Fannon and Dunitz Discuss Lost Profits and Other Commercial Damages

The calculation of lost profits and other commercial damages represent a growing opportunity for valuation experts. The most extensive book in this area is the third edition of The Comprehensive Guide to Lost Profits and Other Commercial Damages, edited by Nancy J. Fannon, CPA, ABV, ASA, MCBA (Meyers, Harrison & Pia), and Jonathan M. Dunitz, Esq. (Verrill Dana). Along with an all-star cast of contributing authors, Fannon and Dunitz have just completed the newest edition of this book, a significantly enhanced and expanded version of the second edition. BVU recently talked about the new edition with the editors, who also gave their unique insights into the practice of lost profits and damages.

**BVU:** What makes the valuation of lost profits/damages different or unique when compared with other types of valuation assignments?

**Nancy Fannon:** I think the most notable difference (compared to a nonlitigation engagement) is the amount of evidence that you need to support a damage claim. This affects everything you do from the minute you take that first phone call to the end of the engagement. Also, the attorneys who handle these cases tend to be of a very high caliber, and financial experts really need to be conversant not only in the economics of damages, but also with the law that guides the appropriate remedy associated with different actions.

**BVU:** Has there been an increase in the amount or complexity of the evidence needed?

**NF:** Absolutely. I’ve been practicing business valuation for 28 years and testifying for 20 years. When I started, you would get one Bankers Box of documents and that was about it, so what you would have to look at was pretty limited. But now, with electronic evidence and the sophistication of these cases, there is a great deal more evidence to examine. Some of our cases can contain as many as 15,000 documents, and the valuation report for litigation purposes can have up to 500 footnotes to the evidence. A valuation report we do for nonlitigation purposes may have only five footnotes.

**BVU:** Is there any particular segment of lost profits or commercial damages that you see as a growth area?

**Jonathan Dunitz:** With the recent severe weather we’ve seen, from hurricanes to Super Storm Sandy to the droughts in the West and significant snow and ice in other regions, there is potential for growth in the area of business interruption claims. Where there is physical damage to property that results in businesses shutting down for a period of time to rebuild, insureds will likely be making claims under the business interruption and extra expense provision of their policies. Business interruption is certainly an area of growth.

**NF:** I also think that intellectual property will continue to have a pretty healthy caseload. That includes copyrights, trademarks, trade secrets, and patents. Particularly, in that area, we added about 170 pages to the new edition of the book dealing with unjust enrichment, which is one...
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of the common remedies with respect to IP damages, but the least understood by financial experts.

BVU: Why did you see the need for a new edition of this book, which was already very comprehensive?

NF: There are a lot of books out there on commercial damages, but there was no book that really bridged the gap between the economics and what the courts have to say about the calculations and evidentiary requirements. This book combines the perspective of the attorney in terms of what the court is looking for in damage calculations with the expert’s perspective on how to analyze and perform the calculations. The third edition also contains a lot of new and expanded material. Also, keeping up with the case law is crucial, so this edition is updated with new case law.

BVU: What does this new edition contain in terms of new and expanded topics?

JD: We added several chapters that not only address lost profits, but other commercial damages as well. As a result, the scope of the book has broadened beyond lost profits.

BVU: Speaking of cases, the book is now in two volumes, with the second volume being case law?

NF: As I mentioned, one topic that’s brand new is unjust enrichment. George Roach contributed a very comprehensive analysis of the case law and financial analysis related to this topic. We also added new chapters on business interruption, new material on forensic accounting, benefit of the bargain damages, and additional insights into intellectual property damages. Also, we added new and enhanced abstracts of lost profits and damages cases.

BVU: Why did you see the need for a second volume?

NF: Yes, the second volume is case law that has been fully updated. For this new edition, we had an attorney completely rebrief all of the cases that we previously had in the guide, as well as add new cases.
**JD:** What’s important in the updated case law are the nuances that these cases add to the area of lost profits and damages. That is, how courts review evidence and how they deal with the minutia surrounding various issues. Also, in different jurisdictions, there are different interpretations of the law.

**NF:** Yes, jurisdictional differences are very important. In the guide, we have the cases split out by jurisdiction, including by state. It’s important for the expert to know what is going on in the courts in their particular jurisdiction. You can look at a decision, and you see something that is seemingly the same decided one way in one jurisdiction and then another way in a different jurisdiction. That’s why it’s so important to keep up with the case law in this area.

**BVU:** How has the courts’ view of lost profits/damage claims changed?

**NF:** We’re seeing more changes of an incremental nature as opposed to anything dramatic. Courts are expecting more and more from the experts. We also see that the courts have greater evidentiary requirements. So it’s more of a continuation of these incremental changes as opposed to anything groundbreaking.

**BVU:** You mentioned the different perspectives between the valuation analyst and the attorney. Can you explain this more? How do you reconcile these divergent views?

**NF:** There’s a huge difference between the expert and the attorney. The expert’s job is to be an unbiased analyst who is essentially working for the court. The attorney’s job is to be an advocate for the client. Of course, the expert is part of the attorney’s case, so they want to try to mold us for the benefit of their client. The courts look to us to not just accept everything that’s told to us, but also look objectively at the facts and evidence in support of our opinions.

**JD:** Attorneys also need to consider how to present the case to a jury. Given the nature of economic damages testimony, having an expert on the stand for two days may not be very exciting for the jury. So we have to figure out how to get the expert’s opinions into evidence and supported without having the expert on the stand for too long. If the expert’s report sounds like it is advocating for the client, the attorney needs to work with the expert to be sure the opinion is adequately supported by the evidence. If the expert can’t support his or her opinions, then all of the advocacy in the world won’t help.

**NF:** The work that valuation experts do in damages cases or in valuation cases appears to be incredibly simple, but, in fact, it is very complex. I think that because at first blush it appears to be simple causes a lot of people to get into the field. They start to perform these calculations and embrace the simple concepts not realizing how complex it really is. And so if you’re doing an analysis and you don’t know what you don’t know, it’s easy to get up there on the stand and sound supremely confident—but be absolutely wrong. It’s important for experts to really understand what the courts require and be able to coherently present their calculations and evidence.

**BVU:** What advice do you have for developing a lost profits/damages practice?

**JD:** For a lawyer to develop this niche, you have to be intrigued by numbers. You also need to learn the topic and work with accountants and valuation experts to understand valuation principles and how the models work. The attorney needs to understand what the expert has in his or her report and what the opposing expert has in his or her report. Depositions and trials are fluid, and an attorney needs to be sufficiently versed in lost profits and economic damages theory to spar with an expert if the expert makes even a slightly nuanced departure from his or her opinion. Also, keeping up with the case law in your jurisdiction is very important.

**NF:** From an expert’s perspective, you can’t get into this area until you understand the requirements. You also have to understand how courts operate in terms of such things as the rules of evidence, civil procedure, and document production. This is very critical in these types of
cases. You also have to be prepared to testify. For me, what helped a great deal was that I do a lot of teaching. When you’re giving testimony, you’re essentially teaching the judge and the jury. Also, public speaking helped me a lot. When you’re testifying, you want the words to come out naturally, so public speaking is a great training ground for that. Also, you need to build your CV by, for example, writing, taking courses, and getting credentials. This increases your credibility to the court, which is critical to what we do.

**JD:** From an attorney’s perspective, communication skills are imperative if you want to be a sought-after expert in this area. Being able to communicate effectively through testimony or through the report is critical. It doesn’t matter to me whether you know lost profits analysis backwards and forwards. If you can’t explain it to a jury or a judge or in your report, it’s not going to be very useful because I need to understand what you’re doing—and so does the jury, judge, and client.

**NF:** Also, don’t give in to the pressure to act as a mouthpiece for the attorney. As an expert, you need to be able to stand firm in your opinions and beliefs. If you can do that, you will be more convincing when you get on the stand because you’re saying what you actually believe. Not only will the court find you more credible, but so will the attorneys. Experts hurt their careers and hold themselves back if they’re willing to be an advocate for the attorney’s client.

**For more information:** *The Comprehensive Guide to Lost Profits and Other Commercial Damages* is available at www.bvresources.com/publications.
The Comprehensive Guide to Lost Profits and Other Commercial Damages, Third Edition

The third edition of The Comprehensive Guide to Lost Profits and Other Commercial Damages, edited by Nancy J. Fannon and Jonathan Dunitz, Esq., provides a deep and rich resource for financial experts and attorneys seeking guidance on damage calculations. The Guide focuses on financial evidence: how to gather it, interpret it, and tell its story in a lawsuit or litigation setting. Blending the financial expert’s knowledge of accepted methods and procedures with the attorney’s knowledge of legal issues and insights, it provides in-depth analysis and interpretation of the continually expanding body of case law.

Key highlights of the new edition include:

• Updated and expanded chapters covering all aspects of calculating lost profits / loss of business value
• An insightful and comprehensive look at the unjust enrichment remedy
• Substantive new materials on forensic accounting
• A new chapter covering business interruption
• Expanded coverage of benefit of the bargain damages
• Expanded insights into intellectual property damages, including patents, trademarks and copyright
• New and enhanced abstracts of many of the lost profit and damage cases found throughout the book

“This 1,500+ page treatise addresses virtually every financial and legal aspect of all types of damages cases.”
— Shannon Pratt

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