

**Contractor Recovers Replacement Cost Plus
Two Years' Lost Profits for Damaged Truck**

by

James R. Keller

This article appeared in *St. Louis Construction News and Real Estate*, p., 34-35, July-August, 2009.

Missouri's Supreme Court recently decided that a contractor could recover \$68,500 to replace a truck destroyed in a traffic accident and, for the first time in Missouri, lost profits of \$120,000 for two years' of non-use of the truck. This decision is significant as Missouri's trial and appellate courts in the coming years apply this broad-reaching approach to when a contractor's lost profits can be awarded.

The case is *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, 279 S.W.3d. 179 (Mo. 2009). The decision is not couched in language that water's down its application to future cases. Rather, it appears to be potentially far reaching in support of recovery for lost profits.

The dispute started when an employee of Jokerst Paving & Contracting, Inc. (the defendant in this case) caused a traffic accident with a specialized foam insulation installation truck of plaintiff Gateway Foam Insulators, Inc. The truck is referred to as a foam rig.

Gateway owned two foam rigs. The accident destroyed the newer truck. A foam rig includes a generator, installation equipment, foam insulation chemicals and other tools and equipment. The trucks are unique.

Gateway looked into the purchase of a replacement for the destroyed foam rig but could not afford payments on a new truck. Thus, Gateway borrowed money and bought a used truck and other equipment and spent two years converting it into a foam rig.

Gateway sued Jokerst Paving for the cost to replace the destroyed truck and lost profits for the two years when the truck could not be used. Gateway also sought reimbursement for environmental costs Gateway incurred due to a chemical spill caused by the traffic accident.

Gateway argued that loss of the foam rig affected its ability to complete jobs on time and diminished its client base, thereby allowing competitors to enter the market. Also, Gateway's older rig was unreliable and this further affected business. Gateway's owners testified that their business plan called for two foam rigs on job sites.

Gateway's accountant testified that based on her knowledge of the construction market Gateway lost \$120,000 at a minimum in profits. At trial, Jokerst challenged this number as speculation and argued that Jokerst could have avoided its lost profits by more quickly replacing its foam rig. The trial court felt otherwise and awarded lost profits of \$120,000.

The trial court also awarded \$68,000 in damages to replace the truck and an additional \$12,746.72 to cover the costs of an environmental cleanup due to the collision. The \$68,000 is the "monetary equivalent" of the destroyed truck.

The Missouri Supreme Court stated that Gateway was unable to afford a ready-to-operate "turn-key" foam rig to replace the destroyed one. Thus, Gateway needed time to finance and build a replacement rig. Since a truck of this sort could not be rented, Gateway had to wait until this second truck was built by it.

A dissent from Chief Justice Laura Denvir Stith offers insight into the potential breath of this decision. "Gateway's evidence was not actually based on evidence that it was so difficult to replace the truck that it could not do so for two years, however. To the contrary, it simply said it did not have the money to replace the truck." The Chief Justice found this surprising since Gateway had been making "hundreds of thousands of dollars per year in profits right up to the time that its truck was in the accident with Jokerst."

The Chief Justice also noted that the evidence of lost profits came from Gateway's accountant who testified as to the percentage of profits in the construction industry as a whole over the next two years. The industry had 18 percent profits, she testified, so it was reasonable to assume that Gateway also would have had such profits.

She did not show that Gateway's profits had tracked the profits of the construction industry or that the profits of a foam insulator matched those of the construction industry generally. Gateway's accountant also did not show how Gateway's previous profits compared to other insulator companies.

The dissent found this evidence to be lacking to support an award of lost profits. “If the accountant’s testimony is sufficient, then in any case alleging lost profits, the plaintiff would be entitled to the industry average of profits, less variable expenses. Respectfully, that is not reasonable proof of lost profits. Rather, it is the definition of speculation,” according to the Chief Justice.

James R. Keller is a partner at Herzog Crebs LLP where he concentrates his practice on construction law, complex business disputes, real estate and ADR. He also is an arbitrator and a mediator.