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
Table of Contents

VOLUME ONE

About the Editors .................................................. ix
Acknowledgments ...................................................... xi
Author Bios .......................................................... xv
Foreword ............................................................. 1

PART I. EXPERT TESTIMONY IN THE U.S. COURTS ......................... 3
Chapter 1. Professional Standards for Experts ..................................... 5
   By Michael A. Crain, DBA, CPA/ABV, CFA, CFE
Chapter 2. The Process: A Brief Introduction to the U.S. Court Systems, From Filing to Appeal ............. 11
   By Jonathan M. Dunitz, Esq., and Clifton T. Hutchinson, Esq.
Chapter 3. Spoliation of Evidence ............................................. 33
   By David B. Chaffin, Esq., and Rachel J. Eisenhaure, Esq.
Chapter 4. A Guide to Electronic Discovery and Evidence .................... 59
   By Daniel K. Gelb, Esq., and Richard M. Gelb, Esq.
Chapter 5. Expert Depositions: Accountants, Economists, and Appraisers ............................................. 71
   By David L. Herzer Jr., Esq.
Chapter 6. The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means .... 85
   By Robert M. Lloyd, Esq.,
Chapter 7. Motions to Exclude Financial Experts .............................. 115
   By Jonathan M. Dunitz, Esq., and Clifton T. Hutchinson, Esq.
Chapter 8. Motions to Exclude Expert Testimony ................................ 165
   By Robert M. Lloyd, Esq.

PART II. LOST PROFITS DAMAGES ........................................... 199
Chapter 9. Professional Liability Risk Management for Valuation Professionals ................................... 201
   By Steven M. Platau, J.D., CPA
Chapter 10. Context of the Lost Profits Damages Claim .......................... 223
   By Jonathan M. Dunitz, Esq., and Tyler L. Farmer, Esq.
Chapter 11. Planning Credible Lost Profits Analyses for Financial Experts ........................................ 235
   By Robert P. Gray, CPA/ABV/CFF/CGMA, CFE, Robert B. Kester, CPA/ABV/CFF, and Karl G. Dial, Esq., CPA
Chapter 12. Projecting But-For Profits ......................................... 267
   By Stacey Udell, CPA/ABV/CFF, CVA
Chapter 13. Establishing Evidence in Lost Profits Cases ....................... 285
   By Tom Burrage, CPA/ABV, CVA, CFF, and Clifton T. Hutchinson, Esq.
Chapter 14. Lost Profits Versus Lost Business Value ............................ 299
   By Tyler L. Farmer, Esq., and Neil J. Beaton, CPA/ABV/CFF, CFA, ASA
Chapter 15. Discounting Lost Profits in Damage Measurements .................. 315
   By Michael A. Crain, DBA, CPA/ABV, CFA, CFE

Note: The title page for each chapter contains a detailed table of contents for that chapter.
Chapter 16. Discounting Damages: Case Law ................................................................. 325
By Robert M. Lloyd, Esq.

Chapter 17. Use of Forensic Evidence in a Lost Profits Case ................................. 341
By Michael Kaplan, CPA/ABV/CFF, CVA, MAFF, and Rebekah Smith, CPA/CFF, CVA, MAFF

PART III. DAMAGES IN SPECIFIC INDUSTRY SETTINGS ........................................ 355
Chapter 18. Calculating Damages for Early-Stage Companies .................................. 357
By Neil J. Beaton, CPA/ABV/CFF, CFA, ASA, and Tyler L. Farmer, Esq.

Chapter 19. Lost Profits for Physician Practices and Violation of Noncompete Agreements ........................................... 373
By Mark O. Dietrich, CPA/ABV

Chapter 20. Fair Market Value in Regulations Impacting Physician Practices and Healthcare-Related Government Enforcement Actions ........................................... 393
By Pamela Coyle Brecht, Esq., Alice G. Gosfield, Esq., David H. Glusman, CPA/CFF, FABFA, Cr.FA, CFS, and Thomas W. Reinke

Chapter 21. Lost Profits Issues Unique to the Government Contracts Industry ........ 413
By Patrick A. McGeehin, CPA, Daniel E. Johnson, Esq., and Evan Sherwood, Esq.

Chapter 22. Construction Claims .............................................................................. 423
By Greg A. McKinnon, CPA/CFF/CGMA, CMA

Chapter 23. Lost Profits for Automobile Dealerships .............................................. 445
By Timothy W. York, CPA/ABV, and Adam Lawyer, CPA/ABV/CFF

Chapter 24. Franchise and Dealership Litigation Damages .................................... 459
By Mark M. Leitner, Esq., Joseph S. Goode, Esq., and Ted Stockton

Chapter 25. Lost Profits Analysis in Eating Establishments .................................... 505
By Ron Seigneur, CPA/ABV, ASA, CVA

Chapter 26. Damages and Right of Publicity Infringements .................................... 517
By Audrey Wessel, Esq., and Mark Roesler, Esq.

PART IV. INTELLECTUAL PROPERTY DAMAGES .................................................. 531
Chapter 27. Intellectual Property Overview ............................................................... 533
By Michael A. Crain, DBA, CPA/ABV, CFA, CFE

Chapter 28. Patent Infringement Damages: Lost Profits and Royalties ................... 541
By Richard F. Bero, CPA/ABV, CVA, CLP, and Autumn N. Nero, Esq.

Chapter 29. Design Patent Damages ....................................................................... 569
By Richard F. Bero, CPA/ABV, CVA, CLP, and Christopher V. Carani, Esq.

Chapter 30. Trade Secret Damages ........................................................................... 579
By Richard F. Bero, CPA/ABV, CVA, CLP, and Jon Margolies, Esq.

Chapter 31. Lost Profits (and Other Damages) in Trademark and Copyright Cases ........................................... 591
By Rick Hoffman, CPA/ABV, and Milan Politi, J.D.

Chapter 32. Uses of Survey Research in Damages Estimation ................................ 605
By Larry Chiagouris, Ph.D., and Leon Kaplan, Ph.D.

Chapter 33. Using Internet Analytic Tools for Valuation and Damages Calculations in Internet IP Infringement and Defamation Cases ........................................... 621
By Brian Buss, CFA, and Doug Bania, CLP

Chapter 34. Profit Apportionment in Intellectual Property Infringement Damages Calculations ........................................... 639
By Brian Buss, CFA, and Doug Bania, CLP

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# Table of Contents

## PART V. THE UNJUST ENRICHMENT REMEDY

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>35.</td>
<td>Introduction to Remedies in Equity</td>
<td>663</td>
</tr>
<tr>
<td>36.</td>
<td>Counting the Beans: Unjust Enrichment and the Defendant's Overhead</td>
<td>673</td>
</tr>
<tr>
<td>37.</td>
<td>Restitution Rollout: The Restatement (Third) of Restitution &amp; Unjust Enrichment: Counter-Restitution for Monetary Remedies in Equity</td>
<td>747</td>
</tr>
</tbody>
</table>

- By George P. Roach

## PART VI. PERSONAL INJURY/WRONGFUL DEATH

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>38.</td>
<td>Economic Damages From Personal Injury and Wrongful Death</td>
<td>787</td>
</tr>
<tr>
<td>39.</td>
<td>Damages in Common-Law Employment Cases</td>
<td>805</td>
</tr>
<tr>
<td>40.</td>
<td>Calculation of Damages in Common-Law Employment Cases</td>
<td>813</td>
</tr>
</tbody>
</table>

- By James A. (Jim) Koerber, CPA/ABV/CFF

## PART VII. OTHER DAMAGES ANALYSES

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>41.</td>
<td>Financial Forensic Services for Internal Investigations</td>
<td>823</td>
</tr>
<tr>
<td>42.</td>
<td>An Overview of Accounting and Financial Analysis in Fraudulent Transfer Matters</td>
<td>859</td>
</tr>
<tr>
<td>43.</td>
<td>Piercing the Corporate Veil: An Alternative Strategy to Collect Damages</td>
<td>881</td>
</tr>
<tr>
<td>44.</td>
<td>Business Interruption and Damage Claims</td>
<td>895</td>
</tr>
<tr>
<td>45.</td>
<td>Compensation Forfeiture: Stacking Remedies Against Disloyal Agents and Employees</td>
<td>935</td>
</tr>
<tr>
<td>46.</td>
<td>Post-Acquisition Disputes and Related Damages</td>
<td>997</td>
</tr>
<tr>
<td>47.</td>
<td>Event Studies in Securities Litigation</td>
<td>1017</td>
</tr>
<tr>
<td>48.</td>
<td>Use of Statistical Analysis to Measure Damages</td>
<td>1043</td>
</tr>
</tbody>
</table>

- By George P. Roach

## PART VII. OTHER DAMAGES ANALYSES

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>41.</td>
<td>Financial Forensic Services for Internal Investigations</td>
<td>823</td>
</tr>
<tr>
<td>42.</td>
<td>An Overview of Accounting and Financial Analysis in Fraudulent Transfer Matters</td>
<td>859</td>
</tr>
<tr>
<td>43.</td>
<td>Piercing the Corporate Veil: An Alternative Strategy to Collect Damages</td>
<td>881</td>
</tr>
<tr>
<td>44.</td>
<td>Business Interruption and Damage Claims</td>
<td>895</td>
</tr>
<tr>
<td>45.</td>
<td>Compensation Forfeiture: Stacking Remedies Against Disloyal Agents and Employees</td>
<td>935</td>
</tr>
<tr>
<td>46.</td>
<td>Post-Acquisition Disputes and Related Damages</td>
<td>997</td>
</tr>
<tr>
<td>47.</td>
<td>Event Studies in Securities Litigation</td>
<td>1017</td>
</tr>
<tr>
<td>48.</td>
<td>Use of Statistical Analysis to Measure Damages</td>
<td>1043</td>
</tr>
</tbody>
</table>

- By George P. Roach

## PART VIII. INDEX

<table>
<thead>
<tr>
<th>Index</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Index</td>
<td>1101</td>
</tr>
<tr>
<td>Index of Cases in Volume One</td>
<td>1133</td>
</tr>
</tbody>
</table>
About the Editors

Nancy J. Fannon is the advisory & consulting services national leader for Marcum LLP. Fannon has over 30 years of professional valuation and damages experience. Throughout her career, she provided expert witness services regarding the amount of financial damages relating to lost profits or the loss of a business or segment of a business, disgorgement of profits related to claims of infringement of intellectual property, the value of a business, and other financial matters. She has served as a jointly retained appraiser in valuation disputes.

Fannon has written, contributed to, and technically reviewed several valuation and commercial damages textbooks. Her text on the valuation of pass-through entities, Taxes and Value: The Ongoing Research and Analysis Relating to the S Corporation Valuation Puzzle, was published in April 2015. This is the sixth edition of her text on damages, The Comprehensive Guide to Economic Damages, which she first published in 2009. She has been a frequent speaker at peer, legal, and judicial conferences on the topics of business valuation and damages and has been a regular contributing author and editorial board member for several national valuation and financial expert journals.

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Acknowledgments

The ability to create a text with deep insights into the breadth of issues that affect financial damages requires the talents of many individuals, and no group is more qualified than this group of contributing authors. They are specialists in the particular area they have written about. We thank each of them for the time and energy they put into helping others gain from their insights by participating in this book.

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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 infringements, 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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Alice G. Gosfield, Esq., practices law in Philadelphia through Alice G. Gosfield and Associates PC (gosfield.com). Gosfield has devoted her practice to health law and healthcare regulation, placing a special emphasis on matters related to physician representation, noninstitutional reimbursement, clinical integration, fraud and abuse, managed care, and value-based payment systems. A graduate of Barnard College and New York University Law School, she served as president of the National Health Lawyers Association (now the American Health Law Association) from 1992 to 1993. She served as chairman of the board of the National Committee for Quality Assurance (NCQA), re-elected to serve five terms, from 1998 through 2002, and as a member of the board from 1992 to 2003. In addition to development of the PROMETHEUS Payment® model, she participated in a project to advise CMMI on modifying the oncology care model for physician payment. She has been listed in every issue of The Best Lawyers in America (Health Law) since the inception of the category. In 2007 and 2009 (the only years the list was published), she was named in “Best of the Best” as one of the top 25 health lawyers in the country and the only one primarily devoted to physician representations. She has written three books, more than 190 articles, 20 monographs, and, for more than 30 years, has been the editor of WestGroup’s Health Law Handbook, an entirely new book every year.

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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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Foreword

“It costs us nothing to be just.”

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).
Index

A
Ability to pay debts, 877–878
Acceleration, construction projects, 439–440
Acceptable noninfringing substitutes, 549
Accountants. See also Certified Public Accountants (CPA)
  discovery depositions of, 73–84
  experience in, as expert qualification, 168–170
  professional standards for, 7–9
Accounting. See Generally accepted accounting principles (GAAP)
Accounting in equity, 966
  but-for profit causation and, 667–668
  disgorgement, 671–672
  historical perspective of unjust enrichment, 689–691
  opportunity cost adjustment and, 668
  remedies in equity, 944–945
Accounting profit, 874
Accounts receivable turnover, 874
Accused sales, 598–599
Acquisitions, insights/observations in disputes of, 1016
Actelion Pharmaceuticals US Inc., 411
Activity ratios, 874
Acts of civil authorities, business interruption, 908–909
Actual cost pricing method, for construction claims, 430–431
Actual damages
  defined, 317
  plaintiff’s, in trademark cases, 593–594
Actual knowledge, RWI policy exclusion, 1079
Actual lost damages, trade secret misappropriation, 585–586
Adjacent property, 907–908
Admissibility, survey-based research, 608
Admissible evidence, 27
  forensic evidence admissibility, 348–349
Admissions, as admissible evidence, 28
Admission-seeking interviews, 830, 845–846
Advantage, 685, 703–705
  profit versus, 754–756
Advertising, Internet and social media tools, 627
Advertising Research Foundation (ARF), survey-based research guidelines, 612–613
Affirmative defenses, 15
Agent, as fiduciary, 975–978
Alabama, expert gatekeeping opinions of, 136–137
Alaska, expert gatekeeping opinions of, 137
Alaskan Method, 798
Albritton, Judge, 945–946
Alcohol distribution, franchise litigation and, 488–489
All-risk policies, 909–911
Alter-ego analysis, piercing corporate veil, 885–886
Alternative market indexes, for robustness test, 1032
Alternative securities, event studies, 1040–1041
Alternative tests, 1037–1038
Ambulatory surgery center (ASC), 402
American Arbitration Association rules
  discovery pursuant to, 23–24
  Rule R-22 and R-23, 23–24
American Association for Public Opinion Research (AAPOR), survey-based research guidelines, 612
American Institute of Certified Public Accountants (AICPA)
  audit standards, 828
  conflict of interest guidance, 833
  objectivity and integrity guidance, 833–834
  professional standards, 7–9
  Statement on Standards for Forensic Services (SSFS No. 1), 260–262
Analytic techniques, for internal investigations
  analytical review of financial statement balances, 856–858
  Benford’s law, 855, 856
  cash sources and uses, 853
  chronology of events and facts sheet, 853
  data-mining procedures, 855–856
  journal entry/subledger reviews, 858
  net worth method, 853
  proof-of-cash method, 853
  ratio analysis, 856–858
  reperformance, 855
  reverse proof, 856
  sampling techniques, 853–854
Ancillary jurisdiction, of unjust enrichment, 681–682
Ancillary testing income, 380
Answer, in lawsuit filing, 15
Anticipatory profit, 421
Anti-kickback statute (AKS), 391
  intent requirement, 396
  penalties for, 396
  purpose of, 395, 396
  safe harbor rule
    fair market value in, 402–403
    list exceptions, 400
  strategies for determining FMV under, 410
  violations of, 396
  whistleblower settlements under, 410–411
Anti-netting doctrine
  characteristics of, 751
  as genetic marker for monetary remedies in equity, 751–752
  Levin case, 727
  in unjust enrichment, 700–702
Antitrust cases, inconsistent facts and, 197
Apparel manufacturer case, forensic evidence used in, 351–352
Appeal, process of, 26
Appearance, protecting as intellectual property, 571–572
Apportionment
  in compensation forfeiture, 985–988
  profit apportionment analysis for intellectual property infringement, 641–659
  royalty damage, 560–562
  unjust enrichment and, 708–710
Appraisal, business interruption claim, 929–930
The Comprehensive Guide to Economic Damages: Volume One

Appraisers, discovery depositions of, 73–84
Aramony, William, compensation forfeiture case, 947–951
Arbitration, business interruption claim, 930–931
Arithmetic average of growth rate, 277–279
Arithmetic returns, versus continuously compounded returns, 1035–1036
Arizona, expert gatekeeping opinions of, 137
Arkansas, expert gatekeeping opinions of, 137–138
As-built schedule method, 434, 435–436
As-planned schedule, 433, 434
Asset approach to purchase price valuation, 1001
Asset forfeiture, 992–993
Asset misappropriation, 827
Asset quality index (AQI), 857
Assumptions, of experts
cases that were not excluded, 186–188
as disputed facts, 192
duration of loss period, 192–194
as grounds for exclusion, 188–192
sanction for unsupported, 194–195
Attorney fees
damages for trade secret misappropriation, 589
franchise litigation and, 474–475, 489–490
Attributable, defined in relation to unjust remedy, 684–685
Attributes sampling, 854
Attribution sampling, avoided cost estimation, 258
Auction draft, in M&A process, 1067–1068
Auction process, in M&A process, 1065
Audited financial statements, 180
Auditors, forensic, 343
Audits procedures, compared to financial forensic investigation, 827–831
Autocorrelation, 1037
Automobile dealerships, lost profits, 447–458
dealership business factors
complexity of business, 453
facilities, 453–454
financial and operational reporting, 455–456
franchise type, 454–455
location of, 454
franchise relationship
franchise agreements, 448
franchise damages, 449–452
franchise laws, 449
information sources for
financial and operational data, 456–457
understanding business, 456
valuation-related guidance, 457–458
lost profit considerations, 452–453
overview, 447–449
Avoidable consequences, doctrine of, 233
Avoided costs, estimations, 256–258
cost structure analysis, 257
fixed and variable costs, 257
B
Background investigation, by forensic specialist, 829, 842–843
covered peril, all-risk policies, 909–911
Back pay, 817
Bad faith spoliation, 40–41, 42
Balance sheet, disputes over post-closing adjustments and, 1004–1005
Balance sheet test, defining insolvency and, 868, 890
Bank fraud, 827
Bankruptcy. See Fraudulent transfer claims
Bankruptcy fraud, 827
Bars. See Eating establishments lost profits analysis
Base earnings, personal injury and wrongful death economic damages, 792–793
Baseline schedule, 433
Bastiat, Frederic, 497
Before-and-after method
advantages/disadvantages of, 273
example of, 272–273
lost revenue estimates, 248–249, 272–273
for proving lost profits, reasonable certainty requirement and, 92
Below-market discount rate method, 798
Benefit, in unjust enrichment, 685–688
excluded expenses, 687–688
ways of establishing, 686–687
Benefit of the bargain damages, 1011
Benford’s law, 855, 856
Best available evidence, reasonable certainty requirement and, 107–109
Bildman, Lars, compensation forfeiture case, 951–955
Billing practices, as form of disloyalty, 983–984
Blameworthiness, reasonable certainty requirement and, 102–107
Blanket policy, 913–914
Bonding capacity, lost profits impairment on, 444
Book ends method, 248
Book of wisdom, 311, 558
discounting future lost profits, 323–324
Bowles, Tyler J., 180
Brandeis, Louis, 519–520
Breach of contract
damage claims, 303–304
employment cases, 807–808
lost profit claims, 226
measurement for damages, 711–712
in post-acquisition disputes, 1008–1011
determining damages in, 1009
measuring damages, 1010–1011
pitfalls to avoid in assessing, 1011
types of damages, 1010
Breach of fiduciary duty, 959–969. See also Compensation forfeiture
categories of remedies available, 964–967
causation and burden of proof, 967–969
claims against lawyers, 993–995
defining who is fiduciary, 975–978
dual goals and stacked remedies, 960–964, 995–996
unjust enrichment remedy, 673
Breach of professional standards, negligence malpractice case, 204, 212
Breach of sales contracts, lost profit claims, 228
Breach of warranty agreements, lost profit claims, 228
Bribes, 396, 974, 982
Bundled Payments for Care Improvement (BPCI) initiative, 387–388
Burden of proof, breach of fiduciary duty, 967–969
Business experience, as evidence for lost profit at other locations, 289–290
subsequent, 289
Business interruption, calculating loss due to, 1060–1062
Business interruption insurance coverage, 897–934
choice-of-law and forum clauses, 931
coinsurance clause, 914–915
covered peril, specified peril policies, 909
extra expense coverage, 897, 919
making a claim
access to damaged property, 921–922
access to records, 922–924
appraisal, 929–930
arbitration, 930–931
duties after loss, 920
examination under oath (EUO), 927–929
independent and public adjusters, 929
prompt reporting, 920–921
proof of loss, 926–927
mitigation of loss, 924–926
overview of, 229, 897
period of restoration
extended period of indemnity, 918–919
initial period of restoration, 916–918
overview of, 915–916
waiting period, 916
policy limits
blanket policies, 913–914
designated limits, 912
sublimits by peril, 913
sublimits by property/schedules of value, 912–913
triggers of coverage
acts of civil authorities, 908–909
covered property, 905–908
direct physical damage, 900–905
interruption, 898–900
time element provision, 898–900
valuing business interruption
history of business, 931–932
market forces, 933–934
new businesses, 933
new facilities/product lines, 933
Business records
access to records in business interruption claim, 922–924
as admissible evidence, 29
summary of, 31
But-for profit causation
fixed costs in unjust enrichment, 683
remedies in equity and, 667–668
But-for profit projections. See also Lost profits analyses
before-and-after method, 248–249
 forecasting expense methods, 284
growth considerations, 281–283
historical information
averages, medians and compound annual growth, 277–279
when past is indicator of future, 277
industry and economic information considerations, 283–284
methods for determining
before and after method, 272–273
lost market share method, 275
sales projection method, 275
yardstick method, 273–275
new business rule and, 280
projections prepared in ordinary course of business, 280–282
unjust enrichment, 705–708
yardstick method, 249–252

C
California
expert gatekeeping opinions of, 138
right of publicity infringement, 522
Capacity, patent infringement cases, 552
Capacity limitations, as evidence, 288–289, 291
Capital
insufficient capitalization and piercing corporate veil, 889–890
unreasonably small capital, 875–877
Capitalization of earnings, 1001
Car dealerships. See Automobile dealerships, lost profits
Cardinal changes, 441
Carlisle HMA LLC, 406–407
Cash flow forecasts, defining insolvency, 867, 869, 890
Cash realization ratio (CRO), 857
Cash sources and uses, for internal investigation, 853
Causation
breach of fiduciary duty, 967–969
as element of lost profit case, 229–230
establishing, for eating establishments lost profit, 509–510
negligence malpractice case, 204
piercing corporate veil, 887
Celebrity endorsement, relief from pay-per-click claim, 636–638
Celebrity name and likeness claims, using Google analytics to defend against, 635–636
Certified Public Accountants (CPA)
professional standards for, 7–9
as qualified expert, 169
Changes clause, 426
Cheat, Earl, 797
Choice of law, 26
business interruption claims, 931
Chronology of events and facts sheet, 853
Chrysler, 450, 451
Ciecka, James E., 796
Circuit Court opinions in unjust enrichment
1st Circuit, 734
2nd Circuit, 734–735
faulty baseline, 723–728
jurisprudence by adjective, 728–731
Levin case, 726–728
Sheldon case, 723–726
3rd Circuit, 735–736
4th Circuit, 736–737
5th Circuit, 737

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Index

claim pricing methodologies
  actual cost method, 430–431
  jury verdict method, 431
  modified total cost, 429–430
  total cost method, 428–429

delay claim
  defined, 431–432
  determining responsibility for delay, 432–436
  pricing impact of delay, 436–438
  project schedule, 432–436

disruptions
  defined, 438
  pricing impact of, 438–439
lost profits impairment on working capital and bonding capacity, 444
overview of, 425–428
  changes clause, 426
  reasonable certainty, 427
  steps in preparing, 428
summary, 444

Construction defects damage computation, 1049–1052
  differences in designs for units, 1050
  double counting of repair costs, 1051
  overestimation problems from high/low defect rates, 1050–1051
  subsets of items used for testing, 1050
  variability of costs of repair, 1052

Construction equipment, franchise litigation and, 489

Corporate officer, extending Lanham Act liability in franchise litigation, 474

Corporate veil, piercing, 883–893
  analyzing where veil should be pierced, 885–887
  corporate or LLC veil defined, 883–884
  defined, 884–885
  entities that can pierce veil, 888
  financial issues in, 891–892
  historical perspective, 883
  practical pointers for forensic accountants and attorneys, 893
  relevant factors, 892

Corporations
  as citizen, 15
  claiming punitive damages against, in franchise litigation, 487
  deposing, 19
  piercing corporate veil, 883–893

Corruption schemes, 827

COSO Framework, components of internal controls, 831

Cost analysis, of government contracts, 419–420

Cost of capital, 866

Cost plus award fee contract, 418

Cost plus fixed fee contract, 418

Cost plus incentive fee contract, 418

Cost reimbursable government contracts, 415, 417–418

Cost sharing contract, 418

Costs of repair
  double counting of, 1051
  variability of, 1052

Counter-restitution in unjust enrichment, defendant as quasi-trustee
  origins of, 693–698

Courts in equity, 666, 680

Court system
  overview of, from filing to appeal, 13–26
  rules of evidence, 27–31

Covenants, 1000

Cover, 233

Covered peril
all-risk policies, 909–911
specified peril policies, 909
Covered property, 905–908
property by description, 906
specified property, 905–906
CPA. See Certified Public Accountants (CPA)
CPT billing codes, 378–379
erroneous use of, 409–410
Critical path method (CPM) scheduling techniques, 433–434
Cross-examination, 25–26
CS Section 100, 261, 262
Curative measures, for ESI spoliation, 54–55
Current ratio, 872

D
Damage calculation
experience in, as expert qualification, 172
for franchises and guiding principles for, 498–502
initial disclosure, computation of damages, 21–22
piercing corporate veil as alternative strategy to collect, 883–893
right of publicity infringement, 521–530
statistical analysis for, 1045–1062
questions of
how different, 1046–1047
how many, 1047–1048
how much, 1046
scenarios for
loss due to business interruption, 1060–1062
observational data for, 1053–1060
survey-based estimation, 607–619
Damages
alternative methods to compensation for, 111–114
amount at stake, and reasonable certainty requirement, 110–111
breach of representation and warranty, 1092–1100
certainty of, and reasonable certainty requirement, 97–102
in common-law employment cases, 807–811
copyright damages, 602–604
discouraging future lost profits to measure, 317–324
fact and amount rule, 97–102, 106
franchise damages, 449–452
negligence malpractice case, 204
in post-acquisition disputes, 1008–1011
determining damages in, 1009
measuring damages, 1010–1011
types of damages, 1010
trademark damages, 593–601
trade secret, 581–589
whole and partial, 360, 371–372
Damages at law, compensation forfeiture, 973–975
Damages period, determining relevant, 244–246
Damodoran, Aswath, 279, 282
Data
adequate consideration of all data, 296–297
cherry-picking, 185–186
collecting from electronically stored information, 63
data and information generally available from parties
business history and experience, 288–289
capacity limitations, 291
competition’s impact, 291
other sources of evidence from parties, 291–292
plaintiff’s/defendant’s subsequent experience, 289
plaintiff’s experience at other locations/similar business, 289–290
prelimination profit projections, 290
data gathering/analysis in survey-based research, 611
industry and economic data, 294–296
internal investigation preliminary data gathering, 838
market and demand for plaintiff’s product, 293–294
for new business lost profit damages, 363–364
other unverified data, 183–184
preserving, when creating valuation report, 216–217
problems caused by opposing party, 184–185
reliability of
financial statements, 179–181
generally, 178–181
supplied by client, 181–183
restoration of, 53–54
RIVIO information storage, 217
sanctions for relying on improper data, 186
Data analytics, 830
Data economy, unjust enrichment remedy and, 675
Data-mining procedures, for internal investigation, 855–856
Data room, in M&A, 1067
Daubert case
impact of, on survey-based evidence, 607
trends in motions to exclude financial testimony, 79–80
Daubert challenge
based on selection of discount rate, 339–340
discount rate and, 328
remedies in equity, 669
Daubert test, 117–119, 167, 296
adequate consideration in all available data, 296–297
computer forensic expert testimony, 68
Days sales in receivables index (DSRI), 858
D.C. District Court, expert gatekeeping opinions of, 136
Deal negotiation, in transaction process, 999–1002
determining purchase price, 1001
indemnification provisions, 1000
losses/damages definitions, 1000–1001
purchase price valuation approaches, 1001–1002
seller assurances, 999–1000
Deal structure, in M&A process, 1065–1066
Debt discount rates, 310
Debts
ability to pay, 877–878
entity’s debt in defining insolvency, 869
Debt-to-equity ratio, 873
Declarant unavailable, admissible evidence and, 30–31
Defamation
damages for costs expended to mitigate, 311–312
Internet and social media analytic tools for damage calculations, 623–638
Defective specifications, construction claims and, 440–441
Defective work, construction claims and, 441
Defend Trade Secrets Act (DTSA)
available damage remedies under, 584–589
overview, 583–585
Delaware, expert gatekeeping opinions of, 139


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Index

Delay claim, construction project
as-built schedule method, 434, 435–436
as-planned method, 433–434
defined, 431–432
determining responsibility for delay, 432–436
Eichleay formula, 437–438
pricing impact of delay, 436–438
types of, 431–432
update impact method, 436
Demand, patent infringement cases, 548–549
Department of Justice (DOJ)
physician practice and fair market value enforcement
initiation of actions, 398
introduction, 395
Dependent property, 906–907
Depositions
cost of, 74–75, 78–79
defined, 19
of experts
financial
decision not to take deposition, 78–79
decision to take deposition, 79
example questioning scenario, 81–84
issues of privilege in, 84
motions to exclude testimony, 79–81
of experts,
general considerations
discovery of files of testifying expert, 75–76
just and reasonable fees, 74–75
notice duces tecum, 76
practice of taking discovery depositions, 76–77
procedural vehicle for discovery depositions, 73–74
scope of disclosure and immunity, 75–76
trial depositions, 77
using discovery deposition at trial, 77
ground rules for, 20
types of
corporate depositions, 19
expert depositions, 20
nonparty witness depositions, 19
party depositions, 19
valuation report creation and risk management, 217–218
witness conduct, 20–21
Depreciation index (DI), 857
Designated limits, business interruption insurance, 912
Design-bid-build project system, 426
Design-build project method, 426
Design patent, defined, 572
Design patent damages, 571–578
appearance protection, 571–572
damages
article of manufacture, 574–577
calculating infringer’s total profit made, 577–578
no double recovery, 578
willfulness, 578
Federal laws governing, 573–574
utility patent compared to design patent, 572
Design patent infringement, 616–617
Differing site conditions, construction claims and, 441
Digital stored information disclosure rule, 23
Dilution, franchise litigation, 472–473
Diminution in value after negative event, 1054
Direct damages, in post-acquisition disputes, 1010
Direct examination, 25
Direct physical damage, as trigger for business interruption coverage, 900–905
Discounted cash flow (DCF) model, 308, 1001
formula for valuation, 319
intellectual property valuation, 535
Discounting future lost profits to measure damages, 317–324
calculating, 319–322
investment rate of return, 320–321
risk adjusted discount rate, 321–322
safe rate of return, 320
discounting to date of trial or injury, 322–323
discount rate as safe rate of return, as matter of law, 320
in nominal and real dollars, 324
objective of compensatory damage, 317–318
prejudgment and post-judgment interest, 318
time value of money, 317
using hindsight (Book of Wisdom), 323–324
Discount methods, personal injury and wrongful death economic damages, 798–799
Discount rates
alternative to challenging
appellate review of discount rate, 338–339
Daubert challenges based on selection of, 339–340
judgment as matter of law, 338
based on commensurate with risk receiving lost profits, 321–322
define, 318
defining insolvency, 871
in lost business value vs. lost profit claim, 309–310
mentioned in opinions but not discussed, 337
other opinions discussing, 336
personal injury and wrongful death economic damages, 798
as rate of return from investing award, 320–321
reinvestment rate, 336
risk adjusted discount rate, 321–322
risk-free rate, 332–334
cases allowing, 327–330
cases requiring, 330–336
yield on Treasury securities as, 329–330
as safe rate of return, as matter of law, 320
Discovery
American Arbitration Association rules, 23–24
devices of, 17–24
depositions, 19–21
interrogatories, 18
requests for admissions, 19
requests for production of documents, 18
of expert’s report, 44–47
financial experts assistance with e-discovery, 69–70
notable federal rules on
digitally or electronically stored information, 23
expert designations, 22–23
expert report, 22–23
initial disclosures, 21–22
privilege, 21
purpose of, 17
Discovery depositions
of experts
financial
decision not to take deposition, 78–79
decision to take deposition, 79
example questioning scenario, 81–84
issues of privilege in, 84
motions to exclude testimony, 79–81
general considerations
discovery of files of testifying expert, 75–76
just and reasonable fees, 74–75
notice duces tecum, 76
practice of taking discovery depositions, 76–77
procedural vehicle for discovery depositions, 73–74
scope of disclosure and immunity, 75–76
trial depositions, 77
using discovery deposition at trial, 77
Discretion
equitable discretion, 768, 769
measuring unjust enrichment and, 744
Disgorgement, 715
breach of fiduciary duty, 961–963
by default, 754, 763–765
gross
cases of, 766–769
FTC claims for gross disgorgement, 769–783
gross, 754
profit vs. advantage, 754–756
as term, 682, 754
Disgorgement of profit
in IP damage valuation, 539
in remedies of equity, 666, 668
term of, 671–672
Disloyal agents, indemnity, 694, 758–759
Disloyal competition, 980–981
Disloyalty, forms of
billing practices, 983–984
confidentiality, 982–983
conflicts, 978–979
disloyal competition, 980–981
duty to disclose, 982
secret profit, 982
self-dealing, 981
Dispute resolution clause, RWI policy and, 1079
Disruptions, construction projects, 438–439
District of Columbia, expert gatekeeping opinions of, 140
Diversity jurisdiction, defined, 15
Dobbs, Dan B., 686, 696, 698
Doctrine of adequate remedy, 670–671
Doctrine of avoidable consequences, 233, 259
Documentation
economic damages in employment litigation, 815–816
personal injury and wrongful death economic damages, 790–792
Documents
access to records in business interruption claim, 922–924
for construction claims, 427
for internal investigation
categories of, 838
establishing control of, 840–841
public document review, 842–843
requests for production of, 18
Dollar-for-dollar damages, 1010–1111
The Dollar Value of a Day, 800
Domicile, determining, 521
Double counting of repair costs, 1051
Dow Jones Industrial, robustness test and, 1032
Drexel Burnham Lambert Inc., 941, 942
Duces tecum, 76
Due diligence, representations and warranties insurance impact on, 1071–1072
Duplicativeness, 994
Duties after loss, 920
Duty, negligence malpractice case, 204, 212
Duty to disclose, breach of, as form of disloyalty, 982
Duty to preserve
ESI and litigation hold, 50–52
spoliation of evidence and, 39–40
E
Early-stage companies. See New businesses, lost profits damages; New business rule
Earnings before interest, taxes, depreciation, and amortization (EBITDA), 874
damages for M&A and, 1095–1096
Earnings growth rate, personal injury and wrongful death economic damages, 793–794
Earnout payments
characteristics of, 1002–1004
disputes over
measurement of performance, 1005–1006
post-closing accounting methodologies, 1006–1007
post-closing operation of business, 1007–1008
Easterbrook, Frank, 174, 332, 333
Eating establishments lost profits analysis, 507–516
establishing causation for losses, 509–510
examples cases of, 511–512
financial performance measures, 508–509
forensic considerations, 510–511
general background of restaurant industry, 507–508
introduction, 507
notable case law relating to, 513
restaurant industry resources, 512–513
valuation information request (VIR) checklist, 514–516
Economic damages, in healthcare, 395
Economic data, lost profit analyses and, 283–284, 296
Economic profit, 874
Economic Report of the President, 794
Economists
discovery depositions of, 73–84
experience in, as expert qualification, 168–170
professional standards, 9–10
e-discovery process, 63
using tools for fact-finding during internal investigations, 843–844
Effective tax rate, 794
Efficiency ratios, 874
Efficient market hypothesis, 1023–1025
Eichengrun, Joel, 702
Eichleay formula, 437–438
8th Circuit, expert gatekeeping opinions of, 131–132
Electronically stored information (ESI)
admission of, into evidence, 67–68
business records, 29
claw back agreement, 65
cost of producing, 65
custody and control issues of, 50
data collection from, 63
defined, 61
disclosure of, 23
default to preserve, 66
financial experts assisting with e-discovery, 69–70
inadvertent disclosure of privileged information, 65
managing review of, 63–64
metadata of, 61
motion to suppress, 67
preservation letter, 62
preservation of, 61–63
producing, 64–67
quick peek agreements, 65
requirements of, as trial evidence, 67–68
Sedona Principles, 65–66
spoliation issues, 47–58
concerns and obligations of counsel, 57–58
duty to preserve and written litigation hold, 50–52
failure to preserve evidence, 53
recommendations, 58
restoration of data, 53–54
safe harbor rule, 48–49
sanctions/remedies, 54–57
storage locations, 61
Electronic evidence, analysis of, by forensic specialist, 830
Electronic medical records, value of, 389
11th Circuit, expert gatekeeping opinions of, 133–135
Elizabethan fraudulent transfer, 861–862
Emergency assistance standard, 713–714, 762
Employees, fiduciary duty of, 975–978
Employment Cost Index, 794
Employment damages, in common-law cases
contract damages
breach of contract other than termination, 808
consequential damages, 809
duty of mitigation, 809
injunctive relief, 810
noneconomic damages, 809
termination in breach of contract, 807–808
damage calculations
conclusion, 818
documentation, 815–816
fringe benefits, 817
loss period, 817
lost earnings, 816–817
medical expenses, 818
mitigating earnings, 817
overview of, 815
references, 818–819
taxes, 817
promissory estoppel, 810
taxation, 810–811
tort damages, 810
Engagement acceptance, internal investigation, 833–834
Engagement letter, elements of, 213–214
Engineer, procure, and construct (EPC) project, 426
Engineering applications, avoided cost estimation, 258
Enstar Group, 940–947
Entire market value rule
patent infringement cases, 547–548
royalties, 560–562
Entity’s debts, in defining insolvency, 869
Equitable claim, franchise litigation, 479
Equitable recoupment
as counterclaim, 482
franchise damages, 481–482
Equitable remedy, 780–781, 939
Equity discount rates, 310
Escalation, construction claims, 436, 437
Established royalties, 557
Estimate of loss, reasonable certainty requirement
certainty injured party has suffered some damage, 97–102
within defined range, 95–97
new business rule, 90, 93
number of difficult-to-quantify risks in, 94–95
track record of plaintiff, 93–94
verifiable data to support, 91–93
Estimation period, 1028–1029
Estimation window, 1028–1029, 1036
Ethical concerns, internal investigation and, 847
Evans, Cyndi, 955–956
Event studies in security litigation, 1019–1042, 1046–1047
efficient market hypothesis, 1023–1025
impact of Halliburton II on, 1019–1023
methodology basics
common error in inference, 1030–1031
Fifth Crammer factor, 1031–1032
goal of study, 1026–1028
inference and significance in, 1029–1030
performing study, 1028–1029
methodology complications
alternative securities, 1040–1041
confounding events, 1038–1039
subjectivity of study, 1040
trading halts/trading delays, 1039–1040
robustness tests
alternate market indexes, 1032
alternative tests, 1037–1038
arithmetic vs continuously compounded returns, 1035–1036
autocorrelation, 1037
estimation windows, 1036
heteroskedasticity, 1037
industry indexes and market bubbles, 1032–1034
multiple indexes, 1034–1035
outlier analysis, 1036–1037
Event window, 1028–1029
confounding events and, 1038–1039
Evidence. See also Federal Rules of Evidence
adequate consideration of all data, 296–297
admissible evidence, 27
best available, and reasonable certainty requirement, 107–109
data and information generally available from parties
business history and experience, 288–289
capacity limitations, 288–289, 291
competition’s impact, 291
other sources of evidence from parties, 291–292
plaintiff’s/defendant’s subsequent experience, 289
plaintiff’s experience at other locations/similar business, 289–290
prelitigation profit projections, 290
duty to preserve, 39–40
ESI requirements for trial evidence, 67–68
failure to preserve, 53
forensic
  admissibility of, 348–349
  cases demonstrating use of, 349–353
  conditions that require, 344–348
  defined, 343
  overview of, 343–344
gathering, during internal investigation, 842
hearsay, 348–349
industry and economic data, 294–296
laboratory analysis of physical and electronic evidence, 830
market and demand for plaintiff’s product, 293–294
reasonable certainty requirement, 287
relevant, 27
spoliation of
  defined and explained, 35–44
  electronic stored information (ESI) issues, 47–58
  expert-related issues, 44–47
  survey-based evidence, 607–619
Examination under oath (EUO), 927–929
Ex-ante approach, discounting future lost profits and, 322–323
Ex ante damages analysis, 1093–1096, 1098
Excusable and compensable, 431
Excusable but not compensable delays, 431–432
Exemplary damages
  RWI policy exclusion, 1080
  for trade secret misappropriation, 588–589
Expectancy damages, in post-acquisition disputes, 1009
Expectation damages, 303–304
Expense-based metrics for eating establishment, 508
Expenses
  deductibility of, in lost business value vs. lost profit claim, 305–306
  expense reimbursement in compensation forfeiture, 984
  forecasting, 284
Expert depositions, 20
  financial experts
    decision not to take deposition, 78–79
    decision to take deposition, 79
    example questioning scenario, 81–84
    issues of privilege in, 84
    motions to exclude testimony, 79–81
general considerations
  discovery of files of testifying expert, 75–76
  just and reasonable fees, 74–75
  nontestifying experts, 74
  notice duces tecum, 76
  practice of taking discovery depositions, 76–77
  procedural vehicle for discovery depositions, 73–74
  scope of disclosure and immunity, 75–76
  trial depositions, 77
  using discovery deposition at trial, 77
Expert report, 22–23
Experts. See also Expert testimony
  assumptions of, in testimony, 186–195
  Daubert test, 117–119, 167
  ESI and assisting with e-discovery, 69–70
  expert’s report
    discovery of, 44–47
    required contents, 45–46
    trial-preparation protection, 46
  failure to deal with inconsistent facts, 196–198
  Federal Rule of Civil Procedure 26, 21, 22–23
  financial, motions to exclude, 117–164
    basic legal predicate, 117–119
    expert gatekeeping by jurisdiction, 122–164
      by Federal Circuit, 123–136
      by state, 136–164
    factors to consider in making motion, 119–120
    format for pretrial gatekeeping, 119
    methodologies flaws in expert opinion, 120–122
    methodologies for expert gatekeeping, 119
  methodology used by, 173–177
  nontestifying, 74
  privilege and, 21
  professional standards for, 7–10
  qualifications of
    damage calculations experience, 172
    experience in accounting, finance, economics, 168–170
    necessity of financial experience, 169
    plaintiff’s industry experience, 170–172
    in relation to amount at stake, 172
  spoliation of evidence and, 44–47
  trial preparation evidence rules, 69–70
Expert testimony
  bases of opinion testimony by experts, 348–349
  checklist for testing admissibility of, 79–80
  disclosure of, 22–23
  motions to exclude
    assumptions, 186–195
    data, 178–186
    expert qualifications, 168–173
    failure to deal with inconsistent facts, 196–198
    methodology, 173–177
    success rate for, 80–81
    trends in, 79–81
  professional standards for experts, 7–10
  when admissible, 27–28
Ex-post approach, discounting future lost profits and, 322–323
Ex post damage analysis, 1098–1100
Extended period of indemnity, 918–919
External validity, in survey-based research, 618
Extra expense coverage, 897, 919
Extra work, construction claims and, 440
F
  Facebook, 626, 627
    advertiser charges, 637
    analyzing responses and impressions, 637
  Fact and amount rule, 90, 97–102, 106
  Fact-finding and analysis phase of internal investigation, 842–847
  addressing ethical concerns, 847
  determine order of interviews, 844
  evidence gathering, 842
  execute investigation plan, 842
  interview knowledgeable persons, 844–847
Index

interview steps, 845
leveraging e-discovery tools, 843–844
leveraging forensic technology, 843
public document review and background investigation, 842–843
structure of interviews, 844–845
types of interviews, 845–846
Fact-finding interviews, 845
Facts
assumptions on disputed facts, 192
experts failure to deal with inconsistent, 196–198
Failure to preserve evidence, 53
Fair market value
calculating damages for right of publicity infringement, 525–528
defining insolvency, 869
in estimating reasonable equivalent value, 865–866
physician practice, 395–411
damage assessment and FMV case studies, 405–410
acquisition of physician-owned outpatient surgical center (OSC), 407
erroneous use of CPT coding, 409–410
FMV determinations strategies, 410
hospital acquisition of physician practice, 406–407
hospital contracting with physicians, 407
hospital physician co-management agreement, 407–408
pharmaceutical manufacturer offers marketing services, 409
physician group contract with HHA and referrals, 409
economic damages overview, 395
fair market value compliance, 401–405
compliance programs, 404–405
other resources, 404–405
safe harbors in AKS, 402–403
in Stark Law, 403–404
federal legislation
Anti-Kickback Statute (AKS), 396
False Claims Act (FCA), 397–400
Physician Self-Referral Law (Stark Law), 397
safe harbor list of exceptions for AKS and Stark Laws, 399–400
whistleblower settlements under AKS and Stark Law, 410–411
Fair market value standard, 302–303
Fair value option for financial assets and liabilities, 869–870
Faithless servant doctrine, 958, 959, 970
False Claims Act (FCA)
damages and penalties under, 399–400
facts and circumstances analysis, 398–399
predicate to liability — relationships among referral sources, 398–399
purpose of, 397–398
qui tam cases, 398
violations of, 398
False designation of origin, franchise litigation, 472
Farm equipment, franchise litigation and, 489
Federal Acquisition Regulations (FAR), 415
cost reimbursable contracts, 417–418
fixed priced contracts, 416–417
Termination for Convenience clause, 421, 422
unallowable cost under FAR Part 31, 420
Federal agency, unjust enrichment claims, 714–722
Federal Arbitration Act, 930
Federal circuit, expert gatekeeping opinions, 122–136
Federal courts
jurisdiction of, 13, 15
lawsuit initiation in, 15
organization of, 13–14
Federal Energy Regulatory Commission, 715
Federal False Claims Act (FCA), 395
Federal question, defined, 15
Federal Rules of Civil Procedure
disclosure of digitally or electronically stored information, 23
disclosure of expert testimony, 22–23
electronically stored information, 61, 64–65
expert designations, 22–23
expert report, 22–23, 45–46
initial disclosure, 21–22
Rule 26, 21–23, 45–46, 69–70
Rule 26(b)(2)(C), 66
Rule 26(b)(4), 74
Rule 26(b)(5)(B), 65
Rule 26(f), 63
Rule 30, 76, 77
Rule 30(b)(6), 19
Rule 32, 77
Rule 34, 61, 63
Rule 35(b), 74
Rule 37(e), 48–49, 53–57
Rule 37(f), 63
Rule 45, 63
safe harbor rule, 48–49
trial preparation, 69–70
Federal Rules of Evidence
admissible evidence, 27
bases of opinion testimony by experts, 348–349
electronically stored evidence, 65
expert testimony, 27–28, 167
hearsay, 28–29
exceptions to, 29–31
leading questions, 25–26
progress of trial, 24–25
Rule 502, 65
Rule 611, 25–26
Rule 701, 31
Rule 702, 31, 68, 167, 177, 296–297
Rule 703, 178, 181, 182, 296–297, 348–349
Rule 803, 29, 30
Rule 804, 30
Rule 902, 29
Rule 1006, 31
Federal Trade Commission (FTC), claims for gross disgorgement, 769–783
Fees, attorneys’, franchise litigation and, 489–490
Fiduciary duty. See also Breach of fiduciary duty
defining who is fiduciary, 975–978
5th Circuit, expert gatekeeping opinions of, 127
Fifth Cammer factor, 1031–1032, 1040, 1041
Finance, experience in, as expert qualification, 168–170
Financial analysis, for profit apportionment analysis for IP infringement, 653

www.bvresources.com
Financial experts
depositions
  decision not to take deposition, 78–79
decision to take deposition, 79
example questioning scenario, 81–84
issues of privilege in, 84
motions to exclude testimony, 79–81
motions to exclude, 117–164
  basic legal predicate, 117–119
  expert gatekeeping by jurisdiction, 122–164
  by federal circuit, 123–136
  by state, 136–164
  factors to consider in making motion, 119–120
  format for pretrial gatekeeping, 119
  methodologies flaws in expert opinion, 120–122
  methodologies for expert gatekeeping, 119
  professional standards, 7–10
Financial forecast
defined, 269
effective, 271
Financial forensic services, 825–858
  forensic defined, 825
  indicators of fraud, 831
  internal investigation
    analysis of financial transactions, 830–831
    audit procedures compared to, 827–831
    confidential sources, 830
    defined, 825
    forensic specialist role in, 832
    interview of knowledgeable persons, 830
    laboratory analysis of physical and electronic evidence, 830
    physical and electronic surveillance, 830
    public document reviews and background investigation, 829
    purposes of, 825–826
    undercover operations, 830
    overview of, 825–826
    white-collar crimes and, 826–827
Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 291
Financial projection, 269. See also Projection, financial
Financial ratios, 871–875
  efficiency, 874
  liquidity, 872–873
  return, 874–875
  solvency and leverage, 873
Financial statement fraud, 827
Financial statements
  analytical review of balances, for internal investigation, 856–858
    audited, 180
    automobile dealerships and, 455–457
    compiled, 180
    information that can be extracted from, 871–872
    reliability of data, 179–181
    reviewed, 180
Financial transactions, analysis of, by forensic specialist, 830–831, 849–850
Firm fixed price contract, 416
Firm fixed price level of effort contract, 417
1st Circuit, expert gatekeeping opinions of, 123–124
Fixed ceiling with retroactive price redetermination contract, 417
Fixed compensation, 1046
Fixed costs
  avoided cost estimation, 257
  breach of contract damages, 711
  construction projects and, 426
  defined in relation to unjust remedy, 682–684
  emergency assistance standard, 713
Fixed priced government contracts, 415–417
Fixed-price incentive contract, 417
Fixed price with economic price adjustment contract, 416–417
Fixed price with prospective price redetermination contract, 417
Florida, expert gatekeeping opinions of, 140–141
Flow down clauses, 421
Food and Drug Administration (FDA), gross disgorgement, 771–772, 775, 780, 781
Ford, 450
Forecast, financial
  compared to projection, 270
defined, 269
Forensic accounting
defined, 343
SSFS No. 1 standards and, 260–262
Forensic auditors, 343
Forensic economist, professional standards, 10
Forensic evidence, 343–353. See also Financial forensic services
  admissibility of, 348–349
  cases demonstrating use of
    apparel manufacturer, 351–352
    metal products manufacturer, 352–353
    restaurant case, 349–351
  conditions that require, 344–348
defined, 343
  eating establishments lost profits analysis, 510–511
  employment litigation, 815–816
  forensic defined, 825
  overview of, 343–344
  personal injury and wrongful death, 790–791
Forensic specialist
  computer, ESI testimony by, 67–68
  engagement acceptance
    conflicts of interest, 833
    integrity and objectivity of, 833–834
  fact-finding investigation phases, 842–847
  initial allegation response, 834–835
  role of, in internal investigations, 832
Forensic technology, using for fact-finding during internal investigations, 843
Foreseeability, as element of lost profit case, 230–231
Former employees, internal investigation and, 847
Forum clause, business interruption claims, 931
4th Circuit, expert gatekeeping opinions of, 126–127
Fracturing, 994
Franchise, 461–503
  compensatory and consequential damages, 466–467
  economics analysis of litigation damages for, 490–496
  equitable recoupment, 481–482
  franchise registration and relationship state laws, 478–481
  damages for equitable claims, 479
  fraudulent inducement, 480–481
Index

quantum meruit, 480
unclean hands, 480
guiding principles for economic damage analysis
mind the money factors, 500
profit contribution, 498–499
ride the escalator, 499–500
understand abnormal, study normal, 501–502
hypothetical parts and services case, 461–466
injunctions, 484–485
mandatory, 485
permanent, 484–485
preliminary, 484
Lanham Act
attorneys’ fees and injunction relief, 474–475
calculating damages, 473
counterfeit marks, 473
dilution, 472–473
extending liability to corporate officer, 474
false designation of origin, 472
recent and definitive ruling on interpretation, 471–472
treble damages, 474
liquidated damages and penalties, 476–478
lost future profit, 467–471
estimation of future lost profit, 469–470
Sealy and franchise law, 468–469
opportunity cost and compulsion, 497–498
punitive damages, 485–487
references, 503
relationship in automobile dealerships
franchise agreements, 448
franchise damages, 449–452
franchise laws, 449
rescission, 482–483
unique regimes
alcohol distribution, 488–489
attorneys’ fees, 489–490
construction and farm equipment, 489
damages under PMPA, 488
injunctions under PMPA, 488
Frank, Jerome, 520
Fraud
categories of, and statutes pertaining to, 827
counter-restitution and, 697–698, 766–768
fraud triangle, 831
gross disgorgement, 766–768
indicators of, 831
lost profit claims, 225–226
mitigate risk of, 831
piercing corporate veil, 886–887
use of corporate form to perpetrate fraud, 892
Fraud on the market, 1020, 1021. See also Event studies in security litigation
Fraudulent conveyance, 861
Fraudulent inducement, franchise litigation, 480–481
Fraudulent transfer claims, 861–879
background of, 861–862
defining insolvency, 866–867
ability to pay debts, 877–878
balance sheet test, 868
cash flow forecasts, 867
discount rates, 871
entity’s debts, 869
fraud in fraudulent conveyance, 868
key financial ratios, 871–875
liquidation value, 870
overview, 866–867
property at fair valuation, 869
return on assets, 870–871
unreasonably small capital, 875–877
when and why insolvency occurred, 868
moral and societal issues, 878–879
overview of, 861
preferential period, 862
reasonably equivalent value, 863–866
identifying value, 864
Friendly witness, 25
Fringe benefits
economic damages in employment litigation, 817
personal injury and wrongful death economic damages, 795–796
Front pay, 817
Fruits of advantage gained, 685, 703–705. See also Advantage
Frye rule, 118
Full-absorption approach of unjust enrichment, 681, 754, 756
attributable expenses, 684–685
breach of contract damages, 712
compared to incremental income approach, 740–744
emergency assistance standard, 714
Levin case, 726
overview of, 676–677
paradox of offsetting allocated overhead, 678–680
Full absorption cost allocation, 419–420
Full function life expectancy, 800
Functional patent infringement, 614–615
Funeral expenses, wrongful death economic damages, 801
Future lost earnings, 800
Future lost profit, estimation of, and franchise litigation, 469–470
Future lost profits, 317
G
Gatekeeper role, of judges
Daubert test and, 117–119, 167
Geiger, Judge, 676, 757
General damages, foreseeability and, 230–231
Generally accepted accounting principles (GAAP)
balance sheet test and, 868
contingent liabilities, 869
disputes over post-closing adjustments and, 1004–1005
earnout disputes, 1006–1007
fair value option for financial assets and liabilities, 869–870
General market value, 403
General Motors, 448, 450, 451
General sign test, 1038
Geometric average or compound annual growth rate (CAGR), 277–279
steps in calculating, 278
Georgia, expert gatekeeping opinions of, 141–142
Georgia-Pacific factors, 558–559, 595
list of, 562–564
overview of, 562–564
qualitative, 565–566
quantitative, 564–565

www.bvresources.com
similarity to relief from royalty method, 595–596
Gittlitz, Ian, compensation forfeiture case, 955–957
GlaxoSmithKline LLC (GSK), 395
Glejser test, 1037
Going concern appraisal, 303
Going concern value, 870
Gold, Alan S., 864
Good Samaritan, 713
Goodwill
   as benefit, in unjust enrichment, 687
   fair market value and, 407, 410
Google, 624, 625
   pay-per-click rate, 637
   using Google analytics to defend against celebrity name/likeness, 635–636
Government, patent infringement claims against, 568
Government contracts industry, 415–419
   contract types
      cost reimbursable contracts, 417–418
      fixed priced contracts, 416–417
      other, 418–419
      overview, 415–416
   cost analysis
      effect of indirect costs reimbursed by government, 420
      full absorption vs variable/avoided cost analysis, 419–420
      unallowable cost under FAR Part 31, 420
   lost profit disputes and, 421–422
Grassgreen, Richard, compensation forfeiture case, 940–947
Gray, John Clinton, 520
Griesa, Judge, 957, 958, 959, 975
Gross disgorgement, 754
   cases of, 766–769
   fraud, 766–768
   outlaws, 768–769
   FTC claims for, 769–783
Gross margin index (GMI), 858
Gross profit margin, 874
Growth rate
   arithmetic average, 277–279
   as evidence of lost profits, 288–289
   factors in maintaining high levels of, 282
   factors to consider when averaging, 277
   geometric average or compound annual growth rate (CAGR), 277–279
   law of large numbers, 282
   median, 277–279
   in physician damage calculations, 385–388
   stable growth period, 282
   weighted averages, 277
Grupo analysis, 715–718, 721, 744, 770–771
Guides to the Evaluation of Permanent Impairment, 797

H
Haig, Alan, 452
Hammer clause, liability insurance, 218
Hand, Judge, 723, 724–728, 741, 762, 765
Hawaii, expert gatekeeping opinions of, 142

Health and Human Services, Department of. See Office of Inspector General (OIG), of HHS
Healthcare. See Physician practice
Healthcare Common Procedure Coding System (HCPCS) codes, 378–379
Health Management Associates LLC (HMA), 406–407, 411
HealthSouth Corp., 989–991
Healthy Life Expectancy Tables, 800
Hearing on the merits, 24
Hearsay evidence, 348–349
Hearsay rule
   exceptions to
      business records, 29
      commercial publications, 30
      declarant unavailable, 30–31
      learned treatises, 30
      summary of business records, 31
   hearsay defined, 28–29
Heteroskedasticity, 1037
Hindsight, discounting future lost profits, 323–324
HIPAA (Health Insurance Portability and Accountability Act), 389, 391
Historical information
   business information/history as evidence, 288–289
   common techniques for comparing, 276
   valuing business interruption, 931–932
   when past growth is indicator of future, 277
HITECH Act (Health Information Technology for Economic and Clinical Health Act), 389
Holmes, Judge, 982
Home Health Agency, physician group contract with, and referrals, 409
Home-office costs, construction claims, 437–438
Home, Mark J., 370
Hospitals
   fair market cases
      acquisition of physician-owned outpatient surgical center (OSC), 407
      acquisition of physician practices, 406–407
      contracting with physicians, 407
      physician co-management agreement, 407–408
Hostile witness, 25
Household services, personal injury economic damages, 800
Housing bubble, 1032–1033
Hurdle rates, 310
Hypothetical negotiation, 558–559

I
ICD Publications Inc. (ICD), 955–957
Idaho, expert gatekeeping opinions of, 143
Illinois, expert gatekeeping opinions of, 143
Illiquidity, 1041
Impartiality, forensic specialist and, 833–834
Implied statutory jurisdiction
   gross disgorgement, 769–773
   of unjust enrichment, 681–682
Implied waiver, 949
Incidental damages, in post-acquisition disputes, 1010
Income approach to purchase price valuation, 1001
Income taxes
  effect of, in lost business value vs. lost profit claims, 306–307
  excluded from benefit in unjust enrichment, 687–688
Inconsistent statements, 28
Incremental income approach of unjust enrichment, 756
  attributable expenses, 684–685
  breach of contract damages, 711
  compared full-absorption approach, 740–744
  fixed costs, 683
  _Hamil_ case, 729
  paradox of offsetting allocated overhead, 678–680
  patent infringement damages, 712–713
Indemnification provisions, 1000–1001
Independent adjuster, business interruption claim, 929
Indiana
  expert gatekeeping opinions of, 143–144
  right of publicity infringement, 523
Indicator variable, 1047
Inducement, 396
Industry data, lost profit analyses and, 283–284
  comparable experience of others, 294–295
  trade or industry association data, 295–296
Industry experience, as expert qualification, 170–172
Industry indexes, market bubbles and, 1032–1034
Inference
  common error in, 1030–1031
  in event studies, 1029–1030
Informational event, confounding, 1026
Information-seeking interviews, 845
Infringements, of personality’s right of, 519–530
Infringements of intellectual property, 197
  Internet IP, and Internet media analytic tools for damage calculations, 623–638
  unjust enrichment remedy, 675
Infringing compensation, 687
Infringing expenses
  disgorgement by default, 763–765
  in unjust enrichment, 698–700
Infringing sales, 598–599
Initial allegation response, in internal investigation, 834–835
Initial disclosure, 21–22
Initial period of restoration, 916–918
Injunctions
  franchise litigation and, 484–485
  mandatory, 485
  permanent, 484–485
  under Petroleum Marketing Practices Act (PMPA), 488
  preliminary, 484
  as remedy in equity, 665–666
Injunctive relief, 682, 689, 691–692, 753, 771–772, 979, 982–983
  in employment cases, 810
  franchise litigation and, 474–475
Insolvency
  defining, 866–878
  ability to pay debts, 877–878
  balance sheet test, 868
  cash flow forecasts, 867–868
  discount rates, 871
  entity’s debts, 869
  fraud in fraudulent conveyance, 868
  key financial ratios, 871–875
  liquidation value, 870
  overview, 866–867
  property at fair valuation, 869
  return on assets, 870–871
  unreasonably small capital, 875–877
  when and why insolvency occurred, 868
  piercing corporate veil and, 889–890
Insurance. See also Representations and warranties insurance
  business interruption insurance coverage, 229, 897–934
  professional liability risk management, 218–219
Integrated delivery system, 384–385, 391
Integrated provider, 391
Integrity, forensic specialist and, 833–834
Intellectual property. See also Patent infringement damages
  copyright damages, 602–604
  defendant’s profits, 603
  example cases, 603–604
  overview of, 602
  plaintiff’s actual damages, 602–603
  lost profits, 602–603
  reasonable royalty, 603
  summary, 604
counter-restitution for monetary remedies in equity, 753
  design patent damages, 571–578
  appearance protection, 571–572
  damages
    article of manufacture, 574–577
    calculating infringer’s total profit made, 577–578
    no double recovery, 578
    willfulness, 578
  Federal laws governing, 573–574
  utility patent compared to design patent, 572
  Internet analytic tools for IP infringement and defamation, 623–638
  lost profit claims, 226–228
  overview, IP valuation/damages measurements
    discounted cash flow (DCF) model, 535
    disgorgement of offending party’s profits, 539
    lost profits of injured party, 537–538
    reasonable royalties, 538–539
    residual income model, 536–537
    summary, 539
  valuing operating company’s IP, 535–537
profit apportionment for infringement damage calculations, 641–659
right of publicity infringements, 519–530
  survey-based research in damage estimation, 607–619
  case studies of, 613–617
  federal judiciary guidelines, 607–611
  industry guidelines, 611–613
  overview, 607
  selecting survey research expert, 619
  special concerns for, 617–619
trademark damages, 593–601
  calculating damages, 597–601
  defendant’s profits in, 596–597
  plaintiff’s actual damages
    name recognition that increases product’s prices, 594
The Comprehensive Guide to Economic Damages: Volume One

name recognition that increases sales volume, 593
saved time and costs, 594
summary of, 601
types of actual damages, 594–596
lost profits, 595
reasonable royalty, 595–596
trade secret damages, 581–589

Intentional conduct, remedies for ESI spoliation, 55–56

Intentional torts, lost profit claims, 226

Interest coverage ratio, 873

Interest rate
defined, 318
post-judgment interest, 318
prejudgment interest, 318

Interim breach, RWI policy and, 1078

Internal controls, COSO Framework, 831

Internal investigation
analytical techniques
analytical review of financial statement balances, 856–858
Benford’s law, 856
cash sources and uses, 853
chronology of events and facts sheet, 853
data-mining procedures, 855–856
journal entry/subledger reviews, 858
net worth method, 853
proof-of-cash method, 853
ratio analysis, 856–858
reperformance, 855
reverse proof, 856
sampling techniques, 853–854
areas of
analysis of financial transactions, 830–831
audit procedures compared to, 827–831
laboratory analysis of physical and electronic evidence, 830
physical and electronic surveillance, 830
common mistakes in, 850–852
common types of investigations, 832
confidential sources, 830
defined, 825
engagement acceptance, 833–834
conflict of interest, 833
integrity and objectivity, 833–834
forensic specialist role in, 832
initial allegation response in, 834–835
interview of knowledgeable persons, 830
memoranda of interviews, 847
structure of, 844–845

Invention, patented technology in patent infringement damages, 544–545

Inventory turnover, 874

Investigation, SSFS No. 1 standards, 260
Investigative auditors, 343
Investment rate of return, 320–321
Iowa, expert gatekeeping opinions of, 144–145
IP misuse, identifying, 630–632. See also Internet and social media analytic tools for damage calculations
Ipse Dixit exclusion, 176–177
Irreparable injury, doctrine of, 974–975

J
Journal entry, review of, for internal investigation, 858
Judgment as matter of law
choice of discount rate, 338
discount rate as safe rate of return, 320
Judiciary Act, 716
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>choice of law, 26</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>diversity jurisdiction, 15</td>
</tr>
<tr>
<td></td>
<td>of federal courts, 13, 15</td>
</tr>
<tr>
<td></td>
<td>of state courts, 13</td>
</tr>
<tr>
<td>Jurisdiction in equity, of unjust enrichment, 681–682</td>
<td></td>
</tr>
<tr>
<td>Jury verdict pricing method, for construction claims, 431</td>
<td></td>
</tr>
<tr>
<td>Just and reasonable fees, 74–75</td>
<td></td>
</tr>
</tbody>
</table>

**K**

- Kansas, expert gatekeeping opinions of, 145
- Kentucky, expert gatekeeping opinions of, 145
- Kickbacks, 396
- Kinder-Care Learning Centers Inc. (KCLC), 940–941
- Known or knowable concept, business valuation, 310
- Kozlowski, Dennis, compensation forfeiture case, 957–959

**Krogman factor**, 1024, 1040

- Krueger, Kurt V., 796, 797
- Kull, Andrew, 753, 768

**L**

- Laboratory analysis of physical and electronic evidence, 830, 849
- Lanham Act, 227, 523–524, 528–529, 572, 595, 613, 645, 705
- franchise litigation
  - attorneys’ fees and injunction relief, 474–475
  - calculating damages, 473
  - counterfeit marks, 473
  - dilution, 472–473
  - extending liability to corporate officer, 474
  - false designation of origin, 472
  - recent and definitive ruling on interpretation, 471–472
  - treble damages, 474
- Law of large numbers, 282
- Lawsuits
  - initiating, 14–15
  - scheduling order, 16–17
- Lawyers, fiduciary claims against, 993–995
- Laycock, Douglas, 670
- Leading questions, 25–26
- Learned treatise, as admissible evidence, 30
- Legal malpractice, 993
- Letter of intent, in M&A process, 1069
- Leveraged buyout, 871
- Leverage ratio, 873
- Lewis, W. Cris, 180
- Liability risk management. See Professional liability risk management
- Licensing boards, professional liability risk management, 203–204
- Lien doctrine, 693–694
- Life care planners, personal injury economic damages, 801–802
- Limitation of Funds clause, 421, 422
- Limited liability company, piercing corporate veil, 883–883
- Liquidated damages, franchise litigation, 476–478
- Liquidation value, defining insolvency, 870
- Liquidity ratios, 872–873
- Litigation, SSFS No. 1 standards for, 260
- Litigation hold, 50–52, 58
- Logarithm transformation, 1058–1059
- Loss. See also Estimate of loss; Estimate of loss: reasonable certainty requirement
  - due to business interruption, 1060–1062
  - RWI policy and, 1078
- Loss of market, business interruption claims and, 933–934
- Loss period
  - duration of, as assumption by expert, 192–194
  - economic damages in employment litigation, 817
- Loss recovery period, in lost business value vs. lost profit claim, 307–309
- Lost asset value, 112–113
- Lost business value, 111
  - for new businesses, 371–372
- Lost business value claim
  - compared to lost profits claim
    - deductibility of expenses in, 305–306
    - discount rates, 309–310
    - effect of income tax, 306–307
    - loss recovery period, 307–309
    - mitigation in, 311–312
    - overview, 304–305
    - post-breach events, 310–311
    - summary of differences, 313
    - wrongdoer rule, 304
  - consideration in making, 303–304
  - definition of value in, 302–303
  - introduction to, 301
  - recovering both lost profits and business value, 312
- Lost earnings
  - economic damages in employment litigation, 816–817
  - personal injury and wrongful death economic damages, 792
- Lost enterprise value, breach of fiduciary duty, 965
- Lost future profits, franchise litigation, 467–468
- Lost profits. See also Estimate of loss; Estimate of loss: reasonable certainty requirement
  - automobile dealerships and, 452–453
  - best available evidence of, 107–109
  - breach of fiduciary duty, 964–965
  - copyright infringement, 602–603
  - defined, 225, 239–241
  - eating establishments, 507–516
  - government contracts and, 421–422
  - impairment on working capital and bonding capacity for contractors, 444
  - as net amount, 239
  - past and future defined, 317
  - in patent infringement cases, 546–553
  - sample of, model approaches, 264–265
  - social media analysis to support, 635
  - trademark infringement, 595
  - trade secret misappropriation, 585–586
- Lost profits analyses, 237–265
  - consideration of mitigation, 259
  - definition of lost profits, 239–241
  - determining relevant damages period, 244–246
  - elements to consider in planning, 241–244
estimating avoided costs, 256–258
expense forecasting and, 284
growth rate considerations, 282–283
historical information uses, 276–279
industry and economic information considerations, 283–284
issues to consider, 263–264
lost revenue estimates, 246–247
before-and-after method, 248–249, 272–273
factors to consider, 246–247
market model, 254–255, 275–276
other methods, 255
sales projection method, 252–254, 275
yardstick method, 249–252, 273–275
practice continuously, 263
professional standards and tools for, 259–263
other guidance, 262–263
VS Section 100 and CS Section 100, 262
Statement on Standards for Forensic Services (SSFS No. 1), 260–262
projections prepared in ordinary course of business, 280–282
Lost profits claims compared to lost business value
deductibility of expenses in, 305–306
discount rates, 309–310
effect of income tax, 306–307
loss recovery period, 307–309
mitigation in, 311–312
overview, 304–305
post-breach events, 310–311
summary of differences, 313
wrongdoer rule, 304
consideration in making, 303–304
elements of cases
foreseeability, 230–231
mitigation, 233–234
proximate cause, 229–230
reasonable certainty, 232–233
establishing reliable foundation for, 287
recovering both lost profits and business value, 312
types of cases, 225–229
Lost revenue estimates, 246–247
before-and-after method, 248–249, 272–273
factors to consider, 246–247
market share model, 254–255, 275–276
other methods, 255
sales projection method, 252–254, 275
yardstick method, 249–252, 273–275
Lost volume sellers, 233
Louisiana, expert gatekeeping opinions of, 145–146
Loyalty, fiduciary duty and, 975–978
Lump-sum royalty, 559–560

M
Madoff, Bernie, 779
Maine, expert gatekeeping opinions of, 146
Malpractice, negligence cases, 204–205
Management interviews, for profit apportionment analysis for IP infringement, 650–651
Mandatory injunctions, franchise litigation, 485
Manual for Complex Litigation, sampling/opinion surveys, 608
Marginal tax rate, 794
Maritime law, lost profit claims, 228
Market bubbles, industry indexes and, 1032–1034
Market demand, as evidence in lost profit, 293–294
Market efficiency, five-factor test of, 1024
Marketing material, for profit apportionment analysis for IP infringement, 654–655
Marketing plan, franchise litigation and, 478–479
Marketing process, Target Company in M&A, 1066–1067
Market segment, in patent infringement cases, 550
Market share analysis, as evidence for lost profit, 293
Market share damage, patent infringement cases, 553
Market share model, lost revenue estimates, 254–255, 275–276
Market valuation approach to purchase price valuation, 1001
Martin, Judge, 728–730, 764
Maryland, expert gatekeeping opinions of, 147
Massachusetts
expert discovery, 46–47
expert gatekeeping opinions of, 147–148
Materiality, initial allegation response and, 834–835
Materiality scrape, in RWI policy, 1078
Mathematical certainty, 232
McCarthy on Trademarks and Unfair Competition, 609
McCorkle, C. R., 695
McCormick, Charles T., 88, 91–92, 107
Measured mile calculation, 438–439
Measuring Damages Involving Individuals: A CPA’s Litigation Service Guide With Case Studies (Sharp), 791
Median growth rate, 277–279
Medicaid
AKS and, 395
fraud case, 406
Stark Law and, 395
Medical expenses
economic damages in employment litigation, 817
personal injury and wrongful death economic damages, 799
Medical Group Management Association (MGMA), 377
Medical records, value of, 389
Medicare
AKS and, 395
Bundled Payments for Care Improvement (BPCI) initiative, 387–388
fraud case, 406, 411
price per unit of service, 385–387
Stark Law and, 395, 397
sustainable growth rate (SGR) formula, 386
Megra Partners, 941–947
Mendel, Perry, 940–947
Mere volunteer, 713
Mergers, insights/observations in disputes of, 1016
Mergers and acquisition transactions. See Representations and warranties insurance
Metadata
from ESI, 61
Internet search and, 626
Metal products manufacturer case, forensic evidence used in, 352–353
Methodology of experts, 173–177
failure to explain, 176–177
failure to understand, 175–176
misuse of accepted methods, 175
Michigan, expert gatekeeping opinions of, 148
Milken, Mike, 941, 942
Minnesota, expert gatekeeping opinions of, 148–149
Misappropriation
laws governing trade secret misappropriation, 583
of website, unjust enrichment remedy, 675
Misrepresentation
lost profit claims, 225–226
purchase or sale of securities, 1019–1020, 1023
Mississippi, expert gatekeeping opinions of, 149
Missouri, expert gatekeeping opinions of, 150
Mitigating earnings
economic damages in employment litigation, 817
as lost earning category, 800
personal injury and wrongful death economic damages, 796–797
Mitigation
addressing as factor in economic damages analyses, 259
in business interruption claim, 924–926
as element of lost profit case, 233–234
employees in terminate in breach of contract, 809
in lost business value vs. lost profit claim, 311–312
lost volume sellers exception, 233
negligence exception, 233–234
Modified total cost pricing method, for construction claims, 429–430
Monetary remedies, in equity as alternative to, 665
Montana, expert gatekeeping opinions of, 150–151
Moral fault, reasonable certainty requirement and, 102–107
Motions to exclude
expert testimony
assumptions, 186–195
data, 178–186
expert qualifications, 168–173
failure to deal with inconsistent facts, 196–198
methodology, 173–177
financial experts, 117–164
basic legal predicate, 117–119
Daubert case and, 79–80
expert gatekeeping by jurisdiction, 122–164
by Federal Circuit, 123–136
by state, 136–164
factors to consider in making motion, 119–120
Federal standards for, 79–80
format for pretrial gatekeeping, 119
methodologies flaws in expert opinion, 120–122
methodologies for expert gatekeeping, 119
success rate for exclusion, 80–81
Motion to suppress, electronically stored information (ESI), 67
Multiple linear regression analysis, sales prices of housing, 1056–1057

N
NASDAQ Composite, 1032
National Automobile Dealers Association (NADA), 449, 456
National Restaurant Association, 512
Nebraska, expert gatekeeping opinions of, 151
Negative information, misappropriation of, unjust enrichment remedy and, 675
Negligence
duty to mitigate and, 233–234
lost profit claims, 226
Negligence malpractice case
elements of, 204–205
staff qualifications and, 215
Net discounting method, 798
Net opinion, 347
Net worth method, for internal investigation, 853
Nevada, expert gatekeeping opinions of, 151–152
New businesses, lost profits damages evidentiary standards, 359
legal requirements for, 360–362
methods for proving
adjusting for survival rates, 363–364
collecting and analyzing data, 363–364
guidance from courts, 366–368
list of factors to assess, 364–366
lost profits vs. lost business value, 371–372
overview, 362–363
venture-backed companies, 369–371
new business rule, 361–362
reasonable certainty requirement, 360, 361–362
valuing business interruption, 933
whole or partial damages, 360
New business rule, 93, 280
apparel manufacturing case and forensic evidence, 351–352
higher evidentiary burden, 233
historical perspective on, 361
moving away from, 361
reasonable certainty requirement and, 90, 93, 232–233
New Hampshire, expert gatekeeping opinions of, 152
New Jersey, expert gatekeeping opinions of, 152–153
New Mexico, expert gatekeeping opinions of, 153
New York
expert gatekeeping opinions of, 153
right of publicity infringement, 523
9th Circuit, expert gatekeeping opinions of, 132
Nominal discounting method, 798
Nominal dollars, future lost profit damages in, 324
Nonattributable fixed costs, 687
Noncompete agreement. See also Physician practice, noncompete violations
yardstick method of lost revenue, 250–251
Noneconomic damages
in employment cases, 809
personal injury and wrongful death, 790
Nonexcusable delays, 431
Nonforfeiture clauses, in employment contracts, 989
Nonparametric tests, 1038
Nonparty witness depositions, 19
Nonphysician providers (NPP), 377
Nonreliance provisions, representations and warranties litigation, 1088–1089
Nontestifying experts, 74
North Carolina, expert gatekeeping opinions of, 154
North Dakota, expert gatekeeping opinions of, 154
Notice of Deposition, 76
Notice pleadings, 14
Notice provision, 920–921

O
Objectivity
forensic specialist and, 833–834
in survey-based research, 610–611
Observational data, 1053–1060
complications in computations, 1059–1060
computation of damages, 1058–1059
determination of who is harmed and when, 1057–1058
diminution of value after negative event, 1054
measurement of alleged diminution and corresponding damages, 1055–1060
overview of, 1053–1054
Occupational fraud, 827
Office of Inspector General (OIG), of HHS
compliance program guidance, 405
physician practice and fair market value enforcement
initiation of actions, 398
introduction, 395
Ohio
expert gatekeeping opinions of, 154–155
right of publicity infringement, 523
Oklahoma, expert gatekeeping opinions of, 155
Operating profit, 875
Operational reporting, automobile dealerships and, 455–457
Operation of business, earnout disputes over post-closing, 1007–1008
Opportunity cost
franchise litigation and, 497–498
personal injury economic damages, 800
Opportunity cost adjustment, remedies of equity and, 668
Optimization, search engine, 625–626
Oregon, expert gatekeeping opinions of, 155–156
Other insurance provision, RWI policy and, 1079
Outlaws, civil, 768–769, 779
Outlier analysis, 1036–1037
Overestimation problems from high/low defect rates, 1050–1051
Overhead allocation in unjust enrichment remedy. See also Unjust enrichment remedy: defendant’s overhead and range of amount due to, 678
willfulness of defendant and, 731–733
Overhead costs, damages for breach of contract, 711

P
Palcek, David, 955–956
Palmer, George, 759–760

Panduit test
acceptable noninfringing substitutes, 549
calculating amount of lost profit, 552–553
capacity, 552
defined, 547
demand for patented product, 548–549
design patent damages, 573–574
Parents, piercing the corporate veil, 888
Partial damages, new businesses, 360
Party depositions, 19
Past lost profits, 317
Patented technology, 544–545
Patent infringement damages, 543–568
collateral sales, 555
damages against U.S. government, 568
design patent damages, 571–578
appearance protection, 571–572
damages
article of manufacture, 574–577
calculating infringer’s total profit made, 577–578
no double recovery, 578
willfulness, 578
Federal laws governing, 573–574
utility patent compared to design patent, 572
design patent infringement, 616–617
federal law governing, 543–544
forensic evidence and, 345–346
functional patent infringement, 614–615
historical perspective on, 689–691
incremental income approach, 712–713
limitations on damages, 567
lost profit claims, 226–227, 546–553
alternative action available to infringer, 551
but-for causation, 546–547
entire market value rule, 547–548
market at issue, 550
Panduit factor 1: demand, 548–549
Panduit factor 2: acceptable noninfringing substitutes, 549
Panduit factor 3: capacity, 552
Panduit factor 4: calculating amount of lost profits, 552–553
Panduit factors, 547
patent owner’s products, 550–551
substitute products, 549–550
two-supplier market, 547
market share damages, 553
market share model, 254–255
mitigation defense, 259
patented technology at issue, 544–545
post-verdict royalties, 567
prejudgment interest, 568
price erosion, 553–555
RAND royalties-standard essential patents, 566
royalty damages, 556–566
collateral sales, 562
entire market value rule, 560–562
established royalties, 557
form of reasonable royalty, 559–560
Georgia-Pacific factors, 562–564
hypothetical negotiation, 558–559
qualitative Georgia-Pacific factors, 565–566
quantitative Georgia-Pacific factors, 564–565
reasonable royalties, value of what was taken, 558
Patient medical records, value of, 389
Patton-Nelson study of personal consumption, 797
Payer mix, 381–382, 391
Pay-per-click claim, celebrity endorsement relief from, 636–638
Pennsylvania, expert gatekeeping opinions of, 156–157
PE ratio, 1001
Perfection of notice requirements, representations and warranties litigation, 1087–1088
Performance, earnout disputes over measurement of, 1005–1006
Peril, sublimits of, 913
Period of restoration, 898
extended period of indemnity, 918–919
initial period of restoration, 916–918
overview of, 915–916
waiting period, 916
Permanent injunctions, franchise litigation, 484–485
Personal consumption, personal injury and wrongful death economic damages, 797
Personal injury, economic damages from, 789–804
components of economic damage analysis
base earnings, 792–793
earnings growth rate, 793–794
fringe benefits, 795–796
lost earnings categories, 792
mitigating earnings, 796–797
personal consumption, 797
tax rate, 794–795
work-life expectancy, 796
conclusion, 802
discount methods, 798–799
discount rates, 798
documentation, gathering information, 790–791
household services, 800
introduction, 789–790
life care planners, 801–802
medical expenses, 799
references, 802–804
standards and burdens, 790
vocational experts, 801
Personal injury tort, lost profit claims, 226
Petroleum Marketing Practices Act (PMPA)
damages under, 488
injunctions under, 488
overview of, 487
Pharmaceutical manufacturer, offers marketing services to physicians, 409
Physician-owned outpatient surgical center (OSC), hospital acquisition of, 407
Physician-owned radiation oncology business, owned by referring physicians, 408
Physician practice
fair market value and government enforcement actions, 395–411
damage assessment and FMV case studies, 405–410
acquisition of physician-owned outpatient surgical center (OSC), 410
erroneous use of CPT coding, 409–410
FMV determinations strategies, 410
hospital acquisition of physician practice, 406–407
hospital contracting with physicians, 407
hospital physician co-management agreement, 407–408
pharmaceutical manufacturer offers marketing services, 409
physician group contract with HHA and referrals, 409
physician-owned radiation oncology business, 408
economic damages overview, 395
fair market value compliance, 401–405
compliance programs, 404–405
other resources, 404–405
safe harbors in AKS, 402–403
in Stark Law, 403–404
federal legislation
Anti-Kickback Statute (AKS), 396
False Claims Act (FCA), 397–400
Physician Self-Referral Law (Stark Law), 397
safe harbor list of exceptions for AKS and Stark Laws, 399–400
whistleblower settlements under AKS and Stark Law, 410–411
noncompete violations, 375–392
availability, affability, and ability, 382
basic factors of
ancillary testing income, 380
basic compensation analysis, 375–380
collections for services, 380
compensation, 381
competition, 382–383
general measures of productivity, 377–379
payer mix, 381–382
physician billing codes, 378–379
physician supply and demand, 379–380
conclusion, 390–391
glossary of terms for, 391–392
special issues in identifying damages
Bundled Payments for Care Improvement (BPCI) initiative, 387–388
general price per unit of service for physicians, 385–386
growth rates in but-for and future earnings calculations, 385–388
large practice and integrated providers, 384–385
Medicare price per unit of service, 385–387
patient medical record value, 389
regulatory considerations, 388–389
typical claims that do not fly, 389–390
unallocated overhead, 383–384
physician self-referral law.
See Stark Law
Piercing the corporate veil, 883–893
analyzing where veil should be pierced
alter-ego analysis, 885–886
causation, 887
fraud, 886–887
corporate or LLC veil defined, 883–884
defined, 884–885
entities that can pierce veil
owners of closely held corporations, 888
parents and subsidiaries, 888
sibling corporations, 888
successor liability, 888
financial issues in
commingling corporate and personal funds, 891
failure to follow corporate formalities, 891–892
insufficient capitalization or insolvency, 889–890
officers’ and directors’ involvement, 892
totality of the circumstances test, 888–889
use of corporate form to perpetrate fraud, 892
historical perspective, 883
practical pointers for forensic accountants and attorneys, 893
The Comprehensive Guide to Economic Damages: Volume One

1124  www.bvresources.com
use of post-litigation projections, 281–282
Project schedule, construction claims, 432–436
Promissory estoppel, employment cases, 810
Prompt reporting, 920–921
Proof-of-cash method, for internal investigation, 853
Proof of loss, business interruption claim, 926–927
Property
access to damaged property, 921–922
covered by business interruption, 905–908
adjacent property, 907–908
dependent property, 906–907
property by description, 906
specified property, 905–906
direct physical damage, 900–905
at fair valuation, 869
sublimits of, 912–913
Proximate cause, as element of lost profit case, 229–230
Proximate cause test, 471–472
Public adjuster, business interruption claim, 929
Public Company Accounting Oversight Board (PCAOB), audit standards, 828
Public document reviews, by forensic specialist, 829
Publicity. See Right of publicity infringement
Pump and dump cases, 719
Punitive damages, 946
breach of fiduciary duty, 962–964, 966
franchise litigation, 485–487
in post-acquisition disputes, 1010
RWI policy exclusion, 1080
Purchase and Sale Agreement (PSA), 999
losses/damages definitions, 1000–1001
working capital disputes and, 1004–1005
Purchase price
adjustment and RWI policy exclusion, 1080
determining, 1001–1002
post-closing adjustments to
disputes over, 1004–1008
earnout payments, 1002–1004
working capital adjustments, 1002
valuation approaches to, 1001–1002
valuation of, and damages for M&A, 1093–1096
Q
Qualitative Georgia-Pacific factors, 565–566
Quantitative Georgia-Pacific factors, 564–565
Quantum meruit, franchise litigation, 480
Quasi-trustee origin in unjust enrichment, 691–702
anti-netting rule, 700–702
counter-restitution, 693–698, 757–759
infringing expenses, 698–700
quasi-trustee, 691–692, 757–759
Quick peek agreements, 65
Quick ratio, 872
Qui tam cases, 398, 409
R
Racketeering, 827
RAND (reasonable and nondiscriminatory) royalties, 566
Rank test, 1038
Rate of return
defined, 318
discount rate
based on commensurate with risk receiving lost profits, 321–322
from investing award, 320–321
as safe rate of return, as matter of law, 320
Ratio analysis
avoided cost estimation, 258
for internal investigation, 856–858
Real dollars, future lost profit damages in, 324
Reasonable certainty requirement, 87–114
crimation claims, 427
as element of lost profit case, 232–233, 287
employment litigation, 815
factors courts consider, 107–109
alternative method to compensate available, 111–114
amount at stake, 110–111
certainty injured party has suffered damage, 97–102
degree of blameworthiness/moral fault on defendant’s part, 102–107
estimate of loss accuracy, 91–97
fact and amount rule, 90, 97–102, 106
new business rule, 90, 93, 232–233
wrongdoer rule, 90, 102–107
mathematical certainty and, 232
new businesses and, 360, 361–362
overview
balancing competing concerns, 89–90
decision-making vs. opinion-writing level of court, 88–89
historical perspective on, 87–88
personal injury and wrongful death economic damages, 790
replacing rule with standard, 114
Reasonable fee, 74–75
Reasonable royalties
copyright infringement, 603
damages for trade secret misappropriation, 587–588
form of, 559–560
hypothetical negotiation, 558–559
similarity to relief from royalty method, 595–596
trademark damages, 595–596
as value of what was taken, 558
Reasonably equivalent value, in fraudulent transfer claims, 863–866
fair market value, 865–866
identifying value, 864
measuring reasonable equivalence, 865–866
Rebate, 396
Reference Manual on Scientific Evidence
data gathering and analysis, 611
defining population, 609
personnel qualifications and objectivity, 610–611
purpose and design of study, 608
sampling, 609–610
use of a control, 611
Regression analysis
avoided cost estimation, 258
cautionsary note on, 1053–1054
The Comprehensive Guide to Economic Damages: Volume One

- predicting sales prices of housing, 1055–1056
  - using to measure damages, 1047
- Regulation, physician practice noncompete violations and, 388–389
- Relationship state laws, 478–479
- Relative value unit (RVU), 377, 391–392
- Relevant evidence, 27
- Reliance damages, 114, 303–304
- Remedy for ESI spoliation, 54–57
- Remedy in equity, 665–672
  - advantages, 665–666
  - basis of, 667–669
  - breach of fiduciary duty, 960, 966
  - but-for profit causation and, 667–668
  - compensation forfeiture, 973–975
  - conclusion, 672
  - Daubert challenge process, 669
  - decline in familiarity, 671–672
  - disadvantages, 666
  - discretion and limited jurisdiction, 669–671
  - opportunity cost adjustment and, 668
  - overview, 665
  - variation by jurisdiction, 669
- Remuneration, 396
- Rental value, as measure of compensation, 113
- Reperformance, 855
- Replacement cost approach, personal injury economic damages, 800
- Report, of internal investigation, 847–848
- Representations and warranties insurance, 1065–1100
  - case studies
    - condition of asset breach, 1083
    - financial statement breach, 1083
    - loss of material customer, 1083
  - claims
    - claim frequency and size of, 1080–1081
    - description of claim process, 1082–1083
    - frequency by type of breach, 1081–1082
  - common policy exclusions
    - actual knowledge, 1079
    - punitive or exemplary damages, 1080
    - purchase price adjustment, working capital adjustment, 1080
  - components of policies
    - dispute resolution clause, 1079
    - interim breach, 1078
    - loss, defense costs and other expenses, 1078
    - materiality scrape, 1078
    - mitigation obligations, 1079
    - other insurance provision, 1079
    - retention, 1077–1078
  - damages
    - calculating at time of transaction, 1093–1096
    - misrepresentations and corresponding impacts to buyer’s model, 1096–1098
    - potential bases of recovery, 1092–1093
    - utilizing post-closing information, 1098–1100
    - introduction, 1065
  - litigation
    - coverage litigation, 1091–1092
    - introduction, 1084
    - nonreliance provisions and contractual limitations on recovery, 1088–1089
    - perfection of notice requirements, 1087–1088
    - sandbagging, 1089–1091
    - survival periods, 1084–1087
  - overview of deal process in M&A
    - auction process of deal process, 1065
    - deal structure and preliminary considerations, 1065–1066
    - deal timing and planning, 1071
    - diligence impact and, 1071–1072
    - marketing Target Company, 1066–1067
    - purchase considerations, 1070–1071
    - sale process letter, 1066
    - sales process considerations, 1069–1070
    - winnowing field of bidders, 1067–1069
  - overview of RWI
    - benefits of, 1074–1075
    - current scope of coverage, 1073–1074
    - evolution of, 1073
    - growth of underwriters and expanding market, 1075
    - purpose, 1072–1073
    - standard exclusions, 1074
  - standard placement process
    - insurer underwriting process, 1076–1077
    - policy negotiations and binding, 1077
    - submission and NBIL, 1076
- Requests for admissions, 19
- Requests for production of documents, 18
- Rescission, 961, 981, 991
  - franchise litigation, 482–483
    - in post-acquisition disputes, 1010
    - as remedy in equity, 665–666
- Rescissory damages, 1010
- Residence, 521
- Residual income model, intellectual property valuation, 536–537
- Restatement of Agency, 692
- Restatement (Second) of Agency, 694
- Restatement of Restitution, 693–694
- Restatement (Third) of Restitution and Unjust Enrichment, 670, 672, 680
  - benefit, 685–688
  - consequential gains, 685–686
  - incremental income vs. full-absorption method, 740–741
  - unjust enrichment defined, 681
- Restatement (Third) of the Law Governing Lawyers, 983
- Restatement of Torts, 670
- Restatement of Trusts, 692
- Restatement (Second) of Unfair Competition, 740–741
- Restaurant Industry Forecast, 512
- Restaurant Industry Operations Report, 509, 512
- Restaurant Performance Index, 513
- Restaurants. See also Eating establishments lost profits analysis
  - forensic evidence used in restaurant case, 349–351
- Restitution
  - equal to unjust enrichment, 681
  - term of, 671–672, 753–754
- Restoration of data, 53–54
- Retention, in RWI policy, 1077–1078
- Return on assets, defining insolvency, 870–871
- Return on total assets (ROA), 875
- Return ratios, 874–875
Return to equity holders (ROE), 875
Revenue-based metrics for eating establishment, 508
Revenue cycle, 392
Revenue source analysis in profit apportionment analysis, 646–647
Reverse proof, for internal investigation, 856
Reviewed financial statements, 18
Reviews, for profit apportionment analysis for IP infringement, 651–652
Rhode Island, expert gatekeeping opinions of, 157
Ride the escalator, damage analysis for franchise litigation, 499–500
Riggins, John, 526
Right of privacy, 519–520
Right of publicity infringement
calculating compensatory damages, 525–528
compared to right of privacy, 520
current state and determining domicile, 521
fair market value and, 525–528
forum shopping, 529–530
historical perspective, 519–521
trademark law intersecting with, 528–529
types of damages available, 521–525
Risk-adjusted discount rate, 309, 321–322
cost of capital in determining, 332–334
reinvestment rate, 336
Risk-free discount rate
cases allowing, 327–330
cases requiring, 330–336
yield on Treasury securities as, 329–330
Safe harbor rule
Anti-Kickback statute exceptions under, 399
historical overview, 48–49
Stark Law exceptions under, 400
Safe rate of return, 320
Saffo, Paul, 271
Sale process letter, in M&A process, 1066
Sales projection method
lost revenue estimates, 252–254, 275
strengths and weaknesses of, 253–254
Sales projections, reliability of data, 178
Sampling
for internal investigation, 853–854
attributes sampling, 854
stratified sampling, 855
variable sampling, 854–855
to measure losses, 1049–1052
construction defects, counting individual problems, 1049
differences in designs for units in populations, 1050
double counting of repair costs, 1051
overestimation problems from high/low defect rates, 1050–1051
subsets of items used for testing, 1050
variability of costs of repair, 1052
in survey-based research, 609–610
Sanctions
for relying on improper data, 186
for spoliation of evidence, 41–44
for unsupported assumptions, 194–195
Sandbagging, representations and warranties litigation, 1089–1091
Saved costs, damages for breach of contract, 711
Schedule, project in construction claims, 432–436
Schedules of values, 912–913
Scheduling order, 16–17
Scheindlin, Judge, 52, 56, 949, 951
Scienter, 863, 868, 967
Scrushy, Richard, compensation forfeiture case, 985, 989–991
Sealy case, franchise law and, 468–469
Search, Internet, 624
tools for
clear browsing data, 628–629
search techniques, 629–630
Search engine optimization, 625–626
2nd Circuit, expert gatekeeping opinions of, 125–126
Secret profit, as form of disloyalty, 982
Securities and Exchange Commission, unjust enrichment claims, 716–722

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Securities fraud, unjust enrichment remedy, 675
Securities litigation. See Event studies in security litigation
Sedona Principles, 65–66
Self-dealing, as form of disloyalty, 981
Seller assurances, 999–1000
Semistrong form efficiency, 1024
Sensitivity, initial allegation response and, 834–835
7th Circuit, expert gatekeeping opinions of, 128–131
SG&A expenses index (SGAEI), 858
Sibling corporations, piercing the corporate veil, 888
Significance, in event studies, 1029–1030
Site traffic source tools, 627
6th Circuit, expert gatekeeping opinions of, 127–128
Skoog, Gary R., 796
Small Business Job Protection Act, 817
Snepp, Frank, 722, 768–769
Social media analysis for damage calculations, 623–638
key concepts
- Internet analytics used, 627–628
- Internet use statistics, 623–624
- optimization, 625–626
- search, 624
- social media platforms, 626–627
overview, 623, 638
valuation and damage analyses
- clear browsing data, 628–629
- identifying IP misuse, 630–632
- search techniques, 629–630
- supplementing accepted valuation methods, 633–634
- to support lost profits, 635
- using analytics to support celebrity endorsement relief from pay-per-click claim, 636–638
- using Google analytics to defend against celebrity name/likeness, 635–636
- using location-specific search statistics to determine confusion in trademark infringement claim, 638
Solvency ratios, 873
South Carolina, expert gatekeeping opinions of, 157–158
South Dakota, expert gatekeeping opinions of, 158
Special damages
- foreseeability and, 231
- personal injury and wrongful death, 789
Specific restitution, 945
Specified-peril policy, 909
Specified property, 905–906
Spoliation of evidence, 33–58
defined, 35, 36
- elements of
  - bad faith, 40–41
  - culpability of spoliator, 40–41
  - destruction, alteration or suppression, 38
  - duty to preserve, 39–40
  - evidence existence, 37–38
  - prejudice resulting from, 38–39
  - relevant evidence, 38
- ESI related issues, 47–58
  - concerns/obligations of counsel, 57–58
  - custody and control issues of, 50
  - duty to preserve and written litigation hold, 50–52
  - failure to preserve evidence, 53
  - reasonable requirement, 49
  - recommendations, 58
  - restoration of data, 53–54
  - safe harbor rule, 48–49
  - expert-related evidence, 44–47
  - expert’s file, 45–47
  - of physical evidence, 44–45
  - trial-preparation protection, 46
overview of, 35–36
- purpose of doctrine, 37
- reasonable requirement, 49
- sanctions for, 41–44
SSFS No. 1, 260–262
Stable growth period, factors in, 282
Stacked remedies, for breach of fiduciary duty, 963–964, 995–996
Standard costs, avoided cost estimation, 258
Standard essential patents, 566
Standard t-test, 1037
Stark Law, 391
- fair market value in, 403–404
- intent standard, 397
- list of prohibited referrals, 397
- penalties for, 397
- purpose of, 395, 397
- safe harbor rule list of exceptions, 400
- strategies for determining FMV under, 410
- whistleblower settlements under, 410–411
State courts
- expert gatekeeping opinions, 136–164
- jurisdiction of, 13
- lawsuit initiation in, 14–15
- organization of, 14
State licensing boards, professional liability risk management, 203–204
Statement against interest, 30–31
Statement on Standards for Forensic Services (SSFS No. 1), 260–262
main elements of, 261
- new items introduced by, 262
Statistical analysis for damage calculation, 1045–1062
- questions of
  - how different, 1046–1047
  - how many, 1047–1048
  - how much, 1046
- scenarios for
  - loss due to business interruption, 1060–1062
  - observational data for, 1053–1060
    - complications in computations, 1059–1060
    - computation of damages, 1058–1059
    - determination of who is harmed and when, 1057–1058
    - diminution of value after negative event, 1054
    - measurement of alleged diminution and corresponding damages, 1055–1060
  - sampling process to measure losses, 1049–1052
    - construction defects, counting individual problems, 1049
    - differences in designs for units in populations, 1050
    - double counting of repair costs, 1051
    - overestimation problems from high/low defect rates, 1050–1051
    - subsets of items used for testing, 1050
1128 www.bvresources.com
variability of costs of repair, 1052
Statutory jurisdiction, of unjust enrichment, 681–682
Stefanchik, John, 773
Stolen property, counter-restitution and, 695
Stored Communications Act, 50
Story, Judge, 89, 94, 974
Stratified sampling, 855
Stream of events, 1053
Strong form efficiency, 1024
Subjectivity, of event studies, 1040
Subledger review, for internal investigation, 858
Sublimits
  by peril, 913
  by property, 912–913
Subpoena coverage, liability insurance, 218
Subrogation, for RWI insurance policy, 1082–1083
Sub rosa distributions of profit, 688
Subsampling plan, 1050
Subsidiaries, piercing the corporate veil, 888
Substitute products, patent infringement cases, 549–550
Successor liability, piercing the corporate veil, 888
Subrosa distributions of profit, 688
Surety bonds, 444
Surveillance, physical and electronic surveillance for internal investigation, 830, 849
Survey-based research in damage estimation, 607–619
  case studies, 613–617
    design patent infringement, 616–617
    functional patent infringement, 614–615
    likelihood of confusion, 613–614
  federal judiciary guidelines
    admissibility factors, 608
    data gathering and analysis, 611
    defining population, 609
    Manual for Complex Litigation, 608
    personnel qualifications and objectivity, 610–611
    purpose and design of study, 608

  Reference Manual on Scientific Evidence, 608–611
    sampling, 609–610
    use of a control, 611
    validity factors, 608

impact of Daubert, 607
industry guidelines
  Advertising Research Foundation (ARF), 612–613
  American Association for Public Opinion Research (AAPOR), 612
overview, 607
selecting survey research expert, 619
special concerns for
  conjoint analysis, 617–618
  external validity, 618
  pretests, 617
  use of prior survey research in litigation, 618–619
  validation, 617
Surveys, for profit apportionment analysis for IP infringement, 651–652
Survival periods, representations and warranties litigation, 1084–1087
Survival rates, adjusting for new businesses and, 363–364
Sutter Health and Sacramento Cardiovascular Surgeons Medical Group
  Inc., 411
T
  Target company, marketing in M&A process, 1066–1067
  Taverns. See Eating establishments lost profits analysis
Taxes
  economic damages in employment litigation, 817
  employment case damages, 810–811
  income tax effect in lost business value vs. lost profit claims, 306–307
  personal injury and wrongful death economic damages, 794–795
Tax fraud, 827
Tax shelter fraud, 827
Technical component (TC), 392
Technology, patented technology in patent infringement damages, 544–545
Technology-assisted review (TAR), 64
Tennessee, expert gatekeeping opinions of, 158–159
10th Circuit, expert gatekeeping opinions of, 133
Terminable contracts, duration of loss period assumptions, 192–194
Terminal value calculation, 308
Termination
  in breach of contract, 807–808
  construction claim, 441–443
  for convenience clause, 421, 422
Testimony
  computer forensic expert on ESI, 67–68
  expert testimony, professional standards for experts, 7–10
  valuation report creation and risk management, 217–218
Texas, expert gatekeeping opinions of, 159–160
3rd Circuit, expert gatekeeping opinions of, 126
30(b)(6) deposition, 19
Time element provision, in business interruption insurance coverage, 898–900
Times interest earned, 873
Time value of money, damage measurement and, 317
Tort damages
  employment cases, 810
  in post-acquisition disputes, 1010
Tortious interference, 712
  lost profit claims, 226
Torts
  damage claims, 303–304
  damages period determination, 245
  lost profit claims, 225–226
Total accruals to total assets (TATA), 858
Total cost pricing method, for construction claims, 428–429
Total equity principle, 760
Totality of the circumstances test, 888–889
Total offset method, 798
Trade association data, as evidence in lost profit analyses, 295–296
Trademark damages, 593–601
  calculating damages, 597–601
  defendant’s profits in, 596–597
  plaintiff’s actual damages, 593–594
  name recognition that increases product’s prices, 594
  name recognition that increases sales volume, 593
  saved time and costs, 594
The Comprehensive Guide to Economic Damages: Volume One

summary of, 601
  types of actual damages, 594–596
    lost profits, 595
    reasonable royalty, 595–596
  using location-specific search statistics to determine confusion in trademark infringement claim, 638

Trademark infringement
  identifying IP misuse, 630–632
  lost profit claims, 226–228
  as protection for design appearance, 571–572

Trademark law, right of publicity infringement intersecting with, 528–529

Trade secret damages, 581–589
  available damage remedies under DTSA and UTSA, 584–589
    actual loss damages, loss profits, 585–586
    attorney’s fees, 589
    exemplary damages, 588–589
    reasonable royalty damages, 587–588
    unjust enrichment damages, 586–587
  introduction, 581–582
  state and federal law governing misappropriations, 583–584

Trading delays, 1039–1040

Trading halts, 1039–1040

Transaction costs, counter-restitution, 696

Transaction process overview, 999–1008
  deal negotiation, 999–1002
  determining purchase price, 1001–1002
  purchase price valuation, 1001–1002
  disputes over post-closing adjustments
    earnout disputes
      over measurement of performance, 1005–1006
      over post-closing accounting methodologies, 1006–1007
      over post-closing operation of business, 1007–1008
    working capital disputes, 1004–1005
    post-closing adjustment to purchase price, 1002–1004
    earnout payment, 1002–1004
    working capital adjustments, 1002

Treble damages, 399
  franchise litigation, 474

Trespass, willful or intentional to timber/mineral detachable, 695
  gross disgorgement, 766

Trial depositions, 77

Trial system
  discovery, 17–24
  discovery depositions used in, 77
  lawsuit initiation, 14–17
  privilege, 21
  rules of evidence, 27–31
  trial, 24–26
    appeal, 26
    process overview, 24–26
    rules and laws for, 26

Triggers of coverage, business interruption
  acts of civil authorities, 908–909
  covered property, 905–908
  direct physical damage, 900–905
  interruption, 898–900
  time element provision, 898–900

20 Group report, 457

Twitter, 626, 627

Two-supplier market, patent infringement cases, 547

Tyco International Ltd., 957–959

U

Unallocated overhead, physician practice and noncompete violations, 383–384

Unclean hands, 480

Undercapitalization, piercing corporate veil and, 889–890

Undercover operations, for internal investigation, 830

Underwriting process, for RWI policy, 1076–1077

Unfair competition, lost profit claims, 225–226

Uniform Trade Secrets Act (UTSA)
  available damage remedies under, 584–589
  overview of, 583–585

United States Life Tables, 799

United States Treasury rates, 798

United Way, 947–951

Universe, defining, in survey-based research, 609

Unjust enrichment
  compensation forfeiture, 962–963
  equal to restitution, 681
  sources of jurisdiction, 681–682

Unjust enrichment claims, 245, 370
  franchise litigation, 479
  Internet analytics to support, 634–635
  remedies in equity, 665–672
    advantages, 665–666
    basis of, 667–669
    but-for profit causation and, 667–668
    conclusion, 672
    Daubert challenge process, 669
    decline in familiarity, 671–672
    disadvantages, 666
    discretion and limited jurisdiction, 669–671
    opportunity cost adjustment and, 668
    overview, 665
    variation by jurisdiction, 669
  trademark damages, 598
  trade secret misappropriation, 586–587

Unjust enrichment in equity, defined, 675, 681–682

Unjust enrichment remedy
  counter-restitution in, 693–698, 749–783
  defendant’s overhead and
    Americanization of profit origin, 702–710
    apportionment, 708–710
    but-for analysis, 705–708
    conclusion, 744–746
  defendant as quasi-trustee origin, 691–702
    anti-netting rule, 700–702
    counter-restitution, 693–698
    infringing expenses, 698–700
    quasi-trustee, 691–692
  full-absorption approach of unjust enrichment, 676–677
  incremental vs. full-absorption, 740–744
    analysis, 742–743
    discretion, 744
  Restatements, 740–741
  introduction, 675–677
  relevance
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page References</th>
</tr>
</thead>
<tbody>
<tr>
<td>legal relevance</td>
<td>678–680</td>
</tr>
<tr>
<td>Willie Sutton theory</td>
<td>678</td>
</tr>
<tr>
<td>remedy measurement</td>
<td>relate areas of law</td>
</tr>
<tr>
<td>contract breach measures</td>
<td>711–712</td>
</tr>
<tr>
<td>emergency assistance standard</td>
<td>713–714</td>
</tr>
<tr>
<td>federal agency claims</td>
<td>714–722</td>
</tr>
<tr>
<td>patent damages</td>
<td>712–713</td>
</tr>
<tr>
<td>2nd Circuit opinions</td>
<td>faulty baseline</td>
</tr>
<tr>
<td>jurisprudence by adjective</td>
<td>728–731</td>
</tr>
<tr>
<td>substance over form</td>
<td>680, 685</td>
</tr>
<tr>
<td>survey by circuit</td>
<td>733–739</td>
</tr>
<tr>
<td>terms for</td>
<td>attributable</td>
</tr>
<tr>
<td>benefit</td>
<td>685–688</td>
</tr>
<tr>
<td>fixed costs</td>
<td>682–684</td>
</tr>
<tr>
<td>profit</td>
<td>685–689</td>
</tr>
<tr>
<td>unjust enrichment</td>
<td>681–682</td>
</tr>
<tr>
<td>willfulness and overhead</td>
<td>731–733</td>
</tr>
<tr>
<td>Unreasonably small capital</td>
<td>875–877</td>
</tr>
<tr>
<td>Update impact method</td>
<td>436</td>
</tr>
<tr>
<td>Upjohn warning</td>
<td>830, 846, 847</td>
</tr>
<tr>
<td>use value of asset, as measure of compensation</td>
<td>113</td>
</tr>
<tr>
<td>Utah, expert gatekeeping opinions of</td>
<td>160</td>
</tr>
<tr>
<td>Utility patent, compared to design patent</td>
<td>572</td>
</tr>
<tr>
<td>V</td>
<td>Validation, in survey-based research</td>
</tr>
<tr>
<td>Validity, survey-based research</td>
<td>608, 618</td>
</tr>
<tr>
<td>Valuation information request (VIR) checklist, eating establishments lost profits analysis</td>
<td>514–516</td>
</tr>
<tr>
<td>Valuation report</td>
<td>creating and risk management</td>
</tr>
<tr>
<td>critique of opposing experts</td>
<td>216</td>
</tr>
<tr>
<td>depositions and testimony</td>
<td>217–218</td>
</tr>
<tr>
<td>insuring risk</td>
<td>218–219</td>
</tr>
<tr>
<td>justify reliance methods</td>
<td>216</td>
</tr>
<tr>
<td>preserving data, confidentiality, privilege</td>
<td>216–217</td>
</tr>
<tr>
<td>relying on client direction</td>
<td>215–216</td>
</tr>
<tr>
<td>staff qualifications</td>
<td>215</td>
</tr>
<tr>
<td>fake reports</td>
<td>217</td>
</tr>
<tr>
<td>providing sample report with methodology</td>
<td>211–213</td>
</tr>
<tr>
<td>recipient of</td>
<td>210–211</td>
</tr>
<tr>
<td>Value/value</td>
<td>definition of, in loss of business value claim</td>
</tr>
<tr>
<td>fair market value standard</td>
<td>302–303</td>
</tr>
<tr>
<td>identifying in reasonable equivalent value</td>
<td>865</td>
</tr>
<tr>
<td>using Internet or social media data for</td>
<td>633–634</td>
</tr>
<tr>
<td>Variable cost allocation</td>
<td>419–420</td>
</tr>
<tr>
<td>unjust enrichment claim</td>
<td>683–684</td>
</tr>
<tr>
<td>Variable costs</td>
<td>avoided cost estimation</td>
</tr>
<tr>
<td>construction projects and</td>
<td>426</td>
</tr>
<tr>
<td>Variable sampling</td>
<td>854–855</td>
</tr>
<tr>
<td>Venture-backed companies (VBCs)</td>
<td>characteristics of</td>
</tr>
<tr>
<td>Internet bubble and</td>
<td>370, 371</td>
</tr>
<tr>
<td>proving lost profit damages</td>
<td>369–371</td>
</tr>
<tr>
<td>Vermont, expert gatekeeping opinions of</td>
<td>160–161</td>
</tr>
<tr>
<td>Veterans Administration BCA (VABCA)</td>
<td>433</td>
</tr>
<tr>
<td>Virginia, expert gatekeeping opinions of</td>
<td>161</td>
</tr>
<tr>
<td>Vocational experts, personal injury economic damages</td>
<td>801</td>
</tr>
<tr>
<td>VS Section 100</td>
<td>262</td>
</tr>
</tbody>
</table>

**W**

- Waiting period, in period of restoration | 916 |
- Warren, Samuel D., | 519–520 |
- Washington, expert gatekeeping opinions of | 161–162 |
- Washington’s Personality Rights Act (WPRA) | 529 |
- Weak form efficiency | 1024 |
- Weighted average cost of capital (WACC) | 310 |
- Weighted averages, of growth rate | 277 |
- West Virginia, expert gatekeeping opinions of | 162–163 |
- Whistleblower settlements, under AKS and Stark Law | 410–411 |
- White-collar crimes, categories of, and statutes pertaining to | 827 |
- Whole damages | loss of new business | 371–372 |
| new businesses | 360 |
- Wiese, Judge | 333 |
- Willfulness of defendant, offset credit for overhead | 731–733 |
- William Beaumont Hospital | 411 |
- Williams, John Burr | 535 |
- Williston, Professor | 98 |
- Wisconsin, expert gatekeeping opinions of | 164 |
- Witnesses | deposition and conduct during | 20–21 |
| friendly or hostile | 25 |
| who must provide written report | 22 |
- Working capital | adjustments to purchase price | characteristics of | 1002 |
| disputes over | 1004–1005 |
| RWI policy exclusion | 1080 |
| lost profits impairment on | 444 |
- Worklife Estimates: Effects of Race and Education | 796 |
- Worklife expectancy | personal injury and wrongful death economic damages, 796 tables for | 796 |
- Work plan, internal investigation | 836–837 |
- Wrongdoer rule | 90, 102–107, 304 |
| risk-free discount rate and | 329 |
- Wrongful death, economic damages from | 789–804 |
| components of economic damage analysis | base earnings | 792–793 |
| earnings growth rate | 793–794 |
| fringe benefits | 795–796 |
| lost earnings categories | 792 |
| mitigating earnings | 796–797 |
| personal consumption | 797 |
| tax rate | 794–795 |
| work-life expectancy | 796 |
| conclusion | 802 |
| discount methods | 798–799 |
| discount rates | 798 |
The Comprehensive Guide to Economic Damages: Volume One

documentation, gathering information, 790–791
funeral expenses, 801
introduction, 789–790
medical expenses, 799
references, 802–804
standards and burdens, 790

wRVU, 409
Wyoming, expert gatekeeping opinions of, 163–164

Y
Yardstick method
  advantages/disadvantages of, 274

apparel manufacturing case and forensic evidence, 352
comparability and choosing guideline company, 249–251
example of, 274–275
lost revenue estimates, 249–252, 273–275
possible benchmarks for, 273
for proving lost profits, reasonable certainty requirement and, 92–93
YouTube, 626, 627
  analyzing video views, 637

Z
Zone of interest test, 471–472
## Index of Cases in Volume One

Note: The list of cases in this index exceeds the number of cases that are covered in the second volume of this guide. The cases that are covered in the second volume of this guide are pared down to include those that are more recent and/or relevant to the subject matter covered throughout the guide.

### A
- Abry Partners VLP v. F&W Acquisitions, LLC, 1088
- ADC Fairways Corp v. Johnmark Construction, 161
- Advanced Bodycare Solutions, LLC v. Thione International, Inc., 253
- AGF v. Great Lakes Heat Treating, 155
- Aircraft Services International, Inc. v. TBI Overseas Holdings, Inc., 1087
- Alaska v. Coon, 137
- Albert v. Warner-Lambert Co., 123
- Allen-Myland, Inc. v. International Business Machines Corp., 732
- Alphamed Pharmaceuticals Corp. v. Arriva Pharmaceuticals, Inc., 337
- Ambrosini v. Labarraque, 79
- American Aerial Services, Inc., v. Terex USA, LLC, 123, 182
- American Federal Bank, FSB v. United States, 334
- American International Group, Inc. Securities Litigation, In re, 1033, 1040
- American Southern Ins. Co. v. Goldstein, 142
- American States Ins. Co. v. Koloms, 904
- American States Ins. v. Nethery, 903
- American Suzuki Motor Corp., 451
- Appeal of Eichleay Corp, 437
- Appeal of Grumman Aerospace Corp., 430
- Apple v. Samsung, 574–576
- Aramony v. United Way of America, 947, 949, 972–973, 996
- Aramony v. United Way Replacement Benefit Plan, 996
- Ashland Pipeline Co. v. Indiana Bell Telephone Co., 144
- Astra USA, Inc. v. Bildman, 963, 996
- ATA Airlines v. Federal Express Corp., 176
- ATM Exch., Inc. v. Visa Int’l Serv. Ass’n., 367

### B
- Baldwin Cooke Co. v. Keith Clark, Inc., 679
- Bank of Tokyo-Mitsubishi, Ltd. v. Malhotra, 986
- Barto v. Shore Construction, LLC, et al., 796
- Basic Inc. v. Levinson, 1020, 1023
- Bear Sterns Morg. Funding Trust v. EMC Mortgage, LLC, 1086
- Beiner Enters., Inc. v. Adam Caldwell, Inc., 337
- Bell Atlantic Network Services v. PM Video Corp., 152–153
- Bennett v. Sprint Nextel Corp., In re, 1040–1041
- Bergstrom v. Sears, Roebuck & Co., 678, 679
- Bero Motors, Inc. v. General Motors Corporation, 295, 451
- Berry v. Goodyear Tire & Rubber Co., 981
- Best Payphones, Inc. v. City of New York, 54
- BGB Pet Supply, Inc. v. Nutro Products, Inc., 328
- BIC Leisure Prods., Inc. v. Windsurfing Int’l, Inc., 550
- Bigelow v. RKO Radio Pictures, Inc., 195
- Big O Tire Dealers v. Goodyear Tire & Rubber Co., 528
- Blinderman Construction Co. v. United States, 434–435
- Blythe v. Bell, 337
- BMW of N. Am., Inc. v Gore, 486
- Borden v. Howard Trucking Co., 146
- Bours, Inc. v. Raychem Corp., 587
- Braun Inc. v. Dynamics Corp. of America, 578
- Brooks v. Conston, 698
- Bundles v. Baker, 866
- Bunting v. Jamieson, 163
- Burger King Corp. v. Barnes, 337
- Burger King Corp. v. Pilgrim’s Pride Corp., 679
- Burrow v. Arce, 993, 994–995
- Business Machines Sales and Services, Inc. v. Murphy, 149
- Busy Bee, Inc. v. Corestates Bank, N.A., 156

### C
- CADCO Inc. v. Fleetwood Enterprises, 346
- Cadco v. Fleetwood Enterprises, 150
- Callaghan v. Myers, 687, 699, 763
- Callery v. United States Insurance Co., 777
- Camar Corp. v. Preston Trucking Co., Inc., 294
- Cameco, Inc. v. Gedieck, 988
- Cammer v. Bloom, 1024, 1025, 1026
- Cardinal Consulting v. Circo Resorts, 148–149
- Carpenters Pension Trust Fund of St. Louis v. Barclays, 1021
- Carter Products, Inc. v. Colgate-Palmolive Co., 736
- Casco v. John Deere, 124
- Cashman v. Allied Products Corp., 131
- Catalina Lighting Inc. v. Lamps Plus, Inc., 578
- Catoe v. Helms Construction & Concrete Co., 154
- Cayuga Indian Nation v. Pataki, 190
- C.B.C. Enterprises, Inc. v. United States, 437–438
- Celebrity Cruises, Inc. v. Essel Corp., 125, 274, 338
- Cell, Inc. v. Ranson Investors, 163
- Century Distilling Co.v. Continental Drilling Corp, 735, 736
The Comprehensive Guide to Economic Damages: Volume One

CFTC v. American Metals Exchange Corp. 4, 736
CFTC v. Co Petro Mktg. Group, Inc., 720
Chaney & James Construction, 434
Charles R. Combs Trucking, Inc. v. Int'l Harvester Co., 154–155
Cher v. Forum Int'l, Ltd., 524, 528
Children's Broadcast Corp. v. Walt Disney Co., 132
Christoff v. Nestlé, 527
Chung v. Kaonohi Center Co., 142
CIT Group/Business Credit, Inc. v. Graco Fishing & Rental Tools, Inc., 182
City Line Joint Venture v. United States, 333
City Welding v. Gidley-Eschenheimer, 147–148
Clara v. Burlington N.R.R., 79
Clark v. Celeb Pub., Inc., 525
Client Funding Solutions Corp. v. Crim, 973
Club Car, Inc. v. Club Car (Quebec) Import, Inc., 134
Cobalt Operating, LLC v. James Crystal Enterprises, LLC, 1009, 1090
Cohen & Co. v. Breen, 219
Cole v. Homier Distributing Co., Inc., 131–132
Collins Holding Corp. v. Landrum, 158
Columbia Sportsware v. Seirus Innovative Accessories, 576
Commonwealth v. Lanigan, 147
Contemporary Mission, Inc. v. Famous Music Corp., 109
Coonis v. Rogers, 150
Cooper v. Ashley Commc'ns, Inc., 865
Cooper v. Travelers Indemnity Co. of Illinois, 182
Cortes v. 3A N. Park Ave Rest Corp., 513
Credit Managers Ass’n of Southern Cal. v. Fed. Co., 876–877
Creditors’ Comm. of Jumer’s Castle Lodge, Inc. v. Jumer, 866
Crystal Semiconductor Corp. v. TriTech Microelectronics Internat’l, Inc., 293, 554–555
Culver v. Slater Boat Company, 799, 802

D
DaimlerChrysler Motors Co., LLC v. Manuel, 250
Daimler Chrysler Motors Co. v. Marvel, 451
Dairy Queen, Inc. v. Wood, 702
Da Silva Moore v. Publicis Group, 68
Data General Corp. v. Grumman Sys., 679
Daubert v. Merrell Dow Pharmaceuticals, 68, 79–80, 81, 117, 167, 168, 173, 175, 607, 669
Davis v. Forest River, Inc., 451
Deckers Outdoor Corp. v. Romeo & Juliette, 576
De Jager Construction, Inc. v. Schleininger, 196
Delaney & Co. v. City of Bozeman, 151
Delores Skinner and Delvia Skinner v. Robert Thomas, 513
Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 903
Denny Construction, Inc. v. City and County of Denver, 444
DePalma v. Westland Software House, 306
Derma v. Service Experts Alliance LLC, 184
Derrick Resources, Inc. v. Wilstein, 995
Design Strategy, Inc. v. Davis, 986
Diabetes Centers of America, Inc. v. Healthpia America, Inc., 127
Dictomatic, Inc. v. U.S. Fidelity & Guar. Co., 932
Douglas Dynamics LLC v. Buyers Products Co., 559
Dowd & Dowd, Ltd. v. Gleason, 996
DSU Medical Corp. v. JMS Co., Ltd., 132
DSU Medical Corp. v. Medisystems Corporation, 136
Duplate Corp. v. Triplex Safety Glass Co., 728
Dura Pharmaceuticals, Inc. et al. v. Broudo et al., 1035
Duro Co. (of Ohio) v. Duro Co. (of New Jersey), 679
Durrett v. Washington Nat'l Ins. Co., 866

E
Eastern Auto Distributors, Inc. v. Peugeot Motors of America, Inc., 197–198
eBay Inc. v. MercExchange, 567
Eckard Brandes, Inc. v. Riley, 980
Edell v. Edell, 347
Edgewater Services, Inc. v. Epic Logistics, Inc., 154
Edwards v. Hauff, 698
E.E. Wooden-Ware Co. v. United States, 763
E.I. du Pont de Nemours & Co. v. C.R. Robinson, 159
El Aquila Food Products v. Gruma Corp., 291
Ellipsis, Inc. v. The Color Works, Inc., 128
EMSI Acquisition, Inc. v. Contrarian Funds, LLC, 1089
Energy Capital Corp. v. United States, 280, 309, 330
Engineered Products Co. v. Donaldson Co., Inc., 131
EnStar Group, Inc. v. Grassgreen, 963, 996
E. Qualcomm v. Global Commerce, 140
Equity Analytics, LLC v. Lundin, 68
ERI Consulting Engineers, Inc. v. Swinnea, 992–993
Ericsson Inc. v. D-Link Systems, Inc., et al., 566
Ericsson v. Harris, 295
Estate of Buonamici v. Morici, 219
EX Dock, Inc. v. Shafer Systems, Inc., 131
Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 528–530

F
Fabrication & Truck Equipment, Inc. v. Powell, 451
Fail-Safe, L.L.C. v. A.O. Smith Corp., 331, 335
Fairmont Supply Company v. Hooks Industrial, Inc., 331
Farm Bureau Ins. Co. v. Foote, 137
Federal Home Loan Mortgage Corp. (Freddie Mac) Securities Opinion Litigation, In re, 1035, 1041
Federal Trade Commission v. Febre, 778
Index of Cases in Volume One

Federal Trade Commission v. First Universal Lending, LLC, 50
Federal Trade Commission v. H.N. Singer, Inc., 775
Federal Trade Commission v. Stefanchik, 773–774, 781
Feesers Inc. v. Michael Foods Inc., 346
Ferriel v. Podgursky, 145
Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp., 919
Fifth Third Bank of Western Ohio v. United States, 311
First Savings Bank, F.S.B. v. U.S. Bancorp, 133
First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc., 903
Fishman v. Estate of Wirtz, 332
FiTeq Inc. v. Venture Corp., 54
Fletcher-Harlee Corp. v. Szymbanski, 892
Flexstake, Inc. v. DBI Services, LLC, 337
Flood Mobile Homes, Inc. v. Liberty Homes, Inc., 451
FMS, Inc. v. Volvo Construction Equipment North America, Inc., 451
Food Lion, Inc. v. Capital Cities, 977
Ford Global Technologies, LLC v. New World Int’l., 576
Fortress Systems, L.L.C. v. Bank of the West, 131
Foti Fuels, Inc. v. Kurrle Corp., 161
Franconia Associates v. United States, 331
Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 707, 731, 732, 739
Freesen, Inc. v. Boart Longyear Co., 129
F.W. Woolworth Co. v. Contemporary Arts, Inc., 740

G

Gallagher v. Southern Source Packaging, LLC, 126–127
Garcia v. Llerena, 140
Garretson v. Clark, 689, 708, 709, 753
Gary’s Implement, Inc. v. Bridgeport Tractor Parts, 250–251
Gemini Networks v. Nofs, 984
General Dynafab, Inc. v. Chelsea Industries, Inc., 156
General Ins. Co. v. Pathfinder Petroleum Co., 919
Genetically Modified Rice Litigation, In re, 175
George Haiss Manufacturing Co. v. Link Belt Co., 679, 735
Georgia-Pacific Corp. v. United States Plywood Corp., 539, 558–559, 588
Gesoff v. IIC Industries Inc., 281
Given v. Field, 163
Glattly v. Air Starter Components, Inc., 256, 259
GN Netcom, Inc. v. Plantronics, 53–54, 57
Goldman Sachs Group Inc. In re, 1022
Goodstein Construction Corp. v. City of New York, 304
Gordon Form Lathe Co. v. Ford Motor Co., 738
Goya De Puerto Rico Inc. v. Rowland Coffee Roasters, 124
Grain Processing Corp. v. American Maize, 551
Great-West Life & Annuity Ins. Co. v. Knudson, 770
Green v. Polyester Fibers, LLC., 789
Groupon Securities Litigation, In ew, 1040

Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 770, 771, 775
G.T. Laboratories, Inc. v. The Cooper Companies, Inc., 130
Guidance Endodontics, LLC v. Dentsply Int’l, Inc., 133

H

Hadley v. Baxendale, 87–88, 113, 231
Haelean Laboratories, Inc. v. Topps Chewing Gum, Inc., 520
Haemonetics Corp. v. Baxter Healthcare Corp., 123–124
Haff v. Augeson, 362
Haiss Mfg. Co. v. Link-Belt Co., 726
Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II), 1019–1023, 1028, 1042
Hallmark v. Eldridge, 151–152
Hamill America, Inc. v. G.F.I., 685, 729, 731, 741, 764
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 738, 744
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 306
Hardman Trucking v. Poling Trucking, 162
Harris Wayside Furniture v. Idearc Media, 124
HealthSouth Corp. Securities Litigation, In re, 1041
Henry Hanger & Display Fixture Corp. of America v. Sel-O-Rak Corp., 737
Holt Atherton Industries, Inc. v. Heine, 102, 270
Home Placement Service v. The Providence Journal Co., 296
Hopper v. All Pet, 164
Horne v. World Publications, Inc. et al., 370–371
Hoskins Oil Co. v. Equilon Enterprises, LLC, 337
Hsueh v. New York State Dep’t of Fin. Servs., 56–57
HTS, Inc. v. Boley, 996
Hubbard v. BankAtlantic Bankcorp, Inc., 1034
Hydrogen Master Rights, Ltd v. Weston, 1086
Hynix Semiconductor Inc. v. Rambus, Inc., 56

I

IBEW Local 98 Pension Fund v. Best Buy Co. Inc., 1021–1022
ICD Publ’ns., Inc. v. Gittlitz, 996
Indiana & Michigan Electric Company v. Terre Haute Industries, Inc., 144
Interim Healthcare, Inc. v. Spherion Corporation, 1009
Irvine v. Murad Skin Research Laboratories, 123
Isaksen v. Vermont Castings, Inc., 272

J

James v. MacDonald, 290
Jarvis v. A & M Records, 729
J&B Entertainment v. City of Jackson, Miss., 331
Jim’s Hot Shot v. Continental Western, 154
The Comprehensive Guide to Economic Damages: Volume One

Johnson v. Alaska State Dept. of Fish & Game, 137
Jonatzke, In re, 337

K
Kairos Scientific, Inc. v. Fish & Richardson, P.C., 331
Kamar Int'l, Inc. v. Russ Berrie & Co., 731–732, 739
KAR Printing, Inc. v. Pierce, 141–142
Kay v. First Continental Trading, Inc., 339
Kenford Co. v. County of Erie, 109, 153
Kipperman v. Onex Corporation, 135
Klapmeier v. Cirrus Indus., Inc., 337
Knox v. Taylor, 336
Konica Minolta Bus. Solutions, U.S.A., Inc. v. Lowery Corp., 54
Krogman v. Sterritt, 1024, 1025
Kumho Tire Co. v. Carmichael, 79, 80, 118

L
Lambert, In re, 331
Lambrecht & Assocs. v. State Farm Lloyds, 901
Lamoureux v. Anazahealth Corp., 125
Larsen v. Walton Plywood Co., 162
Larson Co. v. Wrigley Co., 738
Leisure Time Entertainment v. Global Videos, Inc., 197
Lestigao v. M. R. Mansfield Realty, 697
Levin Bros. v. Davis Mig. Co., 685, 726, 732, 736, 738
Levine v. Wiss & Co, 220
Levy v. Markal Sales Corp., 996
Lewis Jorge Construction Management, Inc. v. Pomona Unified School District, 444
Lexmark Intern., Inc. v. Static Control Component, Inc., 471–472
Libman Co. v. Vining Indus., 679
Lifewise Master Funding v. Telebank, 175
Lindevig v. Dairy Equipment Co., 163
Linton v. Shell Oil Company, et al., 801
Lithuanian Commerce Corp. v. Sara Lee Hosiery, 189
Little Rock Wastewater Utility v. Larry Moyer Trucking, 138
Living Color Enters. v. New Era Aquaculture Ltd., 53, 54
Local 703 v. Regions Financial Corp., 1020–1021, 1024
Loeffel Steel Products, Inc. v. Delta Brands, Inc., 129, 130, 220, 296
Lori Palladino v. DeGiacomo, 878–879
L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co., 728, 733

M
Macbeth-Evans Glass Co. v. L. E. Smith, 679
Madrid v. Lawyers Title Ins. Co., 866
Maiz v. Virani, 133–134
Maltina Corp. v. Cawy Bottling Co., 735, 739, 741, 742–743
Mann v. United States, 331
Manufacturers Technologies, Inc. v. Cams, Inc., 732
Marriage of Pagano, In re, 988
Marten Transp., Ltd. v. Plattform Advers., Inc., 51
Martin v. Freeman, 887
Marzoll v. Marine Harvest US, Inc., 79
Matrix Group Ltd., Inc. v. Rawlings Sporting Goods Co., 308
Matsushita Elec. Corp. v. Sonus Corp., 147
Matthew Enter. v. Chrysler Grp. LLC, 53, 55
Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 862
McCullough v. Scarrbrough, Medlin & Associates., Inc., 993
McDaniel v. CSX Transportation, Inc., 158
Meineke Car Care Centers, Inc. v. RLB Holdings, LLC., 469–470
Mellon Bank, N.A. v. Metro Commc'ns, Inc., 866
Mentor Graphics Corporation v. Eye-USE, Inc. et al., 644
Metro Tech v. TUV Rheinland, 124
M.G. Bancorporation, Inc. v. Le Beau, 139
M&G Polymers, USA, LLC v. Carestream Health, Inc., 182, 336
Micron Technology, Inc. v. Rambus, Inc., 56
Miller v. Bike Athletic Co., 154
Minco, Inc. v. Combustion Engineering, Inc., 555
Mindgames, Inc. v. Western Publishing Co., 95, 369
Minemyer v. B-Roc Representatives, Inc., 130–131
Mississippi Transport Commission v. McMenemy, 149
Mitchell v. Robert DeMario Jewelry, Inc., 714, 770, 771
Mitchell v. Stonecasters, LLC., 220
Monessen Southwestern Railway Co. v. Morgan, 799
Montage Group Ltd. v. Athle-Tech Computer Systems, Inc., 293
Moore v. Ashland Chemical, Inc., 80
Morris Communications, Inc., In re, 865
Motorists Mutual Ins. v. Hardinger, 903–904
Mowry v. Whitney, 703, 704, 754–755
Multimatic, Inc. v. Faurecia Interior Systems USA, Inc., 127–128
MyGallons LLC v. U.S. Bankcorp, 363

N
NASDAQ, Inc. v. Exchange Traded Managers Group, LLC, 334
National Envelope Corp. v. American Pad & Paper Co. of Delaware, Inc., 125
National Railroad Passenger Corp. v. Veolia Transportation Services, 969
Nautilus Ins. Co. v. Jabar, 904
Navigato v. SJ Restaurants, LLC, 513
Nebraska Nutrients, Inc. v. Shepherd, 151
Nebraska Plastics, Inc. v. Holland Colors Americas, Inc., 345
Index of Cases in Volume One

New England Dairies v. Dairy Mart, 125–126
New Mexico v. Alberico, 153
Nike, Inc. v. Wal-Mart Stores, Inc., 709, 731, 740, 743
Nordock v. Systems, 576
Northern Helix Co. v. United States, 330
Nova Casualty Co. v. Wasserstein, 903
Novatel Wireless Securities Litigation, In re, 1030

O
Oakland California Towel Co. v. Sivils, 305
Oberdick, In re, 878
O’Berry v. Turner, 53
Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 120
Omnicon Group, Inc. Securities Litigation, In re, 1039
Orozco v. WPV San Jose, LLC, 337
OSF Healthcare System v. Rockford Health System, In the Matter of, 52
Oslon v. Sax, 48
Otis v. Doctor’s Associates, Inc., 130

P
Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 547
Parlour Enterprises Inc. v. The Kirin Group, 295
Pastimes, LLC v. Clavin, 221
Pavesich v. New England Life Insurance Co., 520
Penn Mart Supermarkets, Inc. v. New Castle Shopping, LLC, 291, 292
Pennzoil v. Texaco, 89
Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, 52, 56, 57
People v. Kelly, 138
People v. Sanchez, 349
Pepe & Hazard v. Jones, 139
Peterka v. Dennis, 221
Petrobras Securities, In re, 1025
Phansalkar v. Andersen Weinroth & Co., 984–985
Pharmanetics, Inc. v. Avantis Pharmaceuticals, Inc., 126, 337
Pharmathene, Inc. v. SIGA Technologies, Inc., 335–336
Platypus Wear, Inc. v. Clarke Modet & Co., 134, 182
Plumbers & Pipefitters, Nat. Pension Fund v. Burns, 1037, 1040, 1041
Polaroid Corp. v. Eastman Kodak Co., 306
Polo Fashions, Inc. v. Craftex, Inc., 736
Porter v. Warner Holding Co., 690–691, 769, 771, 780
Postal Instant Press v. Sealy, 468–469
Progressive Casualty v. All Care, 149
Propellex Corp. v. Brownlee, 429
PSKS, Inc. v. Leegin Creative Leather Products, Inc., 308
Purina Mills, LLC v. Less, 328, 329–330
Purolator Prod., Inc. v. Torite Indus., Inc., 996

Q
Q Sales and Leasing, LLC v. Quilt Protection, Inc., 185

R
Radiologix, Inc. v. Radiology and Nuclear Medicine, LLC, 334
Radisson Hotels Int’l, Inc. v. Majestic Towers, Inc., 469, 470
RAF Enterprises LLC, et al. v. Trident LLC, et al., 513
R & A Inc. v. Kozy Korner, 140
Ratajczak v. Beazley Solutions Limited, 1091
Reading Radio, Inc. v. Fink, 156
Rebelwood Apartments RP, LP, et al. v. English, et al., 796, 802
Recreational Data Services, Inc. v. Trimble Navigation, Ltd., 368
Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 451
Reed v. Maryland, 147
Reinforced Molding Corp. v. General Electric Co., 679
REMEC Incorporated Securities Litigation, In re, 1035
Resenius Medical Care Holdings, Inc. v. Baxter, 132
R.F.M.A.S., Inc. v. Mimi So, 337
Rimkus Consulting Group, Inc. v. Cammarata, 51, 56
RMD v. Nitto Americas, 337
Roberson v. Rochester Folding Box Co., 520
Rockefeller v. Grabow, 143
Rohrer v. Connelly, 221
Rolls-Royce PLC v. United Technologies, 345–346
Rooney v. EZCORP, Inc., 1023
Root v. Railway Co., 769
Rossi v. Standard Roofing, Inc., 187
Roulo v. Russ Berrie & Co., 679
Rowe v. DPI, 346–347
Russell v. Allianze Life Insurance Co. of North America, 347

S
Saden v. Smith, 993
Sammons v. Colonial Press, Inc., 679, 733
Sargon Enterprises, Inc. (Sargon) v. University of Southern California, 138, 255, 275–276, 359
SAS Inst. Inc. v. World Programming Ltd., 337
Scenicland v. St. Francis Medical Center, 146
Schmid v. Milwaukee Tool Corp., 44–45
Schnadig Corp. v. Gaines Manufacturing Co., 708, 738
Schonfeld v. Hilliard, 112, 309
Scientific Atlanta, Inc. Securities Litigation, In re, 1039
Scrumpy v. Tucker, 985
Sealed Party v. Sealed Party, 983
Sebastian Intern., Inc. v. Russolillo, 132
SEC v. Benson, 718
SEC v. Blatt, 720, 778
SEC v. Blavin, 716, 761
The Comprehensive Guide to Economic Damages: Volume One

SEC v. Cavanagh, 717, 735, 746, 771, 775
SEC v. Commonwealth Chem. Sec., Inc., 778
SEC v. First City Fin. Corp., 720–721
SEC v. First Pac. Bancorp, 720
SEC v. Global Express Capital Real Estate, 720
SEC v. Great Lakes Equities Co., 716
SEC v. JT Wallenbrock & Associates, 761, 780
SEC v. Poirier, 720
SEC v. Texas Gulf Sulphur Co., 770, 772, 777
SEC v. Thomas James Associates, 719
SEC v. United Energy Partners, Inc., 720
SEC v. World Gambling Corp., 778
Segal v. Rochelle, 864
Sereboff v. Mid Atlantic Medical Services, Inc., 770
Serio v. Baystate Props., LLC, 886
Servidone Constr. Corp. v. United States, 428
Sheehan v. Daily Racing Form, Inc., 80
Sherf v. Antoniak, 132
Siga Technologies, Inc. v. PharmAthene, Inc., 337
Signet Jewelers Ltd. Sec. Litig., In re, 1021
SIHLE v. Right Way Hauling, 141
Snepp v. United States, 985, 992
Southern National Corp. v. United States, 291
Southern Pacific Communications Co. v. American Telephone & Telegraph Co., 195
Spencer v. Commonwealth, 161
State v. Brown, 155–156
State v. Crosby, 160
State v. Jones, 157–158
State v. Moore, 150
State v. O’Key, 156
State v. Porter, 139
Stensvad v. Miners & Merchants Bank, 150–151
Sterling v. Velsicol Chem. Corp., 80
Steven Palladino, In re, 878–879
Stevens v. Gladding, 690, 714–715, 770
St. Jude Medical Inc. Securities Litigation, In re, 1021
Story Parchment Co. v. Paterson Parchment Paper Co., et al., 104, 304
Strougo v. Barclays Bank PLC, 1021, 1022
Structural Polymer Group, Ltd v. Zoltek Corp., 346
Sunnyland Farms, Inc. v. Central New Mexico Electric Cooperative, Inc., 153
SuperValu Inc. v. Associated Grocers, 193
Super Valu Stores v. Peterson, 136–137
Swinnea v. ERI Consulting Eng’rs, Inc., 996
Sys. Development Integration, LLC v. Computer Sciences Corp., 337
Tate Access Floors, Inc. v. Maxcess Techs., Inc., 550
Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc., 1025, 1041
Tech. Coating Applicators, Inc. v. U.S. Fidelity & Guaranty Co., 903
Telecomm Technical Services, Inc. v. Siemens Rolm Communications Inc., 197
Thakore v. Universal Machine Co. of Pottstown, Inc., 129–130
Thoughtful Media Group, Inc. v. Ingrouille, 331
Tilghman v. Proctor, 705–706
To-Am Equipment Co. v. Mitsubishi Caterpillar Forklift America Inc., 451, 452
Total Clean, LLC v. Cox Smith Matthews Inc., 337
TOUSA, Inc., In re, 863
Town & Country Properties, Inc. v. Riggins, 526
Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc., 95–96
Tremaine v. Hitchcock, 734, 740
Tull v. United States, 717–718, 771, 775
Tyco International, Ltd. v. Kozlowski, 975

U

Unger v. Amedisys, Inc., 1025
United Phosphorous, Ltd. v. Midland Fumigant, Inc., 196–197
United States ex rel. Bookwalter v. UPMC, 411
United States ex rel. Miller & Metts v. HMA, et al., 407
United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 81
United States v. Greber, 396
United States v. Lane Labs-USA, Inc., 736
United States v. Raymond, 79, 80
United States v. Snepp, 699
United States v. Spearin, 440
United States v. Universal Management Services, Inc, 778, 779
University Computing Co. v. Lykes-Youngstown Corp., 586, 588
The University of Colorado Foundation, Inc. v. American Cyanamid Company, 739
US Bank National Association v. GreenPoint Mortgage Funding, Inc., 1087
U.S. Salt, Inc. v. Broken Arrow, Inc., 275
UST v. General Road Trucking, 157
Utah Med. Prods. Inc. v. Graphic Controls Corp., 550

V

Vendo Co. v. Stoner, 996
Ventura v. Titan Sports, Inc., 179, 530
Venture Corp. v. Wherify Wireless, Inc., 132
Vibra-Tech Eng’rs, Inc. v. Kavalek, 996
Vickers v. Wichita State University, 145
Victor Stanley, Inc. v. Creative Pipe, Inc., 57, 58
Victory Fireworks & Specialty Co., 679

**W**

Waggoner Motors, Inc. v. Waverly Church of Christ, 159
Waggoner v. Barclays, 1022
Waits v. Frito-Lay, Inc., 523–524, 528
Walker v. Yellow Freight Systems, Inc., 127
Wallace’s Bookstores, Inc., v. Wells, In re, 128
Ward v. Taggert, 697
Warford v. Industrial Power Systems, 124
Watts et al. v. Waddle et al., 690
Wayne Oakland v. Garden City, 148
Weaver v. Lentz, 158
Webb v. Braswell, 149
Welfare Fund v. Regions Fin. Corp, 1024
Whitby v. Infinity Radio, 140–141
Wilko of Nashua, Inc. v. TAP Realty, Inc., 152
William Floyd Union Free School District v. Wright, 988
Williams Electronics Games, Inc. v. Garrity, 738
Wilt v. Buracker, 162
Winstar Communications Securities Litigation, In re, 1025, 1041
World Radio Labs. v. Coopers & Lybrand, 151
Wye Oak Technology Inc., v. Republic of Iraq, 334

**X**

Xcelera.com Securities Litigation, In re, 1025

**Y**

Yarway Corp. v. Eur-Control USA, Inc., 550
Yellowpages Photos, Inc. v. YP, LLC, 177

**Z**

Zacchini v. Scripps-Howard Broadcasting Co., 520–521
ZixIt Corp. v. Visa USA Inc., 363
Zubulake v. UBS Warburg, LLC, 48, 50, 52, 54, 55
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