Assessing Economic Damages in Civil Litigation

Peter Angelides, PhD, AICP
April 11, 2018
Overview

• Peter Angelides
• What are damages?
• Major Issues
• Working with an Expert
• Discussion
About Me

• Litigation expert for more than 20 years
  – Putnam, Hayes & Bartlett / PHB Hagler Bailley – Washington, DC
  – Charles River Associates – Washington, DC
  – PricewaterhouseCoopers – Philadelphia, PA
  – Econsult Corporation / Econsult Solutions

• Dozens of commercial damage cases
• Principal at Econsult Solutions
• Practice Areas:
  – Real Estate
  – Transportation
  – Economic Development
  – Public Policy
  – Litigation

• Deep Resources
  – Principals
  – Staff
  – Senior Advisors
WHAT ARE DAMAGES?
Economic Damages

• Usually there is a monetary value in dispute
• The expert is typically not opining on liability
  – Assumes that liability has been established
Economic Damages

• Breach of contract/commercial damages
• Personal injury/wrongful death
• Valuation diminution
• Antitrust
• Intellectual property
• Securities
• Environmental (e.g. CERCLA)
Types of Damages

• **Lost Profits**
  – Make the injured party whole

• **Lost Value**
  – Make the injured party whole

• **Disgorgement**
  – Remove the ill-gotten gains from the offending party

• **Reasonable Royalty**
  – Make offender pay what they should hav paid
First Steps

• What is the theory of damages?
  – What was the bad act?
  – How did the bad act lead to harm?
  – What should the doer of the bad act done instead?

• What did the harmed party do in return?
  – The harmed party typically has to mitigate

• When did the harm end?
  – This question may be up to the expert
Actual vs. But For

• Actual World
  – What has actually happened

• But-for-world
  – What would have happened but for the wrongful act

• Damage
  – Difference between the two

![Diagram showing Cash Flows, Actual vs. But For, and Business Value over time.](image-url)
Case Study

- Condominium building in New York
- Pre-sales: more than half of units
- Crash of 2008/2009 reduced value
- Error in condo docs allowed buyers to back out.
- Developer had to resell the unit into a worse market.
- Issues – Slower sales and worse price
Figure 7 - Cumulative Closings by Quarter

- But-For Closings - Contract Based
- But For Closings - Closing Pace Model Based
- Actual Closings
Figure 9 - Cumulative Proceeds by Quarter

- But For Cumulative Proceeds
- Actual Cumulative Proceeds
## BUILDING X

### Damage Analysis

**Comparison of Actual Revenue and Contract Revenue**

### DIFFERENCE IN PRICE AND TIME

<table>
<thead>
<tr>
<th>Month</th>
<th>Client Revenue to Square Foot</th>
<th>Client Revenue to Square Feet Closed</th>
<th>Square Revenue to Square Feet</th>
<th>Square Revenue to Square Foot</th>
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<td>1,356</td>
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</table>

93,608
Interest and Discounting

• Accounting for the time value of money
  – Discount future damages to the present
  – Inflate (apply interest) to past damages to the present

• Interest / discount rate is a big deal
  – Simple vs. compound
  – Statutory vs. market rate
  – Match market rate to risk profile
At what point in time should the damage value be calculated?

- Under the "Date of Injury" approach, one would first estimate the present value as of the date of injury, and then adjust the award for the time value of money to the current date.

- Under the "Current Date" approach cash flows are not discounted, they are brought forward from the date of occurrence to the current date.

Source: Putnam, Hayes & Bartlett, 1990
**Date of Injury Approach:**

Cash Flow

<table>
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<th>Year</th>
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<th>1</th>
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<td>15%</td>
<td>$25</td>
<td>$25</td>
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<tr>
<td>10%</td>
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Without Time Value Adjustment: $40.64
Present Value: $54.10

**Current Date Approach:**

Cash Flow

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<th>Year</th>
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<th>1</th>
<th>2</th>
<th>3</th>
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<tr>
<td>10%</td>
<td>$25</td>
<td>$25</td>
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$50.00
$57.75

These issues apply to both the *ex ante* and *ex post* approaches.

Source: Putnam, Hayes & Bartlett, 1990
### BUILDING X Damage Analysis

**Comparison of Actual Revenue and Contract Revenue**

#### INTEREST ON REVENUE DIFFERENCE

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<th>Month</th>
<th>Simple Interest Rate</th>
<th>Simple Interest</th>
<th>Cumulative Interest</th>
<th>Foregone Interest</th>
<th>Previous Balance</th>
<th>Cumulative Interest</th>
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#### CARRYING COSTS AND PROPERTY TAXES

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**Note:** The table above shows the calculation of interest on revenue difference and carrying costs and property taxes for each quarter from 1Q2009 to 2Q2011.
Earnings before trial, had the harmful event not occurred - Actual earnings before trial + Prejudgment interest = Damages before trial

Projected earnings after trial, had the harmful event not occurred - Projected earnings after trial - Discounting = Damages after trial

Total Damages

Source: Hall and Lazear
Reasonable Royalty

• Used in Intellectual Property cases
• Income Approach
  – What is the value to the infringer?
• Comparable
  – What are comparable licenses selling for?
  – Hard to find licenses, as they are proprietary contracts
Valuation

• Damage is difference in how much an asset is worth
  – Difference is due to wrongful act

• Three main methods
  – Income
  – Market
  – Cost

Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

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MAJOR ISSUES
Ex-Ante vs. Ex-Post

• **Ex-ante**
  – Value at the time of the damage
  – More intellectually defensible, but can lead to odd feeling outcomes

• **Ex-post**
  – Value as of today
  – Can assign large damages to seemingly minor infractions

• **Famous Thought Experiment**
  – Janis Joplin’s yearbook
• Taxes matter and should be considered
• Impact depends on tax rates at time of damages and at time of judgement
• Taxes MAY wash out, but this should be checked and not assumed
  – Interest and discount rates may take taxes into consideration too
• Eliminating opinions based on “junk science”
• The judge is the gatekeeper
• The big three
  – Kumho Tire Co. v. Carmichael (1999)
• Reputable experts do not want to lose a Daubert challenge
Daubert

• Method is generally accepted
• Peer review and publication
• Testability
• Known error rate
Pennsylvania uses older Frye standard

- Method must be generally accepted as reliable
- New Jersey, Illinois, Maryland, California, Washington also use Frye
WORKING WITH EXPERTS

“I know nothing about the subject, but I’m happy to give you my expert opinion.”
Selecting an Expert

• Appropriate technical knowledge
  – Understands damage framework
  – Good with data and analysis

• Specific subject matter expertise is not needed
  – The expert does not need to be an expert in scrap yards to do a damage analysis on scrap yards

• Appropriate advanced degrees are impressive
  – The training should match the report

• Personality
  – Good at communicating
  – Likable and believable
Working with an Expert

• Experts are not advocates
  – Experts will sometimes give you answers you do not want to hear

• Be clear, upfront
  – Deadlines
  – Rules for communication
  – Discoverability of working papers, etc.

• Pay on time.
  – Be fully caught up at the time of trial.
Rebuttal

• Some reports are really bad
• Your expert can rebut the other expert
• Many grounds for challenge
  – Inaccurate or unreliable data
  – Inappropriate data
  – Incorrect conceptual analysis
  – Incorrect arithmetic
• Gold standard is to win a Daubert challenge
Thank you!

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