



Neville L. Johnson

JOHNSON & JOHNSON LLP



Douglas L. Johnson

JOHNSON & JOHNSON LLP



Contract, fraud, and libel damages

DAMAGES AVAILABLE IN COMMON NON-PERSONAL-INJURY ACTIONS. FOR PUNITIVES, LOOK FOR THE WOLF IN SHEEP'S CLOTHING – FRAUDULENT INDUCEMENT

The two questions a litigator must ask before taking on any new matter are (1) whether they can win, and (2) what they can get for winning. A victory without an adequate remedy is hardly a victory at all. As such, knowing the measure of damages realistically available in various non-personal injury actions is key to discerning which of those actions are worth pursuing and to what extent of investment.

Contract damages

Breach of contract is perhaps the most common claim underpinning business disputes. In the law of contracts, after a breach has occurred, an injured party is allowed to receive compensation for the substantial harm he or she endured as a result of the breaching

party's failure to perform. The two primary types of contractual damages are general damages, which compensate for the value of the promised performance, and consequential damages, which account for losses incurred as a result of the breach. (*Speirs v. BlueFire Ethanol Fuels, Inc.* (2015) 243 Cal.App.4th 969, 989.)

General damages, also referred to as direct damages, are intended to place the non-breaching party in a similar position to that which they would occupy had the breaching party fulfilled their contractual obligation. (*Id.* citing *Latham Land I, LLC v. TGI Friday's, Inc.* (2012) 96 A.D.3d 1327, 948 N.Y.S.2d 147, 151-152.) Since general damages are a direct consequence to a contractual breach, parties are generally aware at the time the contract is formed that were a breach to occur, these

damages would be the predictable outcome of that breach. (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1010; see *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 975 [lost earnings on potential future construction projects do not qualify as general damages because they do not naturally flow from the original construction deal].)

Consequential damages, also known as special damages, are dissimilar to general damages in that they do not flow directly from a contractual breach, but are secondary losses arising from particular circumstances of the case that are specific to either the contract or to the parties. (See *Greenwich S.F. LLC v. Wong* (2010) 190 Cal.App.4th 739, 754.) These damages measure the injured

party's loss that occurs *following* the breach, rather than as a direct result of the breach itself. (*Lewis Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1010 [citing *Joyce Construction Management, Inc v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968-969].)

For consequential damages to be awarded, they must fall within a framework outlined in the dissent to the influential English contract case of *Hadley v. Baxendale*, which emphasized the principle that damages will be recoverable for a breach of contract if it were foreseeable at the time of the formation of the contract that these damages would occur as a result of the breach. (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 334 [citing *Hadley v. Baxendale* (1854) 56 Eng. Rep. 145].)

If the facts of the case indicate that a specific purpose was intended to be accomplished and known by one of the parties, and a failure to fulfill this purpose would result in greater damage than would directly flow from the contractual breach, these damages are likely within the "contemplation of the parties." (See *Mack v. Hugh W. Comstock Associates, Inc.* (1964) 225 Cal.App.2d 583, 587 [consequential damages were recoverable because after the defendants made express warranties that guaranteed the performance of their heating system, it was foreseeable that leaks in the system would make the plaintiffs' house uninhabitable]; *Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1469 [plaintiff could not recover consequential damages because it was not foreseeable that the defendant would have to pay the plaintiffs' attorney fees as a result of the contractual breach].)

Calculating the sum of damages in a breach-of-contract claim often involves determining the value of profits, which the law provides cannot be "speculative, remote, imaginary, or contingent," as such measures cannot adequately serve as a legal method for recovery due to their inherent uncertainty. (*Estate of Kampen* (2011) 201 Cal.App.4th 971, 991 [*Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953,

989].) Generally, anticipated lost profits can only be recovered if the plaintiff provides facts to support with reasonable certainty that he or she would have earned a profit but for the defendant's failure to perform. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884 [finding that although plaintiff had a "highly trafficked" website, which would have likely attracted a high volume of wealthy customers, the evidence was not sufficient to show with reasonable certainty a triable issue as to future lost profits].)

The prerequisite to recovery of consequential damages is to provide sufficient evidence as to lost profits, and in business cases, an insufficient history of profits will bar consequential damages. (Compare *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [finding that plaintiff was a new business without a financial track record, and there was no evidence that provided the marketing of their discs would gain them any profits] with *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291 [holding that lost profits would not necessarily be speculative for the plaintiff's business because they were an already established firm].) Generally, courts are likely to deny recovery of damages for a new business venture because the profits are too speculative or remote to accurately compute due to a lack of financial history. (*Handley v. Guasco* (1958) 165 Cal.App.2d 703, 711; *California Press Mfg. Co. v. Stafford Packing Co.* (1923) 192 Cal. 479, 482.)

However, a plaintiff with a new business can still recover consequential damages if he or she provides evidence through expert testimony, a history of economic and financial data of similar businesses, market surveys, or any other relevant data which demonstrates with reasonable certainty that damages exist. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 288 [citing *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884].)

Evidence of this type needs to be proved with substantial similarity, linking

both the facts of future profit projections with the value of the destroyed business. (*Ibid.* [holding that projections from other businesses that are only assumptions of potential profit and are not based on actual operations do not make a substantially similar showing of lost profits]; *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 162 [concluding that although plaintiff provided relevant evidence of gross revenues earned by eleven other drivers working for Central Coast, the profit margin she provided had no relation to plaintiff's current business operation].) Evidence from expert witnesses that provides information on the likelihood of lost profits can be sufficient by itself to show that lost profits from a new business venture are not speculative. (*Micro Modular Technologies PTE Ltd. v. Atheros Communications, Inc.* (C.D. Cal., Dec. 18, 2012, No. SACV1000443JAKMLGX) 2012 WL 13015026, at *4 [jury awarded half of the lost profit damages for which the plaintiff's expert testified about].)

Overall, consequential damages can be treacherous for contracting parties due to their uncertainty and need for foreseeability. However, parties uncomfortable with even their mere prospect can limit or exclude consequential damages by adding an appropriately worded provision to their contract, so long as the limitation or exclusion is not unconscionable. (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1534.) An unconscionable exclusion of consequential damages will be unenforceable. (Compare *J.C. Gury Co. v. Nippon Carbide Indus. (USA) Inc.* (2007) 152 Cal.App.4th 1300, 1304 [holding that the exclusion of damages was unconscionable because the clause restricted plaintiffs ability to receive any relief for product defects] with *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1539 [finding the provision enforceable because the plaintiff had similar restrictions on its products, and the plaintiff knew defendant would not sell is

seeds without such limitations].) As long as the provision excluding consequential damages in the contract is known and understood by both parties at the time of signing, the clause will be presumed acceptable. (Compare *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 490 [finding sufficient evidence to support that because plaintiff never read the reverse side of the terms, coupled with the defendants' failure to direct plaintiffs' attention to the terms, and the extreme complexity of the terms, the plaintiff was unaware of the provision, which was thus unenforceable] with *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1539 [holding that the provision was enforceable because plaintiff was familiar with, read, and understood the exclusion].) Such exclusions are commonplace, and attorneys should familiarize themselves with the key considerations that govern their enforcement.

Fraud damages

Causes of action for fraud or breach of fiduciary duty are attractive in large part because a party can recover punitive or exemplary damages for them. Under Civil Code section 3294, exemplary or punitive damages are not recoverable for breach of contract unless the wrongful act constituting the breach is also a tort. (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 680.) Punitive damages are not typically recoverable in an action for breach of contract no matter how willful, malicious, or fraudulent the breach is. (*Ibid.* [citing *Gorman v. Southern Pac. Co.* (1892) 97 Cal. 1, 7].) However, such damages may be awarded if the defendant "fraudulently [induced] the plaintiff to enter the contract." (*Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 996.)

Upon a showing of such tortious inducement, the injured party can recover punitive damages if there is a proper showing of malice, fraud, or oppression. (*Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 996.) Notably, a fraud

cause of action seeking punitive damages does not need to be coupled with a malicious desire to hurt the plaintiff. (*Stevens v. Superior Court* (1986) 180 CA3d 605, 610, 225 CR 624.) The finding of fraud alone is sufficient grounds for awarding punitive damages. (*Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477, 482 [finding that a dealership was guilty of fraud because it concealed that the car was previously stolen and misrepresented that it was "new," supporting an award of punitive damages for the buyer]; *Iota Phi Lambda Sorority, Inc. v. Contenta Global Capital Group, LLC* (D. Minn., Sept. 26, 2019, No. 19-CV-532 (SRN/DTS) 2019 WL 4687115, at *20 [finding grounds for awarding punitive damages where defendants intentionally defrauded plaintiffs by converting funds for their own use]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal. App.3d 1220, 1258 [concluding that buyers were entitled to punitive damages because they provided evidence of a seller committing fraud in the sale of a shopping center by making guarantees to the buyer without an intention to fulfill them].)

California law diverges from that of other states by holding that a plaintiff can generally only recover out-of-pocket damages and will usually not be entitled to recover benefit-of-the-bargain damages. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240.) Out-of-pocket damages help restore the plaintiff to where they would be had the fraudulent act not occurred. (*Ibid.*) Comparatively, benefit-of-the-bargain damages compensate the plaintiff for what he or she would have expected to receive if the defendant's relied-upon false representations were true. (*Ibid.*) In California, since a defrauded plaintiff is limited to recovering only his or her "out-of-pocket" loss, they are rarely able to recover for any anticipated profits. (*Ibid.*) However, benefit-of-the-bargain damages can be awarded in fraudulent inducement cases. (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.)

If an injured party is defrauded by a fiduciary, a broader range of damages more readily applies. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226.) One decision recently held that a plaintiff may be awarded benefit-of-the-bargain damages for fraud when the fraud is committed by a fiduciary in real-property transactions. (*Moore v. Teed* (2020) 48 Cal.App.5th 280, 289 [finding that an injured party could receive compensation for any and all damages caused by the defendant's fraudulent behavior].)

This holding adds to a line of conflicting case law that has yet to fully resolve whether benefit-of-the-bargain damages should be awarded for fraud by a fiduciary. (Compare *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1086 [benefit-of-the-bargain damages was not appropriate] with *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 239 [due to the intentional misrepresentation by plaintiff's fiduciary, the award for damages should not be confined to out-of-pocket damages].)

As mentioned previously, a plaintiff can recover punitive damages for breach of fiduciary duty or fraud if there is a showing of malice, fraud, or oppression. (See *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1051; *Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1345 [jury awarded punitive damages because defendants misrepresented and concealed information to plaintiffs, which induced them to invest in the corporation]; *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 22 [holding that plaintiffs could recover punitive damages because defendant was involved in a scheme that concealed commissions that belonged to the partnership, intentionally withholding funds from the partners].)

However, absent a showing of tortious conduct, a breach of fiduciary duty will not permit a party to be awarded punitive damages. (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1053-54 [finding that defendant's conduct did not give rise to an award of punitive damages

because although the attorney violated the rules of professional conduct, he did not act with a harmful motive to amount to an award for punitive damages]; *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 380 [setting aside the jury's award of \$200 million in punitive damages because the court did not support a finding of a fiduciary relationship]; *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 716 [holding that termination for an improper reason, by itself, is insufficient wrongful conduct to support a finding of intentional harm].)

Further, an injured party can recover damages for emotional distress when a defendant, in breaching a contract, violates a fiduciary obligation owed to them. (*Cross v. Bonded Adjustment Bureau* (1996) 48 Cal.App.4th 266, 273.) Otherwise, emotional distress is "not recoverable as an element of damages for fraud." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 67 [quoting *Channell v. Anthony* (1976) 58 Cal.App.3d 290].)

A frequent tactic used by defense attorneys looking to stave off fraud remedies is to claim there are only contract damages available in a given case and thus a fraud claim is preempted. It is true that, under California law, "[d]ouble or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159.) As a result, even if a plaintiff prevails on both a tort and contract claim, he or she may not receive damages for both unless a distinct loss underlies each claim. (See *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 563-65 [where a plaintiff's only damages were loss of commissions, identical awards for breach of contract and bad faith denial of the same contract could not be granted together].) However, "where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or

multiple verdicts referring to different claims or legal theories." (*Tavaglione, supra*, 4 Cal.4th at p. 1159; see *Huy Fong Foods, Inc. v. Underwood Ranches, LP* (2021) 66 Cal.App.5th 1112, 1126 ["Punitive damages may be awarded for fraud even though the fraud incidentally involves breach of contract."].)

Libel damages

The damages available to a prevailing libel plaintiff include general damages, special damages, and punitive damages.

General damages encompass damages relating to the plaintiff's loss of "reputation, shame, mortification and hurt feelings in any context, whereas special damages are defined narrowly to encompass only economic loss." (*Gomes v. Fried* (1982) 136 Cal.App.3d 924, 939 [citing *Correia v. Santos* (1961) 191 Cal.App.2d 844, 856-857].) For example, in the unpublished case of *Wallace v. Cass*, the plaintiffs were each able to recover general damages of \$30,000 because the defendant made signs that falsely accused them of criminal conduct such as trespass, destruction of property, and elder abuse. (*Wallace v. Cass* (Mar. 10, 2008, No. G036490) Cal.App.4th [2008 Cal.App. Unpub. LEXIS 2056, at *19].)

The most attractive form of libel claim is libel *per se*, which is when "a listener could understand the defamatory meaning" of a statement "without the necessity of knowing extrinsic explanatory matter." (*Balla v. Hall* (2021) 59 Cal.App.5th 652, 686 [quoting *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112].) This includes statements that tend to cause harm to a plaintiff's profession, trade, property, or occupation. (*Ibid.* [citing Civ. Code, § 46, subd. 3].)

A claim for libel *per se* allows the injured party to pursue their cause of action without having to plead or prove special damages because injury to their reputation is presumed. Conversely, defamatory language that is not libelous on its face (i.e., not libel *per se*) is only actionable if the party proves that he or

she has suffered special damages. (See *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351 [finding that emails were not defamatory *per se* because they just discussed a defendant's understanding of certain incidents, and therefore the plaintiff was required to prove special damages in order to show a reasonable probability of prevailing on his claim]; *Balla, supra*, 59 Cal.App.5th at p. 686 [finding a publication to be defamatory *per se* because any reasonable reader would understand the publication "[asserted] facts harmful to [the plaintiff's] reputation"].)

For a plaintiff to recover general or exemplary damages against a "daily or weekly news publication" (which includes online publications), a demand for correction must be made within 20 days of publication or broadcast to the publisher. (See *Anderson v. Hearst Pub. Co.* (S.D. Cal. 1954) 120 F.Supp. 850, 852. [citing Civ. Code, § 48, subs. (a) & (b)].) The plaintiff has twenty days after receiving knowledge of the libelous statements made either in a publication or broadcast to make a demand for correction and serve a written notice identifying the statements at issue. (*Ibid.*)

For private-figure plaintiffs in defamation actions, their burden of proof is to demonstrate mere negligence on the part of the defendant. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 742.) In a defamation case involving a public figure plaintiff, the courts must determine whether the individual is an 'all purpose' public figure or a 'limited purpose' public figure. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 113.)

An 'all purpose' public figure has "achiev[ed] such pervasive fame or notoriety that he becomes a public figure... in all contexts," whereas a 'limited purpose' public figure "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (*Ibid.* [citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351, 94 S.Ct. 2997].) If a plaintiff is found

to be a public figure for purposes of a defamation claim, the standard for him or her is to not only prove the defendant's statement was false, but that it was made with constitutional malice. (*Ibid.*) This requires a showing that a defendant either knew their statement was false or "entertained serious doubts as to [its] truth." (*Readers Digest Assn. v. Superior Court*, (1984) 37 Cal.3d 244, 256-57.)

One modern wrinkle that many state legislatures have added to defamation claims is the likelihood of defendants responding with an early anti-SLAPP ("Strategic Lawsuit Against Public Participation") motion, which allows for the early dismissal of insufficiently substantiated lawsuits that target the exercise of free speech in connection with a public issue. (Code Civ. Proc., § 425.16, subd. (b)(1).) This is effectively a summary-judgment motion with additional teeth, as attorney fees are automatically assessed against a losing plaintiff, and can therefore be very dangerous to encounter. Thus, be sure your client is aware of and acknowledges in writing this possibility.

Issues that arise with certain contractual provisions

With the contents of a contract only limited by the parties' imagination, it can often be tempting to throw in everything but the kitchen sink. However, not only does this approach to drafting make parsing the final document unnecessarily difficult, many contractual provisions are only beneficial in certain contexts, and therefore both the present and future needs of the parties should be carefully scrutinized first.

One common provision added to many contracts is that any disputes arising from the contract must be arbitrated rather than litigated. These arbitration clauses can be a preferred method of resolving disputes because they utilize private mechanisms that often operate faster than the judicial process. However, lawyers and contracting parties should not automatically assume that arbitration will provide a less expensive

forum for dispute resolution. Indeed, prolonged arbitration can be incredibly expensive given the hefty hourly fees charged by many arbitrators.

Due to this open-ended cost, it is important to discuss whether the benefit of a private and confidential resolution outweighs the financial burden placed on a party of limited means. We typically do not recommend adding an arbitration clause to a contract if anticipated disputes would not be worth well into six figures, as the parties will otherwise have a difficult time justifying those arbitration costs and fees. We do, however, recommend that attorney fee agreements have arbitration clauses to keep such disputes "off the street."

Another common contractual provision is one that expressly provides for the award of attorney's fees to the prevailing party of any dispute arising from the contract. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 777.) Generally, we recommend including such provisions given the reasonable expectation that one's client will be in the right in the event of a future dispute, whereas not having one may dissuade a contingency lawyer from taking on a contracting party's matter should the need arise. Be aware that California law requires such provisions to be reciprocal, meaning it cannot be limited to only certain parties under the contract. (Civ. Code, § 1717.)

Parties often include jury waiver provisions in their agreements. Section 16 of the California State Constitution provides that a jury trial is an "inviolable right and shall be secured to all." However, in civil cases, as set forth in Code of Civil Procedure section 631, a party may waive their right to a jury trial if the parties: 1) fail to appear at trial, 2) provide written consent to the clerk or judge, 3) provide oral consent, in open court, entered in the minutes, 4) fail to announce that a jury trial is required, or 5) fail to pay or deposit the required jury fees. Although the statute does not suggest alternative methods of resolving disputes as an adequate means of waiving

a jury trial, the statute refers to resolution in the context of a judicial forum, and therefore before a trial occurs, the parties can likely waive their right by agreeing to resolve their controversy in mediation or arbitration. (*Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 737 [*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 713].)

Parties can also choose to waive an award for punitive damages. To enforce a provision excluding punitive damages, the provision must not be substantively unconscionable. (*Lange v. Monster Energy Company* (2020) 46 Cal.App.5th 436, 448 ["a waiver of punitive damages as a remedy for all non-statutory claims...is substantively unconscionable regardless of its mutuality."].) Such provisions may ultimately preclude a plaintiff from receiving the bulk of compensation a judge or arbitrator may otherwise wish to award them. (*Wark Entm't v. Twentieth Century Fox Film Corp.* (Cal. Sup.Ct. 2019) 2019 Cal. Super. LEXIS 3179, *17 [striking \$128,455,730 in punitive damages from an arbitration award of \$178,695,778.90 where the parties' contract had waived punitive damages as an available remedy].)

Lastly, parties have the option of including a venue-selection clause, also referred to as a forum-selection clause, to determine where their disputes will be resolved. As long as a choice of venue clause is mutually agreed upon between the parties and the selected venue is in a statutorily permissible location, the provision will be enforceable. (*Battaglia Enterprises, Inc. v. Superior Court* (2013) 215 Cal.App.4th 309, 317.) Be very careful not to blindly accept these clauses, as you don't want to be "hometowned" in another jurisdiction with the concomitant additional costs.

Neville L. Johnson and Douglas L. Johnson are partners at Johnson & Johnson LLP (www.jjllplaw.com) in Beverly Hills, practicing entertainment, media, business, privacy and class action litigation. Daniel B. Lifschitz, an associate with the firm, contributed to this article.