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# Calculating Lost Profit Damages: The Missouri Supreme Court “Semi-Fixed” the “Variable” Appellate Caselaw

*Ameristar Jet Charter, Inc. v. Dodson International Parts, Inc.*<sup>1</sup>

## I. INTRODUCTION

Prior to *Ameristar Jet Charter, Inc. v. Dodson International Parts, Inc.*, a split of authority existed among appellate cases in Missouri as to how to calculate lost profit damages.<sup>2</sup> One line of cases stood for the proposition that all overhead expenses, including fixed expenses, should be deducted from estimated lost revenues to determine lost profit damages.<sup>3</sup> Another set of cases explicitly refused to deduct all overhead; those courts only deducted variable expenses from estimated lost revenue to determine lost profit damages.<sup>4</sup> The Missouri Supreme Court resolved this conflict in a unanimous decision in *Ameristar*.<sup>5</sup>

The court held that fixed expenses should not be deducted from the estimation of lost revenues in the calculation of lost profit damages.<sup>6</sup> This decision achieves the theory behind damage awards; it puts the plaintiff in as good a position as he would have been had the tort not been committed.<sup>7</sup>

The holding presents a problem, not in its reasoning, but in the rigidity of its terminology.<sup>8</sup> A plaintiff will not be put in as good a position as he was before by the deduction of only “variable” expenses from estimated lost revenues in many cases.<sup>9</sup> Some cases, like *Ameristar*, may involve a third type of cost, termed by cost accountants as “step function” or “semi fixed” costs.<sup>10</sup> Furthermore, in other cases the deduction of fixed expenses may be appropriate.<sup>11</sup> The calculation of lost profit damages should focus on deducting the costs actually saved by the defendant, rather than on the classification of the different expenses as “fixed” or “variable.” An additional problem presented

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1. 155 S.W.3d 50 (Mo. 2005) (en banc).

2. *Id.* at 55.

3. *Id.*

4. *Id.* at 56.

5. *Id.* at 56, 60.

6. *Id.* at 56.

7. See RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979).

8. See *infra* Part V.A.

9. See *infra* Part V.A.

10. See *infra* Parts III.D, V.A.1.

11. See *infra* Part V.A.2.

by the decision is the court's ambiguity as to whether the classification of expenses as fixed or variable is a question of law or fact.<sup>12</sup>

## II. FACTS AND HOLDING

Ameristar Jet Charter ("Ameristar") and Sierra American Corporation (collectively "Owner") are in the air charter business.<sup>13</sup> Ameristar is an on-demand aircraft charter company that delivers freight.<sup>14</sup> Ameristar derives the majority of its business from carrying parts for auto manufacturers.<sup>15</sup>

In April of 1998, one of Owner's Falcon 20 jets made an emergency landing on a levee near the Kansas City Downtown Airport.<sup>16</sup> Houston Casualty Company ("Insurer") insured the jet.<sup>17</sup> Insurer's claims adjuster, Howe Associates, Inc. ("Adjuster") hired Dodson International Parts, Inc. ("Hauler") to transport the jet from the levee to the airport.<sup>18</sup> To get the jet to the airport, Hauler had to remove the jet's wings and place its fuselage on a flatbed trailer.<sup>19</sup>

When the flatbed trailer arrived at the airport, some observers noticed a deflection in the jet's fuselage.<sup>20</sup> Owner asked three different companies to examine the fuselage and submit estimates while it was on the trailer at the airport.<sup>21</sup> Owner also claimed that it asked Insurer and Adjuster to remove the plane from the trailer at that time and that they failed to do so.<sup>22</sup> Insurer ultimately concluded that the costs to repair the fuselage of the jet would be pro-

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12. See discussion *infra* Part V.B.

13. Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50, 53 (Mo. 2005) (en banc). Sierra owns several Falcon 20 jets and leases them to Ameristar, its only customer. Substitute Brief of Cross-Appellant Dodson Int'l Parts, Inc. at \*9, Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50 (Mo. 2005) (en banc) (No. SC85889). Ameristar leases all of its Falcon 20 jets from Sierra. *Id.*

14. Ameristar Jet Charter Inc. company website, available at <http://www.ameristarjet.com/aboutus.htm> (last visited Feb. 9, 2006).

15. Brief of Appellants and Cross-Appellants Ameristar Jet Charter, Inc. and Sierra Am. Corp. at \*2, Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 2004 WL 76342 (Mo. App. W.D. Jan. 20, 2004) (No. 61655). Ameristar acted like a "taxi-cab" company for its customers in that it transported goods when its customers called and did not have contracts for ongoing cargo shipment business with its customers. Brief of Cross-Appellant Dodson Int'l Parts, Inc. at \*10, Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50 (Mo. 2005) (en banc) (No. SC85889).

16. *Ameristar*, 155 S.W.3d at 53.

17. *Id.*

18. *Id.*

19. Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 2004 WL 76342 at \*1 (Mo. App. W.D. Jan. 20, 2004).

20. *Ameristar*, 2004 WL 76342 at \*1.

21. *Id.*

22. *Id.*

hibitively high.<sup>23</sup> As such, Insurer submitted a proof of loss to Owner, which proposed to treat the jet as a constructive total loss and obligated Insurer to pay the policy limits of \$1.5 million.<sup>24</sup> Owner signed this proof of loss, though it contended that Insurer gave it no choice in the matter.<sup>25</sup>

Insurer later sold the jet for \$705,000 at a salvage auction to Hauler, which outbid Owner.<sup>26</sup> Hauler discovered that the jet's fuselage was not permanently bent when the fuselage "popped" back into place upon removal from the flatbed trailer after the purchase.<sup>27</sup> Hauler spent approximately \$100,000 to repair the jet, and then offered to sell it to Owner for \$1.5 million.<sup>28</sup> Owner refused Hauler's offer and later purchased a replacement jet for approximately \$2.1 million.<sup>29</sup>

Owner sued Hauler for negligence in handling the jet.<sup>30</sup> The trial court submitted the negligence claim to the jury with a comparative fault instruction.<sup>31</sup> The jury found in favor of Owner, assigning 70% of the fault to Hauler and 30% of the fault to Owner, and determined actual damages of \$2.1 million.<sup>32</sup> The trial court entered judgment in favor of Owner for \$1,435,000 based on the jury's findings.<sup>33</sup> Although the record did not indicate how much of the damages were for lost profits, Hauler argued that the lost market value

23. *Ameristar*, 155 S.W.3d at 53.

24. *Id.*

25. *Id.*

26. *Id.* Hauler submitted the winning bid of \$705,000; Owner bid \$410,000. *Ameristar*, 2004 WL 76342 at \*2.

27. *Ameristar*, 155 S.W.3d at 53.

28. *Id.*

29. *Id.*

30. *Id.* In addition to suing Hauler, Owner asserted tort claims against Insurer for negligence, negligent misrepresentation, and bad faith. *Ameristar*, 2004 WL 76342 at \*2. Insurer moved for summary judgment, arguing that Owner agreed when it signed the proof of loss to discharge Insurer from all further liability. *Id.* at \*2-3. The trial court granted Insurer's motion for summary judgment. *Id.* at \*2. Owner appealed the grant of summary judgment to the appellate court, and the appellate court reversed. *Id.* at \*3, \*6. The Missouri Supreme Court considered the issue, and affirmed the trial court's grant of summary judgment in favor of Insurer. *Ameristar*, 155 S.W.3d at 59. The issues of law involved in this claim concerned contract interpretation under Texas law and are beyond the scope of this Note. *See id.*

Owner sued Adjuster as well, and those parties settled out of court for \$50,000. *Ameristar*, 2004 WL 76342 at \*7. Owner appealed the calculation of the settlement amount it received from Adjuster, and the Western District Court of Appeals granted Owner's point on appeal. *Id.* The Missouri Supreme Court also granted Owner's point of appeal with regard to the calculation of the settlement amount. *Ameristar*, 155 S.W.3d at 59-60. This point of appeal is beyond the scope of this Note.

31. *Ameristar*, 155 S.W.3d at 53.

32. *Id.* at 54.

33. *Id.*

of the airplane could be no more than \$210,000 and that the remaining amount represented lost profits damages.<sup>34</sup>

Hauler appealed the judgment to the Missouri Court of Appeals for the Western District, contending that Owner presented insufficient evidence to support a claim for lost profits.<sup>35</sup> Hauler argued that there were problems with Owner's profit submission, one of which being that Owner failed to deduct overhead and other business expenses to calculate net profit.<sup>36</sup> The court described the method Owner used to calculate its lost profits as follows:

First, [Owner] determined the average number of hours per month that each airplane flew and used the average as a basis for determining how often the subject aircraft would have flown. Second, [Owner] multiplied the average hourly rate by the average hourly utilization per month to calculate the lost gross revenues. Third, [Owner] then divided the gross revenue calculation by the total number of hours that the aircraft would have flown based upon average utilization. According to [Owner], the resulting number represents gross revenue per hour.

Having determined how much revenue its airplanes generated per flight hour [Owner] then subtracted variable expenses incurred to operate its aircraft per hour. According to [Owner], the resulting

34. *Id.* at 54 n.2.

35. *Ameristar*, 2004 WL 76342 at \*2. Hauler raised eight points on appeal. *Id.* This Note focuses on Hauler's sixth point of appeal, in which it claimed Owner failed to support an award of damages for lost profits. *Id.* The other seven points Hauler brought on appeal, none of which the appellate court found persuasive, are beyond the scope of this Note. *See id.* at \*1.

36. *Id.* at \*17. Hauler also claimed that Owner presented insufficient evidence to support a claim of lost profits for two other reasons: (1) failure to present evidence of income and loss for a reasonable anterior period, and (2) failure to introduce actual business records to establish its damages. *Id.* The appellate court disagreed with both arguments. *Id.* at \*19-20.

In regard to the first argument, the appellate court reasoned that it was not necessary for Owner to show lost profits for the whole business for the months preceding its 1998 purchase of the subject plane, as the loss pertained to one piece of property – the jet. *Id.* at \*19. When an entire business is damaged, historical data as to the past profitability may be necessary to remove a lost profits award from the realm of speculation. *Id.* The loss of profits as to a single plane, however, may be determined by the jury without resort to speculation and with a reasonable degree of certainty. *Id.*

In regard to the second argument, the court disagreed with Hauler's argument that the best evidence (instead of summaries of records) was required. *Id.* at \*20-21. The court stated that the voluminous records exception applied and Hauler did not properly object at trial to the admission of the summaries, thus it could not complain at that point. *Id.*

number represents its net profit per hour. Finally, [Owner] then multiplied its net profit per hour by the average aircraft utilization and by the number of days that the subject aircraft was unavailable. According to [Owner], the resulting number represents its lost profit in this case.<sup>37</sup>

Hauler argued that all overhead expenses should be deducted from the lost profit award.<sup>38</sup> The appellate court was not persuaded.<sup>39</sup> Rather, it agreed with the rationale of deducting only variable overhead, not fixed overhead, from lost profit calculations.<sup>40</sup> Since Owner had deducted variable expenses, the court denied Hauler's point of appeal.<sup>41</sup>

Hauler appealed the court of appeal's decision to the Missouri Supreme Court.<sup>42</sup> The Supreme Court began by noting that the "Missouri appellate cases are split on whether fixed expenses should be deducted from estimated lost revenues in the calculation of lost profits damages."<sup>43</sup> The court held "that in tort actions, variable expenses, not fixed expenses, should be deducted from estimated lost revenues in the calculation of lost profits damages."<sup>44</sup> The court found that the record was insufficient to determine which expenses were fixed and which were variable.<sup>45</sup> Thus, the court reversed and remanded the case "for a new trial on the issue of damages or other relief."<sup>46</sup>

### III. LEGAL BACKGROUND

The primary goal of the law of torts is to put injured people, as nearly as possible, in a position equivalent to their position prior to the tort.<sup>47</sup> Injured people are not entitled to be made more than whole, or to be put in a position

37. *Id.* at \*17.

38. *Id.* at \*19.

39. *Id.* at \*20.

40. *Id.* The court also noted that it was deciding "[a]bsent decisive guidance from our Missouri Supreme Court . . ." *Id.*

41. *Id.*

42. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50 (Mo. 2005) (en banc). Hauler again raised eight points on appeal. *Id.* at 53. Owner again appealed the grant of summary judgment in favor of Insurer, which the Missouri Supreme Court affirmed, and the calculation of the damage award with respect to the settlement amount from Adjuster, which the Missouri Supreme Court reversed. *Id.* Both of those points of appeal are beyond the scope of this Note. The Missouri Supreme Court affirmed the trial court's judgment with respect to the remaining issues and did not discuss them in the opinion. *Id.*

43. *Id.* at 55.

44. *Id.* at 56.

45. *Id.* at 57.

46. *Id.*

47. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979).

better than they would have been had the wrong not been committed.<sup>48</sup> “‘Compensatory damages’ are those given as compensation as an equivalent for the injury done, and are awarded to make the injured party whole.”<sup>49</sup> One type of compensatory damages recognized by the courts of Missouri is lost profits.<sup>50</sup> In calculating lost profits, the expenses saved because of the wrongful act must be subtracted from any recovery.<sup>51</sup>

### A. Accounting Background

There are different classifications of “costs,” which are sometimes referred to as “expenses.”<sup>52</sup> A fixed cost is one that remains the same in total as activity increases or decreases.<sup>53</sup> Examples of fixed costs are depreciation on buildings, taxes on land and rent for office space.<sup>54</sup> A variable cost is one that increases with an increase of an activity and decreases with a decrease of an activity.<sup>55</sup> Examples of variable costs are direct materials, sales commissions, payroll taxes and direct labor.<sup>56</sup>

48. Weeks-Maxwell Constr. Co., Inc. v. Belger Cartage Serv., Inc., 409 S.W.2d 792, 796 (Mo. Ct. App. 1966).

49. 25 C.J.S. *Damages* § 3 (2005).

50. Coonis v. Rogers, 429 S.W.2d 709, 714 (Mo. 1968); H. Kent Munson, *Fixed Overhead Expenses: The Gremlins of Lost Profit Damage*, 56 J. MO. B. 104, 104 (2000).

51. MFA Coop. Ass’n v. Stone, 971 S.W.2d 885, 890 (Mo. Ct. App. 1998); 22 AM. JUR. 2D *Damages* § 458 (2005).

52. See RALPH ESTES, *DICTIONARY OF ACCOUNTING* 32, 50 (2d ed. 1985). A “cost” is “an outlay or expenditure of money to acquire goods and services that assist in performing business operations.” J. OWEN CHERRINGTON ET AL., *COST ACCOUNTING* 18 (2d ed. 1988). In cost accounting, outlays are classified into different “costs.” LOREN A. NIKOLAI & JOHN D. BAZLEY, *INTERMEDIATE ACCOUNTING* 42 (7th ed. 1997). Not all costs are necessarily expenses because of the way revenues are recognized in accrual accounting. *Id.* Accrual accounting is the process of relating the financial effects of transactions, events and circumstances having cash consequences to the period in which they occur rather than when the cash receipt or payment occurs. *Id.* The matching concept is the criterion used to determine when a cost becomes an expense. CHERRINGTON ET AL., *supra*, at 20. The revenues that are earned in a period are determined, and then the costs incurred to generate those revenues are matched with that income and expensed against that income. *Id.* The difference between a cost and an expense is simply a matter of timing for accrual accounting purposes, based on revenue recognition principles that are beyond the scope of this Note. For simplification, the terms “cost” and “expense” will be used interchangeably.

53. MARYANNE M. MOWEN, *ACCOUNTING FOR COSTS AS FIXED AND VARIABLE* 5 (1986).

54. LESTER E. HEITGER & SERGE MATULICH, *COST ACCOUNTING* 63 (1985).

55. MOWEN, *supra* note 53, at 5.

56. HEITGER, *supra* note 54, at 64.

A “direct cost” is “one that can be readily identified with and traced to units of product manufactured or to an organizational unit or activity.”<sup>57</sup> For example, if each widget requires four screws, the costs of purchasing those screws may be directly traced to the production of each widget. A cost that cannot be readily traced to specific units is an indirect or overhead cost.<sup>58</sup> Overhead typically has both a variable and a fixed portion.<sup>59</sup> Examples of overhead costs are indirect materials, indirect labor, property taxes, utilities and depreciation.<sup>60</sup> Some overhead expenses, like repair and maintenance, vary with the number of units, but not on a one-to-one variable relationship.<sup>61</sup> Other overhead costs, like real estate taxes and depreciation, do not vary at all with the number of units.<sup>62</sup> Some courts and commentators have separated overhead costs into two groups, labeled “variable overhead costs” and “fixed overhead costs.”<sup>63</sup>

The appellate cases leading up to *Ameristar* were split on whether all overhead expenses, including fixed expenses, should be deducted from estimated lost revenues in the calculation of lost profit damages.<sup>64</sup> The Missouri Supreme Court faced this issue in a previous case, in which the defendant contended that the proper measure of damages requires a pro rata share of all general operating expenses be attributed to sales in determining lost profits.<sup>65</sup> The court did not rule on whether or not fixed expenses should be deducted, stating instead that “it was proper for the jury to determine under all the evidence whether [the plaintiff] was damaged and, if so, to what extent.”<sup>66</sup> Thus, until *Ameristar*, Missouri appellate courts were left to decide whether the classifications of expenses as fixed or variable played a role in calculating lost profit damages.

### *B. Cases Suggesting Fixed Expenses Should Be Deducted*

In some cases, such as *Meridian Enterprises Corp. v. KCBS, Inc.*, courts deducted fixed expenses from lost profit awards.<sup>67</sup> In *Meridian*, a travel

57. ESTES, *supra* note 52, at 41.

58. *Id.* at 68. See also THE COMMITTEE ON ACCOUNTING AND AUDITING RESEARCH, ACCOUNTING TERMINOLOGY 49 (2d prtg. 1958).

59. DAVID L. SCOTT & GEORGE FIEBELKORN, DICTIONARY OF ACCOUNTING 82 (1985).

60. CHERRINGTON ET AL., *supra* note 52, at 28.

61. *Id.* at 30.

62. *Id.*

63. Munson, *supra* note 50, at 104.

64. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. 2005) (en banc).

65. *High Life Sales Co. v. Brown-Foreman Corp.*, 823 S.W.2d 493, 503 (Mo. 1992) (en banc).

66. *Id.*

67. 910 S.W.2d 329 (Mo. Ct. App. 1995).



agency alleged that the defendant tortiously interfered with the agency's business relationship with a client and sought to recover lost profits from a particular contract for travel services it would have otherwise obtained.<sup>68</sup> The trial court stated that there was no proof of damages and, consequently, granted the defendant's motions for directed verdict.<sup>69</sup> The travel agency appealed.<sup>70</sup> In affirming the trial court, the Missouri Court of Appeals for the Eastern District stated that the travel agency failed to establish the overhead expenses, including rent or mortgage, utilities, support staff salaries, and other overhead costs attributable to its work for the contract.<sup>71</sup> The court required the travel agency to deduct both fixed and variable expenses in the calculation of lost profits.<sup>72</sup> The court held that the "ongoing" nature of the travel agency's overhead costs did not negate the travel agency's obligation to present evidence of the overhead costs attributable to the specific trip because "[t]he cost and expense of operation is a considerable item and in an action for loss of profits is an essential item in the proof of damages."<sup>73</sup>

In *Skinner v. Thomas*,<sup>74</sup> the plaintiff sued the defendant for lost profits in connection with the parties' partnership in the operation of a restaurant.<sup>75</sup> The court held that "a plaintiff fails to make a submissible case of damages if plaintiff does not introduce evidence of overhead expenses such as mortgage or rent, utilities, and salaries attributable to the business producing the income."<sup>76</sup> The court said that the facts indicated that the business had overhead expenses for "rent or mortgage, utilities, fixtures, personal property, contract services, and entertainment."<sup>77</sup> Because the plaintiffs did not produce any

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68. *Id.* at 331. Meridian was a travel agency that provided travel arrangements for companies that had meetings like national sales meetings. *Id.* at 330. Pier I was one of its clients. *Id.* Meridian made the travel arrangements for 500 Pier I employees to travel to Hawaii in 1988. *Id.* One of Meridian's employees began making arrangements for Pier I's 1990 trip to Hawaii while working for Meridian. *Id.* The employee left Meridian and, together with a former Meridian consultant, formed a new travel agency and took Pier I's business with them. *Id.* Meridian sued the new travel agency for, among other things, the lost profits from arranging the 1990 trip to Hawaii for Pier I. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 332.

72. *Id.*

73. *Id.*

74. 982 S.W.2d 698 (Mo. Ct. App. 1999).

75. *Id.* at 698.

76. *Id.* at 700.

77. *Id.* The court noted that the following facts indicated that there were overhead expenses: the restaurant and lounge were located in a building with a kitchen, a bar, and a seating area; the restaurant had a juke box; and the partners had hired an accountant. *Id.*

evidence of these overhead expenses, they failed to make a submissible case for the jury for lost profits.<sup>78</sup>

In a third Eastern District case, the court held that “[e]mployee costs, overhead, rents, and other expenses must all be deducted from sales before net profit can be determined.”<sup>79</sup> Though the court remanded the case for failure to provide sufficient evidence of expenses in general, the court’s broad statement could be interpreted to mean that fixed expenses should be deducted.<sup>80</sup>

Statements in additional cases suggest that fixed expenses should be deducted from lost profit awards. In *Rich v. Eastman Kodak Co.*,<sup>81</sup> the Eighth Circuit, interpreting Missouri law, held that *all* salaries must be included when “determining the net profit of [a] company.”<sup>82</sup> In another case, the Court of Appeals for the Western District held that “a proportional amount of the *fixed* salaries paid to the repairmen and business managers must be attributed to the operations.”<sup>83</sup> Along the same line, the Court of Appeals for the Southern District defined “profit” as “the benefit or advantage remaining after *all costs, charges, and expenses* have been deducted from the income.”<sup>84</sup> Each of these statements arguably indicates that fixed expenses should be deducted in the calculation of lost profit awards.<sup>85</sup>

### *C. Cases Suggesting Fixed Expenses Should Not Be Deducted*

Contrary to the cases mentioned above, many cases have held that fixed expenses should not be deducted in calculating lost profit damages.

In *Forney v. Missouri Bridge and Concrete, Inc.*,<sup>86</sup> plaintiff claimed lost profits in a breach of contract suit involving the construction of a bridge.<sup>87</sup> The Missouri Court of Appeals for the Western District held that only expenses actually avoided by the plaintiff should be deducted, not fixed expenses.<sup>88</sup>

In *American Laminates, Inc. v. J.S. Latta Co.*,<sup>89</sup> American Laminates, a manufacturer, sued for lost profit damages after Latta, a wholesaler, cancelled

78. *Id.*

79. *Brown v. McIBS, Inc.*, 722 S.W.2d 337, 341 (Mo. Ct. App. 1986).

80. *See id.*

81. 583 F.2d 435 (8th Cir. 1978).

82. *Id.* at 437 (emphasis added).

83. *All Star Amusement, Inc. v. Jones*, 727 S.W.2d 930, 932 (Mo. Ct. App. 1987) (emphasis added).

84. *Morrow v. Mo. Pac. Ry. Co.*, 123 S.W. 1034, 1039 (Mo. Ct. App. 1909) (emphasis added).

85. *Munson*, *supra* note 50, at 105.

86. 112 S.W.3d 471 (Mo. Ct. App. 2003).

87. *Id.* at 473.

88. *Id.* at 474.

89. 980 S.W.2d 12 (Mo. Ct. App. 1998).

its order for specialized cabinets.<sup>90</sup> The court rejected Latta's argument that the failure to deduct overhead resulted in an "underserved windfall," because American Laminates still incurred these expenses after Latta's breach.<sup>91</sup> The court explained:

To be in as good a position as it would be in had Latta not breached, American Laminates would have had to allocate the overhead figured into Latta's contract into one less contract thereby reducing the profitability of each of its other contracts and its total profit for the period. By awarding American Laminates its gross profits, including overhead, the circuit court put American Laminates in as good a position as it would have enjoyed had Latta performed the agreement.<sup>92</sup>

The court accordingly denied Latta's point.<sup>93</sup>

In *MFA Cooperative Association v. Stone*, the Southern District Court of Appeals also held that fixed expenses should not be deducted from damage calculations.<sup>94</sup> In *MFA*, the plaintiffs sued to recover amounts owed on an unpaid bill for cattle feed, fertilizer and other farm supplies.<sup>95</sup> The defendants counterclaimed, alleging that the plaintiffs' food resulted in decreased milk production in its cows, which, in turn, resulted in a loss of profits.<sup>96</sup> The court rejected the argument that overhead expenses should have been demonstrated and deducted, stating that:

[n]othing in the record suggests Defendants' operating costs during the period in dispute would have been higher had the herd produced the customary amount of milk. Said another way, there was no evidence that it would have cost Defendants any more to produce the "lost milk" plus the actual milk than it did to produce the actual milk alone.<sup>97</sup>

The Uniform Commercial Code ("UCC"), which Missouri has adopted,<sup>98</sup> takes the position that fixed costs should not be deducted in cases

90. *Id.* at 14, 18-19.

91. *Id.* at 24.

92. *Id.*

93. *Id.*

94. 971 S.W.2d 885 (Mo. Ct. App. 1998).

95. *Id.* at 886.

96. *Id.*

97. *Id.* at 890.

98. See MO. REV. STAT. § 400.2-708(2) (2000) ("If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including rea-

involving lost profits.<sup>99</sup> Additionally, as Owner noted in its brief, the view that fixed expenses should not be deducted from lost profit damages is in accord with a number of other jurisdictions.<sup>100</sup> One such case, *Resolute Ins. Co. v. Percy Jones, Inc.*, parallels the facts in *Ameristar*.<sup>101</sup> In *Resolute*, the plaintiff sought to recover lost profits when one of the trucks in its fleet was damaged and not in use for a period of time.<sup>102</sup> The Tenth Circuit found that “[t]he cases have generally held that where such expenses as general overhead operations remain constant they are not to be considered in determining loss from non-use of a particular item or operation from a breach of an obligation.”<sup>103</sup>

#### D. Another Type of Cost

Some costs behave like fixed costs within a specific range of activity but, after a small change in volume outside of this range, become variable costs in that they increase or decrease in “chunks.”<sup>104</sup> These costs are “semi-

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*sonable overhead*) which the seller would have made from full performance by the buyer . . . .” (emphasis added).

99. See, e.g., *Scullin Steel Co. v. Paccar, Inc.*, 708 S.W.2d 756 (8th Cir. 1986).

100. Appellants’ and Cross-Appellants’, *Ameristar Jet Charter, Inc. and Sierra Am. Corporation*, Substitute Brief in Response to the Substitute Brief of Cross-Appellant *Dodson Int’l Parts, Inc.* at \*42 n.3, *Ameristar Jet Charter, Inc. v. Dodson Int’l Parts, Inc.*, 155 S.W.3d 50 (Mo. 2005) (en banc) (No. SC 85889). See *Peter Kiewit Sons’ Co. v. Summit Constr.*, 422 F.2d 242, 264-65 (8th Cir. 1969) (interpreting South Dakota law); *Vitex Mfg. Corp. v. Carbtex Corp.*, 377 F.2d 795, 798-800 (3rd Cir. 1967) (interpreting United States Virgin Islands law); *Resolute Ins. Co. v. Percy Jones, Inc.*, 198 F.2d 309, 312-13 (10th Cir. 1952) (interpreting Oklahoma law); *Oakland Cal. Towel Co., Inc. v. Sivils*, 126 P.2d 651, 652 (Cal. Ct. App. 1942); *Coast Indus., Inc. v. Noonan*, 231 A.2d 663, 665-66 (Conn. App. Ct. 1966) (U.C.C. case); *Murray v. Dep’t of Transp.*, 687 So. 2d 825, 826-27 (Fla. 1997); *Franklin v. Demico*, 347 S.E.2d 718, 720-21 (Ga. Ct. App. 1986) (U.C.C. case); *Sterling Freight Lines, Inc. v. Prairie Material Sales, Inc.*, 674 N.E.2d 948, 953 (Ill. Ct. App. 1996); *King Features Syndicate Dep’t of Hearst Corp. Int’l News Serv. Div. v. Courier*, 43 N.W.2d 718, 726 (Iowa 1950); *Minyard v. Culotta*, 128 So. 2d 797, 798 (La. Ct. App. 1961); *Jessup & Moore Paper Co. v. Bryant Paper Co.*, 147 A. 519, 524 (Pa. 1929); *Morrow-Smith Co. v. Cleveland Traction Co.*, 145 A. 915, 916 (Pa. 1929); *Lakewood Pipe of Tex., Inc. v. Conveying Techniques Inc.*, 814 S.W.2d 553, 556 (Tex. Ct. App. 1991) (U.C.C. case); *Breeding v. Champlain Marine & Realty Co.*, 172 A. 625, 628 (Vt. 1934).

101. 198 F.2d 309 (10th Cir. 1952).

102. *Id.* at 310.

103. *Id.* at 313.

104. See HEITGER, *supra* note 54, at 71 (“Some costs behave like fixed costs only within specific ranges of activity, increasing or decreasing in discrete jumps as activity levels change. Such costs are called *semifixed costs* or *step function costs*. For example, a firm may increase production by adding a night shift or by working overtime without increasing the cost of its production facilities. When maximum capacity

fixed costs” or “step function costs” (hereinafter “semi-fixed costs”).<sup>105</sup> For example, a factory producing widgets may have fixed costs for depreciation of the plant and equipment, but when the factory reaches capacity, an expansion of the plant is necessary in order to increase production.<sup>106</sup> The expansion of the plant would cause a jump in the fixed costs of the plant.<sup>107</sup> Though semi-fixed costs are common, this category of costs has been virtually ignored by courts.<sup>108</sup>

#### IV. THE INSTANT DECISION

In the instant case, the Missouri Supreme Court found that “Missouri courts agree that lost profits are recoverable in a variety of breach of contract, tort, and business interruption cases.”<sup>109</sup> The court noted that the usual formula for calculating lost profits was to estimate lost revenue and then deduct

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is reached within the available facilities, however, increased production can be achieved only by expanding the plant. This expansion causes a jump in the fixed cost of production facilities.”); *see also* CHERRINGTON ET AL., *supra* note 52, at 58 (“A *step-variable cost* is a variable cost that increases or decreases in ‘chunks’ of cost with small changes in volume. A given amount of cost will sustain some increase in volume without any increase in cost. At some point, however, the cost must be increased by . . . chunks and, therefore, the cost curve has a step-like pattern . . . . An example of a step-variable cost is a supply clerk who has the responsibility of delivering raw materials to production workers. One clerk with a monthly salary of \$500 can keep all production employees adequately stocked so long as production does not exceed 1,000 units per month. When this level is exceeded, an additional supply clerk must be employed at \$500 per month, which raises the total cost for supply handling to \$1,000.”).

105. *See* HEITGER, *supra* note 54, at 71.

106. *Id.*

107. *Id.*

108. There are very few reported cases in which the phrase “semi-fixed cost” has been used, and, when used, courts have not necessarily applied the same definition of the term as do cost accountants. *See* Cecil Corley Motor Co., Inc. v. Gen. Motors Corp., 380 F. Supp. 819, 856 (M.D. Tenn. 1974) (stating that “[t]he first, and perhaps most serious, defect in the damage theory advanced . . . is the use of the ‘variable net profit’ figure as the basis for determining lost profits . . . . Variable net profit does not include allowance for additional fixed, semi-fixed or variable expenses which would be generated by the additional volume of new car sales.”); *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 440 N.E.2d 29, 49 (Mass. App. Ct. 1982) (The defendant car manufacturer argued that if the plaintiff car dealership’s volume increased by the number of cars for which it claimed lost profits, there would be a corresponding increase in “semi-fixed” costs. *Id.* at 49. However, the court did not use the same definition of semi-fixed costs as the definition used by cost accountants. *See id.* The court remanded the case for the plaintiff to present specific evidence of semi-fixed expenses. *Id.* at 50).

109. *Ameristar Jet Charter, Inc. v. Dodson Int’l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. 2005) (en banc).

overhead expenses tied to the production of that revenue.<sup>110</sup> After noting that overhead expenses are made up of fixed and variable expenses, the court stated that the “Missouri appellate cases are split on whether fixed expenses should be deducted from estimated lost revenues in the calculation of lost profit damages.”<sup>111</sup> After describing the facts and holdings of several appellate cases on the issue, the court held that:

in tort actions, variable expenses, not fixed expenses, should be deducted from estimated lost revenues in the calculation of lost profits damages. These variable expenses are expenses that are tied directly to the unit of business or property damaged as a result of the defendant’s actions.<sup>112</sup>

The court then listed types of expenses that may be variable if directly tied to the damaged unit of business or property, such as fuel, maintenance, depreciation, interest, salaries and benefits for particular employees, and rental of storage space.<sup>113</sup>

Addressing Hauler’s argument that certain expenses that Owner’s president testified were fixed expenses should have been deducted from the lost profit damages, the court found that although these expenses were fixed under the facts of the case, “under different factual scenarios these overhead costs could be variable expenses that should be deducted from estimated lost revenues to determine lost profits damages.”<sup>114</sup>

Next, the court addressed Hauler’s argument that Owner failed to produce evidence or failed to deduct all of the variable expenses associated with the damaged airplane.<sup>115</sup> The court found that as to the specific expenses about which Hauler complained, the record was insufficient for the court to determine whether the expenses were fixed or variable.<sup>116</sup> Accordingly, the

110. *Id.*

111. *Id.*

112. *Id.* at 56.

113. *Id.*

114. *Id.* at 56-57.

Hauler argued that the following should be deducted: salaries and benefits and training for the pilot and co-pilot to fly the airplane; hangar rental for parking of the airplane; advertising; telephone; salaries and benefits for filing, accounting, clerical and administrative staff involved in scheduling cargo shipments and billing and collecting related revenue; the expense of office space, furniture and equipment used in generating revenues; and depreciation of such capital assets used in generating revenues and interest expense.

*Id.*

115. *Id.* at 57.

116. *Id.* Hauler specifically complained about depreciation on the airplane; debt servicing or interest on financing the airplane; and premiums for hull insurance and

court reversed the judgment and remanded it for new trial on the issue of damages.<sup>117</sup>

## V. COMMENT

### A. *The Calculation of Lost Profit Damages*

The Missouri Supreme Court's reasoning behind its holding that fixed expenses should not be deducted from awards of lost profits was correct. In tort actions, the primary objective is to put plaintiffs, as nearly as possible, into a position equivalent to their position prior to the tort.<sup>118</sup> When a plaintiff loses business as a result of the defendant's conduct, the revenue lost, less the costs saved, puts the plaintiff in as good a position as that which the plaintiff would have been had the defendant not acted tortuously.<sup>119</sup> Fixed costs, when unaffected by the defendant's actions, would be incurred by the plaintiff regardless of the defendant's conduct and should not be deducted. Indeed, to deduct fixed costs would not put the plaintiff in as good a position as the plaintiff was prior to the tort.<sup>120</sup>

Though the court clearly applied the concept of semi-fixed costs, the rigid terminology the court used to explain how to calculate lost profit damages is misaligned with the purpose of lost profit damages.

#### 1. Semi-Fixed Costs

In its argument as to some of the expenses, Hauler had the right idea but used the wrong terminology. Each airplane in Owner's fleet had a set of fixed costs attributable to it, such as insurance, depreciation, debt service financing, and hangar rental space.<sup>121</sup> If Owner added a plane to its fleet, these expenses, though traditionally classified as "fixed," would be variable in that they would increase in one big chunk.<sup>122</sup> These types of costs are "semi-fixed" costs.<sup>123</sup> Because Hauler's conduct resulted in the total number of planes in Owner's fleet decreasing for a period of time, fixed expenses associated with the plane may have decreased in one big "chunk." This "chunk" represents the semi-fixed costs associated with the plane.

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liability insurance for the airplane. *Id.* The court found that "[t]he only variable expenses Owner deducted from its estimate of lost revenue were the expenses for fuel and maintenance of the airplane." *Id.*

117. *Id.*

118. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979).

119. Munson, *supra* note 50, at 107.

120. *Id.*

121. *See Ameristar*, 155 S.W.3d at 57.

122. *See* CHERRINGTON ET AL., *supra* note 52, at 58; HEITGER, *supra* note 54, at 71.

123. *See* CHERRINGTON ET AL., *supra* note 52, at 58; HEITGER, *supra* note 54, at 71.

Owner may have saved these semi-fixed costs when the plane was lost. Thus, in order to put Owner in as good a position as before, these costs should be deducted from estimated revenues in calculating lost profit damages. A failure to deduct these costs would result in a windfall to Owner, because it would be reimbursed for more profits than it would have actually made.

The court recognized that these types of traditionally “fixed” expenses may be variable in this case, and thus the court remanded the case for a new trial on the issue of damages.<sup>124</sup> The court’s recognition that traditionally “fixed” expenses may be variable in some cases was evident when the court stated that certain costs may be variable when tied to a specific business unit, such as “maintenance, depreciation, interest . . . and rental of storage space.”<sup>125</sup> Each of these expenses are traditionally fixed. By specifically mentioning them, the court gave credence to the concept of semi-fixed costs, it just did not use the terminology. Instead, its holding appeared to state a blanket rule against deducting fixed expenses. In cases like this one, where semi-fixed costs are involved, a blanket rule against the deduction of fixed expenses is misleading because, in some cases, it is appropriate to deduct traditionally fixed expenses.

Consider the following hypothetical: a company owns five airplanes and uses them to haul freight for its customers. The company charges \$1,000 per hour to haul materials. Each hour the plane is used, the company spends \$200 for fuel, \$200 paid to the pilot, \$100 in landing fees paid to the airport. Each plane hauls freight about eight hours a day. The revenue and variable expenses are as follows:

	<u>Per Hour</u>	<u>Per Year</u> <sup>126</sup>
Revenue	\$1000	\$14,600,000
Less:		
Fuel	(\$200)	(\$2,920,000)
Pilot	(\$200)	(\$2,920,000)
Landing Fee	<u>(\$100)</u>	<u>(\$1,460,000)</u>
Gross Profit	\$500	\$7,300,000

Assume further that each airplane cost \$1,000,000 and has a 10-year life, so it is depreciated \$100,000 a year.<sup>127</sup> Each airplane costs \$40,000 a year to insure. Each airplane is stored nightly in its own rented hangar,

124. *Ameristar*, 155 S.W.3d at 57.

125. *Id.* at 56.

126. The number of hours flown per year is five planes times eight hours times 365 days, or 14,600 hours. The revenue or cost per hour is multiplied by 14,600 hours to calculate the amount per year.

127. Depreciation, when using the straight line method, is calculated by dividing the cost of the fixed asset by the number of years of the asset’s useful life. Here, the plane cost \$1,000,000 and the useful life is ten years. Therefore, depreciation per year per plane is \$100,000.



which costs \$1,000 to per month, or \$12,000 per year.<sup>128</sup> The other fixed expenses, such as the depreciation on the office building and the salaries of the owner and accountant, total \$200,000 a year. Fixed expenses are thus as follows:

	Per Plane <u>Per Year</u>	Total <sup>129</sup> <u>Per Year</u>
Depreciation of Plane	\$100,000	\$500,000
Insurance of Plane	\$ 40,000	\$200,000
Hangar Rental	\$ 12,000	\$ 60,000
Other Fixed Expenses	<u>n/a</u>	<u>\$200,000</u>
Total Fixed Expenses	\$152,000	\$960,000

Depreciation, insurance, and rent are traditionally fixed expenses. However, some of the fixed expenses break down by plane, while others do not. These “other fixed expenses” remain constant even if the number of planes increases or decreases. In contrast, the expenses that can be broken down by plane only remain fixed when the number of planes remains constant. The addition of a plane results in an increase of fixed expenses in one big “chunk.” This “chunk” of expenses is what cost accountants refer to as semi-fixed costs. If there is one less plane, fixed expenses would go down by \$152,000, the amount of fixed expenses per plane per year. If there is one less plane for half a year, fixed expenses would go down half as much, or \$76,000.

To further illustrate, compare three sets of hypothetical facts. In the first, there is no damage and the business is unaffected. In the second, the defendant’s negligence results in the delay of repairs for one plane. As a result, the plane remains out of commission for six months, but because it is still owned by the plaintiff, it sits unused in the hangar. In the third, defendant’s negligence results in the plaintiff losing a plane completely, and the plaintiff is unable to replace the plane for six months. Under these facts, the impact on profit is as follows:

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128. For purposes of this hypothetical, assume the Hangar is rented on a month-to-month basis.

129. The amount per year is calculated by multiplying the number of planes (five) by the cost per plane per year. The exception is the “other fixed expenses” category, which do not depend on the number of planes.

	Normal <u>Business</u>	Plane Remains <u>in Hangar</u>	<u>Plane Lost</u>
Revenue <sup>130</sup>	\$14,600,000	\$13,140,000	\$13,140,000
Variable Expenses:			
Fuel <sup>131</sup>	(\$2,920,000)	(\$2,628,000)	(\$2,628,000)
Pilot Salary <sup>132</sup>	(\$2,920,000)	(\$2,628,000)	(\$2,628,000)
Landing Fee <sup>133</sup>	<u>(\$1,460,000)</u>	<u>(\$1,314,000)</u>	<u>(\$1,314,000)</u>
Gross Profit	\$7,300,000	\$6,570,000	\$6,570,000
Fixed Expenses: <sup>134</sup>			
Depreciation of plane	(\$ 500,000)	(\$ 500,000)	(\$ 450,000)
Insurance	(\$ 200,000)	(\$ 200,000)	(\$ 180,000)
Hangar Rent	(\$ 60,000)	(\$ 60,000)	(\$ 54,000)
Other Fixed	<u>(\$ 200,000)</u>	<u>(\$200,000)</u>	<u>(\$ 200,000)</u>
Net Profit	\$6,340,000	\$5,610,000	\$5,686,000
Lost Profit <sup>135</sup>	-----	\$ 730,000	\$ 654,000

130. The revenue is the amount per hour (\$1,000) times the total number of hours flown by all planes that year. In the first column, the total hours flown is five planes times eight hours a day times 365 days per year, or 14,600 hours. The hours (14,600) times the revenue per hour (\$1,000) equals revenue per year of \$14,600,000. In the second and third columns, one of the planes is not flying for six months. So, the total hours flown is four planes times eight hours a day times 365 days per year plus one plane times eight hours a day times 182.5 days (half a year), or 13,140 hours. The hours (13,140) times the revenue per hour (\$1000) results in \$13,140,000 in revenue per year.

131. Fuel is calculated by multiplying the cost per hour (\$200) by the number of hours flown per year. See *supra* note 130 for the calculation of hours per year for each column.

132. Pilot salary is calculated by multiplying the cost per hour (\$200) by the number of hours flown per year. See *supra* note 130 for the calculation of hours per year for each column.

133. Landing fee is calculated by multiplying the cost per hour (\$100) by the number of hours flown per year. See *supra* note 130 for the calculation of hours per year for each column.

134. See the discussion on fixed expenses, *supra* note 129, for the calculation of fixed expenses in columns one and two. For column three, fixed expenses are less because rather than having five planes all year, there are only four planes for half of the year, for an average of 4.5 planes for the year. Thus, fixed expenses for depreciation of plane, insurance, and hangar rent are the fixed expense per plane per year times 4.5 planes. "Other Fixed" remains constant as it is unaffected by the number of planes.

135. Lost profit is the profit from the normal business, without defendant's tortious conduct, less the profit with tortious conduct. The lost profit when the plane remains in the hangar is \$6,340,000 less \$5,610,000. The lost profit when the plane is lost is \$6,340,000 less \$5,686,000.

The lost profit is less when the plane is lost than when the plane sits in the hangar. This is because the plaintiff still incurs fixed expenses relating to the plane while the plane sits in the hangar, but the plaintiff *saves* these expenses when the plane is lost. The difference between the lost profit amounts represents the semi-fixed costs: the fixed expenses saved because the plaintiff had one less plane for six months. The lost profit damages when the plane sits in the hangar are \$730,000. When the plane is lost, the lost profit damages are \$654,000. The difference between these amounts is \$76,000, the same amount as the amount of fixed expenses per plane for six months.<sup>136</sup>

If the plaintiff's lost profit damages are calculated by only deducting variable expenses, the amount would be appropriate in the instance where the plane sat in the hangar because fixed expenses remained the same. The only costs saved by the plaintiff were the variable costs. However, when the plaintiff lost a plane, the fixed expenses went down because of the semi-fixed costs associated with each plane. Therefore, if the plaintiff's damages are calculated by only deducting variable, and not fixed, expenses from estimated revenue, the plaintiff would be reimbursed for more lost profits than it would have actually realized. The plaintiff would receive a windfall amount of \$76,000.

## 2. Another Case Where Fixed Expenses Should be Deducted

Cases that involve semi-fixed costs are not the only cases where it is appropriate to deduct fixed expenses. Recall that in *Skinner*, the plaintiffs sued defendant for lost profits in connection with the parties' partnership in the operation of a restaurant.<sup>137</sup> In that case, the plaintiffs entered into a written contract with the defendant in which the defendant agreed to convey one-half interest in a restaurant in exchange for a \$15,000 investment.<sup>138</sup> The parties agreed to share profits and expenses from the restaurant equally, and to make all decisions concerning the restaurant jointly whenever possible.<sup>139</sup> The defendant closed the restaurant after there was disagreement between the parties.<sup>140</sup> The plaintiffs sued, claiming that "they were entitled to an undivided one-half share of the profits of the restaurant, [and] that they had demanded an accounting of the revenue and expenses of the restaurant, [but that the] defendant never allowed them access to the records."<sup>141</sup> In that case, the

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136. See discussion of fixed expenses, *supra* note 129 and accompanying text.

137. *Skinner v. Thomas*, 982 S.W.2d 698 (Mo. Ct. App. 1998). See *supra* notes 74-78 and accompanying text. The plaintiffs entitled the action "breach of contract," and it was submitted to the jury as a breach of contract to share profits, but the action actually prayed for an accounting and other equitable relief in connection with the parties' agreement to equally share profits. *Skinner*, 982 S.W.2d at 698.

138. *Skinner*, 982 S.W.2d at 698.

139. *Id.*

140. *Id.* at 698-99.

141. *Id.* at 699.

plaintiff contractually agreed to share *all* expenses. Thus, any fixed expenses, such as mortgage, rent, utilities, and the accountant's fee, must be deducted from estimated revenues in the calculation of lost profits. Since the plaintiffs agreed to pay one half of *all* expenses, one half of all expenses (including fixed) that the plaintiffs did not pay for should be deducted from plaintiffs' share of the revenue. Thus, because the plaintiffs did not show evidence of the accountant services, rent, mortgage, utilities, etc., the court in *Skinner* was correct to conclude that the plaintiffs failed to make a submissible case under the theory submitted to the jury.<sup>142</sup>

### 3. The Correct Formula

The prior examples are just two instances in which fixed expenses should be deducted from estimated revenues to calculate lost profits. The focus of the calculation of lost profits should be on the costs saved by the plaintiff, rather than the classification of expenses as fixed or variable. In many cases, only variable expenses will be deducted. However, a rigid formula by which costs are classified and only the variable costs are deducted will fail to achieve the goal of lost profit awards in many instances. Recognizing the behaviors of costs as fixed or variable serves as a useful guiding post, but courts should recognize that some costs are semi-fixed, and thus a two-category classification of costs will not always be effective. Therefore, a court should inquire whether the cost was actually saved by the plaintiff, not whether the cost is fixed or variable, when calculating lost profits.

#### *B. Question of Law or Fact*

The *Ameristar* court held that, in tort cases, fixed expenses should not be deducted from estimated lost revenues in the estimation of lost profit damages.<sup>143</sup> However, the court's holding contains ambiguity as to whether the classification of an expense as fixed or variable is a matter of law or an issue of fact. In its discussion of Hauler's argument that certain expenses should be deducted, the court stated: "[a]lthough *this Court finds* these expenses to be fixed under the facts of this case, under different *factual* scenarios these overhead costs could be variable expenses that should be deducted from estimated lost revenues to determine lost profits damages."<sup>144</sup> The court's reference to the factual nature of the expenses implies that the classification of an expense

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142. *See id.* at 700.

143. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 56 (Mo. 2005) (en banc). The court specifically stated that its holding applied to *tort* cases. *Id.* However, in breach of contract cases, lost profit damages are calculated the same way. *Id.* Therefore, this holding should apply to both types of cases. This is, of course, unless there is a contract like the one in *Skinner*, in which the contract specifically called for both parties to share *all* expenses. *See supra* notes 137-142.

144. *Ameristar*, 155 S.W.3d at 57 (emphasis added).

as fixed or variable is a question of fact. The court's use of the word "finds," however, implies that the court made a finding as a matter of law. Similarly, the court later stated that "the record is insufficient for *this Court to determine* what these expenses were and if they are fixed expenses that are not to be deducted, or are variable expenses that should be deducted from estimated lost revenues in the calculation of lost profits damages."<sup>145</sup> Again, the implication is that the court decided as a matter of law whether the costs are fixed or variable.

In Missouri, the jury determines whether the defendant damaged the plaintiff and, if so, to what extent.<sup>146</sup> The question of whether to deduct an expense from estimated revenues depends on whether or not the plaintiff saved the expense as a result of the defendant's conduct. This determination is directly linked to the extent of the plaintiff's damages. Thus, it is a question for the jury. Though an explanation of cost behaviors as fixed, semi-fixed, or variable may be useful to aid the jury in making this determination, the ultimate question presented to the jury should be whether the cost was actually saved by the plaintiff.

## VI. CONCLUSION

In *Ameristar*, the Missouri Supreme Court appropriately resolved a conflict in appellate case law. This decision promotes the theory behind lost profit damage awards and is in line with cases in other jurisdictions across the country and with the UCC. The opinion may have benefited from clarification as to whether the issue is one of law or fact. Additionally, understanding the behaviors of certain costs as "semi fixed"<sup>147</sup> gives effect to the court's reasoning, whereas a rigid scheme in which each cost is classified as either "fixed" or "variable" fails to achieve the result sought by the court. Though cost behaviors are useful in determining the extent of the plaintiff's damages, the calculation should focus on whether the cost was actually saved by the plaintiff, rather than the classification of the cost as fixed or variable. Regardless, the court's holding adheres to the concepts behind these cost accounting terms, and thus reaches the same result without recognizing the category of semi-fixed costs.

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145. *Id.* (emphasis added).

146. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 503 (Mo. 1992) (en banc).

147. *See supra* note 104.