



Worldwide leaders in public and management accounting

Forensic & Valuation Services Practice Aid

Attaining Reasonable Certainty in Economic Damages Calculations

© 2020 Association of International Certified Professional Accountants. All rights reserved.

For information about the procedure for requesting permission to make copies of any part of this work, please email copy-right-permission@aicpa-cima.com with your request. Otherwise, requests should be written and mailed to the Permissions Department, AICPA 220 Leigh Farm Road, Durham, NC 27707-8110

Notice to Readers

This publication is designed to provide illustrative information with respect to the subject matter covered. It does not establish standards or preferred practices. The material was prepared by the AICPA staff and volunteers and has not been considered or acted upon by AICPA senior technical committees or the AICPA board of directors and does not represent an official opinion or position of the AICPA. It is provided with the understanding that the AICPA staff and the publisher are not engaged in rendering any legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. The AICPA staff and this publisher make no representations, warranties, or guarantees about, and assume no responsibility for, the content or application of the material contained herein and expressly disclaim all liability for any damages arising out of the use of, reference to, or reliance on such material.

Since the development of this practice aid, the AICPA [Code of Professional Conduct](#) (AICPA code) has updated the definition of *client* to be defined as both engaging entity (typically engaging attorney or attorney's firm) and subject entity (typically attorney's client). Effective December 31, 2017, the term *client* is defined as “[a]ny person or entity, other than the member’s employer that engages a member or member’s firm to perform professional services (engaging entity) and also, a person or entity with respect to which a member or member’s firm performs professional services (subject entity). When the engaging entity and the subject entity are different, while there is only one engagement, they are separate clients.” ([ET sec. 0.400.07](#))^{fn 1}

For purposes of this practice aid “attorney,” “litigant’s attorney,” and “counsel’s client” are all considered *client* as defined by the AICPA code.

Update as of January 1, 2020

The AICPA’s Forensic and Valuation Services Executive Committee issued Statement on Standards for Forensic Services (SSFS) No. 1 ([FS sec.100](#))^{fn 2} to protect the public interest by preserving and enhancing the quality of practice of a member performing forensic services. Effective for engagements accepted on or after January 1, 2020, [SSFS No. 1](#) establishes standards for a member providing services to a client as part of litigation and investigation engagements. The term litigation as used in [SSFS No. 1](#) and throughout this practice aid is not limited to formal litigation but is inclusive of disputes and all forms of alternative dispute resolution, unless otherwise stated.^{fn 3}

^{fn 1} All ET sections can be found in AICPA [Professional Standards](#).

^{fn 2} All FS sections can be found in AICPA [Professional Standards](#).

^{fn 3} See SSFS No. 1, [paragraph 1](#).

Acknowledgments

The authors of this practice aid are members of the AICPA Forensic & Litigation Services Damages Task Force:

Michael Fahlman, *Chair*
Scott Bouchner
Dave Duffus
Jeffrey Klein
Greg Regan, *Past Chair*
Holly Sharp
Christian Tregillis, *Past Chair*

Attorney Members: Dan Newman, Joe Adams, Cynthia Lock

In addition, members of the AICPA's Forensic and Litigation Services Committee, and Forensic and Valuation Services Executive Committee also provided information and advice to the author and AICPA staff for the update to this practice aid.

AICPA Staff

Barbara Andrews
Director, Forensic, Technology and Management Consulting Services
FVS Section
Christine N. Cutti-Fox
Senior Manager, Forensic Services
FVS Section

Contents

Chapter 1 The Principle of Reasonable Certainty.....	9
Practice Aid Objective	9
Existing Literature	9
Structure of the Practice Aid.....	11
Rules, Guidelines, and What is Reasonable Certainty?	12
Figure 1	13
Figure 2	14
The Implications of Case Law As Guidance	16
Chapter 2 Client-Supplied Information ^{fn 1}	17
Introduction.....	17
Cases Allowing Reliance on Client-Supplied Information.....	18
Amigo v. Spanish Broadcasting.....	18
Legier & Matherne v. Great Plains Software, Inc.	19
Manpower, Inc. v. Insurance Co. of Pa.....	20
Cases Not Allowing Reliance on Management	21
US Salt, Inc. v. Broken Arrow, Inc.....	22
Victory Records, Inc. v. Virgin Records Am., Inc.	23
Ariens Co. v. Woods Equip. Co.....	24
JRL Enters., Inc. v. PROCORP Assocs., Inc.....	26
Reasons why Reliance on Client Projections was Rejected	28
Summit Proprs. Int’l, LLC v. PGA.....	28
Capital Metro. Transp. Auth./Cent. Of Tenn. Ry. & Navigation Co., Inc. v. Cent. Of Tenn. Ry. & Navigation Co., Inc.	29
Cases Evidencing Projections Were Reasonably Known to the Defendant	31
S & K Sales Co. v. Nike, Inc.	31
Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.....	32

Summary Observations and Conclusion.....	33
Chapter 3 Causation Considerations.....	35
Causation and The Damages Expert.....	35
Cases Allowing the Expert to Assume Causation.....	37
Harris Wayside Furniture, Co. v. Idearc Media Corp.....	37
Pharmacy, Inc. v. American Pharm. Partners.....	38
RMD, LLC v. Nitto Ams., Inc.....	39
LG Elecs. U.S.A., Inc. v. Whirlpool Corp.....	39
Cases Determining The Expert Sufficiently Considered Causation.....	41
Apple, Inc. v. Samsung Elecs. Co., Ltd.....	41
Nebula Glass Int'l, Inc. v. Reichhold, Inc.....	42
Conwood Co., L.P. v. U.S. Tobacco Co.....	43
Arista Records LLC v. Lime Grp. LLC.....	44
W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.....	46
Cases Excluding The Expert for Failing to Sufficiently Consider or Demonstrate Causation.....	48
McGlinchy v. Shell Chem. Co.....	48
Fashion Boutique of Short Hills v. Fendi USA, Inc.....	49
Saks Fifth Ave. v. James, Ltd.....	51
Sigur v. Emerson Process Mgmt.....	52
Lowry's Reports Inc. v. Legg Mason Inc.....	53
Mapinfo Corp. v. Spatial Re-Eng'g Consultants.....	54
Cases Excluding Expert for Failing to Sufficiently Consider Alternative Causes of Loss.....	55
Alphamed Pharms. Corp. v. Arriva Pharms., Inc.....	56
Microstrategy Inc. v. Business Objects.....	58
Schiller & Schmidt Inc. v. Wallace Computer Servs. Inc.....	59
Pharmanetics, Inc. v. Aventis Pharm., Inc.....	60

First Savs. Bank, FSB v. U.S. Bancorp	61
Chapter 4 Newly Established Businesses	63
New Businesses and Reasonable Certainty in Damages	63
New Business Rule and the Modern Treatment	64
Cases Identifying What Is a "New" or "Established" Business	67
Delahanty v. First Pa. Bank	67
Clark v. Scott	68
Gorjuice Wrap, Inc. v. Okin, Hollander & De Luca, LLP (unpublished)	69
What does "Sufficiency of Analysis" Mean?.....	70
Using Multiple Analyses to Establish Sufficiency of Analysis	72
Cases Addressing Assumptions and Substantial Similarity to the Matter at Hand	73
Chung v. Kaonohi Ctr. Co.	74
River Bridge Corp., et al. v. Am. Somax Ventures	75
Other Factors Looked at by Courts.....	76
Cases Addressing the Use of Projections.....	77
SuperValu Stores, Inc. v. Peterson.....	77
Parlour Enters., Inc., v. Kirin Grp. Inc.....	78
Cases Addressing the Nature of the Market for the Business in Question	80
Butler v. Westgate State Bank	80
Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.	81
Delahanty v. First Pa. Bank	82
Cases Highlighting the Use and Value of Expert Testimony	83
Harsha v. State Sav. Bank.....	84
Farm Crop Energy v. Old Nat'l Bank of Wash.	84
Cases Addressing Chain/Franchise Operations	86
No Ka Oi Corp v. Nat'l 60 Minute Tune, Inc.	86

Flying J, Inc. v. Dept. of Trans.	88
Mullen v. Brantley	89
Cases addressing the Existence of Management Experience in the Business in Question.....	90
Pauline’s Chicken Villa Inc. v. KFC Corp.	90
Cell, Inc. v. Ranson Investors	91
Cases From New Business Rule States Where Exceptions May Exist to Allow for Recovery.....	92
Milex Prods., Inc. v. Alra Labs. Inc.....	92
Lockheed Info. Mgmt. Sys., Co., Inc. v. Maximus, Inc.....	93
Cases Highlighting Other Relevant Considerations	94
Conclusions.....	95
Appendix of Other Cases	96
Other Cases on Causation	96
Iams Co. v. Nutro Prods., 2004 U.S. Dist. LEXIS 31141 (S.D. Ohio June 30, 2004)	96
El Aguila Food Prod. Inc. v. Gruma Corp., 131 F. App’x 450 (5th Cir. 2005).....	97
Avidyne Corp. v. L-3 Commc'ns. Avionics Sys., Inc., 2012 U.S. Dist. LEXIS 43149 (D. Mass. Mar. 29, 2012)	97
Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483 (8th Cir. 1992)	98

Chapter 1

The Principle of Reasonable Certainty

Practice Aid Objective

In the United States, most courts require that lost profits be proven with reasonable certainty.^{fn 1} According to Robert Lloyd, an author on reasonable certainty, the "courts have never really explained what they mean by the term 'reasonable certainty.'"^{fn 2} One prominent judge, Honorable Richard A. Posner, has written that reasonable certainty is simply code for,^{fn 3}

[D]oes the court think that, given all of the circumstances, this plaintiff has presented sufficient evidence to make it fair to award it the damages in question?

The concept of reasonable certainty has been addressed in prior AICPA practice aids — including [Discount Rates, Risk, and Uncertainty in Economic Damages Calculations](#) and [Calculating Lost Profits](#). The objective of this practice aid is to expand upon existing literature and raise awareness concerning those aspects of a damages calculation in which the concept of reasonable certainty is most likely to be scrutinized. Ultimately, the intent of the practice aid is to help practitioners understand the expectations courts impose upon experts as a result of, for example, Rule 702 of the Federal Rules of Evidence (FRE 702), or comparable tests applied at the state level.^{fn 4}

Existing Literature

The professional standards that apply to AICPA members and member firms preparing economic damage calculations^{fn 5} are set forth in Statement on Standards for Forensic Services (SSFS) ([FS sec. 100](#)).^{fn 6} In addition, the guidance provided within the AICPA's practice aids previously referenced continues

^{fn 1} Reference Manual on Scientific Evidence, *Reference Guide on Estimation of Economic Damages, Third Edition*, p.461, citing Restatement (Second) of Contracts Section 352, "In general, damages law holds that a plaintiff may not recover damages beyond an amount proven with reasonable certainty."

^{fn 2} Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 TRANSACTIONS: TENN. J. OF BUS. L. 11, 12 (2010).

^{fn 3} *Id.* (citing RICHARD A. POSNER, HOW JUDGES THINK 110 (2008)).

^{fn 4} This analysis is frequently referred to as the *Daubert* test. Much has already been written on FRE 702 and its interpretation of the *Daubert* standard. Practitioners that would like more information about FRE 702 and *Daubert* might consider resources such as www.law.cornell.edu/rules/fre/rule_702.

^{fn 5} This practice aid uses the word *calculation* in a general way, and is not "calculation" as set forth in [VS section 100](#), *Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset*. All VS sections can be found in AICPA [Professional Standards](#)

^{fn 6} The AICPA [Code of Professional Conduct](#) is also applicable, and to the extent that the economic damage calculation involves lost business value, [VS section 100](#) is also relevant. All FS sections can be found in AICPA [Professional Standards](#)

to be relevant. As a practical matter, there are other sources of information with which practitioners acting in this capacity might consider. For example, the *Reference Manual on Scientific Evidence* is used by the Federal Judiciary as a means to understand and evaluate evidence. This manual devotes 78 pages to a chapter entitled "Reference Guide on Estimation of Economic Damages," including a sub-section entitled "Is the Defendant Arguing That Plaintiff's Damages Estimate Is Too Uncertain and Speculative?" The *Litigation Services Handbook* and Robert Dunn's *Recovery of Damages for Lost Profits* are other well-known resources for damages experts. These publications identify and assimilate case law to illustrate generally accepted approaches to calculating damages. A review of the case law considered in these resources in some instances highlights the successes of the damages expert; in other cases, the opposite is true. As a result, over time, other incremental quasi-standards have become relevant to practitioners and other individuals performing economic damage calculations.

This practice aid is intended to enhance the AICPA's existing literature for practitioners performing economic damages calculations. Certain cases indicate that such a resource is relevant to courts evaluating the admissibility of a damages expert's opinion. For example, an April 2011 decision by the U.S. District Court in the Eastern District of Wisconsin explained:^{fn 7}

The problem with this line of argument is that neither *Manpower* nor [the expert] demonstrates that compiling a list of possible growth rates and then choosing a rate from this list is an acceptable way to choose a growth rate in the field of forensic accounting. To offer an opinion under Rule 702, an expert must satisfy the court that his or her opinion is guided by principles and methods that are regularly applied by others in the relevant field.

This case highlights a challenge of [SSFS No. 1](#). That is, no single standard can be broad enough to contemplate all of the eventualities that damages experts encounter. Certainly, most damages experts would disagree with the proposition in the *Manpower* decision. Assuming the practitioner possessed the *professional competence* to analyze growth rates and applied the requisite *professional care* to choose the appropriate rate, the practitioner followed a method that was acceptable in the field of forensic accounting. As it relates to this example, [chapter 2](#) of this practice aid deepens the resources that are currently available to practitioners. It addresses various scenarios in which damages experts have been provided with representations or data from the client. Among the issues addressed in [chapter 2](#) is how the courts have assessed the adequacy of the damages expert's examination of client-provided information. This chapter, along with the benchmark-related discussion in [chapter 4](#), might have proved useful for the *Manpower* expert to illustrate appropriate analyses of growth-rate related data.

In October 2013, the Seventh Circuit reversed the District Court's exclusion of the Plaintiff's damages expert in the *Manpower* case.^{fn 8} In doing so, it concluded:^{fn 9}

^{fn 7} *Manpower, Inc. v. Ins. Co. of Pa.*, No. 08C0085, 2011 WL 1356945, at *2 (E.D. Wis. Apr. 11, 2011).

^{fn 8} *Manpower, Inc. v. Ins Co. of Pa.*, 732 F.3d 796, 807 n.3 (7th Cir. 2013).

^{fn 9} This decision references *Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585 (7th Cir. 2000). In that case, the Seventh Circuit ruling stated, "The principle of *Daubert* is merely that if an expert witness is to offer an opinion based on science, it must be real science, not junk science. Tuf's accountant did not purport to be doing science. He was doing accounting. From financial information furnished by Tuf and assumptions given him by counsel of the effect of the termination on Tuf's sales, the accountant calculated the discounted present value of the lost future earnings that Tuf would have had had it not been terminated. This was a calculation well within the competence of a C.P.A." *Id.* at 591.

The district court's suggestion that future earnings projections are outside the ken of a certified public accountant and require expertise in economics and business management, see, e.g., R.132 at 5 ("[The Expert] is not an expert on business management ... [and] did no economic analysis") is difficult to square with our opinion in *Tuf*. Certified Public Accountants regularly perform the tasks that [the Expert] performed in analyzing the information he considered in selecting a projected growth rate. They review financial statements, look for anomalies and trends, and consider the impact of new developments on the company's prospects. They regularly rely on management representations, estimates, and forecasts. Thus, the district court's conclusion that "[the Expert]'s conversations with Right's managers cannot be considered a reliable basis for a revenue forecast," *Id.*, does not provide a sustainable basis for its exclusion of [the Expert]'s report.^{fn 10}

In its *de novo* review, the Seventh Circuit took care to note several aspects of the expert's analysis that it considered in formulating its conclusions. The expert had accomplished the following:

- Collected data from an extended period of time to evaluate the business interruption damages.
- Assembled and considered the data for all of Manpower's affiliates throughout France where the interruption occurred.
- Reviewed the data for anomalies and excluded aberrations.
- Reviewed documents addressing changes in Manpower's business over the relevant period and discussed the changes with the client.
- Reviewed the company's projections that had been prepared prior to the damage event.

Ultimately, the court's opinions in this matter, and the many other matters addressed in this practice aid, provide important guidance for damages experts that gauge the steps necessary to ensure that the court is persuaded that the threshold of reasonable certainty has been attained.

Structure of the Practice Aid

This practice aid is organized into the aspects of economic damages calculations that appear to be particularly challenging for the courts. [Chapter 2](#), "Client-Supplied Information," addresses issues confronted by damages experts when information integral to the damages analysis was provided by the engaging attorney or the engaging attorney's client. [Chapter 3](#), "Causation Considerations," analyzes common approaches by damages experts to this issue. One significant issue is addressing whether portions of loss not attributable to the alleged wrongdoing have been excluded. [Chapter 4](#), "Newly Established Businesses" examines the myriad of circumstances faced by such enterprises and common responses by damages experts. A critical element of [chapter 4](#) is an extensive analysis of factors considered by courts to establish the reliability of benchmark data.

The topics covered in these chapters are interrelated. For example, when the damage analysis addresses a newly formed entity, the practitioner may need to be more acutely aware of causation-related issues. Thus, many of the same considerations for damages experts on these topics are also likely to be present

^{fn 10} *Manpower, Inc.*, 732 F.3d at 807 n.3.

for other challenges not addressed directly in this practice aid. This practice aid may be supplemented with guidance that addresses various other topics that present challenges in attaining reasonable certainty — including, for example, the length of the damage period, or the use of multiple scenarios to calculate damages.

Rules, Guidelines, and What is Reasonable Certainty?

Courts' articulation of what reasonable certainty means appears to recognize that the profits that form the basis for an economic damages calculation need not be certain in order to adduce a calculation of damages that has a reasonable basis, as described by the Supreme Court of Michigan:

Do 'uncertain' profits differ in kind from 'certain' profits? The answer is assuredly, No. There is little that can be regarded as 'certain,' especially with respect to what would have happened if the march of events had been other than it in fact has been. Neither court nor jury is required to attain 'certainty' in awarding damages; and this is just as true with respect to 'value' as with respect to 'profits'. Therefore, the term 'speculative and uncertain profits' is not really a classification of profits, but is instead a characterization of the evidence that is introduced to prove that they would have been made if the defendant had not committed a breach of contract.^{fn 11}

In this context, courts have generally found the standard to be whether the damages calculation has been made such that there is reasonable certainty that the damages amount has been properly calculated. In other words, courts have found that, for example, a venture that has a 40% chance of earning \$1,000, with an expected value of \$400, is not worthless even though the probability of achieving the earnings in question is less than 50%. Rather, reasonable certainty will have been attained when the amount has been proven with a reasonable basis and sound methodology.

As the Supreme Court of Alabama wrote in *SuperValu Stores v. Peterson*, "reasonable certainty" in a damages context is a question of "whether the plaintiff has adduced evidence that provides a basis from which the jury could with 'reasonable certainty' calculate the amount of lost profits."^{fn 12}

In this matter, Peterson was found to have a right to own a SuperValu store. As a result, the task at hand was to value the opportunity that Peterson lost, which value may be impacted by the probability of success and other factors that would decrease the value from a scenario in which there was certainty that Peterson would earn a particular amount of profits. The requirement was not that Peterson would have been in business in 5 years or 10 years — it was that calculation could be made with reasonable certainty, on a sufficient factual basis.

Consistent with this, as the Federal Court of Claims wrote in *Franconia Associates v. United States*, "reasonably certain" damages calculations need not prove elements of a damages calculation are certain, but such calculations shall be anchored in facts, make use of sound methodologies, and yield reasonable results.

Does determining those lost profits require the court to assume that reasonable factual premises which hold true today will be predictably valid in the future? Absolutely, but no more so than in

^{fn 11} *Fera v. Vill. Plaza, Inc.*, 242 N.W.2d 372, 373–74 (Mich. 1976) (citations omitted).

^{fn 12} *SuperValu Stores, Inc. v. Peterson*, 506 So. 2d 317, 326 (Ala. 1987).

employing other well-accepted cash flow methodologies, such as the income approach to valuing a going concern. As Justice Holmes once explained, "all values, as the word is used by the law, . . . depend largely on more or less certain prophecies of the future." So when does one pass from the realm of permissible speculation and projections into that of intolerable guesswork and largesse? The answer, of course, depends upon the record of a case, but the overarching objective is to ascertain whether the approximations and assumptions used to set the amount of damages are anchored to the facts, consistent with sound economic theory and ultimately will produce reasonable results.^{fn 13}

While this interpretation of the definition of "reasonable certainty" has been a common theme in case law, not all courts have consistently applied this meaning. For example, in *Harsha v. State Savings Bank*, the Supreme Court of Iowa ruled that, "If factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the jury."^{fn 14}

As the Supreme Court of Kentucky ruled in *Pauline's Chicken Villa Inc. v. KFC Corp.*,^{fn 15} "No court, including this one, can elucidate a single definition of 'reasonable certainty' which may be used as a yardstick in all cases." With this in mind, this practice aid is not a rulebook. Rather, its objective is to identify information and factors courts have found to be relevant when evaluating testimony and proof of damages. While courts have issued opinions that may appear to be inconsistent, there are certain "rules" that are frequently cited in the decisions reviewed (see [figure 1](#)).^{fn 16}

Figure 1

"Rule"	Question	General Application
Fact and Amount	If the fact that a plaintiff suffered damages can be proven with reasonable certainty, what level of precision is required to calculate the amount of loss?	A higher degree of certainty is required to determine whether the plaintiff incurred some damages than is required to determine the amount of damages incurred.
Wrongdoer	How should the defendant's wrongdoing affect the plaintiff's ability to recover damages?	A plaintiff should not be precluded from recovering damages just because the amount is difficult to calculate. If the defendant caused the harm, it cannot avoid damages simply because it is difficult to estimate the precise amount.
Best Evidence	Can plaintiffs recover lost profits without presenting the "best evi-	As the quality of the evidence improves, so does the court's confidence

^{fn 13} *Franconia Associates v. United States*, 61 Fed. Cl. 718, 70 (2004) (citations omitted)

^{fn 14} *Id.*

^{fn 15} *Pauline's Chicken Villa Inc. v. KFC Corp.*, 701 S.W.2d 399 (Ky. 1985).

^{fn 16} See also Tennessee Journal of Business Law, "The Reasonable Certainty Requirement In Lost Profits Litigation: What It Really Means," Volume 12, by Robert M. Lloyd.

	ence" available?	in the level of certainty associated with the damages calculation.
New Business	Can an unestablished business recover lost profits?	This issue is addressed in chapter 4 , however, most states now allow unestablished businesses to recover lost profits, although the level of scrutiny may be increased.

While these are frequently described as "rules," Mr. Lloyd observed that these "rules" are not consistently enforced. For example, it is generally accepted that wrongdoers should not be free to act without consequences or reap windfalls. But at the same time, wrongdoers should not be profit guarantors. That is the balance with which the court or trier of fact is dealing, which is consistent with Judge Posner's previous quote that reasonable certainty is really code for "fair."

In addition, Mr. Lloyd has identified six factors that he believes courts consider in their assessment regarding reasonable certainty (see [figure 2](#)).^{fn 17} Several of these factors are not directly relevant to the work of the damages expert, but may be indirectly relevant because of the impact on the receptiveness of the court to the positions espoused by either side.

Figure 2

<i>Factor</i>	<i>Considerations</i>
Confidence that the estimate is accurate.	Is the claim supported by verifiable data? Whether the business has a track record. The number of difficult-to-quantify risks in the business projections. The extent to which lost profits fall within a defined range.
Whether the injured party suffered at least some damage.	How clear is the damage causation? Can the damages be quantified at all?
The degree of blameworthiness or moral fault on the part of the defendant.	Often not relevant to the damages expert's calculations, and it is fact and circumstance specific. Influenced by the wrongdoer rule.
Whether the plaintiff used the best available evidence to prove its damages.	As the quality of the data used in the damage analysis improves (for example, because it is verifiable), the likelihood that the related calculation will be accepted increases.
The amount that is at stake.	There are usually more complexities and nuances in cases involving large dollar amounts.

^{fn 17} *Id.*

	In addition, a jury may place more scrutiny on the data and methods applied to calculate damages as the absolute amount of the asserted damages increases.
Where alternative methods exist to compensate the injured party.	Is lost profits the best measure of damages? Can lost business value based upon (for example, contemporaneous purchase offers) be used as an alternative to otherwise less certain projections?

Ultimately though, perhaps the core objective of the reasonable certainty standard is to ensure that plaintiffs are not awarded speculative, overly optimistic or unrealistic damages. A notable recent opinion makes this point. The matter involved a small dental company that sued a university for breaching a contract involving clinical trials of a newly patented implant. Although the company had \$101,000 of net profits in 1998, the expert’s related damage calculation assumed the company would become a world-wide dental implant leader. This assumption culminated in various scenarios asserting damages ranging from \$200 million to over \$1 billion. The California Supreme Court agreed that the expert should not be allowed to testify because of the following:

[C]ase law demands that to establish such lost profits through expert testimony, the expert must base his/her opinion on either historical performance of the company or a comparison to the profits of companies similar in terms of size, locality, sales, products, number of employees and other relevant financial factors. A party is not permitted to make up its own factors as a basis for comparison and invite the jury to decide whether the corporations are similar. To allow this is to invite proceedings where there are no objective standards as there will always be some way to argue that companies are similar, no matter how superficial or irrelevant. Here, for example, the factors [the expert] uses would lead to the absurd result that Sargon, one of the industry’s smallest companies, was similar to the largest. In assessing lost profit damages in this context, there is a meaningful difference between biggest and smallest. [The expert] admittedly shunned historical performance and comparison to companies of similar size and financial situation, choosing instead to compare Plaintiff to multi-national industry giants based upon his own criteria of similar. His criteria, even assuming he has the qualifications to decide them, which he does not, are nebulous and legally irrelevant under case law.

Accordingly, there is no issue of similarity to give to the jury to compare and decide. The court concluded that [the expert’s] opinions are not based upon matters upon which a reasonable expert would rely, and do not show the nature and occurrence of lost profits with evidence of reasonable reliability, because his opinion is not based on any historical data from Plaintiff or a comparison to similar businesses. The court also finds his market drivers meaningless for comparison purposes. Additionally, his opinion rests on speculation and unreasonable assumptions.^{fn 18}

^{fn 18} *Sargon Enters., Inc. v. Univ. of S. Cal.*, 288 P.3d 1237, 1248 (Cal. 2012).

The Implications of Case Law As Guidance

The information discussed in this practice aid represents extrapolations from illustrative decisions. The process to identify these particular decisions involved the review of hundreds of other decisions. It is critical to recognize that the specific facts and circumstances of each damage calculation govern the application of reasonable certainty issues. Accordingly, readers are cautioned against relying on the outcome of any particular decision — in part because there are frequent inconsistencies among, and even within, jurisdictions.

The cases cited in this practice aid were evaluated under multiple criteria. Because cases with broad applicability were sought, in general, cases in federal court were emphasized over state courts where possible.^{fn 19} Within each of these systems, appellate-level decisions were focused on over trial-level decisions. For clarity, in the federal court system, the trial court may also be referred to as the district court and the appellate court is frequently referred to by the number of circuit (for example, the Second Circuit).^{fn 20} In addition, the number of subsequent cases that cited the given case was considered, as well as whether those subsequent cases enhanced the clarity of the decision or dissented in a meaningful way. Finally, cases were identified from a variety of jurisdictions. While the authors of this practice aid sought to identify principles that were applied consistently by the courts, the application of the previous criteria may not result in the identification of the most applicable cases for practitioners in all situations or jurisdictions. For example, a California Supreme Court case may not be informative to a practitioner in a Georgia trial court.

Importantly, it is not possible to glean all of the information pertinent to the judicial decision-making process from the written decision itself. For example, what was the demeanor of the witnesses presenting the underlying factual testimony upon which the expert relied? Similarly, in most cases, was the expert credible in deposition (or at a hearing)? It is not possible to assess from the written opinions whether the decision was impacted by the judge's patience, or lack thereof, with the attorneys representing either of the parties. Understandably, there are a host of other factors that could similarly impact these decisions. Further, there are many more cases addressing damages that have neither been challenged nor have written opinions.

In closing, the authors would like to thank the attorneys who gave their time to this effort. Their skill was critical in identifying on-point cases and vetting our observations. In particular, we express our thanks to Dan Newman, who was a repeat presenter at the AICPA's National Forensic and Valuation Services Conferences while the concepts herein were exposed.

^{fn 19} However, [chapter 4](#) does include a number of state court cases as the New Business Rule is applied differently in some states.

^{fn 20} There are currently 13 judicial circuits in the federal court system. Twelve circuits correspond to specific geographic areas while the 13th has jurisdiction over cases related to international trade, government contracts, patents, trademarks, veterans' benefits, and certain claims involving the U.S. government (see www.law.cornell.edu/uscode/text/28/41).