**27.09 TEMPORARY LOST PROFITS**

The owner claims that [his] [her] [its] business lost profits as a result of the taking. You must decide whether it is more likely true than not true that:

(1) the taking caused a temporary interruption of the owner's business; and

(2) this temporary interruption caused a loss of profits; and

(3) the amount of lost profits can be determined with reasonable certainty.

If you decide that all of these things are more likely true than not true, then the government must pay the owner the amount of [his] [her] [its] lost profits and you should enter the amount on the Special Verdict Form in the space provided.

Otherwise, you should enter a "zero" on the Special Verdict Form in the space provided.

**Use Note**

When the condemnee is a lessee, the term "owner" should be replaced by the term "tenant."

**Comment**

A business may be interrupted when the government takes the property on which the business was operated. "[T]he temporary loss of profits due to business interruption directly resulting from a state's taking of the land on which the business is operated is a damage to property compensable under our constitution." State v. Hammer, 550 P.2d 820, 823 (Alaska 1976). Nothing in the court's decision suggests that a distinction should be drawn between owners and lessees.

In State v. Hammer, the court seemed to imply a duty on the condemnee to mitigate the losses: "[B]y giving precise and early notice of the date when the property must be vacated [the state] can keep the loss of profits due to necessary business interruption to a minimum." 550 P.2d at 827. However, it is not clear whether the court intended to place the burden of proof on mitigation on the condemnee or simply to comment on strategies the condemnor could employ to minimize business claims. Typically, mitigation is an issue on which the party opposing the claim carries the burden of proof. See Comment, Instruction 20.18A (Avoidable Consequences). A review of the Minnesota, Georgia, and California cases cited in Hammer does not shed further light on this issue. See 550 P.2d at 826 & 826 n.22.

To be compensable, loss of profits must be reasonably certain and must be determinable from evidence on the record and reasonable inferences therefrom. State v. Hammer, 550 P.2d at 824-25. "[T]he condemnee has the burden of proving by preponderance of the evidence the amount of profits lost as a direct result of the state's taking. . . ." Id. at 827. Analogous reasoning would require the condemnee to prove by a preponderance of the evidence that the interruption was directly caused by the taking.

Incidental benefits may offset the loss of profits only if the benefits accrue to the precise property interest affected, i.e., the profits during the interruption. State v. Hammer, 550 P.2d at 828.