



GROSSMAN YANAK & FORD LLP
Certified Public Accountants and Consultants

Economic Damages:
Lost Profit Determinations

UNDERSTANDING
THE FUNDAMENTALS

Attorney CLE Series – Spring 2014



GROSSMAN YANAK & FORD LLP
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Economic Damages:
Lost Profit Determinations

INTRODUCTION

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Economic Damages: Lost Profit Determinations

INTRODUCTION

- **Partnership between attorney and financial expert**
- **Expert must maintain independence and objectivity**



Economic Damages: Lost Profit Determinations

INTRODUCTION

- **Critical elements and legal principles guide recovery of damages, including lost profits:**
 - *Proximate Cause Rule*
 - *Reasonable Certainty Rule*
 - *Foreseeability Rule*



Economic Damages: Lost Profit Determinations

OTHER TOPICS COVERED

- **Elements of Lost Profits Damages Claims**
- **Role of Financial Expert & Professional Standards**
- **Spoilation of Evidence, Expert Admissibility & Electronic Discovery**
- **Lost Profits Calculations**
- **Case Study Examples**
- **Critical Judicial Decisions**
- **Conclusion**



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

- **Innumerable cases where damages can be measured by lost profits**
- **Lost profits not independent cause of action; simply a measure of monetary remedy for a business that has suffered financial detriment due to a wrongful act**



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

- **Plaintiff must demonstrate three key elements to enable recovery of lost profits:**
 - *The lost profits were directly caused by opposing parties' wrongful actions*
 - *The lost profits were a foreseeable consequence of the defendant's wrongful conduct*
 - *The lost profits can be determined and proven with reasonable certainty*



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

- **Proximate Cause Rule**
 - *Requires “direct” and “proximate” causation to a “wrongful act”*
 - *Defendant can often counter with arguments of intervening causes that contributed to the damages*



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

- **Proximate Cause Rule**
 - *Financial expert’s role generally limited to confirming or challenging reasonableness of legal counsel’s strategy*
 - *“But for” causation as proof*
 - *In many cases, proving transaction causation alone is insufficient to prove recovery of lost profits is due*



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

▪ **Foreseeability Rule**

- *Requires plaintiff to demonstrate that lost profits damages from actionable and wrongful conduct were foreseeable and probable*
- *For breach of contract, must further prove that parties “contemplated” lost profits damages “at the time they entered into the contract”*
- *Financial expert rarely called upon for assistance*



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

▪ **Foreseeability Rule**

- *Hadley – objective vs. subjective foreseeability*
 - Objective: can be reasonably assumed that the parties contemplated losses when entering into contract
 - Subjective: lost profits are recoverable to the extent a party is informed of “special circumstances” under which damages can be claimed, when entering into a contract



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

▪ **Foreseeability Rule**

– *Subjective foreseeability test*

- Frequently offered as proof of objective foreseeability
- Has become an issue where damages are alleged to have arisen from collateral matters associated with a contract



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

▪ **Foreseeability Rule**

– *Hadley – two types of damages (track objective foreseeability and subjective foreseeability)*

- General damages: those that flow directly and necessarily, or are a result of the wrongful act (objective foreseeability)
- Special or consequential damages: those that arise from the wrongful act's impact on collateral matters, so long as plaintiff can prove circumstances were known (subjective foreseeability) or should have been known by defendant at time of contract



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

- **Reasonable Certainty Rule**
 - *Requires plaintiff to prove lost profits damages with “reasonable certainty”*
 - *Some ambiguity and latitude in interpretation of the term*



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

- **Reasonable Certainty – Fact vs. Amount of Damages**
 - *Generally, once the fact of lost profits has been established with reasonable certainty, less certainty may be required in establishing and proving the amount of lost profits*
 - *Determination should be a reasoned estimate/conclusion*



Economic Damages: Lost Profit Determinations

ELEMENTS OF LOST PROFITS DAMAGES CLAIMS

- **Reasonable Certainty and the U.C.C.**
 - *§2-715: Recovery of Consequential Damages*
 - *§1-305: Remedies to Be Liberally Administered*



Economic Damages: Lost Profit Determinations

ROLE OF FINANCIAL EXPERT & PROFESSIONAL STANDARDS



Economic Damages: Lost Profit Determinations

ROLE OF FINANCIAL EXPERT

- **Role must be determined at inception of engagement**
- **Can serve as a consulting expert or an independent (testifying) expert**



Economic Damages: Lost Profit Determinations

ROLE OF FINANCIAL EXPERT

- **Consultant:**
 - *Assists attorney with various pre-trial matters*
 - *Work is protected by applicable work product doctrine*
- **Testifying expert:**
 - *Expected to provide testimony regarding his/her conclusions or opinions*
 - *Work is discoverable under federal and most state Rules of Civil Procedure*



Economic Damages: Lost Profit Determinations

PROFESSIONAL STANDARDS

- **Credentialed professionals must comply with standards promulgated by governing organizations, rules of ethical behavior and technical/academic standards of practice**
- **Expert should maintain objectivity in analysis and comply with all applicable case law and evidentiary standards**



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE
EXPERT ADMISSIBILITY &
ELECTRONIC DISCOVERY



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE

- **Spoliation is defined in *Black's Law Dictionary* as:**
 - *The intentional destruction, mutilation, alteration, or concealment of evidence usually a document. If proved, spoliation may be used to establish that evidence was unfavorable to the party responsible.*



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE

- **Litigants must preserve documents that may be relevant to pending or imminent litigation**
- **Experts' policies for document and electronic retention should be in line with Federal Rules of Civil Procedures**
- **Experts must keep documents helpful in understanding expert's opinion and those that the opposing party may use in cross examination**



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE

- **Federal Rules of Civil Procedure – Rule 26**
 - *Several important amendments added in December 2010*
 - *Intended to restore protection to certain aspects of communications between experts and retaining counsel*
 - Draft reports
 - Communications with counsel
 - Information considered



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE

- **Federal Rules of Civil Procedure – Rule 26**
 - *Draft reports*
 - Drafts, regardless of form, generally no longer subject to discovery
 - Uncertainty as to what is included and level of protection



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE

▪ **Federal Rules of Civil Procedure – Rule 26**

– *Communication with counsel*

- Protected, regardless of form, with three exceptions
 - *Expert's compensation*
 - *Data/facts provided to expert by attorney that expert considered in forming opinion*
 - *Assumptions provided to expert by attorney that expert relied upon in forming opinion*



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE

▪ **Federal Rules of Civil Procedure – Rule 26**

– *Communication with counsel*

- Amendment should promote broader communications between expert and attorney; however there may be some circumstances when communications are discoverable



Economic Damages: Lost Profit Determinations

SPOLIATION OF EVIDENCE

- **Federal Rules of Civil Procedure – Rule 26**

- *Information considered*

- Only “facts or data considered” will be required to be disclosed
 - Term “considered” can have broad interpretations



Economic Damages: Lost Profit Determinations

EXPERT ADMISSIBILITY

- **Experts must comply with professional standards, as well as applicable case law and evidentiary standards relative to admissibility of testimony**
- **Law and standards dependent upon venue**



Economic Damages: Lost Profit Determinations

EXPERT ADMISSIBILITY

- **Financial experts must establish:**
 - *He/she has requisite knowledge, skill, training and experience in his/her field of practice.*
 - *He/she must provide the facts, assumptions, information and other considerations relied upon when reaching his/her conclusion.*
 - *He/she must provide the methodology employed in reaching his/her conclusion.*



Economic Damages: Lost Profit Determinations

EXPERT ADMISSIBILITY

- **Since *Daubert*, federal judges are gatekeepers for admissibility of testimony of nonscientific experts**
- **Federal Rules of Evidence provides guidance**
 - *Rule 702. Testimony by Experts*
 - *Rule 703. Bases of Opinion Testimony by Experts*



Economic Damages: Lost Profit Determinations

EXPERT ADMISSIBILITY

- **Daubert factors courts should consider in determining reliability and relevance of expert testimony:**
 - *Whether the theory at issue can and has been tested,*
 - *Whether the theory has been subjected to peer review and publication,*
 - *Whether there is a known or potential error rate, and*
 - *Whether the theory has been generally accepted within the scientific community.*



Economic Damages: Lost Profit Determinations

EXPERT ADMISSIBILITY

- **Judges may exclude testimony if it is determined that it relates to damages not attributable to the damaging act**
- **Testifying expert should prepare a report that includes full disclosure as to the theories and methodology he/she employed as well as reasons for using or discounting data**



Economic Damages: Lost Profit Determinations

ELECTRONICALLY STORED INFORMATION (ESI)

- **Some states have specific discovery rules regarding ESI, others refer to federal rules**



Economic Damages: Lost Profit Determinations

ELECTRONICALLY STORED INFORMATION (ESI)

- ***Electronic discovery* – any process in which electronic data is sought, located, secured and searched, with the intent of using it as evidence in a civil or criminal legal case**
- **The same factors that apply to paper documents also apply to ESI**
- **Parties who destroy ESI likely to face spoliation sanctions**



Economic Damages: Lost Profit Determinations

ELECTRONICALLY STORED INFORMATION (ESI)

- **To be admitted into evidence at trial ESI must:**
 - *Be relevant to the issues at hand*
 - *Be authenticated to ensure reliability*
 - *Meet the best evidence requirement*
 - *Not be excluded by a rule of evidence*
 - *Have probative value that outweighs prejudicial value*



Economic Damages: Lost Profit Determinations

ELECTRONICALLY STORED INFORMATION (ESI)

- **ESI not permitted into evidence could impact the admissibility or weight of expert opinion**
- **Experts should avoid creating ESI evidence that could be discovered and used during cross-examination**



Economic Damages:
Lost Profit Determinations

LOST PROFITS CALCULATIONS

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Calculated as the amount necessary to place injured party in a position that he/she would have been in had the injury or incident not occurred**
- **Net lost profits = lost revenues – avoided costs**
- **Approach and method used for calculation selected based on specific facts and circumstances of the case**

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- Damages calculation requires analysis of many elements
- Calculations should not be based on mere speculation; reasonable, reliable factors must be considered
- Sufficient support and documentation should be provided



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- Plaintiff must prove acts of defendant caused damages to the plaintiff (must be material factor in the cause)
- Experts should also consider other factors that may have contributed to cause of plaintiff's loss
- Failure to address relevant factors can cause expert to fail to meet “reasonable certainty” standard



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Period of recovery**
 - *Start date*: *the date on which the harmful act occurred*
 - *End date*: *the point at which the plaintiff's operations return to "normal"*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Approaches used to calculate lost profits**
 - *One-model approach*: *calculation of only the increment lost revenues and related avoided costs*
 - *Two-model approach*: *taking the difference of the net profits the business would have attained "but for" the damaging event, and the actual financial results attained over the given period*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Methods used to determine lost revenues and profits**
 - *Before-and-After Method*
 - *Yardstick Method*
 - *Sales Projection Method*
 - *Market Model*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Before-and-After Method**
 - *Also referred to “book ends” method*
 - *Compares performance of business before the alleged actions and after the effects of damaging event are over*
 - *Underlying theory is “but for “ the defendant’s action, plaintiff would have experienced similar revenues and profits after the event as experienced before the event*



Economic Damages: Lost Profit Determinations

| | <u>Before</u> | | <u>After</u> | | |
|---------------------------------------|----------------|----------------|----------------|----------------|----------------|
| | <u>2008</u> | <u>2009</u> | <u>2010</u> | <u>2011</u> | <u>2012</u> |
| Revenues | \$550,000 | \$575,000 | \$220,000 | \$195,000 | \$475,000 |
| Costs | <u>240,000</u> | <u>250,000</u> | <u>175,000</u> | <u>165,000</u> | <u>225,000</u> |
| Net Profits | \$310,000 | \$325,000 | \$ 45,000 | \$ 30,000 | \$250,000 |
| Average Net Profits Prior to Event | \$318,000 | | | | |
| Lost Profits | | | \$273,000 | \$288,000 | \$ 68,000 |
| Discount Rate (15%) Factor | | | 1.00 | 0.87 | 0.76 |
| PV of Lost Profits | | | \$273,000 | \$250,560 | \$51,680 |

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Before-and-After Method**
 - *Best applied to established business with historical track record of profitability*
 - *Defendant can also use the method to illustrate that the plaintiff did not suffer any harm*
 - *Expert must also consider other factors that may have contributed to harm or loss*

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Yardstick Method**

- Also known as “benchmark” method
- Uses guideline company/industry measures to determine what the revenues and profits of the affected company would have been if the damaging event had not occurred
- Can use outside companies and/or proxies from within the company

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Economic Damages: Lost Profit Determinations

| | 2008 | 2009 | 2010 | 2011 | 2012 |
|------------------------------------|----------------|------------------|------------------|------------------|------------------|
| Actual Revenues | \$550,000 | \$575,000 | \$220,000 | \$195,000 | \$475,000 |
| Actual Costs | <u>240,000</u> | <u>250,000</u> | <u>175,000</u> | <u>165,000</u> | <u>225,000</u> |
| Actual Net Profits | \$310,000 | \$325,000 | \$ 45,000 | \$ 30,000 | \$250,000 |
| Industry Revenue | \$2,000,000 | \$2,300,000 | \$2,825,000 | \$3,100,000 | \$3,225,000 |
| Industry Costs | <u>960,000</u> | <u>1,050,000</u> | <u>1,350,000</u> | <u>1,500,000</u> | <u>1,725,000</u> |
| Industry Net Profits | \$1,040,000 | \$1,250,000 | \$1,475,000 | \$1,600,000 | \$1,500,000 |
| Average Industry Revenue Growth | 12.9% | | | | |
| Indicated Revenue | | | \$649,000 | \$733,000 | \$827,000 |
| Average Industry Net Profit Margin | 51.3% | | | | |
| Indicated Net Profits | | | \$333,000 | \$376,000 | \$425,000 |
| Lost Profits | | | \$288,000 | \$346,000 | \$175,000 |
| Discount Rate (15%) Factor | | | 1.00 | 0.87 | 0.76 |
| PV of Lost Profits | | | \$288,000 | \$301,020 | \$133,000 |

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

▪ **Yardstick Method**

- *Expert must prove that the subject business is sufficiently similar to the guideline company/industry used for comparison*
- *Expert must also consider other factors that may have contributed to harm or loss*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

▪ **Sales Projection Method**

- *Utilizes company-specific forecasts, preferably prepared in the ordinary course of business prior to the damaging event*
- *Method allows expert to more easily incorporate the effect other factors might have had on revenues and profits*
- *However, can be difficult to identify and measure these “other” effects and or support the underlying projections of the business*



Economic Damages: Lost Profit Determinations

| | <u>2008</u> | <u>2009</u> | <u>2010</u> | <u>2011</u> | <u>2012</u> |
|----------------------------|----------------|----------------|----------------|----------------|----------------|
| Actual Revenues | \$550,000 | \$575,000 | \$220,000 | \$195,000 | \$475,000 |
| Actual Costs | <u>240,000</u> | <u>250,000</u> | <u>175,000</u> | <u>165,000</u> | <u>225,000</u> |
| Actual Net Profits | \$310,000 | \$325,000 | \$45,000 | \$30,000 | \$250,000 |
| Projected Revenues | \$500,000 | \$555,000 | \$650,000 | \$680,000 | \$725,000 |
| Projected Costs | <u>220,000</u> | <u>240,000</u> | <u>275,000</u> | <u>290,000</u> | <u>300,000</u> |
| Projected Net Profits | \$280,000 | \$315,000 | \$375,000 | \$390,000 | \$425,000 |
| Lost profits | | | \$330,000 | \$360,000 | \$175,000 |
| Discount Rate (15%) Factor | | | 1.00 | 0.87 | 0.76 |
| PV of Lost Profits | | | \$330,000 | \$313,200 | \$133,000 |

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

▪ Market Model

- *Expert uses plaintiff's market share prior to the alleged act to determine lost revenues*
- *Most frequently used in patent infringement cases*
- *Expert must define the market of the company and analyze the subject business' historical sales, as well as the performance of its competitors*

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Economic Damages: Lost Profit Determinations

| | <u>2008</u> | <u>2009</u> | <u>2010</u> | <u>2011</u> | <u>2012</u> |
|---|-------------|-------------|----------------|----------------|----------------|
| Actual Revenues | \$550,000 | \$575,000 | \$220,000 | \$195,000 | \$475,000 |
| Industry Revenue | 2,000,000 | 2,300,000 | 2,825,000 | 3,100,000 | 3,225,000 |
| Market Share | 27.5% | 25.0% | 7.8% | 6.3% | 14.7% |
| Average Market Share Prior to Event | 26.5% | | | | |
| Indicated Revenue | | | <u>749,000</u> | <u>822,000</u> | <u>855,000</u> |
| Lost Revenues | | | \$529,000 | \$627,000 | \$380,000 |
| Market Profitability as % of Revenue | 45.0% | | | | |
| Lost Profits | | | 238,050 | 282,150 | 171,000 |
| Discount Rate (15%) Factor | | | 1.00 | 0.87 | 0.76 |
| PV of Lost Profits | | | \$238,050 | \$245,471 | \$129,960 |

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Calculation of avoided costs**
 - *Analyze the cost structure of the business to determine the cost drivers and other factors that impact costs directly tied to revenue*

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Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Calculation of avoided costs**
 - *Generally costs are classified into five categories:*
 - Cost of goods sold
 - Direct costs
 - Indirect costs
 - Overhead costs
 - Other expenses
 - *Also separated into “fixed” versus “variable” costs*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Calculation of avoided costs**
 - *Use of historical financial records, ratio analysis and statistical methods can aid expert in establishing costs*
 - *Other factors that can impact calculations must also be considered in determination of final estimate*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Discounting of future lost profits to present value**
 - *Appropriate discount rates must be determined by considering:*
 - Time value of money
 - Risk
 - *Critical for financial expert to determine whether an “ex ante,” “ex post,” or hybrid methodology is appropriate*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Determining discount rate**
 - *Usually based on subject company’s cost of equity or weighted average cost of capital (WACC)*
 - *Some of the common methods used:*
 - Buildup model (BUM) method
 - Capital asset pricing model (CAPM) method
 - Modified capital asset pricing model (MCAPM) method
 - Weighted average cost of capital (WACC) method
 - Price/earnings method



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Buildup Model**

- *Most common methodology used to estimate future cost of equity capital for a specific privately-held business*
- *Formula: $K_e = R_f + R_{pm} + R_{ps} + R_{pu}$*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Developing the discount rate**

- *The rate used to discount expected future cash flows to present value is the estimated rate of return currently available in the market on alternative investments with comparable risk*
- *Required rate of return = risk-free rate + premium for risk*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **WACC Method**

- *Utilizes an approach that looks to overall cost of capital*
- *Computation combines cost of equity (determined under buildup model) and net “after-tax” cost of debt, in proportions that are representative of future expected debt/equity structures*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **WACC Method**

- *First, develop a cash flow discount rate applicable to the risks associated with holding an equity capital position in the Company*
- *Second, identify the Company’s borrowing rate at the date of measurement (requires tax affecting adjustments)*
- *Finally, consider an appropriate debt/equity mix*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Taxes and damages**
 - *Lost profits damages generally taxable as ordinary income to the party receiving the damages payment*
 - *Calculations typically prepared on a pre-tax basis*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Mitigation**
 - *Expert must consider whether revenues and/or profits earned subsequent to the damaging event are a mitigation of the damages caused by the defendant, thereby reducing damages, or are profits that would have been earned regardless of the event*
 - *Plaintiff generally cannot recover damages that were foreseeable and could have been avoided by reasonable efforts, without causing undue expense or risk*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

▪ **Mitigation**

– *Plaintiff’s ability to mitigate is dependent upon:*

- Financial ability to mitigate;
- Cost to mitigate as compared to the economic damages suffered by the plaintiff;
- Technical barriers to mitigation;
- Market barriers to mitigation;
- Supply-oriented barriers to mitigation; and
- Timing issues impacting mitigation of damages.



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

▪ **Mitigation**

– *Defendant typically bears the burden of pleading and proving mitigation, which requires the plaintiff to take “reasonable steps” to mitigate damages caused by the defendant’s conduct*



Economic Damages: Lost Profit Determinations

LOST PROFITS CALCULATIONS

- **Calculation of lost profits is a thorough process requiring an in-depth look at the facts and circumstances of each case**
- **For a sound, defensible calculation of lost profits, expert must consider a multitude of items**



Economic Damages: Lost Profit Determinations

CASE STUDY EXAMPLES



Economic Damages: Lost Profit Determinations

CASE STUDY EXAMPLES

- **Each case is fact-specific**
- **Expert's research and analysis will provide credibility for underlying assessment and calculations**



Economic Damages: Lost Profit Determinations

CRITICAL JUDICIAL DECISIONS



Economic Damages: Lost Profit Determinations

CRITICAL JUDICIAL DECISIONS

- **Foreseeability**
- **Proximate Cause**
- **Reasonable Certainty**
- **Mitigation**
- **Discount Rates**
- **Spoliation of Evidence**



Economic Damages: Lost Profit Determinations

CRITICAL JUDICIAL DECISIONS

- **Patent Infringement**
 - *Arlington Industries, Inc. v. Bridgeport Fittings, Inc.*
- **Price Discrimination**
 - *Feesers Inc. v. Michael Foods Inc.*
- **Breach of Contract**
 - *Buffman, Inc. v. Lafayette Insurance Co.*



***Economic Damages:
Lost Profit Determinations***

CONCLUSION



Economic Damages: Lost Profit Determinations

CONCLUSION

- **Because of legal complexities, counsel and financial expert must interact continuously**
- **Legal principles must be overlaid on financial expert's work to produce a final determination that is correct and legally defensible**
- **It is best to involve a financial expert early in the process**



Economic Damages: Lost Profit Determinations

CONCLUSION

- **Financial expert evaluates all financial and economic aspects of a lost profits claim**
- **Results of assessment subjected to statistical and economic analysis to develop conclusion of lost profits**
- **Financial expert can also act on behalf of defendant to challenge assumptions, economics and calculation of plaintiff's determination**



Economic Damages: Lost Profit Determinations

THANK YOU!