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Corbin on Contracts

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PART VI BREACH OF CONTRACT--JUDICIAL REMEDIES
TOPIC B DAMAGES AS A REMEDY FOR BREACH
CHAPTER 56 FORSEEABILITY--ANTICIPATED PROFITS--DEGREES OF UNCERTAINTY

11-56 Corbin on Contracts § 56.7

§ 56.7 Foreseeability of the Specific Injury and Its Exact Amount Not Required

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Just as reason to foresee does not mean actual foresight, so also it is not required that the facts actually known to the defendant are enough to enable the defendant to foresee that a breach will cause a specific injury or a particular amount in money. As pithily put by one court, "[b]ut the defendant, in trying to add the ingredient of 'prior knowledge' to the 'foreseeability' concept, confuses 'foreseeable' with 'actually foreseen.'"n1 If a defendant knew that failure to perform would cause the shutdown of a mill, the defendant had reason to know that the breach would prevent the sale of the mill's product at market prices. It is not required that the defendant should be able to foresee just how many articles would be sold, or to what specific persons or at what exact prices they would be sold. What is required is merely that the injury actually suffered must be one of a kind that the defendant had reason to foresee and of an amount that is not beyond the bounds of reasonable prediction. The rule does not require that anything should have been foreseeable to a dead certainty; seldom can anything be predicted with such assurance as that. The rule merely requires that the injury must be one of such a kind and amount as a prudent person would have realized to be a probable result of the breach.n2

Nor is it possible to say just how much actual knowledge is required before it constitutes reason to know more. Here, as in numerous other places in the administration of the law, courts and juries must weigh the conduct of the defendant by the standard of the reasonable and prudent person.n3 Such a standard may be indefinite and uncertain. It may vary with the size of the jury's feet, and it certainly varies with the contents of their brains, but we have no better.

Although the question of whether specified damages are direct or consequential is a question of law,n4 the question of whether the defendant did in fact foresee, or had reason to foresee, the injury that the plaintiff has suffered is a question of fact for the jury,n5 subject to the usual supervisory power of the court. It is no easier in contract law than in tort cases to lay down rules that will render service in determining the question in a specific case. The rule itself has been applied in thousands of cases.n6 When a contractor breaches by failing to complete a project at the time promised, is it foreseeable that the owner will be forced to pay an increased interest rate?n7 The next section provides a few useful illustrations. While a scattering of cases involve a seller's breach of contract for the sale of goods, discussion of cases of that sort is mostly reserved for Section 60.19 infra.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Contracts Law Remedies Compensatory Damages Consequential Damages Contracts Law Remedies Foreseeable Damages General Overview

FOOTNOTES:

(n1)Footnote 1. Prutch v. Ford Motor Co., 618 P.2d 657, 662 (Colo. 1980) .

(n2)Footnote 2.

Cal. -- Sabraw v. Kaplan, 211 Cal. App. 2d 224, 27 Cal. Rptr. 81 (1962) , damages for contractor's delay in completion of a store building held not to include salary paid by the owner to a new partner and employee with whom owner contracted in anticipation of increased business. Foreseeability of the specific contract was not required, but here the making of any such contract was not reasonably foreseeable.

Where the defendant contracted to supply carriage springs for the plaintiff's carriage factory, with knowledge of the business of the factory and that production would be stopped by a failure to deliver, the defendant has reason to foresee the injury. This does not require that he must have exact knowledge or information in detail... . One who sells to a manufacturer parts of vehicles, with a fixed time of delivery, must of necessity contemplate that their nondelivery at the time specified will inconvenience and disarrange the system of manufacturing... . Factories are ordinarily operated at a profit, therefore a reasonable man may be assumed to contemplate that an interruption of the operation will cause loss to its owners. He need not know in detail just what loss, provided it be reasonable and within usual experience. Kelley, Maus & Co. v. La Crosse Carriage Co., 120 Wis. 84, 97 N.W. 674 (1903) .

If the defendant had reason to foresee that a delay in unloading a vessel would result in its grounding because of falling water, the defendant must pay damages caused by such grounding even though it had no reason to know of the existence of a submerged anchor or other obstructions on the bottom. Great Lakes S. S. Co. v. Maple Leaf Milling Co., 41 T.L.R. 21 (1924).

(n3)Footnote 3. Landmark Land Co. v. FDIC, 256 F.3d 1365 (Fed. Cir. 2001) . This case, which arose out of the Savings and Loan crisis of the 1980s, was brought by the plaintiff, a real estate development company, against the government. The trial court, in finding the government liable, awarded \$21.5 million to Landmark for the government's breach of a 1982 contract. The Federal Circuit affirmed the judgment as to the plaintiff in all respects. The \$21.5 million sum was the original contribution of Landmark to the thrift. A later contribution had consisted of \$3.3 million worth of real estate, and 100% of the stock of Unique Golf Concepts, Inc., a subsidiary of Landmark with substantial real estate assets and a value of approximately \$31.5 million. Finding it unforeseeable that the plaintiff would contribute essentially all of its assets to the thrift, the trial court found that it could not foresee at the time of contracting that a breach of the contract with the government would cause the plaintiff to lose its entire business. The Federal Circuit, although admitting that the issue of foreseeability is close in this case, found insufficient reason to disturb the initial court's findings as to reliance damages and affirmed the lower court holding on this issue.

(n4)Footnote 4. Roanoke Hospital Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 214 S.E.2d 155, 160 (1975) .

(n5)Footnote 5. Continental Plants Corp. v. Measured Marketing Service, Inc., 274 Or. 621, 547 P.2d 1368, 1372 (1976) ; Bumann v. Maurer, 203 N.W.2d 434, 440 (N.D. 1972) .

(n6)Footnote 6. **The prior edition of this section is quoted in** Larsen v. Walton Plywood Co., 65 Wash. 2d 1, 390 P.2d 677, 682 (1964) , *modified*, 65 Wash. 2d 1, 396 P.2d 879 . The defendant, having breached its contract to procure supplies of logs for the plaintiff's plywood factory, had reason to foresee that the plaintiff would make efforts to assure supply by purchasing for itself, and might be bound to reimburse the losses resulting from the effort. In this case, however, the purchase made by the plaintiff was in panic and imprudent, without good reason to believe that the purchase was one that would mitigate the losses caused by the defendant's breach.

Where the defendant contracted that on receipt of a fire signal it would at once notify the plaintiff's engine room, it was held that it was not competent for the defendant to say that it did not know that the notice to the engine room would cause the engineer to raise the water pressure for the purpose of applying water to a fire. It was sufficiently within the contemplation of the parties when the contract was made that the plaintiff would rely on the defendant and would not regularly maintain high water pressure, and also that loss by fire might result from the defendant's breach. *Missouri Dist. Tel. Co. v. Morris*, 243 F. 481 (8th Cir. 1917) .

A manufacturer of tin cans who contracts to supply a cannery during a season has reason to foresee that his failure will prevent the canning operations and the delivery of canned goods to purchasers. *Pacific Sheet Metal Works v. Californian Canneries Co.*, 164 F. 980 (9th Cir. 1908) . The defects of the broken bands which the plaintiff furnished were latent, and were discoverable by the purchaser, in the ordinary course of events, by actual application to the wooden pipe only. A vendor who knew that these pipe-bands were to be used by the purchaser in the construction of wooden pipes would reasonably anticipate that such latent defects which caused the bands to break when an attempt was made to bend them around and to fasten them upon the wooden pipes would entail upon the purchaser who bought them the useless expense of hauling them from the station at Golden to the place where they would be used upon the pipes; of loading and unloading them for the purpose of this transportation; of distributing, gathering, and counting them; of putting them on and taking them off the pipes, and perhaps of painting them, if painting was necessary and customary before such bands were applied to such a purpose. This expense was the natural and probable effect of these latent defects--an effect which a person of ordinary prudence and foresight, possessed of the knowledge of the plaintiff, might well anticipate. *McDonald v. Kansas City Bolt & Nut Co.*, 149 F. 360 (8th Cir. 1906) .

(n7)Footnote 7. *Roanoke Hospital Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796, 214 S.E.2d 155, 160 (1975) . Roanoke told Doyle that construction absolutely had to be completed by Oct. 31, 1970, but did not tell it that a commitment for a loan at 6 3/4 % financing would be lost if this date was not met. Doyle was late finishing, and Roanoke had to obtain permanent financing at 8 1/2 % . Roanoke sued, gaining a jury verdict and trial court judgment for 6 3/4 % interest for the extra year construction took, and for the difference between 6 3/4 and 8 1/2 % interest for the extra year of construction, but not for the difference between 6 3/4 and 8 1/2 % for the life of the permanent financing loan. This holding was reversed. The court, perhaps erroneously, held that the verdict contained an irreconcilable conflict. It thought the extra year of financing construction was a direct cost of breach, but the increase in the interest rate would be a consequential item of damage whether for the construction period or for the permanent financing. The court **cited the prior edition this section** to show that direct costs arise naturally or ordinarily from the breach, while consequential damages arise from special circumstances. Whether the two jury findings were in conflict is somewhat doubtful. A jury might reasonably have thought that the defendant was familiar with construction loans, and might know their cost goes up and down as the prime rate fluctuates. The same jury might reasonably have thought the contractor had no familiarity with permanent financing loans, and would be unaware of the limited time periods for which a permanent financing commitment would endure. Just because both items are consequential damages does not mean a construction company would have equal familiarity with them.

Thompson v. Hanson, 6 Wash. App. 1, 491 P.2d 1065, 1068 (1971) . Alpine Shores recovered damages for McHenry's failure to complete a sewage treatment plant within a reasonable time (the court finding that McHenry took two years longer than a reasonable time), including loss of profits because of a substantial increase in the interest rates on construction loans. Because of the rise in construction financing rates, Alpine had to reduce the prices at which it sold lots to builders, to induce them to buy and build in its subdivision. Held, reversed. Although this was a question of fact, the appellate court thought the evidence did not support the trial court's finding that construction companies know about fluctuations in the cost of construction financing. A doubtful result. A trial court ought to be able to assume that a company is familiar with the ordinary financial characteristics of its business.