"Reasonable Certainty" Remains Uncertain

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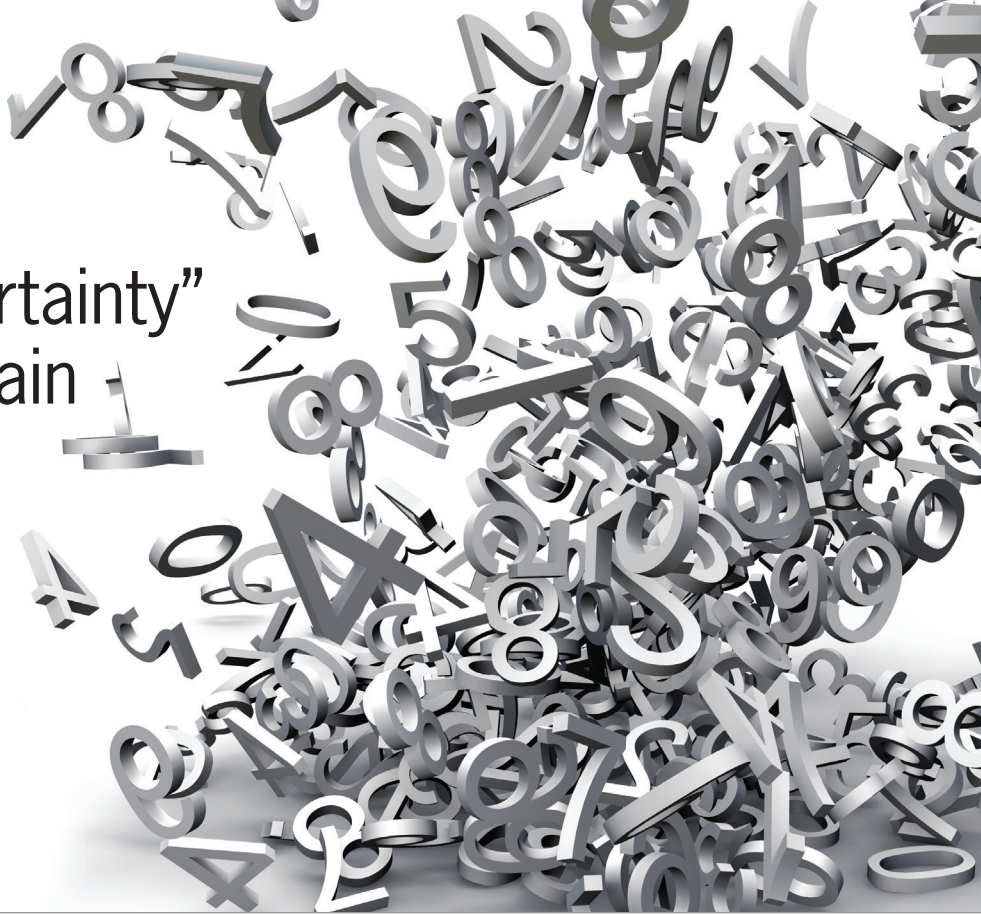

Introduction

Many legal and financial practitioners are facing increasing challenges on whether alleged damages have been proven with *reasonable certainty*. This article explores the theoretical and practical considerations of reasonable certainty.[1]

Achieving reasonable certainty as to the calculation of damages is a critical goal in any matter for which damages are to be proven. If a party cannot demonstrate that their damages calculations are reasonably certain, the court is obligated to exclude the testimony. Without this testimony, even successful proof on liability may lead to an award of no damages. Courts have stated it this way:

> *In order that it may be a recoverable element of damages, the loss of profits must be the natural and proximate, or direct, result of the breach complained of and they must also be capable of ascertainment with reasonable, or sufficient, certainty… absolute certainty is not called for or required.*[2]

Professional literature, court opinions, rules of evidence, and other bodies of knowledge and works of law often use the phrase "reasonable certainty" when discussing damages. However, the *threshold* for reasonable certainty remains ambiguous. It is important to note that this discussion does not define a specific checklist, mathematical formula, or mechanical manner of deducing whether damages opined by the expert is reasonable certainty. No such specific mechanism exists that can be applied to all matters. Indeed, as described herein, "most courts agree that reasonably certainty as to damages is a flexible, inexact concept."[3] Rather, this piece provides a discussion of the factors, elements, and/or characteristics of expert opinions that can generally be considered for any matter to determine the extent to which damages opined on by an expert rise to the level of reasonable certainty.

The article is segmented into several sections. In the first section, we briefly review the Federal Rules of Evidence on the admissibility of expert testimony. We then consider certain sources from professional literature for discussion and commentary on achieving reasonably certain expert opinions as to the calculation of damages. Finally, we review the recent opinion of one notable judge, Judge Richard Posner, in the case of *Apple v. Motorola*. In this opinion, Judge Posner provides his guidance and interpretation on the efforts experts should take to achieve a reasonably certain opinion as to damages, at least as it applies in that case. Taken together, these sections are intended to provide guidance to lawyers and experts toward achieving a reasonably certain result.

[1] Of course, with a topic of this breadth and significance, this piece is not meant to serve as a comprehensive analysis of all relevant aspects of reasonable certainty.
[2] *Morris Concrete, Inc. v. Warrick,* 868 So. 2d 429 (Ala. Civ. App. 2003).
[3] Milikowsky, *A Not Intractable Problem: Reasonable Certainty, Tractebel, and the Problem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market*, Columbia Law Review, Vol. 108, Page 467.

The Federal Rules of Evidence

The *Federal Rules of Evidence (Rule 702)* provide guiding principles meant to hold expert testimony to account. Rule 702 has four components:

1. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue
2. The testimony is based on sufficient facts or data
3. The testimony is the product of reliable principles and methods
4. The expert has reliably applied the principles and methods to the facts of the case[4]

These four criteria provide the general framework for damages experts to consider in developing their opinion. However, whether an expert's opinion actually meets the threshold of reasonable certainty in any particular court or for any particular matter involves a more significant assessment of the efforts undertaken by the expert to determine damages.

Attempts to Define "Reasonably Certain"

In many cases, courts and learned commentators have provided a definition or interpretation of what reasonably certain means in the context of damages calculations. The following is a collection of certain of those interpretations (emphasis added in each):

- "Does the court think that, given all of the circumstances, this plaintiff has presented ***sufficient evidence to make it fair*** to award it the damages in question."[5]
- "Damages for future lost profits must 'be capable of measurement based upon known reliable factors ***without undue speculation***.'"[6]
- "While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is ***speculative and conjectural***."[7]
- "The plaintiff has the burden to present evidence with a tendency to show the probable amount of damages to allow the trier of fact to make 'the most ***intelligible and accurate estimate*** which the nature of the case will permit.'"[8]
- The amount of alleged loss "***could not be speculative, possible or imaginary***, 'but must be reasonably certain.'"[9]
- Lost profits damages should not be "too dependent upon numerous and changing contingencies to constitute ***a definite and trustworthy measure of damages***."[10]
- Lost profits damages should not be based on "too many undetermined variables" and "competent proof" addressing these variables could have removed the "lost profit claim from the ***realm of impermissible speculation***.'"[11]
- "[D]amages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences… Although the law does not command mathematical precision from evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an ***intelligent estimate without conjecture***."[12]
- "[A]nticipated profits may be recovered when '"they are reasonably certain by proof of actual facts, with present data for a ***rational estimate*** of their amount.'"[13]

As noted, attempts to define reasonably certain have considered phrases such as "rational estimate"; "impermissible speculation"; "intelligent estimate"; "imaginary"; and "intelligible and accurate estimate". These phrases demonstrate courts' attempts to better convey expectations and to frame their evaluation of the damages testimony.

In an article for the Business Litigation Section of the Dallas Bar Association in 2011, Hon. Martin "Marty" Lowy noted that "[w]hatever methods are used, the final calculation, as well as all of its elements, should be reasonable. Put another way, the expert, like the jurors, ***should not leave common sense behind***."[14] (Emphasis added.)

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4 Federal Rules of Evidence (As amended Apr. 26, 2011, eff. Dec. 1, 2011).
5 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 6.
6 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 7 (citing *Bykowsky v. Eskanazi*, 2010 N.Y. App. Div. LEXIS 3317 (Apr. 27, 2010).
7 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 26 (citing *Katskee v. Nev. Bob's Golf of Neb., Inc.*, 472 N.W.2d 372, 379 (Neb. 1991).
8 Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 643 (citing *Duane Jones Co. v. Burke*, 306 N.Y. 172, 192, 117 N.E.2d 237, 247–48 (1954) (quoting SUTHERLAND ON DAMAGES § 70 (4th ed. 1916)).
9 Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing *Kenford*, 67 N.Y.2d at 259–60, 493 N.E.2d at 234, 502 N.Y.S.2d at 131.
10 Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing *Witherbee*, 155 N.Y. at 453, 50 N.E. at 60).
11 Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing 155 N.Y. at 405, 624 N.E.2d at 1012, 604 N.Y.S.2d at 917.
12 *Delahanty v. First Penn. BK, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983).
13 *Independent Business Forms, Inc. v. A-m Graphics, Inc.*, 127 F.3d 698 (8TH Cir. 1997).
14 Hon. Martin "Marty" Lowy, *Proving and Defending Lost Profits Damages*, Dallas Bar Association, Business Litigation Section, June 2011, Page 11.

Regarding the courts' varied assessments of "reasonably certain," in 1929, Professor Charles T. McCormick succinctly noted:

> *[A]n examination of a large number of the cases, in which claims for lost profits are asserted, leaves one with a feeling that the vagueness and generality of the principles which are used as standards of judgment in this field are by no means to be regretted. It results in a flexibility in the working of the judicial process in these cases – a free play in the joints of the machine – which enables the judges to give due effect to certain "imponderables" not reducible to exact rule.*[15]

Indeed these quotes from various courts demonstrate the "free play in the joints" described by McCormick. This supports the concept of a "best efforts" doctrine when evaluating the threshold of reasonably certain. However, a comparison of the following three opinions demonstrate the wide latitude courts have used when evaluating whether "best efforts" necessarily results in a reasonably certain result.

- "If the best evidence of damage of which the situation admits is furnished, this is sufficient."[16]
- "Though plaintiff's proof 'not without fault,' it was sufficient because it was the best reasonably obtainable under the circumstances."[17]
- "The quantity of proof is massive and, unquestionably represents business and industry's most advanced and sophisticated method of predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by [the plaintiff] in support of its attempt to establish, with reasonable certainty, loss of prospective profits. Nevertheless, [the claimant's] proof is insufficient to meet the required standard."[18]

A review of the case referred to in the latter quote is instructive. In that matter, the court's concerns appear to rest with the foundation for the analysis of the expert. That is, while the expert may have utilized "business and industry's most advanced and sophisticated method" in the calculation, if the foundation of such analysis is speculative or unreliable, the result may be speculative or unreliable, as well. The court in that case appears to emphasize the importance of the "foundation" of the expert analysis in its determination of whether the result is a reasonably certain measure of the damages in that case.[19] The importance of a "stable foundation" was also noted in *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1976) where the court indicated "the plaintiff must show 'a stable foundation for a reasonable estimate' of damages…."[20]

In November 2010, Robert Lloyd of the University of Tennessee, Knoxville, published *The Reasonable Certainty Requirement in Lost Profits Litigation: What it Really Means*.[21] This research paper provides a comprehensive review of court opinions which considered the reasonable certainty of lost profits damages. In this research paper, Lloyd concludes that there are six factors courts consider "to determine whether a party has proven lost profits with reasonable certainty."[22] Lloyd notes that these factors are:[23]

1. The court's confidence that the estimate is accurate
2. Whether the court is certain that the injured party has suffered at least some damage
3. The degree of blameworthiness or moral fault on the part of the defendant
4. The extent to which the plaintiff has produced the best available evidence of lost profits
5. The amount at stake
6. Where there is an alternative method of compensating the injured party

Several factors listed by Lloyd are seemingly beyond the calculations that are typically prepared by an expert, but may be relevant for counsel's consideration. Lloyd notes that "[i]n most cases, courts deciding whether lost profits have been proven with reasonable certainty consider all or almost all of these factors" but also indicates that "[t]he vast majority of opinions focus on only one or two factors."[24]

This discussion illustrates the challenges that experts face: If the courts provide varied guidance on what is or is not reasonably certain, how is an expert to know whether his or her work is reasonably certain? A common theme in the materials and opinions described is that the expert must develop a foundation for his or her work that is based on reasonable facts and build on that foundation with the expert's best effort using the documents and information reasonably available to them. An expert must then consider what is his or her "best effort." This term, much like reasonable certainty, does not have a standard, clearly articulated definition. In the following section, we review the recent

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15 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 36 (citing Charles T. McCormick, *The Recovery of Damages for Loss of Expected Profits*, 7 N.C. L. Rev. 235, 248 (1929)).

16 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 37 (citing Charles T. McCormick, Handbook on the Law of Damages § 27 at 101 (1935).

17 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 37 (citing *Koehring Co. v. Hyde Const. Co.*, 178 So.2d 838, 853 (Miss. 1965).

18 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 40 (citing 493 N.E.2d at 236).

19 Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 645 (citing Kenford, 67 N.Y.2d at 262, 493 N.E.2d at 336, 502 N.Y.S.2d at 133.

20 *Wathne Imports, Ltd. v. PRL USA, Inc.* (63 A.D.3d 476 (2009), 881 N.Y.S.2d 402)(citing *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1976).

21 Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010.

22 Id. at 6.

23 Id.

24 Id. 6.

decision of Judge Posner in *Apple v. Motorola*. The opinion of Judge Posner provides another, recent, review of one judge's assessment of both "reasonable certainty" and "best effort" as it pertains to damages. The opinion of Posner is not likely shared by all damages practitioners, or all judges, but it does provide a thorough discussion of issues pertinent to this article.

Apple v. Motorola

In *Apple v. Motorola,* Judge Posner took a stern approach in affirming that "any step that renders the analysis unreliable… renders the expert's testimony inadmissible." Posner proposed three "tests of adequacy" that the court should consider when exercising its duty as gatekeeper. Of particular interest are the *reasons the Apple and Motorola experts failed to meet the threshold of reasonable certainty*.

Judge Posner specified three tests to assess the merits of expert testimony:

1. "[w]hether the expert has sufficiently explained **how he derived** his opinion from the evidence that he considered"[25]
2. whether the expert "[e]mploys in the courtroom the same level of **intellectual rigor** that characterizes the practice of an **expert in the relevant field**"[26]
3. "[e]ven where expert testimony is admissible it may be too weak to get the case past summary judgment"[27]

By using these tests, Posner evaluated whether the expert exercised best efforts to develop a:

- sound opinion based on
- an accepted method applied to
- relevant data
- judged against the intellectual rigor of an industry expert.

Test 1:

The first test of the adequacy of proposed expert testimony for Posner is "whether the expert has *sufficiently* explained how he derived his opinion from the evidence that he considered. Any step that renders the analysis unreliable renders the testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." Federal Rule of Evidence 702(d) states that testimony may be admitted if the "expert has reliably applied the principles and methods to the facts of the case."[28] Thus, Posner takes Rule 702(d) one step further. For Posner, a "best effort" at "reasonable certainty" to "reliably apply" principles to the facts of the case no longer appears sufficient.[29]

Sound opinion: The court looks to several key variables to assess whether testimony has achieved reasonable certainty. These variables include sound data, acceptable methodology, and logical opinion. Posner offers an example during his discussion of Expert M's (expert for Motorola) patent valuation. In this instance, Expert M assigned the patent in question 2% of the total portfolio value despite the fact that the actual patent represented only 1% of the total number of patents in that portfolio. Ultimately, Posner concludes that Expert M's testimony would be excluded, because Expert M's declaration does not answer that essential question: How to pick the right non-linear royalty.[30] Posner's criticism indicates his distaste with the unsubstantiated number. It may well be that the patent portfolio consisted of patents of various values (i.e., 100 patents do not necessarily retain 1% each of the total value). Indeed, Expert M may well have had good, qualitative reason to attach a premium to the patent in question. Nevertheless, Expert M's inability to attach this premium to some quantifiable variable rendered it a "gap" in his analysis. Once again, Posner takes a hard line approach in affirming that, "any step that renders the analysis unreliable… renders the expert's testimony inadmissible." This indicates Posner's consideration of a *judicial duty to exclude testimony* where it falls short of this first test. Indeed, this appears consistent with the case of *ATA Airlines v. Federal Express Corporation* wherein Posner stated that, "the evaluation of [expert testimony] may not be easy; the 'principles and methods' used by expert witnesses will often be difficult for a judge to understand. But difficult is not impossible. The judge can require the lawyer who wants to offer the expert's testimony to explain to the judge in plain English what the basis and logic of the testimony are … If a party's own lawyer cannot understand the testimony … the testimony *should* be withheld from the jury."[31] He even proposes that, in particularly complex or technical situations, the court should hire an aid to help the judge gauge the validity of testimony.[32]

Test 2:

The second test states that an expert should "employ in the courtroom the same level of *intellectual rigor* that characterizes the practice of an *expert in the field*." "Sufficiency" and "Reliability," for Posner, seem to be evaluated as a "best effort" analysis

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[25] *Apple, Inc. And NeXt Software Inc., (f/k/a NeXT Computer, Inc.) v. Motorola, Inc. and Motorola Mobility. Inc.*, No 1:11-cv-08540. (E.D. Ill. (May 22, 2012).
[26] *Id.* at 3.
[27] *Id.* at 4.
[28] Federal Rules of Evidence (As amended Apr. 26, 2011, eff. Dec. 1, 2011).
[29] *Apple, Inc. And NeXt Software Inc v. Motorola Inc and Motorola Mobility*, No 1:11-cv-08540, (E.D. Ill. May 22, 2012). Notably, this particular requirement was first suggested in the case of *ATA Airlines, Inc. v. Federal Express Corporation*, No 11-1382,11-1492 (S.D. Ind. December 2011). Here, Judge Posner indicated that the burden for "sufficient explanation" is to be shouldered by the expert, counsel, and judge. He stated, "it is the [Judge's] responsibility, as painful as it may be, to screen expert testimony, however technical; we have suggested aids to the discharge of that responsibility." Posner continued, "[i]f a party's lawyer cannot understand the testimony of the party's own expert, the testimony should be withheld from the jury. Evidence unintelligible to the trier or triers of fact has no place in a trial."
[30] *Apple, Inc. And NeXt Software Inc., (f/k/a NeXT Computer, Inc.) v. Motorola, Inc. and Motorola Mobility. Inc.*, No 1:11-cv-08540, (E.D. Ill.May 22, 2012).
[31] *ATA Airlines, Inc. v Federal Express Corporation.* No 11-1382,11-1492, (S.D. Ind. December 27, 2011).
[32] *Id.* at 27.

defined as the *rigor* that could be expected of an *industry expert*. This standard is a high one, and particularly relevant to the (a) quality of data, (b) the expert's chosen methodology, and (c) the general standards of analysis (for example: did the expert consider alternatives?).

Quality of data and methodology: Judge Posner in *Apple v. Motorola* largely melded these two areas by virtue of the fact that he did not believe that the method for obtaining data was sound. Twice Posner finds Expert A (expert witness for Apple) falls short of "best efforts" when compared against the standard of *intellectual rigor* of the *industry expert*. Posner appears to further Rule 702 by qualifying the word "reliable" and supplanting the metric "intellectual rigor of the expert in the field." The following example serves as an illustration: Posner states, "I am merely asserting that the survey that Motorola did conduct, which did not look for aversion to partial obstruction and so far as I can tell had nothing to do with its pricing, but rather with helping the company to determine which programs and features are particularly important to users, is not the kind of survey that Expert A – *assuming him to be a responsible adviser on marketing or consumer behavior* – would have conducted."[33] The inference, therefore, is that sound financial analysis alone may not be sufficient for admissibility of the financial expert's testimony. Indeed, his burden may be greater; a "best effort" at achieving the "reasonably certain" threshold appears to be judged by Posner against the benchmark of the "intellectual rigor of an industry expert." Second, Posner dismissed Expert A on the grounds that his due diligence was not to the standard of the industry expert. "*Suppose Expert A had been hired by Motorola to advise* on how Motorola might obtain the functionality of the '263 [patent] at lowest cost without infringing on that patent. Obviously, he would not have gone to the patentee for that information! For it would be in the patentee's interest to suggest a method of inventing around that was extremely costly – because the costlier the invent-around, the higher the ceiling on reasonable royalty."[34] Posner's disagreement on the method used to aggregate data for the purposes of the expert's analysis demonstrated to him that the expert fell short of Posner's interpretation of "best efforts" and consequently the threshold of "reasonable certainty." Specifically, he takes issue that the hypothetical "expert in the industry" would not have followed this procedure of market research.

General standards of analysis: On the third point, it appears that a failure to consider alternatives would fall short, at least for Posner, of the "vigorous" standard expected of an industry professional. "This is one fatal defect in Expert A's proposed testimony (referencing the survey criticized), but there is another, and that is a failure to consider alternatives to a 35mm royalty that would enable Motorola to provide the superior gestural control enabled by the relevant claim in the Apple patent. In reference to this situation, Posner once again compares Expert A to the hypothetical industry by creating a hypothetical skit in the text of his judgment. Posner asks his reader to "imagine a conversation between Expert A and Motorola, which I'll pretend *hired Expert A to advise* on how at lowest cost to duplicate the patent's functionality without infringement:"

- Motorola: "What will it cost us to invent around, for that will place a ceiling on the royalty we'll pay Apple.
- Expert A: "Brace yourself: $35 [million] greenbacks."
- Motorola: "That sounds high; where did you get that figure?"
- Expert A: "I asked the engineer who worked for Apple."
- Motorola: "*Dummkopf!* You're fired!"[35]

This dialog serves to illustrate several key points: 1) Posner once again compared Expert A's performance against that of the hypothetical industry expert – in this case, a consultant; 2) A failure to consider alternatives will undermine expert testimony admissibility. Indeed, in Posner's later consideration of a separate Motorola expert, Expert M-2, Posner reinforced this position by excluding her testimony because "Expert M-2 failed to consider the range of plausible alternatives."

Posner seemed to advocate preclusion of expert testimony that falls short of the above thresholds "where an [expert] failed to do so – then his proposed testimony should be barred." Note the definitive nature of his language; he states that testimony "should" be barred, not that it "may" be barred.

Test 3:

Posner's third test – "[e]ven where expert testimony is admissible it may be too weak to get the case past summary judgment" – is less revealing. Simply put, it appears to serve to reaffirm the wide judicial discretion enjoyed by the court in its role as "gatekeeper." Here, Posner cited the case of *Hirsh v. CSX Transportation Inc.*,[36] wherein the court distinguished between the admissibility of evidence and its sufficiency. As circumstances would have it, the court permitted a summary judgment despite the fact that opposition expert testimony was admissible under *Daubert*.[37] In other words, despite a valid expert opinion, the merits of the case may be that the testimony's validity does not compel the court to entertain a trial.

[33] *Apple, Inc. And NeXt Software Inc., (f/k/a NeXT Computer, Inc.) v. Motorola, Inc. and Motorola Mobility. Inc.*, No 1:11-cv-08540, (E.D. Ill. May 22, 2012).
[34] *Id.* at 16,17.
[35] *Id.* at 17.
[36] *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 362 (6th Cir. 2011).
[37] *CSX Transp., Inc. v. United Transp. Union*, 879 F.2d 990, 1004-05 (2d Cir. 1989).

Conclusion

A "reasonably certain" threshold for expert testimony is a function of "best efforts" having regard for the merits of the case. The courts enjoy a wide judicial discretion in determining whether or not the expert's testimony qualifies as a "best" effort and it appears that the courts will look toward several potential variables including, but not limited to: (a) soundness of opinion based upon (b) an acceptable methodology underpinned by (c) relevant data, all of which is to be judged against and, at least according to Posner, (d) the intellectual rigor that could be expected of an industry expert. Finally, where expert testimony falls short of the standard, Judge Posner believes that the trial judge "should" throw out the testimony in question. The word "should" may serve as fertile ground upon which the seeds of a new "duty to exclude" testimony may grow.

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