THE Witness Chair

Leading-edge Ideas for CPAs Providing Litigation and Dispute Resolution Services

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Estimating Lost Sales Damages in Antitrust Cases: Can't Count on Success

by Rebecca Kirk Fair and Aaron C. Yeater

Editor's note: The material for this article was drawn from the authors' contribution to "Lost Profits Damages," edited by Everett P. Harry and Jeffrey H. Kinrich, and available at *www.valuationproducts.com*.

In some antitrust litigation, damages to a plaintiff firm suing a competitor may be calculated as lost sales. In any lost sales framework—whether in antitrust or other litigation—a plaintiff asserts that its sales would have been higher "but-for" the alleged bad acts of the defendant. One implication of this approach is that the plaintiff claims its output of goods or services would have been greater, but for the alleged anticompetitive conduct of the defendant.

However, to be awarded damages based on lost sales, a plaintiff also has to demonstrate that it would have succeeded in increasing that output and making more of those sales in the "but-for world"—absent the conduct. A firm can't claim damages for sales it never would have been able to make in the first place.

In some legal contexts, this question invokes straightforward considerations of available capacity and financing, but in antitrust cases, the calculation of damages based on lost sales may be considerably more complex. As the 10th Circuit observed, rather colorfully, in *Smith v. Pro Football, Inc.* (1979), "The computation of damages in antitrust cases invariably has a certain Alice-in-Wonderland quality to it."

In *Hebert v. Lisle Corp.* (1996), the Federal Circuit noted that "[d]amage awards cannot be based upon speculation or optimism, but must be established by evidence." Typically, this evidence may come in the form of historical sales, sales forecasts made in the ordinary course of business, or sales of competitors. However, in antitrust cases the alleged conduct itself may place this type of evidence out of reach.

In these instances, the damages analyst cannot ignore the fundamental issue of whether the plaintiff had or could acquire the assets and capabilities required to achieve the claimed sales (whether for a historical period, a forecast period, or both). The economic activity at issue involves the efficient deployment of resources to generate profits; one must therefore consider whether the plaintiff would have been able to deploy the resources necessary to achieve the claimed level of sales.

For example, a plaintiff may have had the means to increase production to boost sales, but the cost may have been so high that the firm simply would not have elected to do so, even in the absence of the alleged bad actions on the part of the defendant. In such circumstances, the plaintiff would not be able to claim damages for sales it would not have gone after in the first place.

In other words, a firm must demonstrate that it would have had a reasonable justification for making the investments required to generate the expected lost sales. It also must be able to account for the costs of obtaining the required capacity, or other factors that can mitigate the amount of lost profits that is computed.

Essentially, a lost sales calculation can be divided into two elements: opportunity and means. (The profit motive, of course, is taken for granted.) In economic terms, the "opportunity" may be thought of as corresponding to the "demand side" of the equation. The greater the opportunity, the higher the bar is set—that is, the more capabilities, resources or investment may be required for any firm to achieve the level of claimed sales. By contrast, the more limited the opportunity, the easier it is to imagine a firm having the necessary capabilities already or acquiring them quickly.

The "means," on the other hand, reflects the "supply side," that is, whether the firm faced any constraints on its ability to produce, distribute, market and finance the sales it claims to have lost; and if so, whether it had access to resources to overcome these constraints, and at what cost.

In considering both opportunity and means when calculating lost sales, the expert preparing a report in an antitrust case should address three overarching topics.

First, any possible limits or constraints to a firm's capabilities to have achieved lost sales must be identified.

For example, in many of today's markets, the role of complementary goods has increased in importance, and the ability to access markets may depend on relationships with external stakeholders. It may be determined that a firm is unable to build the

continued on page 6

In this issue

Section Action

Business Valuation

by Lynda Schauer, CPA

The Statement on Standards for Valuation Services No. 1 (codified as "VS section 100") is issued by the AICPA. The Standards must be followed by all AICPA members and all CPAs who are not members, but whose states have adopted those standards as its accountancy law.

VS section 100 provides for two levels of valuation—calculation engagements and valuation engagements—and both are used to estimate the value of a business, business ownership interest, security or intangible asset.

A calculation engagement results in a calculated value, and a valuation engagement results in a conclusion of value. Both results may be either a single amount or a range.

For a valuation engagement, the appraiser analyzes the subject interest and applies valuation approaches and methods the appraiser deems appropriate given the facts and circumstances of the case. A detailed analysis is performed and sufficient facts and data are gathered to provide a conclusion of value.

The distinguishing difference between this and a calculated value is that a calculated value is based upon agreed or limited approaches, methods and/or formulas. This might be a result of a discussion between the client and appraiser, client direction, contractual formula or other factor.

The report issued in a calculation engagement must state "a calculation engagement does not include all of the procedures required for a valuation engagement" and "had a valuation engagement been performed, the results may have been different."

VS section 100 neither prohibits nor endorses using a calculated value in a litigation environment. The appraiser should discuss with counsel if the calculated value can be offered as expert testimony, based on the facts and circumstances of the subject interest. Given the limited procedures required in a calculation engagement, how can a calculated value be sufficient, reliable or determined with reasonable certainty?

Many believe, based upon the limitations in a calculation engagement, that a calculated value should only be used to provide a preliminary estimate. It does not include all the procedures required for a valuation engagement, and its report must explicitly state, had one been performed, the results may be different. A calculated value should be carefully considered as a tool in settling cases, but greater consideration should be given if the expert's opinion as to a calculated value is to be used for court testimony.

Lynda R. Schauer, CPA, CVA, CGMA *is Business Valuation Section chair and a principal with Zivetz, Schwartz & Saltsman, CPAs in Los Angeles.*

Economic Damages

by Suzanne R. Thompson, CPA

Do you remember why you got started in this industry? Maybe it was a conscious decision. Maybe one thing led to another and here you are. We all have our own story of how we got to where we are in our respective careers. What about those just starting their careers? Do they have the same reasons for seeking forensic accounting as a career as you did?

We asked a number of young professionals who have been working for only a short time in forensic accounting, specifically in the economic damages industry, the following two questions:

1. Why did you get involved in this industry?
2. What have you enjoyed the most?

Why did you get involved in this industry?

- I always had an interest in law, but chose to study accounting in school. When I first heard about this industry I thought it was a perfect match between my interests and my training.
- CPA firms in general allow for the possibility of becoming a Partner/Owner in the business, which is not available to most employees in other industries.
- Having the chance to become an expert in a particular field and someday testifying as an expert witness is extremely cool.
- I got involved in this industry because I wanted to hone and develop my analytical, financial, and technical skills, skills that are highly valuable and useful in many different industries and roles.

What have you enjoyed the most?

- The people in the industry are very intelligent. This helps provide an accelerated learning experience for someone new to the industry.
- The cases that we work on are interesting and intellectually challenging. I enjoy the academic aspect of evaluating the facts of each case and finding the most appropriate framework to analyze issues.
- I enjoy the opportunity to see different types of problems and industries within the scope of our work. "Variety is the spice of life."
- I like how you are thrown into the fire. You are given lots of responsibility and trust from the very beginning.
- I enjoy feeling like I have a meaningful impact on my cases. Attorneys ask me for my opinions and advice.

Do these responses sound familiar or does the next generation have a different perspective?

Suzanne R. Thompson, CPA/CFF, CFE, CGMA *is Economic Damages Section vice chair and vice president of TM Financial Forensics, LLC in San Francisco.*

Family Law

by Charles A. Burak, CPA

Some experts suggest that expert reports and testimony should be free of reference to any specific case law, that the calculations should be very clearly free of legal interpretation by the expert. It is then up to counsel to tie the calculations to legal support. This suggestion does not appear to be supported in my experience with the legal community.

When I am first contacted or appointed to apportion real estate, the assignment is nearly always defined by counsel as the performance of a "Moore/Marsden calculation." Yet, how does one perform a Moore/Marsden calculation without reference to, and interpretation of, the two cases which are used to define the assignment?

Attorneys generally reference only the Marriages of Moore and Marsden. I feel secure that I can accurately apply the formulae used in Marriages of Moore and Marsden without significant legal interpretation. These are simple calculations

based on simple fact patterns. Case-specific fact patterns are rarely cooperative here. Add improvements, refinancing, uncertainty over title, rental periods, property damage or highly fluctuating market values to the equation, and you've considered many new case names on which there are widely disparate opinions.

I often confront this problem by calculating the multiple outcomes based on differing legal assumptions,which allows the court some clarity regarding the alternative legal interpretations and how they affect the result. However, each interpretation is still based on interpretation of uncertain legal concepts.

An alternative that I have seen applied more frequently is to largely ignore the case law (at least those cases without the notoriety of Moore or Marsden) and create what the expert believes to be an equitable result based on the case-specific facts. This gets around the concern for attaching your accounting position to legal foundation, but also opens risk that the attorney may not be able to find legal basis for your attempt at an equitable result.

There is too much legal and practical ambiguity on this subject for me to suggest the proper answer here. We will be investigating this topic in detail at our next Family Law Section meeting on Feb. 9.

Charles A. Burak, CPA, ABV, CFF, CFE, CVA *is Family Law Section chair and principal with Burak & Associates CPAs in Walnut Creek.*

MessageFromtheChair

by B. Marie Ebersbacher, CPA

The Steering Committee and Section officers are made up of volunteers who have a few things in common: They are busy and they are committed to their success and that of the forensic accounting profession. It is this commitment that spurs them to write articles for *The Witness Chair*, speak at CalCPA section meetings and other forensic accounting conferences, and mentor others. Thank you, volunteers.

One of the first ideas I asked the Steering Committee members to embrace was for them take an active role in presenting at our meetings and at the section meetings. There are too many to name here, but all shared a common goal of raising the bar of the profession. They didn't view presentations as teaching others to compete with them; they saw it as an opportunity to improve our practice and fulfill our mission: To serve courts and clients by bringing consistent understanding to the process. Most also spoke at national conferences, further sacrificing personal time to raise the bar. I have so much appreciation and admiration for each of you. Thank you.

Greg Regan is Steering Committee vice chair, Peter Brown is treasurer and Bob Watts is secretary. All three made my job much easier with support, ideas and elbow grease. Greg is active in CalCPA and has represented California at the AICPA level for many years. Peter is with the Big 4 and has committed to finding ways to make CalCPA membership meaningful for other Big 4 members. Bob is my voice of reason when the many decisions become overwhelming. Thanks, guys. Your team mentality meant everything to me.

For anyone wondering why we have not started webcasting our section meetings, it is because of the people I have thanked here. Not only could I count on each of them for the things above, but I know I can pick up the phone at any time with any question. You can't build relationships over webcast, and my relationships with other CalCPA members have made my career more rewarding than I ever imagined. Which leads me to one final thank you: Steering Committee member Joe Rosenbaum, who in 1996, took the time to speak at USC about forensic accounting. That presentation changed my life. Thanks, Joe.

— **B. Marie Ebersbacher, CPA, ABV, CFF, CFE** *is Forensic & Financial Services National Practice Leader and Senior Managing Director for the Southern California offices of CBIZ MHM.*

Fraud and Financial Investigations

by David Callaghan, CPA

The Cybersecurity Risk Management session at the AICPA Conference on Current SEC and PCAOB Developments provided information relevant to our Fraud and Financial Investigation Section members. Practicing CPAs, industry representatives and an FBI agent described a variety of challenging cybersecurity risks, recent case examples and highlighted a new resource available to organizations and practitioners.

In response to increasing risks related to cyber threats, the AICPA issued a cybersecurity risk management reporting framework, Systems and Organization Controls for Cybersecurity, earlier this year.

The framework enables organizations to communicate useful information regarding cybersecurity risk management efforts and educate stakeholders, such as investors, customers, vendors, business partners and regulators about processes, systems and controls designed to prevent, detect and respond to electronic hacking and breaches.

The framework also provides guidance for CPAs regarding examining and reporting on an entity's cybersecurity communications. Reports by CPAs increase the confidence stakeholders can place on the information provided by companies.

The cybersecurity reporting framework provides three key pieces of information:

- Management's description: This explains an entity's cybersecurity risk management system and describes critical security policies and procedures; how an entity identifies sensitive information and systems; and how cybersecurity risks are managed.
- Management's assertion: A statement about whether the description is properly presented and whether the program's controls were effective.
- Practitioner's opinion: A CPA's opinion on management's description and on the effectiveness of controls to achieve cybersecurity objectives.

Panel members had assessed the new framework and stated it is well thought out and is an effective tool for evaluating cybersecurity programs companies have in place, identifying weaknesses and communicating to stakeholders.

David Callaghan, CPA, CFF *is Fraud and Financial Investigations Section chair and a partner in the Fraud and Financial Consulting Services Group at Hemming Morse, LLP, based in Los Angeles.*

Keepin' It Legal

Are Tax Gross-up Damages Getting Easier?

by Robert W. Wood, Esq.

Taxes and legal settlements and judgments go hand in hand. Most awards are taxable income to someone, and that can sometimes inject tax issues into the equation even before a case is resolved. Can plaintiffs in litigation successfully seek damages for additional taxes they owe because of the defendant's actions?

Historically, some courts have been reluctant to "gross up" a plaintiff's damages by the taxes the plaintiff must pay. One reason to deny tax damages is a lack of precision in tax calculations. Another commonly stated reason is that we all have to pay taxes.

Thus, the plaintiff must pay taxes in any event, regardless of the activity of the defendant. Sometimes, though, the lump-sum nature of a jury verdict or settlement itself causes the tax problem. That problem would not have existed if payments should have been made over time but were not.

In such a case, shouldn't a plaintiff who can prove that but-for link be able to recover for such an item of damage? It would seem so, and the Ninth Circuit in *Arthur Clemens, Jr. v. CenturyLink Inc. and Qwest Corporation*, 2017 WL 5013661 (9th Cir. 2017) recently said yes, at least in Title VII employment cases. The case started when Arthur Clemens Jr., sued his employer (Qwest) for Title VII violations.

A jury awarded him damages for back pay, emotional distress and punitive damages. Clemens also asked for extra damages for taxes. He claimed that a lump sum would cost him more in taxes than if Qwest had paid him over time, as it should have. But the trial court denied his request for a tax enhancement. Accordingly, Clemens appealed to the Ninth Circuit.

Recently, the Ninth Circuit said that Clemens was right, and reversed the district court. The district court explained that there is a split in the circuit courts on this issue, and that the Ninth Circuit had not ruled on it. Now that it has, taxes as an element of damages may be easier to recover, at least in Title VII cases.

Yet the impact could be broader still. In Title VII cases, the courts are supposed to have full equitable powers to make a plaintiff whole. Back-pay awards are taxable, but a lump-sum award can push a plaintiff into a higher tax bracket than if he had received his pay over several years.

Clemens argued that this extra tax hit denied him what Title VII promises—full relief that puts Clemens where he would have been if the unlawful employment discrimination had never occurred. Some other courts have considered this question. The Third, Seventh and Tenth Circuits have all held that district courts have the discretion to "gross up" an award to account for income-tax consequences [see *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 440–43 (3d Cir. 2009); *EEOC v. N. Star Hosp., Inc.*, 777 F.3d 898, 903–04 (7th Cir. 2015); *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456–57 (10th Cir. 1984)].

In contrast, the D.C. Circuit has ruled against such gross ups. In a per curiam opinion, it rejected gross ups [see *Rann v. Chao*, 346 F.3d 192, 197–98 (D.C. Cir. 2003)]. Although the Ninth Circuit joins the majority view, it made clear that there is no automatic tax gross up. As the Third Circuit put it, "we do not suggest that a prevailing plaintiff in discrimination cases is presumptively entitled to an additional award to offset tax consequences. … The nature and amount of relief needed to make an aggrieved party whole necessarily varies from case to case." *Eshelman*, 554 F.3d at 443, (quoting *Albemarle*, 422 U.S. at 424, 95 S.Ct. 2362).

The party seeking relief bears the burden of showing an income-tax disparity and justifying any adjustment. In this case, Qwest had unsuccessfully argued that only a jury can award a back-pay tax adjustment. Qwest also argued that the district court already exercised its discretion in refusing Clemens a tax gross up.

On that point, the Ninth Circuit agreed that the district court's ruling was somewhat opaque. However, the court found that the district court had declined to consider a gross up in part because the Ninth Circuit had never authorized one. The Ninth Circuit has now remedied that.

Now that the Ninth Circuit allows tax gross ups, will this spill over into other cases beyond Title VII? As a legal matter, one might assume that the answer is no, or that there will be no impact. However, there may well be a practical impact, an expansion of the concept generally.

Tax gross ups are often hard to obtain, in any context. Yet they can be both appropriate and available in a variety of types of cases. In another recent case, *Sonoma Apartment Associates v. United States*, 2017 WL 5078032 (Court of Federal Claims, Nov. 3, 2017), the plaintiff in a complex suit against the federal government sought various damages.

Among the damage claims and calculations considered in a more than 40,000 word opinion from the court, was a tax neutralization payment. The plaintiff asked for an additional $2,136,681, representing compensation for the increased federal and state income taxes the plaintiff's partners would owe. Not unlike in a Title VII case, the plaintiff said that it (and its partners) was receiving a lump-sum damage award in lieu of a 24-year-long stream of market-rate rental income.

That meant more taxes on the lump sum, just like Clemens argued in his Ninth Circuit Title VII case. In *Sonoma Apartment Associates*, the plaintiff's plans for receiving many years of market rents were spoiled by the federal government. The federal government admitted liability. So, the only question was the extent and calculation of damages. The plaintiff sought to gross-up its damages to offset its partners' purported increased tax burden.

For plaintiffs at least, there are probably some lessons in both of these cases, and in their predecessors. One point is to consider claims for taxes as early as you can. Some people consider it as early as preparing a complaint. Others consider it during the discovery process. Others prepare to address it in a motion *in limine*.

On the other hand, some lawyers and claimants like to wait. Some successful plaintiffs (at least in Title VII cases) may

continued on page 5

AICPA Alert

by Annette Stalker, CPA

More than 1,000 professionals attended the AICPA Forensic & Valuations Services Conference in November. In addition to the forensics, valuations, case studies and litigation tracks, the conference showcased two new tracks: Family Law and Fair Value Measurement. The capstone event of the third day was a new four-part mock trial that included a judge, a plaintiffs' attorney and expert, and a defense attorney and expert. Each session featured a segment of a typical trial with an overview, direct examinations, cross-examinations and re-direct, with attendees weighing in as "jurors" through the conference app. The final session was a debrief provided by the attorneys and experts, as well as questions from attendees.

As usual, CalCPA FSS members were well represented. Conference speakers included Travis Armstrong, Brian Brinig, Elizabeth Dean, Marie Ebersbacher, Jolene Fraser, Ted Israel, Tracy Katz, Julie Knox, Greg Regan, Tatyana Shtyrkova, Annette Stalker, Chris Tregillis, Mike Ueltzen and David Wall.

Mark your calendars for the 2018 conference, Nov. 5-7, in Atlanta. Planning is underway and you can contact California-based planning committee members Greg Regan (*regang@hemming.com*) or Annette Stalker (*annette@stalkerforensics.com*) to suggest topics/speakers.

Nuances of Calculations in Valuation

Valuation practitioners are likely aware of the significant differences between the expression of a conclusion of value and a calculated value. Recently, more practitioners report seeing calculated values being offered as part of an expert opinion in courts. The AICPA FVS Section put together a working group to address the issue of "Calculation Engagements" as they related to the Statements on Standards for Valuation Services, VS section 100. The result is an initial FAQ document that will be available on the AICPA FVS website (*www.aicpa.org/interestareas/forensicandvaluation.html*). More publications and presentations on the topic are planned for 2018.

Advocacy Efforts

In October, the IRS officially withdrew the proposed "Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest" (proposed in August) related to estate tax valuations, known as the 2704 Regs. In December 2016, AICPA members testified at a Treasury Department hearing on behalf of the AICPA.

AICPA FVS Section leaders continuously monitor national and international regulations and proposals that may impact our practitioners.

Clarification on CPD and Credential Recertification:

Most of you received notifications in January about the new continuing professional development (CPD) hours required to maintain your AICPA credentials. As of Jan. 1, 2017, you must complete 20 hours of CPD within the credential's body of knowledge annually. Previously, you needed "60 hours of NASBA approved CPE related to the credential's body of knowledge every three years."

Instead of obtaining 60 hours of CPE by the end of year 3, you must now have at least 20 hours of CPD in each of the three years. Unlike CPE, CPD can be earned through unstructured learning activities as outlined by the AICPA.

Visit the AICPA's Credential Recertification Requirements FAQ at: *www.aicpa.org/membership/credential-recertification-faqs.html.*

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continued from page 4

make a motion for taxes post-verdict. Some experts like to address such points post-verdict, where calculations can probably be run with considerably greater certainty. In any event, when a tax claim might be appropriate should be considered in virtually any context.

An expert witness on tax issues and/or damage calculations is often appropriate, if not a downright necessity. A plaintiff may need to show by clear and convincing evidence that these specific taxes were caused by the defendant, and that the plaintiff would not have paid them otherwise. Tax positions taken on later tax returns may or may not bear this out.

For example, a plaintiff's damage calculations may compute taxes based on the entire verdict being taxed at ordinary income rates. That may be the perfectly appropriate and conservative view of the matter. That same plaintiff may later take the position on his tax return that the recovery is capital gain, or even a recovery of basis.

This may sound duplicitous. However, how a verdict will be taxed is often complex and can involve difficult factual and legal judgments. It seems appropriate for the plaintiff to assume the worst tax result when seeking damages. Defendants can be expected to do the reverse.

This is one of many reasons that expert witnesses can be invaluable. Sometimes, tax rules are about probability, and black and white answers may not be available. The U.S. Supreme Court made this clear in *Hanover Shoe, Inc. v. United Shoe Machinery Corp*, 392 U.S. 481 (1968).

The plaintiff in this antitrust case sued for lost profits. The defendant argued that the plaintiff's damages should be reduced for taxes the plaintiff would have had to pay absent the antitrust violation. Had the antitrust violation not occurred, the defendant argued, the plaintiff would have received profits, and those profits would have been taxable.

Defendants trying to mitigate their damages with tax arguments, as in *Hanover Shoe*, may face an even higher burden. Reversing the Court of Appeals, the Supreme Court held that the award should not be reduced for taxes. Underlying *Hanover Shoe* is the notion that there are considerable uncertainties in our tax rules.

For some courts, these uncertainties represent a good reason not to deal with this tax subject. Fortunately, many courts do not apply the throw-up-your-hands "speculative" moniker. And recent case law suggests that getting tax-based damages in appropriate cases may become even easier.

Robert W. Wood *is a tax lawyer with WoodLLP (www.WoodLLP.com) and author of numerous tax books, including* Taxation of Damage Awards & Settlement Payments *(www.TaxInstitute.com). This discussion is not intended as legal advice.*

HAPPENINGS

FORENSIC SERVICES SECTION 2018 MEETING DATES

All Sections Joint Meeting	May 10 Oct. 26	North South
Business Valuation	Feb. 8 Aug. 16	LAX North
Economic Damages	Feb. 22 Aug. 22	LAX North
Family Law	Feb. 9 May 11; Aug. 17	LAX North
Fraud and Financial Investigations	Feb. 23 Aug. 23	LAX North
CalCPA Education Foundation Family Law Conference	Oct. 18 Oct. 19	LAX East Bay

Register online: *www.calcpa.org/fss.* | For more information, call (818) 546-3502.

continued from page 1

relationships with stakeholders that are required (or unable to build them fast enough) to take advantage of an opportunity. The stakeholders' own capacity and financial health also come under examination.

In other instances, strategic choices made early in a firm's history (well before the alleged bad act) may limit the firm's ability to access new markets or customers even in the absence of the alleged bad acts of the defendant. In addition, while the most obvious and direct limits to a manufacturing firm's capabilities are financing, factory capacity and access to raw materials, the examination of capacity constraints does not end there. The modern firm organizes human, as well as financial and material resources (which economists call capital); a firm's capabilities may therefore derive from the talents of its managers and workers, which comprise its human capital.

Second, one must determine whether the firm had access to the resources needed to address any identified limits or constraints.

For example, would the firm have had the ability and the willingness to purchase inventories, hire workers, acquire financing and train its workers in necessary new skills? The relevant consideration may not be whether the firm can acquire what is needed, but whether it can do so in a way that does not disrupt existing investments and without changing the cost structure of the firm in ways that ultimately make the but-for sales unprofitable.

In this respect, the question of whether a firm could have achieved lost sales may bleed into questions of how to estimate the firm's costs in the but-for world. Furthermore, the firm's past performance in the face of capacity constraints, as well as the behavior of other firms in similar circumstances, can serve as important indicators of whether the firm would have acquired what was needed.

Third, a firm's very access to the resources needed to address any capacity limits (or its ability to employ those resources as necessary) may have been impaired by the acts at issue in the litigation. This presents a significant challenge for business and economic experts.

Along with calculating sales and costs in the but-for world, the expert must identify whether the acts at issue also affected the firm's access to needed inputs, and so "build out" the but-for world with reasoned assessments of how those capabilities would have been different absent the alleged acts. Properly considered, this generates a more complete damages analysis; however, it also opens the door to a greater degree of speculation, and ultimately that speculation may threaten to undermine the reliability of the entire analysis.

In sum, both plaintiffs and defendants preparing their cases in antitrust litigation should determine whether or not the plaintiff had both the opportunity and the means to achieve the level of sales it claims–that is, whether the plaintiff had the financing, design expertise, intellectual property, production capability, managerial know-how, distribution network and any other capabilities required to successfully produce and distribute the product or service at issue in the but-for world.

All these factors need to be considered to determine the extent (if any) to which they mitigate the calculation of damages.

Taken together, these steps are intended to ground estimates of lost sales in reality. A plumber injured in an accident cannot lay claim to the earnings of a surgeon, because the plumber held little hope of performing heart bypasses with or without the injuries sustained in the accident.

Similarly, when a company claims lost sales, the case must be made that the firm would have been able and would have had the capacity to procure, produce, market, sell and finance the products or services necessary to generate those expected sales while generating a profit on these activities.

Absent a solid, reality-based foundation for the calculations, the case for lost sales may very well fall down Alice's rabbit hole.

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