

COVENANTS NOT TO COMPETE--ISSUE OF DAMAGES.

The issue reads:

"What amount of damages has (*party claiming damages*) sustained?"

If you have answered the (*state number*) issue (*issue of breach*) "Yes," the (*party claiming damages*) would be entitled to at least nominal damages without proof of actual damages.

Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages resulting from the breach. To recover actual damages the burden of proof on this issue is on the [plaintiff] [defendant] to satisfy you by the greater weight of the evidence, first, that *he* has sustained actual damages in some amount, and, second, the amount of those damages.

[*Lost profits:* A party injured by a breach of contract is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if there had been no breach of the contract. The [plaintiff] [defendant] is entitled to recover the profits, if any, which *he* lost as a result of the breach if those losses, if any, were reasonably foreseeable at the time the contract was made. Damages are reasonably foreseeable if they are ones that arise naturally or according to the usual course of things from the breach of contract. Damages are also reasonably foreseeable if they may fairly be supposed to have been within the contemplation of the parties at the time they made the contract as the probable result of a breach of the contract.]

COVENANTS NOT TO COMPETE--ISSUE OF DAMAGES. (Continued.)

[*Wrongdoer's profits*: The [plaintiff] [defendant] is entitled to recover the profits, if any, which the [plaintiff] [defendant] obtained as a result of the breach but not any profits which were not due to the breach.]<sup>1</sup>

Damages may not be awarded on the basis of speculation but must be proven with reasonable certainty.<sup>2</sup>

Finally, as to this issue on which the [plaintiff] [defendant] has the burden of proof, if you find by the greater weight of the evidence the amount of actual damages sustained by the [plaintiff] [defendant] as a result of [the profits, if any, which *he* lost if they were reasonably foreseeable at the time the contract was made] [the profits, if any, which the [plaintiff] [defendant] obtained as a result of the breach] then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal amount such as "One Dollar" in the blank space provided.

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<sup>1</sup>22 AM.JUR.2D *Damages* § 118 (2005). We have found no North Carolina authority for this measure of damages. Presumably, the plaintiff will have to elect which measure of damages he seeks.

<sup>2</sup>"Damages for lost profits will not be awarded upon hypothetical or speculative forecasts of losses." *Castle McCulloch v. Freedman*, 169 N.C. App. 497, 501, 610 S.E.2d 416, 420 (2005), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005)). However, "[w]hile difficult to determine, 'damages may be established with the aid of expert testimony, economic and financial data, market surveys and analysis, and business records of similar enterprises,'" *Iron Steamer v. Trinity Restaurant*, 110 N.C. App. 843, 849, 431 S.E.2d 767, 771 (1993) (citations omitted). "Sales figures from businesses which are similar in size, location and type of product sold are important sources of" such evidence. *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 411, 466 S.E.2d 324, 331 (1996).