

A Primer on Damages in New York Commercial Cases

By Lauren Dayton



Damages are an essential component of any legal claim, but they are often an afterthought. Counsel for plaintiffs and defendants alike can save themselves time, fees, and heartache by familiarizing themselves with the fundamental principles of damages in commercial cases under New York law.

I. Damages in Contract Cases

When it comes to money damages for a breach-of-contract case, New York law is designed to put the non-breaching party in the position it would have been in but for the breach. All damages – whatever the category – must be (i) actually foreseen or reasonably foreseeable when the contract was formed; (ii) caused by the breaching party; (iii) unavoidable by using reasonable mitigation efforts; and (iv) as to the fact of damage, provable with reasonable certainty.¹ All contract damages are calculated as of the date of the breach.² Any doubts as to the fact of loss are generally resolved against the breaching party. Once the plaintiff establishes that a loss occurred, the amount of damages generally does not need to be calculated with absolute certainty or mathematical precision.³

Breach-of-contract damages include general (direct) and special (consequential) damages. These distinctions are not just academic. As explained below, New York limits the availability of consequential damages for certain claims. Contracts often include limitations on or waivers of consequential damages. And there is a different pleading standard under the federal rules for special damages.

General (or direct) damages are those that are the “natural and probable consequence of the breach.”⁴ As such, they are presumed to have been foreseen or contemplated by the parties.⁵ Common examples in commercial cases include the difference between the contract price and the cost of substitute goods (cover), or the difference between the contract price and market value of the goods at the time of the breach (market damages). General damages are usually intended to give the plaintiff the benefit of the bargain it contracted for. However, if benefit-of-the-bargain damages cannot be calculated with reasonable certainty, a plaintiff can still seek reliance or “out-of-pocket” damages designed to put the plaintiff back into its pre-contract position.⁶

Special damages, on the other hand, are those that would not ordinarily be expected to occur as a result of the breach. They instead arise out of special circumstances that the particular parties *actually anticipated*.⁷ That damages are particular to the contracting parties and their contract is what makes them “special.” The “actually anticipated” part is essential. As the First Department has put it, plaintiff cannot, through special damages “attempt[] to obtain through litigation what they failed to secure at the bargaining table.”⁸ Special damages can include, among other things, lost profits, damages related to third-party claims, loss of use of contracted goods, interest, and attorneys’ fees. In federal cases, special damages must be “specifically stated” in the complaint.⁹

Lost profits – money that the plaintiff would have earned but for the breach – can be available for a breach of contract, but only where (1) the damages were caused by the breach; (2) they are capable of proof with reasonable certainty; and (3) lost profits were within the contemplation of the parties to the contract at the time it was made.¹⁰ This can be a difficult showing to make. “Reasonable certainty” means “capable of measurement based upon known reliable factors without undue speculation.”¹¹ If the plaintiff is a new business seeking future profits, it has no experience from which those lost profits can be estimated with reasonable certainty, and other methods of predicting lost profits may be too speculative.¹²

Lost profits can be either general or special damages, depending on their nature. Lost profits are often considered general damages if they are: (1) bargained for in the contract; (2) the direct fruits of the contract; and (3) not dependent on collateral business relationships.¹³ Lost profits might also be considered general damages where the parties specifically discussed them during the contract negotiations. For example, under New York law, lost profits in the form of the money that the defendant agreed to pay over several years can be general damages,¹⁴ while lost profits from the operation of a football stadium that was never built because of the breach are special damages.¹⁵

In terms of calculating lost profits, the first step generally requires estimating lost revenues, i.e., revenues that the plaintiff could have earned if it had not been harmed by the alleged wrongful act. There are several methods of estimating lost revenues. The two most common are the before-and-after approach and the yardstick approach.¹⁶ The before-and-after approach, as one would expect, compares a business’s past profitability with its profitability after the breach. The yardstick approach involves comparing the injured business to another similarly situated business.¹⁷ After estimating lost revenues, the next step is to deduct any additional costs associated with earning the lost revenues. “Additional costs” could be the incremental costs of producing more units of product, or direct costs associated with earning the lost revenues. These

costs are sometimes referred to as “avoided costs,” because the plaintiff avoided incurring them because of the alleged breach. Lost profits are ultimately calculated by deducting avoided costs from lost revenues.

II. Damages for Commercial Tort Claims

New York limits damages on fraud-based claims to reliance or “out-of-pocket” damages. That means a plaintiff asserting fraud-based claims can recover only the actual pecuniary loss sustained as a direct result of the wrong.¹⁸ A plaintiff asserting fraud must also plead and prove “loss causation,” i.e., that the defendant’s fraud actually caused the plaintiff to suffer a pecuniary loss.¹⁹ For a fraudulent inducement or misrepresentation case, the measure of damages is the difference between the actual value of the bargain that the plaintiff was induced by fraud to make and the amount the plaintiff paid.²⁰ For other fraud claims not involving a purchase, damages are limited to out-of-pocket costs incurred by the plaintiff because of the fraud.²¹ The rule is often stated as: a plaintiff may recover damages only for what it lost because of the fraud, not what it might have gained.²²

Tortious interference-type claims, though, are often treated more like contract claims than tort claims. New York permits the same remedies for a tortious-interference claim as for a contract claim, including benefit-of-the-bargain damages, lost business opportunities or market share damages, and consequential damages.²³ Lost profits, lost contract benefits, or lost business opportunities are the common measure of compensatory damages for a tortious interference-type claim.

III. Limitations on Damages for Contract and Tort Claims Brought Together

Commercial disputes may arise solely from a contract, solely from a tort, or both. Examples of tort claims commonly asserted in commercial disputes include fraud, conversion, fraudulent inducement to enter the contract or inducement to agree to certain terms, breach of contract through deceit or coercion, or breach of fiduciary duties.

New York does not permit a party to bring both contract and tort claims where the claims are duplicative. This rule was in the past sometimes called the “economic loss rule.” The New York Court of Appeals recently clarified that particular term applies only in the products-liability context, but affirmed that a party cannot assert a duplicative tort claim alongside a contract claim.²⁴ If a party relies on the same allegations to support both claims, then the claims are impermissibly duplicative.²⁵ Where the allegations are not exactly the same, the Court of Appeals has directed courts to consider whether the claims are duplicative by analyzing the nature of the injury, how the injury occurred, and the harm it caused.²⁶ Although there is still some uncertainty regarding how the in-

jury and harm must be different, at a minimum, a party that wants to assert both types of claims should identify some separate injury or harm.²⁷

Although a party cannot plead duplicative contract and tort claims, there is no prohibition against pleading alternative tort claims, such as breach of fiduciary duty and breach of the covenant of good faith and fair dealing.²⁸

IV. Damages for Quasi-Contract Theories

Quasi-contract theories like promissory estoppel, quantum meruit, and unjust enrichment are designed to promote equitable results where there is no enforceable contract articulating the parties' obligations. These claims or theories are necessarily not available where there is a contract to enforce – regardless of whether the contract is written, oral, or implied-in-fact.²⁹ However, in a situation where it is unclear whether there is an enforceable contract, the plaintiff might consider pleading quasi-contract theories in the alternative.

Promissory estoppel permits a plaintiff to enforce a promise where it acted or refrained from acting to its detriment in reasonable reliance on that promise. Specifically, the elements are (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) injury sustained by the relying party because of its reliance.³⁰ The standard measure of damages is the amount necessary to undo the injury caused by the plaintiff's reliance, which could include out-of-pocket expenses and restitution.³¹

Quantum meruit permits a party to recover payment for services rendered despite the absence of an enforceable contract. The measure of damages is the reasonable value of the services rendered.³² Similarly, for unjust enrichment, which permits a plaintiff to recover for any benefit that it conferred on the defendant and the defendant accepted without compensation to the plaintiff, the measure of damages is typically restitution (i.e., the return or value of the benefit conferred).³³ The general rule is that the plaintiff seeking unjust enrichment damages bears the initial burden of producing evidence to show a reasonable approximation of the wrongful gain, and then the burden of showing the amount of the defendant's costs (if any) shifts to the defendant.³⁴

V. Nominal Damages

Nominal damages are a small sum fixed without regard to the amount of loss, if any. They exist to permit the law to recognize a technical invasion of a plaintiff's rights, or breach by a defendant, even where the plaintiff did not suffer or cannot establish a compensable loss or injury.³⁵

Under New York law, nominal damages are always available for breach-of-contract claims.³⁶ So even if a plaintiff's

proposed damages are too speculative to support its claims, it could still have a plausible claim for nominal damages.³⁷ Nominal damages are typically limited to \$1.³⁸ A claim for \$1 may sound like a waste of time, but nominal damages may help a breach-of-contract plaintiff avoid dismissal for failure to plead the damages element of a breach-of-contract claim. And succeeding on a breach-of-contract claim might make the plaintiff a prevailing party to support other, more valuable categories of damages, such as statutory or contractual attorneys' fees or (theoretically) punitive damages.³⁹

Importantly, some federal courts (but not all) require a plaintiff to plead nominal damages explicitly to avoid dismissal for failure to state the damages element.⁴⁰ The safest course is to list nominal damages separately in any prayer for relief or damages disclosure. Under New York law, nominal damages are not available for a fraud claim.⁴¹

VI. Punitive Damages

Punitive damages, sometimes called exemplary damages, are supposed to punish gross misconduct. Under New York law, punitive damages are generally not available for a breach of contract.⁴²

Punitive damages are only available for contract claims where the plaintiff also alleges independent tortious conduct that is (1) actionable as an independent tort; (2) of an egregious nature that qualifies independently for punitive damages; (3) directed at the plaintiff; and (4) part of a pattern of similar conduct directed at the public generally.⁴³ All four of these elements must be satisfied for punitive damages to be available on a contract claim. New York's highest court has said these factors will only rarely be met.⁴⁴

The "egregious" nature element requires a "high degree of moral turpitude" and "wanton dishonesty" implying "criminal indifference to civil obligations."⁴⁵ The "directed at the public generally" element requires that the fraud or false statements have been directed to the public at large, rather than solely at the plaintiff.⁴⁶ A single instance of fraud incident to an otherwise legitimate business does not satisfy this element.⁴⁷ And misrepresentations made directly to the plaintiff, rather than to the public at large, cannot satisfy the public-harm requirement.⁴⁸

Federal courts in New York have held that this same stringent four-factor standard – including the public-harm requirement – applies to fraud claims that "arise from" or "directly relate[]" to a contract.⁴⁹ That includes a fraudulent-inducement claim where the claim arises from the breach of a contract that was allegedly fraudulently induced,⁵⁰ or to claims based on misrepresentations related to but preceding a contract.⁵¹ For a fraud claim that is completely independent of a contractual relationship, however, there is no require-

ment that a plaintiff show a public harm to seek punitive damages.⁵² Punitive damages are a legal remedy and do not require the opinion of a damages expert.

VII. Attorneys' Fees and Costs

Attorneys' fees and costs of litigation are of course generally borne by the party that incurs them, unless the contract or statute provides otherwise. The CPLR permits a party to seek costs, including attorneys' fees, as a sanction for frivolous conduct.⁵³ In federal cases, attorneys' fees and costs are potentially available for bad faith under Federal Rules of Civil Procedure 11 and 37.

Attorneys' fees and costs may also be available as compensatory damages where, through a breach of contract or tort, a party was forced to defend itself in litigation.⁵⁴ This is sometimes called the "wrong-of-another" rule because the damages are available only where the plaintiff was forced to defend itself in collateral litigation by a third party because of the defendant's wrong. Notably, to invoke this exception, the plaintiff must be able to show proximate cause between the defendant's acts and the third-party litigation.⁵⁵

VIII. Pre- and Post-Judgment Interest

New York has a mandatory statutory pre- and post-judgment interest rate of 9% per annum on breach-of-contract recoveries.⁵⁶ These statutory defaults can be abrogated by rates specified in a contract.⁵⁷ Although New York prohibits "interest on interest," that rule does not include situations where a party contracted for interest payments on a debt obligation; a creditor can receive pre-judgment interest on those missed payments.⁵⁸

Federal courts sitting in diversity apply the relevant state law for prejudgment interest on state-law causes of action (such as breach of contract). But for claims arising under federal law (such as claims under the Defend Trade Secrets Act), there is no single federal statutory rate.⁵⁹ District courts have authority to award prejudgment interest as to federal-law claims, and substantial discretion as to what rate to apply.⁶⁰

There is, however, a federal statutory post-judgment interest rate. Federal courts apply that rate to all claims, including state-law causes of action – unless the parties' contract provides for a different rate. The federal post-judgment rate is the "weekly average 1-year constant maturity Treasury yield" published by the Federal Reserve, as of the date of the judgment.⁶¹ That rate applies in both federal question and diversity cases.⁶² The rate schedule can be found online.⁶³ If the interest calculations are complicated, counsel should consider setting out the calculations in a table in briefing or the proposed judgment.

Damages can be surprisingly complex under New York law, even in bread-and-butter contract disputes. Thinking

through the damages theory early in the case – and pressure testing it against the case law – can help lead to early resolution in settlement discussions or mediation. If a plaintiff can show a clear path to a reliable damages number, and can show the defendant how that number could be substantiated, that can go a long way, to the benefit of both parties. Similarly, if a defendant can show that the legal or factual path to damages is uncertain – or perhaps unavailable entirely – that can also help resolve the case more efficiently.



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Endnotes

1. See, e.g., *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007).
2. *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 825 (2d Cir. 1990).
3. *E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 458, 80 N.Y.S.3d 162, 175-76 (2018).
4. *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 319, 540 N.Y.S.2d 1, 3-4 (1989).
5. 36 N.Y. Jur. 2d Damages § 40.
6. *Abraham v. Leigh*, 471 F. Supp. 3d 540, 566 (S.D.N.Y. 2020).
7. Restatement (Second) of Contracts § 351(2)(b) (1981).
8. *Awards.com, LLC v. Kinko's, Inc.*, 42 A.D.3d 178, 185, 834 N.Y.S.2d 147, 153 (1st Dep't 2007), aff'd, 14 N.Y.3d 791, 925 N.E.2d 926 (2010).
9. What exactly is required can vary by federal court of appeals and also by the alleged harm. See, e.g., *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013).
10. *Ashland Mgmt.*, 82 N.Y.2d 395, 404, 604 N.Y.S.2d 912 (1993).
11. *Id.*, 82 N.Y.2d at 403, 604 N.Y.S.2d 912.
12. *Id.*, 82 N.Y.2d at 404, 604 N.Y.S.2d 912.
13. *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007).
14. *Am. List Corp. v. U.S. News & World Rep., Inc.*, 75 N.Y.2d 38, 43, 550 N.Y.S.2d 590 (1989).
15. *Id.*
16. Lost Profits, 5 Bus. & Com. Litig. Fed. Cts. § 55:40 (5th ed.) (collecting cases).
17. *Id.*
18. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76 (1996).

19. *Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, 783 F.3d 395, 402 (2d Cir. 2015).
20. *Myers Indus., Inc. v. Schoeller Arca Sys., Inc.*, 171 F. Supp. 3d 107, 123 (S.D.N.Y. 2016) (citing *Lama Holding*, 88 N.Y.2d at 413, 646 N.Y.S.2d 76).
21. *Lama Holding*, 88 N.Y.2d at 421, 646 N.Y.S.2d 76 (describing New York's "out-of-pocket rule").
22. See, e.g., *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142-43, 53 N.Y.S.3d 598 (2017); *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 72, 559 N.Y.S.2d 312 (1st Dep't 1990).
23. *Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 597 (2d Cir. 1996); Restatement (Second) of Torts § 774A (1979). New York permits recovery for actual harm to the plaintiff's reputation or emotional distress if that damage could be reasonably expected to result from the interference. *Rich v. Fox News Network, LLC*, 939 F.3d 112, 128 (2d Cir. 2019).
24. *IKB Int'l, S.A. v. Wells Fargo Bank, N.A.*, 40 N.Y.3d 277, 290-92, 197 N.Y.S.3d 719, 728-30 (2023).
25. See, e.g., *Fora Fin., Advance, LLC v. 4 Pillar Consulting, LLC*, 236 A.D.3d 491, 492, 227 N.Y.S.3d 608 (1st Dep't 2025).
26. See generally *IKB Int'l*, 40 N.Y.3d at 290-92, 197 N.Y.S.3d at 728-30.
27. See Lauren Dayton, *NY Court of Appeals Sharply Curtails Application of the 'Economic Loss Rule' in Commercial Litigation*, 28 NYSBA NYLitigator 14 (2023) (analyzing the IKB decision).
28. *Chazen v. Ma*, 223 A.D.3d 608, 609-10, 204 N.Y.S.3d 66, 67 (1st Dep't 2024).
29. See, e.g., *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 587 (2d Cir. 2006).
30. *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989).
31. *Id.*
32. *Rosenberg v. OSG, LLC*, 224 A.D.3d 466, 467, 203 N.Y.S.3d 88 (Mem) (1st Dep't 2024).
33. *Castellotti v. Free*, 138 A.D.3d 198, 208, 27 N.Y.S.3d 507 (1st Dep't 2016).
34. Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) (2011); see *Capstone Logistics Holdings, Inc. v. Navarrete*, No. 17-cv-4819, 2018 WL 6786237, at *7 (S.D.N.Y. Dec. 13, 2018).
35. 24 Williston on Contracts § 64:9 (4th ed.); *Uzuegbunam v. Preczewski*, 592 U.S. 279, 289 (2021).
36. *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 599 N.Y.S.2d 501 (1993); *Hirsch Elec. Co., Inc. v. Cmty. Servs., Inc.*, 145 A.D.2d 603, 605, 536 N.Y.S.2d 141 (2d Dep't 1988); 28A N.Y. Prac., Contract Law § 22:46.
37. *Luitpold Pharms., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 87 (2d Cir. 2015).
38. Restatement (Second) of Contracts §346, cmt. b (nominal damages are "a small sum usually fixed by judicial practice in the jurisdiction in which the action is brought"); see, e.g., *Berney v. Adriance*, 157 A.D. 628, 632, 142 N.Y.S. 748 (1st Dep't 1913) ("Awards of six cents or \$1 represent nominal damages.").
39. *Acumen Re Mgmt. Corp. v. Gen. Sec. Nat'l Ins. Co.*, 769 F.3d 135, 139 n.8 (2d Cir. 2014).
40. *Anthem, Inc. v. Express Scripts, Inc.*, No. 16-cv-2048, 2022 WL 1558879, at *12 (S.D.N.Y. Mar. 31, 2022), *aff'd*, No. 23-cv-8020, 2024 WL 4635233 (2d Cir. Oct. 31, 2024).
41. *Connaughton*, 29 N.Y.3d at 143, 53 N.Y.S.3d 598.
42. *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339 (1994).
43. *NYU v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316, 639 N.Y.S.2d 283, 287 (1995); *Rocanova*, 83 N.Y.2d at 613, 612 N.Y.S.2d 339.
44. *Rocanova*, 83 N.Y.2d at 613, 612 N.Y.S.2d 339.
45. *Id.*
46. *TVT Recs. v. Island Def Jam Music Grp.*, 412 F.3d 82, 95 (2d Cir. 2005); *Tianbo Huang v. iTv Media, Inc.*, 79 F. Supp. 3d 458, 465-66 (E.D.N.Y. 2015); *Leviton Mfg. Co., Inc. v. Reeve*, 942 F. Supp. 2d 244, 271 (E.D.N.Y. 2013).
47. See, e.g. *Mayline Enters., Inc. v. Milea Truck Sales Corp.*, 641 F. Supp. 2d 304, 312 (S.D.N.Y. 2009).
48. *Tianbo Huang*, 79 F. Supp. 3d at 465-66; *Leviton Mfg. Co., Inc. v. Reeve*, 942 F. Supp. 2d 244, 271 (E.D.N.Y. 2013).
49. *Carvel Corp. v. Noonan*, 350 F.3d 6, 25 (2d Cir. 2003); see, e.g., *Ventus Networks, LLC v. Answerthink, Inc.*, No. 05 Civ. 10316, 2007 WL 582736, at *2 (S.D.N.Y. Feb. 22, 2007).
50. See, e.g., *TVT Recs.*, 412 F.3d at 90-92; *Equinox Gallery Ltd. v. Dorfman*, 306 F. Supp. 3d 560, 579 (S.D.N.Y. 2018); *Tianbo*, 79 F. Supp. 3d at 463.
51. *Equinox Gallery Ltd. v. Dorfman*, 306 F. Supp. 3d 560, 579 (S.D.N.Y. 2018).
52. *Macquesten Gen. Contracting, Inc. v. HCE, Inc.*, 128 F. App'x 782 (2d Cir. 2005).
53. 22 N.Y.C.R.R. § 130-1.1(a).
54. Restatement (Second) of Torts § 914(2) (1979); *Hunt v. Sharp*, 85 N.Y.2d 883, 885, 626 N.Y.S.2d 57 (1995); *Coopers & Lybrand v. Levitt*, 52 A.D.2d 493, 496, 384 N.Y.S.2d 804 (1st Dep't 1976).
55. *In re Sept. 11 Litig.*, 802 F.3d 314, 339 (2d Cir. 2015).
56. CPLR 5001, 5003, 5004(a) (2022); *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599, 607 (2d Cir. 2003).
57. *NML Cap. v. Republic of Argentina*, 17 N.Y.3d 250, 258 (2011).
58. *In re Realty Assocs. Sec. Corp.*, 163 F.2d 387, 392 (2d Cir. 1947); see also *United States v. Hannon*, 728 F.2d 142, 145 (2d Cir. 1984).
59. *Jones v. UNUM Life Ins. Co. of Am.*, 223 F.3d 130, 139-40 (2d Cir. 2000).
60. *Frommert v. Conkright*, 913 F.3d 101, 109 (2d Cir. 2019).
61. 28 U.S.C. § 1961(a).
62. *Cappiello v. ICD Publ'ns, Inc.*, 720 F.3d 109, 112 (2d Cir. 2013).
63. Board of Governors of the Federal Reserve System, Selected Daily Interest Rates (Daily) – H.15 <https://www.federalreserve.gov/releases/h15/>.