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**Headline:** The Cross Examination of the Defense Economist

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In garden-variety personal injury cases, the defense generally will not put on its own economist. Instead, it will have its economist acting behind the scenes, preparing the defense for cross-examination of the plaintiff's economist.

Lately, however, in catastrophic cases where enormous numbers are projected for future medical care and diminution in earning capacity, the defense has been proffering economists either because the plaintiff's projections are so large, or because of a desire to attack the credibility of the plaintiff's economist.

An effective cross, however, can make the defense second-guess its strategy of ever putting its economist on the stand.

### **Growth Rates and Discount Rates**

There are two major substantive concepts to be aware of in preparing to cross-examine an economist: the growth rate and the discount rate. The growth rate is basically another name for the rate of inflation, or the decline in the value of money and purchasing power; the discount rate is another way of saying interest rate, or quantifying the concept of the time value of money over a plaintiff's life expectancy or work-life expectancy. In state court proceedings involving straight personal injury cases (nonmedical malpractice cases), the discount rate is not considered by the jury. It is accounted for by the court in post-trial 50-B calculations. The state court jury is specifically instructed not to discount to present value.

Federal court trials under federal law, such as a maritime case, are much different. There, the discount rate is not only admissible, but the jury is instructed that it must reduce the projections to present value -- even the awards for future pain and suffering. The higher the discount rate, the lower the future projections become, and the lower the award. The higher the growth rate, the higher the future projections become when reduced to present value, and the higher the award. If the discount rate is higher than the growth rate, the projections, when reduced to present value, will be lower than if the economist performed just a straight projection, that is, simply multiplying the present costs by the number of years.

Determining the prevailing discount rate depends on the number of years encompassed by the awards which need to be reduced to present value (conversely, the projected growth rate tends to remain the same, regardless of the length of the projection).

For example, the discounting of 30 years of payments would typically be done with a blended rate, using interest rates such as a 30-year Treasury Bill to determine the value of a no-risk investment of a set

period of time, combined with other economic indicators reflecting other safe investments for other shorter periods.

In testifying before a jury, many economists make it seem that the art of economics is an esoteric one, that only they can master. That is not quite true, and your job is to demonstrate that to the jury. Economists basically determine their growth rates based upon the Consumer Price Index or CPI. The CPI has separate categories for goods and services, including specific categories for medical care services that economists typically use to project future medical costs. The Consumer Price Index is easily found online through the federal government's Bureau of Labor Statistics or BLS.gov. These values can be downloaded from the Internet and easily used as a basis for cross-examination. It is particularly helpful to enlarge the portions of the CPI that show the percentage of inflationary change from year to year.

### **Cost of Future Medical Care**

Take for example, a huge disparity between the plaintiff's economic projections for future medical care and the defense projections where the plaintiff's projections are at 6.98 percent and the defense projections are considerably lower at 3.4 percent. What you want to do is take the mystery out of the projections and show the jury the correct bases for the ultimate award:

Q: Sir, you testified that the growth rate for a home care attendant would be 3.4 percent, true?

Q: That was based upon your judgment as an economist, correct?

Q: Based upon your expertise in the field, right?

Q: Yet there is something known as the Consumer Price Index, correct?

Q: Statistics that are actually published by the United States Government?

Q: Statistics that you actually based your opinion on in this case, right?

Q: And so it's no secret, all you have to do is basically go to the Internet to find these specific growth rates, true?

Q: To BLS.gov, right?

Q: And that is information that not just you, but all esteemed economists generally rely on in coming to their opinions on inflationary rates -- specifically regarding medical services?

After, marking the relevant enlargement of the applicable page of the Bureau of Labor Statistics for identification, approaching the witness, identifying it and offering it into evidence, continue the cross:

Q: First of all, you would agree, that Hospital Related Services under the Consumer Price Index have grown in the last 29 years at a rate of 7.98 percent, true?

Q: And that is easily calculated from finding the net percentage change each year dating back from 1978 through 2007, true?

Q: And we can actually see that with our own eyes on this chart in evidence prepared by the United States government, correct?

Q: And there is no question, that you have only projected the future cost of my client's home care services at 3.4 percent, right?

Q: Nowhere near what this chart shows, true?

Q: Reasoning that a home health care attendant doesn't fit within 'Hospital Related Services,' true?

Q: On the contrary, it is your position that home attendants fit within the CPI category of 'services by other medical professionals,' true?

Q: You are absolutely wrong in taking that position, aren't you?

Q: Right here on plaintiff's exhibit 2, this blow up of the CPI, says unequivocally that 'Care for invalids in the home is now included in the hospital and related services category of the CPI, true?

Q: A category that has been growing at almost 8 percent, over the last 29 years, not the 3 percent you are claiming, correct?

Q: And there is no question that this category includes the home care that my client is getting, is there?

Q: And there is no question that this category is growing at a rate twice as much as what you told this jury under oath on your direct testimony?

Q: What I would like you to do sir, is redo your calculations on this board at 7.89 percent, rather than at 3.4 percent.

Continue this line of attack on the other areas of future medical costs that you can find in the Medical Care Index of the Consumer Price Index:

Q: You also took the position that Mr. Smith's physical therapy should be projected only at 3.4 percent as well, didn't you?

Q: That is far lower than the 6.9 percent that our economist used as the basis for his growth rate?

Q: You determined, based upon your judgment, that physical therapy also fits into the category 'Services

by other medical professionals,' true?

Q: And that is shown on page two of the blow-up we just entered into evidence, correct?

Q: It actually says there: 'Services performed by other professionals such as physical therapists, true?

Q: But I want you to assume that both Mr. Smith's doctor, and the defense life-care planner, testified that the type of physical therapy he needs is hospital-based physical therapy. You'd agree that if what even the defense's own witness says is true, it would take the physical therapy from one category within the CPI to another category, right?

Q: A category within 'Outpatient hospital services,' true?

Q: And once again more than double the growth rate you used on direct?

Q: Please perform those calculations for us.

Q: You'd agree with me, that using this different growth rate projects physical therapy costs into the multimillions, true?

Q: And that, of course, is to a reasonable degree of economic certainty, right?

Sound economic theory dictates that when making cost projections an economist should go back as many years in the past as he projects into the future. If he fails to do that, he should be cross-examined on that failure. Many defense economists do not go back far enough within the historical data either because the data for the particular category only goes back a few years, or because, to go back further, dramatically increases the projections, and therefore, the verdict value.

### **Wages and Fringe Benefits**

When cross-examining on the loss of future income, do not forget the value of fringe benefits. Most workers who are not minimum wage, or part-time employees, get certain fringe benefits. They can add a tremendous amount to the projections of lost earnings depending on the type of fringes the worker is getting. Many union contracts actually spell out the specific fringe benefits that the member is getting, as well as the monies the employer contributes to those benefits. The plaintiff's economist will add up those dollar amount contributions and determine the percentage of those benefits in relation to salary, thereby adding that percentage to the actual salary to show lost earnings. The defense economist generally takes the position that adding those specified contributions to salary is inappropriate methodology.

The cross on fringe benefits should go something like this:

Q: Now, Dr. Economist, the Collective Bargaining Agreement of July 2008 actually has a title that says, fringe benefits, true?

Q: And fringe benefits have a certain meaning, don't they?

Q: They are what are known as employment benefits in addition to one's actual salary, correct?

Q: Fringe benefits usually involve health insurance, true?

Q: Dental insurance, right?

Q: Even medical insurance for immediate family members, correct?

Q: The right to certain amounts of vacation, true?

Q: A pension, or retirement income?

Q: Paid holidays?

Q: These fringe benefits significantly add to a worker's total compensation, right?

Q: And for many workers, it is precisely the value of those fringe benefits that attract them to the job in the first place, true?

Q: The collective bargaining agreement actually shows different categories of specific fringe benefits, true?

Q: And when you add up these categories, those fringe benefits per hour come to \$24.47 per hour, right?

Q: And my client makes \$36.59 per hour, true?

Q: Tell the jury what percentage of his wages his fringe benefits are, sir.

A: 56.8 percent.

Q: Those are excellent benefits true?

Q: That's a great job, right?

Q: As a matter of fact, for many people, it may be worth working at that job for the benefit package alone, true?

Make the defense economist project the lost earnings with the added value of your client's fringe benefits. In the above example, those projections would be increased from \$24 per hour to \$61 per hour. Then have him carry out the projections based upon compounded growth rates over the appropriate work-life expectancy.

### **Life Expectancy**

Life expectancy tables published by the federal government are not only included in jury instructions but are utilized by all economists to complete their projections. Depending on the table used, the disparity in the ultimate projections could be enormous. Because the life expectancy for certain minorities is considerably less than whites, defense economists typically project future damages based on race to shorten the life-expectancy and minimize the defendant's damages. The problem with using differing life expectancy tables is that it is arguably a violation of both the Equal Protection Clause and the Due Process Clause of the U.S. Constitution. It means that white people are entitled to higher damages awards than black people. You should ultimately argue the constitutionality of such a tactic at sidebar, but cross-examine the defense economist to highlight the issue:

Q: You made projections of life expectancy only for 25 more years, true?

Q: I take it you based that on certain life expectancy tables?

Q: You used life expectancy tables limited to those of black males, true?

Q: You testified on direct that my client is African-American, didn't you?

Q: Tell the jury how you know that?

Q: Do you know what his precise heritage is?

Q: Do you know whether his ancestors are from Africa or elsewhere?

Q: Tell us what percentage of his heritage is considered black?

Q: Do you know if he has any 'white' blood?

Q: Or 'Asian' blood?

Q: The truth is, you have no idea?

Q: By the way, the difference in life expectancy is believed to be more from socio-economic factors than racial factors, correct?

Q: For example, the life expectancies are decreased because of neighborhoods, the HIV virus and

homicides, true?

Q: And therefore, by getting a substantial award in the case, being able to get the best medical care, moving to a safer neighborhood, my client's life expectancy should increase, right? Or is that outside your expertise?

Q: Tell the jury, who instructed you to use the tables you used?

Q: Well, correct me if I'm wrong, but you spoke about that very issue with defense counsel, didn't you?

Recently, an eminent federal district court judge ruled that utilizing life-expectancy projections based on race in personal injury cases is unconstitutional. [FN1] You should be armed with this case by the time the defense economist testifies, a case that will ultimately increase awards for minorities in all personal injury cases involving future damages -- even damages for pain and suffering.

### **Conclusion**

The cross-examination of the defense economist is not a difficult task at all. With Internet access to the Federal Bureau of Labor Statistics, the cross of the economist becomes a relatively simple proposition. Download and enlarge the relevant portions of the Consumer Price Index to utilize on cross-examination. Recognize that the growth rate for medical services has traditionally been higher than for other consumer services. Calculate the value of fringe benefits while forcing the defense economist to carry out your projections.

Use these tactics to show that your economist's testimony was right and the defense economist's direct testimony was wrong.

Projecting large numbers through your economist will help you achieve a substantial verdict, but compelling the defense economist to agree with those projections will ensure you keep it.

FN1. McMillan v. City of New York, 03-CV-6049 (E.D.N.Y. Weinstein, J) New York Law Journal, Oct. 20, 2008.