We all want to win a case with that "smoking gun." The e-mail or letter that declares a parties unvarnished evil intent is rarely found. But in Tower v. Tower, reported November 2, 2012 by the Maryland Court of Appeals, the case centered on just such a "smoking gun."

In a case involving lost profit claims for breach of various contracts for development of a building project, the defendants hid their reasons for breaching the contract behind claims that the advice of counsel was not discoverable. Well, you just don't get to hide behind an "advice of counsel" defense unless you are willing to share the actual advice that was given. This defendant fought hammer and tong to avoid that disclosure. And when the last discovery motion was decided, the following e-mail from the defendant to his lawyers floated to the surface of the discovery cesspool and was read by all:

> "just make sure you stop the bastards...Whichever way you choose to go. We need some leverage."

Outstanding! We trial lawyers live through dozens of routine cases to find a nugget like this one! This stunning admission helped lead the jury to award over $36 Million in damages to the plaintiffs and against the authors of the e-mail.

On appeal, Maryland's highest court was asked to provide guidance on a very common issue, post-recession: Under what circumstances should a trial court permit (or require) evidence of post-breach market conditions affecting a claim for lost profits?

It's a fancy way to ask whether a plaintiff can benefit from a rise in market prices, and whether a defendant can minimize it's loss by demonstrating a drop in market prices.

In this case, the defendants who authored the "bastards" e-mail sought to show that the plaintiffs would have made no profits, even absent a breach of contract, because the real estate market had declined after 2008. Their lawyer argued that "the world has changed." and "the cataclysmic events pf 2008" prevented any conceivable profit.

The trial court did not let the defendant's experts testify. This decision was upheld on appeal to the intermediate appellate court, on the general principle that "contract damages are measured at the time of breach."

Maryland's highest appellate court performed an exhaustive review of general versus consequential damages, and ruled that

> ...consequential lost profits are calculated with reference to what the parties can reasonably be said to have anticipated when they entered into the contract. Thus, circumstances that cannot be said to

> have been "known to the parties" when they contracted--such as a post breach boom or bust in the market-- should not affect the measure of consequential damages that would "ordinarily arise" according to the "intrinsic nature of the contract."

What's it mean for your lost profits case, in a post-cataclysmic economy? Simply this- If the parties to your contract cannot be said to have foreseen a rise or fall in the marketplace, then evidence of post-breach boom or bust is not relevant. And if evidence is not relevant, then it is within the sound discretion of the trial court to exclude the evidence. That means the jury will never hear it.

But do not lose heart, aggrieved friends! Contracts can, indeed, be drafted with terms that allocate the risk of future market swings between the parties. And many do. But even if your contract does not have this language, the evidence you need may also be in the conduct of the parties, after the contract was signed. The parties to the contract often change terms as they perform a contract, by word and deed. As Young & Valkenet co-founder Thomas G. Young, III was fond to say, "the signed contract is often the beginning of negotiations."

Think you have a claim for lost profits? Bring it by, and let's have a look.