

Corporate & Financial Weekly Digest

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Seventh Circuit Vacates Internet Marketer's Lost Profits Award

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The U.S. Court of Appeals for the Seventh Circuit vacated a \$5.6 million breach of contract damages award for lost profits because the plaintiff did not establish the prospective earnings of its Internet-based marketing venture with sufficient certainty.

Publications International Ltd. operates an auto guide and a related website that provide price quotes to consumers considering potential automobile purchases. The company originally derived revenue from selling sales leads generated by its website to wholesalers, who in turn sold those leads to individual automobile dealerships. Publications International then decided to sell its sales leads directly to dealerships, and it retained Smart Marketing Corp. to develop and market the direct-sales program. But technical glitches and disappointing sales hampered the project, and after five months Publications International terminated the Smart Marketing agreement. Smart Marketing sued Publications International for breach of contract and obtained a jury award of \$5.6 million for lost profits.

Publications International appealed the damages award, arguing that the amount was speculative because the direct-sales program was an unestablished venture and because Smart Marketing had lost money during its brief time in operation. Smart Marketing contended that the relevant market was sufficiently developed, as Publications International had previously sold the same leads through wholesalers, and that its losses were attributable to start-up costs. The Seventh Circuit ruled that prior sales of Internet-generated leads through wholesalers did not demonstrate that the direct-sales program was feasible and that Smart Marketing had failed to establish how successful the venture would have been. The case was remanded for retrial on damages. (*Smart Marketing Group Inc. v. Publications Intern. Ltd.*, 2010 WL 4237443 (7th Cir. Oct. 28, 2010))

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