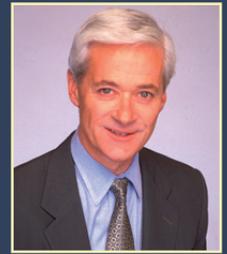


# DUNN ON DAMAGES

THE ECONOMIC DAMAGES REPORT FOR LITIGATORS AND EXPERTS



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# CAUSATION SCENARIOS FOR THE DAMAGES EXPERT



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## The Role of the Expert

Litigating parties engage experts to opine on issues of causation, damages or some combination thereof.<sup>1</sup> Causation provides the linkage between liability-producing conduct and damages that the plaintiff must establish before damages are recoverable. Experts must exercise care in using the term “causation,” however, because it is used, even by judges and lawyers, in many different ways. The most straightforward type of causation – factual causation – may be understood in the context of the “but-for” question. That is, would the harm the plaintiff allegedly suffered have occurred “but for” the defendant’s allegedly improper conduct?<sup>2</sup> Proximate cause extends factual causation to include the legal issue of liability.<sup>3</sup> Ultimately, a recovery by the plaintiff is subject to the principle that damages must be proximately caused by the wrongful conduct of the defendant.<sup>4</sup> In some instances, factual cause is sufficient to establish proximate cause.<sup>5</sup>

In many types of commercial damages disputes, a damages expert either will assume factual causation based upon the instruction of counsel or rely on one or more other witnesses to address factual causation. For example, the damages expert may rely on a medical doctor to testify regarding the implications of radiation exposure to a plaintiff’s health or an engineer to provide testimony explaining the reason a pipe exploded. The damages expert then monetizes the damages flowing from the “caused” injury. In other matters, the damages expert may be retained to provide testimony as to causation. For example, economists and CPAs (“financial experts”) have suc-

cessfully provided testimony in antitrust cases that both (i) establishes that defendants’ conduct resulted in (i.e., caused) noncompetitive prices in the subject industry and (2) quantifies the damages as a result of that noncompetitive conduct.

The decision whether to assume causation, rely on other experts to establish causation, or directly opine on causation, normally is a collaborative one involving the expert and counsel. No approach is right in every situation, and none is without risk. A damages expert who assumes causation (or relies on the causation opinions of others) avoids subjecting himself to vigorous cross-examination on causation issues,<sup>6</sup> but risks having his entire opinion excluded as irrelevant if the plaintiff fails to introduce sufficient evidence of causation to serve as the foundation of the damages calculations. On the other end of the spectrum, a damages expert who testifies both as to causation and damages controls his destiny in terms of laying the foundation for his damages opinion, but he also opens himself up to cross-examination (or even motions to exclude) regarding his qualifications or methodology on causation.

We present below an analysis of what courts expect from damages experts with respect to causation. In doing so, we consider illustrative cases in which courts ruled that experts overstepped their bounds in opining on factual causation or failed to reliably address the question of causation, but also scenarios in which experts successfully navigated causation issues. Of course these opinions do not represent an exhaustive review of the case law, which is extensive and at times inconsistent.

## Understanding the Landscape of Challenges to Damages Experts and Causation

It is important to first revisit Federal Rule of Evidence (“FRE”) 702, which states that expert testimony is admissible only if it is the product of a qualified expert, it is helpful to the trier of fact (i.e., it is relevant) and it is based on a reliable application of facts and methods. These standards find some corollary in the professional guidelines applicable to CPA experts. For example, under the AICPA’s Statements on Standards for Consulting Services No. 1 (“CS 1”) experts must only undertake services that can be completed with professional competence and due care.

Challenges to the admissibility of expert opinion, known in federal court as *Daubert* challenges, are on the rise. In 2010, such challenges were successful, at least in part, against financial experts 50 percent of the time.<sup>7</sup> Many of these successful motions argued that the expert failed to appropriately apply principles and methods reliably to the causation issues of the case in accordance with FRE 702. In fact, PwC’s *Daubert* studies confirm that the most common reason for the exclusion of financial expert testimony pursuant to Rule 702 is a lack of reliability or relevance, and challenges to the causation aspect of damage testimony often is ripe for such a challenge. An expert that is able to demonstrate conformity with professional standards such as CS 1 will be best situated to respond to any such criticisms.

*Continued on next page*

## Expert Damages Testimony Must be Relevant

The relevance of expert testimony under *Daubert* is assessed in terms of whether it "...assists the trier of fact to either understand the evidence or determine a material fact at issue."<sup>8</sup> Expert testimony normally will pass the relevance test where it applies "some specialized knowledge, skill, training or education not available to a lay witness" to a question at issue in the case.<sup>9</sup> There is no doubt that CPAs, economists and other financial experts are qualified as a general matter to testify on issues of damages. Since in almost all cases damages are sought, expert testimony on damages normally will be relevant. But issues of relevance can arise where a plaintiff seeks to offer expert damages testimony without laying proper foundation establishing a link between those damages and defendants' alleged conduct.

For example, in *Mapinfo Corp. v. SRC*, the court excluded SRC's damages experts on relevance grounds because SRC failed "to prove...a causal connection between MapInfo's alleged disparagement and any losses by SRC [which] renders...testimony on damages irrelevant."<sup>10</sup> Similarly, in *Sigur v. Emerson Process Mgmt.*, defendants sought to exclude as irrelevant the testimony of plaintiff's damages expert because he had assumed causation.<sup>11</sup> The court noted that there was no prohibition on a damages expert assuming causation *so long as* that assumption is supported by competent, admissible evidence that at a minimum creates genuine issues of fact as to causation. In the particular circumstances, however, the court held that plaintiff and his expert had failed to identify such evidence in the record.

These cases demonstrate that even when assuming causation, a damages expert must understand the record evidence of the case and be able to point to that evidence as support for the reasonableness of his or her assumptions. At the same time, the expert should resist the impulse to argue competing facts, which can unnecessarily harm credibility. It normally is the job of the lawyers and fact witnesses (and not the damages expert) to establish the foundational facts necessary for the damages opinion.

## Expert Damages Testimony Must Be Within the Realm of the Expert's Specialization and Must Reliably Apply Facts and Accepted Methodology

One of the earliest cases in the post-*Daubert* era to consider the testimony of a damages expert who strayed into issues of causation involved Parkway Garage ("Parkway"). Parkway sought lost profits from the City of Philadelphia. The jury awarded Parkway \$5 million, but the city prevailed on a motion for judgment notwithstanding the verdict. On appeal, the Third Circuit remanded it to the trial court for reinstatement of the verdict. On remand though, the trial court concluded that the damages expert, an accountant, had asserted unsupported causation bases in reaching his damages opinions, and as a result, had ventured beyond the field of his expertise: "In this case, [the plaintiff's expert] was proffered as an expert with respect to the making of financial projections and the analysis of financial statements, and the court and the defendants accepted his qualifications in that regard. [The expert] was never proffered as an expert on the parking industry, and he freely admitted that he did not purport to be such an expert. Therefore, [the plaintiff's expert's] theory about what causal effect, if any, the closing of the garage for a total of six weeks may have had on the parking habits of urban commuters for the next nine years was clearly unreliable because it was based on pure speculation and it was outside the knowledge and experience of his discipline as an accountant." The trial court granted the city's motion for remittitur and the verdict was effectively reduced to \$53,000. These and similar cases<sup>13</sup> demonstrate that a damages expert whose damage calculations rest entirely on his own suppositions or opinions about how defendants' conduct was the but-for cause of plaintiffs' injuries may subject themselves to *Daubert* motions or damaging cross-examination. Presumably the same reliability objections would not have carried the day had Parkway employed another expert with appropriate experience and qualifications to opine on the parking industry or the parking habits of urban commuters.

Although often a point of cross-examination, a damages expert who does

not purport to offer expert testimony on causation normally will not need to demonstrate industry-specific expertise in order to survive a *Daubert* challenge. For example, the court in *Polymer Dynamics v. Bayer* rejected the defendant's challenge to the plaintiff's damages expert on the basis that the expert lacked experience in the shoe industry: "The fact that a witness is not a specialist in a given specialty area does not disqualify that person from testifying as an expert in that field generally."<sup>14</sup> The court allowed the expert to "offer the jury an opinion on damages."<sup>15</sup> The court likely would have evaluated the damages expert's qualifications differently if the expert had attempted to establish factual causation resulting in the lost profits.

One such case, *Arista Records v. Lime Group*, considered this question, when the court ruled: "To the extent that [the expert's] opinions about causation are based upon his own economic analysis or expertise, they are admissible."<sup>16</sup> Absent such qualifications or in-depth industry knowledge enabling an expert to opine on causation, damages experts normally are wise to resist the urge to offer expert opinion directly on causation. This can be particularly difficult when allied lawyers are eager to use their expert's testimony as a chance to "tell the whole story" through one witness. But a damages expert who tries to testify outside his expertise risks damaging his credibility with the judge or jury even on matters fully within his expertise. Worse yet, an expert risks having his entire damages opinion excluded on a *Daubert* motion, as opposed to just his opinion on causation, by a busy judge who may not be inclined to parse through which portions of the opinion are admissible and which are not.

Most cases addressing alleged improper causation testimony deal with expert witnesses for the plaintiffs, but clearly defendants' damages experts are not immune. In a 2010 decision in the Southern District of Texas, defendant "I'm Ready Productions" ("IRP") offered the opinion of a CPA expert to testify on damages issues.<sup>17</sup> Plaintiff Baisden alleged that IRP had impaired the option value of a movie contract involving two novels penned by Baisden. Baisden of-

*Continued on next page*

ferred expert testimony on the damages caused by that impairment. In response, the defendant IRP's expert opined: "[I]t does not appear that Defendants caused the delay in making the motion pictures, but rather the delay was caused by Mr. Baisden... As such, it appears the delay damages were caused by Mr. Baisden's own actions or failures to act and not by those actions of the defendant." The court excluded much of plaintiff's damages expert (under FRE 702's reliability prong), but the court also concluded that the defendant's expert had overstepped. Specifically, the court "agree[d] with Plaintiff that [Defendant's expert's] opinion on what caused the delay is outside his area of stated expertise and should be excluded." It seems likely that the testimony of IRP's expert would have been admissible had he simply criticized plaintiff and his expert for assuming causation without reliable supporting record facts, especially if he had pointed out how that failure violated standards applicable to CPAs. Instead, IRP's expert essentially sought to instruct the factfinder on how to interpret evidence that needed no expert interpretation. That practice clearly is prohibited.<sup>18</sup>

Another 2010 decision demonstrates that reliable causation testimony requires a grounding in admissible record evidence. In *Taj Becker, M.D. v. J. Denis Kroll, et al.*, the plaintiff, Dr. Becker, sued Utah's Medicaid Fraud Control Unit for purported disruptions caused by its investigations. Dr. Becker's expert was experienced in the field of accounting and management services to doctors.<sup>19</sup> The expert sought to testify on both causation and damages. The defendants contended that Dr. Becker's expert was not qualified to testify on the causation of lost business and should be excluded under the *Daubert* standard. While the court concluded that Dr. Becker's expert was "qualified in the field of medical and dental accounting and office management," the court concurrently determined that the expert "will not be allowed to testify as an expert with regards to the connection between the charges against Dr. Becker and her subsequent loss of income." The brief opinion on this issue expressed concern regarding the expert's *ipse dixit* causation opinion. The court did permit

plaintiff's expert to testify on damages: "[The expert] will be permitted to testify as long as his testimony is in regards to the actual decline in income, rather than any explanation or justifications for the decrease." This decision demonstrates that qualifications alone are generally insufficient in the absence of adequately supported bases for proffered expert opinions.<sup>20</sup>

### **Accounting for Other Obvious Causes and Avoiding the Post Hoc Fallacy**

Even where a damages expert does not undertake to prove causation, he or she, as part of setting up the damages calculation, must decide what losses can be attributed to the alleged (or assumed) cause and what losses must be excluded. In this sense, the expert must avoid the *post hoc ergo propter hoc* fallacy ("after this, therefore because of this").

Consider, for example, a hypothetical medical device company that was subjected to certain defamatory statements which the company alleges caused a downturn in sales (and resulting lost profits). The company sues and engages a damages expert who is asked to assume (or is provided allied expert testimony asserting) that the defamatory statements caused lost sales. The damages expert then calculates the drop in revenue (and resulting profit). Even if that calculation is an accurate measure of lower sales and profit, it is not an accurate measure of damages unless the calculation excludes losses caused by factors unrelated to the defamatory statements. For example, during the relevant period, a successful competitive product may have come on to the market, siphoning sales away from the plaintiff, or the Medicare reimbursement schedule may have changed, reducing the margin on sales. Those market changes occurred in both the real and the but-for world, and their effects must be excluded from the damages calculation.

Although it is not always possible to exclude every alternative cause, the 2000 comments to Federal Rule of Evidence 702 specifically identify as one test of reliability "[w]hether the expert has adequately accounted for obvious alternative explanations."<sup>21</sup> Where an expert fails to take into account an obvious al-

ternative cause in performing his damages calculation, the court may exclude that opinion completely. On the other hand, the mere potential of other causes generally is a question of weight (not admissibility) subject to cross-examination.<sup>22</sup>

The peril for experts who fail to consider obvious alternative causes is illustrated in a recent decision by a federal district court in Illinois.<sup>23</sup> The plaintiff, Victory Records, alleged that defendant, Virgin Records, tortiously interfered with Victory's relationship with the band Hawthorne Heights, thereby depressing sales of the album. Victory's damages expert, a CPA, opined that the computed decline in Victory's sales "can only be attributable to the actions" of the defendant.

The court criticized plaintiff's expert for failing to consider other obvious causes for the calculated decline in sales, including an unsavory campaign by Victory to sabotage the sales of a competing artist, Ne-Yo, in order to inflate the relative sales of Hawthorne Heights. Victory's sabotage campaign became public knowledge and resulted in significant bad press for Hawthorne Heights, which conceivably could have caused some portion of the band's lower-than-expected sales. In light of the CPA expert's failure to even consider these facts, the court excluded his damages opinion: "Given this significant gap in [the expert's] knowledge and analysis, he cannot testify with the reliability demanded by Rule 702 either that Virgin caused Victory's alleged losses or that it is 'reasonable to assume' that Virgin did so."

### **Experts Should Consider whether the Recession Is an Obvious Other Cause**

Another 2010 case highlights the importance of at least considering other alternative causes in calculating damages. In *North v. Precision Airmotive Corp.*,<sup>24</sup> the heirs of Mr. North, a developer, sued Precision Airmotive Corp. following a plane crash that resulted in Mr. North's untimely demise in December 2006. Mr. North had been developing a series of condominiums known as Snow Vidda. The plaintiffs' damages expert assumed that the condominium development would have succeeded "but for" Mr. *Continued on next page*

North's death. Meanwhile, the defendant contended that the recession and higher-than-expected construction costs doomed the Snow Vidda project. The court criticized plaintiff's expert for failing to take into account the recession, and held that "the Plaintiff has failed to provide evidence from which a reasonable factfinder could conclude that North's death caused the failure of the Snow Vidda project...Accordingly, [the expert] will not be permitted to testify as to the amount of profits the Snow Vidda project would have earned if it had been completed."

### Meeting the Reasonable Certainty Threshold

Finally, it is worthwhile to explore success stories for damages experts attempting to address uncertainty as to how much of the plaintiff's loss was caused by the defendant's conduct. In one such matter in 2010, Brighton Collectibles, Inc. ("Brighton"), a manufacturer of women's handbags, sought copyright infringement damages from Coldwater Creek, Inc. ("Coldwater"). Brighton's industry expert opined that since Brighton customers typically purchased more than one Brighton product in each transaction, each infringing sale by Coldwater had an amplified impact on Brighton. In turn, Brighton's damages expert quantified lost sales using similar ratios to those identified by Brighton's industry expert. Coldwater challenged this assumption as speculative. The court, however, permitted the testimony of Brighton's damages expert. The court noted that the expert had indicated that the trier of fact had the latitude to adjust the ratio based upon its findings at trial.<sup>21</sup>

*Brighton* provides an example of an expert relying on another expert to supply the causation opinion, while at the same time handling the uncertainty of how much loss was caused by the defendant's conduct. The court focused on the reliability of the expert's methodology rather than the reliability of a particular assumption made by the expert, particularly because the expert deferred to the trier of fact to ultimately resolve the propriety of the damages-related variables. Other courts have ruled similarly.<sup>26</sup>

In fact, it is clear that an expert may meet the reasonable certainty damages standard even when supplying alternate damages scenarios for the trier of fact.<sup>27</sup>

### Observations for Experts

Given the spectrum of ways in which damages experts may find themselves confronting causation issues, it is crucial that experts work closely with their retaining attorneys throughout the engagement to understand expectations. Experts should regularly evaluate their positioning with respect to causation to ensure that they are properly relying on other expert testimony or bringing their own qualifications and expertise to bear, so that they will not be seen as offering "nothing more than [the] factual and legal conclusions of the lawyers themselves."<sup>28</sup> This is particularly important as the scope of the engagement evolves over the course of a particular matter (either expressly or implicitly). In many engagements, the role of the expert shifts as the expert accumulates substantial knowledge about the case, which the retaining attorney hopes to leverage either for cost efficiency or because of the expert's experience communicating issues to a trier of fact. This pressure has only increased with recent amendments to Federal Rule of Civil Procedure 26(a)(4)(C) that protect from discovery communications between a testifying expert and the retaining attorney, thereby making it easier for lawyers to "suggest" edits to expert reports and opinions.

The expert should also expressly state all assumptions relevant to his or her opinion, including those related to causation. Whether assuming or opining on causation, the damages expert should evaluate and control for alternative causes of damages to avoid the post hoc fallacy. A variety of techniques may be employed to do so, for example, reviewing industry benchmarks and applicable publications. While the expert has discretion to determine how to account for alternative causes, one tool available is scenario analysis (see the *Brighton* case above), which allows the expert to adapt the damages calculation should subsequent events in the case lifecycle require modifications, for example, due to the elimination of a cause of action or defen-

dant in the summary judgment phase of the matter.

At a time when expert testimony regularly is subjected to challenge, including *Daubert* motions to exclude, experts are well served by being very familiar with, and grounding their conclusions in, the standards required by FRE 702, as well as any applicable professional standards such as CS 1. Opinions that are based on reliable data and employ accepted professional methodology are most likely to be admitted into evidence and, ultimately, to persuade the factfinder.

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(Endnotes for this article can be found on the next page.)

<sup>1</sup> In this article, use of the term damages is intended to refer to economic damages.

<sup>2</sup> *Black's Law Dictionary*, 8th Abridged Edition, defines "but-for cause" as "the cause without which the event could not have occurred," which it equates with actual cause and factual cause.

<sup>3</sup> *Id.*, "proximate cause" is equated with "legal cause," which is defined, in part, as "a cause that is legally sufficient to result in liability," and incorporates the "but-for cause" analysis.

<sup>4</sup> *Recovery of Damages for Lost Profits*, Volume 1, by Robert L. Dunn, Chapter 1, § 1.1A.

<sup>5</sup> *Id.*, §1.3C.

<sup>6</sup> Even where a damages expert assumes causation, that expert must account for obvious alternative causes in his damages assessment.

<sup>7</sup> 2010 PwC Study, "Daubert Challenges to Financial Experts," <http://www.pwc.com/us/en/forensic-services/publications/daubert-study-2010.jhtml>

<sup>8</sup> *Polymer Dynamics, Inc. v. Bayer Corporation*, No. Civ.A 99-4040, E.D. Pa. May 4, 2005, citing *Daubert* in support of order denying defendant's motion to exclude the testimony of the damages expert, [http://scholar.google.com/scholar\\_case?case=11194204515729943111](http://scholar.google.com/scholar_case?case=11194204515729943111)

<sup>9</sup> *Id.*, citing *Calhoun v. Yamaha Motor Corp.*, 350 F. 3d 316, 321 (3d Cir. 1994).

<sup>10</sup> See *Mapinfo Corporation v. Spatial Re-Engineering Consultants*, Dist. Court, (N.D. NY, Sept. 28, 2006), [http://scholar.google.com/scholar\\_case?case=9830313187136069123](http://scholar.google.com/scholar_case?case=9830313187136069123); see also *Fashion Boutique of Short Hills v. Fendi USA, Inc.*, 75 F. Supp.2d 235 (S.D.N.Y. 1999) (plaintiff's damages expert excluded on relevance grounds because it was based on a causal assumption that plaintiff failed to prove).

<sup>11</sup> *Sigur v. Emerson Process Mgmt.*, No. 05-1323-A-M2, 2007 U.S. Dist. LEXIS 45270 (M.D. La. Apr. 25, 2007), [http://scholar.google.com/scholar\\_case?case=5654805004294536941](http://scholar.google.com/scholar_case?case=5654805004294536941)

<sup>12</sup> *Parkway Garage, Inc. v. City of Philadelphia*, 1994 WL 412430 (E.D.Pa.). See also, *Parkway Garage, Inc. v. City of Philadelphia*, 5 F. 3d 685 - Court of Appeals, 3rd Circuit 1993, [http://scholar.google.com/scholar\\_case?case=151368199608042528](http://scholar.google.com/scholar_case?case=151368199608042528).

<sup>13</sup> The Second Circuit reach a similar result where damages experts strayed beyond the boundaries of their qualifications. See, e.g., *Fashion Boutique of Short Hills v. FENDI USA*, 314 F. 3d 48 - Court of Appeals, 2nd Circuit 2002, [http://scholar.google.com/scholar\\_case?case=3176911749397274657](http://scholar.google.com/scholar_case?case=3176911749397274657), "As the district court recognized, plaintiff's expert was not qualified to make an assessment of the cause of the demise of the business. His expertise was limited to calculating the value of the business. In making his calculations, he assumed that a 'campaign of disparagement' caused Fashion Boutique's sales to decline.

However, as discussed above, no evidence of such a policy existed." See also, *RFMAS, INC. v. So*, 748 F. Supp. 2d 244 - Dist. Court, SD New York 2010, [http://scholar.google.com/scholar\\_case?case=512549174471690586](http://scholar.google.com/scholar_case?case=512549174471690586), "Neither expert's skill, experience, training, or education gives him specialized knowledge about why Neiman Marcus decided to reduce its sales from RFMAS... An expert's testimony that plaintiffs damages were caused by a series of acts by defendants is necessarily an exercise in speculation when the acts that purportedly caused the damages are only hypothesized to have occurred. When the expert cannot even identify what defendants' damaging conduct consisted of, his testimony on causation is not merely suppositional—it is inherently unreliable."

<sup>14</sup> *Polymer Dynamics, Inc. v. Bayer Corporation*, No. Civ.A 99-4040, E.D. Pa. May 4, 2005, citing *United States v. Viglia*, 549 F. 2d 335 (5th Cir. 1977), [http://scholar.google.com/scholar\\_case?case=11194204515729943111](http://scholar.google.com/scholar_case?case=11194204515729943111).

<sup>15</sup> *Id.*

<sup>16</sup> *Arista Records LLC v. Lime Group LLC*, Dist. Court, SD New York 2011, [http://scholar.google.com/scholar\\_case?case=1911436475927288544](http://scholar.google.com/scholar_case?case=1911436475927288544).

<sup>17</sup> *Baisden v. I'm RReady Productions, Inc.*, Dist. Court, SD Texas 2010, [http://scholar.google.com/scholar\\_case?case=4263546244486329101](http://scholar.google.com/scholar_case?case=4263546244486329101)

<sup>18</sup> *United States v. Mazferrer*, 367 F. Supp. 1365, 1373 (S.D. Fla. 2005) (expert opinion improper where "it offers nothing more than [the] factual and legal conclusions" of the parties or their lawyers); *Highland Capital Mgmt. v. Schneider*, 379 F. Supp.2d 461, 468 (S.D.N.Y. 2005) (expert testimony is inadmissible where it addresses lay matters the jury is capable of understanding itself); *De Jager Const., Inc. v. Schleininger*, 938 F. Supp. 446 - Dist. Court (W.D. Mich. 1996) ("an expert cannot opine on the ultimate liability of defendants even though an expert may, under some circumstances, give the jury all of the information from which it can draw inferences as to the ultimate issue."), [http://scholar.google.com/scholar\\_case?case=13373010864157869497](http://scholar.google.com/scholar_case?case=13373010864157869497)

<sup>19</sup> Memorandum Decision And Order Granting In Part And Denying In Part Defendants' Motion To Exclude Expert Testimony" dated January 21, 2010, p.2, accessed at <http://protect.theinfo.org/pacer/ecf.utd/18311624198.pdf>.

<sup>20</sup> See, e.g., *In Re Citric Acid Litig.*, 191 F.3d 1090, 1102 (affirming summary judgment for defendants "[b]ecause there is no evidence in the record establishing" the factual assertion upon which plaintiffs' expert's opinion was founded"), [http://scholar.google.com/scholar\\_case?case=6598341899640642797](http://scholar.google.com/scholar_case?case=6598341899640642797)

<sup>21</sup> <http://www.law.cornell.edu/rules/fre/ACRule702.htm>

<sup>22</sup> See e.g., *Ambrosini v. Labarraque*, 101 F. 3d 129 (D.C. Cir. 1996), [http://scholar.google.com/scholar\\_case?case=17309786861439354369](http://scholar.google.com/scholar_case?case=17309786861439354369), (Potential of some uneliminated causes is a question of weight so long as most obvious causes are reliably considered by expert); see also *Concord Boat Corp. v. Brunswick Corp.*, 207 F. 3d 1039 (8th Cir. 2000), [http://scholar.google.com/scholar\\_case?case=490173074108260855](http://scholar.google.com/scholar_case?case=490173074108260855), ("...expert opinion should not have been admitted...because it did not separate lawful from unlawful conduct.)

<sup>23</sup> *Victory Records, Inc. v. Virgin Records America, Inc.*, Dist. Court, ND Illinois, No. 08 C 3977, February 3, 2011, [http://scholar.google.com/scholar\\_case?case=11952583954607335489](http://scholar.google.com/scholar_case?case=11952583954607335489)

<sup>24</sup> *North v. Precision Airmotive Corporation*, Dist. Court, MD Florida 2010, [http://scholar.google.com/scholar\\_case?case=17067260245420488521](http://scholar.google.com/scholar_case?case=17067260245420488521)

<sup>25</sup> *Brighton Collectibles, Inc. v. Coldwater Creek Inc.*, Dist. Court, SD California 2010, ("[Expert] does not seek to tell the jury what ratio to apply to the lost profits, but how to calculate damages reliably once they have determined the proper ratio based on evidence at trial; in fact, the expert suggests that 'should the judge and/or jury wish to consider lost profits resulting from a lost sales transaction ratio other than a one-to-one ratio, they could simply multiply my calculation of lost profits by an alternative lost sales transaction ratio.'"), [http://scholar.google.com/scholar\\_case?case=5195623210047593718](http://scholar.google.com/scholar_case?case=5195623210047593718)

<sup>26</sup> See, e.g., *Polymer Dynamics v. Bayer Corporation*, supra, ("The assumption that a business will expand is reasonable. The likelihood and extent of that expansion are issues that should be argued to the jury.")

<sup>27</sup> *Euroholdings Capital & Inv. v. Harris Trust & Sav.*, 602 F. Supp. 2d 928 (N.D. Ill. 2009) ("The reports of Plaintiff's expert openly identify reasonable assumptions that support his computations. They also acknowledge any limitations of the data, and set out several alternate scenarios for what profits may have been realized. Ultimately, these reports meet the "reasonable certainty" criteria for lost profits, and should not be excluded on a motion in limine."), [http://scholar.google.com/scholar\\_case?case=17105008606948707248](http://scholar.google.com/scholar_case?case=17105008606948707248)

<sup>28</sup> *US v. Masferrer*, 367 F. Supp. 2d 1365 - Dist. Court, SD Florida 2005, [http://scholar.google.com/scholar\\_case?case=12307690457781328809](http://scholar.google.com/scholar_case?case=12307690457781328809)