

Guidance on Proving Lost Profit Damages Offered By California Supreme Court

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Proving lost profits through expert testimony is often key to recovering the full measure of damages in many lawsuits, but the California Supreme Court decision in [*Sargon Enterprises v. Univ. of Southern California*](#) (November 26, 2012) makes clear that expert testimony regarding lost profits may not succeed if it is too speculative in nature.

Sargon involved a dental implant company that contracted with the University of Southern California (“USC”) to do clinical trials for the company’s patented implant. Sargon alleged that USC failed to provide proper reports during the 5 year clinical trial as required by the contract. Sargon was awarded compensatory damages but the issue on appeal became Sargon’s right to recover lost profits and the evidence presented to support such, which suggested that Sargon would have become a worldwide leader in dental implants if the breach had not occurred.

To support its claim for lost profits, Sargon provided expert testimony by a CPA and attorney named Skorheim.

The California Supreme Court noted that trial courts have a gatekeeper function “to exclude clearly invalid and unreliable expert opinion”. In the final analysis, it held that the expert testimony at issue in *Sargon* was speculative in nature and properly excluded by the trial court.

Commenting on Skorheim’s testimony, the Court noted that:

An expert might be able to make reasonably certain lost profit estimates based on a company’s share of the overall market. But Skorheim did not base his lost profit estimates on a market share Sargon had ever actually achieved. Instead, he opined that Sargon’s market share would have increased spectacularly over time to levels far above anything it had ever reached. He based his lost profit estimates on that hypothetical increased share.

Acceptable methods for proving lost profits mentioned by the Court include “a company’s actual profits, a comparison to the profits of similar companies, or other objective evidence”.

But the Court was uncomfortable with the hypothetical scenarios offered by Skorheim, which were too speculative and relied ‘on data that in no way is analogous to Plaintiff’. Thus the Court concluded that “Sargon could not obtain a massive verdict based on speculative projections of future spectacular success.”

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