

# Using An Economist For The Defense

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# Our Approach

- Know the case
- Understand what the other expert is doing
- If appropriate and feasible, work to exclude the other expert's opinions
- If providing testimony, do so in a completely unbiased fashion using methods that are theoretically correct and widely accepted.

## Step 1

# Engage An Economist Early in the Process

The theory of damages should relate to the theory of liability. Therefore, one should develop the “plan” for managing the damages side of the case early and in concert with the liability side. Damages should not be an afterthought.

The defense should have its own “theory” of damages. If the jury finds that an action was wrong, what was the most likely alternative and what would have been the consequences of that action.

# Early Review Steps

- Understand the liability theories
- Anticipate damages theory
- Identify plaintiff's fact witnesses who can be turned into damages witnesses
- Develop "points" and "facts" related to damages that we want to get from fact / liability witnesses
- Identify documents that we will need and which fact witnesses will know about them

## Step 2

### Review Plaintiff's Report

- Does the damages theory fit the legal theory (Has the right question been asked)?
- Is the “but for” logical and reasonable?
- Are the data the correct data to use?
- Are the calculations correct?
- Is the expert bound by practice standards (ASA, AICPA, AIMR, etc.) and have they been followed?

## Step 3

# Script the Deposition

- Identify all errors, questionable assumptions and departures from standards or required practice
- Draft questions, potential answers and follow up questions
- Identify articles, data, manuals, practice standards, etc. with which to confront the expert
- Defense consultant / expert should attend deposition if case is complex or report light on detail

## Purpose of the Economist's Deposition

- Most importantly, find out what is going to be said and memorialize it.
- Understand the economist's theories and how they fit, or don't, with the rest of the case
- Establish all departures from accepted practice or from the literature
- Establish a foundation for a motion in limine, Daubert challenge or successful rebuttal

## Daubert or Discredit

In our experience CPAs ignore the General Standards Rule of reasonable and sufficient information and appraisers ignore USPAP and ethical guidelines. We have been successful in excluding experts on this basis.

Economists are more problematic -- there are no practice standards and there is an abundance of “fools and charlatans” in the profession. There are also several “junk journals” by which nonsense is provided with the patina of peer-reviewed scholarship.

The best way to handle economic nonsense is to compare what the “expert” says in testimony to market realities or textbook and journal writings (i.e., TIPS) or the experts own writings. Many professionals ignore practice standards in litigation assignments.

Confronting a charlatan can have interesting consequences (i.e., Blue Chip Panel “coin flippers”)

To testify or not to testify, that is the question.

- Can the plaintiff's expert be "turned"
- An incredible spokesman for an incredible product
- Is there a great difference in the numbers
- Can the damages theory help the liability case
- Can a report be filed without calling the expert
- Will a defense report alert the plaintiff

## Step 4

# The Defense Report

- Our belief is that we serve the court and that advocacy has no place in our role as an expert witness.
- An expert should, however, be a zealous advocate for his position -- the truth.
- If two competent economists are presented with the same problem, they should arrive at approximately the same answer.
- If they do not, either one is being less than truthful or they are not answering the same question.

## The Defense Report (cont.)

- The defense expert's report is where the defense theory of damages is laid out.
- Therefore, the “story” of this theory must be clearly presented.
- Should not be a “me too” with the same song but different words (contrast should be stark).

## Step 5

# Helping With The Motions

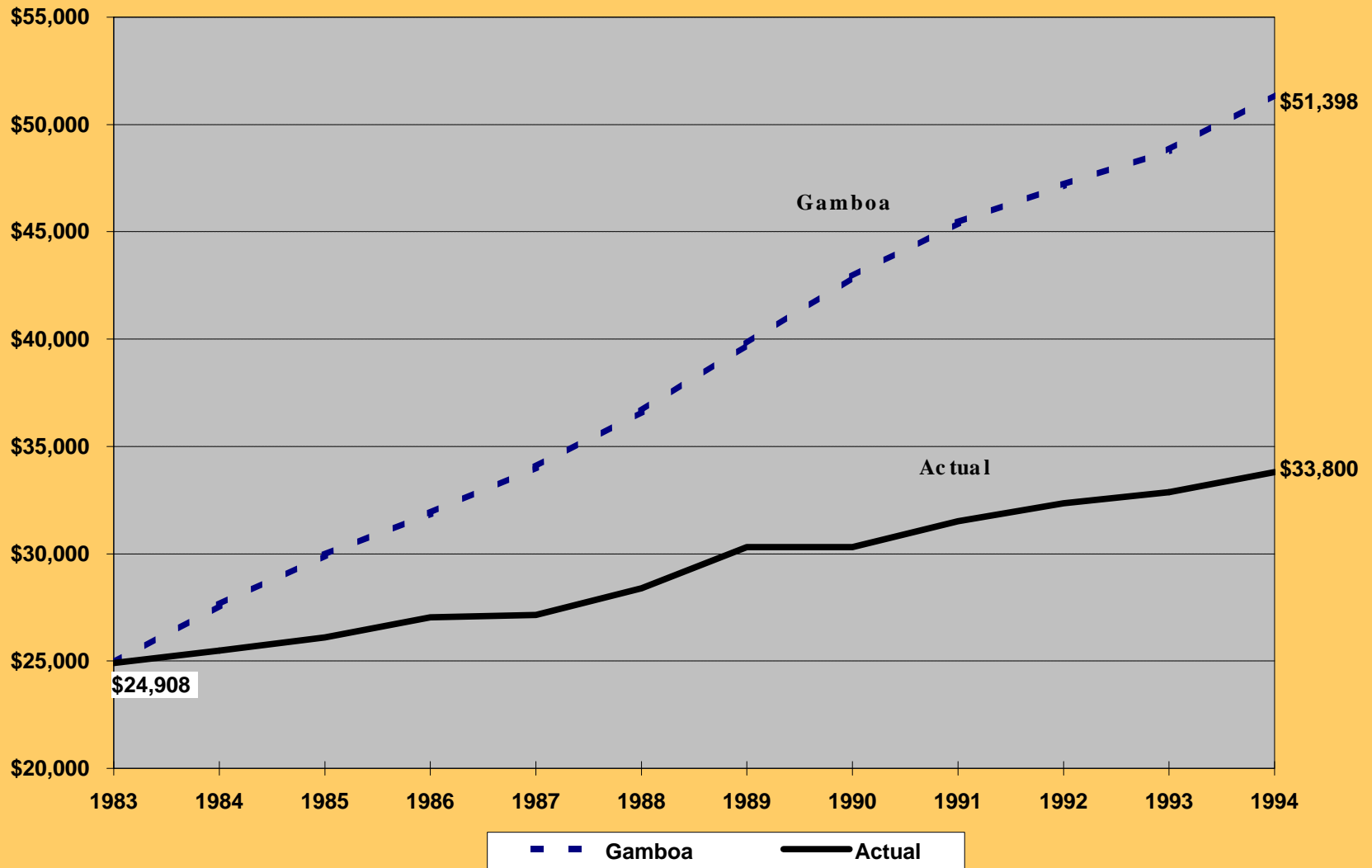
- Motions to exclude based on failure to follow accepted professional practice are difficult for most attorneys to draft -- the expert should help.
- An affidavit from consulting or testifying expert can be helpful.
- Since they have violated the rules of “our” profession, “we” are often best able to say why.
- Preparing for Daubert hearing is like preparing for trial but it is also a “war of the experts.”

1. The futures markets are generally efficient. It is widely recognized that there is no futures trading strategy which a producer can follow which guarantees profits which exceed those from random trading and that the day-to-day fluctuation in prices is, when viewed ex ante, random. A “scenario” which assumes a trading rule which results in the absolute best possible outcome, therefore, flies in the face of all accepted scholarship regarding futures and options markets.
2. If analyzed mathematically, it is clear that Dr. Anthony’s damages range is ridiculous. There were at least 40 trading days during which each of the contracts could be rolled. The probability of rolling on the day which was most profitable to the trader, for any given contract, is one in forty (1/40). The probability of making this best trade eleven times is 2.4 to the - 18 power which is a decimal preceded by 17 zeros after the decimal point. To put this in perspective, a person has better odds of hitting the Powerball Jackpot twice in a row<sup>1</sup> or of being struck by lightning three times in one year.<sup>2</sup>
3. There is no reasonable, economically defensible, scientifically valid argument by which an economist can hold that a range bounded by 2.4 in a quintillion probabilities constitutes a set of reasonable outcomes. Economists routinely calculate ranges on outcomes of economic processes and there are generally accepted procedures for performing these calculations. For example, returns (or prices) from trading in futures should be normally distributed. If this is the case, a range can and frequently is described as the mean (average) plus or minus one standard deviation. This range covers about two-thirds of possible outcomes. I am not even aware of a statistical table which covers a range encompassing probabilities of 2.4 in a quintillion. The number of standard deviations from the mean implied by a normal distribution and such a probability is staggering.<sup>3</sup>

## Step 6 Trial

- Defense expert should help prepare cross-ex
- Economist has data and expertise in preparing exhibits to illustrate points -- economic testimony does not have to be “econo-babble”
- Cross-ex exhibits illustrating economic evidence can be compelling
- Defense testimony should be limited to a few key, easy-to-understand, points
- “Adjust the other report” approach can be quite effective.

### Union Transportation Workers Earnings 1983 - 1994: Gamboa vs. Actual



# Adjusting the Plaintiff Expert's Report

Michael A. Goode  
Sherman's Adjusted Total Loss Estimate

