



## Avoiding Problems of Proving Lost Profits by Using Lost Asset Value

*Columbia Park Golf Course, Inc. v. City of Kennewick*, 2011 WL 450704 (Wash. App.)(Feb. 10, 2011)

The parties executed an option agreement to develop an RV park and golf course on city lands. While the plaintiff acquired the necessary permits and approvals, however, the defendant entered into an agreement with a competitor. The plaintiff sued for breach of contract and a jury awarded \$3 million, based on expert evidence forecasting the value of the asset that the plaintiff had lost. The defendant appealed, claiming the plaintiff could not recover expectancy damages for an option contract; and further, that the expert evidence regarding lost asset value was speculative and uncertain for an unproven (new) enterprise.

The real problem is 'hoped-for' damages. The appellate court first affirmed the jury's finding of liability as well as the plaintiff's entitlement to expectancy damages for breach of a contract to negotiate. The real issue that loomed for the plaintiff—especially when the RV park and development could be characterized as a new business—was whether damages from "hoped-for" future operations were too speculative, the court explained.

Evidently, the plaintiff recognized this risk, and elected to forgo any claim for lost profits at trial. Instead, it presented an expert who estimated that an investor would pay \$2.5 million to \$3 million for the bundle of contract rights, based on projections prepared by the plaintiff at the time of the contract, which were far less than those the competing developer later used.

This approach to calculating lost asset value parallels the method by which the plaintiff would have calculated lost profits, the court observed. "But while a 'lost asset' measure may still be challenged as insufficiently certain . . . it is also more likely to survive the challenge," the court explained because the defendant does not have to challenge "facts hypothesized to exist decades after trial." Instead, it could challenge whether the alleged market for the development opportunities existed at the time of the breach and, if so, whether investors would accept the projections by plaintiff's expert as sufficiently reliable for arriving at a proposed price.

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Moreover, under the plaintiff's lost asset theory of damages, it was irrelevant whether its expert's pro forma financial projections would eventually prove correct. "What matters is only whether a market existed and whether a \$2.5 to \$3 million price would have been paid for the bundle of rights in that market," the court said. "This is a distinction with a difference." It enables an injured party who holds a marketable bundle of rights to avoid a "lost profits problem" by subjecting its damages calculations to countervailing measures and cross-examination. Based on these reasons, the court affirmed the jury's award of \$3 million to the plaintiff.