Getting Additional Damages for Adverse Tax Consequences

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How and when we are paid, whether for services or property, can influence the amount of tax we have to pay. That seems so obvious that no one would need to say it, much less prove it. Yet, in civil litigation, the extent to which a plaintiff can get damages for adverse tax consequences has been a thorny subject. We all know that tax consequences significantly affect the value of what we receive. Still, many courts have been loath to gross up a plaintiff's damages by the amount of corresponding taxes the plaintiff must pay.

This is a damages question, not a tax question, although it is undeniable that you must be tax conversant to prove and quantify a claim for ''tax damages.'' One of the commonly voiced reasons for courts' traditional reluctance to award those damages has been that the plaintiff would have had to pay taxes in *any* event, regardless of the defendant's activity. Of course, that explanation is inapposite if the lump sum nature of a jury verdict or settlement payment *itself* causes the tax problem. By definition, that problem would not have existed had payments been made over time, as they should have been.

One of the primary arguments for a tax damage gross-up is that the defendant's breach (of an agreement or of the law) *itself* causes additional taxes. This is a type of but-for causation reminiscent of tort actions. Shouldn't a plaintiff who can prove that but-for link be able to recover for that item of damage? It would seem so.

First Impression

Recently, the Third Circuit considered those issues and said yes. The court came down resoundingly in favor of awarding a plaintiff additional damages in such a circumstance. This was a case of first impression in the Third Circuit. In *Eshelman v. Agere Systems Inc.*,[1] Joan Eshelman had sued her former employer for discrimination under the Americans With Disabilities Act (ADA). The jury found in her favor and awarded her back pay and compensatory damages of $200,000.

On Eshelman's motion, the court added damages to cover the extra taxes she would have to pay because of the lump sum nature of the award. Eshelman argued that additional damages were warranted because the taxes she would have to pay on a lump sum back pay award would be higher than what she would have paid had she received the pay over the normal course of employment.

Predictably, Agere opposed the motion, arguing that there was no statute or case law to support it. The district court nonetheless agreed with Eshelman and granted additional damages to offset the tax consequences of the lump sum back pay award. On appeal, Agere argued that the district court had improperly granted Eshelman's motion to augment the jury's award. In the process of affirming the district court, the Third Circuit spoke with a clear and fervent voice that is likely to influence tax damage claims in the future.

'Make Whole' Damages

The Third Circuit in *Eshelman* began its discussion of this issue by noting the remedial purposes of employment discrimination statutes such as the ADA. Those statutes are designed to remediate, to make persons whole for injuries caused by unlawful employment discrimination. To do that, Congress armed the courts with broad equitable powers to achieve a ''make whole'' remedy.[2] District courts have wide discretion to apply a just result regarding the specific relief granted under the circumstances in each case.

Noting that it had discretion to fashion a remedy, the Third Circuit saw the trial court as endeavoring to restore the employee to the economic status quo that would exist but for the employer's unlawful conduct. Back pay is an equitable remedy designed to put the employee in the position he would have been in but for the proscribed discrimination. Of course, we all know that back pay awards are taxable.[3]

Not only are they taxable, but they are taxable in the year paid.[4] That plainly leads to employees paying higher taxes when they receive a lump sum. The effect of

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[1]No. 05-4895 (3d Cir. Jan. 30, 2009), *Doc 2009-2478, 2009 TNT 23-7*.

[2]*See* 42 U.S.C. section 2000e-5(G)(1). *See also Franks v. Bowman Transportation Co. Inc.*, 424 U.S. 747 (1976).

[3]*See Commissioner v. Schleier*, 515 U.S. 323 (1995), *Doc 95-5972, 95 TNT 116-8*. *See also United States v. Burke*, 504 U.S. 229 (1992).

[4]*See Robinson v. Southern Pacific Transportation Authority*, 982 F.2d 892 (3d Cir. 1993).

a lump sum pushing an employee into a higher tax bracket, and therefore a greater tax burden, was the essence of Eshelman's argument.

Other Cases

The Third Circuit in *Eshelman* noted that it had not previously addressed this issue, at least not directly. Yet the court also said that it did not write on a completely clean slate.

The Third Circuit noted its decision in *Gelof v. Papineau*.[5] In that case the employer did not contest the conclusion that it would be liable for supplemental amounts to compensate the employee for additional taxes she would be required to pay on her back pay award. The employer did not contest the idea, but disagreed about the appropriate *amount* of that additional award. Unsure how the district court had calculated the additional award, the Third Circuit vacated it and remanded the case for further findings. Thus, the Third Circuit in *Gelof* was not squarely presented with the question whether an award for taxes was proper.

The court next looked to its sister circuits, noting the now-famous case of *Sears v. Atchison Topeka & Santa Fe Ry. Co.*[6] In that case a district court awarded plaintiffs in a Title VII suit amounts for the additional tax liability incurred by receiving 17 years of back pay in a lump sum. The Tenth Circuit found that the trial court had wide discretion to fashion remedies to make discrimination victims whole. The Tenth Circuit noted that those awards might not be appropriate in typical cases, but that it was appropriate under the circumstances because Sears was paying 17 years of back pay. Perhaps the tax issues there were simply too large and too pronounced to ignore. Apart from the leading *Sears v. Atchison* case, a smattering of other courts has reached the same kind of result.[7]

In *Eshelman*, the Third Circuit squarely held that a district court may, under the broad equitable powers conferred by the ADA, award a prevailing employee an additional sum of money to compensate for the increased tax burdens a back pay award may create. Without that equitable remedy, the court said, it would not be possible to restore the employee to the economic status quo.

Interestingly, apart from the tax cases noted, the Third Circuit drew support from what it called "the now-universal acceptance of another form of equitable relief — prejudgment interest on back pay awards." The court of appeals quoted *Loeffler v. Frank*[8] for the proposition that Title VII authorizes prejudgment interest on back pay awards, and that prejudgment interest serves to compensate a plaintiff for the loss of the use of money he would otherwise have earned had he not been unjustly discharged.

In much the same way, said the court, an award to compensate a prevailing employee for an increased tax burden as the result of a lump sum award will (in appropriate cases) help make the victim whole. Along with prejudgment interest, such an award represents a recognition that the harm to a prevailing employee's pecuniary interest may be broader in scope than just the loss of back pay.

Having concluded that a district court could permissibly award a prevailing employee an additional sum of money to compensate for the increased tax burden on back pay, the Third Circuit went on to consider whether the district court erred in granting that relief under Eshelman's particular facts. This part of the opinion should interest trial lawyers because it may represent a road map for what to do from now on.

In support of her motion for additional tax damages, Eshelman had submitted an affidavit from an economic expert who calculated the amount of tax-effect damages based on the back pay award, the applicable tax rates, and Eshelman's income tax returns for the appropriate years. The district court had granted an additional $6,893 to Eshelman to compensate her for the negative tax consequences. Agere did not rebut the affidavit and, even on appeal, it did not dispute the accuracy of the figure awarded by the district court.

In fact, Agere's sole argument before the Third Circuit was that the district court had no legal authority to award the additional amount. That argument failed; the Third Circuit held that the district court did not abuse its discretion in awarding Eshelman compensation for negative tax consequences. The Third Circuit concluded its opinion by noting:

> We do not suggest that a prevailing plaintiff in discrimination cases is presumptively entitled to an additional award to offset tax consequences above the amount to which she would otherwise be entitled. Employees will continue to bear the burden to show the extent of the injury they have suffered.[9]

History Lesson

The Third Circuit in *Eshelman* may have enunciated a new benchmark, but it is not the first court to go down this path. The case law has continued to bumble along, and whether a plaintiff can obtain tax damages is often unclear. For example, *Judith K. Kelley v. City of Albuquerque*[10] arose out of an employment dispute in which Kelley alleged violations of the New Mexico Human Rights Act and Title VII. Before trial, Kelley sought to exclude testimony concerning tax benefits she derived from the losses that formed the basis of her claims.

The court excluded that testimony but allowed Kelley to offer evidence of the tax consequences of any resulting

[5] 829 F.2d 452 (3d Cir. 1987).

[6] 749 F.2d 1451 (10th Cir. 1984).

[7] *See O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp.2d 443 (E.D. Pa. 2000) (the plaintiff was entitled to an award for negative tax consequences). *See also EEOC v. Joe's Stone Crab Inc.*, 15 F. Supp.2d 1364 (S.D. Fla. 1998) (also noting that a district court in exercising its discretion may include a tax component in a lump sum back pay award to compensate prevailing Title VII plaintiffs).

[8] 486 U.S. 549, 557 (1988).

[9] *Eshelman*, No. 05-4895 at p. 23 (slip opinion).

[10] No. CIV 03-507 (D.N.M. 2006), *Doc 2006-9776, 2006 TNT 98-7*.

verdict. The jury awarded $172,174.90 for back pay and $200,000 for loss of future retirement or pension benefits. After a final judgment, Kelley moved to amend the judgment to take into account increased federal taxes she would have to pay because of the award. Specifically, Kelley asked the court for $37,297.49, plus an additional 10 percent of the attorney fee award, all to compensate for additional federal tax effects. The court denied the motion, noting that the Seventh Amendment to the U.S. Constitution generally prohibits additur. Put simply, the amount of damages was the jury's province, not the court's.

Nevertheless, the court had to deal with several tax gross-up cases cited by Kelley. The first was *Sears v. Atchison*, discussed above, in which the Tenth Circuit recognized that tax components of damages may be atypical, but found special circumstances given the protracted nature of that class action litigation.[11] Notably, *Sears v. Atchison* was tried before a judge rather than a jury, so an increase in the award to reflect the tax consequences did not interfere with the jury's province. Kelley also cited *Carter v. Sedgwick Co.*,[12] another bench trial.

More pertinent was *Blaney v. International Association of Machinists and Aerospace Workers*,[13] which held that the state's antidiscrimination statute allowed an increased award to compensate for taxes. Yet *Blaney* was a Washington state case, so the Seventh Amendment was inapplicable. It was also a bench trial, with no jury to overstep. In any event, recognizing it as an equitable matter, the court denied Kelley's gross-up for taxes.

Other Tax Gross-Ups

One case involving the appropriateness of damages for tax effects, *Randall v. Loftsgaarden*,[14] reached the Supreme Court. The plaintiffs were limited partners in a motel marketed as a tax shelter to offset other income. The plaintiffs sued to recover their investment, alleging violations of federal securities laws. The Supreme Court held that tax benefits the plaintiffs received should not be offset against their recovery.

Failing to enunciate a general rule about tax-based damages, the Court actually suggested that if taxes were central to the investment, a different result might apply. Such waffling about the ability to obtain tax-based damages seems to be the norm. Employment cases like *Eshelman* represent the most fertile ground for tax gross-ups, particularly given the 1996 amendments to require physical injury or physical sickness for excludability under section 104.

Yet, plainly, employment cases are not the only context in which the tax-as-damages issue arises. A plaintiff may assert damages arising out of an increased tax liability resulting from the defendant's conduct in many situations. Often, however, courts are unsympathetic to those attempts, even when the nature of the dispute itself revolves around tax issues. In *Gaslow v. KPMG LLP*,[15] the plaintiff could not recover taxes and interest from his accounting firm, even though it allegedly induced him to make tax shelter investments the IRS later challenged. The premise seems to be that the plaintiff would have paid taxes anyway.

This dividing line is also suggested by *Eckert Cold Storage Inc. v. Behl*.[16] Although a claim for tax damages was permitted in that case, the court admonished the plaintiffs that they would have to establish with reasonable certainty that other investments available at the time would have shielded the same tax dollars and that they would have made those alternative investments. Thus, the burden of proof is high.

Most plaintiffs cannot meet that high standard. In *Lewin v. Miller, Wagner and Co.*,[17] the court disallowed a claim for taxes, calling the claim speculative. Similarly, in *DCD Programs Ltd v. Leighton*,[18] the court denied a claim for tax damages, noting that everyone has to pay taxes and that they are imposed by the Internal Revenue Code, not by the wrongful conduct of the defendant.[19]

When taxes are payable in any event, a tax claim against the defendant may seem spurious. But it is often not so clear whether taxes would be payable (and if so, to the same magnitude) if not for the defendant's conduct. That can lead to complex calculations and alternative positions, which some courts have viewed as speculative.

Oddly, many of the authorities dealing with taxes as an item of damage arise in tax malpractice cases in which the plaintiff is suing a tax lawyer or accountant for malpractice. In *Pytka v. Hannah*,[20] for example, the plaintiff sued his attorney for malpractice, arguing that he paid tax on short-term gains from sales of stock. Pytka claimed the defendant's actions caused him to pay an extra $284,468 in federal and state income tax because the stock sales were not long-term capital gains. However, because the damages to reimburse Pytka for the $284,468 in taxes would *also* be taxable, he sought a gross-up of $222,605 *on top* of the tax reimbursement. Although Pytka had an expert testify that he would be taxed on the judgment and would need a tax gross-up to make him whole, the Massachusetts court denied the gross-up.

Tax Competing Offsets

Sometimes both parties invoke tax consequences, seeking offsets. For example, in *Pham v. Seattle*,[21] the plaintiffs sued for discrimination based on race and national origin. The jury awarded $430,000 in front and

[11] 749 F.2d 1451 (10th Cir. 1984).
[12] 36 F.3d 952 (10th Cir. 1954).
[13] 87 P.3d 757 (Wash. 2004).
[14] 478 U.S. 647 (1986).

[15] 797 N.Y.S.2d 472 (App. Div. 1st Dept. 2005).
[16] 943 F.2d 1230 (D.C. Cal. 1996).
[17] 725 P.2d 736 (Ariz. Ct. of App. 1986).
[18] 90 F.3d 1442 (9th Cir. 1996), *Doc 96-22189, 96 TNT 153-32*.
[19] The same motion appears in *Thomas v. Cleary*, 768 P.2d 1090 (Alaska 1989) (a case noting that plaintiffs are under a legal duty to pay taxes). *See also Alpert v. Shea Gould Climenko and Casey*, 559 N.Y.S.2d 312 (App. Div. 1st Dept. 1990) (investors were not allowed to recover taxes paid to the IRS after deductions attributable to their investment were disallowed).
[20] 15 Mass. Law Rptr. 451 (Mass. Sup. Ct. 2002).
[21] Wash. Ct. of App. No. 52356-2-I (2004).

back pay, and $120,000 in noneconomic damages. Plaintiffs' counsel sought attorney fees under the Washington Law Against Discrimination, calculating a lodestar amount of $347,588. The trial court reduced that to $297,532.

The plaintiffs requested supplemental damages to cover the adverse tax consequences of the verdict. The trial court awarded $168,000 in additional damages for adverse tax consequences. Notably, that amount accounted for tax on only the economic damages and did not include an offset for tax on the $120,000 of noneconomic damages. Thus, the plaintiffs received a tax gross-up on only part of their award.

The plaintiffs appealed, arguing for a tax offset on their entire award. Citing *Blaney*,[22] in which the Washington Supreme Court determined that damages for adverse federal income tax consequences could be awarded, the Washington Court of Appeals agreed. That seems consistent with the Third Circuit's recent opinion in *Eshelman*.

Despite these developments, many courts continue to scrutinize the gross-up of damage awards due to adverse tax consequences. The court in *O'Neill v. Sears, Roebuck and Co.*[23] addressed damages for front and back pay and compensatory and liquidated damages under the Age Discrimination in Employment Act. Receiving front and back pay in a lump sum produced higher taxes, so the court allowed a supplemental award for taxes on the front and back pay components. To be made whole, the plaintiff was entitled to an award for negative tax consequences.

Nonwage Cases

Although employment cases may be the most obvious setting for tax gross-ups, the cases can be much more complex. For example, the Court of Federal Claims in *LaSalle Talman Bank FSB v. United States*[24] considered the appropriateness of a tax gross-up in a complicated breach of contract case against the U.S. government. The plaintiff argued that to be put back in the position it would have been in had there been no breach of contract, damages had to be calculated on a pretax basis.

Alternatively, the plaintiff argued that its damages should be grossed up for future taxation.[25] The court relied on *Home Savings of America FSB v. United States*,[26] in which it concluded that damages are foreseeable if they follow from a breach of contract in the ordinary course of events. If you injure someone, it is foreseeable that money damages may not make that person whole because of tax issues. In *Home Savings*, the award was adjusted, assuming it would be taxable.

In *LaSalle Talman Bank*, the court noted that dividends were paid from net earnings after taxes. The government argued that the award would not be subject to tax, so the court had to address the tax impact and what the plaintiff would or would not report as income. In considering the appropriateness of a tax gross-up, the court stated: "Clearly, if we make the adjustment, plaintiff would be estopped from disputing the taxability of the award."[27] That statement suggests that plaintiffs who receive tax gross-ups are going to report and pay tax on the damages they receive.

Alternatively, it may reflect a lack of perception about the parties and the dynamics of tax issues involved. After all, the plaintiff may or may not know what its tax reporting position will ultimately be. The taxing agencies will by definition not be parties to the case, and both plaintiff and defendant will presumably develop their tax reporting positions based on the best information they have available at the time, long after the settlement is achieved or the verdict is paid.

The tax reporting position they ultimately take may be inconsistent with the tax posture they have described in seeking damages. In fact, plaintiffs commonly ask for a tax gross-up based on one set of assumptions but take a different tax return reporting position. For example, a plaintiff's damage study may calculate taxes based on the entire verdict being taxed at ordinary income rates. That may be the appropriate conservative view of the matter. However, the same plaintiff may later take the position on his tax return that the recovery is capital gain or even a recovery of basis. That may sound duplicitous, but how a verdict will be taxed is often complex and involves difficult factual and legal judgments.

Put another way, in seeking damages, a plaintiff may make pessimistic tax assumptions about how the verdict will be taxed. Nine months or a year later, the same plaintiff may take a more aggressive tax return posture. Even if such a dual-prong approach is expressly contemplated when the plaintiff asks the court for a tax gross-up, it seems appropriate for the plaintiff to assume the worst tax result when seeking damages.

Expert Opinions?

Most judges in civil disputes probably took an introductory tax course in law school, but they seldom have the tax expertise of, say, a Tax Court judge. That can make tax gross-ups an ideal subject for expert testimony. Indeed, it seems almost inevitable that a court facing claims for taxes as an item of damages must determine what taxes are payable, or, if they have already been paid, whether the payer took appropriate tax positions.

That is sticky, and it may account for some of the frustration courts seem to express when they discuss tax issues. For example, the court in *LaSalle Talman Bank* had to decide whether the award would be considered a return of capital. The court referenced testimony from several expert witnesses. Ultimately, the court concluded that it had "no reason to believe that the Internal Revenue Service would treat the reimbursement of this cost item as a replacement of a capital asset."[28]

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[22]87 P.3d 757 (Wash. 2004).

[23]108 F. Supp.2d 443 (E.D. Pa. 2000).

[24]64 Fed. Cl. 90 (2005), *Doc 2005-2944, 2005 TNT 29-10*.

[25]*See Centex Corp. v. United States*, 55 Fed. Cl. 381 (2003), *Doc 2003-17565, 2003 TNT 153-3*.

[26]57 Fed. Cl. 694 (2003).

[27]*LaSalle Talman Bank*, *supra* note 24.

[28]*Id.*

Based on that, the court concluded that justice required increasing the plaintiff's award for tax consequences. Recognizing that there may be some doubt on the tax assumptions, the court stated:

> It is only a possibility, and not a high one in our view, that the award will not be taxed. We cannot ignore the fact that, as a general proposition, amounts received as damages in litigation are taxable as income.[29]

That is a sophisticated comment, recognizing that tax rules are often about probability and that black-and-white answers are often not available. After reaching that watershed decision, the court discussed applicable tax rates, consolidated groups, state tax rates, and the impact of paying the corporate alternative minimum tax.

Although *LaSalle Talman Bank* supports the notion that taxes are a foreseeable element of contract damages, many plaintiffs still fail to win tax damages. An example is *Porter v. U.S. Agency for International Development*.[30] After a jury award for employment discrimination, the plaintiff sought supplemental damages for any tax liabilities associated with attorney fees. He requested indemnity against any tax consequences from the attorney fee award or, in the alternative, a gross-up of the attorney fee award to cover the tax liability.

The court did not grant the petition for indemnification or a supplemental award for the tax liability, but the plaintiff was not ultimately responsible for the tax liability associated with attorney fees. Creatively, the court tried to insulate the plaintiff from tax liability on the attorney fees by making the fee award payable directly to counsel. Also, the court explained the nature of the award clearly, so the plaintiff and his tax adviser could refer to the explanation when preparing income tax returns. Presumably, the court also hoped the IRS would consider the explanation before attempting to tax the plaintiff on the fee award.

Summarizing Anarchy

Summarizing case law on this issue is no simple task. Much of the authority suggests that tax benefits should not be considered in computing economic loss damages.[31] For example, in *Danzig v. Jack Greenberg & Associates*,[32] the defendant argued that damages in a class action for fraud should be reduced by the claimed tax benefits to class members arising from their investments. The court disagreed, concluding that tax benefits were irrelevant to the amount of restitution to be awarded.

To the same effect is *DePalma v. Westland Software House*,[33] a buyer's breach of contract suit for computer equipment and software. The seller tried to reduce the damage award by arguing that the buyer had received investment tax credits and depreciation. The court found it was inappropriate to mitigate the damages awarded by such tax benefits.

Even more colorful is *Coty v. Ramsey Associates*,[34] in which the plaintiff sued a neighboring pig farm on a nuisance theory. One of the damage claims was for air conditioners the plaintiff had installed to try to mitigate the noxious odor. The defendant replied that the cost of the air conditioners had to be reduced by depreciation tax benefits. The court disagreed, finding tax consequences irrelevant.

Perhaps defense tax arguments are simply scrutinized more carefully. That may be true even in the Supreme Court. In *Hanover Shoe Inc. v. United Shore Machinery Corp.*,[35] an antitrust case in which the plaintiff sued for lost profits, the defendant argued that the plaintiff's damages should be reduced by taxes it would have had to pay absent the violation. In other words, the defendant argued that the lost profits had to be computed *after tax*. Had the antitrust violation not occurred, the defendant argued, the plaintiff would have received profits, and those profits would have been taxable.

Although that argument seemed vapid (after all, the damage award would *also* be taxable when received, thus making the plaintiff worse off), the court of appeals agreed. Reversing, the Supreme Court held that the award should not be reduced for taxes. Because the plaintiff would be taxed when it recovered damages, reducing the damages by taxes would be deducting tax twice, said the Court.

Yet, the Supreme Court also made the more sophisticated observation that accounting for taxes in the year when damages are received (rather than when profits were lost) can change the amount of tax due.[36] The Court noted that the statute of limitations may bar the IRS from recomputing tax due in earlier years. The Supreme Court laid down the ''rough result'' — not taking account of taxes for the year of injury, but taxing the recovery when received — as a satisfactory outcome.

The Supreme Court's approach in *Hanover Shoe* seems to be followed in many cases.[37] Essentially, it takes the view that there should not be a double deduction of taxes and that the plaintiff needs to be put in the position it *would* have occupied before the suit.

However, underlying *Hanover Shoe* is the notion that considerable uncertainties in our tax rules are a good reason *not* to deal with this tax subject. The Supreme Court noted that the proper amount of tax liability ultimately depends on a plethora of factors. Tax determinations under our system are hardly simple. That is one of the main reasons this entire tax damages area often causes courts to refuse to reflect tax consequences in their awards.

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[29] *Id.*

[30] 293 F. Supp.2d 152 (D.D.C. 2003).

[31] *See Kalman v. Berlyn Corp.*, 914 F.2d 1473 (Fed. Cir. 1990). *See also DePalma v. Westland Software House*, 225 Cal. App.3d 1534 (1990).

[32] 161 Cal. App.3d 1128 (1984), *cert. denied* 474 U.S. 819 (1985).

[33] 225 Cal. App.3d 1534 (1990).

[34] 546 A.2d 196 (1988), *cert. denied* 487 U.S. 1236 (1988).

[35] 392 U.S. 481 (1968).

[36] *See id.*

[37] *See Orchard Container Corp. v. Orchard*, 601 S.W.2d 299 (Mo. App. 1990).

Many courts don't apply the throw-up-your-hands "speculative" moniker, but there is still an almost palpable fear about nailing down tax issues. Rough justice often prevails. For example, some courts have said that when current tax rates are higher than the prevailing tax rates for the year in which the losses occurred, that also should be disregarded.[38] The tax impact of a case is important, and some courts are willing to consider taxes in determining what will make the plaintiff whole.

What to Do Now

Despite the traditional conservatism of courts on this issue, *Eshelman* may be a watershed case, ushering in a new era of tax sensitivity. A type of tax-damages renaissance may portend an easier time for plaintiffs to recover such damages. Like many remedies questions, whether a particular plaintiff or a particular defendant will have its version of the tax impact adopted by a court (increasing or decreasing damages because of tax effects) is likely to vary substantially depending on the jurisdiction, venue, applicable law, and other variables.

However, it is not hyperbole to suggest that tax effects should be evaluated in every case. After all, tax issues are often central to the overall outcome. Yet that does not mean one will always ask for tax damages. There may occasionally be tactical reasons not to raise tax matters.

For example, a defendant may choose not to argue for discounting a plaintiff's damages to take into account tax benefits that the plaintiff received from an investment that went bad. A defendant might make that tactical decision when the plaintiff has not raised tax issues, and when the defendant is worried that the benefits it might achieve from its own tax argument will be outweighed by the risk that the plaintiff will raise *bigger* tax issues in response. The defendant may not want to open the door to such issues. Those circumstances aside, however, asking the court to take into account the tax impact on the case will rarely have a downside.

But raising the issues and counting on their application are two different things. Predicting how the court will respond is not easy. The most traditional answer is that tax issues get lost on the cutting room floor. However, the more modern trend of the case law suggests that tax gross-up claims are more favored today than in the past. *Eshelman*, the recent Third Circuit case, may signal just that.

Despite this latest expansion of tax damages as a concept, one must be realistic. Here are a few suggestions:

- Consider making your claim for taxes as part of your case as early as you can. A motion *in limine* is a good place to address the issue. However, some lawyers will want to wait. Eshelman made her motion post-verdict.
- Because tax issues can be complicated, do your best to keep the tax assumptions and tax calculations you are making straightforward. You are more likely to prevail if you make your argument credible and understandable. That doesn't mean you shouldn't use expert testimony. An expert witness on tax damages, by declaration or by testimony, can spell the difference between success and failure. But getting into nuances can be a mistake. Try to keep it simple.
- Be aware that in federal cases, the jury is going to have to decide the tax damage claim. You are unlikely to succeed if you ask the court to gross up the claim after the fact. That means your timing of the tax damage claim will almost surely be influenced by the nature of the case as a bench or jury trial. The particular court's (and even the particular judge's) track record on such claims may also be important.
- In state or federal cases, you must carry a significant burden of proof. Many of the cases suggest that everyone pays taxes. You may need to show by clear and convincing evidence that these *specific* taxes were caused *solely* by the defendant and that you would not have paid them otherwise.

[38]*See McLaughlin v. Union-Leader Corp.*, 127 A.2d 269 (1956), *cert. denied* 353 U.S. 909 (1957).