

Rosen Seymour Shapss Martin & Company LLP
 Certified Public Accountants & Profitability Consultants

The Watchful Eye

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 of Rosen Seymour Shapss Martin & Company LLP*

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Greetings!

Welcome to The Watchful Eye - a publication of the Business Investigative and Insolvency Services Group of Rosen Seymour Shapss Martin & Company.

We welcome your questions or comments about the topics discussed or related ones. Please feel free to contact me at 212-303-9027 or by e-mail at rmodansky@rasmcpa.com or my partner and co-chair, Martin Leventhal at 212-303-9030 or by e-mail at mleventhal@rasmcpa.com. and let us know how we can be of assistance.

Sincerely,

Robert A. Modansky, CPA
 Martin Leventhal, CPA

Partners and Co-Champions of the Business Investigative and Insolvency Services Group

The Expert Witness

Financial experts can present a number of challenges for even the most skilled litigators. Not only is the expert likely to be a knowledgeable and experienced witness, but his or her testimony is often full of jargon and can be difficult for jurors to understand. However, most financial testimony is vulnerable to attack, especially when it comes to the assumptions made by the expert.

Typically, an expert is asked to predict what would have happened in a specific case absent the actions of the defendant. In making these predictions, the expert relies upon certain assumptions to arrive at an opinion of what would have happened had the defendant's actions not affected the plaintiff. The assumptions lend themselves to close examination and, many times, can be successfully challenged

by opposing counsel.

Identify the Key Assumptions

The first step is to identify the primary assumptions on which the expert's opinion relies. In calculating damages, for instance, there are several different approaches that may be used. Examining which method or methods the expert uses and the major assumptions utilized in applying those methods is essential.

Check the Expert's Support for the Assumptions

Look at the underlying support for the assumptions used by the expert in her/his report. Sometimes the support may be weak or nonexistent. Other times, the assumptions are based on erroneous or inconsistent support. Each key assumption in the report should be closely examined by counsel's own expert for inconsistencies, errors, or failure to take into account actual factors that may have an impact on the assumptions used.

Example: Expert assumes that Plaintiff's business would have retained its market share after Defendant's wrongful action. The fact that a new, strong competitor entered Plaintiff's market shortly after Defendant's action likely would have affected Plaintiff's market share and revenues and should have been taken into account by Expert.

Contest the Assumptions at Trial

Attorneys contesting an expert's assumptions at trial can take a variety of approaches. One approach is to confirm the assumptions used by the expert in her/his report (and perhaps confirmed during deposition) and then challenge those assumptions based on additional factors the cross examiner's own expert has discovered.

If there is little or no support for the expert's assumptions, it is essential to establish that fact. An important issue counsel can raise is whether the expert had enough support for her/his assumptions - and whether the expert did whatever was necessary to obtain adequate support.

Follow Up

Usually, counsel will then present his or her own expert who challenges the support for the assumptions and/or methodology used in the opposing expert's report and presents an alternative opinion.

Whether you are a plaintiff or defendant in cases where

financial expert testimony is a key, you need a financial expert who has the knowledge and experience to provide the professional analysis and testimony required. RSSM can provide litigation support on a wide variety of financial issues. Please contact us to learn more about what our professionals can do for you.

The general information in this publication is not intended to be nor should it be treated as tax, legal, or accounting advice. The reader should seek advice from your independent advisors in connection with any specific matter or set of circumstances pertinent to yourself. The information in this publication is not intended to be nor can it be used for the purpose of avoiding any financial, tax or legal matter with which the reader may be confronted.

Please contact us if we can assist you in any of the foregoing matters.

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