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RE: Establishing the Lost Earnings Base

There is no more fundamental task for a forensic economist than to choose the appropriate amount of base year annual earnings for projecting lost earning capacity through worklife expectancy in a wrongful death case. In a permanent injury case, this is the annual earnings for the pre-injury earnings scenario; the base for residual, post-injury earnings requires vocational/rehabilitation experts and is separate from our focus in this newsletter. Because adjustments to base, annual earnings for inflation, discounting and worklife expectancy are multipliers to this base, any percentage change to the base amount leads to the same percentage adjustment to the present value of lost earning capacity total. A 25 percent increase or decrease to the base means a 25 percent increase or decrease in the earnings total, as reduced to present value.

In the inaugural 1995 issue of the *Litigation Economics Digest*, Mike and an office associate Shelly Caruthers published the article "Principles of Establishing the Lost Earnings Base." It was based upon a survey study of other members of the National Association of Forensic Economics (NAFE), in which they chose an earnings base, using specific plaintiff scenarios which included an earnings history.

The Brookshire and Caruthers analysis led to this formulation of 15 principles for establishing the lost earnings base. In the 25 years since the publication of these principles, no book or journal article has been published challenging the principles. While every case is different and may require experiences and good judgment on application of these principles, they are an important starting point for calculations and criticisms of calculations.

The 15 principles are shown below, as they appeared in the 1995 article.

1. In determining an earnings base, forensic economists rely when possible upon the earnings history of the specific individual, versus government statistics or other sources.
2. Overtime wages will be considered in a base, although the overtime portion of the base may be calculated differently than is the straight-time earnings portion of the overall earnings base.
3. Straight-time earnings which have trended upward may lead the forensic economist to use the last full year of earnings as the earnings base; many would nevertheless take an average of several years of past earnings.
4. Forensic economists may choose a base by relying upon fact witnesses, often as an additional scenario to a base chosen without the opinions of such witnesses.
5. When the base cannot be derived from an individual earnings history, the forensic economist may be more likely to show alternative scenarios.
6. There is no consensus on the issue of earning capacity versus expected earnings in a situation where a working-age adult has no recent history of participation.
7. Recent and continuing activity in an education or training program is often considered in establishing an earning capacity base that is expected.
8. Even when an established earnings history does not continuously move upward, forensic economists place disproportionate weight on the last full year of earnings. This is especially true if wages have generally progressed upward to the last-year value, and absent information that the last year value results from one-time effects that should not be considered in estimating lost earning capacity.

9. Forensic economists do not utilize a “capacity” approach to choosing an earnings base for an individual with an established earnings history. Even if the individual achieved a high “capacity” through his or her own earnings history in a previous year, the forensic economist views the entire earnings history in choosing an earnings base that is expected. Disproportionate weight is given to data and facts from more recent years.
10. When the earnings history of an individual has been significantly varied, up and down, from year to year, the base is an average of several, past years. The number of years utilized from the recent past appears to be a matter of judgment and may depend upon the particular earnings pattern and the facts of the particular case.
11. Forensic economists disagree about whether earnings that are expected but have not been reported should be included in the earnings base.
12. In establishing the base, earnings before a retirement or career change are not considered, unless a return to the previous earnings pattern is expected.
13. In judging an earnings history, forensic economists may seek and consider information on the peculiarities of specific occupations and of the product market.
14. In establishing the base of employer contributions to fringe benefits, as a percentage of wages, forensic economists also focus upon the earnings record of the individual; also choose what is expected versus the highest capacity ever attained; and either use a last-year value or some average of recent years.
15. In establishing the base for residual (post-injury) earning capacity, forensic economists give great deference to the opinion of a vocational/rehabilitation expert.

In our next newsletter, we will discuss the principles of establishing the residual post-injury earnings base through a valid vocational evaluation. Meanwhile, we both hope that you remain healthy through the course of these unprecedented times.

Sincerely,

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