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Q How do you quantify "loss of use?"

A Answer by James J. Proszek

"Loss of use" is a measure of damages designed to compensate a property owner for the loss of the use of property that has been damaged by another during the reasonable time it takes to repair the property. This measure recognizes that simply awarding repair costs or the diminished value of the property may not adequately compensate the property owner for all the loss he has suffered.

The ways to quantify loss of use damages, and limitations on such damages, vary based on the laws of the specific state in which the damage occurred. There are, however, four generally accepted ways to quantify loss of use damages:

Lost Profits: In the case of commercial property, loss of use damages can be quantified by the profits the property would have earned during the time it was out of service. While the amount need not be proved with mathematical precision, the owner must show the amount with reasonable certainty. It must also be based on lost net profit, not gross earnings.

Cost of Hiring Replacement Property: The rental cost of comparable substitute property, or "lease in" value, is another way to quantify loss of use damages. Where the property owner actually rents a substitute, the actual rental cost can determine the amount of loss of use damages. In many states, a property owner can recover loss of use damages based on the rental cost of a substitute even though the plaintiff does not actually rent a substitute. Where this method is used, the amount must be based on cost of comparable property in the same market as that of the damaged property.

In some states, the property owner must show that there was comparable property available to rent before using this method to quantify loss of use damages. In other states, the property owner must show that he could not have rented substitute property before availing himself of this method.

Rental Value of the Property: This method is also known as the "lease out" value. It is based on the amount the owner would have received if he had rented the property to a third party.

Interest: Finally, loss of use damages may be quantified by the interest the plaintiff would have earned on the value of the property during the time it was out of service.

Even with the above four ways to quantify loss of use damages, there are limitations. In some states, loss of use damages are only available if the property can be repaired, and not if it is completely destroyed. In either case, a plaintiff can only recover loss of use damages for the reasonable amount of time it took to repair or, in the case of property which has been completely destroyed, replace the damaged property.

Some states also limit loss of use damages to the market value of the property before the damage. In other words, the amount of loss of use damages cannot exceed the pre-injury value of the property. In such states, the property owner must show the value of the property before the damage. DP

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