A plaintiff's guide to economic reality

by Mark S. Lindensmith

"The average accident trial should not be converted into a graduate seminar on economic forecasting."

– Monessen Southwestern Ry. v. Morgan, ***486 U.S. 330, 341 (1988)***
(*quoting Doca v. Marina Mercante Nicaraguense, S.A.,** ***634 F.2d 30,39 (2d Cir. 1980)

After becoming frustrated with the advice and contradictory predictions of White House economists who would say, "On one hand this might happen, but on the other hand . . .," Harry S. Truman once famously quipped: "Bring me a one-armed economist!"[1] Truman's quip encapsulates certain recognized truths about economic forecasts: they are highly uncertain, subject to countless unknown and unknowable variables, and are infinitely malleable, depending upon which economist is offering the opinion and what assumptions are made.

With all due respect to the prognostication powers of economists generally, counsel for plaintiffs in personal injury cases should consider challenging the admissibility of testimony of a defendant's economist who attempts to testify concerning the reduction of an award for future damages to its "present value."[2] Any testimony purporting to reduce a damages award for *future* lost income (impairment to earning capacity) and *future* medical expenses based on a projected investment yield *without* factoring in a *realistic and meaningful* offset amount based on projected inflation over the same amount of time is based on a fictitious factual premise, is false and misleading, and is without adequate foundation on which to base an expert opinion. Even where an economist offers figures he purports to use as a yield rate and an inflation rate for purposes of reducing to present value, he often will offer no justification for the use of those figures, no explanation as to why those figures should be used rather than others, and no verifiable, accepted methodology for using the figures he has selected as the appropriate method for attempting to project the yield rate and inflation rate. In essence, the trier of fact is given no reasonable, non-speculative way of determining what amount of money today might be invested to provide the plaintiff the amount of money the jury determines he is entitled to over his lifetime and his work-life. Therefore, testimony that attempts to reduce a damages award for future lost income and future medical expenses to a "present value" amount can and should be challenged as inadmissible, and plaintiff's counsel should argue for adoption of a "total offset" method[3] for awarding such damages. The following is a suggested approach to challenging a defendant's evidence purporting to reduce a damage award for future losses to a "present value."

A further introductory note: At the time this article was being drafted in the Spring of 2008, the approaches and results concerning the admissibility of an economist's expert testimony on future losses argued for in the following analysis made perfect sense. Given the dramatic recent events in the world financial markets as of October 2008, as this article goes to press, the following suggestions about challenging the admissibility of an economist's testimony would appear to be even more compelling.

Standard for admissibility of economist's testimony

The test for the admissibility of expert economics testimony under Va. Code Ann. §8.01- 401.1-401.3 (pertaining to expert testimony generally) is well-settled and has been concisely stated by the Supreme Court in cases such as *ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc.*,[4] where the court stated:

> Expert testimony "cannot be speculative or founded upon assumptions that have an insufficient factual basis. Such testimony also is inadmissible if the expert has failed to consider all the variables that bear upon the inferences to be deduced from the facts observed." *Titts-*

> *worth v. Robinson*, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996) (citations omitted). *See* Code §§8.01-401.1 and -401.3.
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> Moreover, when expert testimony consists of an array of numbers conveying an illusory impression of exactness, on a subject in which a jury's common sense is tested in order to evaluate the array, scrutiny of expert testimony is especially important. *Tyger Constr. Co., Inc. v. Pensacola Constr. Co.*, 29 F.3d 137, 145 (4th Cir. 1994), cert. denied, 513 U.S. 1080, 130 L. Ed. 2d 633, 115 S. Ct. 729 (1995), cited with approval in *CSX Transp. Inc. v. Casale*, 250 Va. 359, 366-67, 463 S.E.2d 445, 449 (1995).
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> And, a verdict based upon speculative expert testimony "is merely the fruit of conjecture, and cannot be sustained." *Stover v. Norfolk & W. Ry. Co.*, 249 Va. 192, 200, 455 S.E.2d 238, 243, cert. denied, 516 U.S. 868, 133 L. Ed. 2d 123, 116 S. Ct. 186 (1995).[5]

In a case where a defendant's economist attempts to testify as to the "present value" of an award for future damages, unless he takes into account and factors in a *meaningful and realistic* rate of inflation to offset his figures pertaining to a projected yield in investment over the life of the plaintiff, then his testimony purporting to reduce an award for future damages to a "present value" is merely speculative and is "founded upon assumptions that have an insufficient factual basis."[6] Thus, his testimony concerning a reduction of the damages award to present value should *not* be admitted into evidence.

Frequently, the economist's testimony will lack any meaningful explanation or basis for his conclusions that a particular yield rate and a particular inflation rate projected out over the lifetime of the plaintiff are the appropriate percentages to use in the case. There is no verifiable method for predicting which figures should be used to attempt to predict the effects of the yield rate and the inflation rate fluctuations over a long period of time.

The obvious reality, of course, is that no one can really know what the inflation rate will be next year, let alone for the next 25 years. One thing that is certain is that the inflation rate will vary. The inflation rate might be 2.5 percent next year, then 5.2 percent the following year, and 8.5 percent the next year. During the decade from 1972 to 1981, for example, the annual inflation rate in this country exceeded 10 percent during four of the ten years in that period. In 1980, the inflation rate was over 13.5 percent.[7] Another obvious reality is that no one can know what rates-of-return will be earned on invested funds over the next 25 years. No one, not the most brilliant investment fund manager in the world, can know what rates-of-return will be achieved in future decades. It is outlandish to even suggest that such a thing is possible to any reasonable degree of economic certainty. Yet, that is exactly the type of highly uncertain prediction that defendants often are allowed to rely upon in asking jurors to reduce an award of damages to a "present value." As counsel for plaintiffs, we should challenge such "reduction to present value" testimony as being based on false premises and assumptions that have no basis in reality.

In the 2006 case of *Blue Ridge Service Corp. v. Saxon Shoes, Inc.*,[8] for example, the Court ruled that the expert in that case, testifying as to the origin of a fire, should not have been allowed to testify because his expert opinion was based on factual assumptions which simply had no basis in reality. There, the court stated as follows:

> In *Vasquez v. Mabini*, 269 Va. 155, 159-61, 606 S.E. 2d 809, 811-12 (2005), we held that an expert's testimony in a wrongful death action as to the decedent's expected loss of income and the economic value of the loss of her services was inadmissible as it was "speculative" and "founded upon assumptions that [had] no basis in fact." *Id*. at 160-61, 606 S.E. 2d at 811-12. The expert based his lost income calculation on his assumption that the decedent, who was unemployed at her death and had never earned more than $7,000 per year, would secure fulltime clerical work the next day, at a salary of $16,000 per year and receive a retirement benefit of 3.7% and an annual raise of 4.25%. *Id*. In calculating the economic value of the loss of her services, the expert opined that the decedent's disabled son, who depended upon her for much of his care, would live throughout his mother's remaining life, even though he died prior to trial. *Id*. at 161, 606 S.E. 2d at 812. The trial court erred in admitting that testimony from the expert as it lacked an evidentiary basis in the record.
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> Similarly, in *Countryside Corp. v. Taylor*, 263 Va. 549, 553, 561 S.E. 2d 680, 682 (2002), we held that an expert real estate appraiser's damages calculation was inadmissible because it was based in part on the failure of an access road to abut the plaintiffs' property. However, the defendants had conveyed land to the plaintiffs prior to trial so that the road did abut their property, and the expert's opinion was thus based on speculation contrary to the facts. The trial court erred for that reason in admitting the experts testimony.
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> In both *Vasquez* and *Countryside*, we noted that when an expert "'assumes a fiction and bases his opinion of damages upon that fiction[,] '. . . that testimony [is] 'speculative and unreliable as a matter of law.'" *Vasquez*, 269 Va. at 161, 606 S.E.

2d at 812 (*citing Countryside*, 263 Va. at 553, 561 S.E. 2d at 682).[9]

Likewise, the testimony of an economist should not be based on assumptions that have no basis in fact, and should be considered speculative and unreliable as a matter of law to the extent it is based on such assumptions.

In addition to speculation about future inflation rates, another fundamental problem with an economist's projections in reducing future damages to a "present value" might be his selection of yield rate. Often, the economist's selection of a particular yield rate simply reinforces the notion that his opinion and projections are based on false underlying assumptions which vitiate his credibility, leading to the conclusion that "reduction to present value" evidence should be excluded altogether. For example, the discount rate the economist applies might be based on the U.S. Treasury Yield Curve (the Daily Treasury Yield Curve Rates provided by the United States Treasury, and posted by the Treasury weekly at www.treas.gov/offices/domestic-finance/debt-management/interest-rate/yield). The question arises, however, as to whether to apply the yield rates on relatively short-term Treasury securities or long-term securities.[10]

According to some economists, the yield rates on short-term Treasury securities (T-bills), rather than the yield rate on long-term bonds, provide a more accurate yield rate figure and do a better job of adjusting for inflation for purposes of reducing future damages to a present value amount.[11] In short, there is a divergence of opinion among economists as to which underlying yield rate figures and which inflation rate figures to use for purposes of reducing to present value. There is quite simply no single methodology and no single set of figures that are generally regarded as reliable. Thus, it would seem that a defendant would be hard pressed to establish in a particular case that there is an accepted, verifiable methodology among economists for predicting how money should be invested today to obtain a sum-certain projected over time and well into the future, which is essentially what "reduction to present value" evidence attempts to do.

For example, a defendant's economist in a case our firm handled recently used a 2.8 percent annual increase in the Consumer Price Index, using it as a constant throughout his calculations to factor in an expected rate of increase (inflation) over a period of roughly two decades into the future. He obtained the 2.8 percent annual inflation rate from the 2007 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds, without any further guidance as to how he or the Trust Funds report arrived at the 2.8 percent annual CPI increase, or how he concluded that the plaintiff's "real wage" would remain constant over the projected period of future losses. In reality, the most recent figures from the Bureau of Labor Statistics (*see* http://data.bls.gov/PDQ/servlet/SurveyOutputServlet) showed an annual inflation rate or increase in the CPI for southern cities, including Richmond, Virginia, from November 2006 to November 2007 to be 5.0 percent, with an annual increase nationwide of 4.3 percent.

The economist offered no verifiable methodology for choosing an inflation rate to be projected out over the lifetime and work-life of the plaintiff. How was that rate chosen and why? What were his reasons for predicting that a 2.8 percent yearly increase in the Consumer Price Index was a realistic, fact-based assumption? His assumptions about the projected inflation rate seemed particularly problematic, for example, in light of such factors as the continued steep rise in fuel costs, medical costs, and various consumer goods as China expands its economy and consumption of goods and fuel over the coming years.[12] In short, his projections and opinions as to an appropriate reduction to present value amount would seem to be based on false premises. Hence, we argued that his opinion concerning projected future losses should be rejected as lacking sufficient foundation under cases such as *ITT Hartford Group, supra*.

Where there is a complete and troubling lack of factual foundation for the economist's projections and reduction to present value evidence, his testimony should be considered inadmissible. At the very least, the courts should exercise their broad discretion concerning determining relevancy and the admission of evidence and should exclude the "reduction to present value" evidence as lacking sufficient probative value so as to outweigh its severe prejudicial effect.[13]

Testimony concerning the yield rates and inflation rates should be examined carefully to determine whether the defendant's economist is using a reasonably verifiable and accepted methodology for attempting to reduce damages to a present value amount, and the plaintiff should require and press for strict proof on those points. Moreover, it is the trial court's responsibility in exercising its discretion concerning relevancy and the prejudicial effect of the evidence to examine the testimony closely to determine if there is sufficient foundation to make the evidence relevant and sufficiently probative to justify admission. Frequently the "reduction to present value" evidence does nothing except interject collateral, speculative, and nebulous economics issues into the case, thus distracting the jury, the litigants, and the Court from the important matter of determining the plaintiff's injuries and the appropriate damages to be awarded to compensate him for those injuries. Sorting out the evidence pertaining to facts and figures used by an economist in reducing an award for future economic damages to a present value amount can amount to nothing less than a "trial within the trial," and might cause significant

delay, confusion, and a waste of judicial resources - particularly in light of the extensive evidence that otherwise must be presented in a reasonably complex case involving significant injuries and damages.[14] Indeed, the collateral nature of such "reduction to present value" evidence, its speculative and unverifiable underpinnings, and the confusion and waste of judicial time and resources that it interjects into the case, are the very reasons why some states decline to allow such evidence, but instead apply what is known as the "total offset" method in calculating and awarding damages for future losses.

Future losses should not be reduced to present value

The discrepancies and confusion that naturally result from an attempt to predict future losses and what amount may *now* be invested to produce those amounts over time (including adjusting for a realistic inflation figure) can and should be eliminated altogether by *not* injecting the "reduction to present value" issue into the case. Virginia law does not *require* that future losses be reduced to present value, and the better and more reasonable practice, as adopted by a number of courts in other states, is to use a variation of the "total offset" method (discussed further below) for projecting future losses.[15]

First, Virginia law does not require a reduction to present value for purposes of awarding damages for loss of future income or for projected future medical needs, except in the limited situation of FELA cases.[16]

In *Chick Transit Corp. v. Edenton*,[17] for example, a wrongful death case, the Defendants specifically objected on appeal to a damages instruction on the basis "that it allows recovery for all that Deavers [the decedent] would have earned during his lifetime, without taking into consideration the fact that it is to be presently paid and not to be paid in installments from time to time . . . ."[18] The Supreme Court of Virginia rejected the objection, held that the damages instruction given was proper, and affirmed the judgment for the plaintiff.

The *Virginia Model Jury Instructions – Civil* specifically instruct the jury that in determining a plaintiff's damages they may consider medical expenses incurred in the future, loss of future earnings, and pain and mental anguish suffered in the future.[19] The model instruction contains no provision authorizing or requiring the jury to consider the "time-value" of money, the discounting of future amounts to present value, or any such matters as investment yield rates. The *Virginia Model Jury Instructions – Civil* further specifically instruct the jury that the Plaintiff "is not required to prove the exact amount of her damages, but she must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item."[20]

Eliminating testimony that purports to reduce a damages amount to its present value altogether is a sound approach, because it avoids the speculation, uncertainty, confusion, and distraction by collateral issues that would otherwise occur. Thus, for example, income tax considerations are not relevant to the jury's determination of damages in a personal injury case under Virginia law.[21] Arguments and evidence regarding present value issues, just like argument and evidence regarding tax considerations, inject collateral and confusing matters into the case, and they are not a required part of the damages evidence under Virginia law. Therefore, they should be excluded.

Although there are Virginia cases that have *allowed* "reduction to present" value evidence and testimony (although it is not known whether such evidence was vigorously challenged, or even challenged at all), those cases have done so in passing as dictum, in the context of FELA cases, and they have clearly placed the burden of going forward with such evidence on the defendant, "to enable the fact finder to make a rational determination on the issue."[22] Note, however, that even in the *Arrington* case, decided under federal law, there is no indication that the defense was permitted to make an argument to the jury or submit purported expert testimony concerning yield rates and reduction to present value. Rather, the investment yield rate of 6 percent was merely mentioned in the appellate court's discussion of whether the verdict was excessive. Thus, there is nothing to establish that a reduction to present value is required under Virginia law in non-FELA cases.[23]

The confusion and speculation suggested by an economist's *opinion* on reduction to present value (the problems noted above concerning the yield rate and the rate of inflation) can be eliminated, and the trier of fact can be assisted in making "a rational decision on the issue" of loss of future income and the incursion of future medical expenses, by utilizing the "total offset" method adopted in some states, and as explained by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*.[24]

In the *Paducah Area Public Library*[25] case, for example, the appellate court affirmed the trial court's exclusion of evidence regarding yield rates and the effects of inflation and said that the exclusion of such evidence would avoid contests between litigants regarding "money, its worth and the nebulous art of economic forecasting, all of which encumber the trial proceedings and confuse the deliberation of jurors." [26]

And in the *Kaczkowski* case, the Pennsylvania court noted that, with its decision, it joined "the growing number of jurisdictions which considered inflation and productivity as integral factors to be included in computing lost future earnings,"[27] Moreover, the *Kaczkowski* court stated as follows in justifying its adoption of the "total offset" method of assessing damages for future losses:

> In support of our adoption of the "total offset method" in allowing for the infla-

tionary factor, we note *that it is no longer legitimate to assume the availability of future interest rates by discounting to present value without also assuming the necessary concomitant of future inflation*. We recognize that inflation has been and probably always will be an inherent part of our economy. Although the specific rate of inflation during any given period may vary, we accept the fact that inflation plays an integral part in effectuating increases in an employee's salary, and we choose to adopt a damage formula which will allow for that factor without actually requiring the factfinder to consider it as an independent element of the award.

Current economic theory demonstrates the accuracy of the total offset approach to inflation. As previously noted, the total offset method assumes that in the long run, future inflation and the discount rate will offset each other. "At first blush the rough and ready approach seems too obviously to invite the objection that it is far less precise than [other approaches] and overcompensates the plaintiffs." Fleming, 26 Am.J.Comp.L. at 69. However, critics of the total offset approach fail to realize that future inflation rates and future interest rates do not exist in a vacuum, but covary significantly. *Inflation: A Survey*, 85 Econ.J. 741, 788 (1975). *It can be stated with assurance that present interest rates depend at least in part upon expectations of future inflation*.[28]

The Pennsylvania court further explained its justification for adoption of the "total offset rule," stating:

Since over the long run interest rates, and, therefore, the discount rates, will rise and fall with inflation, we shall exploit this natural adjustment by offsetting the two factors in computing lost future earning capacity. *Accord, Freeport Sulphur Co. v. S. S. Hermosa*, 526 F.2d 300, 310 (5th Cir. 1976) (concurring opinion). We are satisfied that the total offset method provides at least as much, if not greater, accuracy than an attempt to assign a factor that would reflect the varying changes in the rate of inflation over the years. . . . *As to the concomitant goals of efficiency and predictability, the desirability of the total offset method is obvious. There is no method that can assure absolute accuracy. An additional feature of the total offset method is that where there is a variance, it will be in favor of the innocent victim and not the tortfeasor who caused the loss*.[29]

For similar reasons, and because the reduction to present value for future losses is not required under Virginia law, plaintiffs should attempt to exclude defendant's expert's opinion evidence purporting to make reductions to present value. Prognostications concerning the present value of money to compensate for future losses are based on inadequate foundation, false premises, and accomplish little in the way of guidance for the jury, except to introduce confusing, extraneous, and speculative matters in the guise of economic wisdom. Such purported expert testimony on the reduction to present value should be excluded. Indeed, the better and most reasonable approach would be to essentially eliminate the "reduction to present value" calculations from cases completely by applying the "total offset" method for computing future economic losses, as per the reasoning and result in cases such as *Kaczkowski*.

Endnotes

1. *See* J. Allen, "One-Armed Economists," *U.S. News & World Report* (May 4, 2003).
2. "The concept of 'present value,' sometimes called 'present worth' or the 'time or use value theory of money,' has been defined as being the amount of money needed as a lump sum today, in order to generate a stream [or sum] of money in the future. For example, at an annual investment rate of 6%, $1 to be received one year from now would have a present value of approximately $.94 [94 cents]." 4-38 *Damages in Torts Actions* §38.02 [1] (2007).
3. As discussed further below, the "total offset" method adopted by some courts basically holds that, over the long term, the effects of the earning power of money and of inflation should be viewed as essentially offsetting each other, and, therefore, evidence and arguments concerning discount rates and inflation rates should not be presented to the jury. *See, e.g., Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027, 1034 (1980).
4. *ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc.*, 258 Va. 193, 520 S.E.2d 355, 359-60 (1999) (ruling that the purported expert, who was not an economist, should not have been allowed to testify as to certain projections).
5. *Id*., 520 S.E.2d at 359-60. *See also Billips v. Commonwealth*, 274 Va. 805, 652 S.E.2d 99, 100 (2007) ("As with any evidence requiring a preliminary foundation, *the burden of making a prima facie showing of that foundation rests upon the proponent of the evidence*, subject to the opponent's opportunity for cross-examination and refutation. Here, the Court of Appeals erred in reversing that burden, requiring Billips to introduce evidence of unreliability instead of requiring that the Commonwealth [the proponent] *first make out a prima facie case of "the reliability of the scientific method offered*." The plethysmograph evidence, *lacking foundation*, was inadmissible") (emphasis added); and *John v. Im*, 263 Va. 315, 559 S.E.2d 694, 696-97 (2002) (expert testimony properly

excluded as lacking sufficient foundation based on, among other things, the expert's "inability to account for the testing variables").

6. *ITT Hartford Group, supra*, at 359.
7. *See* www.inflationdata.com (which provides the data and cites the historical sources relied upon).
8. *Blue Ridge Service Corp. v. Saxon Shoes, Inc.*, 271 Va. 206, 624 S.E.2d 55, 61 (2006).
9. *Id*., at 61.
10. In the month of March 2008, for example, the Daily Treasury Yield Curve Rates for 3-month Treasury securities went from a rate of 1.70 on March 3 to a rate of 1.33 on March 28; five-year Treasury securities went from a rate of 2.48 to 2.51 in the same period; and the rate on 20-year Treasury securities went from 4.37 to 4.32 in the same period. *See* http://www.ustreas.gov/offices/domestic-finance/debt-management/interest-rate/yield.shtml (3/31/08).
11. *See* George A. Jouganatos, Ph.D., *Time Value of Money – The Discount Rate "Controversy": Much Ado About Nothing* (Monograph), at www.cce-mcle.com/tests/ss6016a.htm (discussing various methods used by several economists for selecting yield rates and adjusting for inflation for purposes of reducing a sum to present value).
12. For instance, as reported by the Associated Press as of February 26, 2008, the most recent data from the U.S. Department of Labor showed that wholesale inflation increased by 1 percent in January alone, more than double the rate that analysts had expected, leaving "wholesale prices rising by 7.5 percent over the past 12 months, the fastest pace in more than 26 years." The Associated Press, "U.S Producer Prices Soar in January," http://www.msnbc.com/id/23349559/print/1/displaymode/1098/ (2/26/08). The Associated Press report summed up the news, stating that, "[b]attered by bad economic news, consumer confidence plunged while wholesale food energy and medicine costs soared, pushing inflation up at the fastest pace in a quarter century." *Id*.
13. *See Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 529, 636 S.E.2d 416 (2006) (while a "trial court has no discretion to admit clearly inadmissible evidence . . . , a great deal must necessarily be left to the discretion of the court of trial, in determining whether evidence is relevant to the issue or not." *Peacock Buick, Inc. v. Durkin*, 221 Va. 1133, 1136, 277 S.E.2d 225, 227 (1981)) (some citations omitted). *See also Gamache v. Allen*, 268 Va. 222, 227-228, 601 S.E.2d 598 (2004); *General Motors Corp. v. Lupica*, 237 Va. 516, 522-523, 379 S.E.2d 311 (1989) (generally, "[a]n assessment of the prejudicial effect of evidence against its probative value is a matter largely within the discretion of the trial court." *Gray v. Graham*, 231 Va. 1, 10, 341 S.E.2d 153, 158 (1986)).
14. *See Seilheimer v. Melville*, 224 Va. 323, 327, 295 S.E.2d 896 (1982) ("Evidence of collateral facts, from which no fair inferences can be drawn tending to throw light upon the particular fact under investigation, is properly excluded for the reason that such evidence tends to draw the minds of the jury away from the point in issue, to excite prejudice and mislead them." *Spurlin, Administratrix v. Richardson*, 203 Va. 984, 990, 128 S.E.2d 273, 278 (1962)).
15. *See, e.g., Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027, 1034 (1980); and *Paducah Area Public Library v. Terry*, 655 S.W.2d 19, 26 (Ky. App. 1983).
16. *See CSX Transportation v. Casale*, 247 Va. 180, 441 S.E.2d 212, 216 (1994); and *Virginia Model Jury Instruction – Civil* Instruction 21.060 (instructing the jury in FELA cases to reduce the award for future economic damages to a "present value" amount, without offering any guidance or instruction as to how that reduction is to be accomplished).
17. *Chick Transit Corp. v. Edenton*, 170 Va. 361, 196 S.E. 648 (1938).
18. *Id*., at 651.
19. *See Virginia Model Jury Instructions – Civil*, Instruction 9.000.
20. *Virginia Model Jury Instructions – Civil*, Instruction 9.010.
21. *See Norfolk Southern Railway Company v. Rayburn*, 213 Va. 812, 195 S.E.2d 860 (1973); *Hoge v. Anderson*, 200 Va. 364, 106 S.E.2d 121 (1958).
22. *CSX Transportation v. Casale*, 441 S.E.2d at 216 (FELA case governed by federal statute and Supreme Court authority approving reduction to present value in FELA cases, and cited as authority for *Virginia Model Jury Instruction – Civil*, Instruction 21.060). *See also Chesapeake & Ohio Railway v. Arrington*, 126 Va. 194, 101 S.E. 606, 607 (1919) (FELA case in which court made reference to annual yield that could have been earned if the amount of verdict had been invested, discussed in the context of whether verdict for plaintiff was excessive).
23. Even in the context of an FELA case, governed by federal law and requiring a reduction to present value, the court in *CSX Transportation v. Casale*, 441 S.E.2d at 215, specifically noted that the United States Supreme Court, in cases such as *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 341 (1988), has recognized "that the calculation of present value 'may be a difficult mathematical computation' for the average juror to make" and that "the Supreme Court has said that the procedural and evidentiary law of the forum should determine whether 'the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life.'" 441 S.E.2d at 215. In any event, as the *Casale* court noted, the Supreme Court has stated that the "average accident trial should not be converted into a graduate seminar on economic forecasting." (*citing* and *quoting Monessen*, 486 U.S. at 341; and *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 548 (1983). Thus, in FELA cases, courts must instruct or otherwise give guidance to the jury in order to reduce the damages award to a "present value" amount, but the method by which that is accomplished is essentially left to the discretion of the trial court, depending on the facts and circumstances of the particular case, as long as the jury is ultimately left to decide "the essentially factual question of the appropriate rate at which to discount [plaintiff's] FELA award to present value." *Monessen*, 486 U.S. at 342.

24. *Kaczkowski v. Bolubasz*, 421 A.2d at 1038 (holding that the effects of the earning power of money and of inflation should be viewed as totally offsetting and that evidence and argument concerning discount rates and inflation would not be presented to the jury; the court stating that under its "total offset" rule, "[l]itigators are freed from introducing and verifying complex economic data. Judge and juries are not burdened with complicated, time consuming economic testimony"); *see also Paducah Area Public Library v. Terry*, 655 S.W.2d at 25 (the Kentucky court holding that "the relationship of interest rates and rates of inflation are 'self-adjusting' and it is unnecessary to concern the jury with either"); *Miller v. Pacific Trawlers, Inc.*, 204 Or. App. 585, 131 P.3d 821, 830 (2006) (upholding the use of the "total offset" method by plaintiff's expert in projecting future damages, explaining that the "total offset method of calculating future income assumes that earnings growth exactly offsets cost of living increases and that, therefore, the future value of income is the same as the present value"); and *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986) (in FTCA case arising out of Texas, court approved use by plaintiff's economist in the case of the "total offset" method of calculating future damages, noting that the plaintiff's economist testified that he considered both the inflation rate and the discount rate in his calculations, and that the "approach specifies that when the inflationary rate, including considerations for pay increases over a career, and the appropriate discount rate are equal, they may be offset. The method allows computation of present values by simply adding the absolute amounts comprising the award").
25. *Paducah Area Public Library v. Terry, supra.*
26. *Id*., at 25.
27. *Kaczkowski v. Bolubasz, supra,* at 1034 (citing numerous cases from various jurisdictions).
28. *Id*., at 1037 (emphasis added).
29. *Id*., at 1037-38 (emphasis added).

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