

TRADE REGULATION--DAMAGES--ISSUE OF DAMAGES.¹

The (*state number*) issue reads:

"In what amount has [the plaintiff been injured] [the business of the plaintiff been injured]?"

If you have answered all the preceding issues "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage caused by the wrongful conduct of the defendant.

The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages sustained, if any, as a result of [*his injury*] [the injury to *his business*].

Such damages would include (*here give appropriate instructions on damages. The following examples are not exhaustive² but are offered to provide guidance in most cases*).³

¹Treble damages are allowed under N.C.G.S. § 75-16 for any award made under its authority (except that treble damages are not allowed for any awards based on violations of N.C.G.S. § 75-50 through § 75-56). The jury is not to be informed of this provision in the law.

²The Antitrust and Trade Regulation Law Section of the North Carolina Bar Association published a twenty-five year review of case law developments under Chapter 75-1.1 in conjunction with its 1994 Annual Meeting. Part VIII.B of that review contains an excellent damages summary. See N.C.G.S. § 75-1.1 After Twenty-Five Years: The Good, The Bad and The Ugly.

³In a breach of contract case, the Chapter 75 damages are not limited to the damages awarded by the jury on the breach of contract claim. The plaintiff is required to elect between the damages awarded for breach of contract and the Chapter 75 violation. *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000).

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I. For injury to the plaintiff as a competitor:

[any loss in profits suffered (or to be suffered) by the plaintiff]⁴

[any loss in the value of the plaintiff's business as a going concern]

[the value of the plaintiff's business as a going concern just before it was destroyed. That is, the amount a willing buyer would pay for the business, and a willing seller would accept, neither being in need of an immediate purchase or sale].

II. For injury to the plaintiff as a consumer or to its business as a customer:

[personal injury to the plaintiff. (Here give appropriate instructions on personal injury damages. See N.C.P.I.--Civil 810.00 through 810.85.)]

[(give appropriate "benefit of the bargain" instructions. For example: the difference in the value of (describe

⁴"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).

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property) as represented by the defendant and as actually delivered.)]

[*(give appropriate instructions on cost of repairs. For example: the reasonable cost of parts and labor necessary to repair (describe property) to put it in as good condition as was represented at the time of the sale.)*]

[the amount of price discrimination paid by the plaintiff. That is, the amount that the plaintiff was required to pay above what he would have had to pay if *(describe conduct that would have been nondiscriminatory; e.g., "defendant had charged the same price in Wilmington that he charged in Charlotte")*].]

[the excess price paid by the plaintiff. That is, the difference between the price actually paid for *(specify product or service)* and the price for which it could have been obtained in an open and free market.]

III. *For damages resulting from a breach of contract to sell real property:*

[earnest money deposits]

[loss of the use of specific and unique property]

[loss of the appreciated value of the property]

[*(Here state such other elements of damage supported by the evidence)*].⁵

⁵*Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000).

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The plaintiff's damages are to be reasonably determined from the evidence presented in the case. The plaintiff is not required to prove with mathematical certainty the extent of [*his injury*] [the injury to *his business*] in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. An award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty. However, you may not award any damages based upon mere speculation or conjecture.⁶

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the amount of actual damages sustained by the plaintiff by reason of [*his injury*] [the injury to *his business*], 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.

⁶"Party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty," *Olivetti v. Ames Business Systems*, 319 N.C. 534, 546, 356 S.E.2d 578, 586 (1987).