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WHEN IT'S NOT
BUSINESS AS USUAL

# BUSINESS TORTS
# PROOF OF DAMAGES
# The North Carolina Experience

**SFS LAW GROUP OCCASIONAL PAPERS 2006**
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**The Expanding Volume of Business Tort Litigation**

Business Torts are a loosely defined collection of wrongs and injuries to business interests that have developed into a major area of litigation practice. Though business transactions are generally governed by contract, disputes over business behavior and actions that cause injury to intangible economic interests are often case as tort claims. In addition, the use of statutory remedies under state unfair competition laws and the more familiar federal laws governing trademarks, copyrights, and patents has grown substantially

In addition to the development of enforceable legal rights under principals of tort law that may not be available under contract law principles, a major benefit of asserting rights characterized as tort recoveries is the availability of punitive damages. Statutory remedies

for unfair trade practices often include attorney's fees and trebling of damages that provide a strong inducement to characterizing a claim arising out of a commercial transaction as an unfair trade practice or fraud claim rather than a breach of contract claim.

In its 2006 Patent and Trademark Damages Study, PwC Advisory found that:

1. In the past 15 years, the number of patent infringement case filed increased very year from 1,171 in 1991 to 3,075 in 2004. The number of trademark cases rose from 2,220 in 1991 to 2,508 in 2004

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2. The number of damage awards in patent cases increased 59% this decade over the 1990s.

3. Since 2000, damage awards in patent cases are based on reasonable royalty claims 59% of the time and lost profits 38% of the time.

4. Jury trials have become an increasing source of recovery in patent litigation. Since 2000, 53% of patent damage awards were made by juries. Since 1994 the median amount of damages awarded by juries has been $8.0 million, compared to $1.9 million for the average bench award.

2006 Patent and Trademark Damage Study.

In addition to the patent and trademark litigation, the protection of intangible business assets such as trade secrets and contractually protected interests has made pursuit of tort remedies a significant growth area for litigation.

## II. Damage Remedies and Business Tort Claims

### A. The Right Dictates the Remedy

Though litigation may not be contemplated as the best way to conclude a business transaction, the applicable law governing the risk that a breaching party will face is an essential element to any transaction. When parties assume contractual obligations, they generally assume that the rights and remedies that may be addressed if a dispute arises among or between the parties to a contract will be interpreted under the principals of contract law under common law or applicable statutory remedies such as the Uniform Commercial Code.

*At the heart of the problem is the availability of punitive damages as a tort remedy as well as the award of attorney's fees and special treble damage multiplier under statutory remedies. For that reason, it has become almost commonplace for plaintiffs to add statutory claims of unfair and deceptive practices and fraud to complaints that may appear to be breach of contract disputes.*

In counseling a client who plans to breach a contractual obligation, the analysis in Amy Doehring, *Blurring the Distinction Between Contract and Tort: Courts Permitting Business Plaintiffs to Recover Tort Damages for Breach of Contract*, Business Torts Journal, Vol. 12 No. 9 Winter 2005 provides a insight into the consequences of the increasing willingness of courts to allow business plaintiffs to recover in tort for breaches of commercial contracts:

The Distinction between Tort and Contract Remedies

When business parties enter into a contract, they "agree upon the rules and regulations which will govern their relationship; the risks inherent in the agreement and the likelihood of its breech. " The parties create obligations to one another where none existed before. They voluntarily choose the party with whom they will contract and "define their respective obligations, rewards, and risks." Because parties freely enter into these relationships and are the masters of the terms of such relationships, courts have agreed that "it is appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive." For these reasons, "contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at the time.

As the California Supreme Court explained, limiting damages for breach of contract to those within the contemplation of the parties "serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of the enterprise." This result is in line with the purpose for damages for a breach of contract, which is to enforce the intentions of the parties." On the other hand, tort damages are intended to compensate a victim for all injury incurred at the hand of the offending party. Additionally, courts have applied the economic loss doctrine to bar tort recovery for breach of contract actions. Under this doctrine, "[I]f the parties have entered into a contract, the obligations of the contract cannot be relied upon to establish a cause of action in tort for recovery of purely economic damages" (footnote omitted) 12 Bus. Tort Journal at 19

## B. The Impact of State Deceptive Trade Practice Law

This sensible distinction is under a great deal of pressure from cases in which parties seek relief under state statutes prohibiting unfair and deceptive trade practices. Though the courts addressing unfair and deceptive practice claims have generally recited the fundamental principal that a mere breach of contract is not sufficient to state a claim under their statutes, the standard guiding the analysis is not uniform. In Illinois, the claim must implicate consumer protection issues. In Massachusetts, the defendant's conduct must rise to "such rascality that would raise an eyebrow of a seasoned businessman familiar with the harsh customs of the commercial world" Katrina S. Callahan, *Note, Massachusetts Gen. Laws Chapter 93A, Section 11: The Evolution of the "Raised Eyebrow" Standard*, 36 Suffolk U. L. Rev. 139, 140.

Under North Carolina law, "It is well established that a mere breach of contract, even if intentional, is not sufficiently unfair and deceptive to sustain an action [under the Unfair And Deceptive Trade Practices Act] *Computer Decisions, Inc. v. Rouse*

*Office Management of N.C., Inc.* 124 N.C. App. 383, 390, 477 S.E. 2d 262, 266 (1996) North Carolina law requires "substantial aggravating circumstances" attending the breach. Id. Indeed, the court in *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.* 139 N.C.App. 360, 368 533 S.E.2d 827,883 (in the context of a breach of contract action, these "sorts of [unfair and deceptive trade practice] claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations") citations omitted.

In North Carolina, "The measure of damages for breach of express contract is an amount which reasonably may have been contemplated by the parties when they entered into the contract, or which will compensate the injured party as if the contract had been performed" *Catoe v. Helms Construction & Concrete Co.* 91 N.C. App. 492, 495, 372 S.E.2d 331,334 (1998) The damages, however, can include lost profits as well as out of pocket losses if the losses. "In order to recover damages for lost profits, the complainant must prove that except for the breach of contract, profits would have been realized, and he must ascertain such losses with "reasonable specificity". *Olivetti Corp. v. Ames Business Systems, In.* 319 N.C. 534, 356 S.S.2d 578, *petition denied* 320 N.C. 639, 360 S.E.2d 92 (1987). Punitive damages and treble damages are not remedies for breach of contract.

At the heart of the problem is the availability of punitive damages as a tort remedy as well as the award of attorneys fees and special treble damage multiplier under statutory remedies. For that reason, it has become almost commonplace for plaintiffs to add statutory claims of unfair and deceptive practices and fraud to complaints that may appear to be breach of contract disputes.

## C. Getting To the Damage Remedy: Media Network v. Mullen

### Advertising. N. C. Business Court

### 1. Contract, Tort or Something Else

For North Carolina practitioners, the efforts of the North Carolina Business Court to fulfill one of its goals of providing a body of commercial law that will provide predictability and uniformity in business disputes has provided some useful insights into the dilemma in the recent ORDER entered by Judge Diaz on January 19, 2007 ruling on Summary Judgment Motions in *Media Network, Inc. d/b/a Gateway Media v. Mullen Advertising, Inc. et al* 2007 NBC 1, Superior Court 05 CVS 15428 ("Gateway") included in the Appendix to this discussion.

Though the facts of the case require some study, the essential claim by Gateway was that it had a "non-cancellable" one year contract with Mullen/LHC under which Gateway was to provide advertising services to the " Mullen Defendants' under a program for R.J. Reynolds Tobacco Company. The program (the "One Sheet Program") was for the design and manufacture of "one-

sheets", poster-sized print advertisements for placement at convenience stores throughout the United States. The operative purchase orders (identified as "insertion orders"), however, contained "terms and conditions "that provided for cancellation on 60 days notice. In 2002 and 2003, Gateway operated under programs that provided for a 60 cancellation, but negotiated a one year guarantee that the program was non-cancelable for the 2004 program year and claimed that the 2005 program was also guaranteed for a year. When Gateway's president received insertion orders showing a 60 day cancellation right, he asked Mullen/LHC about the one year guaranteed. Gateway's President claimed that Mullen/LHC's Sr. Vice President assured him that it was an 'administrative oversight" to leave out the one year guaranteed term and Gateway prepared to fulfill a one year contract believing that it would be under a one year non-cancelable contract. The defendants, however, claim the contract meant what its terms said, that it was cancelable on a 60 day written notice and that the notice was properly given to Gateway. The impact of the cancellation on Gateways business was profound, It claims that it lost $3 Million in profits it should have received on a full year 2005 contract sought $14.472 million in damages for diminution in Gateway' business value.

*Though UDPTA cases are recognized as sui generis, neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions, the Gateway court sheltered its analysis under traditional common law damage remedies and declined the invitation to fashion a damage remedy that was more expansive.*

The case certainly seems to be a "mere" breach of contract. If Gateway did have a one year guaranteed contract, the breach was certainly intentional, but still a breach of contract dispute. As the court went through the case discussion and analysis, however, it did not limit the case a "mere" breach of contract.

The court ruled that "there simply was no contract between the parties…because the offer was too definite to bind the parties" Opinion at 21. Though there was no contract, the court was sufficiently outraged at the behavior of a Senior Vice President of defendant Mullen/LHC that he prefaced the holding that there was not contract with the following preview of his ruling on the unfair and deceptive trade practice claim asserted by Gateway:

78. For reasons I discuss later, the ensuing conversation between Heard [Gateway's President] and Haynes [Mullen/LHC Sr. V.P]—wherein Haynes

allegedly assured Gateway's president that this omission [of the guaranteed one year contract term] was inadvertent and that the parties agreement in fact included a guaranteed one year term – provides a sufficient basis for Gateway to proceed on its claim alleging unfair and deceptive trade practices. Opinion at 20.

It appears that this is not a case of a breach of contract with aggravating circumstances, either. The court seems to view the behavior of the Mullen corporate officer as so deceitful and outrageous that it is sufficient to make out a case under the North Carolina law prohibiting Unfair and Deceptive acts or practices. N.C. Gen. Stat. Section 75-1.1 et seq. (2003)

The Gateway opinion provides very useful guidance on how a court must wrestle with behavior that it finds truly offensive and the absence of a more traditional contract or tort basis for liability. Having found that there was no contract, the court also discussed the alleged bad behavior of Mr. Haynes, the Mullen/LHC executive. In several places, the court notes that the Gateway complaint "smacks of fraud in the inducement" but also acknowledges that Gateway had already dismissed its fraud claim and was not seeking rescission or asserting it as a defense to a contract claim by Mullen/LHC. All that Gateway had left to support a claim against the defendants after the court denied the contract claim and ruled that evidence Gateway proposed to offer was barred by the parol evidence rule was its claim under Chapter 75 (the "UDPTA" claim). Opinion at 25.

After cataloguing the "'potpourri' of alleged misconduct" by Mullen/LHC and noting in a footnote that the court was quite aware of the North Carolina law that "silence is generally not actionable as fraud unless there is a duty to speak which in turn arises from a relationship of trust, confidence, inequality of condition and knowledge or other attendant circumstances "Opinion at 29 fn 13, the court distinguished that law and said that "the critical question is whether Muller/LHC's acts, taken as a whole, had a capacity or tendency to deceive. Gateway need not prove all of the elements of common law fraud." Id.

The court had little difficulty in concluding that in the light most favorable to Gateway, the alleged conduct of Mr. Hayes "may well have been fraudulent and was certainly unethical. At a minimum, it had the capacity or tendency to deceive, and Gateway's evidence is that—in reliance on Haynes's promises—Gateway was deceived into undertaking a host of commitments it would not otherwise have made and also failed to pursue other business." Opinion at 29. To the court, Mullen/LHC's effort to argue that all Gateway had alleged was a mere breach of contract "missed the point" Opinion at 29. It appears that a UDTPA claim arose from the alleged misrepresentations by Haynes during the contract negotiations when he induced Gateway to commit to the program that was the subject of the proposed contract by assuring Gateway's president that it

was guaranteed for a one year term even though Mr. Haynes knew he had no authority to make the commitment and his company Mullen/LHC failed to set the record straight. Opinion 29, 30.

While allowing the case to proceed as a UDPTA claim, the court also stated its agreement with *Broussard v. Meineke Discount Muffler Shops, Inc.* " that trial courts should keep 'open-ended tort damages from distorting contractual relations' and must be vigilant against a party's attempt''to manufacture a tort dispute out of what is, at bottom, a simple breach of contract claim[,]''a practice that is ''inconsistent both with North Carolina law and sound commercial practice'' 155 F.3d 331, 346 (4th Cir. 1998) quoting *Strum v. Exxon Co.* 15 F.3d 327, 329 (4th Cir. 1994). In finding sufficient grounds in the facts alleged by Gateway to determine that the was not turning a contract dispute into broader tort-based conflict, the court seemed to express the same desire to punish rascality that has characterized the Massachusetts court's gloss on its unfair trade practices law. Despite the fact that the offending 60 day term was clearly set forth in the written insertion orders that Gateway's president , the court left it to the jury to decide if it was reasonable for Gateway to rely on the alleged oral assurances from Mr. Haynes and cited *Johnson v. Owens 263* N.C. 754. 140 S.E.2d 311:

The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract;[instead] there must be a reliance on the integrity of man or else trade and commerce could not prosper…Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery…is frequently very difficult to determine…In close cases, however, we think that a [party to an action]….should not be permitted to say in effect, "You ought not to have trusted me. If you had not been so gullible, or negligent, I could not have deceived you.' Courts should be very loath to deny an actually defrauded plaintiff relief on this ground

263 N.C. 754,758, 140 S.E.2d 311,314 (1965) (internal citations and quotations omitted}.

Though the court certainly expressed agreement and support for the view that contract disputes should not be transformed into tort remedies and Unfair and Deceptive practice claims, the court's decision seem to have precisely that result. Indeed, the court held that there was, in fact, no contract between the parties. The court also acknowledged that Gateway was not pursuing a claim for fraud in the inducement. Gateway was left with its UDTPA. The court also acknowledged, "those cases barring UDTPA claims involving misrepresentations concerning the terms of a contract… [and recognized] that persons executing written contracts have duty to read them and ordinarily are charged with knowledge of their contents…In this case, however, I found that a contract did not exist in October 2004, as

contended by the Plaintiff." pinion at 32 fn 15.

**2. The Damage Remedy**

Gateway sought recovery for lost profits of $3 Million in profits lost in 2005 following its termination by Mullen/LHC and $14.5 million in damages from the diminution of its business value.

The "diminution of business value" damages were derived by estimating what the value of Gateway's business would have been at the end of 2005 had the Mullen\RJRT business continued or at a level of business similar to the Mullen RJRT business compared to the actual estimated value of the business at the end of 2005 without the Mullen/RJRT business. The $14.5 figure was calculated by projecting Gateway's expected net cash flows for the years 2006 to 2010 and then discounting those amounts to a present value using a discount rate of 22%.

In determining what damage remedies were available to Gateway, the court noted that Gateway's UDTPA claim "is essentially a claim alleging fraud in the inducement" Opinion at 33 under which the measure of damage is the "difference between the value of what was received and the value of what was promised, as is potentially trebled by N.C.G.C. Section 75-16. In the Gateway case, the court stated that the measure of damages " is the difference between Gateway's expected profit had it been allowed to perform for the full year and the amount Gateway was actually paid before being terminated in February 2005 with any such award potentially trebled." The court cited *Horne v. Cloninger,* 256 N.C. 102,104, 123 S.E.2d538, 556 (1961) as the source of the measure: "The jury, having established the fraud, should have awarded as damages the difference between the actual value and the value if the [property] had been as represented."

As the court worked through the measure of damages for Gateway's claim, it concluded that, "Except by virtue of the statutory trebling of damages that arises from these facts, however, Gateways actual damages are the same whether the case proceeds as a contract action or as a UDPTA claim. That is, Gateway is entitled to recover the difference between the value of what it received (i.e. the profits earned and paid before Gateway's termination) and the value of what was promised (i.e. the profits Gateway would have earned for the full year). Opinion at 36

While recognizing the lost profits damage claim as compensable damages in the case, the court did not accept the diminution in value damage claim. In *Pleasant Valley Promenade v. Lechmere., Inc.* 120 N.C. App. 650, 464 S.E.2d 47 (1995), the court recognized that damage remedies for breach of contract could include an award based on the calculation of diminished market value of contract damages where the harm suffered would not otherwise be fully compensated and held that "diminution in market value may be

applied to redress breach of contract occurring between an anchor store and the shopping center in which it resided," 120 N.C. App. At 671, 464 S.E.2d at 62. In Gateway, the court distinguished the unique relationship among tenants in a shopping center and the role of anchor tenants from the Gateway case. The Gateway claim for diminished value was, in the court's opinion, nothing more than an estimate of lost profits for future years based upon unfounded or purely speculative assumptions that would not support a recovery.

Though UDPTA cases are recognized as sui generis, neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions, the Gateway court sheltered its analysis under traditional common law damage remedies and declined the invitation to fashion a damage remedy that was more expansive. The tenor or the court's opinion suggests a view that a UDPTA claim may provide a right of recovery for behavior that the court finds unethical, unscrupulous or deceptive that may not otherwise give rise to a contract or tort claim, but that the damage remedy analysis is measured by established law under tort or contract grounds.

Whether Gateway should be permitted to offer evidence that the injury is suffered was more than the loss of one year's profits is an issue that may be addressed on appeal. The Gateway court was aware of North Carolina's rejection of the "new business rule" in *Olivetti Corporation v. Ames Business Systems, Inc.* 319 N.C. 534, 356 S.E.2d 578 (1987) under which some jurisdictions would not permit damage recoveries for lost profits where a business was a new business with no history of established profits. *Olivetti* held that North Carolina would not adopt a *per se* rule against lost future profits where they may be shown with a requisite degree of certainty. The announced holding did not benefit the plaintiff in Olivetti, however, since the court held it had failed to offer competent evidence to show with reasonable certainty that it lost a business opportunity to make profits. Though there is not "*per se"* rule barring new businesses from pursuing damages for lost future profits, the evidentiary standard appears to be sufficiently rigorous to make such damage remedies very, very difficult to establish.

The remedies, however, would not have been available to Gateway if it had not established a statutory business tort claim under the North Carolina UDPTA. The damages it may receive arise under the UDPTA, not common law fraud or breach of contract recoveries. Since it was not "a mere contract dispute", but a claim under the UDPTA, Gateway's damages, if it succeeds at trial, will be trebled. It will also seek its attorneys fees under N.C. Gen Stat. §75-16.1. Though the elements of damage the court has allowed Gateway to prove will be limited to its lost profits under the 2005 program which its expert values at $3 Million, the use of the statutory business tort remedy under Chapter 75 will raise the value of any judgment to $9 Million plus likely attorney's fees.

In some cases, a plaintiff will establish both a fraud claim and a UDPTA case, See *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 443 (1991), and may receive either punitive damages or treble damages. That choice is not available to Gateway under the court's ruling.

### D. Unfair And Deceptive Practices Claims and Damages

In considering damages and remedies in Business Tort claims, the benefits of including a claim under the relevant state law dealing with Unfair And Deceptive practices remains substantial. Gateway provides insight for business court litigation in North Carolina and illustrates the benefit of close attention to pleading a case under N.C. Gen. Stat. § 75-1.1.

The discretion granted to the trial court in evaluating the "aggravating circumstances" of a breach of contract and determining whether behavior is unethical or unscrupulous or deceptive is a challenge to counsel preparing claims under the statute. In addition, the gatekeeper function of the court in determining whether damage evidence is competent, speculative, or shown to a reasonable certainty makes the presentation and forecasting of the evidence in the preliminary motion stage critical.

The developing law recognizing statutory unfair and deceptive practice claims in contact cases is a major development that will continue to create unforeseen or undesirable risks when parties consider action that may lead to a breach of contract claim. Some recent illustrative cases demonstrate the consequences of these new views. See, e.g. Robinson Helicopter Co. V. Dana Corp. 34 Cal 4th 979 (2004); Western Star Truck Sales Inc. v. Big Iron Equipment Services, Inc 101 P3d 1047 (Alaska 2004)

The dissenting justice in Robinson commented on the effect of the expansion of liability for contract breach under the majority ruling: "As a matter of both statute and common law, a breach of a commercial contract cannot be the basis for punitive damages…340 Cal 4th at 994 (internal citations omitted) See also Harris v. Atlantic Richfield Co. 14 Cal App. 4th 70, 82 (1993) , "The imposition of tort remedies for 'bad' breaches of commercial contracts is a substantial deviation from the traditional approach with was blind to the motive for breach" .

In cases that also establish clear common law rights or other statutory rights such as claims for interference with contract, interference with prospective advantage, theft of Trade Secrets, and other competitive or business related tort claims, the inclusion of claims under N. C. Gen. Stat. § 75-1.1 will also add a broader range of relief and opportunity to present evidence of the defendant's behavior that may influence a jury or other fact finder's view of the related claims.

### E. An Overview of The Business Tort Landscape

The areas of law encompassed in business torts is broad and continuing in its evolution. There are, however, some long-standing and familiar business tort claims that lawyers encounter frequently in their practice. Claims for theft or misappropriation of trade secrets, intentional interference with contractual or expectancy interests, and the litigation dealing with violation of employment and non-competition agreements arise often.

### 1. Trade Secrets

Many businesses rely upon special knowledge or processes that are not disclosed to others in conducting their business. In some cases, they may choose not to seek patent protection in order to preserve the secrecy of their process and products. The law had protected these trade secrets under common law and more recently through statute. In North Carolina, the Trade Secrets Protection Act, N.C. Stat. §66-152 provides for the protection of trade secrets and grants holders the right to recover damages among other remedies. A trade secret is business or technical information that [d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development…and [is] the subject of efforts that are reasonable under the circumstances to maintain its secrecy" N.C. Gen Stat. §66-152(3) (a)-(b) (2003) Courts have found that cost history information, price lists, confidential customer lists, pricing formulas and bidding formulas can be trade secrets.

In Sunbelt Rentals, Inc. v. Head & Engquest Equipment L.L.C. 2005 N.C. App. (COA04-082), the court heard the appeal of an award made by Judge Tenille of the Business Court finding liability against the defendants under the Trade Secret Act and the Unfair and Deceptive Trade Practices Act with an award of actual damages of 5 Million which the court trebled to $15 Million. It also awarded attorneys fees of $1.2 Million for a total award of $16.2 Million. Though it was a trade secret case, the UDTPA claim provided the basis for the damage awarded.

The Sunbelt case involved an effort by a competitor to enter into new markets and develop its business in competition with Sunbelt. It tactics in facilitating a mass exodus of key employees whom the court found took valuable trade secrets with them an used them to develop the new business. The court found that Sunbelt had made a prima facie showing of misappropriation of trade secrets in violation of the Trade Secret Act.

Among the clear indicia of the benefit of the misappropriation was a finding that "prior to hiring BPS' employees, defendants had no customers, in North Carolina, Georgia or Florida; however , defendants actions resulted in a $3.7 million turnaround during 2001 while BPS branches in those same locations during that time experienced a concurrent, substantial decrease in business." Slip Op. at 6.

The trial court commented on the damages that Sunbelt suffered and identified the following:

Loss of trained employee
Cost of replacing those employees
Loss of customers and business due to inefficient service resulting from the loss of staff
Loss of efficient use of its fleet in affected branches
General disruption.

Opinion paragraph 309

In making its damage assessment the trial court said:

{310} BPS/Sunbelt was a sufficiently large organization that it could and did replace the lost employees, and its new employees were trained and had the equipment and tools to compete with Hi-Lift in the long run. Hi-Lift was entitled to compete fairly with BPS/Sunbelt. The success that the management team had at BPS was a clear indication of their capability, and they had sufficient capital backing. In the long term, it was clear that Hepler and Kline would provide stiff competition. BPS could have protected itself against that competition but did not. Accordingly, the Court finds that the compensable damages are limited to the short-term period of time and expenses it took BPS /Sunbelt to compensate for the actions which the Court has found to be unfair. For most of the positions, six months was an adequate period of time to hire and train new employees and have them on the job with competitive capabilities. Many could be hired and trained quicker. At that point the companies were on a fair competitive basis and it would not be unexpected that Hi-Lift would take some market share from BPS/Sunbelt. Therefore the Court has not attributed all lost customers to unfair competition.

‘’’’

{313} The plaintiff has been damaged in the amount of five million dollars by the unfair trade practices of defendants. This is the amount to be trebled in this case; it is the amount the Court concludes represents the actual damages in this case directly flowing from the Chapter 75 violations, including the use of confidential business information. The damages are based upon the number of employees unfairly appropriated by Hi-Lift, their value and the disruption and expense their coordinated departures inflicted on BPS/Sunbelt, as well as the benefit received by Hi-Lift. The damages result from actions in the Atlanta, Charlotte, Orlando and Tampa-Fort Myers markets for the most part, with some smaller allocation for the Texas markets. The extent of the appropriation is set out above in the Findings of Fact. The damages resulted from the coordinated efforts of all the defendants which were part of an overall strategy designed to hit BPS/Sunbelt during the transition period before a transaction

could be closed between Rentokil and Sunbelt and to convert customers quickly to
take advantage of profitable fleet utilization.

The damages resulting from the misappropriation of trade secrets and the tortuous interference with prospective advantage claims were subsumed in the damages that the court found flowed from unfair competition. The significance of the use of the UDTPA basis for damages was highlighted on appeal:

Defendants argue damages were speculative in that defendant- HJ&E did not make a profit in its first year. They assert the trial court violated N.C. Gen Stat. §66-154 because it awarded duplicate damages. Defendant incorrectly assert that the trial court awarded the plaintiff duplicate damages. The trial court awarded damages under the UDTPA, not the NTSPA. Under the UDTPA, plaintiff was awarded lost profits and the value of benefit defendants received, two different types of damages permitted under the UDTPA. N.C. Gen. Stat. § 75-16…

Opinion at 7, 8

The availability of UDTPA damage trebling and attorney's fees makes it the preferred remedial statute for litigants. Despite the existence of the Trade Secrets Protection Act, the remedies under the UDTPA are the more effective remedy. The damage remedies for misappropriation of trade secrets under the TSPA are actual damages measured by the greater of economic loss or unjust enrichment. If the misappropriation is willful and malicious, the court has discretion to grant punitive damages. Attorneys fees are available if the misappropriation is in bad faith or willful and malicious.

The most common damage measure for trade secret misappropriation is an accounting of the profits obtained by the defendant. The defendant's records provide the basis for the calculations which often lead to significant dispute over the items of cost that may be recognized in reaching the recoverable profits.

In *Potter v. Mirror Tech,* 150 N.C. App. 326 (2002), the court enforced a consent decree over the misappropriation of a trade secret known as Substance X. In applying the unjust enrichment remedy under the Trade Secrets Protection Act, the court took the total sales of the product the used Substance X in manufacturing mirrors and subtracted only direct costs to determine the amount awarded as damages. The defendant argued that a fair allocation of costs should have included indirect costs such as health insurance, utilities, uniforms and other overhead items. The court allowed only incremental costs affected by the use of Substance X and did not allow deduction of fixed costs.

The court also noted the difference in the analysis of an unjust enrichment or accounting for profits remedy under the Trade Secrets Act from lost profit damages for breach of contract. The court acknowledged that, "Lost Profit damages mean the non-

breaching party is entitled to the contract price less cost of performance. Bowles Distributing Co. V. Pabst Brewing, 80 N.C. App 588, 597 343 S.E.2d 543.548 (1986) and that "The non-breaching party may not recover the expenses saved from the result of being excused from performance by the other party's breach. Hasset v Dixie Furniture Co, 333 N.C. 307,312-13, 425 S.E.2d 683, 685(1993), and ruled that, "Here, one party profited from the violating the parties' consent judgment and the trial court sought to remedy the violation by, in effect, transferring those profits. The trial court's findings were that the additional expenses sough to be included by the plaintiffs were fixed and not affected by the products at issue." 150 N.C. App. at 336

Lost profits are also available as a remedy in a misappropriation of trade secrets action. The elements of damage are similar to other lost profits case and the plaintiff must provide sufficient evidence to enable the court to determine the amount of lost profits with reasonable certainty. The most common measure is to identify customers or sales diverted by virtue of the misappropriation and apply the plaintiff's profit margin to determine what the profits would have been for the lost business. Usually courts will accept a plaintiff's evidence of its historical figures on profitability. There is often a dispute over whether remedies should be limited to the "head start" the defendant received through the misappropriation or some longer period.

If the lost profits or unjust enrichment remedies are inadequate to compensate the plaintiff, courts have used other damage measures such as imposition of a "reasonable royalty". The courts generally seek evidence on what a willing buyer and willing seller would agree on as a royalty for use of the trade secret. It is often taken as a percentage of the defendant's sales or a lump sum in the absence of sales evidence.

### 2. Other Competitive Torts

Interference with contract, advantageous relations and other intentional torts often involve business disputes and competitive injuries. In addition, employees violating non-competition agreements will find themselves facing contract and tort litigation dealing with unfair competition as well as trade secret claims. In all of these litigation environments, the plaintiffs will encounter the problem of establishing the remedies for the harm suffered. As the UDTPA continues to function as the preferred source of remedies for plaintiffs, the scope of relief developing in UDTPA litigation will define the standards for proof of harm and damages.

The evidentiary standards enunciated by the courts that proof must not be speculative and must provide a basis for an award of damages with reasonable certainty will continue to provide the verbal framework for the court's analysis, but the continuing broad discretion afforded the courts will continue to require careful case preparation and analysis.