantial evidence. This is particularly the case in business torts, where the critical focus is on the wrongfulness of the defendant's conduct.").

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