Damages for Lost Future Profits in Franchise Disputes—Overcoming the New Business Rule and Establishing Reasonable Certainty

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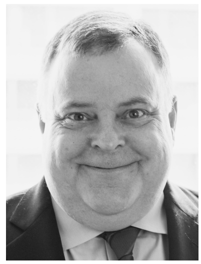

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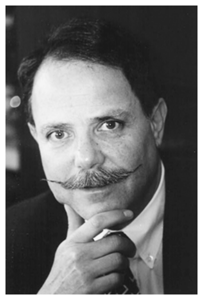

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Claims to recover lost profits can be among the most substantial damages claims asserted in commercial litigation. In franchising, lost profits claims are often asserted by either franchisors or franchisees when a franchise is terminated before the expiration of its term. And increasingly, lost profits claims are gaining traction in cases where the desired franchises never opened for business.

In both situations, the general rule is that damages must be proven to a reasonable degree of certainty—but the reasonable certainty standard is often misunderstood.[1] And, in cases where lost profits are claimed for an intended franchise that never opens, the defense is almost certain to argue that the claim is barred by the common law "new business rule."

This article reviews the applicable standards for recovering lost profits for both established and new or never-opened franchises in cases where the substantive right to seek the recovery of lost future profits is otherwise established as a matter of contract, tort, or statutory law. The authors conclude that the prevailing "reasonable certainty" standard should be consistently applied whenever lost profits are claimed, no matter how new the business, with different outcomes being attributable to differences in proof. In addition, the authors urge the conclusion that "reasonable certainty" is established by a preponderance of the evidence and nothing more.

1. For an excellent analysis going beyond the scope of this Article, *see* Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 Tenn. J. Bus. L. 11 (2010).

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I. The Reasonable Certainty Standard

"Broadly speaking, all American jurisdictions require that the party seeking recovery of lost profits must establish those lost profits 'with reasonable certainty.'"[2] The reasonable certainty standard as it evolved at common law was intentionally flexible by design. In colorful language, a leading evidence commentator once described it as "*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*."[3]

In practice, the reasonable certainty standard usually means that to recover lost profits, the plaintiff must present proof "sufficient to bring the issue outside the realm of conjecture, speculation or opinion unfounded on definite facts,"[4] and the financial information contained in the record must be such that a just or reasonable estimate can be drawn.[5] The plaintiff has the burden of proof and to sustain it, it must show with reasonable certainty the amount of damages and the cause from which they resulted.

However, the task of proving damages to a reasonable degree of certainty is not necessarily as daunting as it sounds. As the Seventh Circuit has explained, "the epithet 'certainty' is overstrong, and that the standard is a qualified one, of 'reasonable certainty' merely, or, in other words, of 'probability.'"[6] Rather, "reasonable certainty means by preponderance of the evidence as in other civil contexts."[7] For lawyers representing plaintiffs, this is an important point that should be emphasized at all stages of the case, such as in the briefing of summary judgment motions, since more than one savvy defense lawyer has been heard to suggest that "reasonable certainty" requires some unspecified level of proof that would approach "beyond a reasonable doubt."

Furthermore, and also an important point for plaintiffs seeking to get their lost profits claim over a summary judgment or directed verdict hurdle, there is authority holding that:

> The [reasonable certainty] rule applies only to the fact of damages, not to the amount of damages. Proof of the fact of damages in a lost profits case means proof that there would have been some profits. If plaintiff's proof leaves uncertain

2. H.B. Williamson Co. v. Ill-Eagle Enters., 2015 U.S. Dist. LEXIS 22603, at *14–15 (S.D. Ill. Feb. 25, 2015).

3. Charles T. McCormick, *The Recovery of Damages for Loss of Expected Profits*, 7 N.C. L. Rev. 235 (1929) (emphasis added).

4. Fireside Marshmallow Co. v. Frank Quinlan Constr. Co., 213 F.2d 16, 18 (8th Cir. 1954); *see also* 22 Am. Jur. 2d *Damages* § 171.

5. Rich v. Eastman Kodak Co., 583 F.2d 435, 437 (8th Cir. 1978) (per curiam); Twentieth Century–Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 855 (8th Cir. 1952); *see also* Sun Blinds, Inc. v. S.A. Recasens, Bus. Franchise Guide (CCH) ¶ 12,913 (1st Cir. 2004) (recovery under the Puerto Rico Dealers' Contracts Act required proof of specific damages for a contractual impairment and did not permit "indirect" proof of damages).

6. TAS Distrib. Co. v. Cummins Engine Co., 491 F.3d 625, 634 (7th Cir. 2007).

7. Mac Sales v. E.I. du Pont de Nemours & Co., 1996 U.S. Dist. LEXIS 3199, at *14 (E.D. La. Mar. 8, 1996).

> whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty (*perhaps none at all*) is required in proof of the amount of damages.[8]

In a very recent case, *Wilbern v. Culver Franchising System, Inc.*,[9] a federal district judge held on June 7, 2016, that the preponderance of evidence standard applies to the entire issue of whether lost profits may be recovered, including the first level inquiry of whether any lost profits injury was sustained and the second level determination of the amount of the damages. The court's oral ruling has been transcribed and is included as an appendix to this article.[10] However, it must be mentioned that at the conclusion of trial, the jury found the defendant not guilty and, therefore, no lost profits were awarded.

II. Lost Future Profits Arising from Established Franchises

Where a franchisor wrongfully terminates or otherwise injures an established franchise, the recovery of lost profits by the franchisee is obviously far more likely where the franchise has been profitable as opposed to unprofitable, all other evidentiary factors being equal. Consistent with the Restatement (Second) of Contracts, where the franchise has been profitable, the loss of future profits is likely to be reasonably certain.[11] If the franchise did not have a track record of profits, the franchisee/plaintiff's task is all the more daunting because the plaintiff will have to show that "but for" some actionable misconduct by the franchisor (or another defendant, if applicable) that it was "reasonably certain" that the franchise would have been profitable before it was terminated.

Curiously, many franchisors appear to believe that the same logic and the same "reasonable certainty" requirement does not apply when the shoe is on the other foot. In cases where a franchisor seeks to recover lost profits in the nature of lost future royalties from a franchisee that abandoned the franchise before the expiration of the term, the franchisor often argues that the franchisee's lack of profitability (if that is the case) is irrelevant because the franchisor's revenue comes from gross sales or the top line.

Faced with such arguments, franchisees may fight back by invoking the now familiar *Daubert* standards for the admissibility of expert opinion testimony, which generally include the requirement that an expert consider the "known and potential error rates" that would undermine the "certainty" of

8. Mid-Am. Tablewares v. Mogi Trading Co., 100 F.3d 1353, 1365 (7th Cir. 1996) (emphasis added).

9. Case No. 13-C-3269 (N.D. Ill. June 7, 2016), *available at* https://scholar.google.com/scholar_case?case=5274351533043176760&q=Wilbern+v.+Culver+Franchising+System,+Inc.&hl=en&as_sdt=400006&as_vis=1.

10. Co-author Carmen Caruso represented the plaintiffs in this case, and substantial portions of this article were adapted from briefs filed by the plaintiffs in this case.

11. *See* Restatement (Second) of Contracts § 352, cmt. b.

the expert's opinions.[12] Where a franchise is not profitable, the likelihood that it can survive to generate royalties for a full term is obviously going to be much lower than if it were profitable for the franchisee; therefore, any expert opinion as to the franchisor's lost future revenue stream should arguably be required to take the "going out of business" risk into account. This argument is perhaps better made by the franchisee in the first instance as a *Daubert* challenge, as opposed to moving for summary judgment against the franchisor's lost profits claim in its entirety as a matter of substantive law (i.e., arguing that as a matter of law the franchisor cannot meet the reasonable certainty standard).

Of course, many franchisors might wish to argue that their franchise agreements require the payment of lost future royalties (or liquidated damages), even in cases where the franchisee has gone out of business; the success of such an argument will likely depend, in the first instance, on the applicable contract language. In essence, a franchisor making such an argument is contending that the franchisee *guaranteed* the franchisor's profit, something that few franchisees would consciously do.

III. Lost Future Profits Arising from New or Unopened Franchises

In deciding whether lost profits have been proven with reasonable certainty, courts often distinguish between established businesses and "new businesses" because new businesses must generally meet a higher evidentiary burden.[13] For many years, the common law "new business rule" stood as a formidable barrier to the recovery of lost profits by any business that did not have a track record of profits. At its peak, the new business rule approached per se status in many jurisdictions, meaning that a business without a track record of profits was categorically barred from recovering lost future profits, which were deemed too speculative as a matter of law "for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty."[14]

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12. In *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Supreme Court directed trial courts to consider at least four factors when making the threshold determination of whether to admit expert testimony: (1) whether the theory or technique can be tested, (2) whether the expert's work has been subjected to peer review, (3) whether the rate of error is acceptable, and (4) whether the method utilized enjoys widespread acceptance. The second case in the *Daubert* trilogy is *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), which stands for two propositions: (1) the "gatekeeper" function allows the court itself to investigate the expert's reasoning process as well as the expert's general methodology, and (2) the standard of review of such a trial court's decision is only to be for "abuse of discretion." *See, e.g.*, Dollar Rent A Car Sys., Inc. v. P.R.P. Enters., Inc., Bus. Franchise Guide (CCH) ¶ 13,676 (10th Cir. Aug. 2, 2007). In the third case of the trilogy, *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Court rejected the argument that *Daubert* applied only to "scientific" testimony, holding that the *Daubert* test applies to all expert witnesses.

13. Travellers Int'l v. Trans World Airlines, 41 F.3d 1570, 1579 (2d Cir. 1994).

14. Kenford v. Cty. of Erie, 493 N.E.2d 234 (N.Y. 1986).

However, cracks began to appear in the new business rule over the years. Some courts, for example, held that instead of being an absolute bar, the rule is simply an evidentiary rule that requires a higher level of proof to achieve reasonable certainty as to the amount of damages.[15] Courts taking this view hold that although a new business is not categorically precluded from claiming lost profits, the evidence presented must remove the claimed profits from the "realm of speculation" and must be certain enough to support such an award. The inherent problem is that a new business lacks any established income stream or historical performance against which to compare its claims.

IV. The New Business Rule—National Trends

Although it was once held in high esteem, the majority of states now expressly reject the idea that the new business rule is a per se automatic exclusion of any claim for "lost profits" by a "new business." The rejection has sometimes been by statute[16] and sometimes by case law,[17] but in any event, the vast majority of jurisdictions have rejected it as a per se rule of exclusion and instead allow lost profits when they can be proved with reasonable certainty.[18] The majority approach conforms to Restatement (Second) of Contracts (1981) § 352 comment b, which provides in part that:

15. TVT Records v. Island DEF JAM, 279 F. Supp. 2d 366, 388 (S.D.N.Y. 2003).

16. *See e.g.* VA. CODE ANN. § 8.01-221.1 ("Damages for lost profits of a new or unestablished business may be recoverable upon proper proof. A party shall not be deemed to have failed to prove lost profits because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation.").

17. *See, e.g.*, Olivetti Corp. v. Ames Bus. Sys., Inc., 356 S.E.2d 578 (N.C. 1987) (holding that "the 'new business rule,' which precludes an award of damages for lost future profits where the allegedly damaged party has no recent record of profitability, is not the law in North Carolina. There should be no per se rule against the award of damages for lost future profits where they are shown with the requisite degree of certainty."); *accord* Iron Steamer, Ltd. v. Trinity Rest., 431 S.E.2d 767 (N.C. Ct. App. 1993) (recognizing the rejection of the new business rule); BMK Corp. v. Clayton Corp., 226 S.W.3d 179 (Mo. Ct. App. 2007) (rejecting the new business rule as an absolute).

18. *See, e.g.*, Int'l Telepassport Corp. v. USFI, Inc., 89 F.3d 82, 86 (2d Cir. 1996) (under New York law, new business rule does not per se preclude lost profits); Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 681 (3d Cir. 1991) (under Pennsylvania law, new business can prove lost profits with reasonable certainty); Super Valu Stores, Inc. v. Peterson, 506 So. 2d 317, 327 (Ala. 1987) (anticipated profits of new business recoverable if proved with reasonable certainty); Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 267 (Minn. 1980) (new business rule no longer law); McNamara v. Wilmington Mall Realty Corp, 466 S.E.2d 324, 330 (N.C. Ct. App. 1996) (refused to adopt new business rule); Welch v. U.S. Bancorp Realty & Mortgage Trust, 596 P.2d 947, 964 (Or. 1979) (reasonable certainty standard applies to new business lost profits); Smith Dev. Corp. v. Bilow Enters., Inc., 308 A.2d 477, 482–83 (1973) ("reasonable certainty" rule, not per se, new business rule applies); Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc., 371 S.E.2d 532, 534 (S.C. 1988) (new business rule not automatic bar); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of N. Am., 955 S.W.2d 120, 132 (Tex. App. 1997) (Texas case law in line with vast majority of jurisdictions in rejecting new business rule as per se exclusion); Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 20 S.W.3d 692 (Tex. 2000).

> [i]f the breach prevents the injured party from carrying on a well-established business, the resulting loss of profits can often be proved with sufficient certainty. Evidence of past performance will form the basis for a reasonable prediction as to the future. . . . However, if the business is a new one or if it is a speculative one that is subject to great fluctuations in volume, costs or prices, proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.

A series of decisions by the Seventh Circuit exemplifies the national trend in this area, recognizing that difficulty in establishing lost profits when a business is strangled in its cradle does not mean the new business rule bars recovery of lost profits regardless of the evidence. In 1996, the Seventh Circuit surveyed national case law and observed that:

> [W]hat was once a generally accepted rule precluding lost profits damages for a new business has become the minority view and "the development of the law has been to find damages for lost profits of an unestablished business recoverable when they can be adequately proved with reasonable certainty." . . . [T]here is no basis for concluding that MidAmerica is precluded from recovering lost future profits as a matter of law merely because it is a new or unestablished business.[19]

Thereafter, in *MindGames, Inc. v. Western Publishing Co.*, the Seventh Circuit held that the new business rule has been "widely regarded as [a] failed" attempt to control damages and confirmed that the new business rule has lost its aura of being a per se bar to these claims.[20] And in *Smart Marketing Group, Inc. v. Publications International Ltd.*, the Seventh Circuit held that new businesses "are entitled to try" to recover lost profits although, like any plaintiff, they must present "hard evidence" in support.[21] In *Smart Marketing*, the court cited to an Illinois Supreme Court decision, *Tri-G, Inc. v. Burke, Bosselman & Weaver*, where the *Tri-G* court held that "a recovery may be had for prospective profits when there are *any* criteria by which the probable profits may be estimated with reasonable certainty" and that "[t]here is no inviolate rule that a new business can never prove lost profits. Rather, in some cases, courts have found that the rule that a new business's profits are too speculative did not fit the circumstances before them."[22]

Finally, in *Parvati Corp. v. City of Oak Forest*, the Seventh Circuit analyzed what it referred to as the now "discredited" new business rule, finding that while "the rule is based on the correct observation that it is more difficult to establish loss objectively when a business is strangled in its cradle . . . it doesn't make sense to build on this insight a flat prohibition," but rather courts should apply "the general standards governing proof of damages,

19. Mid-Am. Tablewares v. Mogi Trading Co., 100 F.3d 1353, 1365 (7th Cir. 1996).
20. 218 F.3d 652, 657 (7th Cir. 2000).
21. 624 F.3d 824, 829 (7th Cir. 2010).
22. 856 N.E.2d 389, 407 (Ill. 2006) (emphasis in original); *see also* Apa v. Nat'l Bank of Commerce, 872 N.E.2d 490, 493 (Ill. App. Ct. 2007) (also holding that "[l]ost profits may be recovered when there are *any* criteria by which the probable profits may be estimated with reasonable certainty").

which requires a plaintiff to make a reasonable estimate of its damages as distinct from relying on hope and a guess."[23]

V. Successful Franchising Overcomes New Business Rule Concerns

Courts across the country have recognized that successful franchising may supply sufficient evidence to achieve reasonable certainty with respect to lost profits claims in cases that might previously have been subject to the common law new business rule. As stated by the U.S. District Court for the Northern District of Illinois, "[c]ourts are willing to entertain lost profit calculations based upon historical data from franchise operations, even when those calculations also included the business owner's assumptions, and sometimes, when the business had not yet begun operation."[24]

This is true because a franchise agreement is a "conveyance of the franchisor's good will to the franchisee for the length of the franchise."[25] As a leading treatise on damages law has observed, a business that opens its doors enjoying substantial goodwill, i.e., a franchise in a proven brand, is not a new business:

> The supposed rule that lost profit damages of an unestablished business were not recoverable would seem to be least justifiable when the business to be established is a location for a national franchise. Each store is cast from the same mold. The locations are rigidly controlled by the national franchisor. Projections are readily available based on extensive experience in other stores from which sales and profits can be derived with a high degree of certainty. These projections are the basis for the franchisor's selection of the new location and the franchisee's investment in it. If the figures are good enough for the parties to invest their money, it would seem that they should be good enough for the court.[26]

This position is based on the theory that one franchise unit is a "yardstick" for anticipating results at a new unit to be opened in the same system. It is also articulated in *Pauline's Chicken Villa, Inc. v. KFC Corp.*, where the Kentucky Supreme Court similarly allowed a KFC franchisee to recover lost profits for units that were never built.[27] These courts were persuaded by consumer acceptance of the brand[28] and related factors, such as "national [or regional] advertising, uniform quality control, earnings and expense figures on nearby and comparable locations, and an available history concerning success and failure ratios."[29]

23. 709 F.3d 678, 685 (7th Cir. 2012).
24. FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc., 2007 U.S. Dist. LEXIS 19517, at *31 (N.D. Ill. Mar. 20, 2007).
25. Quizno's Corp. v. Kampendahl, 2002 U.S. Dist. LEXIS 9124, at *15 (N.D. Ill. May 20, 2002).
26. Dunn on Damages § 4.7 (2005) ("Recovery of Lost Profits of an Unestablished Business") (citing Smith Dev. Corp. v. Bilow Enters., 308 A.2d 477, 483 (R.I. 1973) (allowing a McDonald's franchisee who was blocked from opening his unit to recover lost profits).
27. 701 S.W.2d 399, 401–02 (Ky. 1985).
28. *Smith*, 308 A.2d at 483.
29. *Pauline's Chicken Villa*, 701 S.W.2d at 401–02.

In *Super Valu Stores, Inc. v. Peterson*, the Alabama Supreme Court reversed a summary judgment for a defendant based on the new business rule, finding that a nationwide franchise system provided sufficient data to support the recovery of lost profits and expressly holding that it would be inequitable to deny the franchisee lost profits where the franchisee produced "the best evidence available" and it was sufficient to afford a reasonable basis for estimating the claimed losses.[30]

These franchising cases are not outliers. The authors are unable to find any reported opinions in which a plaintiff seeking to recover lost profits for unbuilt units in a successful franchise system was categorically denied on the basis of the common law new business rule. An opinion from the U.S. District Court for the Northern District of Illinois in *Otis v. Doctor's Associates, Inc.* appears to be the proverbial exception that proves the rule.[31] The court in *Otis* rejected a lost profits claim based on franchised restaurant outlets that were never built, but critically, those unbuilt units would have been part of what the court described as a "*failed fast food franchise* known as Cajun Joe's Chicken."[32] The *Otis* decision denying the lost profits claim harmonizes with the other cases in which lost profits for unbuilt franchise units were awarded. The critical dispositive factor appears to be, and we submit ought to be, whether the performance of the brand, as a whole, provides sufficient data to overcome new business concerns. The brand as a whole, not the particular units that were never built, is the alleged new business being evaluated.

VI. Toward a Federal Common Law on Lost Future Profit Claims in "New Franchise" Cases

A recent U.S. District Court for the Northern District of Illinois opinion has upheld "franchising exception" to the new business rule in the context

30. 506 So. 2d 317, 330 (Ala. 1987) (cited with approval by the Seventh Circuit in Mid-Am. Tablewares v. Mogi Trading Co., 100 F.3d 1353, 1365 (7th Cir. 1996)).

31. 1998 U.S. Dist. LEXIS 15414 (N.D. Ill. Sept. 10, 1998).

32. *Id.* at *1 (emphasis added). The district court held: "However, Illinois law also enforces the 'New Business Rule' which precludes a plaintiff from recovering lost profits in some circumstances. Under Illinois law, a new business generally has no right to recover lost profits." *Id.* (citing Stuart Park Assocs. Ltd. P'ship v. Ameritech Pension Trust, 51 F.3d 1319, 1328 (7th Cir. 1995)). Rather, "this element of damages is recoverable only if the business was previously established." *Otis*, 1998 U.S. Dist. LEXIS 15414 (citing Hill v. Brown, 520 N.E.2d 1038, 1043 (Ill. App. Ct. 1988)). Moreover, proffered evidence demonstrating lost profits must provide "'a reasonable basis for the computation of damages' and cannot be 'conjecture or sheer speculation.'" Real Estate Value Co. v. USAIR, Inc., 979 F. Supp. 731, 741 (N.D. Ill. 1997) (quoting Midland Hotel Corp. v. Reuben H. Donnelley Corp., 515 N.E.2d 61, 66 (Ill. 1987)). In assessing the *Otis* opinion, the authors believe that the district court in that case simply did not have occasion to consider the status of the new business rule in Illinois because the plaintiff seeking to recover lost profits for unbuilt units in a "failed franchise system" simply did not get to "first base," thus mooting the need for any deeper analysis. *Otis*, 1998 U.S. Dist. LEXIS 15414, at *1. *Otis* was decided several years before the Illinois Supreme Court decision in *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 856 N.E.2d 389, 407 (Ill. 2006), discussed above, which appears to align Illinois with the modern trend for allowing the possible recovery of lost future profits in any case where there is sufficient proof.

of a federal civil rights claim. In *Wilbern v. Culver Franchising System, Inc.*, which is mentioned above, an African American franchisee contended that he was denied the opportunity to open as many as three Culver's restaurants in predominantly African American neighborhoods in Chicago in alleged violation of a federal civil rights law, 42 U.S.C. § 1981; he sought to recover lost profits for the unbuilt restaurants.[33] The defendant moved for summary judgment under Federal Rule of Civil Procedure 56, arguing that the lost profits claims were too speculative to meet the reasonable certainty standard and also pointing out that Illinois law has historically frowned upon the recovery of lost profits by new businesses except in certain very narrowly defined exceptional situations.[34] The defendant also filed a related *Daubert* challenge to the opinions of plaintiffs' expert setting forth the plaintiffs' lost profits claims.

As a threshold response to the defense motions, the plaintiffs pointed out that damages in federal civil rights cases are determined as a matter of federal common law;[35] and that federal courts have historically recognized the need for uniformity in the interpretation of the federal civil rights laws.[36] The district court agreed, and thus the analysis of the lost profits claims in *Wilbern* is a matter of federal common law.

Citing to *FMS, Inc. v. Volvo Construction Equipment North America, Inc.*,[37] *America's Favorite Chicken Co. v. Samaras*,[38] *No Ka Oi Corp. v. National 60 Minute Tune, Inc.*,[39] *Pauline's Chicken Villa, Inc. v. KFC Corp.*,[40] and *Smith Development Corp. v. Bilow Enterprises, Inc.*,[41] the district court held at the summary judgment stage that, in the franchise context, historical data as to the performance of similar franchised units is a permissible "yardstick" for measuring losses sustained by the potential franchisee that was prevented from going into the franchise business by the wrongful conduct of the defendant.[42] The court found two factors to be persuasive: the overall success of the franchise brand and its national character.[43] In particular, because the "the nationwide character of the franchise business at issue provide[s] an ample basis

33. Wilbern v. Culver Franchising Sys., Inc., 2015 U.S. Dist. LEXIS 130888 (N.D. Ill. Sept. 29, 2015).

34. Illinois courts provided for exceptions to the new business rule: (1) where the business would sell a product indistinct from an existing product with a known market, (2) where the new business was prevented from acquiring the operations of an existing business, or (3) where the new business lost profits to the defendant and the defendant's profits were quantifiable. Milex Prods., Inc. v. Alra Lab., 603 N.E.2d 1226, 1237 (Ill. App. Ct. 1992); Malatesta v. Leichter, 542 N.E.2d 768, 781–82 (Ill. App. Ct. 1989); Jamsports & Entm't, LLC v. Paradama Prods., Inc., 336 F. Supp. 2d 824, 849 (N.D. Ill. 2004).

35. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969).

36. *See* Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965).

37. 2007 U.S. Dist. LEXIS 19517 (N.D. Ill. Mar. 20, 2007).

38. 929 S.W.3d 617 (Tex. App. 1996).

39. 863 P.2d 79, 83 (Wash. Ct. App. 1993).

40. 701 S.W.2d 399 (Ky. 1985).

41. 308 A.2d 477 (R.I. 1973).

42. Wilbern v. Culver Franchising Sys., Inc., 2015 U.S. Dist. LEXIS 130888, at *105 (N.D. Ill. Sept. 29, 2015) (citing *Volvo*, 2007 U.S. Dist. LEXIS 19517 (N.D. Ill. Mar. 20, 2007)).

43. *Id.* at *105–06.

for computation of probable losses"[44] and because "a national franchisor, with uniformity of national advertising, uniform quality control, earnings, and expense figures on nearby and comparable locations, and an available history concerning success and failure ratios" can provide adequate yardsticks for calculating lost profits.[45] Despite the plaintiffs' loss at trial, the case provides viable precedent for future franchisees seeking to recover lost profits on units *in successful brands* that were never built.

To be sure, most franchising disputes are adjudicated under state law as claims for breach of contract, common law fraud, or under state franchise acts or Little FTC acts. Nonetheless, the opinion in *Wilbern* is likely to be cited as persuasive authority in future cases, whether state or federal law is controlling.

VII. Challenges in Proof

Defendants faced with lost future profit claims that now may be more likely to survive a new business rule challenge are not left without arguments in their arsenals. As a first line of defense, a defendant may challenge the contention that the unbuilt franchise (or any other unopened business) would have ever opened its doors to the public absent the defendant's alleged wrongful conduct. However, defendants relying on this approach should be aware of two reported decisions in which the courts appeared to be very lenient in accepting the plaintiffs' claims that they would have been able to open the desired new franchises but for the defendants' misconduct.

For example, in *America's Favorite Chicken Co.* v. *Samaras*, a Texas appellate court upheld the recovery of lost profits for two "build to suit" Popeye's Chicken units that the franchisor had agreed, but failed, to deliver to the franchisee.[46] Significantly, at the time of the breach of contract in that

44. *Id.* (citing No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc., 863 P.2d 79, 83 (Wash. Ct. App. 1993)).

45. *Id.* at *105–06 (citing Pauline's Chicken Villa, Inc. v. KFC Corp., 701 S.W.2d 399, 401 (Ky. 1985)). An expert estimating lost profits generally has four available approaches:

(1) *Before and after method*: Under the before and after method, the plaintiff's profits are analyzed before the wrongful act, during the loss period, and after the loss period ends, and estimates are made of the amount by which profits were reduced by the wrongful act.

(2) *Sales projection method*: Under the sales projection method, the plaintiff estimates sales and profits during the loss period based on what the results would have been but for the defendant's wrongful act. Projected profits are then compared with actual profits to estimate lost profits.

(3) *Yardstick method*: The yardstick method uses a benchmark (comparable companies) to estimate lost sales, profits, or value for the subject company. The results of the benchmark companies are compared to the subject company and the difference forms the basis for the loss estimate.

(4) *Market share method*: The market share method calculates lost profits based on the market share the company would have attained but for the wrongful act of the other party. This approach is most appropriate for larger companies owning a reasonable market share for their products.

46. 929 S.W.2d 617, 623–24 (Tex. App. 1996) (cited with approval in *Volvo*, 2007 U.S. Dist. LEXIS 19517, at *31).

case, sites for the proposed units had not been identified; there remained substantial open contract terms such as "the amount, duration and repayment terms under the lease agreement;" and it was "not determined whether AFC would finance the build-to-suit restaurants internally or externally."[47] Despite these uncertainties, the court rejected the defendant's "speculation" objections, holding that:

> [T]he contract was about as definite and certain as the parties could have made it under the circumstances, and it was sufficiently definite and certain to furnish a basis for arriving with reasonable certainty at the minimum damages which [Samaras] would suffer by reason of [AFC's] breach even though, to repeat, the locations of the two un-built units had not been determined.[48]

The facts are even more striking in a Washington state court decision, *No Ka Oi Corp. v. National 60 Minute Tune*.[49] There, the plaintiff signed an "area representative agreement" with the franchisor of 60 Minute Tune (an "automobile tune-up and service franchises in the Western United States") giving the plaintiff "the exclusive rights to sell or own up to ten 60 Minute Tune franchises in Hawaii for twenty-five years."[50] In preparation, the plaintiff "made two trips to Hawaii to investigate and develop the Hawaii market for 60 Minute Tune franchises."[51] That was the extent of the progress toward opening these franchises.[52] At the time of the alleged breach of contract, not a single 60 Minute Tune retail shop was open in Hawaii; not a single franchise had been sold; the 60 Minute Tune franchise offering was not yet registered for sale in the State of Hawaii; not a single specific site had been identified for any proposed units; no land had been obtained by lease or purchase; no signed real estate contracts were cited in the opinion; and no firm financing arrangements were in place for any proposed shop.[53] Despite the inherent speculation as to future success, the court affirmed a jury verdict awarding lost profits to the area representative, holding that:

> Proof of the nationwide character of the franchise business at issue provided an ample basis for computation of probable losses. *It has come to be recognized that in the arena of franchise or chain stores, "courts are displaying increasing reluctance to apply the new business rule" because of the inherent characteristics of franchise outlets, which "eliminate nearly all uncertainty."* . . . When the franchisor is a national or regional franchisor with uniform advertising and quality control, and when there is available data on earnings and expenses and on failure and success ratios from similar locations, the franchisee can usually show lost profits with "reasonable certainty.[54]

47. *America's Favorite Chicken Co.*, 929 S.W.2d at 623.
48. *Id.* at 624.
49. 863 P.2d 79 (Wash. Ct. App. 1993).
50. *Id.* at 80.
51. *Id.*
52. *See id.*
53. *See generally id.*
54. *Id.* at 83 (emphasis added) (citations omitted); *see also* Joel R. Buckberg, *When Private Equity Knocks, Will You be Ready to Answer*, 13 LJN's Franchising Bus. & L. Alert 11 (Aug. 2007).

VIII. Two Other Issues: Best Evidence and Intent and Preparedness

A. *Best Evidence*

The result in *No Ka Oi Corp.* is best understood by reference to the common law "wrongdoer rule," which sometimes overlaps with the "best evidence" rule. In a 1931 decision, *Story Parchment Co. v. Patterson Parchment Paper Co.*, the U.S. Supreme Court held: "Where the tort itself is of such a nature as to preclude the ascertainment of damages with reasonable certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts."[55]

Following this logic, the Seventh Circuit in *Mid-America Tablewares* held that:

> "Where the defendant's wrong has caused the difficulty of proof of damages, he cannot complain of the resulting uncertainty" and "If the best evidence of the damage of which the situation admits is furnished, this is sufficient." . . . These principles are commonly invoked by courts allowing recovery of future lost profits by new or unestablished businesses. *See, e.g., Chung v. Kaonohi Center Co.*, 62 Haw. 594, 606, 618 P.2d 283, 291 (1980) (allowing recovery of lost profits by a restaurant that never opened and stating "it would be grossly unfair to deny a plaintiff meaningful recovery for lack of a sufficient 'track record' where the plaintiff has been prevented from establishing such a record by defendant's actions"); *Welch v. United States Bancorp Realty & Mortgage Trust Co.*, 286 Or. 673, 704–05, 596 P.2d 947, 963–64 (1979) (allowing recovery of lost profits by unestablished business and observing that expert testimony as to plaintiff's expected returns was all that could be expected under the circumstances and that to require more "would be tantamount to holding that the defendant could breach this particular contract with impunity"); *Fera v. Village Plaza Inc.*, 396 Mich. 639, 648, 242 N.W.2d 372, 376 (1976) (affirming award of lost profits by store that never opened and noting that precision in the assessment of damages is not required "particularly . . . where it is defendant's own act . . . that has caused the imprecision"); *see also Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 383 (7th Cir. 1986) ("Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer."), *certiorari denied*, 480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574.[56]

The theory discussed above, of not requiring "best evidence" that is unavailable because of the defendant's actions has also gained acceptance in state courts, including, for example, the Illinois Supreme Court, which held in *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, that "[d]efendants should not be permitted to escape liability entirely because the amount of the damage they have caused is uncertain. To do so would be to immunize defendants from the consequences of their wrongful conduct."[57]

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55. 282 U.S. 555, 563 (1931).
56. Mid-Am. Tablewares v. Mogi Trading Co., 100 F.3d 1353, 1365–66 (7th Cir. 1996) (citations in original).
57. 770 N.E.2d 177, 199 (Ill. 2002).

B. *Intent and Preparedness*

Similar law has been developed in a line of market exclusion cases, in which federal courts have allowed antitrust plaintiffs to recover lost profit damages by making a sufficient showing that they were "prepared to enter the market," even though they never actually entered the market or earned a dime in the intended business. In *JamSports & Entertainment, LLC v. Paradama Products*, the U.S. District Court for the Northern District of Illinois held that:

> The fact that JamSports was never able actually to promote a supercross tour does not preclude it from recovering damages. "There would be a big gap in the damage remedies of the antitrust laws if [section 4 of the Clayton Act] were read to prevent the recovery of damages by all would-be entrants." . . . The key problem involves "quantifying lost hopes. While damages for loss of future earnings and profits are familiar items in tort and contract cases, the problem of measurement is greater when the loss occurs in a market that the plaintiff is not yet in." To "balance the interest in deterrence against the concern with measurement," courts, including the Seventh Circuit, have required a plaintiff that has not yet entered the market "to show that it intended to enter and was prepared to do so within a reasonable time as a prerequisite to collecting lost profits for being excluded. . . . As the intent and preparedness requirement is generally interpreted, only a plaintiff who takes demonstrable steps to enter an industry can recover projected lost profits as antitrust damages." The plaintiff's preparedness to enter the market is determined by assessing its ability to finance the business; consummation of the requisite contracts; affirmative action to enter the business; and background and experience in the prospective business.[58]

Of significance, the district court in *JamSports* continued:

> The Court finds no support in the law for a hard-and-fast rule that full financing, signed on the bottom line, must be proven as a prerequisite to recovery of damages for exclusion from a market. . . . As the [Seventh Circuit has] said . . . "the whole purpose of the 'intention and preparedness' test is to allow recovery of damages in cases where the plaintiff has not entered the business in which he is seeking lost profits."[59]

Following the same logic, the district court in *JamSports* also allowed the plaintiff to present its ancillary state law lost profits claims based on tortious interference with prospective economic advantage to the jury, rejecting the common law new business rule objection and recognizing that to deny recovery where the plaintiff presented the best available evidence "*would effectively write such tort claims out of existence*."[60]

Of course, while a plaintiff may try to establish best evidence, intent and preparedness as discussed above, the defendant remains free to introduce evidence that the plaintiff's efforts were feeble or that there were insurmountable obstacles that simply could not have been overcome in any circum-

58. 2004 U.S. Dist. LEXIS 23605, at *11–13 (N.D. Ill. Nov. 22, 2004) (citing Grip-Pak, Inc. v. Ill. Tool Works, Inc., 694 F.2d 466, 475 (7th Cir. 1982)).

59. *Id.*

60. *Id.* at *15–17 (emphasis added) (citations omitted).

stances. For example, the prospective new business might have required third party approval, such as the granting of a license by a governmental entity. In *Gecker v. Flynn (In re Emerald Casino, Inc.)*, the U.S. District Court for the Northern District of Illinois barred an expert from testifying to damages that in substantial part depended on the plaintiff obtaining approval from the Illinois Gaming Board (IGB) for a gaming casino, but where:

> [t]he IGB expressed clear hostility towards a casino in Rosemont throughout Emerald's efforts to sell the license . . . The Trustee cannot show that Emerald lost the opportunity to operate a casino in Rosemont because the Trustee has not shown that but for Defendants' conduct, the IGB would have approved a Rosemont location.[61]

One can argue that if the evidence in the *Emerald Casino* case had been the opposite, i.e., if the plaintiff had been able to show *clear support* for its project by the relevant gaming board, instead of "clear hostility," the lost profits claim would have been allowed to proceed. In other words, there is no hard and fast reason why the outcome of the reasonable certainty analysis cannot anticipate the outcome of a political process such as the granting of a license. The authors submit that decisions in these types of cases must turn on their facts.

IX. Conclusion

The prevailing "reasonable certainty" standard as developed at common law is the correct standard for assessing claims for lost profit damages in every case, regardless of whether the business was established or un-opened at the time of the claimed injury. In other words, the goal posts should not be moved. The once-heralded new business rule is largely discredited and is no longer a per se bar in most jurisdictions. Franchising, in particular, lends itself to the potential recovery of lost profits in cases that would previously have been barred by strict application of the new business rule. In effect, this represents a shift from demanding "before and after" proof of lost profits to accepting "yardstick" proof from the same system. Franchisees or area developers that are thwarted in their efforts to open new units in successful franchise systems are much more likely to succeed in recovering lost profits than in the past. It is important for practitioners to keep in mind that the new business to be analyzed in the franchise context is often the franchisor. Franchisors can no longer rely on the new business rule as a complete shield from these claims in most jurisdictions.

61. 2014 U.S. Dist. LEXIS 139804, at *14–15 (N.D. Ill. Sept. 30, 2014) (citations omitted).

APPENDIX I

New Business Rule Cases

2TH CIRCUIT

1. *TVT Records v. Island Def Jam Music Grp.*, 279 F. Supp. 2d 366 (S.D.N.Y. 2003), *rev'd*, 412 F.3d 82 (2d Cir. 2005).

4TH CIRCUIT

1. *Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC*, 423 F. App'x 274 (4th Cir. Apr. 14, 2011).
2. *Vulcan Chem. Tech., Inc. v. Barker*, 167 F. Supp. 2d 867 (W.D. Va. 2001), *vacated*, 297 F.3d 332 (4th Cir. 2002).
3. *Perry v. Scruggs*, 2001 U.S. App. LEXIS 18553 (4th Cir. 2001).

7TH CIRCUIT

1. *Parvati Corp. v. City of Oak Forest*, 709 F.3d 678 (7th Cir. 2013).
2. *Smart Mktg. Grp. v. Publ'ns Int'l Ltd.*, 624 F.3d 824 (7th Cir. 2010).
3. *Von der Ruhr v. Immtech Int'l, Inc.*, 570 F.3d 858 (7th Cir. 2009).
4. *TAS Distrib. Co. v. Cummins Engine Co.*, 491 F.3d 625 (7th Cir. 2007).
5. *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652 (7th Cir. 2000).

8TH CIRCUIT

1. *Housing 21, L.L.C. v. Atl. Home Builders Co.*, 289 F.3d 1050 (8th Cir. 2002).

9TH CIRCUIT

1. *Humetrix, Inc., v. Gemplus S.C.A.*, 268 F.3d 910 (9th Cir. 2001).

10TH CIRCUIT

1. *Blair-Naughton L.L.C. v. Diner Concepts, Inc.*, 369 F. App'x 895 (10th Cir. 2010).
2. *Specialty Beverages, L.L.C. v. Pabst Brew'g Co.*, 537 F.3d 1165 (10th Cir. 2008).
3. *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188 (10th Cir. 2004).

11th Circuit

1. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009).
2. *Lowe's Home Cent., Inc. v. Gen. Elec. Co.*, 381 F.3d 1091 (11th Cir. 2004).

* * *

Alabama

1. *KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265 (M.D. Ala. 2011).

Arkansas

1. *Arloe Designs, LLC v. Ark. Capital Corp.*, 431 S.W.3d 277 (Ark. 2014).
2. *Erdman Co. v. Phoenix Land & Acquisition, LLC*, No. 2:10-CV-2045, 2013 WL 3776805 (W.D. Ark. July 18, 2013).

California

1. *Flying J, Inc. v. Dep't of Transp.*, No. F060545, 2012 WL 147925 (Cal. Ct. App. Jan. 18, 2012).
2. *Sargon Enters., Inc. v. Univ. of S. Cal.*, No. B156587, 2005 WL 435413 (Cal. Ct. App. Feb. 25, 2005).
3. *Transphase Sys., Inc. v. S. Cal. Edison Co.*, No. G025948, 2002 WL 31576869 (Cal. Ct. App. Nov. 19, 2002).

Delaware

1. *XpertUniverse, Inc. v. Cisco Sys., Inc.*, No. CV-09-157-RGA, 2013 WL 6118447 (D. Del. Nov. 20, 2013).

Florida

1. *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, No. 05-21113-CIV, 2007 WL 3232274 (S.D. Fla. Oct. 31, 2007).
2. *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319 (S.D. Fla. 2006) (order granting post-trial motion).

Georgia

1. *Reynolds v. Fla. Highway Prods., Inc.*, No. CV507-78, 2008 WL 5430332 (S.D. Ga. Dec. 31, 2008) (order granting in part and denying in part motion for partial summary judgment).
2. *Gen. Elec. Co. v. Lowe's Home Ctrs., Inc.*, 608 S.E.2d 636 (Ga. 2005).

1. *Wilbern v. Culver Franchising Sys., Inc.*, Case No. 13-C-3269 (N.D. Ill. June 7, 2016).
2. *H.B. Williamson Co. v. Ill-Eagle Enters., Ltd.*, No. 14-cv-0575-MJR-PMF, 2015 WL 802250 (S.D. Ill. Feb. 25, 2015).
3. *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 31 N.E.3d 451 (Ill. Ct. App. 2015).
4. *In re Emerald Casino, Inc.*, 459 B.R. 298 (Bankr. N.D. Ill. 2014).
5. *Levin v. Grecian*, 974 F. Supp. 2d 1114 (N.D. Ill. 2013).
6. *Smart Mktg. Grp., Inc. v. Publ'ns Int'l, Ltd.*, No. 04-cv-00146, 2013 WL 2384248 (N.D. Ill. May 29, 2013).
7. *Sys. Dev. Integration, LLC v. Computer Sciences Corp.*, 886 F. Supp. 2d 873 (N.D. Ill. 2012).
8. *Blythe Holdings, Inc. v. Flawless Fin. Corp.*, No. 06 cv 5262, 2012 WL 3028329 (N.D. Ill. July 23, 2012).
9. *TAS Distrib. Co. v. Cummins, Inc.*, No. 07-CV-1141, 2011 WL 5180285 (C.D. Ill. Oct. 28, 2011).
10. *Kinesoft Dev. Corp. v. Softbank Holdings Inc.*, 139 F. Supp. 2d 869 (N.D. Ill. 2011).
11. *Cement-Lock v. Gas Tech. Inst.*, 618 F. Supp. 2d 856 (N.D. Ill. 2009).
12. *Euroholdings Capital & Inv. Corp. v. Harris Tr. & Sav. Bank*, 602 F. Supp. 2d 928 (N.D. Ill. 2009).
13. *TAS Distrib. Co. v. Cummins, Inc.*, No. 07-cv-1141, 2009 WL 928100 (C.D. Ill. Mar. 31, 2009).
14. *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, No. 08 C 6031, 2009 WL 995477 (N.D. Ill. Apr. 14, 2009).
15. *TAS Distrib. Co., Inc. v. Cummins Inc.*, No. 07-1141, 2009 WL 3757375 (C.D. Ill. Oct. 27, 2009) (order granting in part and denying in part motion for summary judgment).
16. *Kiswani v. Phoenix Sec. Agency, Inc.*, 247 F.R.D. 554 (N.D. Ill. 2008).
17. *Polyad Co. v. Indopco Inc.*, No. 06 C 5732, 2008 WL 4287623 (N.D. Ill. Sept. 12, 2008).
18. *Dominion Nutrition, Inc. v. Cesca*, 467 F. Supp. 2d 870 (N.D. Ill. 2006).
19. *Q Sales & Leasing, LLC. v. Quilt Prot., Inc.*, No. 01 C 1993, 2004 WL 2420640 (N.D. Ill. Oct. 26, 2004).
20. *JamSports & Entm't, LLC v. Paradama Prods., Inc.*, 336 F. Supp. 2d 824 (N.D. Ill. 2004).
21. *M.S. Distrib. Co. v. Web Records, Inc.*, No. 00 C 1436, 2003 WL 21087961 (N.D. Ill. May 13, 2003).
22. *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01 C 4366, 2003 WL 21506808 (N.D. Ill. June 27, 2003).
23. *Alper v. Altheimer & Gray*, No. 97 C 1200, 2002 WL 31133287 (N.D. Ill. Sept. 26, 2002).

24. *Novogroder/San Bernardino, L.L.C. v. Cohen Realty Servs., Inc.*, No. 98 C 7484, 2000 WL 556621 (N.D. Ill. May 4, 2000).
25. *Villalba v. Consol. Freightways Corp.*, No. 98 C 5347, 2000 WL 1154073 (N.D. Ill. Aug. 14, 2000).

INDIANA

1. *Square D Co. v. Breakers Unlimited, Inc.*, No. 1:07-cv-806-WTL-JMS, 2009 WL 1468700 (S.D. Ind. May 21, 2009) (order denying motion to exclude testimony).
2. *R.I. Spiece Sales Co. v. Bank One, N.A.*, No. 1:03-CV-175-TS, 2006 WL 978979 (N.D. Ind. Apr. 12, 2006).
3. *R.I. Spiece Sales Co. v. Bank One, NA*, No. 1:03-CV-175, 2005 WL 1653990 (N.D. Ind. July 7, 2005).

IOWA

1. *Catipovic v. Turley*, 68 F. Supp. 3d 983 (N.D. Iowa 2014).
2. *DePenning v. Res. Elec., Inc.*, No. 10–1377, 2011 WL 3115172 (Iowa Ct. App. July 27, 2011).
3. *Green v. Heithoff*, No. 10-1608, 2011 WL 5515167 (Iowa Ct. App. Nov. 9, 2011).
4. *Mid-Am. Bio AG, Ltd. v. Wieland & Sons Lumber Co.*, No. 10-0014, 2010 WL 3662305 (Iowa Ct. App. Sept. 22, 2010).
5. *McNeal v. SDG Macerich Props., L.P.*, No. C. 07-4015-MWB, 2008 WL 2691047 (N.D. Iowa July 1, 2008).
6. *Doctor John's, Inc. v. City of Sioux City*, 438 F. Supp. 2d 1005 (N.D. Iowa 2006).
7. *Stammer v. Kruse*, No. 03-1213, 2004 WL 1898489 (Iowa Ct. App. Aug. 26, 2004).
8. *Kolkman v. Roth*, No. 01-0945, 2002 WL 1429524 (Iowa Ct. App. July 3, 2002).
9. *Hog Slat, Inc. v. Ebert*, 104 F. Supp. 2d 1112 (N.D. Iowa 2000).

KANSAS

1. *Blair-Naughton, L.L.C. v. Diner Concepts, Inc.*, 568 F. Supp. 2d 1261 (D. Kan. 2008).

MAINE

1. *Packgen v. Berry Plastics Corp.*, 113 F. Supp. 3d 371 (D. Me. 2015).
2. *Gamache v. Kingfield Sav. Bank*, No. CV-99-135, 2000 WL 33671782 (Me. Super. Ct. Dec. 21, 2000) (order granting in part and denying in part motion for partial summary judgment).

Michigan

1. *Dunn v. CCH Inc.*, 834 F. Supp. 2d 657 (E.D. Mich. 2011).

New Jersey

1. *Essex Cty. Vocational Sch. Bd. of Educ. v. New United Corp.*, 2014 WL 1356603 (N.J. Super. Ct. App. Div. Jan. 1, 2014).
2. *Gorjuice Wrap, Inc. v. Okin, Hollander & De Luca, LLP*, 2011 WL 92957 (N.J. Super. Ct. App. Div. Jan. 12, 2011).
3. *Mamacita, Inc. v. Colborne Corp.*, 2010 WL 2793781 (N.J. Super. Ct. App. Div. July 15, 2010).
4. *Bounanno Revocable Tr. v. Franklin Universal Bldg. Corp.*, 2006 WL 2947689 (N.J. Super. Ct. Ch. Div. Oct. 13, 2006).
5. *Sea Crest Enters., L.L.C. v. City of Elizabeth*, 2006 WL 2590327 (N.J. Super. Ct. App. Div. Oct. 17, 2005).
6. *RSB Lab. Servs., Inc. v. BSI, Corp.*, 847 A.2d 599 (N.J. Super. Ct. App. Div. 2004).
7. *V.A.L. Floors, Inc. v. Westminster Cmtys., Inc.*, 810 A.2d 625 (N.J. Super. Ct. App. Div. 2002).

New Mexico

1. *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Co-op., Inc.*, 301 P.3d 387 (N.M. 2013).

New York

1. *Pharmacy, Inc. v. Am. Pharm. Partners, Inc.*, 511 F. Supp. 2d 324 (E.D.N. Y. 2007).

North Carolina

1. *Verona v. U.S. Bancorp*, No. 7:09–CV–057–BR, 2011 WL 1252935 (E.D. N.C. Mar. 29, 2011).
2. *Basic Med. Care Plus, Inc. v. N.C. Mut. Life Ins. Co.*, No. 1:03CV00269, 2005 WL 2205016 (M.D.N.C. Sept. 6, 2005).

Ohio

1. In re *Smartalk Tel'Servs., Inc. Sec. Litig.*, 487 F. Supp. 2d 940 (S.D. Ohio 2007).
2. *Telxon Corp. v. Smart Media of Del., Inc.*, No. 22098 & 22099, 2005 WL 2292800 (Ohio Ct. App. Sept. 21, 2005).

RHODE ISLAND

1. *UST Corp. v. Gen. Rd. Truck'g Corp.*, 783 A.2d 931 (R.I. 2001).

VERMONT

1. *Madowitz v. Woods at Killington Owners' Ass'n*, 196 Vt. 47 (2014).

VIRGINIA

1. *PBM Prods., Inc. v. Mead Johnson & Co.*, 174 F. Supp. 2d (E.D. Va. 2001).
2. *Interactive Return Serv., Inc. v. Va. Polytechnic Inst.*, No. LE-3014-4, 2000 WL 489617 (Va. Cir. Ct. Apr. 20, 2000).

WASHINGTON

1. *Colombia Park Golf Course, Inc. v. City of Kennewick*, 248 P.3d 1067 (Wash. Ct. App. 2011).
2. *Strategic Intent, LLC v. Strangford Lough Brew'g Co. Ltd.*, No. CV–09–309–RHW, 2011 WL 1810474 (E.D. Wash. May 11, 2011).
3. *Torres Mazatlan Remainder, L.L.C. v. FLRX, Inc.*, No. 64747-4-I, 164 Wash. App. 1038 (Wash. Ct. App. Nov. 14, 2011).
4. *Ultimate Timing, L.L.C. v. Simms*, 715 F. Supp. 2d 1195 (W.D. Wash. 2010).
5. *Point Ruston, L.L.C. v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, No. C09-5232BHS, 2010 WL 3720277 (W.D. Wash. Sept. 17, 2010) (order granting in part and denying in part motions in limine).
6. *A.G. Design & Assocs., LLC v. Trainman Lantern Co.*, No. C07-5158RBL, 2009 WL 1393240 (W.D. Wash. May 18, 2009).
7. *613 Fairview Ave., L.L.C. v. Pong's Corp., Inc.*, No. 49728-6-I, 115 Wash. App. 1012 (Wash. Ct. App. Jan. 21, 2003).
8. *Nw. Mining & Extraction, Inc. v. Safe Guard Prods.*, No. 19715–8–III, 122 Wash. App. 1045 (Wash. Ct. App. July 23, 2002).
9. *Kaech v. Lewis Cty. Pub. Util. Dist. No. 1*, 23 P.3d 529 (Wash. Ct. App. 2001).
10. *Morgan v. Microsoft Corp.*, No. 41586-7-I, 2001 WL 783758 (Wash. Ct. App. July 9, 2001).
11. *KK & LL Corp. v. Alamo Grp. (WA), Inc.*, No. 23533-1-II, 2000 WL 380455 (Wash. Ct. App. Apr. 14, 2000).

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL ANTHONY G. WILBERN	)	
and WILBERN ENTERPRISES,	)	
LLC,	)	Docket No. 13 C 3269
	)	
Plaintiffs,	)	
	)	
vs.	)	Chicago, Illinois
	)	June 7, 2016
CULVER FRANCHISING SYSTEM,	)	4:31 p.m.
INC., a Wisconsin corporation,	)	
	)	
Defendant.	)	

EXCERPT TRANSCRIPT OF PROCEEDINGS—Trial
BEFORE THE HONORABLE THOMAS M. DURKIN, and Jury

APPEARANCES:

For the Plaintiffs: CARMEN D. CARUSO LAW FIRM, by
MR. CARMEN D. CARUSO
MR. SHANE D. VALENZI
MS. XIAOYIN CAO
77 W. Washington Street, Suite 1900
Chicago, IL 60602

For the Defendant: SMITH AMUNDSEN, LLC, by
MR. LARRY A. SCHECHTMAN
MR. ALAN L. FARKAS
MR. DARREN P. GRADY
150 N. Michigan Avenue, Suite 3300
Chicago, IL 60601

Also Present: MR. MICHAEL ANTHONY G. WILBERN
MR. STEVEN E. ANDERSON

Contract Court Reporter: AMY M. SPEE, CSR, RPR, CRR
219 S. Dearborn Street, Room 2144A
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(773) 484-3623
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(In open court outside the presence of the jury.)

(Proceedings had not herein transcribed.)

THE COURT: All right. Well, defendant—here's my ruling: Defendant proposes that plaintiff must prove by a reasonably certain standard that either Stony Island and/or—that Stony Island and/or Marshfield Plaza would open, and that if that burden is met, the burden of proving the amount of lost profits is by a preponderance standard.

I see nothing in the case law supporting such differing burdens of proof. Also, I see nothing that defines reasonably certain as a higher—or a different burden of proof than preponderance. And the word "certainty," even reasonable certainty, can misleadingly lead the jury to require more of the plaintiff than is required under the law.

Damages can't be speculative, and the jury is instructed at Pages 28 and 29 of that that [sic] compensatory damages must be based on evidence and not guesswork. They are instructed on Page 30 that there must be a reasonable basis for estimating the amount of lost profits. And if there is no reasonable basis for estimating the amount of loss, they cannot award damages in the form of lost profits. They are told it cannot be based on hope or a guess.

The Seventh Circuit Pattern Instruction 11.4.3 for lost profits in a patent context uses the words "reasonable probability." That was issued in 2010.

Reasonable probability takes out the word "certainty," which implies a burden greater than the law requires. The *TAS v. Cummins* case interpreted Illinois law, but we must look to federal law under Section 1981.

Even *MindGames*—even the *MindGames* case discussion of new business—of the new business rule regarding lost profits and its use of the words "reasonable certainty" is in discussing the language from certain state court cases across the country. *MindGames* itself actually dealt with Arkansas law.

In the end, the Court in *MindGames* analyzed the appropriateness of the damages under the lens of excessive speculativeness or under speculation.

In a more recent Seventh Circuit case than *MindGames* and *TAS* was *Parvati v. City of Oak Forest*, 709 F.3d 678 (2013), which we mentioned in our summary judgment ruling, which was a Section 1981 case. The Court said the general standard governing proof of damages, even in a lost profits case involving a new business—the Court referred to the new business—

referred to that as a business strangled in the cradle. And the Court said, Plaintiff must make a reasonable estimate of its damages as distinct from relying on hope and a guess. Nothing about reasonable certainty is said in that case.

I'll note in a different context, the Seventh Circuit criticized even the language of reasonable probability in the context of whether the jurisdictional minimum of $75,000 in a diversity case has been met.

In fact, the phrase "reasonable probability that jurisdiction exists" was, as the Court said, banished from our lexicon.

Obviously it's a different context, but the rationale of why it was banished was because of the confusion caused by comparing reasonably probable with a preponderance standard. As the Court in that case said, "All legal phrases have some potential for misuse, which must be tolerated when there is no good alternative," but there was a very good alternative to reasonable probability: the preponderance standard.

Recognizing that's a different case, I still find in this case that reasonable certainty is not called for; it's preponderance standard. And even using the words "reasonably probable," which were suggested by the plaintiff, is inappropriate. So we're going to give that instruction as I gave it to you yesterday, which takes out the words "reasonable certainty" and "reasonable probability." You'll—it will be prepared as I edited it yesterday.

And the proper standard for damages whether it is—whether Marshfield and Stony Island would open, and if they opened, if one or both opened, what the type or burden of proof is as to the amount of damages is a preponderance standard for both, both issues. That will be the ruling.

Is there any objection to that by plaintiff?

MR. CARUSO: No objection.

THE COURT: Any objection by defendant?

MR. FARKAS: Yes, your Honor. We maintain the objection and prefer the wording of the instruction as submitted by defendant that includes the reasonable certainty language.

THE COURT: Very good. Your objection is noted and preserved for the record.

MR. FARKAS: Thank you.

THE COURT: Okay. Any questions about that instruction then?

MR. VALENZI: No, Judge, I think we understand.

THE COURT: Okay. Anything else we need to discuss on instructions or any other issue?

MR. CARUSO: Not by plaintiff.

MR. VALENZI: Should—I will say, Judge, should we send one more final version?

THE COURT: Yes, make that edit, send a final version which incorporates Mr. Schechtman's changes, send them all in red line, but in a way where we can remove the red line. And then we'll—I may reorder these instructions somewhat and we'll make copies of them tonight. And we'll make copies for the jury. I think that's going to be easier, because if I have to flip through them and change the order, it does you no good to staple them and unstaple them.

If we have problems copying, you'll get an e-mail with the correct order and we'll ask probably the plaintiffs to make those copies; but if not, we'll handle it from our end.

All right. So nothing else from plaintiff.

Mr. Farkas, Mr. Schechtman, anything else?

MR. SCHECHTMAN: No.

MR. FARKAS: No, your Honor.

(Proceedings had not herein transcribed.)

(Excerpt concluded at 4:37 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the excerpt of proceedings in the above-entitled matter.

/s/ Amy M. Spee *June 15th, 2016*

AMY M. SPEE, CSR, RPR, CRR
Contract Court Reporter