

EXCERPT

THE COMPREHENSIVE GUIDE TO
**ECONOMIC
DAMAGES**

Edited by

Nancy J. Fannon and Jonathan M. Dunitz

With Jimmy S. Pappas, William Scally, and Steven M. Veenema

SIXTH EDITION

The Comprehensive Guide to Economic Damages

VOLUME ONE

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What It's Worth

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Doug Bania, CLP, is a founding principal of Nevium Intellectual Property Consultants and holds a Google Analytics Individual Qualification (GAIQ). Bania has over 18 years' experience as an intellectual property (IP) and brand licensing strategist and IP valuation professional. He is an accomplished writer, speaker, and is part of the International Trademark Association's (INTA) Right of Publicity Committee. Bania's expertise includes internet infringement investigations, internet and social media analytics analysis, licensing, and expert testimony in intellectual property infringement litigation. Bania has been named in approximately 70 cases and provided testimony at trial, in arbitration, and in depositions, including trial testimony as the damages and apportionment expert in the *Blurred Lines* case. He has managed hundreds of projects related to brands, intellectual property, and the related intangible assets. He has assisted clients in intellectual property matters related to acquisitions, litigation, bankruptcy, tax, estate, and licensing. He holds an M.A. in television, film, and new media with an emphasis on marketing from San Diego State University and a B.A. in cinema from San Francisco State University. His writings have appeared in peer-reviewed journals such as the *Journal of Intellectual Property Law* and other publications such as *The World Trademark Review* and panel presentations for the Licensing Executive Society (LES) and the SXSW music festival.

Neil J. Beaton, CPA/ABV/CFF, CFA, ASA, is a managing director in Alvarez & Marsal's Valuation Services Practice. Prior to joining A&M, Beaton was the global lead in charge of complex valuation at Grant Thornton LLP's valuation services group. He has over 25 years of experience analyzing both closely and publicly held companies. Beaton has appeared as an expert witness across the country and in international tribunals, is an instructor for the AICPA's business valuation courses, and speaks nationally on business valuation with a special emphasis on early-stage and high-technology companies. He has published two books, contributed chapters to a number of other books, and written many articles on early-stage company valuations as well. He has served on the AICPA's National Accreditation Commission and the Financial Accounting Standards Board Valuation Resource Group. Beaton has a Bachelor of Arts degree in economics from Stanford University and a Master of Business Administration in finance from National University.

Richard F. Bero, CPA/ABV, CVA, CLP, is the managing director of The BERO Group, which specializes in litigation and valuation services. He received his BBA in accounting and finance from the University of Wisconsin—Madison. Bero has provided accounting and financial consulting services and expert testimony pertaining to valuation and economic damages issues for more than 30 years. He has served as an expert witness in commercial and intellectual property litigation matters in a wide range of industries and technologies. He has testified as an expert more than 150 times in trials, depositions, arbitrations, and other hearings in federal and state courts across the country. Bero has presented, instructed, and written articles on topics including intangible assets, intellectual property damages, commercial damages, and various accounting issues. He and his team developed and instruct the intellectual property damages course for the National Association of Certified Valuation Analysts. Bero has also been a member of the Intellectual Property Owners Association’s damages committee since 2004. He has written a book designed for commercial litigators titled *The Litigator’s Damages Blueprint: The Pragmatic Solution*. The five-step pragmatic solution guides commercial litigators through a structured damages process. Prior to founding The BERO Group, Bero was the Wisconsin Practice Leader for Coopers & Lybrand’s National Litigation & Claims Services practice and an executive consultant with Peterson Consulting.

Jared Bourgeois, CPA/ABV, CFE, CAMS, is a director in a large professional services firm in the financial forensics practice and is based in Chicago. Bourgeois advises clients regarding the accounting- and financial-related aspects of sale and purchase agreements (SPAs) presigning and also advises clients in post-closing M&A disputes, commercial disputes, bankruptcy-related litigation, and forensic accounting investigations. He has performed economic damages, valuation, solvency, and forensic accounting analyses in various matters, including post-closing accounting disputes, breach of representations and warranties claims, earnout disputes, material adverse change cases, and fraudulent conveyance investigations. He has served as a consulting expert on various matters involving complex damages, valuation, and accounting issues, including the interpretation of generally accepted accounting principles in the United States (U.S. GAAP). He has also conducted a variety of forensic accounting and other internal investigations, including fraud, FCPA, anti-money laundering, auditor malpractice, successor liability, and breach of fiduciary duty investigations.

Pamela Coyle Brecht, Esq., is a partner at Pietragallo Gordon Alfano Bosick & Raspanti LLP. Brecht serves as chair of the firm’s national Qui Tam/False Claims Act Practice Group. She is also experienced in white-collar criminal litigation, employment law, internal investigations, and complex healthcare litigation. Brecht has litigated many of the most complex False Claims Act cases filed in the United States. Her cases have included alleged fraud by a large multistate Medicaid managed care contractor, FCA violations by three of the largest hospital corporations in the country, and dissecting complex financial relationships among healthcare providers including Stark and Anti-Kickback issues. She has also litigated cases involving hospital fraud, emergency room fraud, medical device allegations, Medicare Part C and Part D fraud, government contractor fraud, laboratory fraud, as well as all types of pharmaceutical fraud. One of the whistleblower matters that Brecht has worked on was recognized in 2018 by *The National Law Journal* as one of the “Top 100 Verdicts.” The matter, *Lutz v Health Diagnostics Laboratory*, ranked as No. 39 on the list of highest verdicts throughout the nation for that year and came in at No. 2 for the highest verdicts coming out of Pennsylvania. Brecht received her Juris Doctorate from Temple University School of Law where she served on *Temple Law Review*. She also graduated on the Dean’s List and received honors for “distinguished class performance.” Prior to Temple University School of Law, Brecht graduated cum laude from Villanova University, where she was a competitive rower on the women’s crew team. Currently, Brecht is a Hearing Committee Member serving the Disciplinary Board of the Supreme Court of Pennsylvania. She began her three-year term on July 1, 2020.

Brian Buss, CFA, is a founding principal of Nevium Intellectual Property Consultants, a San Diego-based intellectual property (IP) consulting firm specializing in valuing, monetizing, and managing IP. Buss has over 25 years of experience in valuations, financial analysis, and corporate finance both in the U.S. and overseas. He provides strategic advice for intellectual property transactions and IP portfolio management; product pricing and resource allocation strategies for executive teams and corporate boards; and performs valuations of trademarks, patents, copyrights, brand assets, trade secrets, technology assets, marketing strategies, and other intangible assets. Buss has provided expert testimony and opinions regarding damages, the value of intellectual property assets, and the contribution of IP to economic profits in bankruptcies, tax court, federal court, and arbitration. He has spoken and published papers on topics including damages in internet and social media infringement, IP valuation, and the economic impact of brand disparagement. Buss was recently named to the Commercialization of Brands Committee of the International Trademark Association (INTA). Buss graduated from Claremont McKenna College with a degree in biology and economics and earned an MBA from San Diego State University. During his career, Buss has developed financial models and analyses for acquisitions, business valuations, class action litigation, reorganizations and privatization transactions, licensing transactions, and new business ventures. His entrepreneurial experience includes serving as co-founder of a technology startup. Prior to founding Nevium, Buss worked at San Diego-based consulting firms, Westpac Institutional Bank, and Deloitte & Touche's Financial Advisory Services group in New Zealand and the United States.

Jeff Buzen is a partner in McGill and Partners' Mergers and Acquisitions group and the leader of the United States Mergers and Acquisition team. He focuses on the structuring, marketing, negotiation, and brokering of representations and warranties insurance, tax liability insurance, and other bespoke contingent liability insurance solutions. Buzen works on transactions spanning the entire mergers and acquisitions market; however, he has extensive experience in the financial services, food and beverage, healthcare, renewable energy and technology, and media and telecom sectors. Additionally, throughout his career, he has focused on the implementation of transactional insurance solutions in less traditional ways, including as it relates to take-private transactions, distressed transactions, and secondaries transactions. Prior to joining McGill and Partners in July 2020, Buzen worked for Aon's M&A and Transaction Solutions practice in New York City for six years. During this time, he placed transactional insurance policies on over 500 closed mergers and acquisitions and other transactions. While working at Aon, Buzen completed a secondment in London where he focused on placing M&A insurance for transactions with EMEA-based targets involving investors from the United States and throughout the rest of the world. He holds a Bachelor of Science degree in business and economics from Lehigh University, where he majored in finance with a concentration in accounting.

Christopher V. Carani, Esq., is a partner at the Chicago-based IP law firm of McAndrews, Held & Malloy Ltd. practicing in all areas of IP with particular emphasis on design law, which focuses on the protection of the appearance of products using a strategic combination of design rights, utility patents, trade dress, and copyrights. He is widely recognized as a leading authority in the field of design law, having published and lectured in the field for over 20 years. Carani has extensive experience litigating design law cases, including high-profile matters before U.S. district courts, the Federal Circuit, U.S. Supreme Court, and the ITC. Some of the world's most design-centric companies have sought out Carani's strategic insights into creating valuable design right portfolios, including the top filer of U.S. design patents. In 2020, Carani was named to the "IAM Strategy 300—The World's Leading IP Strategists." In 2019, *IAM Magazine* included Carani in its "IAM Patent 1000," referring to him as one of the U.S.'s "pre-eminent design law experts." He is the current chair of the AIPPI Committee on Designs and past chair of both AIPLA and ABA Design Rights Committees. Carani is current vice chair of AIPPI-US. He is on faculty at Northwestern University School of Law and as an adjunct professor teaching IP law and policy. His book *Design Rights: Functionality and Scope of Protection*, published by Wolters Kluwer N.V., is the seminal work on these contentious and decisive issues. He serves on the Advisory Design Council for The School of The

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Rick Hoffman, CPA/ABV, has nearly 30 years of experience in performing damage calculations, business valuations, and other forensic accounting projects for several international consulting firms as well as for a firm he co-founded in 2008. He has been a frequent instructor on the proper methods of measuring damages resulting from intellectual property disputes. He co-wrote *Intellectual Property Damages: Guidelines and Analysis* and has taught many courses for NACVA. He has testified in state and federal courts, including bankruptcy courts, on many occasions. He has also acted as the special master in a number of matters. He is a co-founding partner of Lone Peak Valuation Group in Salt Lake City, Utah.

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Robert M. Lloyd, Esq., is Professor Emeritus at the University of Tennessee College of Law, where he taught courses in contracts, commercial law, and finance. His primary research interest is damages for lost profits. Professor Lloyd has three times been honored the Harold C. Warner Outstanding Teacher Award and once with the Student Bar Association Outstanding Teaching Award. In 1996, he received the University of Tennessee National Alumni Outstanding Teacher Award. Professor Lloyd is a Fellow of the American College of Commercial Finance Lawyers. He received a Bachelor of Science degree in aerospace and mechanical engineering from Princeton University and a law degree from the University of Michigan. Prior to his teaching career in Tennessee, he practiced law with a large firm in Los Angeles. Professor Lloyd consults regularly on large lost profits cases.

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Timothy W. York, CPA/ABV, is the managing partner of Dixon Hughes Goodman LLP's (DHG) industry practices, where he is focused on the growth and oversight of all nine formalized industry practices, as well as being the executive sponsor of all client experience activities for DHG. York has held various leadership positions at DHG, including his most recent position ending in 2017 as managing partner of DHG's Dealership practice, which provides services to more than 3,000 rooftops in all 50 states, including six of the country's top 10 dealership groups. He served as office managing partner of the Birmingham, Ala., office from 2005 to 2015 and as regional managing partner of two regions in years past, leading offices in Dallas, Atlanta, and Birmingham. Since 2014, York has been an elected member of the DHG Executive Committee. He has also served a number of leadership positions for national organizations. He was chair of the National Auto Dealer Conference for the American Institute of Certified Public Accountants for four years, from 2015 to 2018. He completed a three-year term as a member of the Business Valuation Committee for the AICPA in 2004 and was also the 2004 chair of the National Business Valuation Conference for the AICPA. Furthermore, York has been featured in a variety of industry publications, including *Automotive News* and *Automotive Buy Sell Report*, and he remains a speaker and writer on automotive topics. His participation with Business Valuation Resources includes contributions to *Key Trends Driving Auto Dealership Value*, various editions of the *Comprehensive Guide to Lost Profit and Other Commercial Damages*, webinars, and more.

Foreword

“It costs us nothing to be just.”¹

This book is about financial evidence: how to gather it, interpret it, and tell its story in a lawsuit or litigation setting. This is the task that the attorney typically retains the financial expert to accomplish. In this comprehensive guide, we bring together the financial expert’s knowledge of accepted methods and procedures with the attorney’s knowledge of legal issues and insights. This includes a summary of the applicable rules of civil procedure and of evidence, as well as the rich and continually expanding case law that interprets what courts have accepted as evidence for damages claims—and what the courts have rejected and why. This guide contains representational analyses as well as excerpts and abstracts of case law on financial damages. However, like any guidance, it is a tool and not a substitute for the professional’s knowledge of a particular case, the potential impact of local rules regarding discovery, and the jurisdictional nuances that may affect the damage calculations.

The attorneys and financial experts who have participated in putting together this text are among the best in the country in their respective areas of expertise. Our heartfelt thanks go out to all of them for their generous and substantial contributions. Each of their chapters served to make this a better, more comprehensive work covering a range of never-before-addressed topics—including extensive analysis of concepts and case law that lawyers and experts have to grapple with when faced with a damage analysis.

This sixth edition includes materials on a variety of damages measures, including lost profits or value, unjust enrichment, intellectual property damages, other commercial damages, personal injury, and wrongful termination.

As with each edition, much of the text’s material has been substantially enhanced for this edition, and we thank the continuing efforts of the panel of contributing authors for their efforts. Additionally, many new case digests have been added.

In addition to these expanded materials, new topics have been added to this edition, including Professional Liability Risk Management for Valuation Professionals, Fair Market Value in Regulations Impacting Physician Practices and Healthcare-Related Government Enforcement Actions, Design Patent Challenges, Piercing the Corporate Veil: An Alternative Strategy to Collect Damages, and Representations and Warranties Insurance. Each of these chapters adds to the depth and coverage of the book, and we thank the contributing authors greatly for their contributions.

Once again, Business Valuation Resources LLP has provided extraordinary support, and, in particular, we thank Monique Nijhout-Rowe, publisher at BVR, whose assistance has been irreplaceable, as well as Sylvia Golden for her valuable assistance with case digests.

Finally, readers familiar with this guide will see we have three new editors for this edition: William Scally, Jimmy Pappas, and Steven Veema. This is my (Nancy Fannon) and Jonathan Dunitz’s final editions—and we leave the future of this guide in their very capable hands. I have enjoyed enormously the opportunity to work with the talented contributing authors over the last 12 years, when the journey to create this work first began.

To all our new contributors to the guide, a warm welcome, and to all who participated in this edition, a heartfelt thank you.

To our readers, we hope you find this text to be a rich resource for your practice and our editors welcome your suggestions and input for our continuing updates and for new topic areas that would benefit your work as an attorney or expert.

Nancy Fannon

¹ Henry David Thoreau, “A Plea for Captain John Brown” (1859).

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