

'FAIR VALUE' CAN FACTOR SPECIAL VALUE TO THE OWNER

I worked on the lower court trial, *Christopher Advertising Group, Inc. v. R & B Holding Company, Inc.* (883 So.2d 867 (Fla. 3d DCA 2004), heard by the 3rd District Court of Appeals. The reported version of the Christopher Advertising case deals with the measure of damages in the case of conversion and civil theft. The case is now used as a precedent for these types of damages.

Christopher Advertising was an advertising agency that dealt predominantly with the needs of Kendall Toyota (the operating subsidiary of R & B Holding Company, Inc.). At the time of the incidents in the case, Kendall Toyota accounted for half of the agency's business. However, by the time of the allegations, Mr. Christopher and all of his employees became employees of Kendall Toyota and the agency's business was moved onto its premises.

After a dispute, Kendall Toyota locked Mr. Christopher and his employees out of the dealership, but certain agency records remained on premises. The issue in the case involved whether the dealership converted the agency's assets.

In assessing the nature of the records at issue, the agency characterized them as a "database." Essentially, this database represented mostly old car ads placed in newspapers. Having spent a fair part of my career working on auto dealership financial matters, I can attest to the extensive amount of advertising that accompanies that business. Most dealerships spend between 4 and 8 percent of their gross margin on advertising and much of that is spent on newspaper ads.

The agency claimed that it could not conduct its advertising business for

auto dealerships without its database of previously run ads. When the old car ads were characterized as a database, they took on a new meaning and their status became somewhat blurred.

In any event, the key points made in the case are that:

1. The measure of damage in a conversion case can be viewed as the cost to re-create the asset. The appeals court acknowledged that the database is an intangible asset. Therefore, unlike in other valuation-related cases, the approach to valuing this type of asset is not related to the reasonable royalty rate or the market-driven value approaches, but instead to the measure of damages being the cost approach.

2. In certain cases, recovering for lost profits is appropriate even in the context of a conversion. The reasoning in this case is that the cost of re-creating the database would not fully compensate the agency for the alleged profits it would have made during the time the database was withheld.

Other elements of damages that are often of interest (sometimes vital) to the successful calculation of damages involve the concept of relative value. The appeals court briefly addressed this issue by citing to the Restatement (Second) of Torts, wherein it noted "a person tortuously deprived of property is entitled to damages based upon its special value to him, if that is greater than its fair market value."

Restatement (Second) of Torts (Section 927) says, "In a proper case, lost profits may be recovered as damaged (sic) for conversion." The *Christopher Advertising case* shows us that, in part, a proper case will have the following characteristics:

1. The extent of the lost profits must be



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shown with sufficient certainty; and

2. The conversion must be the legal cause of the lost profits.

Further, depending on the manner in which a case is pleaded and the counts are permitted by the court, damages may be considered by the loss sustained by the plaintiff or by the gain unlawfully obtained by the defendant. At least for the instant case, we learn that the definition of value for the plaintiff can consider special value, which is specific to the plaintiff and may have little value to an outside third party. ¹