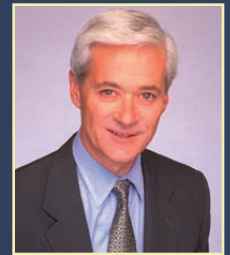


DUNN ON DAMAGES

THE ECONOMIC DAMAGES REPORT FOR LITIGATORS AND EXPERTS



ROBERT L. DUNN

Letter from the Editor

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Each issue of *Dunn on Damages* — The Economic Damages Report for Litigators and Experts will have a Letter from the Editor to you, our subscribers, with my comments about the contents of the issue and perhaps other subjects. In this first issue of *Dunn on Damages*, I write at more length on the purpose of the publication and my perception of the need that it will fill.

I believe that I have unique qualifications to write and edit *Dunn on Damages*. I practiced law specializing in commercial litigation for over 30 years, litigating cases that presented sophisticated damages issues. Examples include a successful property tax appeal in which the valuation of American Telephone and Telegraph Company in California was in issue; securities law cases requiring valuation of privately held and publicly traded securities; and litigation claiming lost profits damages. At the same time, I have written three books on damages subjects: *Recovery of Damages for Lost Profits*, now in its sixth edition; *Recovery of Damages for Fraud*, now in its third edition; and *Winning with Expert Witnesses in Commercial Litigation*, a revision of *Expert Witnesses— Law and Practice*. I will bring this combination of practice in the real world of the courtroom and legal scholarship to *Dunn on Damages*.

Continued on next page

EXPERT WITNESS DISCOVERY RESTRICTED— RULE 26 AMENDED

Important amendments to Federal Rules of Civil Procedure, Rule 26, have been approved by the United States Supreme Court, and became effective December 1, 2010. These amendments will protect certain attorney-expert communications from discovery and restrict discovery of draft expert witness reports. The Rule amendments accomplish these results by indirect wording. The attorney or expert analyzing the amendments must walk through the changes by reference to the accompanying Committee Note to understand what has been accomplished and the intent of the drafters behind the changes. The amendments will fundamentally change the ways in which experts and attorneys interact and the approaches taken by both to trial preparation and discovery.

THE PURPOSE OF THE AMENDMENTS

The Committee Note opens by stating that: “Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery.” The Rule drafters have, in fact, been struggling with expert witness discovery at least since 1993, when Rule 26 was extensively amended to provide for mandatory disclosure of expert witness reports and for expert witness depositions. These amendments backtrack somewhat from the consequences of the 1993 changes.

The Committee Note recognizes this:
Many courts read the disclosure provision to authorize discovery of all communications between coun-

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Occasionally I am asked how I came to write *Recovery of Damages for Lost Profits*, my flagship book, now colloquially called *Dunn on Damages*. This is what set me on that path. After working on several lost profits damages cases as a very young lawyer, I was struck by the absence of any secondary sources— books, law review articles, or other commentary— analyzing lost profits damages issues. I put together the briefs I had written on my cases into a law review article, "Recovery of Lost Profits Damages in California," which was published in the *University of San Francisco Law Review*. A law book publisher saw the article and encouraged me to write a book with national coverage. I started on it, was in too deep to quit when I realized what I had undertaken, and the first slim volume was created.

There is more literature today about calculation and proof of economic damages but still *nothing* like the content that we intend to provide to our subscribers in *Dunn on Damages*. The journal will fill that void. *Dunn on Damages* will give our readers in-depth analysis, practical advice, and commentary on important and controversial subjects. We will discuss the court cases that contribute important analysis of economic damages theory or that decide unsettled questions of law. We will draw from the law the practical applications that are crucial for litigators and experts alike. We will look for implications for litigators and experts that may not be apparent and that others have overlooked. Because of our electronic format, we can be absolutely up-to-date, keeping our readers current on the new developments they must know about.

We have assembled a stellar Panel of Experts, whose charter members include both attorneys and damages experts. The Panel includes contributors from all areas in which economic damages are claimed. *Dunn on Damages* will contain their writing and analyses. Our journal will not be just me, although I will contribute at least one article to every issue.

This issue includes two articles that I have written. The first is "Expert

Witness Discovery Restricted— Rule 26 Amended." This article deals with the amendments to Federal Rules of Procedure Rule 26, the Rule governing presentation of expert testimony in federal court and those state courts that have adopted the Federal Rules. The amendments are effective December 1, 2010, so the article is time sensitive. An understanding of the amendments and their implications is essential to every practitioner. The article explores those implications, which are not obvious on the surface of the language, and suggests subtle issues that every attorney and expert will have to confront in applying the amended rule. My second article, "Using Lay Opinion Testimony to Prove Economic Damages," analyzes the use of so-called lay opinion testimony— that is, testimony to economic damages issues by business owners and others who would not ordinarily be considered qualified experts. Recent case law, summarized in the article, appears to restrict what had been previously considered acceptable in court.

The issue contains as its parallel lead article, "Lost Profits and Lost Business Value— Differing Damages Measures" by Everett P. Harry. Can economic damages calculations be *ex post* or must they always be *ex ante*? Virtually every economic damages projection presents the issue whether post-injury facts can be considered and the resolution of this question has been vigorously debated for at least 20 years. Next, Ralph Q. Summerford and Jeffrey N. Windham contribute "Reliability of Business Plans to Support Lost Profits Damages." The article cites interesting recent case law and suggests factors that may make use of business plans appropriate— or not. From Richard M. Wise we have "Cross-Examination of Plaintiff's Lost Profits Damages Expert," a subject of never-ending interest to attorneys and experts. This article includes a useful review of elements of proof of a lost profits damages claim. Finally, William Norman has contributed "A Potential Checklist for Lender-Borrower Disputes in Credit Crisis Litigation," a topic that could not be more timely or important.

Continued on page 22

sel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts— one for purposes of consultation and another to testify at trial At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

The Committee could have gone further. The reality for too many experts and attorneys has been an undesirable culture of discreet concealment. Every complex assignment would seem to require written communications between expert and attorney and notes and drafts by the expert. Yet often in deposition the examining attorney finds no written trail. All writings have been disposed of. The expert recalls no documents besides the report that has been already produced, a thin file indeed. Even an attorney determined enough to subpoena the computer on which the report has been produced may find nothing. All of this, professionals can hope, will no longer be necessary.

THE AMENDMENTS TO RULE 26(a)(2)

Rule 26(a)(2) has been amended in subsections (B), (C), and (D). The subsection (C) amendments are directed towards discovery from experts who are not required to provide reports— most com-



monly, treating physicians and employees of a party who do not regularly provide expert testimony. These experts now must provide summary disclosure of their opinions and supporting facts, but not full reports. The subsection (D) amendments provide that the time limits for disclosure of rebuttal evidence apply to subsection (C) disclosures. It is the amendment to subsection (B), apparently innocuous but deceptively important, that operates on expert discovery.

Subsection (B) is amended to provide that the expert's report must disclose "the facts or data considered by the witness in forming" the expert's opinions rather than disclosing the "data or other information" previously mandated by the Rule.

The Committee Note states:

This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures of attorney-expert communications. The refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data 'considered' by the expert in forming the disclosure to be expressed, not only those relied on by the expert.

The Rule 26(b)(4) amendments (discussed below) that restrict expert discovery cross-reference both amended Rule 26(a)(2) and Rules 26(b)(3)(A) and (B), which define work-product protection. The Committee Note appears to conclude that both cross-references are required to effect the intent of the amendments to prevent discovery of the

attorney's theories and conclusions. The innocent reader looking only at the subtle change in wording from "data or other information" to "facts or data" might not suspect the important implications that the Committee intended from the amendment. A judge looking at a motion to compel answers also might not see what was intended without explanation. The Committee nowhere defines "data" or explains why "data" are not included within "facts" or what the difference is between the two terms.

THE AMENDMENT TO RULE 26(b)(4) PROTECTING DRAFT EXPERT REPORTS

The first amendment to Rule 26(b)(4) adds new subsection (B):

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

The Committee Note states that this subsection "is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures." These subsections "ordinarily" protect "documents. . . prepared in anticipation of litigation or for trial" from discovery. The Note continues that the protection applies to all witnesses identified as experts, whether they provide reports or only disclosures, and regardless of the form of the draft, whether written, electronic, or otherwise.

The work-product doctrine is not an evidentiary privilege, like the privilege against self-incrimination or the attorney-client privilege. An evidentiary privilege is absolute, or nearly so (almost no rule is without some exception). The work-product doctrine has big loopholes. Work-product protection may not be a guarantee of nondisclosure. Attorneys and experts must keep this in mind.

The loopholes are, in general, embodied in Rule 26(b)(3), which states in part:

But, subject to Rule 26(b)(4), these materials [documents prepared in anticipation of litigation] may be

Continued on next page

discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

This exception to the work-product doctrine seems unlikely to justify a request for production of drafts of economic damages expert witness reports but no discussion of the new Rule would be complete without mentioning it. After all, the Note drafters presumably had some purpose in retaining the exception.

The Committee Note recognizes that application of the exception will be unusual: "It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony."

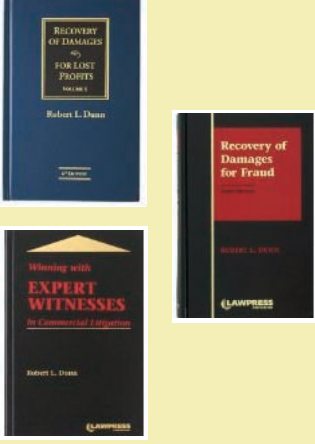
There is yet a further exception in Rule 26(b)(3) to this exception. Protection will still be afforded to the attorney's "mental impressions, conclusions, opinions or legal theories" even if work product discovery is ordered. The Committee Note makes this point: "In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26 (b)(3)(B)." However, this rule-within-a-rule becomes important in application of the second amendment to Rule 26(b)(4), to be discussed below.

THE AMENDMENT TO RULE 26(b)(4) PROTECTING COMMUNICATIONS BETWEEN ATTORNEY AND EXPERT

The second amendment to Rule 26(b)(4) adds new subsection (C):

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26 (a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

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- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

The Committee Note explains:

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery.

The Committee Note also observes that the protection does not extend to experts that are not required to submit reports—subsection (C) experts. And: "The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine." The Committee Note observes, in general terms, that the new subsections do not restrict the usual discovery into the development and basis for the expert's opinion and possible alternative approaches that the expert may

or may not have considered. The Note drafters seem to be concerned that the three exceptions will swallow the Rule:

But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included within a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

The first attorney-expert communication exception is for discovery of expert witness compensation which is, of course, a standard subject of inquiry. Attorneys ordinarily want to bring out the expert's compensation on cross-examination at trial, although the effect is often blunted by the increasing sophistication of juries on the subject and the fact that, when the cross-examiner's own expert is examined, it is disclosed that that expert's compensation is comparable— or even more.

The Committee Note states:

First, under Rule 26(b)(4)(C)(i) attorney-expert-communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(A)(2)(b)(vi). It is not limited to compensation for work forming the opinions to be expressed, but ex-

Continued on next page

tends to all compensation for the study and testimony provided in relation to the action. . . . The objective is to permit full inquiry into such potential sources of bias.

The second attorney-expert communication exception is for discovery identifying the “facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed.” Experts will almost always be provided with factual information by the attorney retaining them. This is unexceptional. The limitation of discovery to “facts or data” rather than the old formulation “data or other information” seems intended to cut off inquiry into the attorney’s “mental impressions, conclusions, opinions or legal theories.” Those remain protected work product. The reference to facts or data “that the expert considered” may be read as broader than facts or data that the expert relied on. Presumably, the expert “considered” everything the attorney turned over; that would be the attorney’s purpose. Most attorneys would be unhappy with an expert that did not at least look at and think about “facts or data” the expert was provided. But the expert need not necessarily have relied on everything that was provided. The limitation to facts or data “considered” has minimal effect. The Committee Note states:

Second, under Rule 26(b)(4)(C)(ii) discovery regarding attorney-expert communications is permitted to identify facts or data the party’s attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications ‘identifying’ the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

The third attorney-expert communication is for discovery identifying “assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.” Assumptions made by experts at the request of counsel are common elements of expert preparation for trial testimony.

But assumptions can be important subjects of cross-examination at trial and the experienced cross-examining attorney will always try to develop a list of these in discovery. If any assumption on which the expert’s opinion is based turns out to lack evidentiary support, that may be grounds for exclusion of the opinion. Here, the limitation is to assumptions “relied on” rather than only “considered.” The distinction is important as the expert may have rejected assumptions provided after making an investigation. Presumably, these would not have to be “identified.” They would not form a part of the basis for the expert’s opinion.

The Committee Note states:

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party’s attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert’s conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

SOME CONCLUSORY REMARKS

The Federal Rules of Civil Procedure have effect only in federal court, but many states have adopted the Federal Rules, verbatim or with modifications. State versions may be modified to conform to these amendments, or they may not. Practitioners should check their state rules in state-court litigation to determine the extent of expert witness discovery permitted.

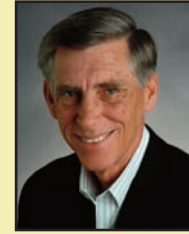
Attorneys have in some instances entered into stipulations restricting expert witness discovery equally for both sides. The objective is to accomplish by agreement something like what amended Rule 26 provides. There will still be scope for these agreements in

state-court litigation wherever state rules are not amended to conform to the Rule 26 amendments or do not provide sufficient protection from expert witness discovery to enable unhindered adequate trial preparation.

While amended Rule 26 protects draft reports from discovery, it offers no protection for the expert’s notes, drafts and preliminary calculations. These remain discoverable. If opposing counsel can obtain full production of all the work that preceded the draft report, not too much may be accomplished by protecting the draft report from discovery. Perhaps counsel can argue that the expert’s notes, calculations and drafts are equivalent to a draft report. Or the expert might possibly put all his or her important preliminary work into a document called “Draft Report.” The draft report, after all, is a work in progress. The term is not defined, although the language of the Rule (“regardless of the form in which the draft is recorded”) seems to suggest a liberal interpretation, and it will remain for the courts to fill in what is meant.

Amended Rule 26 fits together like a precision machine, but it will take some study for anyone unfamiliar with the amendments to understand how the Rule works and how it is intended to work. The complex subsection format with multiple cross-references is reminiscent of the Internal Revenue Code. Attorneys must be prepared to explain to judges how the Rule subsections function together and operate. There is likely to be litigation over interpretation of the new provisions of the Rule. The Committee Note is helpful but cannot possibly anticipate all the problems that may arise. This article has attempted to unpack the provisions of the amended Rule and to juxtapose them with the applicable comments from the Committee Note. Practitioners are advised, however, to review the amended Rule and the entire Committee Note carefully to determine how to proceed in future expert witness assignments. It is no overstatement to say that the Rule 26 amendments will fundamentally change practice in the federal courts for both attorneys and experts in any case in which expert testimony is involved. ~

LOST PROFITS AND LOST BUSINESS VALUE—DIFFERING DAMAGES MEASURES



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“Today most scientists would say a law of nature is a rule that is based upon an observed regularity and provides predictions that go beyond the immediate situations upon which it is based.”¹

Some experts argue that certain principles of finance and economics developed based upon our free market system, including its capital markets, necessarily guide and constrain the calculation of business damages for litigation. In particular, these experts believe that lost profits damages cannot materially exceed, if at all, the lost business value of an enterprise. The debate on this topic continues perhaps, in part, because a growing number of professionals are attaining business valuation accreditations and applying the related body of knowledge for free market asset valuations to litigation damages computation assignments.

Lost profits or lost business value damages are determined for the alleged legal wrongdoing, which may entail facts and circumstances contradicting the “immediate situations” observed in a free market system. Therefore, certain “laws” or principles derived from the “real world” (not related to litigation) may or may not apply to the computation of damages. The expert is advised to select principles of finance and economics developed from free market observations and “immediate situations” that best parallel and fit the facts and circumstances of the subject legal dispute. From the array of choices, certain such principles are not inherently superior and controlling compared to others.

Business damages may be expressed as the value of a lost stream of economic income with a valuation date as of or following the date of defendant’s legal wrongdoing. Plaintiff’s loss may be measured either as lost profits or as the lost business value, particularly when the lost business value is determined based upon the income approach. Since

both lost profits and lost business value may be based upon the discounted cash flow methodology, some practitioners believe the alternative damages values rely upon the same financial and economic principles, including a discount rate commensurate with the risk plaintiff would have borne. As a result, some experts opine that the related damages amounts should be approximately equal but, in any event, lost profits damages cannot materially exceed the lost business value.

By using the WACC...the lost business value and the lost profits are the same (after adjusting for taxes). This is as it should be. ... Economically, it is difficult to comprehend that the present value of all the profits of a business enterprise would be greater than the tax-adjusted fair market value of the entire business.²

PREMISES FOR PARITY IN APPROACHES

Lost profits and lost business value damages will be equal only if the alternative computations employ the same premises and calculation factors, including but not limited to the same valuation date, standard of value, information set, unresolved risk factors, loss period, discount rate and offsetting mitigation. If parity or equality exists for all such considerations or variables, then lost business value and lost profits damages are merely mirror discounted cash flow exercises. As a practical matter, opposing experts seldom agree on all damages model premises, calculation factors and input data. More importantly, the facts and circumstances related to a particular case, coupled with the court’s objective to measure plaintiff’s loss of “but for”

economic income in terms of the potential award amount needed to make the plaintiff economically whole, may require a lost profits damages computation that is markedly different than a standard business valuation.

LOST BUSINESS VALUE AND LOST PROFITS MAY BE DIFFERENT

Lost business value and lost profits often are different approaches to measuring damages, which may result in markedly different damages amounts. Lost profits damages need not be constrained by plaintiff’s alleged lost business value, particularly when measured as of the date of defendant’s legal wrongdoing. In fact, lost profits measured on or about the trial date may be well below (e.g., \$0 damages) or significantly above the lost business value as of the date of legal wrongdoing.

Damages amount differences arise, among other potential reasons, because business valuations may be based upon less information than lost profits damages, some or all risks contemplated in a violation-date business valuation may be resolved by the trier of fact, or the discount rate used for the business valuation to reflect an asset transfer price from a willing seller to a willing buyer is greater than the discount rate appropriate for a plaintiff suffering a constructive forced sale of an asset. A standard business valuation is defined by the following precepts, which may not apply to lost profits determined for litigation purposes.

- A business valuation is based upon the information known or reasonably knowable as of the valuation date, which typically for litigation is the date of defendant’s alleged wrongdoing and constructive or actual taking of plaintiff’s asset.

Continued on next page

- The standard business valuation measures plaintiff's loss using finance and economic principles developed from free market observations about asset pricing between willing buyers and willing sellers, including the related observed or determinable discount rates.

EX ANTE V. EX POST INFORMATION AND DAMAGES

A business valuation uses only the information known or reasonably knowable as of the valuation date, even if the valuation specialist performs the service at a much later point in time. Likewise, *ex ante* damages are based upon the information available or reasonably knowable through the date of defendant's wrongdoing. Franklin M. Fisher and Craig R. Romaine ("F&R") argued for *ex ante* damages measurement in their seminal article "Janis Joplin's Yearbook and the Theory of Damages."³ F&R contend that the objective is to make the plaintiff whole as of the time of the violation; a plaintiff should not be compensated for risks it did not bear; lost economic income should be discounted to t=0 at a risk-inclusive rate; the t=0 loss should be subject to a risk-free rate to trial; and "Hindsight should not be used."

Konrad Bonsack promptly responded to the F&R article.⁴ Bonsack traced the development of legal theory from medieval times and noted a shift from *ex ante* to *ex post* damages determination methodologies. Bonsack explained and defended *ex post* damages considering that the objective should be to "Restore the plaintiff ... for all time"; injury occurs over time and the violation and trial are not simultaneous; a legal violation is not a legitimate asset exchange and may be the constructive passage of title and forced sale; the owner had the rights to both the risks and rewards of the lost asset; the passage of time may bring to light the asset's intrinsic value; and "Hindsight should be used," which returns either the risks or the rewards of the asset to the plaintiff.

COURT DECISIONS GENERALLY FAVOR THE EX POST METHODOLOGY FOR COMPUTING DAMAGES



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Basic listings and profiles are available without charge. Robert L. Dunn is a CI Strategic Advisor and Everett P. Harry is the CI President.

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Written court decisions tend to adopt and support the *ex post* methodology, but exceptions exist. Although the choice between the *ex ante* and *ex post* methodologies for measuring damages still varies among legal jurisdictions, the trend for many decades (if not centuries) has been toward use of the *ex post* methodology.

Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within.⁵

There are few significant cases that reject the admission of *ex post* data to assist the trier of fact's determination of lost past profits or lost future profits.⁶

In summation, substantial case law indicates that experts can, and indeed should, incorporate all information, even information relating to events that occurred after the date of damage or after the date of hypothetical negotiation in the damages analysis. One could argue that, if the goal is to ascertain the amount of damages that would return the plaintiff to the same position it would have been in but for the unlawful act, the expert should use all available information in reconstructing the but-for-world so that the resulting award reflects all the events that have contributed to or limited the damages suffered by the plaintiff.⁷

DISCOUNT RATES FOR LOST BUSINESS VALUES OR LOST PROFITS

Discount rates are used for a variety of purposes and under differing circumstances outside of litigation. These discount rates expressed as percentages vary from single to higher double-digits. Achieved rates of return on actual investments can reach the 20-30 percent range, such as for successful venture capital firms. As historical returns, achieved returns relate to risk-resolved streams of economic income. On the other hand, prospective investments often are valued with discount rates that include additional premia for unresolved risk that has not been removed from the income projection. For example, discount rates of up to 70 or 80 percent may be applied to initial venture capital investment opportunities or early-stage, extremely high-risk pharmaceutical technologies. Of course, if such hoped-for income streams truly were adjusted to an *expected value*, as defined in business valuation and other literature, then the valuation discount rates could more closely approximate the relevant, achieved rates as reported by such services as Morningstar.

Lost economic income projections often are presented in the litigation arena, either as the basis for a business valuation or for the determination of lost profits. The "but for" projection for either approach likely will be challenged by opposing counsel and witnesses. For example, defense counsel may argue that

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“Conversations with the Masters”

Bob Dunn and Everett Harry appear in the NACVA series, “Conversations with the Masters.”

This program was videotaped at the NACVA Annual Consultants' Conference in June, 2010, at which Bob and Ev gave a two-hour presentation. The brief video covers a range of subjects from discounting future damages to present value to the use of business valuation techniques to calculate lost profits damages.

To see the video, and hear Bob and Ev, click on this link:

CLICK HERE

plaintiff's alleged lost business value or lost profits damages is based upon overly optimistic and unattainable premises in the “but for” world. To a large or possibly full extent, the trier of fact may resolve these issues of risk for the projected or “but for” stream of economic income. If the trier of fact is unable to resolve all of the projection uncertainty, then the discount rate may contain a factor or factors to account for unresolved risk or risk that is not otherwise addressed in the projection model for lost economic income.

Even assuming that the trier of fact can resolve all material risk in the projected stream of economic income used as the foundation for either a business valuation or lost profits computation, a more important issue arises. Should a trier of fact-determined highly-certain stream of projected economic income be discounted at 1) the rate of return that an investor would have sought to purchase the subject asset in a non-litigation, free market exchange, or 2) at a relatively lower rate to recognize and quantify plaintiff's loss by constructive forced sale of the asset's ability to return an element of owner economic profit above plaintiff's marginal cost of capital?

The issue of reasonable mitigation, a legal duty of plaintiff, may complicate the answer to the foregoing

question. From the F&R perspective, mitigation alternatives matter little since the lost business value is established at the time of the purported legal violation, which relieved the plaintiff of any asset-holding risk; therefore, F&R contend that a risk-free rate of return from the date of wrongdoing to the trial is fair compensation to the plaintiff. Of course, if plaintiff had not lost the asset, then the plaintiff might have earned a much more favorable rate of return to trial possibly when corroborated by *ex post* or hindsight information. For simplicity and focus on the inquiry posed above, assume that the damages expert is selecting a discount rate only for future losses from the date of trial, the projected lost stream of economic income is highly certain according to the trier of fact, and plaintiff cannot mitigate its losses by buying a like business opportunity on or about the trial date. The question still is valid. Under these premises, business valuation and lost profits damages may employ different discount rates.

- Business valuation damages would be measured using a free market-based rate of return, such as the relevant industry weighted average cost of capital (“WACC”), arguably because the plaintiff will not bear the risk of holding the asset into the future.
- Lost profits damages may be measured at a lesser rate, such as plaintiff's marginal cost of capital. This approach recognizes that the difference between the subject WACC and the plaintiff's marginal cost of capital (e.g., borrowing rate) represents an incremental owner economic profit taken by defendant through a constructive forced sale that is not replaceable given the assumed lack of mitigation opportunities.

H.G. Acuna and F.A. Garb discussed two types of economic evaluations to estimate damages.⁸ The authors refer to the two approaches as fair market value (“FMV”) and loss of bargain (“LOB”), which can result in a very large difference in the computed loss. The authors identify the following characteristics of LOB damages, for example, as related to breaches of contract.

- Recognizes the agreement terms as if fulfilled, which may significantly impact risk factors, discount factors, market assumptions and other parameters.
- Recognizes no willing seller expecting a “profit transfer” to the buyer.
- Recognizes all expected economic profit as part of victim's denied benefits and doesn't discount to FMV levels.
- Uses an alternative discount rate, such as cost of debt.
- Does not penalize the victim for having other opportunities in its portfolio for reinvestment.
- If a highly certain cash flow, then use a lower risk discount rate to represent the cost of money.

The authors explain their reasoning as exemplified below.

A FMV approach would not be the appropriate measurement of damages for a LOB resulting from the breach of contract by one of the parties.⁹

In a FMV, calculations are made to determine how much the market would pay for a specific asset. These calculations inherently transfer a profit component from the asset to the potential buyer. ... A LOB calculation recognizes all profit as part of the benefits denied to the victim and, therefore, considers it inappropriate to discount future net revenues to FMV levels.¹⁰

ANCHOR SAVINGS BANK, FSB V. UNITED STATES, UNITED STATES COURT OF APPEALS, MARCH 10, 2010, 597 F.3D 1356— A RECENT DECISION

Anchor Savings bought four failing thrifts from 1982-1985 and was permitted to capitalize negative “supervisory goodwill” to the extent of \$550 million toward regulatory capital requirements. In June 1988, Anchor Savings bought Residential Funding Corporation (“RFC”). In August 1989, Congress enacted FIRREA and reversed the treatment of negative goodwill, which caused Anchor Savings to be undercapitalized. As a result, in March 1990, RFC was sold to GMAC for \$64.4
Continued on next page

million. In January 1995, Anchor filed suit in the Court of Federal Claims and later was awarded \$356.5 million—90% was attributable to sale of RFC and was based on the lost profits for RFC after the sale to GMAC.

The Government (defendant) explicitly argued that business damages should be determined by and limited to the fair market value of the disposed enterprise at the time of its sale. According to the Government, citing other cases to support its position, the “trial court erred as a matter of law by considering post-breach evidence, when the only relevant evidence concerns RFC’s market value at the time of the March 1990 sale.” More explicitly, the Government offered the following arguments.

- “(D)amages for the loss of ‘income producing property’ must be measured by the asset’s market value as of the time the property is lost, not by the loss of the profits the asset could have produced in the future.”
- “(T)he market valuation should already reflect RFC’s expected future risks and future profit stream.”

The Court of Appeals rejected the Government’s arguments and found that lost profits damages were more appropriate given the case facts.

- The court “considered the two permissible methods ... Ultimately, the court concluded that the most accurate approach was to base the award of damages on RFC’s actual post-breach profits.”
- The objective is to “make the non-breaching party whole. One way to accomplish that objective is to award ‘expectancy damages’ ... Expectancy damages ‘are often equated with lost profits ...’.”
- “Neither decision mandates that one measurement method must invariably be used.” “Neither *Lincoln* nor any of our other *Winstar* decisions bars the court from considering post-breach evidence.”
- “(I)t seems especially and unreasonably static and wooden to limit the expectation interest to the then-present value of individual assets.”

The Court of Appeals acknowledged that the RFC sales price reflected distressed sale conditions (i.e., “blood in the water”

or “veritable fire sale”) but, regardless, found it inappropriate to measure Anchor Saving’s damages as the FMV of RFC at the time of asset disposition.

- “As the Supreme Court has held, ‘fair market value presumes conditions that, by definition, simply do not obtain in the context of a forced sale’” and “thrift’s lost profits, as expectancy damages related to forced sale ...”
- “(T)he breach deprived Anchor of the profits it would have obtained from retaining RFC while at the same time preventing Anchor from investing the proceeds of the RFC sale in a similarly profitable enterprise.”
- “In effect, that meant that the proceeds of the RFC sale lost much of their value as a potential source of profit, and thus that the difference between the fair market value of RFC and the proceeds from the sale was not necessarily a reliable measure of Anchor’s loss from the breach.”

SELECTING A DAMAGES MEASUREMENT APPROACH AND DISCOUNT RATE

Business damages may be determined using alternative methodologies and discount rates. The expert’s choices are not necessarily limited or constrained by certain purported “laws” or principles of finance and economics when derived from

“immediate situations” not germane to a plaintiff forced away from its “but for” world. Instead, an expert may select from a range of theories, practices and metrics developed outside of the litigation system. For example, rates of return like risk-free, cost of debt and WACC are all evidenced in and derived from the capital markets.

In general, courts have displayed wisdom in neither dictating that certain methodologies or discount rates are preferable for the measurement of business damages nor ruling that certain financial or economic principles impose limits on damage amounts computed using one methodology versus another. Rather, courts have exhibited prudence in seeking harmony among the damages methodology, legal precedents, case facts and the financial award appropriate to make the plaintiff economically whole. As appropriate, the expert may discuss and explore such matters with the attorney-client in the process of selecting a damages computation approach. As a result, the expert may find that at times plaintiff’s damages are better measured by the lost business value (e.g., FMV) at the time of legal wrongdoing but for other cases, like Anchor Savings, the damages are better measured by a lost profits approach not limited to the lost business value. ~

“Each theory can describe and explain certain properties, and neither theory can be said to be better or more real than the other. Regarding the laws of the universe, what we can say is this: There seems to be no single mathematical model or theory than can describe every aspect of the universe.”¹¹

¹ Stephen Hawking and Leonard Mlodinow, *The Grand Design*, Bantam Books, New York, 2010, p. 27.

² Brian P. Brinig and Jeffrey H. Kinrich, “Discount Rate, Risk & Economic Damages: Practical Considerations,” *Business Valuation Update*, September 2009.

³ Franklin M. Fisher and Craig R. Romaine (“F&R”) argued for ex ante damages measurement in their seminal article, “Janis Joplin’s Yearbook and the Theory of Damages,” *Journal of Accounting, Auditing & Finance*, Winter 1990.

⁴ Konrad Bonsack promptly responded to the F&R article in “Damages Assessment, Janis Joplin’s Yearbook, and the Pie-Powder Court,” *George Mason University Law Review*, Fall 1990.

⁵ U.S. Supreme Court, *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933).

⁶ George P. Roach, “Correcting Uncertain Prophecies: An Analysis of Business Consequential Damages,” *The Review of Litigation*, University of Texas School of Law Publications, Winter 2003, p. 47.

⁷ Michael J. Wagner, Michael K. Dunbar and Roman L. Weil, “Ex Ante Versus Ex Post Damages Calculations,” *Litigation Services Handbook*, Fourth Edition, John Wiley & Sons, Inc., 2007, pp. 8-20.

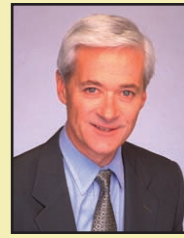
⁸ H.G. Acuna and F. A. Garb, “Quantification of Economic Damages Resulting From a Breach of Joint Venture or Joint Operating Agreement,” Society of Petroleum Engineers paper #SPE 52961, 1999.

⁹ *Ibid*, p. 1.

¹⁰ *Ibid*, p. 2.

¹¹ Hawking, p. 58.

USING LAY OPINION TESTIMONY TO PROVE ECONOMIC DAMAGES



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Can a plaintiff prove economic damages, not by expert testimony, but through lay opinion testimony by plaintiff or by plaintiff's owner or executive? A long series of cases has permitted lay opinion testimony to economic damages. These cases appear to rest on case law dating back well into the 19th century that permits an owner of property to testify to its value, even lacking any expertise in property valuation. The owner is presumed to be familiar with the property and therefore qualified, simply by being the owner, to testify to its value. It is debatable whether this proposition holds true in today's world and even more debatable whether it should be extended to permit testimony to the amount of economic damages associated with the loss of benefits expected to be derived from the property. In only the last year or so, seven decisions have come down excluding or affirming the exclusion of lay

opinion testimony to economic damages, or rejecting the testimony as inadequate. The day of the non-expert's testimony to economic damages may be ending. This article will examine this recent case law.

THE APPLICABLE RULES OF EVIDENCE

Use of testimony by so-called lay experts is governed in federal court and in state courts that have adopted the Federal Rules of Evidence by Evidence Rule 701.

That Rule reads:

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of

the witness' testimony or the determination of a fact in issue, *and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.* [Emphasis supplied.]

The italicized language was added by amendment in 2000. Rule 702 refers to testimony by qualified experts.

The Advisory Committee Notes state the purpose of the amendment:

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

But the Notes disclaim any intent to eliminate the admission of lay opinion testimony to economic damages:

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. See, e.g. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an

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expert, but because of the specialized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.

As the Notes suggest, the leading case affirming lay opinion testimony to economic damages was *Lightning Lube, Inc. v. Witco Corp.*, supra. This was an action by Lightning Lube, a franchisor of auto service centers, for tortious interference with its business and other claims. Lightning Lube's sole owner testified at trial to lost profits arising from loss of franchise contracts. The business owner had been denied, before trial, qualification as an expert to testify to lost profits damages. Nonetheless, the court held admission of the business owner's lay opinion testimony at trial not to have been error and affirmed a multi-million dollar damage judgment for Lightning Lube. Proponents of lay opinion testimony since *Lightning Lube* invariably rely on *Lightning Lube*. But Advisory Committee Notes or no, the case was decided under a different Rule 701 and opponents of admission of the lay opinion testimony often take pains to point that out.

THE RECENT APPELLATE COURT CASES

US Salt, Inc. v. Broken Arrow, Inc., 563 F.3d 687 (8th Cir. 2009) (Minnesota law), was an action by the buyer of salt against the seller alleging breach of the contract of sale. The buyer intended to use the salt to re-enter the water conditioning business after an absence of several years. The buyer attempted to prove lost profits damages by lay opinion testimony of its president and by independent expert testimony relying on assumptions supplied by its president. The district court excluded the testimony of both and granted summary judgment for the seller. Affirming, the court recognized that there are limits even on lay opinion testimony (563 F.3d at 690):

U.S. Salt first argues that Johnson as president of U.S. Salt is qualified to provide lay opinion testimony as to lost profits because of his unique understanding of U.S. Salt's operations and finances. Broken Arrow argues that Johnson's proposed testimony is too speculative to justify a damages award since it was based

on optimistic projections for an unproven enterprise. . . . [Citations omitted.] We conclude that Johnson's proposed testimony regarding lost profits amounts to speculation and conjecture because he failed to perform any analysis of a viable market for the solar salt he expected to receive from Broken Arrow and he lacked relevant and recent activity in the solar salt market. [Citations omitted.] Notably, the record demonstrates that Johnson could not identify any customer interested in buying from U.S. Salt a specific amount of solar salt at a specific price and that U.S. Salt had not been active in the solar salt market since the late 1980s. [Citations omitted.]

The court distinguished *Lightning Lube, Inc. v. Witco Corp.*, supra (563 F.3d at 690):

For support, U.S. Salt relies on *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175-76 (3rd Cir. 1993), where the Third Circuit held that the district court did not abuse its discretion in permitting a business owner to give lay opinion testimony as to lost profits damages. U.S. Salt's reliance is misplaced because, unlike the business owner in *Lightning Lube*, Johnson has not shown any written comments from any customer as to the price it would pay for solar salt; he does not have recent experience within the relevant market; and he has not presented any objective market research, a cost analysis, or a business plan.

The court also concluded that the testimony of the outside expert based on unsupported assumptions supplied by the president was properly excluded. The expert relied on those assumptions without independent verification, conducted little, if any, analysis of market conditions, and revised his opinion on damages "dramatically" from his original report in a supplemental report.

In *Von der Ruhr v. Immtech International, Inc.*, 570 F.3d 858 (7th Cir. 2009) (Illinois law), Septech, Inc. sued Immtech for breach of a licensing agreement (including a patent license and the grant of other rights) related to a new drug developed by Immtech. On a motion in lim-

ine, the district court excluded the lay opinion testimony of Septech's president, Von der Ruhr, to lost profits damages alleged to arise from breach of the agreement and then disallowed the lost profits claim as lacking evidentiary support. In summary, Von der Ruhr was to testify that Septech would have entered into an agreement with a major pharmaceutical company, as partner, to develop the drug; that company would have obtained regulatory approval of the drug at its own expense and would have manufactured and marketed the drug, paying a 5 percent royalty; the drug would have captured at least a 50 percent market share; and the present value of ten years' lost profits from the drug sales totaled \$42 million.

The court first stated (570 F.3d at 862):

In the realm of lost profits, lay opinion testimony is allowed in limited circumstances where the witness bases his opinion on particularized knowledge he possesses due to his position within the company. . . . This is allowed only because that testimony is tied to [the witness'] personal knowledge... [citation omitted].

The court found that Von der Ruhr had no personal experience with obtaining a pharmaceutical licensing agreement and had never brought a drug to market or made a profit from one. He had no particular knowledge about the market for the drug in issue, what the drug would have sold for, or the competition in the market. Conversations with investment bankers and materials that the witness read did not substitute for personal knowledge (570 F.3d at 864): "While experts are allowed to give testimony based outside of their personal experience or observation, lay witnesses are not."

The court found this witness did not have personal knowledge of the basis for his testimony. The court distinguished *Lightning Lube* and other cases as having permitted lay opinion testimony based on personal knowledge. It concluded there was no abuse of discretion by the trial court in excluding the proposed testimony.

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In *Advertising Specialty Institute v. Hall-Erickson, Inc.*, 601 F.3d 683 (7th Cir. 2010) (Pennsylvania law), plaintiff ASI alleged that defendant breached the contract between them by co-sponsoring a trade show in Chicago with a third party, thereby violating ASI's contractual right of first refusal to co-sponsor these events. The trial court held that the contract had been breached but awarded only nominal damages, holding that lost profits damages had not been proven with reasonable certainty. The court found there to have been no abuse of discretion, although the question was close, in denying recovery based on testimony given by ASI's vice-chairman. The court stated that the witness could properly give testimony to a range of damages, based on different factual scenarios, and that the testimony was based on the witness' experience and was not speculative. Nonetheless, ASI's failure to identify companies that would have attended the event had ASI co-sponsored it and omission of proof about the financial results of the trade show as co-sponsored introduced shortfalls in the evidence sufficient to support the trial court's conclusion.

Donlon v. Philips Lighting North America Corp., 581 F.3d 73 (3rd Cir. 2009), was an action by a temporary employee against the employer alleging gender discrimination after the employer failed to hire plaintiff as a permanent employee. The employee testified at trial to estimated lost earnings and pension benefits under Rule 701. The court held it to have been an abuse of discretion for the trial court to have admitted the testimony. Plaintiff, a temporary employee for a term of less than one year, "did not develop in-depth knowledge of the company's salary structure, advancement opportunities, pay raises, or employment patterns." (581 F.3d at 81-82). The court concluded that while the employee could testify to current and past earnings, as facts within her knowledge, her testimony to prospective annual pay raises, the calculation of retirement benefits, life expectancy, and present value discounting went into areas that required expert testimony. The testimony was not within the witness' personal knowledge. The damages award was vacated and the case remanded.



THE RECENT DISTRICT COURT CASES

In *Compania Embotelladora del Pacifico, S.A. v. Pepsi Cola Co.*, 650 F. Supp. 2d 314 (S.D.N.Y. 2009), a soft drink bottler brought action alleging breach of its contract with the beverage company. A declaration seeking to support plaintiff's claimed damages by plaintiff's former general manager and chief financial officer was excluded on defendant's motion for summary judgment. The declarant had not been identified or qualified as an expert witness; the testimony was offered as lay opinion. According to the court, the declaration was based on documents the declarant had reviewed and not personal knowledge, as required by Rule 701.

In *Macy's Inc. v. Johnson Controls World Services, Inc.*, 670 F. Supp. 2d 790 (N.D. Ill. 2009), plaintiff claimed business income and other losses in this action against its maintenance contractor, following a flood in its store. Plaintiff sought to offer lay opinion testimony by a corporate employee. Defendant objected that the employee was not employed in the store, or even in Chicago, where the store was located, and that he did not have the necessary personal knowledge to testify under Rule 701. The witness proposed to calculate lost

profits by comparing the results projected in plaintiff's internal plan for the store to the amount actually earned during the days the store was affected by the flood. The court excluded the testimony. The plan was only a projection and, besides, the witness could not explain it.

Water Craft Management, L.L.C. v. Mercury Marine, 638 F. Supp. 2d 619 (M.D. La. 2009), presented a complex set of claims for business losses. The court rejected lay opinion testimony to their damages by the individual plaintiffs, stating (638 F. Supp. 2d at 626):

The testimony of Glascock and Martrain was not permissible as 'lay opinions' under Rule 701 of the Federal Rules of Evidence because 'a person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by an ordinary person.' [Footnote omitted.] . . . [T]he complex issues underlying the determination and causation of business losses require the application of specialized knowledge. Also, the testimony plaintiffs wanted to give as lay opinions is testimony which is usually given by experts qualified under Rule 702 of the Federal Rules of Evidence. Thus,

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RESOURCES

The 7th Annual Litigation Trends Survey Report, published by Fulbright & Jaworski, contains a wealth of statistical information regarding the experience and opinions of the respondents about their current and potential future litigation.

Highlights include:

(1) more than a quarter of respondents expect an increased number of disputes in the next year;

(2) the poor economy is cited by 40% of U.S. respondents as the reason for the expected increase in litigation; and

(3) 80% of U.S. respondents think the Federal Rules of Civil Procedure should be amended to limit electronic discovery.

We have included a link to the Survey Report below for those of our readers who want to review it.

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these issues were not appropriate subjects for lay opinion testimony as a matter of law under the facts of this case.

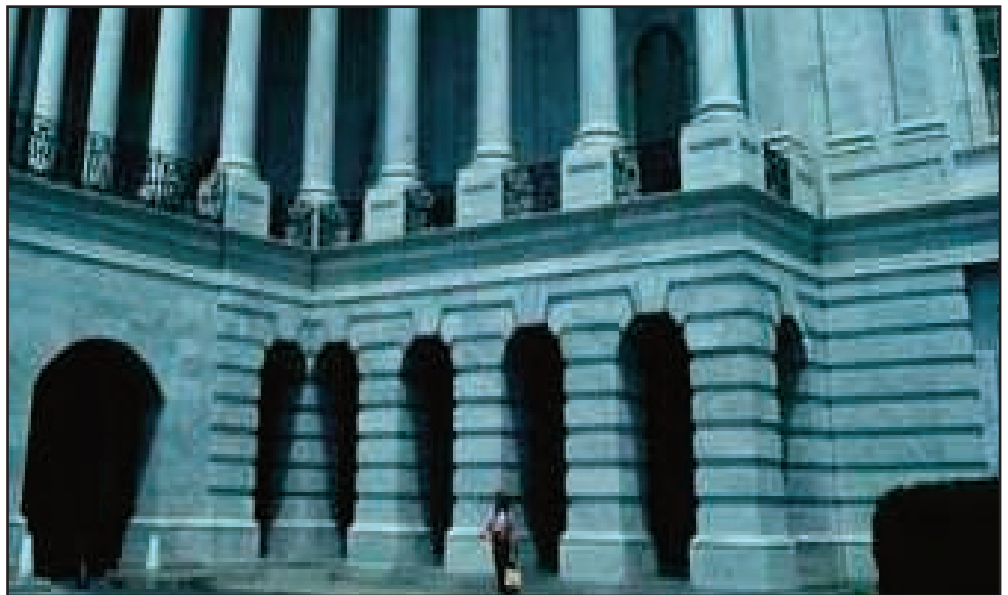
CONCLUSIONS

First, the objection to lay opinion testimony that appears to be most successful is that the testimony does not come from the witness' personal knowledge, derived from experience in the business. The courts should properly reject testimony based on efforts to "educate" the witness (probably by counsel) so that the witness can present opinions not based on existing personal knowledge. The proponent of lay opinion testimony should be ready to defend the testimony as derived entirely from the witness' business experience. This may be a difficult or impossible assignment when the lay witness presents complex calculations forecasting lost profits or other future economic damages (discounted to present value). The opponent of the lay opinion testimony should be ready to pick apart the factual bases and assumptions underlying the testimony, trying to find even just one that does not derive from the witness' previous business experience.

Second, the question should also be raised whether economic damages testimony is testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Under amended Rule 701, that would be grounds to exclude it. The Advisory Committee Notes seem to reject

that position apparently reasoning that while economic damages testimony requires "specialized knowledge," it is the kind of "specialized knowledge" that a business owner might have by reason of experience in the business, not the kind of "specialized knowledge" that an expert has that falls within Rule 702. Only if it is the latter, the Notes say, does Rule 701 require the lay opinion to be excluded. The position twists the language of the amendment to Rule 701, which makes no such distinction. But *Watercraft Management, L.L.C. v. Mercury Marine*, supra, does conclude, on the facts of that case, that economic damages testimony does require "specialized knowledge" and is not appropriately presented by a lay opinion witness. At least in complex cases, this is an argument that should be raised in opposition to lay opinion testimony.

Finally, the lay opinion witness should be held to the same standards as an expert. Testimony that is without foundation, based on unproven assumptions, or just plain speculation should be excluded. Moreover, the basis for the lay opinion must come entirely from the witness' experience. Gaps cannot be supplied by hearsay evidence, as would be true with an expert witness. This is (or should be) a basic principle but one that sometimes requires forceful advocacy. *U.S. Salt, Inc. v. Broken Arrow, Inc.*, supra and *Von der Ruhr v. Imtech International, Inc.*, supra, both support this conclusion. ~



RELIABILITY OF BUSINESS PLANS TO SUPPORT LOST PROFITS DAMAGES



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INTRODUCTION

It is widely accepted business practice to employ some type of business plan, forecast, model, and/or budget to aid the entity in planning and control. In fact, many new businesses— as well as those that utilize some form of debt financing— are often required to provide such information to lenders in order to obtain financing. On the other hand, it is rare that these tools are prepared solely in anticipation of being used in litigation to show the business's lost profits. Unfortunately, this is exactly what usually happens when business is interrupted or damaged due to the act or omission of a third party. Courts are not uniform on the use of business plans, forecasts, models, and budgets to support damages and/or lost profits calculation. As such, an expert seeking to use such information as the basis for a damage calculation must exercise caution and carefully examine the underlying information, including the purpose, assumptions, intended users, form and method of preparation, convertibility, and reliability prior to use.

This article examines the use of business plans, forecasts, models, and/or budgets (hereinafter collectively referred to as "business plans" unless otherwise noted) as the basis for lost profit damage calculations. The use of a business plan as a model to calculate lost profits is not without potential hazards and risks for the damages expert. To illustrate the effectiveness and/or ineffectiveness in the use of business plans we focus in part on some informative recent cases that consider business plans as the basis for expert testimony.

Lost profit damages must be proven with "reasonable certainty." Due

to the substantial use of assumptions and forward looking projections, business plans present a unique challenge in determining whether or not they meet the "reasonably certain" standard. These plans are often called into question by opposing experts, who challenge the plan assumptions on a highly detailed level. The following is an analysis of several key issues regarding business plans and a survey of relevant cases on both sides of the issue. The key issues involved when basing lost profit calculations on business plans can significantly influence the success or failure of your case. This impact is demonstrated in the case examples discussed below.

BUSINESS PLANS NOT SUPPORTIVE OF LOST PROFITS DAMAGES

(1) Failure to target specific lost profits
One scenario in which business plans can fail to provide reasonable certainty is when they are used to show a party's overall business losses while neglecting to zero in on the specific losses as a result of the alleged conduct.

In *Exel Transportation Services, Inc. v. Aim High Logistics Services, LLC*, 323 S.W.3d 224 (Tex. App. 5th Dist. 2010), the Texas Court of Appeals overturned a jury's aggregate one million dollar damage award in favor of Aim High because the evidence of lost profits damages in the case was legally insufficient to support the award. Aim High's expert put forth three damage models, including one that incorporated Aim High's own five-year business plan and rate proposals for all of Aim High's accounts, not just the four accounts that were at issue. The losses under this model, dubbed the "blended" model, ranged from \$1.4 mil-

lion to \$3.6 million. Aim High's expert did not consider that Aim High lost its largest customer (over 65 percent of its revenue) through no fault of Exel. Instead, Aim High presented testimony of blanket company-wide lost profits (including the large customer) based upon business plans, forecasts, and pricing models that did not focus only on the accounts in issue. As a result, the Texas Court of Appeals held that Aim High failed to present evidence establish[ing] any amount of lost profit damages with "reasonable certainty" and rendered a take-nothing judgment in favor of Aim High.

(2) Overly optimistic business plans may create a windfall

New or startup business plans can sometimes be extremely optimistic and include material that is essentially a sales pitch in order to attract lenders, financiers, and other business partners. Overly optimistic business plans present a risk of unreliability when introduced in litigation.

In *Agranoff v. Miller*, 791 A.2d 880 (Del. Ch. 2001), the court was tasked with determining the valuation of certain warrants for Express Messenger Service, Inc. ("EMS"), an express delivery and courier service. The court noted that EMS enjoyed relatively strong revenue in the late 1990s but its ability "to derive profits from its revenues was less impressive." (781 A.2d at 882) The parties submitted testimony of two highly regarded and experienced experts in business valuation, both admitting that the projections (both revenue and profit) for EMS as presented in its business plans were "wildly unreliable and overly optimistic." (*Id.*)
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Both experts attempted to perform a valuation of EMS while substituting other, more reliable data for the overly optimistic projections. The court determined that the valuations were still highly speculative because of the optimistic projections and embarked on performing its own valuation. The court chose to primarily use an analysis of comparable companies to formulate a valuation while using certain reliable aspects of each expert's methodology. Nonetheless, the court declined to base a valuation on the "wildly unreliable and overly optimistic" business plan projections.

(3) No comparison to similar businesses

Use of business plans that include comparisons to similar businesses or the industry may provide enhanced reliability. On the other hand, where there is no comparison or consideration of similar businesses, the opponent is likely to attack a business plan by showing that it is not in line with other similar businesses. Attempting to establish lost profits by a business plan alone without any comparison to similar businesses or the industry may prove to be highly detrimental

In *Mid-American Bio Ag, Ltd. v. Wieland & Sons Lumber Co.*, 2010 WL 3662305 (Iowa Ct. App. Sept. 22, 2010), the plaintiffs were attempting to start a mushroom farm operation and had gathered substantial information and prepared a business plan for the new venture. The plan was full of projections but failed to make any comparison to the industry or even a comparable business. The trial court refused to admit the business plan as evidence of damages. The Court of Appeals affirmed this decision, stating:

The proffered business plan is full of projections, but lacks any link to past experience or a comparable business. The evidence offered in the offer of proof [which included the business plan] does not provide the jury with any basis for determining what, if any, damages might have been suffered. ... Even if damages are assumed, there is no "reasonable basis from which the amount can be inferred or approximated."

(4) Inefficient business operation

Courts can sometimes disallow all or parts of a business plan from being admitted as evidence (and thus precluded

from serving as a basis for lost profits) where unexplained or personal expenses and inefficient operations have made the business plan and projections unreliable. Additionally, assuming a business plan is admitted as evidence, a jury may conclude that these same concerns preclude reliability of the plan.

In *Old Well Water, Inc. v. Collegiate Distributing, Inc.*, 150 N.C. App. 717, 565 S.E.2d 112 (2002) (memorandum affirmance), Collegiate Distributing ("Collegiate") was incorporated to distribute bottled water products affiliated with various colleges and universities. Since Collegiate did not have a financial history, the trial court allowed Collegiate's business plan to be used to establish projections made by Collegiate but disallowed the plan's use as direct evidence of lost profits. The court reiterated the "reasonable certainty" standard for lost profits and noted that where "an estimate of anticipated profits does not provide an adequate factual basis for a jury to ascertain the measure or damages, the trial court is permitted to exclude evidence of lost profits if it is based on mere speculation." The Court of Appeals (in an unpublished opinion) affirmed a nominal jury verdict of \$1.00 in favor of Collegiate and its key person, noting that the jury was free to determine that Collegiate's business plan was unreliable because Collegiate was inefficiently run and its operating costs and expenses were often attributable to personal expenses of its key person.

(5) The "hope" of success present in a business plan is insufficient

Nearly all for-profit business plans, especially for new business ventures, will provide a plan for financial success. A business plan expressing a desire for success, even when that success is realistic, may not be reasonably certain enough to establish lost profits.

In *Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) LLC*, 207 S.W.3d 801 (Tex. App. 14th Dist. 2006), the parties presented a dispute over interests in a foreign oil and gas field that included extensive expert testimony as to lost profits damages. The Plaintiffs claimed that they would have earned over \$640 million in profits from the acquisition of

Continued on next page



an oil field but for the Defendants' actions. The Plaintiff's experts based their lost profits damages on business plans and numerous assumptions about events (such as acquisitions, licensing, financing, operations, etc.) that would have to come to fruition in order for the business to be profitable. The Court held (207 S.W.3d at 824-25):

In sum, to realize Van Dyke's "dream and business plan," Plaintiffs first would have needed to obtain approval from Tenge Development. Then, despite the lack of profitable production from the Tenge field in the past, Plaintiffs would have had to convince a third-party lender to put millions of dollars at risk, without compromising Plaintiffs' equity stake and right to all of the profits in the event of success. Plaintiffs' lost profits calculations are not based on a business that already was established and making a profit when the contract was breached. The fervent hope of Brickhill and Schaefer [Plaintiff's experts] for Plaintiffs' success in obtaining financing, buying the Kazakhtenge interests, and producing and marketing oil and gas from the Tenge field under Schaefer's production plan is not enough to warrant recovery of lost profits.

The Court concluded that "Plaintiffs' proof of lost profits is largely speculative, dependent on uncertain and changing market conditions, and based on risky business opportunities and the success of an unproven enterprise. Thus, it is insufficient for recovery." (*Id.*)

BUSINESS PLANS SUPPORTIVE OF LOST PROFITS

(1) Use of other corroborative factors along with business plans

Business plans usually have elements of uncertainty because of their forward-looking nature. However, consideration of other details used in conjunction with a business plan can bolster the plan over the "reasonably certain" standard.

In *Gullwing Int'l Motors, Ltd. v. Ostermeier*, 2009 WL 2961939 (Cal. Ct. App. 2nd Dist., 2009) (unpublished; not citable), the plaintiff built and sold replica Mercedes Benz Gullwing vehicles. He subsequently sold the right to Defendant, with a transition period

where the production and selling would be moved to a new entity. Plaintiff's expert relied on a strategic business plan for the new venture as well as interviews with the primary person responsible for creating the plan. The expert also analyzed various documents, assumptions and other details regarding profitability present in the plan and concluded that the projections were achievable and that there was "quite a profit in them." On appeal, the court noted that the expert had thoroughly analyzed the business plan along with other factors such as the plaintiff's experience, the market, data on profitability of building replica automobiles, and interviews with the creator of the business plan. The court determined that the projections contained in the plan were reasonably achievable and affirmed the lost profits damages.

(2) Pre-litigation plans more reliable

Business plans and projections created prior to any litigation generally carry more weight in a lost profit context than those created subsequent to the litigation. The reason is simple: pre-litigation plans possess greater indicia of trustworthiness and reliability due to the fact that they are not yet affected by the litigation. They provide a pure look at what the business owners expected to achieve. It should be noted that this only applies to projections created by the harmed business and/or its owners and agents. Post-litigation projections are routinely created by experts and others to assist with the case.

In *Super-Valu Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala. 1987), the Alabama Supreme Court dealt with a claim that Super-Valu stores had interfered with Hardin & Co. Warehouse Market's ("Hardin") exclusive right to operate a certain type of grocery store in Oxford, Alabama. Hardin introduced evidence of its lost profits in the form of Super-Valu's own projections "produced in its normal course of business long before this dispute arose." (506 So. 2d at 330). In affirming the award of lost profits to Hardin, the court stated (506 So. 2d at 330):

In considering claims by unestablished or new businesses for lost profits, courts have consistently given

special deference to a party's pre-dispute projections of anticipated profits. As one court succinctly noted, pre-dispute projections are "no mere 'interested guess' prepared with an eye on litigation. Instead, they [are] ... the product of deliberation by experienced businessmen charting their future course." *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, (2d Cir. 1970) (affirming profits award for new business).

The courts have shown even more deference in a situation, such as exists in the present action, where plaintiff's proof of lost profits is based on pre-dispute projections prepared by the defendant. For example, in a closely analogous case, a substantial verdict for lost profits was upheld where plaintiff's proof was based upon the defendant's "projected profit-and-loss statement" for plaintiff's anticipated second year of operation as one of defendant's distributors. *Computer Systems Eng'g, Inc. v. Qantel Corp.*, 740 F.2d 59, 66 (1st Cir. 1984). Similarly, lost profits have been awarded based on sales "projections, prepared by the defendant's market expert, [that] were not put together with an eye to litigation." *Perma Research & Dev. Co. v. Singer Co.*, 402 F.Supp. 881, 898-902 (S.D.N.Y. 1975), aff'd, 542 F.2d 111 (2d Cir. 1976), cert. denied, 429 U.S. 987, 97 S.Ct. 507, 50 L.Ed.2d 598 (1976).

CONCLUSION

The overriding factor in almost all lost profits cases is whether the lost profits can be proven with "reasonable certainty." The methods for showing reasonable certainty are far-ranging because every lost profits case is unique and incorporates different factors, assumptions, and characteristics from the next. Case law such as that analyzed above provides useful guidance on situations where lost profits have been upheld or denied based on business plans. The litigant or expert seeking to prove lost profits damages based on business plans should consult an attorney and have some understanding of case law on the subject in his/her jurisdiction. ~

CROSS-EXAMINATION OF PLAINTIFF'S LOST-PROFITS DAMAGES EXPERT



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INTRODUCTION

The damages expert relies on counsel regarding (a) the underlying facts, (b) the recovery theory under which damages are being claimed, and (c) the requisite measure of damages, and will review the various heads of damage with respect to the statutory, contractual, or other legal basis for each compensable category.

The expert's quantification of economic damages, whether in contract litigation or in tort litigation, may involve determining (a) the loss of profits suffered by a plaintiff's business, or (b) the impairment of the value of the business, which had been adversely affected by the alleged wrongful acts of the defendant. In some cases, it may involve a combination of both, or even that the business may have been totally destroyed. Depending on the nature of the claim and whether the plaintiff is an established or unestablished business, the lost profits may be past, present, and/or future.

Whether the expert either quantifies the loss of future profits or deter-

mines the loss in the value of the business, he or she must (a) project a reasonable level of lost future economic income (numerator, or multiplicand), and then (b) convert these projected lost profits to a net present value (i.e., a capital sum), by applying a capitalization factor (denominator or divisor) or discount factor (multiplier) the expert developed after analyzing the risk-profile of the projected stream of lost profits.

The calculation of these variables is judgmental and often open to intense cross-examination both in lost-profits litigation and valuation disputes. The various inputs making up the lost-profits numerator and rate-of-return denominator used by plaintiff's expert are typically dissected and critiqued by defendant's damages expert and challenged by defendant's attorney in cross-examination.

DAMAGES FOR LOST PROFITS — OVERVIEW OF METHODOLOGY

The plaintiff's expert must support a reasonable approach to the quantification of

economic damages so that the plaintiff can demonstrate that the losses are proven with reasonable certainty or reasonable probability.

Most lost-profits damage calculations are made by adopting one of the following three approaches:

1. Before-and-After Approach;
2. Yardstick (Comparable) Approach; and
3. Sales Projection (*But-For*) Approach.

BEFORE-AND-AFTER APPROACH

This approach is generally best suited to a business having an established track record of operations or pattern of activity. It compares actual (adversely affected) operating results during the damage period to normalized, *but-for* results. Adopting this approach, the expert estimates, or extrapolates, plaintiff's *but-for* results during the damage period based on (a) normalized actual results experienced by plaintiff prior to defendant's alleged damaging acts and (b) normalized actual results after the injurious effects of the event have subsided. The plaintiff's adversely affected, actual results during the damage period are compared to the pre- and post-damage periods' actual results, which serve as "benchmarks," considering seasonality, cyclicity, and any non-recurring or unusual items, as applicable. Often, in practice, only the "before period" is available for purposes of projecting plaintiff's *but-for* results for the damage period.

When plaintiff's past operating activity is used for projecting the *but-for* results in the damage period, the assumptions underlying the projections must be reasonable and supportable. Courts typically reject speculation, con-

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jecture, double-counting, and “leaps of faith.”

YARDSTICK (COMPARABLE) APPROACH

The Yardstick Approach may be suitable if the plaintiff’s business does not have a sufficiently long historical track record and, consequently, the Before-and-After Approach is not feasible.

Adopting this approach, the expert compares the plaintiff’s adversely affected results during the damage period to those of similar companies (“guideline companies”¹), if available, or to industry performance which may serve as a yardstick, and reconstructs the operating data of the plaintiff on a *but-for* basis. In this regard, the damages expert analyzes available financial and operating data of the guideline companies. Adjustments are then made, as appropriate, to the respective financial data of the plaintiff and of the guideline companies so as to minimize any material differences in the accounting policies or practices as well as business or industry conditions. Non-recurring, unusual, extraordinary, and discretionary items are also adjusted, as necessary.

The difficulty with this approach lies in (a) properly identifying similar guideline companies, businesses or industries that would serve as meaningful yardsticks or “comparables,” and (b) demonstrating that the lost profits claimed by plaintiff, appropriately adjusted, would be comparable to the profits generated by the guideline companies.

In some cases, a comparable, but unaffected, division or branch of the plaintiff may provide the necessary yardstick. For example, a plaintiff operating a chain of retail stores in which Store A has been injuriously affected, might consider the operations of one of its other (unaffected) outlets, Store B, assuming that Store B has similar characteristics with respect to size, demographics, strategic location, competitive environment, floor space, parking facilities, and so forth. In such a case, regression analysis² may prove useful in forecasting *but-for* sales of damaged Store A.

SALES PROJECTIONS (BUT-FOR) APPROACH

Adopting this approach, an economic model is created for the damaged business, using assumptions as to how the plaintiff’s business would have performed *but for* the defendant’s alleged wrongdoing. Based on such assumptions, plaintiff’s expert projects revenues and related costs during the damage period. The *but-for* results (projected revenues minus projected costs) are then compared to plaintiff’s *actual* results during this period. The excess of each year’s projected *but-for* results over actual results is discounted (present-valued) back to the damage date at a risk-affected rate of return.

Because this methodology requires developing an economic model that includes plaintiff’s projected sales and related net profit, a proven, historical track record supporting the expert’s extrapolations may be necessary to convince the court; industry forecasts of growth and profitability, in and of themselves, might not suffice.

To the extent that the *value* of plaintiff’s business, as a capital asset, has been impaired or destroyed, such loss may also be included in the damages quantification. However, the aggregate of (a) the lost profits in the projection period and (b) the decrease, if any, in the value of the business as a capital asset cannot exceed (c) the present value of the plaintiff’s loss of future profits (profits being the principal value-driver), immediately prior to defendant’s wrongful conduct. There can be no double-counting.

In measuring damages for lost profits, the plaintiff’s financial statements are merely a starting point. The loss of revenues, minus the related incremental expenses (variable and direct — see below) incurred to generate those revenues, equals lost “contribution margin”³ (incremental lost profit margin). That is, for every lost dollar of sales, what was the amount of incremental lost profit that would have contributed to the plaintiff’s “bottom line” (i.e., to reducing fixed overhead, which in turn, would have increased the bottom line, pre-tax)?

As lost profits (lost revenues minus related expenses) are lost *net* profits (before income taxes), the identification and estimation of costs are



fundamental to any lost-profits quantification. The damages expert must therefore analyze the cost structure of the plaintiff’s damaged business or asset, distinguishing between the “variable” and “fixed” components of the costs. This is explained in more detail below.

Variable expenses are costs that vary in direct proportion to gross revenues or levels of activity (e.g., sales commissions, labor hours, royalties, etc.). *Fixed expenses* are costs that remain the same regardless of the level of gross revenues or sales volume of the business (e.g., overhead expenses such as insurance, rent, office payroll).⁴ A third category is *semi-variable* expenses, which are part way between fixed and variable expenses and occur because the relationship between cost and sales volume is not always regular or linear, but can take the form of a “step” function, i.e., they change at certain key-activity levels (e.g., additional rent for increased manufacturing or storage space used to support higher sales volumes; or telephone charges that have a fixed monthly component plus a variable component that relates to long-distance usage).

As most variable costs of a manufacturing concern can be directly related to the product itself, fixed costs are usually incurred for the benefit of the entire business enterprise as a coordinated unit. Most fixed costs require allocation
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by the firm's accounting department to processes, departments, divisions, products, or some other identifiable profit center or reporting unit of the total enterprise. For example, head office and administration expenses might be allocated to the various outlets of a chain of retail stores or restaurants.

The defendant will attempt to adduce evidence to show that the expenses of the damaged business are higher than what plaintiff's expert has calculated.

AREAS FOR CROSS-EXAMINATION

It is beyond the scope of this article to comment on qualifying the damages expert,⁵ or on causation and mitigation issues. This article addresses the cross-examination of the plaintiff's expert who has been accepted or qualified by the court as an expert in the quantification of economic damages.⁶

There are many fundamental questions that the defendant's attorney can put to the plaintiff's expert in cross-examination. As deemed necessary, the attorney will formulate these questions with the input of his or her damages expert. At trial, of course, there may well be various other areas giving rise to further cross-examination and/or follow-up questions, some with the input of the cross-examiner's expert, if feasible.

Without affording the plaintiff's expert a platform or forum to explain and/or reinforce his or her opinion given in direct testimony, the cross-examination of the plaintiff's expert should probe into the following areas, only as necessary, keeping the expert's replies strictly limited, controlled, and confined to the

narrow subject matter contained in the question.⁷

BEFORE-AND-AFTER

APPROACH –

SOME MATTERS TO ADDRESS

- The "Before" (pre-damage) period that was used to determine plaintiff's actual results prior to defendant's alleged damaging act(s).
- Any adjustments made to "normalize" the pre-damage, "Before," results.
- The "After," or "back-to-normal," period used subsequent to the damage period.
- Any adjustments made to the post-damage, "After," results.
- Whether any interpolation by the expert (averaging "Before" and "After" revenues) is truly meaningful or representative.
- Whether the "Before," "After" and/or "But-For" periods had possibly been affected by, or were a function of, seasonal and/or cyclical factors.
- "Normalization" adjustments, if any, made to the "Before" and "After" damage period results, particularly with respect to subjective and judgmental factors.
- Whether there might have been new competitors that entered the marketplace during the damage period.
- Whether substitute, alternative, or competitive products had been introduced in the marketplace during the damage period, thus rendering the pre-damage period results to be unrepresentative, on a going-forward basis, for purposes of estimating *but-for* results.

YARDSTICK (COMPARABLE)

APPROACH –

SOME MATTERS TO ADDRESS

- "Comparability" of the guideline (comparable) companies used by plaintiff's expert in making projections.
- Reliability of the statistical industry data used in estimating plaintiff's *but-for* results, including considerations regarding geographical dispersion.
- Appropriateness of the adjustments made to the financial data of the plaintiff and to those of the guideline companies to minimize any major differences in their respective accounting treatments.
- Whether the time period(s), or time-frame(s), relating to the underlying source data used in making projections are compatible (e.g., automobile dealer sales in May vs. November or department store sales in December vs. March).
- Similarities between each of the guideline companies used as a yardstick and the plaintiff, such as size, product mix, geographic location, customer base and diversity, intellectual-property protection, demographics, capital structure, profit margins, maturity of the business, off-balance-sheet assets and liabilities, depth and experience of management, regulatory issues, etc., as the case may be.
- Whether the respective notes to the guideline companies' financial statements can have an effect on the interpretation of the results used by the expert in performing his/her calculations *vis-à-vis* the plaintiff's business.
- Whether there were any material customer, supplier, labor, and/or other contracts in force that would render the guideline-company results inapplicable to plaintiff's business.
- Whether any related-party transactions involving the guideline companies might distort their results for use as yardsticks or "comparables."
- Steps taken to verify the comparability of the guideline companies and the source data extracted from them.

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SALES PROJECTIONS (BUT-FOR) APPROACH — SOME MATTERS TO ADDRESS

- Duration of the damage period.
- Whether budgets or forecasts made by the plaintiff were already in existence prior to the damages-causing event.
- The major assumptions under which gross revenues/sales volumes were projected.
- Whether expert's underlying assumptions are reasonable and consistent in the light of past performance of plaintiff's business and conditions expected to prevail during the *but-for* period.
- Basis and support for projected costs/expenses.
- How expert accounted for the fact that projections are less "reliable" each year as they go further into the future.
- Definition and interpretation of the term *profits* in "lost profits" and its applicability to the subject litigation (whether it refers to, or should be interpreted as, pre-tax profits, after-tax profits, operating income, profits before management bonuses, profits before discretionary expenses, profits before depreciation and amortization, profits before interest charges, adjusted profits, cash profits, economic income, accounting income, etc.).
- Whether, and to what extent, management interviews were conducted and details of the notes taken by the expert at the interview(s).
- Whether depositions had been taken of plaintiff's management/financial officer.
- Whether there had been a business plan prepared (e.g., furnished to the plaintiff's bank prior to the event).
- Whether expert interviewed independent industry specialists and others, if appropriate.
- Whether plaintiff had future contractual expense-commitments at the damage date that would impact operating results during the post-event damage period (e.g., new labor agreement, new raw materials supply agreement, etc.).
- Whether capital expenditures would be required during the projection period.
- Whether external financing would be necessary during the projection period.

- Propriety of, and support for, the particular costing method used ("direct costing" vs. "absorption costing") by the expert.⁸
- Treatment of depreciation and amortization charges in calculating lost profits.
- Treatment of discretionary items (management fees, charitable donations, related-party income and charges, etc.).
- Appropriateness and validity of the terminal, or residual, value of the plaintiff's business.
- Expert's calculation of the discount rate (rate of return) applied in present-valuing the projected lost profits, including considerations regarding:
 - Projection risk.
 - Contingencies.
 - Weighting of the various company-specific factors considered in building up the discount rate.
- Sources, reliability, and relevance of data used.
- Whether costs of another division might be properly allocable to the injuriously affected division, including possible contributory charges.
- Integrity and fair presentation of any graphics prepared by plaintiff's expert to depict various numbers or amounts (whether the graph or chart might

portray a misleading, exaggerated, or unduly dramatic picture).

- Integrity and validity of the inputs to the regression analysis applied, including the independent variable that was used.
- Whether plaintiff's expert had applied sensitivity analyses to check the reasonableness of the input variables (a slight variation of any variable potentially having a material effect on the lost-profits calculation). (The cross-examiner should already have in hand his/her own expert's sensitivity analysis and be prepared to confront plaintiff's expert on this issue.)
- How the expert dealt with inflation in the quantification of damages for lost profits.

CONCLUSION

While the facts and circumstances of every situation will differ, there are certainly enough areas and aspects of an expert's lost-profits damages quantification that can provide the defendant's attorney with sufficient ammunition to create doubt so as to discredit, or at least cause the court to place less weight on, the expert's opinion. Ideally, the cross-examiner should have the benefit of his or her damages expert's professional input. ~

¹ Ideal guideline companies are in the same industry as the company being valued; however, if there is insufficient transaction evidence available in the same industry, it may be necessary to select companies with an underlying similarity of relevant investment characteristics such as markets, products, growth, cyclical variability and other salient factors.

² A statistical technique used to establish the relationship of a dependent variable, such as a company's sales, and one or more independent variables, such as gross domestic product per capita, income, and other economic indicators. By measuring exactly how large and significant each independent variable has historically been in its relation to the dependent variable, the future value of the dependent variable is predicted.

³ "Contribution margin" is defined as revenues less variable costs, including the "variable" component of semi-variable costs.

⁴ Some fixed expenses may be fixed to the extent that they will not vary up to a certain gross-revenue limit; if the revenues are increased above that limit, these expenses will increase, but may remain fixed at the higher amount up to the new gross-revenue limit.

⁶ Federal Rules of Evidence, Rule 702 or the "Daubert Challenge" (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), and Rule 703.

⁶ See, for example, Robert L. Dunn, *Recovery of Damages for Lost Profits*, Lawpress Corporation (Westport, CT: 2005), 6th Edition (with Supplements to September 2010), Volume 2, Chapter 7.

⁷ See, for example, Robert L. Dunn, *Winning with Expert Witnesses in Commercial Litigation*, Lawpress Corporation (Westport, CT: 2003), Chapters 6 and 7. See also, Richard M. Wise, "What the Expert Witness Should Know About the Cross-Examiner's Trial Tactics," *Financial Valuation and Litigation Expert*, Issue 21, October/November 2009, www.valuationproducts.com, and "The Cross-Examiner's Tactics: What the Expert Witness Should Know," *Business Valuation Review*, Quarterly Journal of the Business Valuation Committee of the American Society of Appraisers, Vol. 23, No. 4, December 2004.

⁸ These alternative methods are explained in a presentation by Richard M. Wise to the Faculty of Law at McGill University, "Quantification of Economic Damages," *The Civil Law of Damages* (Montreal, Quebec: 1996).

A POTENTIAL CHECKLIST OF DAMAGE-RELATED ISSUES FOR LENDER-BORROWER DISPUTES



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As lenders, borrowers, and guarantors attempt to work towards solutions to the multi-pronged problems associated with troubled real estate construction projects in our current credit crisis environment, several damage-related issues seem to arise repeatedly. Prudent parties should probably consider including the following seven items on their respective checklists to be sure they are fully prepared for the negotiations.



✓ *Has There Been a Thorough Analysis of Potential Lender Liability Claims?*

Have damages been caused by third parties under circumstances which might fully exonerate a guaranty or reduce the amount due on a loan? There seems to be an increasing trend by LLC borrowers to contend that their project's lender has aided and abetted the dishonest acts of a managing member of the LLC, legally exposing the lender to potential claims for commingling, excessive, and/or unauthorized payments to insiders, or even straight defalcations. Since under many scenarios the managing member may have been terminated and/or proven to be judgment-proof, borrowers are increasingly invoking California legal principles applicable to co-conspirator liability in formulating claims against lenders. These obviously need to be addressed in the work-out negotiations before any releases are executed.

✓ *Have All Guarantor Issues Been Addressed?*

Lenders need to evaluate how proceeding with non-judicial foreclosure remedies might affect rights against guarantors (and even the borrower) if a credit bid at the sale is below fair value. Indeed, they should even consider

whether a principal's guaranty is even enforceable (for example, where the borrower is a general partnership or there is an *alter ego* relationship between the borrower and the guarantor). Further, since the balance sheet of many a guarantor will likely include other real estate projects, the overall state of the current market may well decrease net worth substantially to the point where a lender might have to write the loan down immediately either upon initial default or upon being provided with information on the guarantor's weakened financial condition. The size of such a write-down can significantly affect settlement negotiations.

✓ *In Any Plans for a Chapter 11 Bankruptcy, Has There Been a Full Consideration of Exceptions to Single Asset Rule?*

Borrowers routinely threaten bankruptcy to forestall foreclosure efforts and lenders traditionally discount this risk because of the Single Real Estate Asset Rule. The latter generally entitles the lender to an early dismissal of a Chapter 11 proceeding if a readily confirmable plan has not presented to the Court. But borrowers are becoming increasingly creative in their arguments as to other assets, such as third party guaranties or in-

come streams generated from affiliated businesses operating on the site, and consequently the procedural protections available to lenders in the Single Asset Rule may be less reliable. The prospect of keeping the project in bankruptcy for an extended period of time can provide a real impetus to work out negotiations and it can lead to increased flexibility from lenders.

✓ *Have All Damages Caused by Defects Been Considered?*

Any partially completed real estate project is, of course, vulnerable to the existence of construction defects, whether due to unpaid subs stopping work or otherwise. With construction funds having been cut off by a foreclosing lender, significant strategic decisions have to be made for completion of the project in order to obtain a maximum sale price. Tactical issues also arise in connection with what kind of insurance coverage might be available for claims against subcontractors. Some kinds of physical damage to unfinished work caused by the passage of time or weather can strengthen claims for coverage. Further, construction defect claims can provide an offset against liens. Finally, just how the foreclosure process (which can wipe out all subcontractor liens) is managed becomes critical.

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✓ *Have All Subcontractor Lien Issues Been Resolved?*

Troubled projects are very often the subject of subcontractor liens and close scrutiny is required to determine whether the very specific requirements for serving Preliminary Notices or recording Mechanic's Liens have been timely met. It is surprising how often deadlines are missed and that can prove fatal to lien claimants.

✓ *Has the Enforceability of Exculpatory Clauses Been Examined?*

Many Construction Loan Agreements and guaranties have exculpatory clauses which attempt to immunize lenders from claims or limit their responsibility in the construction draw process. But there are limits to how far courts will go to enforce these clauses, and each fact situation must be closely analyzed on its own. Courts can be very reluctant to enforce exculpatory clauses for forward-looking lender misconduct.

✓ *Has Full Attention Been Paid to Alternative Dispute Clauses?*

Many clients and attorneys believe that arbitrators often “split the baby” and so, in their eyes, liability is a given and damages are regrettably the only remaining issue. Others disagree and argue that a party can control this risk by selecting the arbitrator carefully.

Whether it is a desired resolution approach or not, the parties need to determine whether arbitration is required, which service provider is best (there are many cheap but substandard ones), which particular arbitrator is suitable for a given set of facts, and whether mediation is required first. Further, a borrower's need for injunctive relief against a lender can be impacted by the wording of an arbitration clause, particularly when the need for speedy legal resolution is important.

There are certainly many other damage-related items which should be included on any comprehensive checklist for work out negotiations, but the very recent trends we have observed in credit crisis litigation suggest that these seven items should probably be on anyone's short list. ~

Letter from the Editor, continued

Finally, we invite communications from our readers— electronic letters to the editor— commenting on what we have written, suggesting topics of interest, or sharing experiences. This will be a practical publication, and we want to know what is going on in the courtrooms of the country. ~

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To comment on an article, suggest a topic for a future article, or submit a “Letter to the Editor,” email Bob Dunn at attydunn@comcast.net.

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President of the Florida Business Valuation Group, Ms. Bour's forensic accounting and litigation consulting work includes commercial cases involving breach of contract, fraud, shareholder disputes, and intellectual property issues. Ms. Bour serves as a governor for the Institute of Business Appraisers and on boards and committees for various professional organizations. She is an instructor and regularly speaks on business valuation and economic damages.



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Mr. Dorrell has delivered 100+ forensic accounting training sessions during the last 5 years and has published over 60 articles in technical journals. He co-authored two seminal publications on forensic accounting in counterterrorism for the US Dept. of Justice (USDOJ). His civil/criminal practice transcends alter-ego, anti-trust, bankruptcy, breach of contract, economic damages, family law, fraud, and IP.



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A former partner and head of litigation at Cooper, White & Cooper in San Francisco, Mr. Dunn is considered one of the country's leading legal experts on commercial damages. Dunn graduated magna cum laude from Harvard Law School, where he was a member of the Board of Editors of the Harvard Law Review. His books include *Recovery of Damages for Lost Profits*, *Recovery of Damages for Fraud*, and *Winning with Expert Witnesses in Commercial Litigation*, all published by Lawpress.



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Everett P. Harry of Harry ♦ Torchiana LLP has over 30 years experience with litigation, claims and disputes consulting. He has held many positions for the California Society of CPAs and the AICPA, and his litigation-related writings appear in numerous publications. He has testified in U.S. District Courts, Superior Courts, arbitrations and numerous depositions. He earned his AB in Economics from San Diego State and holds an MBA from the University of Southern California.



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Bill Norman began practicing law in California after extensive trial experience as an officer in the U.S. Army. After serving as a trial partner at Bronson, Bronson & McKinnon, he became the senior trial attorney at Cooper, White & Cooper LLP. He is an experienced business trial lawyer with emphasis in real property, wrongful termination, trade secret, professional liability, partnership/LLC disputes (including minority rights and dissolution), and petroleum pipeline safety issues.



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Mr. O'Brien is a managing partner of OSKR, LLC, an economic consulting firm specializing in applying economic analysis to complex legal issues. A damages expert for over 30 years, he has testified in matters involving patent, antitrust, intellectual property, securities and other complex business claims. He co-authored "Patent Infringement Damages" in the leading work on the role of accounting and economic experts in litigation and also authored and co-authored guides for calculating lost profits.



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Mr. Schubert received a B.S. degree from the NY State School of Industrial and Labor Relations at Cornell University, where he graduated first in his class. He received his J.D. cum laude from Harvard Law School and has taught law at both Columbia and Golden Gate universities. He has been actively engaged in the practice of law, specializing in class actions and other complex litigation. He is also the author of several published articles and lectures on class actions.



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