

# THE CONNECTICUT LAW TRIBUNE

MONDAY, MARCH 10, 1986 • VOL. 12, NO. 10

## ANALYSIS:

# The Economic Expert for the Defense

BY FRANK D. TINARI

In any negligence case in which significant pecuniary losses are alleged, defense counsel should initially review plaintiff's expert report and analyze it for any obvious weaknesses. Recognize, however, that the errors of logic that defense counsel typically finds comprise only a small portion of potential shortcomings in such reports. The reason is that most problems in eco-

### *What is defense counsel's best strategy when confronted with an economic appraisal?*

conomic appraisals involve methodological and theoretical issues, not logical ones. Thus, defense may decide to use the specialized knowledge and experience of an economic expert.

An economist can identify the economic, statistical, and logical bases for possibly exaggerated loss estimates. For example, if plaintiff's expert assumes that lost wages would have increased over time at a rate of, say, 8 percent annually, a good defense expert will scrutinize the statistical, theoretical, and historical basis for that assumption. If the analysis then warrants, defense expert would be able to question the soundness of the assumption and suggest the use of a lower rate of earnings growth than that projected in

the plaintiff's expert's report.

Defense should not automatically request an independent appraisal of economic loss in every instance, however. In most cases, the total present value of loss estimated by plaintiff's economic expert is the sum total of several elements of loss, each of which is dependent on a number of facts and assumptions. By implication, therefore, the range of economic loss begins at zero and is capped at the estimated value given by plaintiff's expert. But if the defense commissions an independent appraisal of loss that turns out to be, say, 25 percent lower than plaintiff's expert's value, then settlement of the case would be locked into a much narrower and higher range lying between plaintiff's expert's number and an alternative number only 25 percent below that.

Unless absolutely necessary, therefore, an independent appraisal by an expert for the defense should not be sought because defense counsel would effectively shrink the range of possible settlement. Then what should be done by defense counsel to reduce the magnitude of a very large award?

#### Defense Strategy

Defense counsel should ask the economist to identify weaknesses in the report so that these may be used to criticize and bring into question plaintiff's expert's work. Although a good number of economists who provide such appraisals use high professional standards in their work, there is nevertheless the distinct possibility that some error or oversight can be uncovered in any given appraisal. Here are some of

the sources of possible difficulties that could form the basis on which defense would call into question the work of plaintiff's expert:

- Unreasonable assumptions
- Inadequate or inappropriate statistical sources
- Inappropriate measurements
- Factual errors
- Omissions

### *Is it necessary to obtain an independent evaluation by an expert hired by the defense?*

- Questionable methodology
- Double counting
- Calculation errors
- Inconsistencies

After a thorough examination of plaintiff's report and other relevant documents, the economic expert for the defense could prepare a list of criticisms in the form of questions. The questions could then be adapted by the defense attorney and used in the deposition of plaintiff's expert or in communication with plaintiff's counsel. The defense expert's advice, written or oral, should be treated at this stage as a confidential work product for use by counsel.

#### Follow-Up Work

As a follow-up, defense counsel could next ask the economist to select those areas that have the greatest potential for changing the estimated value prepared by plaintiff's expert. The defense expert could then prepare independent calculations that might show how much lower the total loss estimate would be if just those selected categories were recalculated in accordance with more acceptable economic procedures.