

# CAUSATION: A DRIVING FORCE TO LOST PROFIT DAMAGES

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Many would argue that if a plaintiff has proven that it was damaged but the court does not provide a monetary award, the plaintiff has not won its case. The damages portion of the trial is often in the hands of a financial expert witness whose work is independent of the trial team. All too often the efforts of the financial expert are not coordinated with the overall case strategy. There is a danger of a missing link when this occurs.

The lost profit damages opinions of independent financial expert witnesses have long been under scrutiny by opposing parties and courts. For all the time and effort put into forming an opinion, a very important issue is sometimes overlooked: the link between causation and the lost profit damages opinion. Such an omission may render that opinion vulnerable to a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>1</sup> challenge. Case law in recent years suggests that although it is not the job of the financial expert to prove causation, an admissible lost profit damages opinion ought to provide a link between the cause and the resulting damages. Furthermore, the expert should also consider intervening causes specific to the case when offering a lost profit damages opinion. Independent financial experts and attorneys alike should be mindful that courts continue to grant motions to exclude testimony and expert reports for a failure to provide a causal link to the damages or a failure to consider the impact of intervening causes.

## Admissibility of Lost Profit Damage Opinions

A recovery of lost profit damages often requires the plaintiff to satisfy three common elements: (1) proximate cause, (2) foreseeability, and (3) reasonable certainty. The first element requires the plaintiff to show that the lost profit damages were caused by the conduct upon which the claim is based. This is the necessary link between the alleged wrongful acts of the defendants and the compensation due the plaintiff to make them whole. Yet this link is sometimes missing.

A review of recent case law finds

numerous *Daubert* challenges of lost profit damages opinions that focus on how a failure to address causation is in turn a failure to properly apply principles and methods reliably to the facts of the case. The following are three causation issues to consider when rendering a lost profit damages opinion.

### 1. Damages should be directly traceable to/ caused by defendant's conduct.

In *Sigur v. Emerson Process Management*,<sup>2</sup> the plaintiff's damages expert relied upon the underlying assumption that the lost sales/damages were caused by the defendants' conduct. The judge stated that the expert "in his sole capacity as a damages expert, was not necessarily required to gather causation evidence by interviewing Sigur's customers and reviewing depositions or documents to determine whether Sigur's customers actually reviewed the defamatory material, as the defendants suggest."<sup>3</sup> However, in order for the damages expert's testimony to be relevant, the judge found that the plaintiff would need to "submit evidence and argument supporting the causal assumptions underlying the opinions" of the expert.<sup>4</sup> The plaintiff attempted to provide such evidence, but in a subsequent ruling, the judge granted the motion to exclude the testimony of the damages expert. The judge found that "Sigur has not presented any competent evidence demonstrating that it was defendants' alleged conduct which caused the decline in sales during that year." She further added, "The only competent evidence before the Court on the issue of whether defendants' alleged conduct caused a decline in Sigur's business has been presented by the defendants, and such evidence indicates that the defamatory materials were not received from defendants and/or did not cause a decline in sales."<sup>5</sup> The expert quantified the alleged lost profits, but no one established that the lost profits were a result of the defamation. Here, a failure to show that the damages were caused by the defendants' conduct resulted in the exclusion of the expert's testimony.

The causal link between the defendant's conduct and the lost profit damages was also addressed in *MapInfo Corp. v. Spatial Re-Engineering Consultants*,<sup>6</sup> which involved a breach of a termination agreement. In its motion to preclude the defendant's causation and damages expert, MapInfo asserted that "the reports do not satisfy the requirements for reliance or reliability established by *Daubert* and Fed. R. Evid. 401 and 702." MapInfo contended that the expert's reports on lost sales "failed to use proper methodology and assumed the effect of a 'campaign of disparagement' that was not supported by the evidence."<sup>7</sup> The judge ultimately granted the motion to preclude finding that "SRC's failure to prove in any other way a causal connection between MapInfo's alleged disparagement and any losses by SRC" rendered the expert's "testimony on damages irrelevant."<sup>8</sup> The expert repeatedly testified that he had "assumed that the alleged disparagement occurred and that it impacted the customers in the marketplace."<sup>9</sup> The lack of evidence in the record to show a causal connection between the defendant's action and the damages created a vulnerability in the expert's opinion, ultimately resulting in the opinion being precluded.

### 2. Damages should be sufficiently tied to the facts.

In *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*,<sup>9</sup> the defendant moved to preclude the proposed testimony of the plaintiff's expert about the lost value of Fashion Boutique's retail business when Fashion Boutique closed in 1991. The court addressed Federal Rule of Evidence 702, stating: "[The expert's] expertise in valuation is only helpful to the trier of fact if it is applicable to the facts of this case. His expertise is not helpful to the extent that it is based upon a causation assumption that plaintiff cannot prove."<sup>10</sup> The expert's testimony was "premised on his assumption that the sharp decline in plaintiff's sales beginning in December 1989 was caused by a 'campaign of disparagement' by defendants." However, the court found that without proof of the causation,

the expert assumed, “his estimate of the value of Fashion Boutique’s business is not the measure of damages for the defamatory statements that plaintiff can prove.” The expert’s testimony was precluded under Rules 403 and 702 because it was “based on an irrational assumption and accordingly would not assist the jury in the case.”<sup>11</sup>

### 3. Damages should consider intervening causes.

The court in *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*,<sup>12</sup> addressed, among other things, the failure to consider intervening causes when ruling on the defendant’s motion to exclude the damages expert’s testimony under Rules 403 and 702 and *Daubert*. The defendants argued that the expert’s methodology was flawed for multiple reasons, including the fact that the expert “did not take into account significant factors, aside from defendants’ conduct, which could have explained the decline in the growth of plaintiff’s sales.”<sup>13</sup> The court found that because the expert attributed “all lost profits to defendants without considering increased competition in the market, other market conditions or alleged wrongdoing of other competitors,” the expert’s “testimony would not assist the jury in determining the fact or the amount of damages.” The court subsequently granted the motion to exclude: “Any probative value of his opinion on damages is substantially outweighed by the danger of misleading the jury and unfair prejudice resulting from his unsupported assumptions and failure to consider other circumstances.”<sup>14</sup>

Another case where intervening causes were a factor in excluding part of an expert’s opinion was *Euroholdings Capital & Investment Corp. v. Harris Trust & Savings Bank*.<sup>15</sup> In this case, the defendant brought a motion to exclude the damage calculations of the plaintiff’s expert. Specifically, the motion addressed the exclusion of damages evidence regarding (1) lost profits; and (2) alleged union losses. On the issue of lost profits evidence, the court denied the motion because the expert’s “analysis provides the jury with an appropriate framework within which it may consider the issue of damages” and that “it may be challenged at trial.”<sup>16</sup> Regarding the alleged union losses, the court

excluded the expert’s testimony and the 30 related exhibits:

[F]aced with a business that was not even operating, this Court finds the damages evidence pertaining to Union is too speculative, is not supported by legal causation, and is barred by the new business rule. Not only could numerous contingencies have caused the Union acquisition to fall through, the damages evidence is overly speculative. Thus, any evidence concerning Euroholdings’ alleged Union losses should be excluded where applicable, as such evidence is premised upon speculative predictions of what Union might become.<sup>17</sup>

In *First Savings Bank, F.S.B. v. U.S. Bancorp*,<sup>18</sup> a damage expert’s lost profit opinion was challenged for failure to consider intervening causes. The court found it crucial in its determination that the expert “improperly attributed all losses to the defendants’ allegedly illegal acts, despite the presence of other factors that could be significant to his analysis.”<sup>19</sup> This failure made his testimony “inherently unreliable and purely speculative,” and as such the court concluded that the expert’s report and testimony were “inadmissible under Fed. R. Evid. 702 because they would not assist the jury in determining the amount of actual damages defendants caused plaintiff to suffer.”<sup>20</sup>

Finally, in *Sigur*, which is discussed above, the court noted that “Courts have often found that an expert’s opinion is inadmissible under Rule 702 and *Daubert* where the expert’s opinions are based upon unjustified assumptions and where there is no evidence that the expert considered other market factors which may have caused the losses in question.”<sup>21</sup> In this case and others, the consideration of intervening causes to the lost profit damages was an important factor in the court’s ruling on admissibility of expert reports and testimony.

The link between causation and a lost profits damages opinion can prove to be critical when it comes to the admissibility of that opinion. The case law discussed above highlights three causation

issues that both attorneys and independent financial experts should consider when a lost profits damages opinion is put forth: (1) damages should be directly traceable/caused by defendant’s conduct; (2) damages should be sufficiently tied to the facts; and (3) damages should consider intervening causes. A failure to consider these causation issues may render an expert’s opinion vulnerable to a *Daubert* challenge.

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1. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *Daubert* and its progeny require that a trial judge “make a preliminary assessment of whether the testimony’s underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue.” Id.
2. *Sigur v. Emerson Process Mgmt.*, No. 05-1323-A-M2, 2007 U.S. Dist. LEXIS 45270 (M.D. La. Apr. 25, 2007).
3. Id. at \*18.
4. Id. at \*25.
5. *Sigur v. Emerson Process Mgmt.*, 492 F. Supp. 2d 565, 569 (M.D. La. 2007).
6. *MapInfo Corp. v. Spatial Re-Engineering Consultants*, No. 02-CV-1008(DRH), 2006 U.S. Dist. LEXIS 70408 (N.D.N.Y. Sept. 28, 2006).
7. Id. at \*10.
8. Id. at \*18.
9. *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 75 F. Supp. 2d 235, (S.D.N.Y. 1999).
10. Id. at \*238.
11. Id. at \*239.
12. *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022 (D. Kan. 2006)
13. Id. at \*1030.
14. Id. at \*1031.
15. *Euroholdings Capital & Inv. Corp. v. Harris Trust & Sav. Bank*, 602 F. Supp. 2d 928 (N.D. Ill. 2009).
16. Id. at \*938.
17. Id. at \*939.
18. *First Savings Bank, F.S.B. v. U.S. Bancorp*, 117 F. Supp. 2d 1078 (D. Kan. 2000).
19. Id. at \*1084.
20. Id. at \*1085.
21. *Sigur*, 2007 U.S. Dist. LEXIS 45270, at \*20.



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