PURSUITING “LOSS OF A CHANCE” DAMAGES IN A COMMERCIAL DISPUTE

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In any commercial dispute, a party may seek damages under various theories. Typically, a wronged party will seek damages to be made whole, as if it had not been wronged in the first place. However, it is not always easy to determine make-whole damages in a commercial dispute, and a claimant should carefully assess how to define and calculate its potential damages. Given emerging case law in federal courts, particularly from the Seventh Circuit Court of Appeals, one option for a claimant may be to seek damages based on a “loss of a chance” theory. While such damages are rarely sought in commercial disputes and few courts have reviewed the contours of the theory, loss of a chance damages may provide a fitting framework for certain disputes. Depending on the jurisdiction, this damages theory could present a wronged party in a business dispute with a potential method for recovering its true losses, especially in cases that involve competitive bidding or lost business opportunities.

The loss of a chance damages theory has been defined as “a probabilistic injury . . . [that] requires evidence of the loss of what economists call an ‘expected benefit.’” Milam v. Dominick’s Finer Foods, Inc., 588 F.3d 955, 958 (7th Cir. 2009). The theory was first applied in medical malpractice cases, in which a claimant shows that a patient would have had a chance of survival if not for the malpractice. As stated in Doll v. Brown, 75 F.3d 1200, 1205-1206 (7th Cir. 1996), the loss of a chance theory “is illustrated by cases in which, as a result of a physicians negligent failure to make a correct diagnosis, his patient’s cancer is not arrested, and he dies – but he probably would have died anyway. The trier of fact will estimate the probability that the patient would have survived but for the physician’s negligence – say it is 25 percent – and will award that percentage of the damages the patient would have received had it been certain that he would have survived but for the negligence.” See also Delaney v. Cade, 873 P.2d 175, 203 (Kan. 1994) (“The loss of chance theory arises in medical malpractice cases wherein the patient is suffering a preexisting injury or illness which is aggravated by the alleged negligence of the doctor or health care provider to the extent that the patient dies, when without negligence there might have been a substantial chance of survival or the actual recovery is substantially less than it might have been absent the alleged malpractice”); McKellips v. Saint Francis Hospital, Inc., 741 P.2d 467, 475-77 (Okla. 1987).

Some courts have ruled that loss of a chance only applies in medical malpractice cases. See e.g., Frey v. AT&T Mobility, LLC, 379 Fed. Appx. 727, 729 (10th Cir. 2010) (“The Oklahoma Supreme Court has determined that only medical malpractice claims qualify for the reduced causation standard entailed in a loss of chance action.”) (emphasis in original). But the Seventh
Circuit Court of Appeals has applied the loss of chance theory in employment cases that involve lost opportunities for promotions due to discrimination. *Doll*, 75 F.3d at 1206 (“Yet [the loss of a chance theory] strikes us as peculiarly appropriate in employment cases involving competitive promotion.”); *Alexander v. City of Milwaukee*, 474 F.3d 437, 449 (7th Cir. 2007); *Biondo v. City of Chicago*, 382 F.3d 680, 688 (7th Cir. 2004).

In the *Milam* case, the Seventh Circuit explained by example how loss of a chance damages are calculated in a non-medical malpractice case:

Suppose you’re playing roulette on a 37-number wheel (18 red, 18 black, and 1 green) at the Casino de Monte-Carlo, and after you have placed your $1,000 bet on red, which will pay you $2,000 if the ball lands on red, the casino collapses through the negligence of a building contractor, destroying not only the roulette wheel but also your chips, and you cannot get the money you paid for them back because all the casino's records were destroyed when it collapsed. You've suffered a loss equal to a 48.6 percent chance of winning $2,000. So $972.73 would be your damages.

*Milam*, 588 F.3d at 958.

The loss of a chance theory has been raised in breach of contract claims, although those claims have met with mixed results. *Compare Van Gulik v. Resource Dev. Council for Alaska*, 695 P.2d 1071, 1073-74 (Alaska, 1985) (plaintiff was entitled to share a grand prize or participate in a drawing between two winning tickets with a showing that plaintiff would have won or tied if the lottery had been properly completed) and *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 29 (Fla. Ct. App. 1990) (“It is now an accepted principle of contract law, nonetheless, that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain.”) with *Denardo v. GCI Comm. Corp.*, 983 P.2d 1288, 1291 (Alaska 1999) (a claim against a phone company for failing to connect his phone service, which would have allowed the plaintiff to enter a prize contest, was too speculative for recovery under the loss of a chance theory) and *Youst v. Longo*, 729 P.2d 728, 736 (Cal. 1987) (losing the chance to win a horse race did not present a viable basis for a claim for tortious interference with prospective economic advantage because the nature of a sporting event is too speculative).

While the loss of a chance damages theory does not appear to have been applied in a commercial dispute between business entities, the theory seems to fit in certain circumstances. For example, in a competitive bidding situation, where contractors are bidding for a construction project or buyers are bidding to purchase property, and the process is fraudulently fixed to allow a particular party to prevail in the bidding, loss of a chance damages seems to fit to compensate the honest bidders that lost their chance to compete in a good faith bidding process. Of course, given the undeveloped nature of the theory, the strength of the claim will depend on the testimony from the parties involved and whether an expert is allowed to testify as to the lost chance, as well as the state of the law in the applicable jurisdiction. Moreover, a defendant will likely argue that a loss of a chance damages claim involves layers of speculation and hypothetical guesswork, and is not based on reliable evidence. But the *Doll* court provided the counter-point to the speculative nature of the loss of chance damages theory in the employment context:

It would be hard to pick a number that would reliably estimate the probability of Doll’s receiving the promotion but for discrimination. Would it be 5 percent?
percent? 40 Percent? Who knows? Yet no less uncertainty attends the efforts of
triers of fact to fix the percentage of a plaintiff’s negligence in a tort case governed,
as most tort cases are today, by the rule of comparative negligence. . . If the
uncertainty is bearable there, why not in an employment case?

_Doll_, 75 F.3d at 1206-1207.

Based on the above case law, loss of a chance damages are slowly gaining wider acceptance
by courts. _Id._ at 1206 (“This basis for an award of damages is not accepted in all jurisdictions, but it
is gaining ground and it is in our view basically sound”). In assessing a potential claim related to a
commercial dispute, parties should keep the loss of a chance damages theory in mind, and check
with the applicable jurisdiction as to whether the courts allow such damages, as the theory may
provide a basis of recovery in circumstances that involve otherwise speculative claims.

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