Welcome to this podcast on Certainty brought to you by CALI. I am Professor Scott J. Burnham.

The topic of this podcast is the basic concept of certainty which is used in computing damages.

Certainty is a principle that can limit a plaintiff’s recovery in a claim for breach of contract. Certainty fits in with the concept that the purpose of contract damages is to compensate the plaintiff for the loss and not to punish the defendant. That is why there are no punitive damages for breach of contract. And contract law seems particularly concerned about overcompensation of the plaintiff – they should get what they would have had if the contract had been performed, but no more. As a result, the plaintiff, who has the burden of proving its damages, has to prove those damages to a reasonable certainty lest the damage award overcompensate the plaintiff and punish the defendant. The rule can be found in Restatement (Second) of Contracts § 352: “Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.” Note that the rule requires reasonable certainty, not absolute certainty.

One instance where this concept comes up is described as the “new business” problem. If a new business is about to start up and then because of a breach, the business cannot operate, we know what the expectancy is – it is the money that the business would have made had it been able to operate. The causation principle requires the plaintiff to prove that it was the breach that caused the business not to be able to operate. But how can a business owner prove how much money it would have made had it been able to operate? This is difficult, and the old rule seemed to be that a new business could never prove damages to a reasonable certainty, but today the rule has moderated and there are some methods the plaintiff can use to determine the loss to a reasonable certainty. For example, by the earnings of comparable businesses or through computer modeling, but it is still going to be an uphill battle for the plaintiff.

If the plaintiff can prove that it suffered a loss, but can’t prove the amount of the loss to a reasonable certainty, then a court may award what is called “nominal damages,” historically an amount like one dollar. This may seem unhelpful to the plaintiff, but it could be significant if, for example, the contract provided that the prevailing party could recover attorney’s fees from the other party. The party who received a dollar would be the prevailing party for that purpose.

Another example where the concept of certainty comes up is in lost royalties. When I began my law practice in New York state, I represented an author who had a contract with a publisher. The publisher breached the contract by refusing to publish the book. I wrote a demand letter to the publisher and in response, the publisher sent me a copy of a case that had just been decided by the New York Court of Appeals, *Freund v. Washington Square Press*. My heart sank as I read it. The facts were very similar, and the court held that the expectancy of the author was the royalties that the book would have earned. But the author was unable to prove what the sales would have been on a book that was never published, so he got only nominal damages.

But as I thought about it, I realized the court was not saying as a matter of law that the author could not prove damages. It was saying as a matter of fact that this author had not proven damages to a reasonable certainty. I realized that my author had better facts. Unlike Freund, he was a published author with a track record. And the book was one of a series and the publisher had published other books in the series. So I went ahead and brought suit. During document discovery, I struck gold. The publisher turned over a study by the marketing department that showed the expected sales of the book. Armed with that information I could now prove damages to a reasonable certainty and I was able to get a nice settlement from the publisher.

The courts are often guided by the principle that if the plaintiff can prove to a certainty that there was a loss, and provides some evidence, then the court is going to be more sympathetic to the plaintiff than if the plaintiff cannot prove there was any loss at all. After all, it is the defendant’s fault that the plaintiff is in the situation it is in, so doubts are generally resolved against the party in breach. A few years after *Freund*, a case came up in New York where a music publisher had failed to promote the plaintiff’s songs as required by the contract. An expert testified that a song would have gone much higher in the Billboard charts if it had been promoted. That was not much proof, but it was enough for the court to distinguish the case from *Freund*, where there was no evidence at all.

Let’s briefly review this podcast. At this point, you should be able to explain and apply the concept of certainty.

I hope you’ve enjoyed this podcast on Certainty.

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