

Effectively Deposing Your Opponent's Financial Expert

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Financial Experts' Reports

a) Calculation of Economic Damages:

- Contract disputes;
- Lost earnings;
- Business interruptions;
- Intellectual Property infringements;

b) Business Valuation;

c) Forensic Accounting



Before taking expert deposition... ...complete fact discovery

- a) Interrogatories answered;
- b) Documents obtained;
- c) Lay and other witnesses deposed



Purposes to depose the expert:

- a) To determine the expert's opinions and the complete basis for those opinions;
- b) Undermine or limit the impact of the expert's opinions and conclusions;

General Outline of Expert Deposition

- a) The expert's qualifications;
- b) The expert's previous testifying experience;
- c) The facts upon which the expert based her opinions;

General Outline of Expert Deposition (continued)

- d) The analysis and assumptions the expert made;
- e) The professional standards followed;

General Outline of Expert Deposition (continued)

- f) The professional literature and / or studies considered, and;

- g) The expert's opinion;

Financial Expert's Qualifications

- a) Federal Rule of Evidence 702 – expert witness must be qualified by knowledge, skill, experience, training or education;
- b) Is there a connection (“nexus”) between credentials and the specific subject on which the expert opines?

Financial Expert's Credentials - Sample

- a) Public Accounting - CPA;
- b) Business Valuation - ABV, CVA, ASA, CBA;
- c) Fraud Examination, Financial Forensics – CFE, CFF;
- d) Economics – PhD in Economics

Previous Testifying Experience

- a) Has the expert testified previously on similar matters?
- b) Are the expert's opinions consistent with previous testimony?
- c) Has the expert been disqualified or barred from testifying?

The Facts

- a) What documents did the expert receive?
- b) What documents did the expert review?
- c) Did the expert make additional requests for information?

The selection of documents can create bias!

The Facts (continued)

e) What other documents / data did the expert consider?

- Government statistics (labor, economic, financial);
- Industry data;
- Market data;
- Other texts, standards or documents?

Analysis and assumptions - methodology

- a) Does the damage model comport with the facts and legal story presented?

- b) Does the damage model fit within statutory guidance, contract language and case law?

Financial Expert Report – Key Elements

Goal – construct a damage model to measure the financial amount required to make the injured party whole.

Financial Expert Report – Key Elements (continued)

a) Measurement points:

- Ex Ante (“from before”) – damages measured on the date of the “event”;
- Ex Post (“from after”) – damages measured as of the date of the report or anticipated trial date.

Financial Expert Report – Key Elements (continued)

b) Comparative scenarios:

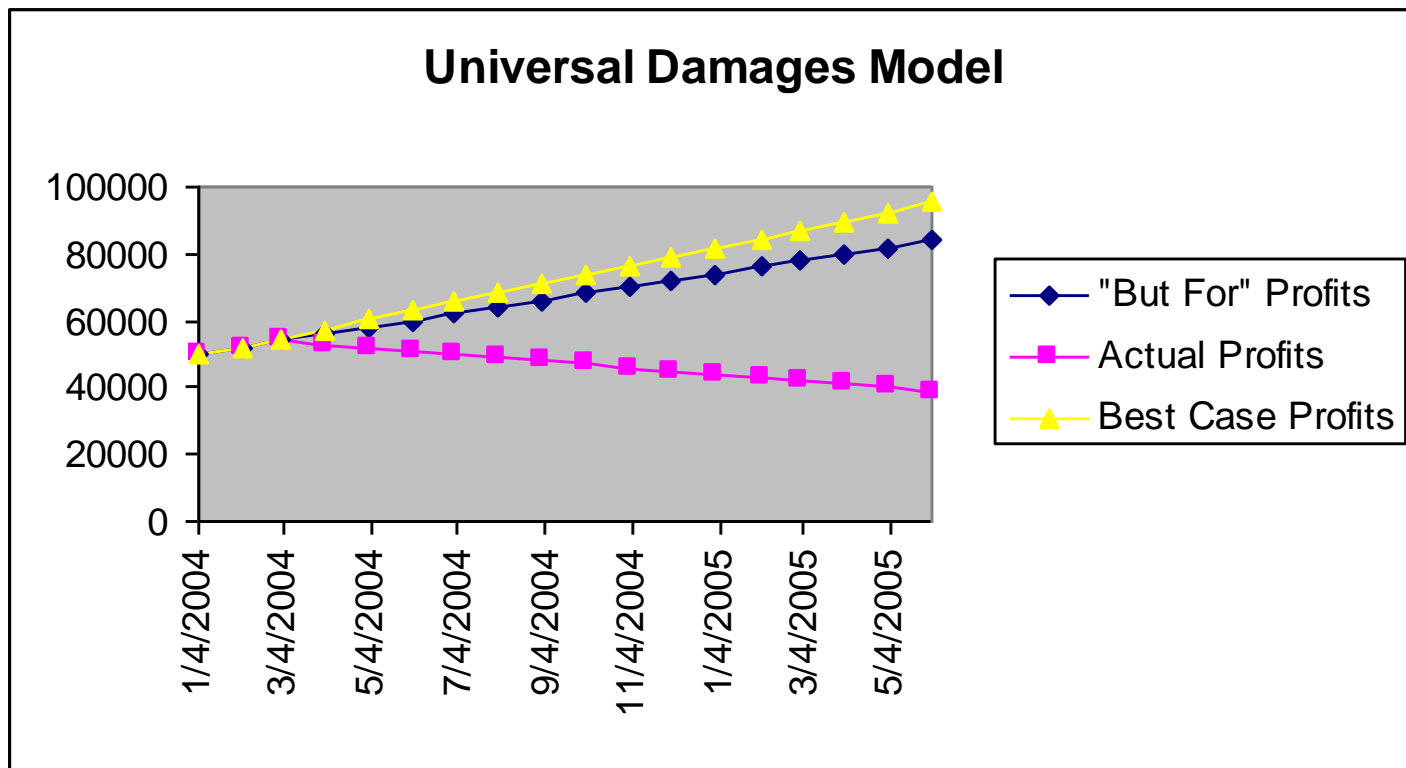
- Before and After;
- But For;
- Yardstick;
- Market Share.

The Before and After Method

**Keys to employing the
Before and After Method include having:**

- 1) Sufficient historical data upon which to build a reliable forecast.
- 2) Similar economic and industry conditions during the before and after periods.
- 3) Data and information necessary to thoroughly analyze each period.

Universal "But For" Model



The Yardstick Approach

- With the Yardstick Approach, the damages expert attempts to measure damages by comparing the performance of the impacted business after an event to the performance of a comparable business during the same period
- Factors to consider can include size, location, customer base, market share, and product differences.

Financial Expert Report – Key Elements (continued)

c) Assumptions in Financial Projections:

- Future growth rates (nominal v real);
- Discount rates (risk free and risk adjusted);
- Is there bias in client and counsel provided assumptions?

Financial Expert Report – Key Elements (continued)

d) Quality of Work:

- Were appropriate documents used?
- How was market or industry data defined, gathered, analyzed and interpreted?
- Are there clerical errors in calculations?

Financial Expert Report – Key Elements (continued)

d) Quality of Work (continued):

- Did the expert adhere to applicable professional standards?
- Did the expert test the analysis against competitor or industry experience?

Daubert Challenges

- a) Qualifications – the expert does not possess the prerequisite qualifications;
- b) Methodology – the expert did not use appropriate methodologies;

Daubert Challenges (continued)

- c) Application – the expert failed to apply the methodologies properly, and
- d) Support for Opinions – the expert failed to support his conclusions or establish a direct link between the litigated actions and the calculated damages.

Common Errors in Financial Experts' Reports

- Failure to establish a causal link;
- Failure to consider other factors contributing to losses;
- Failure to perform reasonableness check;
- Limited access to relevant data;

Common Errors in Financial Experts' Reports (continued)

- Failure to consider independent data;
- Failure to distinguish between fixed and variable expenses;
- Failure to consider mitigation effort;
- Relying on a “cookie-cutter” approach.

Questions?

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