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'Challenging the Plaintiff's Economic Expert'

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Introduction

The trial cross-examination of a plaintiff's economic expert may not be the emotional highlight of many cases, but it can be a critically important element (and in some commercial cases, the critically important element) in determining the value of a case. Economic expertise is commonly offered, and often necessary, in a wide range of cases from personal injury to commercial litigation and antitrust cases. Unlike with scientific or medical experts, it is not uncommon to see defense counsel elect not to call a counter economic expert to trial – often to avoid the appearance of setting a floor for damages in a personal injury case. Instead, defense counsel will sometimes rely on their challenge (i.e., cross-examination) of the plaintiff's expert to make the defense's points regarding damages.

Handling economic damages issues at trial is an inherently tricky endeavor for the defense for a number of reasons. In contested liability cases, damages are an issue that defendants never want the jury to reach, and therefore, defense counsel does not want to emphasize them at trial. And even in commercial and other cases where the parties' respective economic positions are an ultimate, inescapable issue, the hurdle of making the evidence interesting and digestible to a jury remains.

This article is intended to frame common issues that a defense litigator will face when challenging an opposing party's expert economist or accountant and provide examples of several approaches to the expert challenge.

Challenges to Economic Expert Testimony

There are a number of recognized approaches by which to challenge the testimony of a plaintiff's proffered economic expert, whether for purposes of exclusion by the trial court or to undermine the jury's acceptance of the expert and his/her opinions. Viable methods of attack will vary depending upon the type of case and the

types of damages claimed.

Challenges Based Upon Speculative Opinion

The general rule in many jurisdictions is that damages must be established to a degree of reasonable certainty. See, e.g., Restatement (Second) of Contracts § 352 (1981) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty"); Merion Spring Co. v. Muelles Hno. Garcia Torres, 462 A.2d 686, 695 (Pa.Super. 1983) (citing the Restatement (Second) definition of speculative profits with approval including comment (c) which describes such profits as those which are "so meager or uncertain as to afford no reasonable basis for inference"); De Jager Construction, Inc. v. Schleininger, 938 F.Supp. 446, 449 (W.D.Mich. 1996) (excluding accounting expert based on unsupported assumptions and projections, including "deliberately ignor[ing] documents and figures which would strike a CPA in the face"); also compare, Rodriquez v. United States, 823 F.2d 735, 749 (3rd Cir. 1987) (calculation of future earnings of decedent were speculative where based on the probability that he would have become a commercial pilot based upon wife's testimony that such was his ambition) and McGrath v. Erie L.R. Co., 460 F.2d 1312, 1315 (3rd Cir. 1972) (damages based upon compensation level of expected promotion not speculative where testimony was provided that it was 100% certain that the plaintiff would have received the promotion). Furthermore, courts have excluded experts whose testimony was based upon generalized industry projections that were not sufficiently applicable to plaintiff's specific circumstances. See, e.g., Van Brode Group, Inc. v. Bowditch & Dewey, 633 N.E.2d 424, 430 (Mass. App. 1994).

Speculative damages are those "[p]rospective or anticipated damages from the same acts or facts constituting the present cause of action, but which depend upon future developments which are contingent, conjectural, or improbable." Black's Law Dictionary Online, 2nd Ed. (https://thelawdictionary.org/speculative-damages). The law limits a party's opportunity to recover damages that are too remote or speculative in nature. The prohibition against speculative future damages is not limited to contract and commercial cases, but applies to personal injury claims, as well. See, e.g., Jordan v. Bero, 210 S.E.2d 618 (W.Va. 1974) (future permanent consequences of a personal injury must be established to a reasonable certainty; "contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery"); Chesapeake Operating, Inc. v. Hopel, 2013 WL 5782916 (Tex.App. Oct. 24., 2013) (Memorandum Opinion) (economic expert in personal injury case not permitted to give testimony on loss of earning capacity where opinion based on speculation by plaintiff's rehabilitation counselor; finding that under Daubert, an economic expert's underlying assumption is not reasonable simply because "an expert says it is so").

In the context of lost profits, issues relating to the reasonable certainty of – or, alternatively, the speculative nature of – damages can include the manner of commercial activity involved, whether or not the subject product or market was new or untested, and the extent to which the business was dependent upon fluctuating market conditions, among other factors. See, e.g., Texas Instruments, Inc. v. Teletron Energy Management, Inc., 877 S.W.2d 276, 279-280 (Tex. 1994). The riskier the venture and the more "wishful" the plaintiffs' expectations of profit, the more likely a court will find the claimed damages speculative. Id. at 280; see also, Cambridge Plating Co., Inc. v. Napco, Inc., 876 F.Supp. 326 (D.Mass. 1995), affirmed in part and reversed in part, 85 F.3d 752 (1st Cir. 1996) (court reduced lost profits where expert's opinions regarding the amount and duration of lost profits were inflated).

Courts have recognized a number of approaches for preparing lost profits calculations, but the most commonly

discussed approach in the case law is the "before and after" model, in which the periods of time immediately before and immediately following the alleged harmful conduct are compared as to profitability. See, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) (antitrust case); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 260 (1946) (noting with approval the combined use of the "before and after" method with the "yardstick" method, an alternate approach which uses another similarly situated company as the basis for comparison); Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987) (Judge Posner applying and analyzing the "before and after" method); Schiller v. Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410 (7th Cir. 1992) (another Judge Posner opinion examining "before and after").

While speculation is not permitted, courts have found that mathematical perfection is not required for admissibility. See, Scully v. U.S. WATS, Inc., 238 F.3d 497, 515 (3rd Cir. 2001) ("mathematical preciseness" not required in lost profits analysis); Scobell Inc. v. Schade, 688 A.2d 715, 719 (Pa.Super. 1997) ("mathematical certainty" not required; reasonable certainty is the standard).

One manifestation of the speculation-based challenge is to attack the incomplete nature of the opposing expert's review and methodology (see below as to methodology challenges). For instance, in a profit and loss case, has the expert analyzed the profit and loss statements, statement of cash flows and income tax returns from the relevant period? In a personal injury case, has the expert projected one or more scenarios that are contradicted by the testimony of medical experts and therefore reflect merely wishful thinking on the part of the plaintiff? Have the assumptions upon which the expert built his analysis become unreliable due to recent events or changes in market conditions? Questions like these dig under the surface of the expert's opinions and reveal the expert's insufficient methodology and speculative nature of his or her conclusions. See, e.g., JMJ Enterprises, Inc., v. Via Veneto Italian Ice, Inc., 1998 WL 175888, *8 (E.D.Pa. 1998) (applying American Institute of Certified Public Accountants guidelines in striking the testimony of plaintiff's expert accountant who relied upon unfounded assumptions in formulating his damages model).

Qualifications Based Challenges

Most economic experts will be credentialed as a Forensic Economist, Certified Public Accountant (CPA), Certified Valuation Analyst (CVA), and/or hold a Certification in Financial Forensics (CFF), or the equivalent to those credentials outside of the United States. Other financial specialty designations such as Chartered Financial Analyst (CFA) may appear on experts' curriculum vitae, as well. Understanding the basics of those credentials and the differences between them is important for the litigator assessing a potential qualifications challenge. The CPA designation reflects that the professional has passed the uniform CPA test administered by the American Institute of CPAs ("AICPA"), and satisfied related work experience requirements. A "certified accountant" is the professional equivalent of a CPA in the United Kingdom. The AICPA also recognizes a specialty credential designation of CFF for those CPAs with at least five years of experience, who pass the CFF examination and complete requirements for field experience in forensic accounting and related continuing education credits. The CVA credential is a designation from the CFA Institute that requires completion of three levels of examinations covering a range of financial disciplines including accounting and economics.

The defense litigator should consider (and should obtain guidance from his or her own consulting economic expert, where necessary) the extent to which the analyses conducted by the plaintiffs' economic expert fit within his or her field(s) of expertise. If some or all of the analyses is outside the expert's field, a jury can readily grasp a challenge to those opinions. Even if the expert is not actually straying beyond his field in giving

the opinions rendered, opportunities for a qualifications challenge may exist if the expert has relatively little practical experience with the particular analysis/model in question, or if there is an advanced certification or credential relating to that analysis which the expert has not obtained. This type of challenge can be enhanced where the defense is using its own economic expert, and the defense witness is better qualified.

Relevance Based Challenges

The foundational tenant of admissibility of expert opinion is that it must be helpful to the jury. Rule 702, Federal Rules of Evidence - "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." - is the first threshold that an expert must cross. Where an expert's methodology amounts to nothing more than simple calculations that are within the common knowledge of the jury, the opinions are unnecessary and should be excluded. See, e.g., Israel Travel Advisory Service, Inc., v. Israel Identify Tours, Inc., 1993 WL 387346, at *2 (N.D.Ill. 1993) (expert opinion excluded where court concluded that the simple averages calculated by the expert "could be computed by anyone with junior high school mathematics"). As Judge Posner observed in Schiller & Schmidt, Inc. v. Nordisco Corp., supra, in order to constitute admissible economic expert testimony, it is not enough to "endu[] simplistic extrapolation and childish arithmetic with the appearance of authority by hiring a professor to mouth damages theories that make a joke of the concept of expert knowledge." Id. at 415-16. In short, the economic expert is vulnerable to attack if offering no calculation that the jury cannot understand and do on its own, and therefore overly simple analyses can be exposed when offered.

Methodology Based Challenges

Within the United States, in federal court and in many states, the standard for methodology based challenges to expert testimony is the now-familiar_ Daubert_ standard, later extended to non-scientific but technical or specialized expert testimony by Kumho Tire. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 1999. Under Daubert/Kumho, the court serves as the gatekeeper to admission or exclusion of expert testimony, and in order to merit admission that testimony must be demonstrated as both reliable and relevant. Factors germane to that determination include whether the expert's theory/technique/opinion is generally accepted in the field, whether it can be tested, whether it has a known rate of error, whether it has been peer reviewed, and the extent to which it satisfies applicable industry standards if any exist. Id.

United States jurisdictions that have not adopted Daubert typically apply the standard of Frye v. United States, 293 F. 1013 (D.C.Cir. 1923), the hallmark factor of which is general acceptance of the methodology in question. Outside of the U.S., other standards may control. The United Kingdom, for instance, does not have an equivalent to the Daubert challenge.

Flaws in methodology may come in many forms, such as misapplication of a discount rate or failure to reduce to present value. A discount rate is an interest rate applied to a future cash flow in order to determine the present value of that sum of money. The economic expert's use of a discount rate acknowledges that a future sum of money is worth less today because if the money were in hand today, it could be invested to earn interest. Present value reductions, which are commonplace and in some jurisdictions required, reflect the value in today's monetary unit of a specific future cash flow, determined by multiplying the future total by a discount rate in order to account for the future effects of inflation. The determination of the discount rate applied in the calculation of present cash value will be one of the assumptions built into the economic expert's analysis. The

failure to reduce to present value and/or the application of an erroneous discount rate can create vulnerability for the expert.

Examples of other methodology factors that might provide a basis for challenge include over-reliance upon life expectancy and work life expectancy tables. The tables are derived from resources compiled by the U.S. Department of Labor Statistics purporting to provide a statistical average life expectancy for particular demographics of individuals and the projected age at which an individual will exit the workforce and cease to earn wages income. While reliance on such tables by economic damages experts is commonplace, in some cases the expert will be vulnerable to a challenge that the statistical averages upon which these tables are based (i.e., "average person" data) does not reasonably reflect the circumstances of the plaintiff in the case.

For a sampling of cases applying a Daubert challenge to an economic expert's proffered testimony, see JMJ Enterprises, Inc., supra (expert excluded in where methodology contradicted American Institute of Certified Public Accountants guidelines); ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc., 198 F.Supp.2d 598 (E.D.Pa. 2002) (plaintiff's economic expert's lost profits opinions excluded in part and admitted in part, with exclusion based upon speculative nature of some proffered opinions); De Jager Construction, supra at 452 (noting that accounting experts are required to provide "technical competence" and "due diligence"); Coleman v. Dydula, 139 F.Supp.2d 388 (W.D.N.Y. 2001) (economist's testimony on future lost wages, future medical costs and work life expectancy admissible despite absence of testing and publication, where demonstrated that multiple acceptable approaches to his projections existed); Garcia v. Columbia Medical Center of Sherman, 996 F.Supp. 617 (E.D.Tex. 1998) (admitting forensic economist's future lost wages opinion where based upon tables for growth, discount rates, life expectancy and work life expectancy).

Miscalculation Based Challenges

Don't forget to check the math! (Or, better yet, to have a defense expert – even if in only a consulting, non-testifying capacity – check it). Even the best economists and accountants are fallible and no one is immune from mistakes. Courts have recognized the imprecise nature of some economic calculations and that mathematical imprecision may not be a basis for exclusion. See, Commonwealth Assocs. v. Palomar Med. Tech., Inc., 982 F.Supp. 205, 208 (S.D.N.Y. 1997) ("in assessing damages, particularly those for lost profits, we recognize the inevitability of some imprecision of proof, and note that certainty as to the amount of damages is not required"). But there is a significant difference between an inherently imprecise calculation and a mathematical mistake. Economic experts' reports should always be reviewed for computation errors. If an error is identified, consideration should be given as to the most effective way to bring it to light. Depending on the egregiousness of the error and the impact, if any, which it has on the expert's ultimate opinions in the case, the defense may have an opportunity to undermine the expert's credibility before the jury. If the error is insignificant, the point should be made (if at all) subtly, to avoid the appearance of pettiness, so that it plants the seed for the jury that the expert was sloppy. The jury may become annoyed or sympathetic to the other side if too much is made of low-hanging fruit. A more meaningful error may, however, provide an opportunity for the defense attorney to score points in cross-examination.

Conclusion

Economic expert testimony lends itself to a wide range of potential challenges and lines of cross examination. An effective cross can demonstrate the overreaching and unrealistic nature of a claimed loss, the adverse expert's flawed analytical approach, or underlying assumptions that defy industry realities. By selectively

deploying the challenges that most starkly highlight these flaws under the circumstances the case, the defense litigator can educate the jury and draw back the curtain to expose an opponent's weak damages case.
