

## A Reflection on the New Jersey Supreme Court's Recent Rejection of a *Per Se* Ban on Lost Profit Claims by New Businesses

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On August 17, the New Jersey Supreme Court decided *Schwartz v. Menas*, 279 A.3d 436 (N.J. 2022). At issue was whether the plaintiff's claim for lost profits damages as a new business was barred by the "new business rule." This rule generally bars claims for lost profits by new businesses, as no such claims can be proven with reasonable certainty. The reasoning of this rule is that untested, inexperienced businesses should be treated differently from experienced businesses with proven track records, as prospective profits of a new business are too remote and speculative to be "reasonably certain."

In this case, plaintiff Larry Schwartz and his business, NJ 322, LLC, sued several parties for tortious conduct interfering with Schwartz's efforts to develop two real estate projects. It was uncontested that Schwartz had no experience as a real estate developer and that his development business was a "new business." Schwartz presented expert testimony regarding his lost profits under several scenarios. These reports did not acknowledge that Schwartz had no experience, but rather assumed that he would have obtained financing and partnered with experienced developers. The lower court barred this proffered evidence pursuant to the new business rule and subsequently granted summary judgment to the defendants.

The Appellate Division affirmed, finding it was constrained to follow *Weiss v. Revenue Bldg. & Loan Ass'n*, 182 A. 891 (N.J.L. 1936), and applied the new business rule. The Appellate Division also found that, even if the rule did not apply, the expert's opinions were too speculative to meet the standard of reasonable certainty required for lost profits damages. The New Jersey Supreme Court granted certification.

The Supreme Court reversed in an opinion clarifying application of the new business rule standard. The Court faced a novel issue in New Jersey: whether a plaintiff's status as a new business constitutes an important factor in determining whether lost profits damages may be proven with reasonable certainty, or whether it bars such damages entirely.

Looking to the reasoning of several other jurisdictions and the Restatement of Contracts, the Court rejected a *per se* ban on such claims. The Court stressed that lost profit damage claims are governed by a "reasonable certainty" standard, which requires a fact-sensitive case-by-case analysis. The Court reasoned that, while it is "substantially" more difficult for a new business to establish lost profits with reasonable certainty, it is not impossible. The Court rejected *Weiss* inasmuch as it stood for a *per se* ban on such claims. The Court also seemed to find significant Schwartz's near complete lack of experience in his new business's field. His expert reports did not acknowledge that lack of experience, but rather assumed that he would have simply partnered with more experienced developers. The Court reversed and remanded for the lower court to review all of the evidence to apply this fact-sensitive analysis.

In the wake of *Schwartz*, while there is no longer an outright ban, it will remain difficult for a new business to prove such damages as they are often remote, uncertain, or speculative. This opinion instructs trial courts to "carefully scrutinize" a new business's claim that a defendant's tortious conduct or breach of contract prevented it from profiting from an enterprise in which it has no experience. A court should bar such a claim unless the lost profits can be proven with reasonable certainty. The Court cited the Restatement of Contracts, which refers to possible evidence including "expert testimony, economic and financial data, market surveys and analyses, business

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records of similar enterprises, and the like.” Needless to say, supporting expert opinions must be specific and supported with such data to even attempt to satisfy the high reasonable-certainty requirement.

Thus, while there is no longer an outright ban on lost profit claims for new businesses in New Jersey, the evidentiary burden is high and may ultimately prove insurmountable by new businesses pressing such claims.

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