

# ***Benchmarking Methodology Passes Daubert Challenge In the Sixth Circuit***

***Tharo Systems, Inc. v. cab Produckttechnik GmbH & Co. KG, 2006 U.S. App. LEXIS 21895 (August 24, 2006)***

Tharo won a substantial, multi-million Euro breach of contract claim against a German manufacturer in federal court. On appeal, the U.S. Court of Appeals re-considered the defendant's *Daubert* challenge to the qualifications and methodologies of plaintiff's damages expert, Robert Brlas, CPA, CMA, CAMS (BBP Partners; Cleveland, OH).

## **Expert challenged on many fronts**

Defendants first challenged Brlas' expert qualifications, claiming that the CPA and international auditor (with nearly 100 trial appearances) wasn't familiar with German accounting principles. Yet they failed to rebut Brlas' testimony that there were no material differences between German and typical U.S. financial statements. And even though Brlas had made a translation error—which caused him to exclude 80% of certain salaries from his calculations—he'd admitted the error on cross-examination, and the jury had resolved the fact question in its damages award. In the end, his error or lack of familiarity with German accounting statements went to the "weight" of his testimony, according to the Appeals Court, not its admissibility.

Brlas also had no technical expertise on the thermal transfer printers that the Germans manufactured; but as a CPA specializing in financial analysis and business disputes, he was certainly qualified to testify on the value of the technology, with or without the underlying technical know-how.

More importantly, the defendants challenged Brlas' use of the common benchmarking methodology, which develops ratios to estimate cost of value in cases where historical data are incomplete. Brlas testified that benchmarking "is a recognized method to determine things like cost and value," which requires accountants and appraisers "to use their best judgment in coming up with estimates."

Although the defendants attacked the results, they failed to demonstrate the unreliability of the benchmarking method—even though Brlas conceded that he'd never before used benchmarking to estimate the value of technical information. The defendants were free to—and did—rigorously subject Brlas to cross-examination. The jury was also free to credit his testimony in their award to plaintiffs—which they did, without reversible error.

Finally, defendants argued that even if Brlas properly used the benchmarking method to estimate past developmental costs, he incorrectly used it to project future cost. But that is "the very purpose of using the method," the Court observed, to estimate present costs based on historical data (such as the cost of developing a product in the past). "Brlas needed to estimate [the plaintiff's] developmental costs because there was insufficient data to do anything more."

## **Limited citation, wider application**

The Appeals Court ultimately did not recommend its decision for publication—and so the case is subject to limited citation rules. Nevertheless, its rationale has wider application for business appraisers, as after *Daubert*, their methods, conclusions, and qualifications come under increasing attack.