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AN UPDATE AND REFRESHER ON CONSTRUCTING AND PROVING DAMAGES

Presenter

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I. Introductionⁱ

In most general terms, “damages” may be defined as “compensation in money imposed by law for loss or injury.” *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992). Damages typically take the form of a judicial award of money given to compensate an injured party for its legal injuries, which are any invasions of the plaintiff’s legally protected interests. *See Zidell v. Bird*, 692 S.W.2d 550, 555 (Tex. App.—Austin 1985, no writ). A fundamental purpose of all rules of damages, except punitive damages, is to indemnify an injured party for pecuniary loss suffered, placing the injured party as nearly as possible in the position he or she would have occupied but for the injury. *Dallas v. Cox*, 793 S.W.2d 701 (Tex. App.—Dallas 1990, no writ).

Damages and the appropriate measure of damages vary widely depending on the type of case and the harm at issue. Nevertheless, damages generally can be separated into the following categories: (1) nominal damages, (2) compensatory or actual damages, and (3) exemplary damages. This paper provides a quick refresher on these overarching categories of damages and highlights some recent opinions addressing several facets of damages.

We also provide a summary of practical concerns practitioners should consider in assessing and using the issue of damages in the course of lawsuit.

II. Refresher & Case Law Update

A. Categories of Damages

1. Compensatory or Actual Damages

Compensatory damages—sometimes called actual damages—aim to make a plaintiff whole while not providing the plaintiff with a windfall. Compensatory damages include both economic and noneconomic damages, but not exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.001(8). In tort cases, such damages typically consist of injuries to real or personal property, interference with a business or contract, and injuries to persons (including medical expenses, mental anguish or pain and suffering, loss of earnings and earning capacity, and loss of society). In breach of contract cases, the nonbreaching party may recover as compensatory damages its lost profits, along with any pecuniary loss shown to have been the natural, probable, and foreseeable consequence of the breaching party’s conduct or to have been within the contemplation of the parties. *See Mead v. Johnson Group, Inc.*, 615 S.W.2d 685 (Tex. 1981); *Davis v. Small Business Inv. Co. of Houst.*, 535 S.W.2d 740 (Tex. App.—Texarkana 1976, writ ref’d n.r.e.).

2. General Damages vs. Special Damages

Actual damages are either general or special. *Sterling Projects, Inc. v. Fields*, 530 S.W.2d 602, 605 (Tex. 1975). “General damages” refers to loss, damage or injury which is conclusively presumed to have been foreseen or contemplated by the party as a consequence of his breach of contract or wrongful act, whereas “special damage[s]” signifies injurious consequences which are not deemed as a matter of law to have been foreseen, but which are

shown to have been contemplated or anticipated by the parties. *Id.* General damages are imposed by law regardless of whether they were contemplated by the parties. *American Bank v. Thompson*, 660 S.W.2d 831, 834 (Tex. App.—Waco 1983, writ ref'd n.r.e.). General damages are those that are so usual an accompaniment of the kind of breach or wrongdoing alleged in the complaint that the mere allegation of the wrong gives sufficient notice. Tex. R. Civ. P. 56; *Sherrod v. Bailey*, 580 S.W.2d 24, 28 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). By contrast, when items of special damage are claimed, they must be specifically pleaded and proved separately. *Naegeli Transp. v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 739 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (citing *Odom v. Meraz*, 810 S.W.2d 241 (Tex. App.—El Paso 1991, writ denied)).

3. Nominal Damages

a. What Are Nominal Damages

Nominal damages are appropriate in “cases in which there are no damages, or none that could ever be proved.” *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 665 (Tex. 2009). As the U.S. Supreme Court has stated, “nominal damages . . . are the appropriate means of vindicating rights whose deprivation has not caused actual, provable injury.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 n.11 (1986). Plaintiffs who show liability are able to recover nominal damages in the following causes of action: (1) Breach of contract; (2) defamation; (3) assault; (4) invasion of privacy; and (5) trespass. *See e.g., MBM Fin. Corp.* 292 S.W.3d at 664-65 (breach); *Maass v. Sefcik*, 138 S.W.2d 897, 899 (Tex. App.—Austin 2950, no writ) (defamation); *Sumner v. Kinney*, 136 S.W. 1192, 1196 (Tex. App.—El Paso 1911, no writ) (assault); *K-Mart Corp. v. Trotti*, 677 S.W.2d 632, 638 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e., 686 S.W.2d 593 (Tex. 1985) (invasion of privacy); *General Mills Rests., Inc. v. Texas Wings, Inc.*, 12 S.W.3d 827, 833 (Tex. App.—Dallas 2000, no pet.); *see also* Michol O'Connor, O'CONNOR'S CAUSES OF ACTION 2010 Ch. 45-A, §2.2.

In Texas, nominal truly means trivial or in name only, not merely limited damages. In the words of the court “the usual meaning of the phrase ‘nominal damages’ refers to an award of one dollar.” *MBM Fin. Corp.*, 292 S.W.3d at 665. “A few cases have awarded nominal damages of \$ 10 and even \$ 100, but nominal damages are supposed to be a ‘trifling sum.’” *Id.* “[N]ominal damages are not available when the harm is entirely economic and subject to proof (as opposed to non-economic harm to civil or property rights).” *Id.* (citing *Gulf Coast Inv. Corp. v. Rothman*, 506 S.W.2d 856, 858 (Tex. 1974)). In *MBM Financial Corp.*, for example, the Supreme Court set aside a \$1,000 judgment as “too large to constitute nominal damages.” *Id.* at 663.

b. Nominal Damages and Recovery of Attorneys' Fees

Nominal damages matter as a mechanism for taxing the defendant with costs, *see ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 257 (Tex. App.—Dallas 1990, no writ). It is unclear in Texas whether recovery of nominal damages alone supports the award of attorney's fees. The question was left open by the Supreme Court in *MBM Financial Corporation*. 292 S.W.3d at 666. Some Texas appellate courts have found that nominal damages are not the type of “valid” claim contemplated by the Legislature which will entitle a litigant to the “additional”

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