*Proving Future Lost Profits for New Businesses in the Post-*Daubert *Era*

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Introduction

Proving future lost profits for a new business poses a conundrum, because a new business has no track record upon which to predict such losses. Accordingly, some judges liken an expert's prediction of a new business's future lost profits to an astronomer testifying that the "sun revolves around the earth."[1] In the view of some courts, such experts should be precluded from testifying because their opinions do not rise above the level of unsupported speculation. An emerging trend in federal case law, however, suggests that experts can establish future lost profits with reasonable certainty and, thus, can provide valuable lost-profit testimony to the jury.

A History of Judicial Skepticism

Federal courts have always met an expert's prediction of future lost profits for a new or recently launched business with a raised eyebrow. Early judicial skepticism was based on the cardinal rule of contract damages that future damages must be proven with "reasonable certainty."[2] At the state level, however, this evolved into the common law "new business rule," which severely restricts or bars new businesses from obtaining lost profits as an element of damages.[3]

The new business rule holds that the hazards, contingencies, and uncertainties inherent in the operation of a newly established business preclude consideration of future lost profits as an element of damages.[4] Several states, including Alabama,[5] Georgia,[6] Maryland,[7] New Jersey,[8] New York,[9] Ohio,[10] Oklahoma,[11] Texas,[12] and Virginia,[13] have adopted this rationale and all but shut the courthouse doors to new businesses claiming future lost profits. If the plaintiffs filed their breach of contract or business tort cases in federal court, the *Erie* doctrine of 1938[14] required the court to apply the substantive law of the forum state to the case. By the middle of the 20th century, the new business rule made it virtually impossible to prove future lost profits for new businesses.[15]

Overcoming the New Business Rule

In General

Fortunately for plaintiffs, the new business rule has evolved over the past 20 years.[16] Some jurisdictions have relaxed or abandoned the rule,[17] while others have recognized enough exceptions to suggest the rule's demise.[18] Consequently, today's federal judicial landscape reveals a number of approaches that new companies can use to prove lost profits, regardless of how long they have been in business.

The Definition Approach

When a business first opens its doors, it can safely be labeled as new—but beyond that first day, "new" becomes a matter of opinion. In *GM Brod & Co, Inc v US Home Corp,*[19] the Eleventh Circuit wrestled with the question of how long a business must be operating before it can shed the new business label and thus be spared the effects of the new business rule. In this case, a property management company brought suit against a condominium developer for a breach of the property management contract and for U.S. Home's other unlawful acts.[20] G.M. Brod had only been in business for three months, yet the jury awarded it $956,000 in future lost profits.[21] On appeal, U.S. Home argued that it was the settled law of Florida that "proof of profits for a reasonable time anterior to the breach is required to establish lost profits," and that since G.M. Brod was a new business, future lost profits were too remote and speculative to be awarded.[22]

The Eleventh Circuit disagreed, reasoning that if a company like G.M. Brod operates for three months, it is not a "new" business.[23] Supporting this proposition, the court cited authorities where businesses were awarded future lost profits despite the fact that they had only been in operation for five or six months.[24] The court then cited with approval the Fifth Circuit's policy reasoning on the future lost profit dilemma:

> Particularly is the calculation of damages difficult when … there is

> no reliable track record to look back on. But uncertainty cannot end the efforts of the federal courts to redress the harm caused proprietors…. The wrongdoer must bear the risk of the uncertainty in measuring the harm he causes.[25]

As exhibited by the Eleventh Circuit's analysis here, federal circuits have narrowed the definition of what constitutes a new business. Further, the courts are willing to construe the uncertainty of a young business's future lost profits against the party that breached the contract or committed the tortious act.[26] Such an analysis defies the new business rule, which held that any uncertainty with regard to future lost profits must be construed against the plaintiff, not the defendant.[27] The reasoning set forth in *GM Brod & Co* challenges this proposition by recognizing a policy of lessening the burden placed on the plaintiff in proving lost profits.

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The Chain Store Approach

Likewise, when established businesses or chain stores open new business locations, the new business rule can be overcome. Lowe's Home Centers is one of the largest chain stores in the country. In 2004, it brought suit against General Electric,[28] alleging that G.E. was responsible for the environmental contamination of Lowe's property and that this contamination prohibited it from opening a new, significantly larger store on that lot. G.E. brought a motion for judgment as a matter of law with respect to Lowe's claim of future lost profits.[29]

The District Court denied the motion, reasoning that the new store was not a new business because Lowe's planned to sell in the new building identical products at identical prices to those sold at other locations.[30] The Eleventh Circuit did not decide the issue on appeal but instead certified the question to the Supreme Court of Georgia,[31] noting other jurisdictions that have carved out a chain store exception to the new business rule[32] and outlining several reasons why the Georgia Supreme Court should follow suit.[33]

The Experienced Management Approach

In *In re Merritt Logan,*[34] the Third Circuit engaged in a similar analysis about a company opening a second grocery store location.[35] Plaintiff Merritt Logan ran a small neighborhood grocery store before opening a large supermarket called Rancocas Thriftway. Unlike the chain store circumstances of *Lowe's Home Centers,* however, the plaintiff in this case was not simply going to sell the same products at the same prices in a new building. Accordingly, the court decided that it would not treat Rancocas Thriftway as simply a continuation of the small neighborhood store.[36] However, the court's analysis didn't end there.

The Third Circuit went on to review the track record of the store's managers, stating that "it does seem proper to us to consider Mr. Logan's years of overall experience in the retail food business" when deciding whether evidence of future lost profits should be allowed.[37] In the end, plaintiff's significant experience in the industry, coupled with the fact that Rancocas Thriftway had been in business for more than a year, led the court to hold that there was a sufficient financial track record upon which to calculate future lost profits.[38]

Merritt Logan was not the first case to engage in such an analysis. Other federal courts have similarly cited the track record of management personnel in allowing new businesses to offer evidence of future lost profits, despite the new business rule.[39] As a result, attorneys for young companies should not be quick to accept an opponent's definition of their business as "new." Courts have held that companies in business for as little as three months have a sufficient track record upon which to predict future lost profits. Moreover, even when the business is in its infancy, it may still prove future lost profits if its management has considerable experience in the industry.

The "Yardstick" Approach

The "yardstick" approach is a fourth judicially recognized method of overcoming the new business rule, and it has been used to predict future lost profits in everything from antitrust cases[40] to labor relations disputes[41] to breach of contract actions.[42] The approach does not require a new business to have a long operational history because it bases profit projections on the record of other established businesses that are closely comparable to the plaintiff's.[43] By studying the track record of these similar firms, the plaintiff's expert may project future profits even though the plaintiff's business has little or no profit history of its own.[44]

The case of *CA May Marine Supply Co v Brunswick Corp*[45] demonstrates that the yardstick approach is a legitimate tool for demonstrating lost profits in federal court. At the trial level, C. A. May brought suit against Brunswick for the wrongful termination of its franchise boat-engine dealership.[46] The issue on appeal concerned the amount of damages that C. A. May should recover as a result of not being able to sell engines to Brunswick. The Fifth Circuit recognized that "[w]here the business is new and the dealer goes out of business before he is able to compile an earnings record, the amount of lost profits is gauged by a 'yardstick' study of the business profits of a closely comparable business."[47] The court went on to hold that because C. A. May had a profit record, a study of this record was the more appropriate method for quantifying damages in this particular case.[48] However, the court made it clear that if the profit history had not been available, the yardstick approach would have been a legitimate means for projecting future lost profits.[49]

The Liquidated Damages Approach

Courts generally enforce contractual provisions that specifically set forth what liquidated damages will result in the event of a breach.[50] In these cases, the new business rule is no obstacle to recovery because proactive parties resolve the question of what amount of damages is appropriate or "reasonably certain" in the event of a breach in the contract. There is a significant likelihood that future lost profits will not be recoverable if a new business does not demand a liquidated-damages clause during contract negotiations and does not subsequently use one of the other approaches to overcoming the new business rule.

In *RMLS Metals, Inc v International Business Machines Corp,*[51] plaintiff was a new company with no operational track record that was thus subject to New York's new business rule.[52] Nevertheless, plaintiff sought future lost-profit damages arising from defendant's breach of contract,[53] arguing that even in the face of the new business rule, its future lost profits were not remote or speculative. Plaintiff cited the case of *Hirschfeld v IC Securities, Inc*[54] in support.

This reliance on *Hirschfeld,* however, was misplaced. In *Hirschfeld,* plaintiff had inserted the amount of anticipated damages into the contract.[55] As a result, the court reasoned that because the amount of damages was fixed and ascertainable by the plain language of the contract, those sums could be recovered, regardless of plaintiff's lack of a financial track record.[56] In *RMLS Metals,* on the other hand, plaintiff had no such contract clause, and consequently the court held that RMLS could not recover lost profits pursuant to the new business rule.[57]

The lesson here is simple: in states that rigidly apply the new business rule, new businesses should insert a liquidated-damages clause into their contracts until they can safely shed the new business label.[58] Then, if a contractual dispute arises, the business can ask the court to simply enforce the plain language of that clause.

With the emergence of these four approaches to overcoming the new business rule, the rule is no longer a major obstacle to predicting future lost profits with reasonable certainty. Still, these approaches are only half of the lost-profits battle today. The second half of the battle focuses on the qualifications and methodology of the plaintiff's damage expert, and whether that expert should be allowed to testify in front of a jury about the plaintiff's future lost profits.

How Lost-Profit Experts Pass *Daubert* Muster

Development of Standards

Before the U.S. Supreme Court's opinion in *Daubert*, judges had expressed their disappointment at what experts had become. One court expressed its displeasure this way:

> [Experts are] … the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called "experts."[59]

For an expert to testify in the courtroom of judge and legal scholar Learned Hand in the early 1900s, it had to be possible to test the expert's theory for reliability in the same way that one could test the laws of nature.[60] It is certainly a tribute to Judge Hand that almost a century after the publication of his article "Historical and Practical Considerations Regarding Expert Testimony," the judge's informal thoughts on expert testimony would be mirrored in *Daubert v Merrell Dow Pharmaceuticals*[61] and become the law of the land.

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The petitioners in *Daubert* were minor children and their parents, who alleged that birth defects in the children had been caused by Dow's pharmaceutical Bendectin. At the trial level, the court dismissed the case based on Dow's submission of a "well-credentialed" expert affidavit that concluded that Bendectin does not cause birth defects.[62] Plaintiffs in turn presented eight experts who relied on animal studies, chemical structure analysis, and the unpublished "reanalysis" of previously published human studies to reach the conclusion that Bendectin does cause birth defects.[63] The trial court held that this evidence did not meet the "general acceptance standard"[64] for reliable expert testimony and, given the reliable testimony of Dow's expert, dismissed the case.[65]

On appeal to the U.S. Supreme Court, plaintiffs argued that the "general acceptance standard" was superseded by the enactment of Federal Rule of Evidence 702.[66] While the Court agreed, its holding was overshadowed as it proceeded to set out "helpful" factors that federal trial courts could review before admitting expert testimony under FRE 702. The list of factors includes the following:

- whether the expert theory can be tested
- whether the theory or technique has been subjected to peer review and publication
- whether there is a known or potential rate of error
- whether the theory has "general acceptance" in the relevant scientific community[67]

The purpose of these factors is to ensure scientific validity in expert testimony.[68] Just as fact witnesses can only testify to that which can be perceived by the senses, an expert witness can now only testify to that which can be tested for relevance and reliability.[69] The Supreme Court followed *Daubert* with two more decisions that clarified the federal judiciary's role as the gatekeepers of expert testimony: *General Electric v Joiner*[70] and *Kuhmo Tire Co v Carmichael*.[71] Together, these cases are known as "the trilogy."[72]

In *Joiner,* the Court held that the federal court should scrutinize an expert's underlying data, and if there is a gap between the data and the expert's conclusion, the court should exclude the expert's entire testimony.[73] In *Kuhmo,* the Court held that the *Daubert* standard applies to all experts, not just to those specializing in science.[74] Taken together, the trilogy demands that federal judges ask (1) whether the proposed witness is a qualified expert, (2) whether the proposed expert's testimony is reliable, and (3) whether the expert's testimony will assist the trier of fact.[75]

Whether the Expert Is Qualified

Because projecting future lost profits for a new business requires quantitative analysis, economists and accountants should be retained early in the litigation.[76] The standard qualification for economists is a PhD, while accountants should be CPAs. In both cases, the plaintiff's attorney should seek out experts who have superior academic credentials and a history of original research and publication.[77] Even so, *Daubert* motions rarely challenge an expert's qualifications, as experts who satisfy the liberal standard of FRE 702 usually meet the qualification prong of the *Daubert* standard.[78] In a recent bankruptcy case, for instance, a trustee who was not a CPA and who lacked many of the certifications and professional affiliations customary for accountants[79] was allowed to testify about reconstructive accounting because she had sufficient general accounting training and experience to be considered an expert under FRE 702.[80]

Whether the Expert Will Assist the Trier of Fact

Obviously, expert testimony must be relevant if it is to be admitted under *Daubert*. "Rule 702's 'helpfulness standard' requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[81] In other words, the plaintiff's lost-profit expert's testimony must be tied to the issues raised in the case.[82] Not surprisingly, federal case law reveals that relevance is not a point of contention between the parties when it comes to the exclusion of experts before trial. Instead, the heart of the dispute is the reliability of the expert's testimony.

Whether the Expert's Testimony is Reliable

The breadth of federal case law discussing the reliability of the plaintiff's expert testimony on future lost profits is sobering.[83] Thus, it is essential for new businesses to be prepared for the expert's challenge even before that challenge is made. The most important preparation for a *Daubert* motion is to compare each step of the expert's methodology with the methodology presented in the peer-reviewed literature published at the time the expert opinion was formed. This way, when

the court subsequently evaluates the expert's opinion under the *Daubert* standard, the plaintiff is prepared to show that the expert's methodology has been (1) tested, (2) subjected to peer-reviewed publication, and (3) generally accepted in the relevant professional community.[84]

Fortunately, modern methodologies for forecasting business profits are sophisticated.[85] There is no one particular methodology or model that must be used to project future lost profits to satisfy *Daubert*; rather, it depends on the circumstances of the particular case. Regardless of which methodology is used, the Federal Judicial Conference has set forth several issues that can be addressed when seeking to quantify future lost profits:

- the plaintiff's economic position absent the harm compared to its actual economic position;
- the full economic and market consequences of the defendant's behavior, including price, supply, demand, and competition;
- the possible causes of the plaintiff's lost profits other than the defendant's breach of contract or wrongful acts, if any;
- the likely profitability of the new business given the lack of a track record.[86]

If the parties follow these guidelines, they should be able to rebut any suggestion that the lost-profit analysis by their experts is not reliable under *Daubert*.

The plaintiff in *Swierczynski v Arnold Foods Co*[87] followed this advice and defeated the defendant's *Daubert* motion, despite its unusual choice of lost-profit methodology. In *Swierczynski*, plaintiff was a bakery distributor that sued defendant, a bakery, for breach of contract, seeking lost profits.[88] Defendant moved to exclude plaintiff's lost-profit expert on the grounds that his testimony improperly used a "lost wages" approach to quantifying damages, and that the damage calculations were thus not reliable.[89] Plaintiff responded by arguing that the relationship between the parties and the objective circumstances of the market warranted the "lost wages" methodology, and that any challenge should go to the weight, not the admissibility, of the expert's testimony.[90] The *Swierczynski* court engaged in the *Daubert* analysis and held that since the expert's overall method for calculating future lost profits appeared to be valid, it did not fail the *Daubert* reliability standard.

The court made this ruling despite defendant's vigorous argument that a better methodology should have been used.[91] If defendant suggested a better method for quantifying lost profits, the court held that defendant could present that alternative during direct and cross-examination.[92] The importance of the court's refusal to hold that there is only one valid methodology per case cannot be understated. *Daubert* and its progeny do not hold that there is one correct method for quantifying lost profits.[93] They require only that the expert set forth a reliable methodology that is based on objective market forces.[94]

A second point of attack on the reliability of an expert's testimony focuses on the expert's underlying assumptions when making lost-profit predictions. Obviously, any expert who predicts future lost profits for a new business will have to make assumptions to project revenues into the future, and these assumptions will be vulnerable to attack. The key is that the attorney must ensure that any assumptions the expert makes are drawn from the plaintiff's evidence. Large or unrealistic profit projections that have little relationship to the plaintiff's evidence endanger the entire opinion, and the entire case.[95]

Main Street Mortgage, Inc v Main Street Bancorp, Inc[96] is an example of the correct response to an attack on an expert's underlying assumptions. Plaintiff in *Main Mortgage* brought suit against defendant for unfair competition[97] and retained a CPA named Kenneth Biddick to quantify lost-profit damages.[98] Predictably, defendant filed a *Daubert* motion to strike the expert, arguing that Mr. Biddick's testimony was not reliable because his lost-profit calculations were based on unrealistic assumptions.[99]

Mr. Biddick set forth three possible scenarios for predicting lost profits, based on a set of assumptions about what would have happened had defendant not engaged in unfair competition. The expert also addressed many of the other issues set forth in the Federal Judicial Conference's *Reference Manual*.[100] As a result, the expert's assumptions did not overreach but were instead supported by a variety of independent market factors.[101] The court recognized that there was nothing inherently wrong with plaintiff's expert basing his lost-profit projections on reasonable assumptions, and denied defendant's motion in its entirety.[102]

New businesses seeking to present unfettered lost-profit expert testimony to the jury can do so with proper preparation.

The analysis in *Main Street Mortgage* is sound. Contrary to popular belief, *Daubert* does not stand for the proposition that if an expert bases his or her opinion on assumptions, the opinion is per se unreliable. As the Supreme Court stated in *Kuhmo*, the expert's testimony need not be certain, but must be based on the same level of intellectual rigor that characterizes the expert's field.[103] According to Robert L. Dunn in his authoritative treatise *Recovery of Damages for Lost Profits*,[104] assumptions are part of predicting lost profits and should not be excluded if they are reasonable:

> Expert testimony is properly admitted when based on assumptions of fact supported by the evidence, even if the evidence is disputed. As long as there is some evidence to support the assumptions, and the opinion rests on an adequate foundation. The dispute is then for the trier of fact to resolve.[105]

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The plaintiff's accountant or economist should not be excluded from the courtroom merely because his or her projections involve assumptions.[106] Assumptions are part of the "intellectual rigor that characterizes" accounting and economics when these fields are used to project future lost profits for any business.[107]

Accordingly, new businesses seeking to present unfettered lost-profit expert testimony to the jury can do so with proper preparation. First, each step of the expert's methodology should be validated by authoritative sources so that the court can be reassured that the expert's analysis has been tested, reviewed by his or her peers, and accepted in the professional community.[108] Second, the expert's opinion should fully address the issues raised by the Federal Judicial Center's *Reference Manual*. Third, the expert's assumptions must be conservatively drawn from the plaintiff's evidence. If these acts are performed at the same time that the expert's opinion is formed, the plaintiff can easily respond to attacks on the reliability of the expert testimony's, and *Daubert* will not be an obstacle to the recovery of lost profits.

Conclusion

Today, proving lost profits for new businesses is nothing like trying to prove that the "sun revolves around the earth." Modern accounting methods can test future lost-profit projections for reliability by considering independent market forces. Federal courts are more frequently questioning the rationale of the new business rule when new businesses can prove damages by adopting alternative approaches to quantifying lost profits. Judicial skepticism over the reliability of expert testimony in the courtroom will no doubt continue in the post-*Daubert* era. But the modern federal judicial landscape reveals that there is little reason that new businesses seeking to prove future lost profits should abandon possible claims out of the fear that they will be thwarted by the traditional new business rule.

NOTES

1. *Target Mkt Publ'g, Inc v ADVO, Inc,* 136 F3d 1139, 1143 (7th Cir 1998).

2. Restatement (Second) of Contracts § 352.

3. There is considerable confusion in the courts regarding the appropriate application of the new business rule. One court has suggested that the rule is simply a new label given to the normal burden of proof placed on plaintiffs in proving damages. *Fera v Village Plaza, Inc,* 396 Mich 639, 641–646, 242 NW2d 372 (1976). Other courts, however, believe it is a rule of law that actually raises the plaintiff's burden of proof to a higher evidentiary standard. *Schonfeld v Hilliard,* 218 F3d 164, 172 (2d Cir 2000) ("Therefore, evidence of lost profits from a new business receives greater scrutiny because there is no track record upon which to base an estimate").

4. *Larsen v Walton Plywood Co,* 390 P2d 677, 687 (Wash 1964).

5. *Taylor v Shoemaker,* 38 So2d 895, 899 (Ala Civ App 1948).

6. *Georgia Grain Growers Ass'n Inc v Craven,* 98 SE2d 633, 637–638 (Ga 1957).

7. *St Paul at Chase Corp v Manufacturers Life Ins Co,* 278 A2d 12, 37–38 (Md 1971).

8. *Weiss v Revenue Bldg & Loan Ass'n,* 182 A 891, 893 (NJ Super Ct App Div 1936).

9. *Kenford Co v County of Erie*, 67 NY2d 257, 260–261 (1986).

10. *Hickman v Coshocton Real Estate Co,* 15 NE2d 648, 650 (Ohio 1938).

11. *Dieffenbach v McIntyre,* 254 P2d 346, 349 (Okla 1953).

12. *Southwest Battery Corp v Owen,* 115 SW2d 1097, 1099 (Tex 1938).

13. *Mullen v Brantley,* 195 SE2d 696, 700 (Va 1973).

14. *Erie RR v Tompkins,* 304 US 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

15. *See* notes 5–14.

16. *See* Herman Forsecue Green, *Remedies—Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated*, 56 NC L Rev 693, 695–696 (1979). Green discusses the origin and evolution of the new business rule and opines that the rule is outdated because of the growing sophistication of market analysis and business forecasting.

17. *Cope v Vermeer Sales & Serv,* 650 P2d 1307, 1309 (Colo Ct App 1982); *Cardinal Consulting Co v Circo Resorts, Inc,* 297 NW2d 260 (Minn 1980); *Universal Computers (Sys) v Datamedia Corp,* 653 F Supp 518, 525–527 (DNJ 1987) (All three cases reasoning that the

new business rule can be overcome if the plaintiff presents alternative evidence that profits were lost).

18. *Lowe's Home Ctrs, Inc v General Electric Co,* 381 F3d 1091, 1096–1097 (11th Cir 2004) (questioning whether a "new" chain store is a "new" business); *Lakota Girl Scout Council, Inc v Havey Fund-Raising Mgmt, Inc,* 519 F2d 634, 640–641(8th Cir 1975) (recognizing that despite the new business rule, a plaintiff may recover anticipatory lost profits when the profits were foreseeable to the defendant at the time of contracting); *Cates v Morgan Portable Bldg Corp,* 591 F2d 17, 21 n7 (7th Cir 1979) (noting that in cases where new businesses have obtained lost profits, the measure of damages can be based on the profits of other, similar businesses).

19. 759 F2d 1526 (11th Cir 1985).

20. *Id*. The wrongful acts included U.S. Home's tortious interference with the business relationship between G.M. Brod & Co. and the unit owners of the condominium hotel.

21. *Id.* at 1537.

22. *Id*. (citing *A&P Bakery Supply & Equip Co v Hawatmeh,* 388 So2d 1071, 1072 [Fla Dist Ct App 1980]).

23. *GM Brod & Co.,* 759 F2d at 1526.

24. *See Manufacturing Research Corp v Greenlee Tool Co,* 693 F2d 1037 (11th Cir 1982); *Heatransfer Corp v Volkswagenwerk, AG,* 553 F2d 964, 983 (5th Cir 1977).

25. *Lehrman v Gulf Oil Corp,* 464 F2d 26, 45 (5th Cir 1972).

26. *Id.*; *GM Brod & Co*, 759 F2d at 1537–1538.

27. *Schonfeld,* 218 F3d at 172.

28. *Lowe's*, 381 F3d at 1091.

29. *Id.* at 1096.

30. *Id*.

31. *Id*. at 1097.

32. *No Ka Oi Corp v National 60 Minute Tune, Inc,* 863 P2d 79, 84 (Wash 1993) (allowing proof of lost profits for new franchise); *Pauline's Chicken Villa, Inc v KFC Corp,* 701 SW2d 399, 401–402 (Ky 1985).

33. *Lowe's*, 381 F3d at 1097.

34. 901 F2d 349 (3d Cir 1990).

35. *Id*. at 356.

36. *Id*.

37. *Id.*

38. *Id*. at 357.

39. *Lee v Joseph E Seagram & Sons, Inc,* 552 F2d 447 (2d Cir 1977); *McDermott v Middle East Carpet Co Associated,* 811 F2d 1422 (11th Cir 1987).

40. *See, e.g.*, *Lehrman*, 500 F2d at 659.

41. *Iodice v Calabrese,* 409 F Supp 389 (SDNY 1976).

42. *Merritt Logan*, 901 F2d at 349; *GM Brod*, 759 F2d at 1526.

43. *GM Brod,* 759 F2d at 1538.

44. *Id*.

45. 649 F2d 1049 (5th Cir 1981).

46. *Id*. at 1050–1051.

47. *Id*. at 1053 (citing *Lehrman*, 500 F2d at 667).

48. *Id*. at 1054.

49. *Id*.

50. *See, e.g., Rattigan v Commodore Int'l Ltd,* 739 F Supp 167 (SDNY 1990); *Manufacturers Cas Ins Co v Shome Power Corp,* 157 F Supp 681 (WD Mo 1957); *Atel Fin Corp v Quaker Coal Co,* 132 F Supp 2d 1233 (ND Cal 2001).

51. 874 F Supp 74 (SDNY 1995).

52. *Id*. at 76.

53. *Id*.

54. 132 AD2d 332 (NY App Div 1987).

55. *RMLS Metals*, 874 F Supp at 77.

56. *Id.*

57. *Id*. at 78.

58. If a business inserts a lost-profits provision into a contract, the amount must be reasonably related to its anticipated losses or it will be viewed as a penalty and become void. *See, e.g., Easton Telecom Servs, LLC v Corecomm Internet Group, Inc,* 216 F Supp 2d 695, 698 (ND Ohio 2002).

59. *Keegan v Minneapolis & St Louis RR Co,* 78 NW 965, 966 (Minn 1899).

60. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony,* 15 Harv L Rev 40, 53 (1901). The U.S. Supreme Court even references Mr. Hand's thoughts on expert testimony in *Kuhmo Tire Co v Carmichael,* 526 US 137, 148–149 (1999).

61. 509 US 579 (1993).

62. *Id.*

63. *Id.*

64. This standard was set forth in *Frye v United States,* 293 F 1013 (DC App 1923).

65. *Id*.

66. FRE 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

67. *Daubert,* 509 US at 593–594

68. *Id*. at 590 n9.

69. *Id*.

70. 522 US 136 (1997).

71. 526 US 137 (1999).

72. Robert E. Hall and Victoria A. Lazear, *Reference Manual on Scientific Evidence, in* Reference Guide on Estimation of Economic Losses in Damage Awards 282 n5 (2d ed 2000).

73 *Id*. at 146.

74. It has been held that accounting is subject to the *Daubert* standard of admissibility. *See City of Tuscaloosa v Harcros Chems, Inc,* 158 F3d 548, 564 n17 (11th Cir 1998).

75. *In re Paoli RR Yard PCB Litig,* 35 F3d 717, 741–43 (3d Cir 1994). These prongs are commonly referred to as qualifications, reliability, and fit. The plaintiff's expert must satisfy the prongs by a preponderance of proof. *In Re TMI Litig,* 193 F3d 613, 633 (3d Cir 1999).

76. Retaining experts early in litigation is essential. In these cases, it is not enough for the expert to issue a report under Fed R Civ P 26. Rather, each step of the way, the expert must compare his or her methodology with authoritative sources and peer-reviewed publications to ensure that it has been reviewed and tested for reliability. This way, when the defendant files the *Daubert* motion, the plaintiff is fully prepared to demonstrate to the judge that the expert's analysis is not novel and can be shown to be scientifically valid.

77. Hall and Lazear.

78. *See, e.g., Casey v Ohio Med Prods,* 877 F Supp 1380, 1383 (ND Cal 1995) (admitting expert testimony based on education and experience); *Crowley v Chait,* 322 F Supp 2d 530, 538 (DNJ 2004) (admitting experts based on experience alone); *Elcock v Kmart Corp,* 233 F3d 734 (3d Cir 2000).

79. *In re Bonham,* 251 BR 113, 131–132 (Bankr D Alaska 2000).

80. *Id*.

81. *United States Info Sys, Inc v IBEW Local Union No 3,* 313 F Supp 2d 213, 226–227 (SDNY 2004) (citing *Daubert,* 509 US at 591–92).

82. *United States Info Sys.*

83. *See, e.g., Club Car, Inc v Club Car (Quebec) Imp Inc,* 362 F3d 775 (11th Cir 2004); *Chemipal Ltd v Slim-*

Fact Nutritional Foods Int'l, 350 F Supp 2d 582 (D Del 2004); *Lithuanian Commerce Corp v Sara Lee Hosiery,* 179 FRD 450 (DNJ 1998); *Real Estate Value Co v USAir, Inc,* 979 F Supp 731 (ND Ill 1997); *Albert v Warner-Lambert Co,* 234 F Supp 2d 101 (D Mass 2002).

84. These are the first, second, and fourth factors set forth in the *Daubert* opinion.

85. Green.

86. Hall and Lazear. The *Reference Manual* discusses many other issues that should be addressed as well.

87. 265 F Supp 2d 802 (ED Mich 2003).

88. *Id.*

89. *Id.* at 809. Plaintiff in *Swierczynski* was not a new business and did not face the new business rule. However, the court's holding did not rest on the track record. Rather, it was based on the fact that plaintiff used a recognized and valid methodology to quantify lost profits.

90. *Id.*

91. *Id.* at 810–811.

92. *Id.*

93. *Daubert*, 509 US at 579.

94. The "best" methodology is a matter of opinion. Under *Daubert*, the jury is to decide the better of two opposing, but reliable, methodologies.

95. *Matosantos Commercial Corp v SCA Tissue North America, LLC,* 369 F Supp 2d 191, 198 (DPR 2005); *Boucher v United States Suzuki Motor Corp,* 73 F3d 18, 21 (2d Cir 1996).

96. 158 F Supp 2d 510 (ED Penn 2001).

97. *Id.*

98. *Id.*

99. *Id.* at 515–517. One of the expert's scenarios involved the yardstick approach discussed above.

100. *Id.* at 515.

101. *Id.*

102. *Id.* at 514–516.

103. *Kuhmo*, 526 US at 152.

104. Robert L. Dunn, *Recovery of Damages for Lost Profits* (6th ed 2005).

105. Dunn at 610.

106. At least one court has been willing to admit that when it comes to proving future lost profits, "reasonable certainty" may not be a practical standard. "Once it is apparent that damages must be assessed so as to approximate the future profits of a business, a court and jury necessarily enter into the realm of the imprecise and the uncertain." *Lehrman,* 500 F2d at 671 n57.

107. *Kuhmo,* 526 US at 152.

108. Although the U.S. Supreme Court in *Daubert* provided that these factors are merely "helpful," there is little doubt that striving to satisfy these factors increases the plaintiff's chance of prevailing in a *Daubert* dispute.

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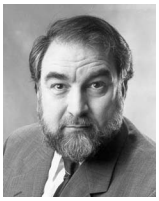

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