Litigation Economics SERIES

Economatrix Research Associates, Inc

An Economic and Financial Consulting Firm

Ten Mistakes Plaintiff's Economists Make in Measuring Lost Earnings in Personal Injury Cases

1 Projecting Future Losses for Too Long a Time Period

Some economists project losses for arbitrary and unsupported time periods. However, the standard in the economics profession is the worklife expectancy. This is a statistical construct based upon labor market data, which vary by a worker's age, sex and educational level. For many workers, especially younger workers, this is less than age 65 and most times it is less than other arbitrary end dates such as age 70 or even 75. A worklife is not the same as a planned retirement date. Defendants need to consult their economist who will show them what the various different worklife expectancy tables indicate and which tables are accepted in the profession and which are not.

Attorneys should be aware of tables that some plaintiffs may try to utilize - so called disabled worklife tables. These tables are not accepted by the economics profession and tend to produce exaggerated and unreliable loss measures.

2 Failure to Fully Discount Losses

In many jurisdictions, including Federal courts and Maritime cases, losses need to be brought to present value. This involves dividing future losses by the relevant discount rate to reduce them to present value terms. Using too low a discount rate exaggerates the present value of the loss. Using a version of discounting, the total offset method, usually exaggerates the loss as well and often is wrong. It is often the case that the expert may not fully understand security market returns and is thus unable to determine what the appropriate discount rate should be. Your economist will be able to determine what the correct discount rate is for your case.

3 Selecting an Anomalous Year Upon Which to Base a Lost Earnings Forecast

Many times damages experts pick an anomalous year, such as a year when the plaintiff earned unusually high compensation, and extrapolate those earnings levels out for the remainder of the plaintiff's worklife and sometimes even longer. Your economist needs to analyze the plaintiff's work history and determine if the selected year is anomalous and, if so, what earnings level is more representative of the plaintiff's employment history.

4 Not Fully Exploring Mitigation

Each dollar of post-injury wages and benefits results in a dollar-for-dollar reduction in the estimated loss. Plaintiffs have an obligation to mitigate their damages. Sometimes the defense may use a vocational or employability expert, in conjunction with an economist, to fully measure the extent to which the plaintiff can mitigate his or her damages and determine what the mitigated losses are. It is important for the defense to also be aware that vocational and employability assumptions are usually outside the expertise of an economist. A defense vocational expert may possibly shed useful light on the ability of the plaintiff to pursue gainful employment to mitigate his or her losses. Such assumptions can then be given to the economist to measure the extent to which damages can be mitigated.

5 Not Considering Business Fluctuations and Unemployment Contingencies

Amazingly, it is not unusual to see economists retained by plaintiffs project a future stream of earnings that does not allow in any way for the possibility of interruptions due to unemployment and the cyclical variation of the economy. They end up creating an artificial worker who is immune from unemployment. In such cases, the defense needs to consult an economist who can examine the plaintiff's past unemployment experience, consider developments in the plaintiff's industry, and determine what the unemployment-adjusted losses are.

6 Failure to Conduct Industry and Firm-Specific Research

It is not unusual to see experts project losses based upon specific employment and industry assumptions but not do any research on the industry or the companies that are assumed to employ the plaintiff. Many times there are important changes in the industry that would affect the reasonableness of the projection. These may give rise to a need for some industry analysis. Such an analysis could be conducted by an economist hired by the defendant.

7 Failure to Deduct Taxes When the Jurisdiction Requires It

Federal case law *(Jones & Laughlin Steel Corp. v. Pfeifer)* and the laws of many states, such as New Jersey *(Friedman v. C&S Car Service)*, require that losses be presented on a net-of-taxes basis. Other states such as New York *(McKee v. Colt Electronics)* require that losses be presented on a gross basis. When taxes are required to be deducted, they must be reliably measured and deducted. Often plaintiff's economists measure such taxes incorrectly or do not even consider them.

8 Incorrectly Factoring in Offsetting Pension Benefits

Sometimes the combination of a lower pension along with alternative, post-injury employment can result in an earnings stream that partially or even fully mitigates the plaintiff's losses. In order to determine if this is the case, the defense needs to hire an economist to accurately measure the pre-injury and post-injury pension projections. Sometimes this analysis can be complicated and plaintiff's experts do a "quick and dirty" analysis that exaggerates the losses and results in an inaccurate projection. In such cases, the defendant may be best served by devoting some resources to measuring the pension correctly and determining the true extent to which losses may be mitigated.

9 Using an Inaccurate Inflation Rate

Future lost earnings projections are constructed by applying a selected inflation rate to a base or starting income level. Income levels increase at a compound rate and this compounding effect has a greater impact the higher the selected inflation rate. Picking too high an inflation rate, such as one that does not fully factor in the generally lower inflation rates we now have in many industries, exaggerates the loss. This exaggeration is greater the longer the projection. Defendants need to seek the advice of an economic expert who fully understands inflationary trends in the economy overall as well as in the relevant industry sectors.

10 Inaccurately Measuring the Value of Fringe Benefits

There are many ways that fringe benefits can be inaccurately valued. Sometimes fringe benefits are double counted when the economist includes various fringe benefits in a projection of losses while the attorneys also seek compensation for certain losses, such as past medical expenses. These categories may overlap and the defense needs to consult their economist to determine the extent to which this may be the case. In other instances, fringe benefits are simply inaccurately measured using simplistic assumptions or percentages. This may result in a value that has little to do with the plaintiff's actual losses or which is simply speculative.

Special Considerations in Wrongful Death Lawsuits

One major difference in damages in wrongful death lawsuits, compared to personal injury cases, is that there needs to be a deduction for personal consumption expenditures. These are the expenditures that the decedent would have spent exclusively on him or herself. Such monies would not be available for the survivors had the decedent lived.

Economic research studies are available which provide an estimate of what such expenditures would be as a percent of income. This percentage can be quite high in cases where the decedent is single. Defendants need to have a clear understanding of what this deduction means and how it is not the same as a different, but related, concept, personal maintenance expenditures, which tends to be discussed more in the State of Pennsylvania *(McClinton v. White)*.

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