

Judicial Council Of California Civil Jury Instruction 3903N

Judicial Council Of California Civil Jury Instructions | July 2023 Update
By the Judicial Council of California Advisory Committee on Civil Jury Instructions

Damages

3903N Lost Profits (Economic Damage)

[Insert number; e.g., “13.”] Lost profits.

To recover damages for lost profits, [name of plaintiff] must prove it is reasonably certain [he/she/nonbinary pronoun/it] would have earned profits but for [name of defendant]'s conduct.

To decide the amount of damages for lost profits, you must determine the gross amount [name of plaintiff] would have received but for [name of defendant]'s conduct and then subtract from that amount the expenses [including the value of the [specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capiline.instr employed]] [name of plaintiff] would have had if [name of defendant]'s conduct had not occurred.

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction is not intended for personal injury cases. Instead, use [CACI No. 3903C, Past and Future Lost Earnings \(Economic Damage\)](#). (See [Pretzer v. California Transit Co. \(1930\) 211 Cal. 202, 207–208 \[294 P. 382\]](#).)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- “The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured.” ([Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO \(1964\) 227 Cal.App.2d 675, 702 \[39 Cal.Rptr. 64\]](#), internal citations omitted.)
- “In business cases, damages are based on net profits, as opposed to gross revenue.” ([Meister v. Mensinger \(2014\) 230 Cal.App.4th 381, 397 \[178 Cal.Rptr.3d 604\]](#).)
- “‘Lost profits, if recoverable, are more commonly special rather than general damages . . . , and subject to various limitations. Not only must such damages be pled with particularity [citation], but they must also be proven to be certain both as to their occurrence and their extent, albeit not with “mathematical precision.”’” ([Greenwich S.F., LLC v. Wong \(2010\) 190 Cal.App.4th 739, 754 \[118 Cal.Rptr.3d 531\]](#).)
- “‘[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.’ Such damages must ‘be proven to be certain both as to their occurrence

and their extent, albeit not with ‘mathematical precision.’ ” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–774 [149 Cal.Rptr.3d 614, 288 P.3d 1237]), internal citation omitted.)

- “It is for the jury to determine the probabilities as to whether damages are reasonably certain to occur in any particular case.” (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 972 [166 Cal.Rptr.3d 134].)
- “It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant’s conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits.” (*S. C. Anderson, Inc. v. Bank of America N.T. & S.A.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)
- “Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]” (*Sargon Enterprises, Inc., supra*, 55 Cal.4th at p. 773.)
- “Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. ‘[W]here the operation of an established business is prevented or interrupted, as by a ... breach of contract ..., damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.’ ” (*Sargon Enterprises, Inc., supra*, 55 Cal.4th at p. 774.)
- “[T]he lost profit inquiry is always speculative to some degree. Inevitably, there will always be an element of uncertainty. Courts must not be too quick to exclude expert evidence as speculative merely because the expert cannot say with absolute certainty what the profits would have been. Courts must not eviscerate the possibility of recovering lost profits by too broadly defining what is too speculative. A reasonable certainty only is required, not absolute certainty.” (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 397–398 [248 Cal.Rptr.3d 623].)
- “‘On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] ... But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.’ ” (*Sargon Enterprises, Inc., supra*, 55 Cal.4th at p. 774.)
- “[I]f the business is ... new ... or ... speculative ... , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.” (*Meister, supra*, 230 Cal.App.4th at p. 397.)
- “In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits.” (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161–162 [190 Cal.Rptr. 815], internal citations omitted.)
- “Even in cases of unestablished businesses, while a plaintiff may base its lost profits on the experience of comparable businesses, there is no requirement that it must do so.” (*Orozco, supra*, 36 Cal.App.5th at p. 399.)
- “[T]he case law requires reasonable certainty, not absolute certainty, and once the occurrence of lost profits is established a plaintiff has greater leeway in establishing the extent of lost profits, particularly if the defendant was shown to have prevented the relevant data from being collected through its wrongful behavior.” (*Asahi Kasei Pharma Corp., supra*, 222 Cal.App.4th at p. 975.)

Secondary Sources

6 Witkin, *Summary of California Law* (11th ed. 2017) Torts, § 1914

Haning et al., *California Practice Guide: Personal Injury*, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:66-3:233 (The Rutter Group)

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.12, 52.37 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Tort*, § 64.27 (Matthew Bender)

WEST'S EDITORIAL REFERENCES

Related References:

- [BAJI 14.00, 14.01, 14.02, 14.60, 14.76](#)

Statutory References:

- [Civ. Code, § 1431.2](#)

Library References:

- [Cal. Jur. 3d, Damages § 79](#)

Research References:

- West's Key Number Digest, [Damages](#)  40, 210(1)
- [C.J.S., Damages §§ 53, 58 to 61, 327, 351 to 372](#)
- [C.J.S., Torts § 26](#)

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