

# Commentary on *Lost Profits Damages: Principles, Methods, and Applications, Second Edition*

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*The discussions in Insights often describe and illustrate the current thought leadership related to the generally accepted damages measurement methodology. One important consideration with regard to damages analysis thought leadership is the professional literature related to this technical discipline. This Insights discussion describes—and recommends—a new addition to the professional literature with regard to the development of—and the reporting of—damages measurement analyses in commercial litigation.*

## INTRODUCTION

It is a pleasure to provide a very favorable commentary related to the recently published second edition of *Lost Profits Damages: Principles, Methods, and Applications*.

The title of this 800-plus page reference book is as fulsome and as comprehensive as the book itself. Therefore, this commentary will adopt a more summarized title: *Lost Profits Damages*.

The shortened book title should not detract from the fact that *Lost Profits Damages* provides an extremely valuable addition to the professional literature related to the damages measurement analysis discipline.

## EDITORS AND AUTHORS

Published by Valuation Products and Services, *Lost Profits Damages* is edited by Everett P. Harry III and Jeffrey H. Kinrich.

Everett Harry was the senior partner of the Harry-Torchiana LLP firm. Mr. Harry has over 40 years of experience in forensic accounting and damages analysis related to commercial disputes.

Jeffrey Kinrich is a managing principal of Analysis Group, an economic and financial consulting firm.

Mr. Kinrich has practiced as both a damages analyst and a valuation analyst for over 40 years.

In addition to editing the book, Harry and Kinrich authored or co-authored several book chapters. All told, 56 authors contributed to this anthology reference book. These 56 authors include academics, forensic accountants, economists, damages analysts, valuation specialists, lawyers, and judges. Twelve of the 56 authors are new to the second edition of *Lost Profits Damages*.

## PURPOSE AND OBJECTIVE

As with every damages analysis, a damages analysis reference book should have a stated purpose and objective. Everett Harry and Jeffrey Kinrich summarize the purpose and objective of *Lost Profits Damages* in the book's preface.

The purpose of this principles reference book is “to provide a single source for discussion of important topics relevant to determination of lost profits damages.”

The objective of this reference principles book—in both its first and its second editions—is to serve as a “reference guide and instructional tool for the analysis of business damages, especially lost profits and lost business value.”

*Lost Profits Damages* accomplishes its stated purpose and objective. The measurement of damages is one component of most commercial disputes. And a damages measurement analysis is a typical component of commercial disputes involving either breach of contract claims or tort claims.

The analysis of lost profits damages is one damages measurement method. Arguably, the analysis of lost profits is the most frequently applied damages measurement method in the quantification of damages related to either breach of contract or tort disputes.

## WHAT THIS REFERENCE BOOK PROVIDES

As indicated by the subtitle, *Lost Profits Damages* presents comprehensive discussions of:

1. damages analysis principles and concepts,
2. damages measurement methods and procedures, and
3. damages analysis applications and illustrative examples.

This book is a forensic practitioner's reference manual. That is, this book is intended to be used as a desk reference by damages analysts from various technical backgrounds and disciplines. This book is also intended as a reference for legal counsel who rely on and work with damages analysts.

While the audience for this reference book is fairly broad (including economists, forensic accountants, valuation analysts, fraud specialists, and other forensic practitioners), the focus of this book is fairly narrow.

Other reference books provide general discussions of the development of—and the reporting of—the generally accepted methods related to the measurement of dispute-related damages. Such generally accepted damages measurement methods include reasonable royalty, cost to cure, and various other measurement methods. There is an important place in the professional literature for these other books.

In contrast, *Lost Profits Damages* fills a very focused niche. *Lost Profits Damages* provides a deep dive specifically into the defined topic of lost profits damages analysis. This principles-level reference book explains everything that the damages analyst practitioner (and legal counsel) need to know about the development—and the reporting—of the lost profits damages measurement method.

## NEW AND IMPROVED EDITION

The second edition of *Lost Profits Damages* includes four completely new chapters. These four new chapters relate to:

1. the use of surveys in damages analysis,
2. the measurement of lost profits related to a development stage business,
3. the impact on the damages award measurement of income tax considerations, and
4. the admission of damages analyst expert testimony.

In addition, the 23 chapters of the *Lost Profits Damages* first edition were revised and updated. Most of these first edition chapters include updated professional literature and legal citations, expanded narrative text, and additional illustrative examples.

## GENERAL OUTLINE OF THE BOOK

In addition to the four new chapters, *Lost Profits Damages* includes discussions of the following damages analysis topics:

- Fundamental principles of lost profits damages analysis
- Legal principles of lost profits damages measurement
- Generally accepted lost profits damages measurement methods
- Ex post damages measurement analyses versus ex ante damages measurement analyses
- Generally accepted business valuation approaches and methods
- Comparison of lost profits damages analysis to lost business value damages analysis
- Damages causation considerations
- Economic and industry analysis within the damages measurement
- Application of statistics in damages analysis
- Development of the damaged party revenue projection
- Analysis of damaged party cost behavior
- Damages mitigation considerations
- Cash flow metrics versus accounting income metrics
- Identification of the damages measurement period
- Present value procedures and damages modeling

- Discount rate measurement methods
- Pretax and after-tax damages analysis considerations
- Prejudgment and post-judgment interest calculations
- Developing the damages expert report
- The admission of the damages expert testimony
- Legal challenges to the damages analyst's expert testimony

## HOW FORENSIC PRACTITIONERS CAN USE THIS REFERENCE BOOK

*Lost Profits Damages* is an authoritative reference source for forensic analysts. Most readers will start with the table of contents and/or the comprehensive index. That is, most forensic practitioners will come to this book with some form of the question "how do I . . . ?" Fortunately, for such forensic practitioners, this book will provide the answer.

Frequently, *Lost Profits Damages* answers the practitioner's questions in several different chapters, written by several different authors—who provide several different perspectives.

## WHAT MAKES THIS BOOK PARTICULARLY USEFUL

While this reference book is directed primarily to damages analysts instead of to legal counsel, several chapters are authored by legal counsel and/or by judicial finders of fact.

These chapters provide important legal guidance (including citations to relevant statutory authority and judicial precedent) to damages analysts. However, these chapters are written to the benefit of damages analysts and, to the extent possible, avoid technical legal jargon.

Related to legal issues, there are important discussions of causation, liability, mitigation, and other concepts that directly or indirectly affect the development of a damages measurement. And there are several important discussions with regard to the admissibility of damages-related expert reports and damages analyst expert testimony.

As would be expected in this damages analysis principles-level book, most of the *Lost Profits Damages* discussions relate to economics, statistical, finance, and accounting topics. Important discussions include industry and economic analysis, competitive analysis and the development of the damaged party revenue projections, various mea-

sures of accounting income, damages measurement methodology, and business valuation methodology.

*Lost Profits Damages* includes important discussions on the many differences between (1) a damages analysis and (2) a valuation analysis. These many differences are both conceptual and practical in nature. And, these differences affect both the development of—and the reporting of—the subject analysis.

As a consideration in any third edition that may be forthcoming, *Lost Profits Damages* may provide a little too much emphasis on business valuation reports and business valuation professional standards. This comment is only relevant from a comparative perspective.

That is, there could be a more balanced discussion of damages analysis (and not business valuation) professional standards. For example, the AICPA *Statement on Standards for Valuation Services* (and various other valuation professional standards) are extensively explored. In contrast, the AICPA *Statement on Standards for Forensic Services* is not explored.

Certainly, such minor omissions can be addressed in future editions of this reference book.

## SUMMARY AND CONCLUSION

In conclusion, every economist, forensic accountant, valuation analyst, or fraud specialist who practices in the damages analysis discipline should have—and should use—*Lost Profits Damages*.

As did the first edition, the second edition of *Lost Profits Damages* functions as a forensic practitioner's desk reference. In addition, commercial litigation counsel and judicial finders of fact will benefit from adding *Lost Profits Damages* to their libraries. The legal community will use this reference book as a benchmark by which to evaluate damages measurement expert reports and damages analyst expert testimony.

The stated purpose and objective of *Lost Profits Damages* were mentioned above. If forensic practitioners want to achieve the stated purpose and objective of their damages measurement analyses, then they should keep a well-used copy of *Lost Profits Damages* close at hand.

*Lost Profits Damages* is published by Valuation Products and Services, and this book may be ordered at [www.valuationproducts.com/lost-profits](http://www.valuationproducts.com/lost-profits).

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