Actual Damages Recoverable for Loss of Credit or Injury to Credit Reputation if Proven Natural, Probable, and Foreseeable Consequence of Breach.

Sharon Callaway

CONTRACTS—Damages—Actual Damages Recoverable For Loss of Credit or Injury to Credit Reputation If Proven Natural, Probable, and Foreseeable Consequence of Breach.

Mead v. Johnson Group, Inc.,
615 S.W.2d 685 (Tex. 1981).

Evadine Mead contracted to sell her real estate agency to Johnson Group, Inc. in return for the latter's promise to pay all the agency's debts by March 1, 1976. On April 24, 1976, Mead filed a breach of contract action against Johnson for failing to pay those debts. The trial court entered judgment for Mead upon a jury verdict that included $3,000 for damages to her credit reputation.[1] Holding that loss of credit is not an element of actual damages,[2] the Waco Court of Civil Appeals reformed the judgment by deleting the $3,000 recovery.[3] Subsequently, the Texas Supreme Court heard the case on appeal. Held—*Affirmed in part and reversed in part.*[4] Actual damages are recoverable for the loss of credit or injury to credit reputation if proven a natural, probable, and foreseeable consequence of the breach.[5]

The purpose of awarding damages for breach of contract is to put the injured party in as good a position as if the contract had been performed.[6] Moreover, the fact that damages must be paid has been viewed as a means to prevent breaches and, therefore, to provide some security for

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1. Johnson Group, Inc. v. Mead, 605 S.W.2d 386, 388 (Tex. Civ. App.—Waco 1980), *aff'd in part and rev'd in part*, 615 S.W.2d 685 (Tex. 1981). After March 24, 1976, Mead was denied a loan at Oak Hill National Bank, had her accounts at Penny's, Sears, Ward's, and Yaring's closed, and was denied credit by Exxon, Joske's, Handy Dan, Master Charge, Bank Americard, and Carte Blanche, among others. Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981).

2. Johnson Group, Inc. v. Mead, 605 S.W.2d 386, 388 (Tex. Civ. App.—Waco 1980), *aff'd in part and rev'd in part*, 615 S.W.2d 685 (Tex. 1981).

3. *Id.* at 390.

4. Mead v. Johnson Group, Inc., 615 S.W.2d 685, 690 (Tex. 1981).

5. *Id.* at 688.

6. *E.g.*, Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co., 253 U.S. 97, 100 (1920) (actual loss measured by that which injured party would have had if contract performed); Smith v. Kinslow, 598 S.W.2d 910, 912 (Tex. Civ. App.—Dallas 1980, no writ) (complaining party entitled to recover amount necessary to put him in as good a position as if contract performed); R. G. McClung Cotton Co. v. Cotton Concentration Co., 479 S.W.2d 733, 738 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (plaintiff given benefit of bargain by awarding amount that would put him in as good a position as if contract performed); *see* 5 A. *Corbin, Contracts* § 992, at 5 (1964 & Kaufman Supp. 1980).

business transactions.[7] Actual damages are classified as either general or special. General damages are those deemed, as a matter of law, to have been foreseen or contemplated by the parties as a consequence of a breach.[8] Special damages are those which are shown, as a matter of fact, to have been contemplated by the parties.[9] Special damages, sometimes called consequential damages,[10] are allowed when knowledge of special conditions at the time of contracting is imputed to the defaulting party.[11] In Texas, actual damages are recoverable for breach of contract when they naturally arise from the breach and were reasonably within the contemplation of the parties.[12] Proof of damages, in general, requires the

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7. *See* 5 A. CORBIN, CONTRACTS § 1002, at 34 (1964 & Kaufman Supp. 1980). Awarding damages for such a breach helps "to make possible the vast structure of credit, upon which so large a part of our modern prosperity depends." *Id.* § 1002, at 34. A large part of this structure of credit is consumer credit, including installment loans, long-term mortgages, and credit cards, which has been expanding rapidly, from $7,116,000 in 1929 to $260,735,000,000 in 1977. INFORMATION PLEASE ALMANAC 74 (1979).

8. *See, e.g.*, Anderson Dev. Corp. v. Coastal States Crude Gathering Co., 543 S.W.2d 402, 405 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (general damages are those presumed to have been contemplated); Sterling Projects, Inc. v. Fields, 530 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1975, no writ) (general damages deemed as a matter of law to be foreseen); First Nat'l Bank v. English, 240 S.W.2d 503, 507 (Tex. Civ. App.—Waco 1951, no writ) (general damages are conclusively presumed to be foreseen).

9. *See, e.g.*, Sterling Projects, Inc. v. Fields, 530 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1975, no writ) (damage to credit and business reputation not recoverable as special damages because not foreseen); New Amsterdam Cas. Co. v. Bettes, 407 S.W.2d 307, 316-17 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) (special damages not awarded because financial arrangements between plaintiff and third party not within contemplation of parties); First Nat'l Bank v. English, 240 S.W.2d 503, 507 (Tex. Civ. App.—Waco 1951, no writ) (special damages not allowed because circumstances not contemplated or anticipated by defendant). *See generally* 2 R. MCDONALD, TEXAS CIVIL PRACTICE §§ 6.17.2, 6.17.3 (rev. ed. 1970).

10. 5 A. CORBIN, CONTRACTS § 1011, at 87 (1964 & Kaufman Supp. 1980). Corbin suggests abandoning the term "consequential damages" to mean an unforeseeable harm incurred as a "consequence" of the breach because what is really meant is "special" as opposed to "general" damages.

11. *See, e.g.*, Gregory v. Tyler Grain & Storage Co., 341 S.W.2d 221, 223 (Tex. Civ. App.—Texarkana 1960, no writ) (special damages allowed for breach of contract to store grain); Martin v. Southern Engine & Pump Co., 130 S.W.2d 1065, 1067 (Tex. Civ. App.—Galveston 1939, no writ) (consequential damages may be exempted by agreement between parties); McKibbin v. Pierce, 190 S.W. 1149, 1151 (Tex. Civ. App.—Amarillo 1916, writ ref'd) (damages allowed because special conditions communicated to defaulting party).

12. *See* Humble Oil & Ref. Co. v. Wood, 292 S.W. 200, 201 (Tex. Comm'n App. 1927, judgm't adopted) (no actual damages because injury to market value not within contemplation of parties at time oil lease executed). *See generally* 2 MCDONALD, TEXAS CIVIL PRACTICE § 6.17.3 (rev. ed. 1970); *see also* Atchison, T. & S.F. Ry. Co. v. Butler, 127 Tex. 154, 155, 93 S.W.2d 143, 143 (1936) (must prove that on date of contract defaulting party had notice of special conditions rendering such damages probable); Missouri K. & T. Ry. Co. v. Belcher, 89 Tex. 428, 429-30, 35 S.W. 6, 7 (1896) (carrier not liable for delay in transportation when at time of contract was unaware special damages would arise from delay). This theory of

ability to estimate with "reasonable certainty" the amount of monetary damage sustained as a result of the injury.[13] Damages, however, do not fail because it is impossible to calculate them exactly.[14]

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recovery follows the classic rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854). *Hadley v. Baxendale* has been described as the "starting point for all discussion of contract damage theory." *See* G. GILMORE, THE DEATH OF CONTRACT 49 (1974). The Restatement (Second) of Contracts § 365 adopted the rule of *Hadley v. Baxendale*. *See* RESTATEMENT (SECOND) OF CONTRACTS § 365 (Tent. Draft No. 14, 1979). The English court set forth this rule in the following manner:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (Ex. 1854). One interpretation of *Hadley v. Baxendale* is that it involves two rules which differentiate between damages which naturally flow from the breach or are contemplated by the parties (general damages), and those which arise from special circumstances (consequential damages). *See* Note, *Lost Profits and Hadley v. Baxendale*, 19 WASHBURN L. J. 488, 493 n.36 (1980). *See generally* Adams, *Hadley v. Baxendale and the Contract/Tort Dichotomy*, 8 ANGLO-AM. L. REV. 147, 147 (1979); Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 253 (1975).

13. *See, e.g.*, Fredonia Broadcasting Corp., Inc. v. RCA Corp., 481 F.2d 781, 804 (5th Cir. 1973) (cannot base damages on mere opinion; must be proven to reasonable certainty); Jordan v. Cartwright, 347 S.W.2d 799, 801 (Tex. Civ. App.—Fort Worth 1961, no writ) (evidence did not establish damages with sufficient degree of certainty to allow jury to calculate damages); Schoenberg v. Forrest, 253 S.W.2d 331, 336 (Tex. Civ. App.—San Antonio 1952, no writ) (mere opinion and estimate insufficient to support damages). *See also* 5 A. CORBIN, CONTRACTS § 1020, at 124 (1964 & Kaufman Supp. 1980). To recover actual damages for a breach of contract, the "plaintiff must lay a basis for a reasonable estimate of the extent of his harm, measured in money." *Id.* § 1020, at 124. Otherwise, only nominal, not actual, damages are allowed. *Id.* § 1001, at 29.

14. *See, e.g.*, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927) (damages for lost profits not uncertain if reasonable basis for computation offered); Southwest Battery Corp. v. Owen, 131 Tex. 423, 427-28, 115 S.W.2d 1097, 1099 (1938) (uncertainty as to amount will not preclude recovery); Copenhaver v. Berryman, 602 S.W.2d 540, 544 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (data for lost profits recovery sufficient if supports degree of certainty; exact calculation not necessary). Texas courts have used the same language in denying recovery for lost profits of a new business as they have used with loss of credit claims. *Compare* Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 671 (5th Cir. 1971) (damages for lost profits of new business not allowed because based only on speculation and conjecture) *and* Southwest Bank & Trust Co. v. Executive Sportsman Ass'n, 477 S.W.2d 920, 929 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (prospective profits from new enterprise with no history too remote and speculative to be actual damages) *and* Wade v. Southwestern Bell Tel. Co., 352 S.W.2d 460, 462 (Tex. Civ. App.—Austin 1961, no writ) (lost profits claim by new attorney uncertain) *with* Traweek v. Martin-Brown Co., 79 Tex. 460, 464, 14 S.W. 564, 566 (1890) (cannot permit jury to consider damages too remote to be strictly compensable) *and* Wallace v. Finberg, 46 Tex. 35, 47

Historically, Texas courts have denied the recovery of actual damages for loss of credit or injury to credit reputation.[15] In *Traweek v. Martin-Brown Co.*,[16] a wrongful attachment case, the Texas Supreme Court stated that loss of credit was not an element of actual damages, but could be considered as exemplary damages.[17] Exemplary damages, however, are

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(1876) (special damage for loss of credit too remote and speculative) *and* Galloway v. Morris 249 S.W. 284, 285 (Tex. Civ. App.—Fort Worth 1923, no writ) (injury to credit too speculative to be considered).

15. *See, e.g.*, Traweek v. Martin-Brown Co., 79 Tex. 460, 463-64, 14 S.W. 564, 566 (1890) (disallowed actual damages for injury to credit for wrongful attachment of merchant's property); Tynberg v. Cohen, 76 Tex. 409, 415, 13 S.W. 315, 316 (1890) (levy on small portion of merchant's stock not proximate cause of injury to credit); Streetman v. Lasater, 185 S.W. 930, 931 (Tex. Civ. App.—El Paso 1916, no writ) (allowed damage to credit reputation as exemplary but not actual damages for wrongful distress warrant on cotton and property).

16. 79 Tex. 460, 14 S.W. 564 (1890). The court refused to allow recovery of actual damages on the grounds that merchant's credit was injured because defendant's attachment caused plaintiff's other creditors to also issue attachments also. *See id.* at 464, 14 S.W. at 566. The court cited Wallace v. Finberg, 46 Tex. 35 (1876) as authority for the proposition that loss of credit is not an element of actual damages. *See id.* at 464, 14 S.W. at 565. In *Wallace* the court noted in that loss of credit resulting from the seizure of goods was too remote and speculative, but did not specifically state that loss of credit cannot be an element of actual damages. *See* Wallace v. Finberg, 46 Tex. 35, 47 (1876). *But cf.* Elizarraras v. Bank of El Paso, 631 F.2d 366, 375-76 (5th Cir. 1980) (damages allowed for wrongful dishonor of a check under the " trader rule"); First Nat'l Bank v. Hubbs, 566 S.W.2d 375, 378 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (actual damages recoverable if wrongful dishonor occurs through bank's mistake); Northshore Bank v. Palmer, 525 S.W.2d 718, 719 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (in suit for loss of credit consequential damages allowed for intentional wrongful dishonor of check). Under the Uniform Commercial Code, Texas courts may allow actual damages for loss of credit in actions for wrongful dishonor of a check. *See* TEX. BUS. & COM. CODE ANN. § 4.402, Comment 3 (Vernon 1968).

17. Traweek v. Martin-Brown Co., 79 Tex. 460, 464, 14 S.W. 564, 566 (1890). . . .This view was widely followed in subsequent wrongful attachment cases. *See, e.g.*, Neese v. Radford, 83 Tex. 585, 587, 19 S.W. 141, 141-42 (1892) (injury to credit by wrongful levy may be considered only as exemplary damages); First Nat'l Bank v. Cooper, 12 S.W.2d 271, 274 (Tex. Civ. App.—Amarillo 1928, writ ref'd) (loss of credit an element of exemplary damages in wrongful attachment); Ullmann, Stern & Krausse, Inc. v. Rogers, 288 S.W. 1109, 1110 (Tex. Civ. App.—San Antonio 1926, no writ) (injury to credit not element of actual damages); *accord*, Bridwell v. Anderson, 156 S.W.2d 231, 234 (Ark. 1941) (in wrongful levy action damages for loss of credit uncertain, conjectural, and unestablished by evidence); Birch Ranch & Oil Co. v. Campbell, 43 Cal. App.2d 624, 111 P.2d 445, 447 (Dist. Ct. App. 1941) (in wrongful execution on business property damages for injury to credit too remote to allow actual damage recovery); Union Nat'l Bank v. Cross, 75 N.W. 992, 996 (Wis. 1898) (in wrongful attachment suit injury to credit too speculative for actual damage recovery). The Waco Court of Civil Appeals in the only breach of contract case involving an actual damages claim for harm to credit, relied on the line of wrongful attachment cases and refused to allow actual damages for injury to the credit or business reputation of a subcontractor. *See* Sterling Projects, Inc. v. Fields, 503 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1975, no writ).

not allowed in the absence of a finding of actual damages.[18] Denial of actual damages for loss of credit was based on the rationale that such damages were too remote or speculative in terms of proof.[19]

In *Mead v. Johnson Group, Inc.*,[20] the Texas Supreme Court did not view *Traweek* as an obstacle to recovery of actual damages,[21] but rather as a case decided at a time when loss of credit was too remote and speculative to be recoverable as actual damages.[22] The court observed that the precedents for this proposition were decided in an era when most commercial transactions were for cash, while today many transactions, both personal and commercial, depend on credit.[23] The court viewed the loss of credit as a foreseeable consequence of a contract breach because the use of credit has become so widespread.[24] Damages are, therefore, recoverable if there is evidence that "the injury was the natural, probable, and fore-

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18. *See, e.g.*, Neese v. Radford, 83 Tex. 585, 587, 19 S.W. 141, 141-42 (1892) (injury to credit by wrongful levy on interest in business partnership may be considered only as exemplary damages); Ullmann, Stern & Krausse, Inc. v. Rogers, 288 S.W. 1109, 1110 (Tex. Civ. App.—San Antonio 1926, no writ) (no exemplary damages for injury to credit because actual damages not proven in wrongful levy on merchandise); Galloway v. Morris, 249 S.W. 284, 285 (Tex. Civ. App.—Fort Worth 1923, no writ) (nominal damages not recoverable for loss of credit in absence of actual damages).

19. *See, e.g.*, Traweek v. Martin-Brown Co., 79 Tex. 460, 464, 14 S.W. 564, 566 (1890) (cannot permit jury to consider damages too remote to be strictly compensable); Wallace v. Finberg, 46 Tex. 35, 47 (1876) (special damage for loss of credit too remote and speculative); Galloway v. Morris, 249 S.W. 284, 285 (Tex. Civ. App.—Fort Worth 1923, no writ) (injury to credit too speculative to be considered).

20. 615 S.W.2d 685 (Tex. 1981).

21. *Id.* at 688.

22. *See id.* at 688.

23. *See id.* at 688; *See generally* STATISTICAL ABSTRACT OF THE UNITED STATES (1920, 1930, 1940, 1950, 1980). An examination of the indexes of the *Statistical Abstracts* from 1920 to 1980 reveals that in the 1920 index there is no listing for credit or mortgages. In 1930 no listing for credit appears although 17.6% of urban homes and 17.4% of rural homes were mortgaged. STATISTICAL ABSTRACT OF THE UNITED STATES 48 (1930). A chart on installment loans appears in the 1940 index. *Id.* at 251 (1940). Credit unions appear in the index in 1944 and in 1950 there is a "consumer credit" entry showing total consumer credit rising from $6,821,000,000 in 1930 to $18,779,000,000 in 1949. *Id.* at 416 (1950). By 1980 consumer credit had risen to $373.4 billion, including installment loans and credit cards. *Id.* at 540 (1980). In 1978 long-term mortgage loans totalled $999.8 billion, up from $3,234 million in 1940. *Id.* at 539 (1980) and at 251 (1940). As the court points out, a good credit rating is crucial to economic survival. *See* Mead v. Johnson Group, Inc., 615 S.W.2d 685 (Tex. 1981). One commentator describes the habitual use of credit and debt as money in our society as follows: "Credit, not cash, is the medium through which the income of different members of society is distributed to them, . . . the means by which they provide for their different necessities . . . it is in credit, not cash, that they count their wealth." R. HENDRICKSON, THE CASHLESS SOCIETY 158 (1972).

24. *See* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981).

seeable consequence of the breach. . . ."[25] As the court pointed out, allowing actual damages for loss of credit is not a departure from general contract damage rules,[26] but rather a recognition of damages if they are proven.[27]

Although the *Mead* Court adopted a sound rule allowing actual damages for loss of credit or injury to credit reputation,[28] it neglected to provide guidelines for determining what type of evidence would be necessary to prove actual damages.[29] A likely explanation for the court's failure to enumerate such guidelines is that the evidence introduced at Mead's trial appeared to contradict the jury's finding that the defendant's breach was the proximate cause of Mead's loss of credit.[30] As noted by the Waco

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25. *Id.* at 688.

26. *See id.* at 688. Although the supreme court did not address this issue, the problem with relying on a line of wrongful attachment cases to formulate a rule of contract recovery is that a wrongful attachment suit is a common law tort action, whereby the plaintiff seeks to sue out of an attachment levied without probable cause. *See, e.g.*, Gale v. Transamerica Corp., 382 N.E.2d 412, 415 (Ill. App. Ct. 1978); Cahn Bros. & Co. v. Bonnett, 62 Tex. 674, 676 (1884); M. BIGELOW, THE LAW OF TORTS 229-30 (8th ed. 1907). Theories of damage recovery in contract and tort differ, especially as to exemplary damages. In tort actions the purpose of awarding exemplary or punitive damages is to punish the wrongdoer for his outrageous conduct and to deter similar future conduct. *See* W. PROSSER, TORTS 9-10 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 908, at 464 (1977). The purpose of contract damages, however, is compensation for the injured party in order to make him whole again, not punishment of the wrongdoer. Exemplary damages, therefore, are not allowed for breach of contract unless the breach also gives rise to an independent tort. *See* 5 A. CORGIN, CONTRACTS § 1077, at 438 (1964 & Kaufman Supp. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 369, Comment a at 112 (Tent. Draft No. 14, 1979).

27. *See* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981).

28. *See* 2 A. CORBIN, CONTRACTS § 1007, at 128 (Kaufman Supp. 1980). Professor Kaufman points out that there is no reason why damage to credit reputation should not be allowed. *Id.* at 128. See Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981).

29. *See* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981). The court simply noted the decision was a recognition of the principle that damages may be allowed if proven. *See id.* at 688. Proof of damage to credit reputation is difficult because it is an intangible concept of property, similar to good will. Texas courts have recognized good will as a property which may be damaged or destroyed and for which the owner is entitled to damages for its destruction. *See, e.g.*, Texas & P. Ry. Co. v. Mercer, 127 Tex. 220, 225-26, 90 S.W.2d 557, 560 (1936) (good will, although intangible, is property and damages may be recovered for destruction thereof); Taormina v. Culicchia, 355 S.W.2d 569, 572-73 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (good will considered valuable intangible asset); Scott v. Doggett, 226 S.W.2d 183, 187-88 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.) (recovery allowed for damages to good will of grocery business). *See generally* Note, *Consequential Damages: The Loss of Goodwill*, 23 BAYLOR L. REV. 106, 107 (1971). Damage to good will can be recovered as special damages if it is shown to be reasonably foreseeable that damage would result from the wrong done. Loss of good will is considered as exemplary damages absent such proof. *See* Southwest Bank & Trust Co. v. Executive Sportsman Ass'n, 477 S.W.2d 920, 928-29 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

30. Mead's major contention at trial was that prior to the contract date of December

Court of Civil Appeals, Mead had some $75,000 in personal debts, including $29,000 in open accounts and consumer debt, many of which were delinquent.[31] The Texas Supreme Court, however, decided that the evidence was legally sufficient under a "no evidence" point of error viewed in a light most favorable to the jury finding.[32] In so doing, the court correctly did not consider contradictory evidence.[33] A civil appeals court presented with similar facts could nevertheless justifiably hold that such

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19, 1975, she had never been denied credit, but after March 24, 1976, she was denied credit many times. *See* Record, Vol. I at 109-11. Mead testified that Penny's, Sears, and Wards closed her charge accounts because she was four or five months delinquent and that even though she had paid off the balance, the stores refused to reopen the accounts. Yarings reopened her account after having closed it, but refused to raise it to its past limit. *Id.* Vol. VIII at 1594-96. These closed accounts were offered as proof that Johnson's breach of contract damaged her credit. *See* Mead v. Johnson Group, Inc., 615 S.W.2d 685 (Tex. 1981). When asked if any of the creditors whom Johnson had agreed to pay had denied her credit, Mead replied she had not asked any of them for credit. *See* Record, Vol. VII at 1301. In fact, Oak Hill National Bank, listed in the supreme court opinion as a lender who denied her credit, is shown by the trial record to have refused her credit because at the time a car note she had co-signed was delinquent, not because Johnson failed to pay the SBA loan held by Oak Hill. *See id.* Vol. VIII at 1590-91. Subsequently, the bank made her two loans: $5,000 to start another real estate business and $1,500 unsecured. *See id.* Vol. VII at 1311-12. One of the most common rules of damage recovery in contract is that the plaintiff's injury cannot be too remote from the defendant's conduct which caused the breach — a requirement of proximate cause. *See* A. CORBIN, CONTRACTS § 997, at 19 (1964 & Kaufman Supp. 1980). To establish proximate cause, it is not enough simply to show that the injury occurred; plaintiff must prove a causal relationship between that injury and defendant's breach. *Id.* § 997, at 21. An examination of the trial record reveals no testimony from the bank, or any of the merchants who denied her credit, that they did so because a credit report indicated any unpaid trade accounts. It is apparent, therefore, that Mead's credit reputation was damaged by her delinquencies in payment rather than Johnson's failure to retire the trade accounts. If several factors have combined to produce the injury, the defendant's breach must be a substantial factor in causing the injury. *Id.* § 999 at 24-25.

31. *See* Johnson Group, Inc. v. Mead, 605 S.W.2d 386, 389 (Tex. Civ. App.—Waco 1980), *aff'd in part and rev'd in part*, 615 S.W.2d 685 (Tex. 1981). *See also* Record, Vol. VII at 1284. The civil appeals court did not have to reach the issue of "no evidence" because it sustained Johnson's first contention that as a matter of law, under *Traweek*, actual damages were not recoverable for loss of credit. *See* Johnson Group, Inc. v. Mead, 605 S.W.2d 386, 389 (Tex. Civ. App.—Waco 1980), *aff'd in part and rev'd in part*, 615 S.W.2d 685 (1981). The court, however, did consider the evidence as to Mead's personal indebtedness important enough to note it in the opinion. *See id.* at 389.

32. *See* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981).

33. *See, e.g.*, McClure v. Allied Stores of Texas, Inc., 608 S.W.2d 901, 904 (Tex. 1980) (evidence must be viewed in light most favorable to jury finding); East Texas Theatres, Inc. v. Rutledge, 453 S.W.2d 466, 467 (Tex. 1970) (must view evidence in most favorable light in support of verdict); Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965) (Court must consider only evidence supporting jury finding and disregard all evidence to the contrary. *See generally* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-64 (1960).

a jury finding is factually insufficient under an "insufficient evidence" point of error and remand for a new trial.[34] Lower courts are thus left without a means of determining whether evidence of loss of credit supports an actual damage recovery. The United States Court of Appeals for the Fifth Circuit in *Elizarraras v. Bank of El Paso*,[35] however, has offered suggestions as to what evidence would prove injury to a business credit reputation—evidence which could arguably be applied to loss of credit in general.[36] Such evidence includes size of business, past income, future prospects, and the need for and prior use of credit.[37]

The rule adopted by the court in *Mead* applies, by analogy, to damages for lost profits of an unestablished business.[38] In Texas, anticipated profits are not recoverable for an unestablished business or a business which has operated at a loss[39] because these profits are not capable of being established to a degree of certainty required by law.[40] As with loss of

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34. *See* Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365-66 (1960).

35. 631 F.2d 366 (5th Cir. 1980). *Elizarras* involves application of the "trader rule" which does not require a businessman to prove actual damages for wrongful dishonor of a check to recover for damage to credit reputation. *Id.* at 375-76. The court cites the rationale for such a rule to be "that it is too difficult to prove any specific loss of income was caused by . . . a loss of credit." *Id.* at 377. The court accepts that principle, but states that even under the trader rule, some evidence must be required to reduce jury speculation. *Id.* at 377.

36. *Id.* at 377.

37. *Id.* at 377; *cf.* Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 268 (Minn. 1980) (proof of new business's lost profits includes experience and expertise of owner, and market for product or profitability of similar business).

38. *Compare* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981) (damages for credit loss allowed if foreseeable and proven with certainty) *with* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4, at 391 (2d ed. 1980) (recovery for lost profits if foreseeable and certainty requirement met). Lost profits of unestablished businesses is one of the most commonly litigated items of consequential damages. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4, at 391 (2d ed. 1980).

39. *See, e.g.*, Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 458 (5th Cir. 1979) (prospective profits on newly opened franchise operating at a loss not recoverable); Southwest Bank & Trust Co. v. Executive Sportsman Ass'n, 477 S.W.2d 920, 929 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (no actual damages for lost profits of new enterprises with no history); Atomic Fuel Extraction Corp. v. Slick's Estate, 386 S.W.2d 180, 189-90 (Tex. Civ. App.—San Antonio 1964) (uranium mining speculative business; recovery of lost profits denied), *writ ref'd n.r.e. per curiam*, 403 S.W.2d 784 (Tex. 1966). *But cf.* Harper Bldg. Systems, Inc. v. Upjohn Co., 564 S.W.2d 123, 126 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.) (new business had definite contracts to manufacture portable buildings upon which future profit estimate could be based).

40. *See, e.g.*, Southwest Battery Corp. v. Owen, 131 Tex. 423, 427-28, 115 S.W.2d 1097, 1099 (1938) (lost profits recovery allowed because evidence established loss with reasonable certainty); Barbier v. Barry, 345 S.W.2d 557, 563 (Tex. Civ. App.—Dallas 1961, no writ) (profits from unestablished business not susceptible of proof to degree of certainty law requires); Silberstein v. Laibovitz, 200 S.W.2d 647, 650 (Tex. Civ. App.—Austin 1947, no writ)

credit, the problem with allowing recovery for lost profits of a new business is that they are considered highly speculative.[41] Certain jurisdictions, however, allow a new business to collect for lost profits if the business can present factual data to predict lost profits.[42] This trend effectively replaces the "new business" with a "sufficiency of the evidence" test.[43] By allowing actual damages under these circumstances, these courts have recognized that the improvement in market data and forecasting techniques make lost profits of a new business less speculative and more susceptible to proof.[44] Although Texas courts have not yet adopted this view

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(denied recovery of lost profits for breach of business rental lease because failed to establish damages by competent proof); *accord*, Evergreen Amusement Corp. v. Milstead, 112 A.2d 901, 904 (Md. 1955) (new business profit speculative and incapable of ascertainment).

41. *See, e.g.*, Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 671 (5th Cir. 1971) (damages for lost profits of new business denied because based only on speculation and conjecture); Southwest Bank & Trust Co. v. Executive Sportsman Ass'n., 477 S.W.2d 920, 929 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (prospective profits from new enterprise too remote and speculative to be actual damages); Wade v. Southwestern Bell Tel. Co., 352 S.W.2d 460, 462 (Tex. Civ. App.—Austin 1961, no writ) (lost profits claim by new attorney too uncertain). *See generally* Comment, *Lost Profits as Contract Damages: Problems of Proof and Limitations on Recovery*, 65 YALE L. J. 992, 999 (1956).

42. *See, e.g.*, Fera v. Village Plaza, Inc., 242 N.W.2d 372, 373 (Mich. 1976) (new business may recover lost profits for breach of contract if justified by evidence); Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 267 (Minn. 1980) (although more difficult to prove prospective profits of a new business, no law proscribes it); Ferrell v. Elrod, 469 S.W.2d 678, 684-85 (Tenn. 1971) (no reason to penalize new business by denying recovery if evidence supports prospective profits). *See generally* Comment, *A Case for Recovery: Damages for Lost Profits of an Unestablished Business*, 12 CREIGHTON L. REV. 1081, 1087 (1979). The Dallas Court of Civil Appeals has stated that lost profits of a new business would not be denied if factual data was available to compute losses. *See* Barbier v. Barry, 345 S.W.2d 557, 563 (Tex. Civ. App.—Dallas 1961, no writ) citing Pace Corporation v. Jackson, 155 Tex. 179, 284 S.W.2d 340 (1955)). The Texas Supreme Court in *Pace Corp. v. Jackson*, allowed for lost profits to a new business, but stressed that this business was established in the sense that it continued to operate past the trial date and show a profit. *See* Pace Corp. v. Jackson, 155 Tex. 179, 190, 284 S.W.2d 340, 348 (1955). Additionally, the business was established on the strength of the contract and discontinued because of the breach. *Id.* at 190, 284 S.W.2d at 348. In such an instance, recovery can be had because the contract provides sufficiently specific information upon which to determine future profits. *See* Page v. Hancock, 200 S.W.2d 421, 424 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.).

43. *See, e.g.*, Standard Mach. Co. v. Duncan Shaw Corp., 208 F.2d 61, 64 (1st Cir. 1953) (rejected "new business rule"; focused on sufficiency of evidence); Fera v. Village Plaza, Inc., 242 N.W.2d 372, 373 (Mich. 1976) (lost profits should not be denied merely because hard to prove); Brenneman v. Auto-Teria, Inc., 491 P.2d 992, 994 n.1 (Or. 1971) (question is whether lost profits can be proved with reasonable certainty). *See generally* R. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS 119 (1978) (trend is development of a rule of law into a rule of evidence).

44. *See* Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 268 (Minn. 1980) (proven existence of a market supports new business, lost profits recovery); Larsen v. Walton Plywood Co., 390 P.2d 677, 687 (Wash. 1964) (expert testimony and analysis of

in terms of new business profits, the allowance of actual damages for loss of credit is based on the same principle.[45]

The Texas Supreme Court in *Mead* found the rule of general foreseeability to be applicable to loss of credit recovery for breach of contract.[46] Because *Mead* recognized injury to credit as being within the reasonable contemplation of parties who contract in an area affecting business or personal credit, parties who incur such losses are now assured a remedy if they can meet the burden of proof.[47] The types of evidence necessary to constitute such proof, however, remain uncertain. Future courts and the practitioner are, therefore, without evidentiary guidelines upon which to appraise similar fact situations. Nevertheless, the *Mead* rationale is logically adaptable to the issue of damages for lost profits of a new business and could be used as support for the argument that Texas courts should afford unestablished businesses the same opportunity to recover damages if they can prove their losses by a sufficiency of the evidence.

Sharon Callaway

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market conditions take lost profits out of realm of uncertainty). *See generally* Comment, *Lost Profits as Contract Damages: Problems of Proof and Limitations on Recovery*, 65 YALE L. J. 992, 1018-19 (1956).

45. *Compare* Ferrell v. Elrod, 469 S.W.2d 678, 684-85 (Tenn. 1971) (no reason to penalize new business by denying recovery if evidence supports prospective profits recovery) *with* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981) (actual damages for loss of credit is allowed if proven by evidence).

46. *See* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 688 (Tex. 1981).

47. *See id.* at 688.