

CHAPTER 1

Introduction and History

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§ 1.01 **Structured Settlement and Periodic Payment Defined**

[1]—**Lump Sum v. Periodic Payment**

When a person is injured by tort, money is the traditional way of compensating the victim. An arm or leg cannot be restored, so the party liable for the injury must pay economic damages for the past, present and future consequences of the injury. Traditionally, this is done in a lump sum payment. Whether by judgment or settlement, the claimant receives a single payment in recompense for an injury. The claimant can invest, use or squander the lump sum. The funds may cover long-term health care and other needs of the claimant, or they may fall short. The defendant closes its books on the claim, and does not share the risk that the claimant's injury might worsen, or that the actual costs of the injury over time are greater than were anticipated at the time of the lump sum payment.

The lump sum tradition for paying tort damages is challenged by an alternative concept known as periodic payment. Instead of receiving a single lump sum, the claimant receives compensation over time. Periodic payment is defined here to mean a commitment to make future payments to a claimant according to an agreed schedule on specified terms.

The Workers Compensation statutes in the United States¹ provide a well-established system of using periodic payments to fund the long-term needs of work-related accident victims. Structured settlements apply periodic payment to a wide range of personal injury claims. Other statutes and a few judicial rulings have permitted or required periodic payment of damages.² More than half the states³

¹ Chapter 14 discusses the interaction between structured settlements and workers compensation claims.

² See § 1.02[3] *infra* for a discussion of the historical precedents for the periodic payment of damages.

³ Chapter 10 discusses state legislation authorizing periodic payment of judgments. Most states authorize courts to enter judgments that include periodic payment

permit the periodic payment of certain personal injury judgments.

[2]—Periodic Payment v. Structured Settlement

A structured settlement could be defined as any resolution of a dispute where one party is to receive something other than nothing or a lump sum. This is a very broad definition. As used in this book, “structured settlement” is used to describe the resolution of tort cases that are settled by a claimant’s accepting payments over time rather than a single sum. Structured settlements can be simple or complicated. They often involve monthly payments over a claimant’s lifetime, but can include cash up front and periodic payments over varying amounts on specified due dates. The focus of this work is on settlements of injury claims that involve non-taxable recoveries arising from tort cases where physical personal injury or physical sickness has occurred or where a workers’ compensation system provides funds to injured workers.

The Internal Revenue Code contains a definition of “structured settlements” in a section that deals with excise taxes on factoring companies that are involved in the transfer of structured settlement rights.⁴ The definition in that section is more narrow than used in this book. Some state statutes that address periodic payment judgments or protection of structured settlement rights holders that propose to transfer their rights have definitions of structured settlement for the purpose of these statutes. These statutory definitions should be viewed in their context, and not as a unified meaning of the term. Structured settlements can be created for tax-exempt or taxable disputes. Nonetheless, the vast majority of structured settlements are aimed at achieving tax-exempt treatment, and so this work concentrates on issues that surround settlements of tax-exempt recoveries.⁵

The Internal Revenue Code uses the phrase “periodic payments” in the section that excludes from income tax amounts received from a

of at least some damages awarded. In a few states, this authority extends generally to personal injury claims. In the others, periodic payment judgments are authorized only in medical malpractice cases.

⁴ 26 U.S.C. §5891. This 2002 addition to the Internal Revenue Code imposes a 40% tax on income received by a factoring company in a transaction not approved in advance by a state court. See § 16.03[3] *infra*. There are other definitions of structured settlements that appear in state structured settlement protection acts and other laws, and none is viewed in this book as an exclusive or “correct” definition of the term.

⁵ Chapter 2 discusses the taxation of amounts received by a claimant that are excluded from taxable income, with lesser treatment of recoveries taxed as income on a deferred basis.

⁶ 26 U.S.C. §104(a)(2).

personal physical injury or physical sickness.⁶ The reference there is to amounts paid over time, and no technical meaning is ascribed to this phrase in that Code section or otherwise. “Structured settlement” and “periodic payment” will be used in their generally understood sense in this book, except when their meanings for purposes of particular sections of the Internal Revenue Code are being discussed.

The variety of periodic payment arrangements used in structured settlements has expanded greatly since the 1970’s. Many different financial products have been devised for the structured settlement marketplace, although annuity financing is the most prevalent form of product.⁷ Periodic payment products can address multi-claimant dispute resolution⁸ and are used to preserve government benefits for claimants who would otherwise be disqualified from receiving them.⁹

[3]—Varieties of Structured Settlement Arrangements

There are many types of structured settlement arrangements. Importantly, they vary as to methods of financing and as to legal relationships among parties to the transaction.^{9.1} Structured settlement arrangements also vary in terms of timing, amount and direction of payment to settlement payees or creditors.

For example, structured settlements usually include an immediate cash payment for past expenses, current bills, other immediate needs and attorney fees. In addition, they provide for deferred payments which may have any of the following characteristics:

(1) Level payments made at regular intervals over the claimant’s lifetime.

(2) Payments that increase periodically and which are made at regular intervals over the claimant’s lifetime.

(3) Level or increasing payments at regular intervals over the claimant’s lifetime, with a commitment that if the claimant dies before a specified time (e.g., twenty years), the payments will continue to the end of that period to the claimant’s estate or to some other contingent payee. This additional feature has been referred to as a “guarantee,” though a better description is “minimum term” or “period certain.”

(4) Payments at regular intervals over a claimant’s lifetime, plus additional lump sums at specified future dates (referred to in insurance slang as “pops”).

⁷ Ch. 3 *infra* discusses financing alternatives for periodic payment arrangements.

⁸ See § 3.08B *infra*.

⁹ See § 3.08A and Ch. 15 *infra*.

^{9.1} See discussion in Ch. 3 *infra*.

(5) Payments at regular intervals over a fixed period of years (regardless of the claimant’s lifetime).

(6) Payment schedules, including “college funds” or “special need” funds that provide sums in the future to cover specific anticipated needs.

(7) Payment schedules with step increases or decreases in the base amount (e.g., \$1,000 per month until a minor reaches age eighteen and \$2,000 per month thereafter).

(8) Payments over a lifetime, plus a lump sum at the time of the claimant’s death.

(9) Variations of the above, plus a medical trust funded with a specific sum of money that can be used to pay future medical expenses of the claimant (or a trust to pay for other anticipated special needs).

These payout schedules may be arranged to accommodate the needs of any particular claimant. An example of a typical structured settlement is set forth in Table 1.1.¹⁰

Table 1.1 Typical Structured Settlement

Claimant:	Female, age 7 (life expectancy 77 years)		
Injury:	Pedestrian struck by auto resulting in broken arm. Life expectancy is normal (63 years at ag 22)		
Settlement:	\$131,333.34	Cost of Periodic Payments	
	<u>\$68,666.66</u>	Up Front Cash (Fees & Expenses)	
	\$200,000.00	Total Cost of Settlement	

Benefits	Cost ¹¹	Certain Payout	Expected Payout
<u>College Education Fund</u>			
\$12,500.00 per year beginning at age 18 for 4 years certain	\$25,238.00	\$50,000.00	\$50,000.00
<u>Lifetime Monthly Benefit</u>			
\$375.00 per month beginning at age 22 for life with 30 years certain, increasing at 5% compound annually	\$92,122.00	\$298,975.00	\$1,856,114.00
<u>Deferred Lump Sum Payments Certain</u>			
\$25,000.00 at age 35			
\$40,000.00 at age 45			
\$62,044.03 at age 55	\$13,973.34	\$127,044.03	\$127,044.03
Periodic Payment Total	\$131,333.34	\$476,019.03	\$2,033,158.03
Up Front Cash	\$68,666.66	\$68,666.66	\$68,666.66

¹⁰ The information was developed by Little, Meyers & Associates, Ltd. of Cincinnati, Ohio, with particular assistance from Karen D. Meyers and John Daniels.

¹¹ Based on August 2006 market quotation.

§ 1.02 History of Structured Settlements and Periodic Payment Judgments

[1]—Common Law Reliance on Lump Sum Payment

Under English common law, the legal recompense for a tort is a single recovery of money. In *Fetter v. Beale*,¹ the court rejected a plaintiff's attempt to claim a second round of damages after being awarded a small sum in a prior lawsuit and held that the former judgment barred the later action. The plaintiff's medical condition had worsened after his first victory, but the court's holding barred him from recovering damages for the worsened condition, even though he was not able to forecast the worsened condition during the first trial.

The holding of *Fetter v. Beale* had nothing to do with how the first judgment was entered, whether on a lump sum or periodic basis. Rather, it stood for the principle of finality of litigation. With each ensuing consequence of an injury, a plaintiff was not free to file a new action. A single recovery is available for a single tort.

Treatises on damages have cited *Fetter v. Beale* and similar holdings for the single recovery rule, i.e., "All damages for an injury must be recovered in a single action."² It has been standard within English and United States jurisprudence that a single recovery is to be expressed as a lump sum of money, and case law and commentators seem to have assumed that this must be the case. One searches in vain for analysis of why the particular form of a judgment might not better be expressed as a schedule of periodic payments than a lump sum. Nowhere in the standard texts on damages is there discussion of periodic payment arrangements. The texts do state the agreed view, however, that judgments for damages should be expressed in terms of money,³ rather than musket balls or tobacco or oxen, as once was the case in the American colonies.⁴

¹ *Fetter v. Beale*, 1 Ld. Raym. 339, 91 Eng. Rep. 11 (1699), *aff'd* 1 Ld. Raym. 692, 91 Eng. Rep. 1122 (1702). The case involved a battery of one man by another. In the first trial, the plaintiff proved a certain degree of injury. The court held after the second trial that the first had "considered the nature of the wound, and gave damages for all the damages that had been done to the plaintiff." The court found it to be the plaintiff's fault for not proving in the first trial that his condition might worsen. The plaintiff should not have been "so hasty" as to sue until the full extent of the injury had become apparent. 1 Ld. Raym. 339-340.

² See, e.g., Sedgwick, *Measure of Damages* 138 (9th ed. 1912).

³ Sedgwick, *The Measure of Damages* 529-550 (9th ed. 1912); McCormick, *Handbook on the Law of Damages* 62-63 (1935); Sutherland, *Law of Damages* (2d ed. 1893); Stein, *Damages and Recovery* (1972).

⁴ Sedgwick, *Measure of Damages* 8, 530 (9th ed. 1912). Sedgwick states that in England legal fines and penalties were paid in kind until metal currency was introduced.

A frequently quoted statement of the single recovery rule appears in *United States v. Bauman*,⁵ a condemnation case:

“There can be no judgment for an indefinite amount, or a judgment payable by installments. The principle is followed that a judgment must be certain in amount and unconditional in effect.”⁶

The law of tort damages has been generally in accord with this viewpoint:

“The common law system provides a single lump sum judgment in the typical accident case, although in some tort situations (continuing nuisance and continuing trespass) plaintiff may recover periodically for continuing damages as it accrues.”⁷

The single recovery rule has been the object of criticism by the bar and the bench, because it forces a jury or judge to lump into one amount what is, at best, an educated guess of funds needed to compensate a claimant for future damages.⁸ By requiring the finder of fact to enter one sum for all past and all future actual and probable injury, the law has been accused of resorting to “haphazard methods of assessing compensation in actions for personal injuries.”⁹

[2]—Single Recovery Rule and Structured Settlements

Why courts require only lump sums for damage awards is not clear. In theory, there is nothing other than history and precedent to explain why judges or juries should not enter a damages award that specifies a combination of past damages and pain and suffering (in one lump sum) and future damages in a stream of amounts expected to occur over time. In all essential respects, a periodic payment judgment meets the basic requirements for judgments. An order that a defendant pay specific amounts according to a specified schedule is definite. There

⁵ *United States v. Bauman*, 56 F. Supp. 109 (D. Ore. 1943).

⁶ *Id.*, 56 F. Supp. at 117.

⁷ Harper and James, 2 *The Law of Torts* § 25.2 at 1303 (1956). (Footnotes omitted.)

⁸ See: Lawless, “Computation of Future Damages, A View From the Bench,” 54 *Georgetown L. J.* 1131 (1966); Thomas, “Medical Prophecy and the Single Award: The Problem and a Proposal,” 1 *Tulsa L. J.* 135 (1964).

See also:

Supreme Court: *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 494, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) (personal injury damages are a matter of “estimate and prediction”).

Third Circuit: *Frankel v. Heym*, 466 F.2d 1226, 1228 (3d Cir. 1972).

⁹ McCormick, *Handbook on the Law of Damages* 306 (1935).

need be no room for doubt as to its meaning. The terms can be as clear in a judgment as in a settlement agreement. Rules of civil procedure recognize that judgments may be entered other than on a lump sum basis. Federal Rule of Civil Procedure 58, for example, envisions two types of judgments, those for “only a sum certain” and those “upon a decision by the court granting other relief.” Furthermore, through special interrogatories, a judge can leave to the jury the fact-finding task on all essential components of a periodic payment judgment.

The inconsistency between periodic payment of judgments and the single recovery rule could be said to rest on two points: (1) periodic payment of judgments allows an award to be paid in installments and (2) it permits the total amount of the award to be affected by contingencies, such as the claimant’s death. These considerations do not conflict, however, with the principle of finality of litigation that gave rise to the single recovery rule. With a periodic payment judgment, there is only one recovery for an injury; the payout is simply made over time.

The more probable reasons why courts have not fashioned periodic payment judgments are practicality and risk.¹⁰ The practical difficulties in deciding the precise phrasing of a judgment are significant. For how long are payments to be made in what amount? By whom? If the defendant will be the only periodic payment judgment debtor, the court may award a judgment that would disappear if the defendant becomes insolvent. A court may be unwilling to order a plaintiff to take this risk. Courts may also view the form of a judgment to constitute a substantive policy choice best left to legislatures if periodic payment is to be used for judgments. For these and other reasons, courts have not abandoned the lump sum tradition in their judgments. Legislatures have been more eager to experiment.

[3]—Precedents for Periodic Payment of Damages

[a]—Statutory Exceptions

Statutory exceptions to the single recovery rule are widespread. Specific exceptions include awards for alimony and child support, workers’ compensation, no-fault automobile insurance, medical malpractice,

¹⁰ In *Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972), the federal government sought a judicially created trust for the benefit of a brain-damaged infant, with funds to be paid as needed to cover her unpredictable future medical expenses. The court declined to do this, holding that it was up to Congress to change the lump-sum system in Federal Tort Claims Act cases. It also noted the concern of a “continuing burden of judicial supervision.” 466 F.2d at 1229.

recovery for injuries from childhood vaccinations under federal law, and a variety of cases under state statutes and the laws of foreign countries.

[i]—Alimony and Child Support

Periodic payment is well recognized in alimony and child support awards by domestic relations courts. Both are subject to contingencies, such as remarriage, death or change in a child's circumstances. Both are generally subject to future adjustment.¹¹

[ii]—Workers' Compensation

An equally familiar exception to the single recovery rule is the workers' compensation system. Workers' compensation statutes generally provide for periodic payment and forbid a "single recovery," so that the purpose of an award will not be defeated by dissipation of a lump sum. Accordingly, many of these statutes restrict the availability of a lump sum award, a redemption agreement, or a commutation of future compensation.¹² Most states restrict the availability of lump sum payments to disabled workers.¹³ Without an express statutory restriction, courts and administrative boards may refuse to commute future benefits to a lump sum if it would defeat the purpose of the legislation.¹⁴ Workers' compensation statutes further depart from the

¹¹ *Sherburne County Social Services v. Riedle*, 481 N.W.2d 111 (1992).

¹² See, e.g., Mich. Comp. L. § 418.835. In Michigan, the change from a periodically paid workers' compensation award to a lump sum is referred to as a "redemption agreement." Paragraph (1) of § 418.835 provides:

"After 6 months time has elapsed from the date of a personal injury, any liability resulting from the personal injury may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of a worker's compensation magistrate. If special circumstances are found which in the judgment of the worker's compensation magistrate require the payment of a lump sum, the worker's compensation magistrate may direct at any time in any case that the deferred payments due under this act be commuted on the present worth at 10% per annum to 1 or more lump sum payments and that the lump sum payments shall be made by the employer or carrier. When a proposed redemption agreement is filed, it may be treated as a lump sum application, within the discretion of a worker's compensation magistrate. The filing of a proposed redemption agreement or lump sum application shall not be considered an admission of liability and if the worker's compensation magistrate treats a proposed redemption agreement as a lump sum application under this section, the employer shall be entitled to a hearing on the question of liability."

¹³ Kolbach, "Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards," 64 Iowa L. Rev. 138, 146 (1978).

¹⁴ See, e.g.:

single recovery rule to the extent that future payments are subject to increase, decrease, termination, or revival.¹⁵ Chapter 14 addresses the periodic payment aspects of Workers' Compensation in detail.

[iii]—Medicare Set-Aside Arrangements

A Medicare set-aside arrangement (MSA) is an administrative and funding mechanism utilized in certain categories of settlements to protect Medicare's interests as "secondary payer" under the Medicare Secondary Payer (MSP) statute. Congress enacted the MSP statute in 1980 to curb the rising cost of Medicare. The Center for Medicare and Medicaid Services (CMS) is the Federal agency within the U.S. Department of Health and Human Services responsible for enforcing the MSP rules. Until 2001, however, CMS did not enforce the MSP statute. Beginning in 2001, CMS began enforcing the MSP statute by recommending MSAs for certain categories of workers compensation (WC) commutation settlements. Since 2001, CMS has issued multiple policy memoranda for WCMSAs, several of which address structured settlement issues.¹⁶

[iv]—No-Fault Automobile Insurance

Since Massachusetts enacted the first no-fault automobile insurance statute (effective January 1, 1971), approximately half the states have enacted some form of no-fault law for motor accidents. None of them currently provides for periodic payment of judgments when an accident victim sues in tort to recover damages in excess of no-fault benefits. Many, however, provide that an accident victim may receive periodic payment of allowable no-fault benefits directly from the victim's insurer.¹⁷

New Mexico: *Paradiso v. Tipps Equipment*, 2004 N.M.C.A. 9, 82 P.3d 985 (2003).

New York: *Mohr v. Wiebusch & Hilger*, 247 App. Div. 679, 289 N.Y.S. 421, *aff'd* 272 N.Y. 655, 5 N.E.2d 378 (1936).

¹⁵ See, e.g., N.Y. Work. Comp. L. §§ 22, 25, 123 (McKinney 1965). Paragraph 5(b) of Section 25 provides that the board which administers the system

"whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be in the interests of justice. . . ."

¹⁶ For additional information about MSAs and the MSP statute, see § 15.03 *infra*.

¹⁷ See, e.g.:

Florida: Fla. Stat. Ann. § 627.736(4).

Massachusetts: Mass. Gen. L. Ann., Ch. 90, § 34 M.

Michigan: Mich. Comp. L. § 500.3101 *et seq.*

New Jersey: N.J. Stat. Ann. § 39:6A-4(b).

Periodic payments have been made a part of legislation establishing state funds for crime victims. In Michigan, for example, the Crime Victims Compensation Fund makes

[v]—Medical Malpractice

Between 1974 and 1979, fourteen states enacted statutes authorizing some form of periodic payment in medical malpractice actions, and there were additional enactments in the 1980's.¹⁸ One goal of this state periodic payment legislation was to remedy a perceived crisis in medical malpractice insurance.¹⁹ Some state courts held that a narrow application of periodic payments (e.g., limited to medical malpractice actions only) violates constitutional standards of equal protection, while other state courts upheld the statutes.²⁰

[vi]—Childhood Vaccination Cases

Congress provided in 1986 that in cases where children damaged from vaccinations qualify under the National Vaccine Injury Compensation Act, a special master can order the purchase of an annuity to cover part of the future damages.²¹ Special masters have used this authority to create a blend of solutions, including lump sums, medical contingency funds and annuities.²² When ordering the purchase of an annuity to pay compensation under this program, special masters typically direct the Secretary of the Department of Health and Human Services to purchase and take ownership of the annuity from an insurance company that meets certain minimum criteria for financial strength.²³

lump sum payments to victims, but “in the case of death or protracted disability, the board may specify that the award shall provide for periodic payments to compensate for the loss of earnings or support.” *Jerome v. Crime Victims Compensation Fund*, 419 Mich. 161, 350 N.W.2d 239 (1984), construing Mich. Comp. L. § 18.362.

¹⁸ Elligett, “The Periodic Payment of Judgments,” 46 Ins. Counsel J. 130, 134 N.49 (1979). See also, Chapter 10 for a survey of state statutes on periodic payment of judgments and Appendix C(2) *infra* for a listing of state periodic payment acts.

¹⁹ See Chapter 10 *infra* for developments in state periodic payment legislation.

²⁰ See Chapter 10 *infra* for discussion of these decisions.

²¹ 42 U.S.C. § 300aa-15(f)(4).

²² *Doe v. Secretary of Health and Human Services*, 2009 U.S. Claims LEXIS 583 (Oct. 2, 2009); *Gresh v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 429 (Oct. 26, 1990); *Loe v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 321 (Aug. 1, 1990); *Marrero v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 218 (May 23, 1990); *Wilson v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 186 (April 26, 1990).

²³ The U.S. Court of Claims uses special masters, who in 2009 required use of a life insurance company with at least \$250 million of capital and surplus, exclusive of mandatory security valuation reserve, and a rating from at least two of four rating organizations: A.M. Best Company: A++, A+, A+g, A+p, A+r or A+s; Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1 or Aaa; Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+ or AAA; and Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+ or AAA. *Ray v. Secretary of Health and Human Services*, 2009 U.S. Claims LEXIS 647 (Sept. 24, 2009). See: *Walker v. Secretary of the Department of Health and*

[vii]—*Personal Injury Claims Generally*

Several states have adopted periodic payment legislation applicable to personal injury and wrongful death claims. In Florida, contract claims are also covered if they fit within the provisions of the statute.²⁴

[viii]—*Minors and Incompetents*

The cases of injured minors and incompetents are particularly suited to structured settlements. One example from Minnesota was this: “A minor settles a personal injury action for a lump-sum payment that is placed in a special account until he turns 18. Upon reaching the age of majority, he moves in with friends and uses the funds to buy a car and ‘party down,’ burning through \$90,000 in a year.”²⁵ For the purpose of preventing such results, some state statutes expressly permit the use of periodic payments to settle or compromise the claims of minors or incompetents, to overcome the suggestion that probate courts are hamstrung to release large lump sums when a minor turns 18.²⁶ Where courts have this discretion, they have refused parental requests for lump sum disbursement at age 18. A New York court, for example, rejected the requests of parents to distribute over \$500,000 to a young girl upon her 18th birthday, who was struck by a car and suffered lifelong neurological damage. “[I]mpelled to vigilance where infants are involved,” the Court rejected this approach and effectively ordered that a structured settlement be created.²⁷ Note, however, that other judges have raised concerns about

Human Services, 1991 U.S. Cl. Ct. LEXIS 515 (Oct. 25, 1991); *Adam v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 519 (Oct. 25, 1991); *Anghel v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 476 (Oct. 3, 1991); *Robinson v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 470 (Oct. 3, 1991); *Mackler v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 480 (Oct. 3, 1991); *Correa v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 478 (Sept. 30, 1991); *Veasey v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 474 (Sept. 26, 1991); *Spooner v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 463 (Sept. 25, 1991); *Froelich v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 454 (Sept. 13, 1991); *Lafler v. Secretary of the Department of Health and Human Services*, 1991 U.S. Cl. Ct. LEXIS 455 (Sept. 13, 1991).

²⁴ See Chapter 10 *infra* for developments in state periodic payment legislation.

²⁵ M. Lore, “Protect Clients From Themselves With Structured Payments,” N.C. Lawyers Weekly (May 21, 2007).

²⁶ See, e.g.:

Georgia: Ga. Code Ann. § 29-2-16.

Virginia: Va. Code Ann. § 29-2-16

²⁷ *Roman v. Bermudes*, 832 N.Y.S.2d 770, 15 Misc. 3d 321 (Bx. Cty. Sup. Ct. 2007).

See also:

Sixth Circuit: *Jordan v. Graco Children’s Product, Inc.*, 2010 W.L. 3603420 (E.D. Tenn. Sept. 10, 2010).

Ninth Circuit: *Moore v. County of Kern*, 2009 U.S. Dist. LEXIS 101205 (E.D. Cal. Oct. 30, 2009).

whether they have statutory authority to extend periodic payments beyond the age of majority.²⁸

[b]—Judicial Exceptions

A few U.S. courts in rare instances have used their equity powers to fashion installment judgments, absent statutory authority. For example, in a suit in equity for fraud in inducing marriage, the Supreme Court of Idaho affirmed a trial court judgment that was payable in monthly installments.²⁹ In an action for personal injuries, the Supreme Court of Oklahoma reviewed a trial judge's decision to enter a lump sum judgment in the face of a jury verdict which had specified that payment was to be made in monthly installments for twenty years.³⁰ Neither side had objected to this unusual sleight of hand by the jury. Although commenting that the verdict should not have been rendered or received in this form, the appellate court reversed and directed that the judgment be entered on the jury's periodic payment plan, with interest to accrue on each monthly installment from its due date only.³¹ These two holdings represent modest departures from the single recovery rule, in each case terminating the litigation completely.

In a more radical judicial departure from the single recovery rule, the Supreme Court of Iowa reviewed a trial court decision that permitted the parties to elect either periodic payment of damages or specific performance of an employment contract.³² The court determined that the employer had not elected specific performance, and affirmed the trial court's retention of jurisdiction to adjudicate annually the amount of damages owed to the employee, based on a mandate to equalize the claimant's compensation in comparison to that to be received in the future by the majority shareholder. The court's holding was radical because the amount of the plaintiff's recovery depended on future contingencies and was to be reviewed by the court. The decision terminated litigation on the issue of liability only.

At least one court has used remittitur as a device to offer the plaintiff a choice between lump sum and periodic payment judgments. Applying Missouri law, which then had no periodic payment statute, the court

²⁸ Florida Circuit Judge McFerrin Smith III in re: Guardianship of Marisa Hancock, a Minor, In the Circuit Court, Seventh Judicial District, State of Florida, Case No.: 2009-10850-PRDL (2010).

²⁹ *McGhee v. McGhee*, 82 Idaho 367, 353 P.2d 760 (1960). Because the court sat in equity, it was entitled to permit the defendant to retire the judgment by installment payments.

³⁰ *M&P Stores v. Taylor*, 326 P.2d 804 (Okla. 1958).

³¹ *Id.*, 326 P.2d at 808.

³² *Holden v. Construction Machinery Co.*, 202 N.W. 2d 348 (Iowa 1972).

found excessive an \$800,000 award for loss of vision in one eye.³³ It ordered a new trial unless plaintiff agreed to take \$600,000, which was to be satisfied either in cash or at plaintiff's election by a "structured settlement." The periodic payments were to be backed by the purchase of an annuity. By its nature, remittitur offers a claimant a choice between a new trial or a reduced judgment from the jury's verdict, so that courts may experiment more freely with remittiturs than with non-optional judgments.

In the United Kingdom, until 1996, lump sum awards were the overwhelming norm. A few courts wandered from their exclusive use. Appellate courts sometimes modified damage awards of trial courts, and occasional judgments were phrased to permit reconsideration of the amount owed based on future change in circumstances.³⁴ British practice began to change in 1996, when legislation was adopted to authorize periodic payments in personal injury cases.³⁵

Thus, cautious judicial ingenuity has opened the door of common law judgments to periodic payment, if only a crack. By contrast, private parties have extensively used periodic payment to fashion structured settlements.

[4]—Early Use of Structured Settlements

As private contractual agreements, settlements have not been restricted by the single recovery rule. Private parties can do as they wish to settle disputes, without regard to what judgment might be entered if settlement is not achieved. There is no recorded history of when periodic payment was first used to settle a personal injury claim. It no doubt occurred when an injured plaintiff learned that the defendant did not have enough immediate funds to pay the claim, and instead accepted a promise from the defendant to pay over time.

³³ *Stineman v. Fontbonne College*, 664 F.2d 1082, 1089 (8th Cir. 1981) (applying Missouri law).

³⁴ In *Jenkins v. Richard Thomas of Baldwin Ltd.* [1966] 1 W.L.R. 476, 477 (C.A.), and *Curwen v. James* [1963] 1 W.L.R. 748, 754-55 (C.A.), events arising after verdicts of lump sum damages were considered on appeal and the lump sum awards were adjusted accordingly. These decisions are exceptional, as the court stated in *Jenkins*:

"Save in exceptional circumstances, the rule is that for better or worse the assessment at the trial is once and for all. It may well be that that rule is very much for the worse. It would perhaps be better, when questions of loss of earnings capacity are being considered, that the amount to be awarded by way of damages should be assessed by way of an award of an annual or monthly sum, with liberty to apply to the court should the circumstances change. This might well be much fairer from the point of view of both plaintiffs and defendants. But that is not the law at the moment. The law is that the damages must be assessed at the trial once and for all and awarded in a lump sum. It is a rule which is rarely departed from."

³⁵ See § 1.05[2] *infra*.

The first reported uses of periodic payments to settle personal injury cases were in the 1960's. These arose from Canadian structured settlements for children who suffered birth defects from their mothers' use of Thalidomide during pregnancy.³⁶

The use of structured settlements in the United States settlements slowly grew during the 1970's,³⁷ but remained a relatively rare phenomenon until the Internal Revenue Service issued several revenue rulings.³⁸ These administrative rulings made clear that a claimant would receive all amounts from a structured settlement free from federal income tax, provided certain requirements were met.³⁹ Public recognition of the tax-free status of periodic payments, coupled with the increase in size of injury awards throughout the country, propelled the concept into widespread use in the United States.

³⁶ See § 1.05[1] *infra*.

³⁷ A 1977 survey reported that of eighty-two casualty insurers who responded, twenty-three had used periodic payment in settlements, seventeen had tried to do so but without success, and forty-two had a lump sum only policy. Lilly, "Alternatives to Lump Sum Payments in Personal Injury Cases," 44 *Ins. Counsel J.* 243, 244 (1977). The amount of annuity premium that was received by life insurance companies from third party sources in the United States for funding periodic payment obligations was \$10 million for all years through 1975 and only \$5 million in 1976. Source: Michael Bodtker, Vice President, First Colony Life Insurance Co. (Dec. 13, 1984). Periodic payment was undoubtedly used to a greater extent than these annuity figures would indicate for years through 1976. This is because many periodic payment obligations were funded by casualty insurers either internally or through related life insurance companies and no centralized data is available for such transactions.

³⁸ Revenue Ruling 77-230, 1977-2 C.B. 214; Revenue Ruling 79-220, 1979-2 C.B. 74; and Revenue Ruling 79-313, 1979-2 C.B. 75. See § 1.03 Ns. 1-2 *infra*, for estimates of the expanded use of periodic payments since 1977.

³⁹ For discussion of these rulings, see § 2.03[2] *infra*.

§ 1.03 Expanding Use of Structured Settlements

[1]—The Structured Settlement Market

[a]—Size and Growth

There is no definitive public source of information about the amount of structured settlements in the United States. Those involved in settling claims and financing periodic payment arrangements are not required to report the data publicly. Life insurance companies report their structured settlement annuity business as a particular product line, however, so that industry volume of annuity-finance structured settlements can be estimated on an annual basis.¹ The

¹ Estimates of annuity premium received by life insurers from third party sources in the United States from 1975 to 2010 for funding of periodic payment obligations are as follows. For historical estimates of non-qualified structured settlements, see § 2.06 N. 6 *supra*.

Year	Annuity Premium
2011	\$4.97 billion
2010	\$5.5 billion
2009	\$5.4 billion
2008	\$6.2 billion
2007	\$6.1 billion
2006	\$6 billion
2005	\$5.9 billion
2004	\$6 billion
2003	\$5.8 billion
2002	\$6 billion
2001	\$6 billion
2000	\$5 billion
1999	\$4 billion
1998	\$3.55 billion
1997	\$3.75 billion
1996	\$4.0 billion
1995	\$3.8 billion
1994	\$4.0 billion
1993	\$4.0 billion
1992	\$3.6 billion
1991	\$4.0 billion
1990	\$3.9 billion
1989	\$3.75 billion
1988	\$3.6 billion
1987	\$3.3 billion
1986	\$2.9 billion
1985	\$2.5 billion
1984	\$2.0 billion
1983	\$1.3 billion
1982	\$.9 billion
1981	\$.575 billion
1980	\$.350 billion

majority of structured settlements are funded through annuities. Because other funding vehicles are also used, the volume reported from annuity sales understates the depth of structured settlement business in the United States.

The relatively steady annual amount of annuity-financed structured settlements from 2001-2010 in the United States indicates a mature market. Structured settlements can occur on the basis of unfunded promises to pay by a defendant, through the use of non-annuity products, such as a bond trust, and through governmental mechanisms. Annuities, however, are the predominant funding vehicle for structured settlements. In 2010, an estimated \$5.5 billion of annuities were purchased to fund structured settlement obligations. Structured settlements support an active group of practitioners who understand its intricacies and are prepared to assist claimants and defendants and their insurers in resolving claims through periodic payments. They also provide opportunities for factoring

Year	Annuity Premium
1979	\$.150 billion
1978	\$.040 billion
1977	\$.015 billion
1976	\$.005 billion
1975	\$0

Source: Memorandum to author from Michael Bodtke, Vice President First Colony Life Insurance Co. (Dec. 13, 1984), revised (July 16, 1986), revised (November, 1998). Post-1985 estimates are based on the authors' conversations with various life companies participating in the structured settlement industry. The 2004 and 2005 estimates are from life insurance industry statistics kept by The National Underwriter Co., "Fixed Annuity Sales Fell 10% in 2005," National Underwriter, Life & Health/Financial Services Edition, Feb. 27, 2006. A calculation from an industry source to the authors reveals structured settlement annuity premium from the 15 US-based insurers believed to write annuities for structured settlement use of \$6,226,578,725 in 2008.

These estimates do not include annuity premium paid by casualty companies to their affiliated life companies for funding of periodic payment obligations. One such casualty company used periodic payment in 419 claims in 1979 and 1,129 claims in 1980, paying \$31 million and \$51.6 million in annuity premium to its affiliated life insurer during those two years. See: Le Roux, "Insurers Structure More Liability Awards," *Business Insurance* at 1 (July 20, 1981); Aetna Claim Department Newsletter, "Structured Settlements" (Jan. 1981). One 1985 estimate is \$2.4 billion in sales of periodic payment products during that year. Greene, "The Structure Game," *Forbes*, 68-69 (June 3, 1985). See also, All-Industry Research Advisory Council, *Structured Settlements*, Tables 25-27 (1983). Another indication of the increased use of periodic payment was the 1985 formation of the National Structured Settlement Trade Association, whose members are primarily brokers of investment products to fund periodic payouts.

Melissa Evola of Structured Financial Associates is the source for most recent estimates of industry annuity sales estimates. Ms. Evola conducts a quarterly study that she shares with the co-authors.

companies to approach structured settlement recipients to induce them to cash in their periodic payment streams for immediate cash payments.

A report by Towers Perrin titled the “2007 Update on U.S. Tort Cost Trends”² provides some perspective about the size of the structured settlement market compared to overall tort claim costs in the United States. The report represents the eleventh such study by Towers Perrin affiliate Tillinghast Insurance Consulting beginning in 1985. This report provides updates through 2006. The report looks at tort costs from an insurance perspective. It does not specifically address structured settlements. The report excludes consideration of non-fault auto insurance, property insurance, workers compensation and some extraordinary industry settlements (example: tobacco litigation).

What the Towers Perrin report does consider are three cost components (losses paid to third parties; defense costs; and administrative expenses) for three tort cost categories (insureds; self-insureds; and medical malpractice). The results for such tort costs in 2006 totaled \$247 billion (a decrease of \$13.4 billion from 2005) as follows:

1. Insureds: \$171.2 billion;
2. Self-insureds: \$45.5 billion;
3. Medical malpractice: \$30.3 billion.

An earlier Tower’s Perrin study of U.S. Tort Costs translated the overall tort costs into these additional cost categories and cost percentages:

1. Administrative costs: 21 percent;
2. Defense costs: 14 percent;
3. Plaintiff attorneys: 19 percent;
4. Economic loss: 22 percent;
5. Non-economic loss: 24 percent.

By 1997, it was estimated that structured settlements in the United States were backed by over \$40 billion of assets, that between 250,000 and 300,000 structured settlements were in place and that at over 20 life insurance companies were issuing annuities to the structured settlement market.³ Reliable industry estimates in 2004 were that \$70-80 billion of structured settlements had been placed and over \$400 billion of payouts had been made to a half million structured settlement recipients.⁴

² Towers Perrin, “2007 Update on U.S. Tort Cost Trends” “ 2007 Towers Perrin and available for download at http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2007/200712/tort_2007_1242007.pdf (last visited Sept. 7, 2011). This 2007 Update on U.S. Tort Costs represents the eleventh such study of U.S. tort costs published by Towers Perrin, and subsequent annual updates have been published by Towers Perrin for 2008 and 2009 and are likewise available for download from its website.

³ Report on the Inquiry into the Motor Accident Scheme, 2d Interim Report of the Standing Committee on Law & Justice of the Parliament of New South Wales Legislative Council.

Structured settlements were not confined to private sector defendants. The United States Justice Department (Torts Branch of the Civil Division) actively uses structured settlements, through the reversionary grantor trust to finance the claims.⁵ In New Jersey, a state that does not provide for periodic payment of judgments, an appellate court remanded a case for a new trial on the issue of damages, suggested the parties consider a structured settlement.⁶

Structured settlements represent a minority of case dispositions, the vast majority of which are resolved through a single payment. One estimate is that the approximate \$6 billion of annual structured settlements in the mid-2000's represents about 5% of \$130 billion paid out annually in personal injury settlements.⁷

The global economic crisis triggered by events in the United States in mid-2008 carries significant but uncertain ramifications for the structured settlement industry. Attorneys, brokers and consultants report modest to major increases in the number of claimants seeking advice on annuities and other periodic payment vehicles.⁸ Like many Americans concerned with their financial health and skeptical of returns achieved from stock market and other investments, claimants may increasingly opt for the safety and security of fixed annuities to weather tough economic times. The low interest rates prevailing in the last part of the twenty-first century's first decade, however, resulted in a lessened advantage of structured settlement annuities as compared to periods when interest paid on bonds was higher. The decline from the 2008 peak of \$6.2 billion in structured settlement annuities to \$5.4 billion in 2009, with a slight increase to \$5.5 billion in 2010, shows a sustained demand for the product.⁹ The decline in gross dollar total masked an 8% rise in the number of cases using structured settlement annuities during the same period.¹⁰

Periodic payment has increasingly been used to create judgments, pursuant to state and federal statutes.¹¹ Even greater use of periodic payment in judgments is probable. In 1990, the National Conference of Commis-

⁴ Report of National Structured Settlements Trade Association President Mal Deener to NSSSTA Annual Meeting (May 1, 2004).

⁵ See Chapter 3 *infra* for discussion of periodic payment financing alternatives, including annuity financing and reversionary grantor trusts.

⁶ *Friedman v. C & S Car Service*, 211 N.J. Super. 657, 512 A.2d 560 (1986).

⁷ Sheffield, "Evolve Financial Division Ramps Up Marketing To Grow Settlement Business," *Memphis Bus. J.* (Feb. 4, 2008).

⁸ Authors' conversations with structured settlement consultants.

⁹ See § 1.03 N. 1 *supra*.

¹⁰ "First-Quarter US Sales of Fixed Annuities Jump 78%," *BestWire* (June 2, 2009), <http://www.beaconresearch.net/pdfs/1stQusfaj78.pdf> (last visited Feb. 24, 2011).

¹¹ See Chapter 10 *infra* for developments in periodic payment legislation. State statutes are listed in Appendix C *infra*.

sioners on Uniform State Laws approved the Uniform Periodic Payment of Judgments Act (hereinafter cited as the “Uniform Act”).¹² The Uniform Act will assist state legislatures as they continue to develop laws for distributing large personal injury awards in periodic rather than lump sum payments.

In 1986, Congress enacted a periodic payment provision within the National Childhood Vaccine Injury Act, pursuant to which children injured from diphtheria-pertussis-tetanus (DPT) and other vaccinations have rights and limitations on recovery for injuries suffered.¹³ Children adversely affected by DPT vaccinations who qualify under the Act are candidates for very long-term care. The Act expressly provides for the courts to order the purchase of annuities to address this need.¹⁴ The courts have successfully integrated periodic payment features into awards under the Act.¹⁵ The distinct advantage of the use of an annuity to protect the corpus of the award from mismanagement or other waste by the petitioner was cited as sufficient reason to affirm a special master’s order for the use of an annuity over the objections of the plaintiff.¹⁶

Periodic payment has been included in major federal proposals, including the Federal Health Care Liability Reform and Quality of Care Improvements Act of 1991 and the American Health Security Act of 1994, legislation proposed by both Republican and Democratic administrations. As part of an effort to limit the growth of medical costs, these and other proposals reflect a bipartisan consensus that periodic payment is one way to reduce costs associated with medical malpractice cases. The use of periodic payment judgments is advocated in federal proposals that promote product liability reform.

The significant common provisions of such proposed federal legislation are generally the following:

- (1) eliminate the collateral source rule to prohibit double recovery by a claimant who receives compensation from other sources, such as health insurance or workers compensation;

¹² See Chapter 9 *infra* for a summary and analysis of the Uniform Act. See Appendix B *infra* for the text of the Uniform Act.

¹³ 42 U.S.C. §§ 300aa-1, *et seq.*

¹⁴ 42 U.S.C. § 300aa-5(f)(4).

¹⁵ Courts have ordered combinations of a lump sum payment, a medical contingency fund, and an annuity to cover lifetime or long-term needs. See: *Gresch v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 429 (Oct. 26, 1990); *Loe v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 321 (Aug. 1, 1990); *Marrero v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 218 (May 23, 1990); *Wilson v. Secretary of the Department of Health and Human Services*, 1990 U.S. Cl. Ct. LEXIS 186 (April 26, 1990).

¹⁶ *Ruben v. Secretary of the Department of Health and Human Services*, 22 Cl. Ct. 264, 1991 U.S. Cl. Ct. LEXIS 6 (1991).

- (2) provide for alternative dispute resolution techniques; and
- (3) require verdicts to be translated to periodic payment judgments, with amounts to be paid over time rather than all in a lump sum.

If federal legislation beyond the vaccinations arena is enacted, it could force states to implement companion legislation, through incentives or the threat of reducing or eliminating the states' Medicaid administrative costs reimbursement. The trend toward changes in legislation to provide for periodic payment of awards is clearly established.

Periodic payment has application to the funding of hazardous waste cleanups. A study prepared for the U.S. Environmental Protection Agency (EPA)¹⁷ regarding alternative cleanup financing mechanisms to promote settlements with potentially responsible parties (PRPS) under the Comprehensive Environmental Response, Compensation and Liability Act as amended (CERCLA) concluded that structured settlements demonstrated the highest potential as an incentive to promote PRP settlements with the EPA.¹⁸ Both self-insured companies and states utilize periodic payment to settle environmental claims.¹⁹

¹⁷ U.S. Environmental Protection Agency, Office of Waste Programs Enforcement, *An Analysis of Alternative Cleanup Financing Mechanisms for their Potential Application to CERCLA Settlements* (Feb. 19, 1988).

¹⁸ The EPA Study consisted of three components. First, it identified existing financing mechanisms that have been used in CERCLA cases as well as alternative financing mechanisms that might facilitate settlements. The existing financing mechanisms included: lump sum cash payments, trust funds and liens on PRP assets. The alternative financing mechanisms included: surety bonds, financial tests, corporate guarantees, letters of credit and structured settlements.

Periodic payments present potential advantages for the funding of some types of property damage claims. Actions brought by homeowner's associations against builders or developers for damages resulting from faulty materials or construction practices typically involve a large number of individual homeowners. A timetable can be developed to identify the approximate timing of construction failure and the need for repairs. Periodic payment offers the parties an opportunity to settle the action with a guarantee that funds will be available when the defects need to be repaired.²⁰

Periodic payments have become significant features of mass litigation involving thousands of claimants. In one company's program, claimants of the company in a class action were offered the opportunity to accept structured settlements that would be funded in the future, based on proceeds anticipated from unresolved insurance litigation. One insurer settled its share of the company's insurance litigation against it by agreeing to bear defense costs against the company's claimants and to pay 40% of the costs of claimants who enroll in the structured settlement program, pending the outcome of the class litigation.²¹

As mass tort litigation of personal injury claims becomes more complex, the use of periodic payment arrangements is increasing. By its nature, periodic payment addresses enhanced tax and financial planning opportunities for claimants and often creates reciprocal opportunities for defendants. The distinct advantages in resolving claims with periodic payment for both claimants and defendants should be reviewed by both sides. Lump sums, by contrast, cannot provide tax advantaged payout schedules for claimants or a service-oriented approach by defendants.

Second, the EPA Study qualitatively evaluated each financing mechanism in terms of six funding issues: (1) settlement cost to the PRP; (2) security of cleanup money; (3) future government administrative cost; (4) flexibility of funding; (5) market availability; and (6) cost. Based on this evaluation, the study selected structured settlements as the most promising financing study for more in-depth research.

Third, the EPA Study qualitatively evaluated structured settlements by performing a simulation in two selected CERCLA cases. According to the study, this qualitative simulation confirmed that structured settlements: (1) reduce PRP's settlement costs when compared to a lump-sum cash payment; (2) assure timely completion of planned response activities; and (3) may provide net payments in excess of the required cleanup costs.

¹⁹ See Chapter 13 *infra*.

²⁰ See Haggerty, "New Use for Structured Settlements."

²¹ The example comes from litigation involving Fibreboard Corporation, as reported in Legislative Update, a publication of the National Structured Settlements Trade Association (Feb. 3, 1989).

Structured settlements are an established part of American personal injury practice. Any litigator, judge, mediator or claims adjuster involved in significant personal injury litigation must be able to evaluate the merits of periodic payment in a particular case and to fashion a legally sound structured settlement or periodic payment judgment. As a matter of professional competence, attorneys and judges cannot treat periodic payment as an arcane sidelight.

[b]—Professional Stakeholders

In addition to structured settlement recipients, there are many professional structured settlement stakeholders. They include: judges, mediators, guardians, trustees, plaintiff trial attorneys, special needs attorneys, settlement planners and consultants, Medicare set-aside consultants, life care planners, defense attorneys, claims executives, risk managers, product providers, secondary market participants including transfer attorneys—as well as the legislators and regulators responsible for structured settlement laws. This book attempts to provide these professional structured settlement stakeholders with a regularly updated introduction to and learning resource for structured settlements and periodic payments used in the personal injury context.

[c]—Professional Associations

Structured settlement professional stakeholders historically have organized themselves in professional associations for educational and/or lobbying purposes. Professional associations where structured settlement stakeholders interact include:

- National Structured Settlement Trade Association (NSSTA)²²
- Society of Settlement Planners (SSP)²³
- National Association of Settlement Purchasers (NASP)²⁴
- American Association for Justice (AAJ)²⁵

²² See <http://www.nssta.com/i4a/pages/index.cfm?pageid=1> (last visited Mar. 9, 2010). NSSTA's members include structured settlement annuity providers (life insurance companies) and their agents as well as attorneys, trustees and consultants who specialize in structured settlements.

²³ See <http://ssp.members101.com/ssp/Module/Home/Theme16.aspx> (last visited Mar. 9, 2010). SSP's membership consists of structured annuity provider agents who represent injury victims (plaintiffs) and their attorneys as well as special needs attorneys, trustees and consultants who do the same.

²⁴ See <http://www.thenasp.org/default.aspx> (last visited Mar. 9, 2010). NASP's members are companies who specialize in structured settlement factoring transactions.

²⁵ See <http://www.justice.org/cps/rde/xchg/justice/hs.xml/default.htm> (last visited March 9, 2010). - AAJ's members are personal injury trial attorneys.

- National Association of Elder Law Attorneys (NAELA)²⁶
- National Association of Medicare Set-Aside Professionals (NAMSAP)²⁷

[2]—Structured Settlement Law

This book identifies and analyzes a growing body of legislation, regulations and case law that applies to structured settlements. The Federal legislation includes: tax law (Chapters 2, 3 and 16), HIPAA (Chapter 4) and government benefit laws such as Social Security, Medicare and Medicaid (Chapter 15). The state legislation includes: periodic payment of judgments (Chapters 9-11), structured settlement protection statutes (Chapter 16), workers compensation (Chapter 14), state Medicaid laws, UCC Article 9 assignment rules (Chapter 16), exemption statutes (Chapter 8), insurance laws (Chapters 4 and 6), insurance guarantee statutes (Chapter 3 and 5), and state minor statutes (Chapter 1).

[3]—Public Policy

[a]—Sources for Structured Settlement Public Policy

Wikipedia defines “public policy” as “the course of action or inaction taken by governmental entities (the decisions of government) with regard to a particular issue or set of issues.”²⁸ Public policy support for periodic payments in the United States pre-dates structured settlements and includes structured settlements.²⁹ The legislative history of structured settlements highlights considerable public policy support for structured settlements.³⁰

[b]—Lump Sum Dissipation

When the U.S. Congress legislated a tax exclusion for structured settlements in 1982,³¹ part of the justification for the resulting tax subsidy was the assumption and belief that injury victims frequently

²⁶ See <http://naela.org/> (last visited Mar. 9, 2010). NAELA’s members are elder law attorneys and special needs attorneys whose members have expertise in government benefits, trusts and disability issues. Many NAELA members are also members of special needs networks such as the Academy of Special Needs Planners (ASNP) and the Special Needs Alliance (SNA).

²⁷ See <http://www.namsap.org/> (last visited Mar. 9, 2010). NAMSAP’s members are product providers, agents, attorneys and consultants who specialize in Medicare set-aside arrangements.

²⁸ See http://en.wikipedia.org/wiki/Public_policy.

²⁹ See § 1.02[3] *supra*.

³⁰ See §§ 2.02, 9.01 and 16.02 *infra*.

³¹ See § 2.02 *infra*.

dissipate lump sum settlements. One of the stated purposes of the National Conference of Commissioners on Uniform State Laws for drafting and approving the Uniform Periodic Payment of Judgments Act in 1990 was “to reduce the burden on relatives of personal injury victims and public assistance costs created by the premature dissipation of lump-sum payments.”³² More recently, assumptions and beliefs about lump sum dissipation have helped shape the public and legislative debates about transfers of structured settlement payment rights.³³

Many industry participants have promoted the sale of structured settlements with references to “studies that show 90 percent of injury victims who receive lump sum settlements dissipate the entire amount within five years.”³⁴ No one within the structured settlement industry, however, has ever identified or produced such studies. To the contrary, commentators who have researched dissipation studies³⁵ have refuted the 90% statistic and have identified dissipation studies that reach a contradictory conclusion: injury victims have no greater propensity to dissipate money than non-injury victims. Other commentators³⁶ have suggested that when some injury victims dissipate settlements prematurely, they do so for reasons other than some innate propensity to squander. For example, the qualification requirements for needs-based government benefits such as Medicaid and Supplemental Security Income (SSI) impose severe income and asset restrictions upon recipients.³⁷ As an additional explanation for possible dissipation, many personal injury settlements underfund future damages, forcing even fiscally responsible settlement recipients to consume their entire recovery prematurely.

[c]—Benefits to Parties

All settlements are voluntary. As such, they reflect a decision that the parties prefer them to the alternative of further litigation with uncertain outcomes. When periodic payments are part of a settlement, it is because the parties perceive mutual advantage, as compared with resolving a claim based on a one-time payment.

³² See § 9.01 *infra*.

³³ See § 16.02 *infra*.

³⁴ See S2KM blog post titled “Dissipation Studies” - http://s2kmblog.typepad.com/rethinking_structured_set/2009/06/dissipation-studies.html (last visited Mar. 9, 2010).

³⁵ See Babener, “Justifying the Structured Settlement Tax Subsidy: The Use of Lump Sum Settlement Monies”, NYU Journal of Law & Business, Volume 6, No. 1 (Fall 2009).

³⁶ David J. Lillesand speaking at the 2008 Annual Meeting of the Society of Settlement Planners.

³⁷ See § 15.04 *infra*.

The basic tax advantage of periodic payment is that the interest or investment element of a lump sum is not taxable to the claimant, provided that the relationship between the parties meets prescribed conditions.³⁸ The casualty insurance industry initially saw structured settlements as an opportunity to save money in the settlement of claims. Based on anecdotal comments and without any empirical evidence, one commentator estimates that in the mid-1970's, defense-side savings from the use of structured settlements ranged from 50-75%, that by 1978, the range of savings had dropped to between 20-40%, and that by the first decade of the twenty-first century, defense-side savings were typically 20-25% as compared with lump sum settlements payments.^{38.1} Informal estimates from defense industry representatives provided to the authors suggest that the defense industry believes that it has been achieving savings of 10-20% over lump sum settlements. Both sides to a structured settlement can in theory achieve a tax-free economic result that has a higher present value than the taxable alternative of receiving funds immediately and then investing them on a taxable basis, including transaction costs, fees and other charges, aside from the risk and rewards associated with individual investing. In theory, therefore, the savings from structured settlements could represent a savings to be shared between claimant and defense.

It is unknown empirically, however, whether structured settlements represent on an overall basis an actual savings to the defense versus what a claim would have cost in a lump sum, just as it is unknown statistically whether individual claimants would fare financially better if they received and accepted lump sum settlement offers. Without a clear means of knowing or measuring whether structured settlements in fact save defense costs or increase the present value of what claimants receive, it is speculative to comment further about whether the tax-favored aspect of structured settlements is shared between parties and, if so, whether it has lowered defense costs.

If a perceived defense saving exists from structured settlements, this could be ascribed to several factors. First, claimants and their attorneys do not always enlist structured settlement consultants to assist them in settlement. When they do not, they must accept the one-sided results of quotations and periodic payment proposals created and submitted by defense-side consultants. Second, the power of

³⁸ See Chapter 2 *infra* for discussion of the tax advantages of periodic payment arrangements and the requirements for obtaining these advantages.

^{38.1} Babener, 13 NYU Journal of Legislation and Public Policy No. 1, 1 at 50-51 (2010).

large numbers could be appealing to claimants, so that “\$1 million over time” looks better than “400,000 now,” even though the periodic payment offer may in financial terms have a lower after-tax present value than the lump sum. If costs of a periodic payment are misstated or misrepresented to some extent, that could mislead a claimant. This is counterbalanced by the common practice in negotiation to agree tentatively on a dollar amount, and then discuss that a portion of this will be used to purchase periodic payments.

Over the years since the industry arose in the mid-1970’s, the structured settlement industry matured as a marketplace. Claimants today have equal opportunities to access market information and obtain competitive quotes for funding vehicles. Mutual advantage continues to create opportunities for both sides to benefit from periodic payment.³⁹ With the advent of Section 468B funds and the rise of structured settlement consultants and brokers serving claimants, there is a relatively level playing field, at least as to available information, between claimants and the defense in the knowledge and use of structured settlements.⁴⁰

In addition, parties in the digital age have access to modern and sophisticated tools when negotiating. The structured settlement industry has implemented mobile applications for smart-phones that allow structured settlement agents instantly to quote future monthly payments from a structured settlement annuity. Instant quoting gives consultants the capability to close deals rapidly and with full information, even during courthouse settlement conferences.^{40.1} Claimants and defense participants alike can use the internet and computing capacity to answer questions about periodic payment. Websites devoted to informing potential claimants about structured settlements have emerged as a tool helping parties negotiate on even ground.^{40.2}

³⁹ See § 1.04 *infra* for a discussion of the advantages and disadvantages to each of the parties typically involved in a periodic payment arrangement.

⁴⁰ See § 3.08B *infra* regarding 468B settlement funds. For the views of a plaintiff’s broker, including the shift from a defense-controlled environment to current conditions, see Risk, “Structured Settlements: The Ongoing Evolution from a Liability Insurer’s Ploy to an Injury Victim’s Boon,” 36 Tulsa L. Rev. 865 (2001).

^{40.1} Malamut, “American General Structured Settlements Launches Industry-First Quick Quote Mobile Application,” Business Wire (Mar. 20, 2012) <http://www.businesswire.com/news/home/20120320005129/en> (last visited June 19, 2012).

^{40.2} “New StructuredSettlementsInfo.net Website Gives Answers on Structured Settlements,” SBWire (Apr. 13, 2012) <http://www.sbwire.com/press-releases/new-structuredsettlementsinfonet-website-gives-answers-on-structured-settlements-136640.htm> (last visited June 19, 2012).

[d]—Benefits to Society

Before suggesting the general categories of cases where periodic payment should be considered by litigators as a matter of course, it is helpful to consider why periodic payment can be advantageous to society as a whole. As Harper and James have written: “The single recovery rule is often both capricious and inflexible in its operation so that damages in accident cases . . . often fail to do the job they should if accident law is to perform the function of administering accident losses efficiently in the public interest.”⁴¹

The goal of a tort remedy is to make a plaintiff whole, i.e., to restore a victim (or a dependent survivor) to the person’s same economic condition that existed before the injury occurred. The best the law can do is to give the victim money. The changing economic and medical environment has made it increasingly difficult to make a plaintiff economically whole through a one-time payment. Inflation complicates predicting the cost of future health care. Medical advances have extended life expectancies for severely injured persons, and future advances will do so as well, in ways not known at the time a claim is resolved. One result of such changes is significantly larger personal injury judgments and settlements throughout the United States. When paid in lump sums, these larger awards and settlements create problems for both the defendant and plaintiff. Some defendants may find it difficult or impossible to pay large losses strictly as lump sums. A plaintiff may find that the value of what seemed a substantial sum has diminished alarmingly after a few years for any of several reasons: underfunding future needs, inflation, mismanagement of funds, income and asset qualification requirements for “needs based” government benefits, and/or the erosion caused by federal taxation of the earnings on a lump sum. It is in the interest of both the public and the plaintiff that awards of damages match their intent to offset the consequences of any injury. When funds run out, claimants may be forced to turn to government assistance programs, thus burdening public budgets. For a claimant who is using public assistance programs that address health care and disability needs, they may become disqualified from these programs if they receive unrestricted lump sums in settlement of their claims. Thus, both claimants and the defense have reasons to consider structured settlements that match society’s interest in making sure that injured persons are properly compensated for their losses. As a practical means of resolving difficult financial and medical problems, periodic payment is more

⁴¹ Harper and James, 2 *The Law of Torts* § 25.2 at 1304 (1956).

flexible than lump sum payment. In addition to regular monthly payments, a periodic payment arrangement can include an educational endowment, a trust to pay future medical expenses, and other provisions tailored to address an injured plaintiff's particular anticipated needs. Because periodic payment reallocates the responsibility and risk of money management to financial institutions, it can better ensure that the plaintiff will continue to be compensated for future losses. The planning that can and should precede a periodic payment plan offers the opportunity to design a program that meets a plaintiff's future needs better than simply giving the person a lump sum.

The lump sum alternative has obvious inadequacies. Almost by definition, a one-time amount will be either more or less than an accident victim needs to be made whole into the future. If a victim lives longer than the period on which the jury or judge based an award of damages, the award will be too small. If a victim dies before the period on which a lump sum was based, the award was greater than compensation dictated, though the victim's survivors will benefit from an inheritance. "[A]n inequitable award is virtually inevitable in personal

(Text continued on page 1-29)

injury cases.”⁴² Studies indicate that generally lump sum awards and settlements have been inadequate to compensate victims for their actual losses and future needs.⁴³ Although the use of periodic payments rather than lump sums does not guarantee that a victim will be adequately compensated, periodic payment is, by its very nature, a concept that tries to match the receipt of payments with the experience of needs. Society’s decision to use periodic payments as a preferred means of compensating disabled workers (workers compensation) and providing for the children of divorce (child support) indicates that when need is most acute, periodic payment is the preferred way of meeting the need.

When one looks at the appropriateness of periodic payment in a specific case, one should consider the inherent disadvantages and risks associated with lump sum settlements. It is likewise helpful to review the after-tax yields of a structured settlement along with the expected payouts. Given the inadequacies of lump sums, research has shown and common sense mandates, a structured settlement should be considered. It may provide a result that is not only beneficial to a given claimant, but also to society as a whole.

[e]—Public Policy Issues

Despite public policy support for structured settlements, many controversial and strategically important public policy issues exist:

- Does public policy support court approved structured settlement factoring transactions pursuant to IRC § 5891 and state structured settlement protection statutes?⁴⁴
- Does public policy support single claimant qualified settlement funds under IRC § 468B?⁴⁵
- Do personal injury victims have a greater propensity to dissipate their financial resources (lump sum settlements or transfer payments) than non-personal injury victims? If yes, why?⁴⁶
- Should the existence of the secondary market disqualify structured settlement annuities as funding options for special needs trusts?⁴⁷
- Does the Deficit Reduction Act of 2005 apply to structured settlement annuities?⁴⁸

⁴² Kohlbach, “Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards,” Iowa L. Rev. 138, 157 (1978).

⁴³ *Id.*, at 142-144.

⁴⁴ See § 16.03[3] *infra*.

⁴⁵ See Chapter 16 *infra*.

⁴⁶ See § 1.03[3][b] *supra*.

⁴⁷ See § 16.03 *infra*.

⁴⁸ See § 15.04[3] *infra*.

- Why should structured settlement annuities cost less to fund Medicare set-aside arrangements (MSAs) than lump sum alternatives?⁴⁹

[4]—Standards and Practices

[a]—Business Models

Traditional structured settlement models can be categorized and summarized as follows:

[i]—Intermediaries

Structured settlement intermediaries are frequently referred to as “brokers” or “consultants.” Most are “agents” representing structured settlement annuity providers. The distinction between “broker” and “agent” is legally significant under insurance law. A broker owes his contractual loyalty to his client or customer. An agent owes his contractual loyalty to one or more product providers. Both defense and plaintiff intermediary business models exist within the structured settlement industry. In addition, some liability insurers own captive structured settlement intermediaries. Some of these captive intermediaries sell affiliated annuity products. Some only sell independent annuity products. Hybrid intermediary models exist. For example, many structured settlement intermediaries (agents) increasingly offer non-insurance settlement consulting products and services.⁵⁰

[ii]—Product Providers

Life insurance companies selling fixed annuities have been the dominant product providers in the United States structured settlement market. More than seventy-five insurance companies have sold structure settlement annuities since the late 1970s. As of 2010, less than fifteen annuity providers remain active in the structured settlement market. At least one property casualty insurer has offered a structured settlement product. Several trust companies have offered structured settlement products. Among structured settlement life insurance annuity product providers, some have affiliated liability insurers while others do not. Some own affiliated structured settlement intermediaries while others do not.

⁴⁹ See § 15.03[4] *infra*.

⁵⁰ See § 6.02 *infra*.

[b]—Industry Standards

A “technical standard” is guideline documentation that reflects agreements on products, practices, or operations by nationally or internationally recognized industrial, professional, trade associations or governmental bodies. This includes formal, approved standards, as contrasted to *de facto* standards and proprietary standards (such as company products and corporate standards), which become generally accepted or dominant. During its history, the structured settlement industry has created many technical and *de facto* standards.

[i]—Vocabulary

Every community of practice develops its own standard vocabulary. In traditional business models, glossaries⁵¹ provide one type of resource for identifying, organizing and defining shared industry vocabulary. In Internet-based business models, folksonomies⁵² increasingly serve as a classification method for collaboratively creating tags (vocabulary) to define, organize and locate content.

The standard vocabulary of the structured settlement industry includes many terms now defined by legislation. Examples include: “structured settlement” and “structured settlement factoring transaction” (IRC section 5891); “qualified assignment” and “qualified funding asset” (IRC section 130); “qualified settlement fund” (IRC section 468B).

Sometimes “standard” vocabulary can be incorrect and misleading. For example, structured settlement intermediaries regularly and historically refer to themselves as “brokers.” In fact, most structured settlement intermediaries are “agents” not “brokers.” The distinction is significant. In most states, insurance brokers have a higher duty to their clients and/or customers than agents (whether independent or captive) who owe their primary legal responsibilities to one or more insurance (annuity) product providers. Unlike brokers, agents’ primary duties to their customers are administrative. These distinctions become important in the context of issues such as “compensation disclosure” and whether a structured settlement is in the “best interests” of a particular injury victim.⁵³

⁵¹ See Appendix for one example of a structured settlement glossary.

⁵² See <http://en.wikipedia.org/wiki/Folksonomy>.

⁵³ See § 6.02 *infra* for a more detailed discussion of agents vs. brokers.

[ii]—Qualifications

The standard (only) qualification necessary to sell structured settlement annuities is a state specific insurance license. Historically, the professional background of most structured settlement salespersons has been either liability insurance claims or life insurance sales. More recently, persons with other professional training, including law and financial planning, have entered the structured market. Both the National Structured Settlement Trade Association (NSSTA) and the Society of Settlement Planners (SSP) offer professional certification programs for their members.⁵⁴

[iii]—Products

Since structured settlements originated in the United States, the standard funding product has been a fixed (non-variable) life insurance annuity.⁵⁵ Other structured settlement funding products have included internal funding (self-funding),⁵⁶ variable annuities⁵⁷ and trusts.⁵⁸ As structured settlements are increasingly integrated with government benefits, many structured settlement annuities are paid into trusts and custodial accounts instead of directly to an injury victim.⁵⁹

[iv]—Funding Methods

A qualified assignment⁶⁰ funded with an annuity purchased by a defendant (or its insurer) pursuant to IRC § 130 is the standard funding method for structured settlements. Alternative funding models for structured settlements include internal financing,⁶¹ annuity financing,⁶² non-qualified assignments,⁶³ and reinsurance.⁶⁴ Another alternative funding model for structured settlements is an IRC § 468B qualified settlement fund⁶⁵ where the fund, not the defendant, purchases the structured settlement annuity.

⁵⁴ See § 6.02 *infra* for a more detailed discussion about structured settlement intermediaries and consultants.

⁵⁵ See § 3.05 *infra*.

⁵⁶ See § 3.04 *infra*.

⁵⁷ See § 3.10[6] *infra*.

⁵⁸ See §§3.07A, 3.08 and 3.08A *infra*.

⁵⁹ See Chapter 15 *infra*.

⁶⁰ See § 3.06 *infra*.

⁶¹ See § 3.04 *infra*.

⁶² See § 3.05 *infra*.

⁶³ See § 3.06A *infra*.

⁶⁴ See § 3.07 *infra*.

⁶⁵ See § 3.08B *infra*.

[v]—Documentation

Structured settlement legal documentation can be complex, including annuity, assignment and settlement documents as well as trust agreements.⁶⁶ The National Structured Settlement Trade Association (NSSTA) publishes and updates a Uniform Structured Settlement Qualified Assignment document.⁶⁷

[c]—Business Practices*[i]—In General*

For detailed discussions and advice about structured settlement business standards and practices, see chapter 4 (defense attorneys), chapter 5 (plaintiff attorneys), chapter 6 (case preparation), section 6.02 (settlement consultants), chapter 7 (negotiation), chapter 8 (case closing), chapter 11 (periodic payment of judgments), chapter 15 (government benefits) and section 16.02[2] (secondary market).

[ii]—Standards of Professional Conduct

The Society of Settlement Planners (SSP) adopted Standards of Professional Conduct for Settlement Planners in 2008.⁶⁸ According to the SSP, these standards are subscribed to by SSP members as a condition of joining and maintaining good standing in their organization. Non-SSP members who provide settlement services are encouraged to follow the SSP standards, but are not required to do so.

The National Structured Settlement Trade Association (NSSTA) has adopted a Code of Ethics, but has not published written Standards of Professional Conduct. In 2005, NSSTA funded, but never published, a “Broker Relationship Initiative” to improve the reputation and public image of structured settlements by establishing more effective broker to broker communication and understanding.

[iii]—Guidelines for Use

Not every personal injury claim is appropriate for periodic payment. Guidelines about particular claimants, a predictable stream of

⁶⁶ See Chapter 8 *infra* for discussion and advice about structured settlement closing processes and documentation.

⁶⁷ See Appendix F for the latest version of NSSTA’s Uniform Qualified Assignment documentation.

⁶⁸ See § 6.02[2] *infra* for a discussion of SSP’s Standards of Professional Conduct and Appendix I for the complete text.

obligations, and the amount of settlement are suggested for evaluating whether periodic payment should be actively considered in a given case.

[A]—Particular Claimants

Periodic payment could be used in virtually any personal injury case for almost any claimant. Certain types of claimants, however, are particularly suited to the advantages offered by periodic payment. A claimant's potential suitability depends on both the type of injury involved and the type of person the claimant is.

[I]—Type of Injury

A “fender-bender” or minor injury claim is probably not a candidate for a structured settlement. There is not enough at stake, and the claimant may have no need for relatively small amounts of deferred income. Likewise, injuries that do not qualify for tax-free receipt of proceeds are not candidates for tax-advantaged structured settlements, although long-term payout of settlement proceeds may still be advantageous.⁶⁹

Whenever an attorney encounters the following injuries, however, the case should be routinely evaluated for possible use of periodic payment:

- (1) wrongful death;
- (2) serious head injuries;
- (3) spinal cord injuries;
- (4) serious burns;
- (5) loss of limbs;
- (6) multiple fractures;
- (7) moderate permanent injury;
- (8) injuries that require ongoing medical care; and
- (9) hedonic damages in states where recovery is permitted.

These injuries will almost certainly be associated with substantial future economic needs. The wrongful death category is included because it typically addresses the need to replace a regular earnings stream for the survivors. The other categories are typically associated with disability payments and recurring medical expenses.

⁶⁹ For discussion of the types of cases that qualify for tax-free receipt of damages and those that do not, see Chapter 2, especially § 2.03 *infra*.

[II]—Type of Claimant

Some claimants will insist on receiving a lump sum recovery. Certain types of claimants, however, regardless of the nature of their injury, are well suited to a periodic payment plan:

- (1) those with poor or limited financial management skills;
- (2) those with no immediate need for large amounts of money;
- (3) minors;
- (4) physical or mental incompetents;
- (5) elderly persons (or others) with a keen interest in lifetime payments (e.g., to cover nursing home costs for an indefinite period).

For these types of claimants, a periodic payment approach should be considered as a matter of course.

Many persons are susceptible to pressures that make it probable that a lump sum of money will be dissipated before it serves the intended function of compensating for future needs. Persons who are addicted to alcohol, drugs, or gambling, for example, would benefit from periodic receipt of income. Persons subject to pressures from relatives, charities, “friends” and others are in a better position to resist their financial requests if a lump sum has not been received. The same reasons that trusts are used in planning for future generations apply to structured settlements.

[B]—Predictable Stream of Obligations

When a predictable stream of obligations exists for a claimant, whether for medical expenses, mortgage payments, alimony or child support, periodic payment can be used to offset them. A lump sum could be dissipated or inadequate to meet such future obligations, depending on how adequately or wisely the lump sum is managed. Life care plans are available to plot the expected needs of severely injured persons. Based on a life care plan, a structured settlement can match future payments with the timing of expected events over an injured person’s lifetime.

[C]—Amount of Settlement

If a settlement is small enough, periodic payment is not worth the effort for the defense to set up machinery to pay a claimant over a long period of time. How little is “small enough”? Some commentators have suggested that if a claim settlement is worth less than \$100,000, periodic payment should probably not be

used.⁷⁰ Some state statutes providing for periodic payment of judgments contain threshold amounts, below which no judgment may include periodic payments. These thresholds range from \$25,000 to \$500,000.⁷¹ The Commissioners on Uniform State Laws include the \$100,000 figure as a recommended threshold in the Uniform Act. The threshold refers to the value of future damages without reduction to present value. Recognizing, however, the appropriateness of periodic payments in cases involving relatively small amounts of future damages, the Commissioners' Comment recommends the threshold amount should not exceed \$100,000.⁷² The \$100,000 figure is offered merely as a benchmark to suggest that a significant figure should be involved before it makes sense to set up a long-term obligation to make payments periodically. A plaintiff's taxable income from an invested lump sum is subject to progressively increasing income tax exposure. The tax on an invested lump sum of \$100,000 or less will not be substantial unless the taxpayer is already in a high tax bracket. Many cases have been settled using periodic payment, however, which would have settled on a lump sum basis for less than \$100,000.

The better way to consider "how much is enough" for a periodic payment is to ascertain how much of a periodic payment would be generated from the settlement, and how important regular future payments are to the particular claimant. If regular future payments are important to an individual, periodic payment should be considered. For elderly plaintiffs, for example, where a life-time assurance of regular payments may be more attractive than a lump sum that could be dissipated too soon, a minimum cash value may not be relevant at all to the consideration of periodic payment. A telling example in which one of the co-authors was involved concerned a 90-year-old gentleman who suffered a broken hip from an accident, and was forced to go into a nursing home. The litigation value of future economic damages was not substantial, given the gentleman's remaining life expectancy. The defense therefore offered a relatively modest lump sum. Instead of accepting it, the claimant asked for and received a

⁷⁰ Lilly, "Alternatives to Lump Sum Payments in Personal Injury Cases," 44 Ins. Counsel J. 243, 244 (1977). See also, LeRoux, "Insurers Structure More Liability Awards," *Business Insurance* at 1 (July 20, 1981) (casualty company internal guidelines for the minimum amount needed for claims agents to consider a periodic payment settlement range from \$10,000 to \$200,000).

⁷¹ See: § 10.02[2] *infra*; Frolik, "The Convergence of I.R.C. § 104(a)(2), *Norfolk & Western Railway Co. v. Liepelt* and Structured Tort Settlements: Tax Policy 'Derailed,'" 51 *Fordham L. Rev.* 565, 570-577 (1983).

⁷² See Chapter 9 *infra* for discussion of the Uniform Act.

lifetime annuity that covered the monthly nursing home bills. This particular gentleman lived to be a hundred years old. Ten years of periodic payments of \$1,500 per month (with inflation adjustment) were a far better deal for him than the \$25,000 he was offered in a single payment. But whether he had lived for one month or twenty years, he received from the structured settlement the certainty that his nursing home would be covered. The peace of mind that came from this was of incalculable value to him.

[D]—Caveat Regarding Workers' Compensation Claims

Workers' Compensation claims generally are resolved by periodic payment from governmentally controlled funds. There are opportunities to apply private structured settlement principles to such claims. Chapter 14 is a discussion of Workers' Compensation Claims.

§ 1.04 Advantages and Disadvantages of Structured Settlements

A structured settlement is not the answer for every claimant, or for every defendant, or in every case. In many cases, a lump sum will be the preferred method of paying a settlement or judgment. Sometimes, however, the gap between a claimant and defense cannot be bridged by a negotiation of “how much” to pay in a single amount. Furthermore, there are advantages and disadvantages of structured settlements and periodic payment judgments in particular cases, even when the parties have generally agreed that a particular amount represents a fair settlement or damage assessment in a judgment. For settlements, whether to use periodic payment will depend on the parties’ perception of advantage.

[1]—Advantages to Claimant

[a]—Lifetime Payment

A basic advantage of structured settlements for claimants is the lifetime feature available from annuity-funded arrangements. A claimant who receives a lump sum award and proceeds to live longer than expected will not be compensated for losses that continue beyond the projected lifetime. A structured settlement plan is usually drawn to cover the claimant’s actual, not predicted, lifetime. This can ease the worry of persons concerned that a nest funds be gone before they die.

[b]—Financial Management

A second advantage of structured settlements is professional money management. This is especially attractive to claimants who lack financial experience or expertise. Unlike lump sums, structured settlements typically allocate the obligation and responsibility of money management to one or more insurance companies or affiliates. In this way, structured settlements provide increased protection against loss or misapplication of funds. Although some research suggests that lump sum recipients in personal injury cases tend to dissipate their recoveries,¹

¹ See 1 *United States Railroad Retirement Board*, “Work Injuries in the Railroad Industry 1938-40” 176 (1947). The Railroad Retirement Board analyzed the disposition of lump sum settlements by 1700 accident victims and their survivors. The study concluded, “Their disposition is not generally such as to offer assurance of a stable substitute for the loss of wages incurred in the severe and fatal injuries.” See also, Morgan, Snider and Sobol, *Lump Sum Redemption Settlements and Rehabilitation* (1959).

More recent articles recite a similar experience, with one source claiming that 90 percent of claimants exhaust lump sums received for personal injury recoveries within five years. Krause, “Structured Settlements for Tort Victims, Settlements and Plea Bargaining,” *Journal of the American Trial Lawyer’s Ass’n* 178 (1981).

other research questions that conclusion.^{1.1} Anecdotal evidence and reports from attorneys with deep personal injury experience reflect a view that lump sum awards are often exhausted in a few years of receipt.² Some commentators³ have studied and challenged these claims, including what one calls the “most consistently repeated ‘fact’ in this area of the law”—that “90% of lump-sum claimants exhaust their awards within five years.”^{3.1} Their counter-conclusion is that there appears to be no evidence that personal injury claimants wind up on welfare more than do nonclaimants. Regardless of statistics and the need for greater study of this issue for public policy implications, it is undeniable that one advantage of a structured settlement is the built-in cash flow and investment management of the arrangement.

A counter-argument to this advantage is that every personal injury victim has the right to dispose of a lump sum award as he or she chooses.⁴ For the claimant who would benefit from protection against thieves, claims of friends and relatives, gambling, charities and other temptations, however, periodic payment has a clear advantage over a lump sum. Claimant insolvencies (and creditors’ rights with respect to future periodic payments) present special issues, and require attention to state and federal bankruptcy law concerning possible exemptions from the bankruptcy estate.^{4.1}

A structured settlement may not, however, be able to generate immediate cash for a claimant who wants more than the stream of payments provides at a given time. The holder of structured settlement

^{1.1} See § 1.03[3][b] *supra* for additional discussion about lump sum dissipation.

² Lore, “Structured Payments Can Help Protect Clients From Themselves,” St. Louis, MO Daily Record (Jan. 8, 2006), quoting an attorney that “within three years, a lump sum vanishes.”; Scheffey, “Elder Law Bar Battles Winning Plaintiffs’ Jackpot Mentality,” 27 CT Law Tribune No. 72, at 1 (Feb. 6, 2006), citing a plaintiff’s consultant’s statement, “Statistically, 90 percent of all lump sum awards paid with cash are exhausted in five to seven years.” One experienced personal injury attorney said, “I love structures, and the reason is that statistically within three years a lump sum vanishes. Most Americans are horrible at saving.” Lore, “Protect Clients From Themselves With Structured Payments,” N.C. Lawyers Weekly (May 21, 2007).

³ Scales, “Against Settlement Factoring? The Market in Tort Claims Has Arrived,” 2002 Wis. L. Rev. 859, 869-74.

^{3.1} See § 1.03[3][b] *supra* and Babener, “Justifying the Structured Settlement Tax Subsidy: The Use of Lump Sum Settlement Monies”, NYU Journal of Law & Business, Volume 6, No. 1 (Fall 2009).

⁴ See dissent of Chief Justice Bird in *American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.*, 36 Cal. 3d 359, 204 Cal. Rptr. 671, 689-695, 683 P.2d 670 (1984), *vacating* 33 Cal. 3d 674, 190 Cal. Rptr. 371, 660 P.2d 829 (1983).

^{4.1} See § 8.04[2] *infra* for discussion of issues related to claimants’ indebtedness in general, and § 8.04[2][a] for discussion of whether exemptions from the bankruptcy estate may apply.

rights may be able to convince a bank or other lender to advance funds, with the stream of periodic payments some protection to the lender that borrowings will be repaid. Factoring companies offer structured settlement holders the potential of selling future rights in exchange for immediate cash. There is no advance certainty that a structured settlement holder will be able to transfer rights in exchange for cash, and if this is possible, a steep discount from the present value of the future payments will be the price to be paid.⁵ Depending on how a structured settlement was financed and negotiated, as well as which life insurance company provides the financing, it may be possible to commute future payments to a present sum by agreement with an annuity issuer or obligor.⁶

[c]—Tax-Free Income or Tax Deferral

Structured settlements provide a claimant with an opportunity for federal income tax savings that does not exist with a lump sum award. Under Internal Revenue Code Section 104(a)(1) and (2), amounts received in a lump sum because of a workers' compensation injury, physical personal injury or physical sickness arising from a tort are excluded from a claimant's gross taxable income, but the interest or other investment earnings on the lump sum are not.⁷ For amounts recovered for reasons that do not qualify for tax exemption, it may be possible to avoid immediate taxation on the entire present value of a stream of future payments, so that tax deferral is achieved. This can be particularly important to someone with a very large overall recovery in a particular year. Instead of paying tax at a high marginal rate and facing inability to achieve the full benefit of deductions because of the alternative minimum tax, a claimant may be able to achieve significant tax savings by spreading payments out over time.

[d]—Settlement

Periodic payment may provide the difference between settling a case and risking a loss at trial. In a given circumstance, a defendant may be unwilling to offer a lump sum large enough to satisfy the claimant, but willing to offer a structured settlement. Primarily because of its tax advantage, structured settlement provides a "value extender" that can bridge the difference between parties otherwise unwilling to settle.

⁵ See Chapter 16 for a full discussion of the transfer (or liquidation or factoring) of structured settlement rights.

⁶ See § 2.05[3][d] *infra*.

⁷ Rev. Rul. 65-29, 1965-1 C.B. 59. See Chapter 2 *infra* for discussion of taxation of damages.

Structured settlements can help overcome obstacles to settlement arising from various factors. When workers' compensation, Medicare or other liens or subrogation rights must be satisfied from a settlement before the claimant receives funds, a lump sum settlement represents an immediate source to satisfy these obligations, and it may be difficult to negotiate reductions. When, however, a claimant is prepared to accept monies over time, the lien holder can be willing to accept a reduced payment in order to get as much as possible immediately to resolve the claim. Alternatively, a lien holder might agree to satisfy a \$100,000 lien by agreeing to be paid \$10,000 a year for ten years. In either case, the resulting effective savings can be used to generate a better overall settlement for the claimant.

[e]—Increasing Benefits

Structured settlements can provide a claimant with increasing benefits over the years. For example, periodic payments can incorporate a percentage rate of increase compounded annually, such as "\$1,000 per month for lifetime increasing each year at a 3 percent rate compounded annually." Periodic payments can also include a series of deferred lump sums or "pops" such as "\$1,000 per month for the claimant's lifetime plus \$50,000 in 10 years, \$150,000 in 20 years and \$300,000 in 30 years." Structured settlements also can potentially be adjusted annually in reference to an index, e.g., "\$1,000 per month increasing annually at a rate equal to an average figure for the prior year's discount on United States Treasury Bills." These and other adjustment factors are an important advantage to the claimant, who should be concerned about inflationary prospects or increasing economic need.

[2]—Disadvantages to Claimant

[a]—Financial Risk

A basic disadvantage for the claimant is the financial risk in accepting a promise of periodic payment. A structured settlement represents to the claimant a promise from an entity to make payments over a lifetime. A claimant is keenly interested in the certainty that the obligor on the promise remains in business and actually makes the payments over time.

Under the Periodic Payment Settlement Act of 1982, as well as previous administrative tax law,⁸ claimants could rely on only the general credit of their settlement debtors if they wish to receive the promised future payments free of federal income tax. In 1988, Internal Revenue

⁸ See Rev. Rul. 79-220, 1979-2 C.B. 74 and 79-313, 1979-2 C.B. 75.

Code Section 130(C) was enacted to permit qualified assignments of structured settlement obligations, and for claimants to obtain a security interest in the annuity or other asset that funds the long-term promise to pay.⁹ With structured settlements, the primary risk faced by a claimant is the obligor's insolvency. Insolvency of the obligor in a structured settlement was a relatively obscure risk for a claimant prior to 1991, when insurance commissioners took control of three long-established life insurers that were active in the structured settlement annuity market but experienced financial reversals.¹⁰

There is a risk that under the Bankruptcy Reform Act of 1978 (applicable to a periodic payment obligor other than an insurance company, which files in bankruptcy) and under the Uniform Insurers Supervision, Rehabilitation and Liquidation Act (applicable in those states where enacted in the case of a liability insurance company which goes into receivership), structured settlement creditors will be given the status of general creditors and therefore may not be paid in full on their contract claims. This risk, however, has been avoided in those situations where periodic-payment obligors and annuity providers have become insolvent.¹¹ With rare exceptions, structured settlements have provided all the long-term benefits that claimants expected when they resolved their claims.

[b]—Lack of Liquidity

A second disadvantage to the claimant of a structured settlement is lack of liquidity. If a claimant needs more funds than are available under a fixed schedule of periodic payments, they cannot be readily obtained. If inflation jumps to unprecedented heights, the periodic payment schedule will not adjust accordingly.

Partial solutions to this problem include use of deferred lump sums and increasing payments, or use of a trust where the trustee is empowered to invade corpus or income (limited by a specific standard) and make distributions to the claimant-beneficiary. If liquidity

⁹ See §§ 2.03[2], 3.06[5] and 5.03[2] *infra* regarding this change.

¹⁰ Executive Life Insurance Company of California was placed into conservatorship by the Superior Court of the State of California on April 11, 1991. Executive Life Insurance Company of New York (ELNY) was placed into Rehabilitation by the New York Supreme Court by order dated April 23, 1991 and placed into liquidation by order dated April 16, 2012, subject to pending appeal. See §§ 3.05 [11], [12] and [13] *infra*.

¹¹ See § 5.03 *infra* for discussion of alternative ways to lessen financial risk in periodic payment settlements and probable treatment of these arrangements under the Bankruptcy Reform Act of 1978, the Uniform Insurers Liquidation Act, the Postassessment Property and Liability Insurance Guaranty Association Model Act, and the Life and Health Insurance Guaranty Association Model Act.

is a critical need, however, there is no substitute for a lump sum a claimant controls. A liquidity-conscious claimant may wish to obtain a significant lump sum and accept a series of deferred payments, using the lump sum as a hedge against the need for future liquidity.

There may be ways to liquidate all or part of the stream of future payments specified in a settlement. In some instances, insurance companies may be willing to commute annuities to a present sum.¹² Factoring companies are willing to pay immediate cash in exchange for rights to future payments, albeit at significant discounts from their present value and with particular risks and limitations.¹³

[c]—Misperception of Amount of Award

Some plaintiffs' attorneys have criticized structured settlements for misleading claimants about the true value of a settlement. As one plaintiff's attorney wrote, "A structured settlement is a device invented by the insurance industry to make a *little* money look like a *lot* of money."¹⁴ This criticism has become less significant as plaintiffs' attorneys and their clients have access to structured settlement consultants, experts and brokers who can explain the value of specific structured settlements. With lotteries offering cash options versus payment streams and expert advice available to claimants, the true value of a payment stream can be explained and understood, so that misperception of a recovery's true value should not be a valid criticism of structured settlements.

[3]—Advantages and Disadvantages to Plaintiff's Attorney

The plaintiff's attorney in a personal injury action historically has been responsible for establishing the client's rights in litigation, but not for counseling the client on tax, financial or estate matters. Under a system of lump-sum recovery, these issues may not arise until after successful prosecution of the personal injury action and receipt of the one-time payment. Thus, many claimants who need tax, financial, medical and estate planning either pay an additional

¹² See § 2.05[3][d] *infra*.

¹³ See Chapter 16 *infra* concerning the availability of and issues concerning liquidations of structured settlement rights. In one case, a bankruptcy trustee was permitted to transfer a stream of future payments in exchange for immediate cash from a liquidation company. In re Cooper, U.S. Bankr., No. 98-21222 (S.D. Ga. Nov. 24, 1999 Order).

¹⁴ Litvin, "The Certainty of Payments for an Uncertain Future: The Plaintiff's Perspective on Structured Settlements," *Structured Settlements*, ALI-ABA Video Law Review Study Materials 23 (1984). (Emphasis added.)

fee for this service or do not receive it at all. By using a periodic payment system, the plaintiff's attorney has the opportunity and responsibility to integrate tax, financial, medical and estate planning into the settlement plan itself, or at least to see that the claimant is counseled about the need to consider these elements. Structured settlement payment plans do not do this automatically, but they offer this opportunity to claimants who are advised by astute legal counsel and financial advisers. For plaintiff's attorneys, structured settlements provide the basis for more comprehensive settlement planning for an injured person.

An additional advantage of structured settlements for the plaintiff's attorney involves potential compensation benefits.¹⁵ A cash basis attorney working under a contingent fee contract who achieves a large lump sum settlement or judgment receives a large lump sum attorney's fee. The entire amount of that fee is taxable in the year it is paid. Attorneys who wish to avoid this bunching of income may wish to spread their receipt of fees over more than one taxable period and defer recognition of income until they actually receive the payments. Structured settlements may also permit attorneys to build deferred compensation techniques into their billing and collection procedures.

Disadvantages depend on a particular plaintiff's attorney's perspective. Structured settlements introduce certain complexities not present in lump sum payments. When claimants and their counsel had little access to experts about what was happening behind the scenes of the defense, there was valid criticism that claimants suffered from unspecified disadvantage by not being provided with full information. The playing field has, however, been leveled.¹⁶ Nonetheless, structured settlements force a careful claimant and plaintiff's attorney to engage a structured settlement specialist that may not be needed with a lump sum.

There is a potential fee dispute and ethical issue for the plaintiffs' attorneys when a contingent fee must be calculated against a structured settlement.¹⁷ With proper planning, these issues can be avoided.

Given the broad range of expertise available to claimants and their counsel,¹⁸ the mysteries surrounding structured settlements are readily solvable. Structured settlement annuity agents and consultants serving claimants can balance defense access to financing

¹⁵ See discussion in § 5.04 *infra*.

¹⁶ See Risk, "Structured Settlements: The Ongoing Evolution From a Liability Insurer's Ploy to an Injury Victim's Boon," 36 Tulsa L.J. 865, 882, 889 (2001).

¹⁷ See discussion in § 5.07 *infra*.

¹⁸ See discussion in § 5.01[2] *infra*.

alternatives. Rules for determining contingent fees in structured settlement cases are relatively developed and permit pre-planning by informed plaintiff's counsel.¹⁹

[4]—Advantages and Disadvantages to Defendant and Insurer

Historically, the major inducement for defendants and casualty insurers to use periodic payment has been cost savings. Literature regarding structured settlement is replete with references to cost savings.²⁰ During the early development of structured settlements, defendants maintained an information and resource advantage over plaintiffs, a condition that dissipated in the 1990's.²¹ Most casualty insurance companies have established formal structured settlement programs. Some of these programs include annuities issued by affiliate life companies to fund periodic payment obligations.

It is difficult to measure or prove the amount of actual cost savings to the defense from structured settlements. Whether that savings is real depends upon measuring a hypothetical, alternative lump sum settlement or judgment or measuring whether use of a structured settlement reduces the time it takes to resolve a case. In the abstract, however, there do exist fundamental and permanent reasons why structured settlements should provide more cost effective case resolutions than lump sums.

First, structured settlements encourage defendants to think more about damages. Lump sum is a crude form of analysis. Periodic payments provide more precise, more flexible and more practical analysis. Defendants are required to know more about the medical and financial problems of plaintiffs and their families. Defendants become problem solvers on a cost effective basis.

Second, structured settlements permit and encourage tax planning for plaintiffs, plaintiff attorneys and insurers. The resolution of a serious personal injury case involves the transfer of significant sums and

¹⁹ See discussion in § 5.07 *infra*.

²⁰ See, e.g.: Aetna Claims Department Newsletter, "Standard Settlements (Jan. 1981); LeRoux, "Insurers Structure More Liability Awards," Business Insurance 1 (July 20, 1981); Greene, "The Structure Game," *Forbes* 68 (June 3, 1985) (citing a 15% savings); Choulos, "Structured Settlements: Cure or Curse?," Trial 73, 74 (Nov. 1980) (claiming that insurers "are able to reduce their costs by as much as 50 percent and even 75 percent"). Before enactment of I.R.C. § 461(h), which changed the timing of deductions from an accrued to a paid basis, as discussed in § 4.02 *infra*, one author argued that a defendant could end up "economically better off making a \$3 million payment in 1991 than if it had never been sued." McGown, "Structured Settlements: Deduct Now and Pay Later," 60 Taxes 251 (1982).

²¹ *Forbes*, "Something For Everyone," *Forbes*, 29 (Jan. 19, 1981).

impacts several sections of the Internal Revenue Code.²² As is true for other complex financial transactions, opportunities exist to reduce after-tax costs and maximize after-tax benefits through cooperative tax planning. The potential tax savings can facilitate advantageous settlements for defendants.

Third, structured settlements provide a more cost efficient allocation of risk than lump sum. On receipt of a lump sum, a plaintiff assumes several risks, including mortality, morbidity, investment, reinvestment, inflation and insolvency. These and other risks can have an impact on the claimant's ability to meet expenses arising from the injuries that were suffered. A plaintiff is not the ideal unit to assume such risks. Instead, insurance companies pool most of these risks, and provide for secure, life-time benefits regardless of such issues. This helps the defense from two perspectives. First, it makes settlement more attractive, and hence facilitates agreement. Second, it provides a social utility and enhances the service image of the defendant and its casualty insurer. In fact, some casualty insurers use the settlement process to try to turn the claimant into a customer. One casualty insurer offers settling claimants a bank account within its financial family rather than simply writing a check to the claimant. After settlement, the claimant becomes a customer of the enterprise, although the claimant is free to move the assets to any other institution at any time.²³ The process of structuring a settlement, furthermore, encourages all parties to project the various needs of the injured person over time. Life care plans, that match future payment streams against predictable needs (e.g., wheelchairs, nursing home costs), assist the claimant in devising a financial plan in light of the injuries suffered.

Fourth, structured settlements provide the plaintiff's attorney with the opportunity to lock in a tax-favored benefit and the defendant with an opportunity to serve the claimant with a settlement that actually pays the claimant more dollars. Hence, the claimant, the economy, society and the defendant are all better served.

²² See: Chapter 2 *infra* for a discussion of taxation of damages received by claimants; § 3.06 *infra* for a discussion of the tax treatment of qualified assignees; § 4.03 *infra* for a discussion of the general tax rules affecting defendants and their insurers; and § 5.07 *infra* for a discussion of attorney's compensation.

²³ "OC Secure," for example, is a product of Ohio Casualty Insurance Group. It provides a bank account to the injured person, instead of a check, for the lump sum portions of settlements. The claimant is not required to maintain an OC Secure account after receiving it, but is free to transfer the cash elsewhere. Many claimants, however, maintain the account and thus become a post-settlement client of the financial institution that settled the underlying case.

Insurance companies are in the business of identifying, understanding, pricing, assuming and transferring risks. The law of large numbers works to their advantage. The opportunity therefore exists, through the concept of periodic payment, for the insurance industry to create a more cost-effective marketplace for the risks encountered by plaintiffs than the system of lump sum resolution provides.

The obvious disadvantage of structured settlements to the defendant or casualty insurer is that periodic payments create potential long-term financial obligations. Rather than closing its books on a claim, a structured settlement obligor must set up the machinery and arrange the financing to pay amounts to claimants over long periods of time. While these disadvantages can be lessened or even eliminated in a given case (by assignment to a third party or use of an IRC section 468B qualified settlement fund), they are real. All other things being equal, a defendant or casualty insurer would rather pay once and be done with a claim than pay many times.²⁴

The complexity of structured settlements relative to lump sum is another disadvantage for defendants and casualty insurers. This complexity creates additional costs, such as the time required to obtain annuity quotes or complete settlement documentation. This complexity creates mistakes, some of which may not be discovered for many years. Until participants become more sophisticated, forms become standardized, and procedures are established, structured settlements will be used less frequently than they should.

Some risk and claim managers believe structured settlements produce a further disadvantage for the defense industry. Publicity generated by large payouts projected over a claimant's lifetime may be accused of creating an inflated perspective of value in the minds of future juries, thereby raising the general level of verdicts. There are no known studies to support or refute this perception.

Although structured settlements are normally concluded in a way that makes future payment streams final and non-assignable by the claimant, factoring companies have become active purchasers of structured settlement rights, paying rights holders immediate cash in exchange for the right to future payments. This has created litigation and burdens for structured settlement obligors and annuity issuers, including risks of adverse taxation and even double payment.²⁵

²⁴ See § 4.03[3] *infra* for a discussion concerning property and casualty insurers' accounting treatment of annuity financed periodic payments.

²⁵ See §§ 16.04-05 *infra* regarding risks created by the liquidation industry.

[5]—Advantages and Disadvantages to Defense Attorney

Structured settlements provide the defense attorney an additional tool to achieve more favorable results for his client. They also present new negotiating techniques for achieving better settlements.²⁶ Structured settlements create powerful methods for evaluating and arguing damages.²⁷ This tool, however, will not be effective if the defense attorney does not learn how to use it. Structured settlements and periodic payment judgments create their own sets of discovery requirements²⁸ and require particular types of experts and consultants.²⁹ Periodic payments also change trial procedures³⁰ and necessitate new forms of settlement and trial documents.³¹

Structured settlements encompass areas of the law (e.g., taxes, contracts, bankruptcy, securities, estate planning) and finance that traditionally have not affected personal injury litigation. Thus, structured settlements require learning and levels of expertise that both complicate and enrich a defense attorney's practice.

[6]—Summary of the U.S. Structured Settlement Experience

The structured settlement industry in the United States began in the late 1970's. In its first three decades, the evolution of periodic payments in personal injury litigation can be described in three stages, depicted in the following diagram:

*Please see the next page for
Structured Settlement: History Table³²*

²⁶ See Chapter 7 *infra* regarding case negotiation.

²⁷ See Chapter 12 *infra*.

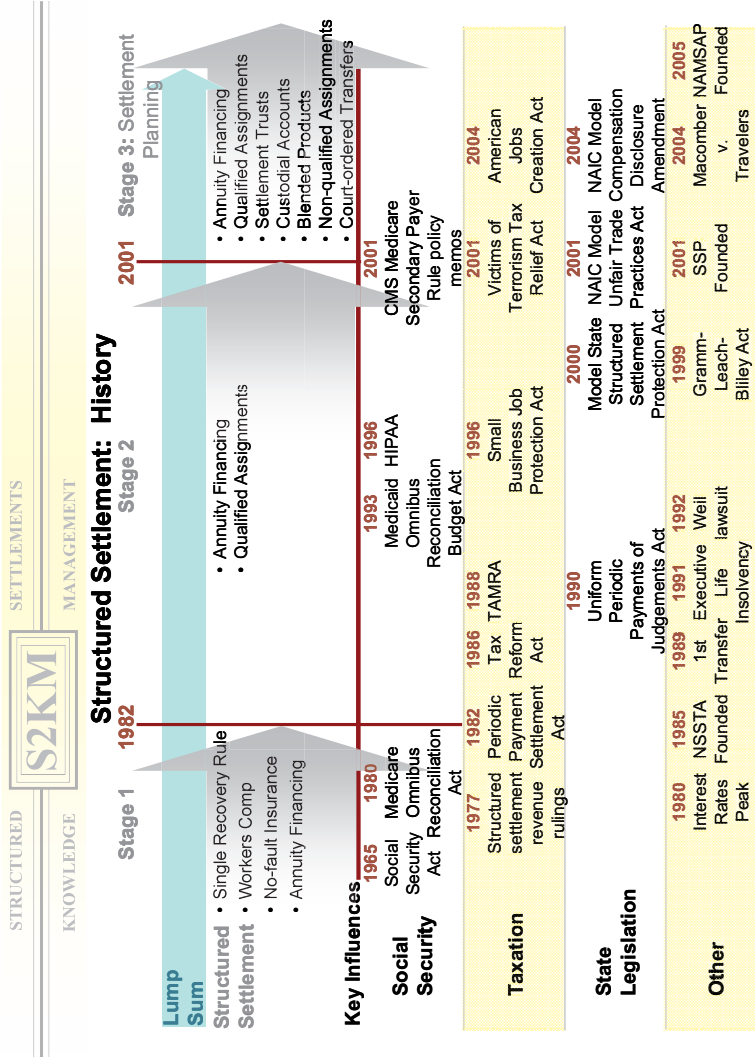
²⁸ See § 6.01 *infra*.

²⁹ See § 6.02 *infra*.

³⁰ See Chapter 11 *infra*.

³¹ See Chapter 8 *infra*.

³² Reprint courtesy of Timothy T. Morbach and The Settlement Services Group (TSSG) - www.tssg.net.



The Future of Structured Settlements Created by Keith Burtoff, Markers & Mice, for S2KM © 2006 S2KM 4

As this diagram explains, the first stage of U.S. usage of structured settlements arose in a period of rising interest rates, which made annuity financing of long-term payouts particularly attractive. Revenue Rulings in the late 1970's gave credibility to the tax-exempt nature of periodic payment settlements in personal injury cases. An increasing use of structured settlements led to the enactment by Congress of the Periodic Payment Settlement Tax Act of 1982 and the formation of the National Structured Settlements Trade Association (NSSTA) in 1985.

Stage two saw increasing attention to protecting structured settlement recipients in the wake of the insolvency of First Executive and its related life insurer that had written thousands of annuities to fund structured settlements. Qualified assignments became the dominant settlement mechanism, with claimants able to achieve greater certainty that long-term promises would be met by taking security interests in annuities used to finance payment streams. The broader use of periodic payments in judgments received a major boost in 1990, when the Uniform Law Commissioners adopted a Uniform Periodic Payment of Judgments Act.³³ In 1996, Congress changed the scope of recoveries that would merit tax exclusion by specifically making punitive damages taxable and limiting tax exclusion to tort cases with their origin in a physical injury or physical sickness. As the amount of structured settlements grew, factoring companies entered the arena, offering to cash out payment streams at discounts to structured settlement holders wanting immediate cash. Because of abuses perceived in huge discounts imposed on these transfers of structured settlement rights, around 2000 states began enacting acts to protect the holders of structured settlements, but also authorizing courts to permit transfers if consistent with the rights of parties to structured settlements and the terms of state structured settlement protection acts.

In this same historical period, the plaintiff's attorney bar and brokers serving claimants challenged the predominance of defense-side financing, forcing disclosure of cost and other information about the financing of periodic payment streams and encouraging life insurers to work with claimant-oriented brokers as well as those serving the defense. Coincidentally, privacy concerns increased the care needed to transmit medical and other information needed to process annuity quotations that are essential for annuity financing used in most structured settlements.

By the turn of the twenty-first century, settlement planning had become more than simply obtaining the greatest amount possible on

(Text continued on page 1-39)

³³ See Chapter 9 *infra*.

a tax-excluded basis for the longest possible time. Advising claimants became a matter involving life care planning. Efforts to keep government benefits, including Medicare, available to injured persons, while negotiating substantial settlements on their behalf, required tax, trust, estate and financial planning for injury victims. The Society of Settlement Planners (SSP) formed in 2001, aiming to provide a national network for professionals involved primarily on the claimant's side to address best practices and share information with one another. The 2005 formation of NAMSAP (National Association of Medicare Set-Aside Professionals) confirmed the emergence of professionals throughout the country who assist injured persons in preserving governmental benefits while receiving settlement proceeds. Congress imposed steep excise taxes on factoring companies that accepted transfers of structured settlement rights that were not court-approved under state protective statutes, which at the same time created a federal structure for the factoring industry for transfers that receive court approval. Greater sophistication appeared in product offerings, and an increased emphasis arose concerning disclosure of all relevant cost factors in procuring financing. In 2004, the National Association of Insurance Commissioners (NAIC) proposed a compensation disclosure model act, in recognition of issues raised by the Connecticut case of *Macomber v. Travelers*³⁴ and insurance industry litigation launched by New York's Attorney General. These and other developments not depicted on the chart above represent a maturing structured settlement industry, with its viability established, its use growing and the issues arising from its growth being addressed in statutes, regulations, court cases and private sector innovations.

The current state of the industry that supports the use of periodic payment in dispute resolution can be generally summarized by the following chart, comparing the first 25 years of structured settlements and the period since 2001:

³⁴ 804 A.2d 180 (Conn. 2002). The *Macomber* case was settled in 2007 on confidential terms. The attorney who represented the plaintiffs said that Travelers, primary defendant in that matter, had "discontinued its reduced-commission practice and has instituted a disclosure policy" regarding commissions paid to structured settlement brokers and the overall cost of a structured settlement. A. Horvath, "Approved Lists, Rebating Said To Plague Structured Settlements," I The Structured Settlements Report No. 2, at 1, 7 (Feb. 20, 2008).



Structured Settlement – Post 9/11

	From:	To:
Profession	Structured settlement	Settlement planning
Expertise	Tax and annuity	Additional laws; SMEs; products; gov't benefits;
Control	Defense control with claimant consent	Multiple stakeholders and decision makers
Products	Annuities	Annuities, trusts, custodial accounts, reinsurance, 468B funds, transfers, blends
Decisions	Single Product Decision	Extended product lifeline -multiple decisions
Knowledge Work	Paper; telephones; F2F meetings	Digital; Internet; Anywhere, Anytime (AWAT)

As this Chart³⁵ summarizes, the structured settlement industry has evolved beyond its origins to an increasingly sophisticated means of addressing and resolving claims by considering settlement in the context of government benefits, estate planning, tax and other factors affecting injured persons. While the predominant means of financing periodic payments remains annuities, the ways in which they can be used and blended with other settlement and post-settlement mechanisms have evolved.

Professionals assisting claimants, defendants and insurers operate in a process that should address the highest and best interests of injured persons, while offering ways for the defense to achieve reasonable cost and tax efficiency in the resolution of claims. The remainder of this book aims to educate all participants about the intricacies of this dynamic aspect of dispute resolution.

³⁵ Reprint courtesy of Patrick J. Hindert, S2KM Ltd., www.s2km.com.

§ 1.05 Use of Structured Settlements Outside the United States

[1]—Canada

Canada can be credited as the birthplace of structured settlements to resolve personal injury cases. The first reported use of periodic payments to settle claims was in the 1960's. At that time, the drug Thalidomide was associated with severe birth defects, specifically focomelia, in Canadian children. Substantial claims were made on behalf of the victims, who faced life-long dependency at enormous cost to their families.¹ Richardson Merrill, a drug company which had inadequate insurance to cover the claims, resolved cases through structured settlements, promising to pay the victims over the course of their lifetimes. Rather than receiving a one-time cash payment and facing the risks and difficulties of conserving it for the long-term protection of the disabled children, the families thus received a stream of payments, to continue over the children's lives.² The promise to pay was backed by annuities scheduled to increase in amount each year by two percent. This creative resolution of a highly publicized set of disputes stimulated interest in structured settlements throughout North America.

The Thalidomide settlements forced the Canadian revenue authorities to confront the tax effects of large long-term payouts. Public sympathy for the victims resulted in a 1973 Act of Parliament to exempt from tax the investment income of minors that resulted from a personal injury action.³ The public policy expressed in this Act led to private revenue rulings that expanded the non-taxability of structured settlement payouts to adult personal injury victims.⁴ A 1979 Canada revenue ruling secured tax-free treatment for structured settlement recipients generally, and was augmented by a 1981 interpretation bulletin. This eliminated the perceived need for advance rulings on the taxability of periodic payments in individual cases.⁵

The Canadian structured settlement industry grew slowly at first, and expanded about 20 percent a year through the 1980's.⁶ Use of structured settlements paralleled the United States experience. Today, structured settlements are an established part of personal injury practice. The Cana-

¹ For an historical account of the settlement process, see "Annuities to Settle Cases," 42 *Ins. Counsel J.* 367, 371-377 (1975). The Thalidomide story is recounted in Insight Team, "Suffer the Children: The Story of Thalidomide," *Sunday Times*, Ch. 9 (1979).

² There were reportedly 110 Canadian Thalidomide cases, thousands in Germany, and only 15 in the United States. Weir, *Structured Settlements*, 10 (1984).

³ *Id.* at 102.

⁴ *Id.* at 105.

⁵ IT-365R (Mar. 1981), *Rev. Canada*. See also IT-365R2 (May 1987), which eliminated the need for advance rulings in most cases.

⁶ Lewis, *Structured Settlements: The Law & Practice*, 51 (1993).

dian market operates in a similar fashion to that in the United States, with consultants and brokers available to find competitively sourced financing to support long-term payouts.⁷ Judges have found structured settlements to offer particular advantages to ensure long-term security of payments being made to injured persons, for example approving a settlement for a disabled person who would receive regular monthly payments, without the need for the expense and oversight of an appointed guardian.⁸

Periodic payment of judgments came to Canada by way of legislation. The Canadian courts did not use their common law powers to grant flexibility to trial judges to impose periodic payment judgments.⁹ Under the 1990 Ontario Courts of Justice Act, courts in that province are required to order periodic payment of damage amounts on certain conditions unless this would not be in the best interests of the plaintiff.¹⁰ Canadian courts are free to, and do, impose periodic payment judgments in appropriate cases over the objection of the plaintiff.¹¹

[2]—United Kingdom

The single-recovery rule announced in the 300-year-old decision in *Fetter v. Beale*¹² remained the law of most of the United Kingdom, specifically in England, Wales and Northern Ireland, until 2005. The influence of this decision remains dominant in the thinking of judges, attorneys and the population in most of the common law world. Subsequent decisions held that not only must a plaintiff recover damages in a single action, but that payment for damages must come in a single lump sum.¹³ For persons with a need for long-term care, however, lump sums increasingly were recognized by the courts and government officials as an inaccurate way of compensating claimants for future damages.

In 1978, the Royal Commission on Civil Liability and Compensation for Personal Injury recommended periodic payment of damages for liability claims involving death or serious and permanent disablement.¹⁴ The Damages Act of 1996 authorized courts to award damages in per-

⁷ *Id.* at 53-54.

⁸ In re Carano, [2010] O.J. No. 4086; 2010 ON. C. LEXIS 3964; ONSC 5389 (Sept. 29, 2010).

⁹ Watkins v. Olafson (1990), 50 C.L.L.T. 101.

¹⁰ Ontario Courts of Justice Act, 1990, § 116.

¹¹ Bransford v. Yilmazcan, [2010] B.C.J. No. 1711; 2010 BCSC 1217; 2010 BC.C. LEXIS 1670 (Aug. 30, 2010).

¹² Fetter v. Beale (1699), E.R. 11, *aff'd* (1702) 91 E.R. 1122.

¹³ Fournier v. Canadian National Railways (1927), A.C. 167.

¹⁴ *The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmnd. 7054, 1978, 3 vols.) (referred to as the Pearson Commission).

sonal injury actions with the consent of both parties.¹⁵ This experiment yielded few results. By 1999, a judicial decision referred to this voluntary provision as a “dead letter,” and advocated in dictum that Parliament change the law to give courts discretion to award periodic payments, at least for future damages.¹⁶

The reform effort achieved a boost in 2002, when the Lord Chancellor strongly advocated giving courts the discretion to award periodical damages in appropriate cases, even when the parties failed to consent to this.¹⁷ The Consultation Paper of the Lord Chancellor argued that “in most circumstances periodical damages are, in principle, the more appropriate means for paying compensation for significant future financial loss.”¹⁸ While arguing that lump sum was the proper method of compensating for past loss and emotional damage, the Paper criticized lump sums as being ineffective in addressing future damages, whereas periodical payments could more closely restore a claimant to his or her prior position, and would be more likely to ensure that funds would be present to support injured persons over a long period of time. “Lump sums invariably penalize one of the parties,” because if a claimant lives a short time, the defense has paid more than the plaintiff’s future losses were estimated to be, and if the plaintiff lives longer than expected, the lump sum awarded will be inadequate to address future needs.¹⁹

Parliament changed centuries of tradition through the Courts Act 2003.²⁰ Sections 100 and 101 of this Act amended section 2 of the Damages Act 1996, to permit courts in England, Wales and Northern Ireland to order periodical payment damages in personal injury cases. Judicial discretion is provided, and for “future pecuniary loss” a judgment may provide in whole or in part for periodical payments, even if parties do not consent.²¹ For other personal injury damages, periodical payments may be ordered only with the parties’ consent.²² Before ordering peri-

¹⁵ UK Damages Act of 1996, § 2(1).

¹⁶ *Wells v. Wells* (1999) A.C. 345 at 384B.

¹⁷ A Lord Chancellor’s Department Consultation Paper—Damages for Future Loss (March 2002). See http://goliath.ecnext.com/coms2/gi_0199-1592163/Consultation-on-periodical-payments-for.html.

¹⁸ *Id.* at Introduction.

¹⁹ *Id.* at para. 22.

²⁰ The Courts Act 2003, 2003 Chapter 39, Royal Assent (20 Nov. 2003, eff. Apr. 1, 2005), ISBN 0 10 543903 7. See also Courts Act 2003 (Transitional Provisions, Savings and consequential Provisions) Order 2005 (Mar. 23, 2005, eff. Apr. 1, 2005).

²¹ § (1)2(1) of Damages Act 1996 (c. 48).

²² The Court ordered periodic payment of damages in *Morton v. Portal Ltd.*, [2010] EWHC 1804 (QB), [2010] All ER (D) 167 (Jul. 16, 2010). While the Plaintiff sought periodic payments, the Court stated that the Plaintiff could not insist on this, but concluded it was right to enter a periodic payment judgment. The ruling recites the history of periodic payment legislation in the United Kingdom, including the fact that periodic payment judgments simply never occurred when the consent of both parties was required,

odical payments, a court must be satisfied that “the continuity of payment under the order is reasonably secure.”²³ Periodical payments are to vary by reference to a retail prices index,²⁴ and no income tax will apply to qualifying periodical payments.²⁵

A year after periodical payment orders were authorized without either party’s consent, one report suggested significant reluctance of the courts to use discretion to impose long-term pay-out terms.²⁶ Reasons cited for this include claimant resistance, the use of retail price indexing when healthcare costs appear to grow faster than this index, the difficulty of modifying an order once made and the uncertainty of whether available insurance products offer “reasonably secure” assurance of long-term payment. One source from the insurance industry complained that by virtue of the Act, “Insurers will never really be able to close their books on a loss.”²⁷ The use of a retail price index for future adjustments to a damages award raised concerns because of the general perception that health care costs generally rise faster than general costs in a society.

Sensing frustration over indexing, the High Court of Justice tied periodic payments to the Annual Survey of Hours and Earnings (ASHE) in December 2008.²⁸ The decision permits claimants to index annuities against the increase in cost of home care assistants (ASHE 6115), considered a more accurate figure than the broader retail price index.²⁹ The High Court’s resolution allowed almost a hundred cases to move forward

and that the current law allows a court to enter such a judgment on its own motion in appropriate circumstances. In another case, the court entered a periodic payment judgment including the future payment of rent, believed to be the first such use of a judgment to ensure that the cost of living quarters for an insured person would be addressed for the person’s lifetime. *J. Colley, “Brain-Damaged Prisoner Awarded £ 4.7m,”* Press Association Limited (Apr. 14, 2010).

²³ § (1)2(3) of Damages Act 1996 (c. 48).

²⁴ § (1)2(8) of Damages Act 1996 (c. 48).

²⁵ § (2) of Damages Act 1996 (c. 48), modifying § 329AA of the Income and Corporation Taxes Act 1998 (c. 1).

²⁶ S. Raeburn, “Personal Injury: Periodical Payments—A Hard Case,” *Post Magazine*, p. 25 (May 4, 2006).

²⁷ M. Brodsky, “The ‘Hard’ Facts of the U.K. Liability Market,” *17 Risk & Ins. No. 2*, p. 8 (Feb. 1, 2006).

²⁸ “Court Finalises *Thompstone* Periodical Payment Order,” *Solicitors Journal* (Dec. 12, 2008), available at http://www.solicitorsjournal.com/story.asp?sectioncode=2&storycode=13419&c=1&eclipse_action=getsession (last visited Aug. 3, 2009). Periodic payments may still be linked to the retail price index. *Thompstone v. Tameside*, 2008 EWHC 2948 (QB) at 6(c). The ASHE 6115 index dropped below the retail price index just before an earlier appellate decision in *Thompstone*. See also “Legal Analysis: Indexation—Indexing Humanity,” *Post Magazine* 12 (Jan. 24, 2008).

²⁹ The Annual Survey of Hours and Earnings can be accessed at <http://www.statistics.gov.uk/StatBase/Product.asp?vlnk=15187> (last visited Aug. 3, 2009).

to settlement,³⁰ while engendering some backlash within the British medical establishment. The National Health Service estimated that clinical negligence payouts would increase by 80% in 2010, in part due to the High Court ruling.³¹ In response, the Medical Defence Union called for a cap on disproportionate attorney compensation that compound by awards that outpace inflation.³² The actual impact of periodic payment judgment flexibility in the United Kingdom through the end of 2010, however, has not been the dramatic increase in costs that was predicted.³³ The historical reversal of the lump sum heritage of England presages a growing use of periodical payments in court orders, which was preceded by use in settlements.

The first structured settlement in the United Kingdom reportedly arose in 1981, but widespread use did not occur until the 1990's.³⁴ Courts that have been asked to approve structured settlements (e.g., because a minor or disabled person is involved) have warmly endorsed them in preference to lump sums.³⁵ Tax-free treatment of installment payments is available, so long as the form of agreement follows a standard set of provisions approved by Inland Revenue.³⁶ Inland Revenue's acceptance of the tax-free receipt of structured settlement payments was crucial to the concept, and resulted from a 1987 agreement with the Association of British Insurers.³⁷ By 1997, about 600 structured settlements were thought to exist in the United Kingdom, with most related to catastrophic injuries.³⁸ The range of cases for which structured settlements can be used is greater than in the United States and Canada, because the United Kingdom does not have a prevalent workers compensation system. As a result, work-related injuries against employers are resolved in the court system and are candidates for structured settlements. By 2004, the United Kingdom

³⁰ See Solicitors Journal, *supra* N. 28.

³¹ Brimelow, "NHS Facing 700m Negligence Bill," BBC News (Feb. 8, 2009), available at <http://news.bbc.co.uk/2/hi/health/7872501.stm> (last visited Aug. 3, 2009).

³² "Put an End to Excessive Legal Costs says MDU," Feb. 1, 2009, available at http://www.the-mdu.com/section_dental_professionals/topnav_News_3/hidden_Article.asp?articleID=1926&contentType=Media+release&articleTitle=Put+an+end+to+excessive+legal+costs+says+MDU (last visited Feb. 24, 2011).

³³ Insurance Times (Oct. 8, 2010), citing an AXA spokesperson as saying that periodic payments had not had the impact AXA had anticipated - "At least, not yet."

³⁴ Lewis, *supra* N. 6 at 1.

³⁵ *Id.* at 10-12. See unreported cases cited therein and comments of the Master of the Rolls and Lord Chancellor.

³⁶ Lewis, *supra* N. 6, Chapter 14.

³⁷ *Id.* at 55; App. I.

³⁸ Report on the Inquiry into the Motor Accidents Scheme, 2d Interim Report of the Standing Committee on Law & Justice of the Parliament of New South Wales Legislative Council, 10 (Dec. 1997).

market was estimated to involve about 2,500 structured settlements per year, with an annuity cost of about US \$1 billion.³⁹

[3]—Continental Europe

Continental European legal systems are based on civil law, rather than common law. Statutes control how personal injuries are addressed and how and whether payouts are taxed. France permits periodic payment of judgments for victims of motor accidents who are severely disabled.⁴⁰ Germany has historically provided for long-term payouts to injured persons in a variety of contexts, while also allowing for lump sum resolution of cases.⁴¹ In German medical malpractice cases, a government fund pays the injured claimant in monthly amounts. This creates an opportunity for a privately funded structured settlement to end the government fund's obligation to claimants.

[4]—Australia and New Zealand

Structured settlements exist in other countries, but are discouraged in jurisdictions that tax the investment portion of periodic payments or that have left the tax issue uncertain. New Zealand has adopted legislation requiring periodic payment of damages in specified instances.⁴² New Zealand has a statute that specifically permits a court to order a convicted criminal to make periodic payments in restitution to a crime victim.⁴³ The tragic case of a three-month-old infant injured in a 1993 car accident that killed his parents focused Australia's attention on the need for reforms that led to income tax exclusion for structured settlements and publicly funded lifetime care for catastrophic injuries.⁴⁴

Following pressure from interest groups, in 2002 the Australian Parliament passed income tax exemptions covering structured settlements.⁴⁵ Under Division 54 of the Income Tax Assessment Act of 1997, annuities

³⁹ Address of Alistair Kinley, Policy Advisor to Association of British Insurers, to NSSTA Annual Meeting (May 2, 2004).

⁴⁰ Law of Dec. 27, 1974, modified by Law of July 5, 1985. See Thomas, "Motor Accident Claims in France," 88 (45) L.S. Gaz. 17 (1991); Lilly, "Alternatives to Lump Sum Payments in Personal Injury Cases," 44 Ins. Counsel J. 243, 247 (1977).

⁴¹ See Stone, "Separate Trials, Declaratory Rulings and Instalment Damages: A Comparative Study," 35 Tulane L. Rev. 597 (1961).

⁴² Palmer, "Accident Prevention in New Zealand: The First Two Years," 25 Am. J. Comp. L.I. (1977); Fleming, "Damages: Capital or Rent," U. Toronto L.J. 295, 306 (1969).

⁴³ Section 22(6) of the Criminal Justice Act of 1985. See discussion in *RK v. Mirik*, 2009 Victoria Sup. Ct., Australia, 21 VR 623, at 123-124 (Feb. 2, 2009).

⁴⁴ T. Vermeer, "Sad Legacy of a Brave Little Boy," Sunday Telegraph, p. 20 (Australia) (May 7, 2006).

⁴⁵ Income Tax Assessment Act of 1997 § 54.

and deferred lump sum payments initiated as structured settlements receive tax free treatment. A related provision removes tax-exempt status in the event of commutation or assignment.⁴⁶

A 2007 Australian government study found that despite the attendant tax benefits, few injured parties pursued structured settlements.⁴⁷ Most claimants chose to invest traditional lump sum awards in superannuation funds or conventional investment portfolios, as both offered higher returns than lifetime annuities linked to the Australian Consumer Price Index.⁴⁸ Insurers have also been hesitant to embrace CPI-indexed annuities, given the higher cost in assessing and guaranteeing lifetime policies.⁴⁹ Global financial turmoil saw Australian superannuation funds drop by 27 percent in 2008,⁵⁰ however, a sign that claimants seeking stability may give CPI-indexed annuities a second look.

The maturation of structured settlement use in Australia has not been without controversy. In a 2012 case,^{50.1} a dispute arose over the insurer's duty to provide ongoing medical expenses to a claimant who as an infant in 1985 suffered catastrophic injuries, and was awarded a structured settlement for her injuries to pay for all reasonable medical expenses and attendant care in the future.

In 2011, the settlement recipient gave birth to a child and sought to recover the cost of the newborn's nursing care and care giver's fees, whereas the settlement obligor viewed these as unrelated to the claimant's own medical expenses that arose from the 1985 injuries. The Supreme Court of New South Wales ordered that the child expenses be paid by the insurer, holding that where an agreement's terms are ambiguous, a structured settlement should be construed in favor of the injured party. As the structured settlement called for "reasonable" needs, the court held that the insurer should have anticipated that claimant's reasonable needs would naturally change over time. On one hand the case is one simply of contract interpretation, but it also indicates that a structured settlement without precise monetary payouts defined can be an open-ended and unpredictable burden for

⁴⁶ Life Insurance Act of 1995 § 2A.

⁴⁷ Cameron, "Review of the Income Tax Exemption for Structured Settlements," (December 2007) <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1355> (last visited Aug. 3, 2009).

⁴⁸ *Id.* at 17, 19.

⁴⁹ *Id.* at 20.

⁵⁰ Barrymore, "Super Funds Fail Aussies," Sun Herald (June 25, 2009) <http://www.news.com.au/heraldsun/story/0,21985,25686059-664,00.html> (last visited Aug. 3, 2009).

^{50.1} *McCann v. NSW Self Insurance Group* [2012] NSWSC 488.

an insurer, compared with the certainty of a single lump sum resolution to a claim.

[5]—Other Countries

There is no common approach taken by European countries as to whether a court may order periodic payments over the objection of a claimant. In Belgium, Denmark, Greece and Italy, a successful claimant receives damages only in the form of a lump sum, assuming there is no settlement of the dispute.⁵¹ Courts in Finland, France, Luxembourg, Portugal, Spain and Sweden are empowered to order defendants to pay damages for certain future losses in periodic payments or in a lump sum, even if the claimant objects.⁵² Courts are generally aware of the possibilities of a structured settlement, and in practice allow or even encourage parties to consider structured settlements before the entry of a judgment.⁵³

Ireland is close to changing its approach in a similar fashion to the United Kingdom.⁵⁴ Ireland's High Court President criticized the lump-sum system as based on "guesswork," which leaves many injury victims without funds when they live longer than expected, and produces unfair windfalls to those responsible for an injury when the victims die shortly after the accident.⁵⁵ Pressures from within judicial and other government circles resulted in the report of a Working Group on Medical Negligence and Periodic Payments in November 2010.⁵⁶ The influential report recommended legislation to exempt periodic payments from income tax, to codify a court's agency right to order payments over time, and to fashion a judgment to extend compensatory payments for a victim's lifetime (terminating upon death, while allowing settlements that could address post-death beneficiary payments). As a result of the Working Group report, Irish

⁵¹ For a summary of European positions on court authority to order periodic payments as of early 2002, see Annex C, "The Position Overseas," to Lord Chancellor's Department Consultation Paper, "Damages for Future Loss" (March 2002).

⁵² *Id.* Periodic payment judgments are reportedly the norm in Sweden, but there are no damages involving future health care, which is presumed to be supplied by the state.

⁵³ *Id.*

⁵⁴ The Irish State Claims Agency worked with the Department of Justice towards introduction of periodic payment orders, which would be an alternative to lump sum payments. "Payouts for life injury victims are too small," *Irish Independent* (Apr. 12, 2010). See also, M. Brennan, "Annual Payouts will Replace Lump Sums to Injury Victims," *Irish Independent* (May 10, 2010).

⁵⁵ "Option of Staged Payouts in Child-Negligence Cases," *Irish Independent* (Feb. 1, 2010).

⁵⁶ Working Group on Medical Negligence and Periodic Payments, Mondaq Business Briefing, describing the November 15, 2010 report (Dec. 14, 2010).

judges have entered interim orders in large-recovery personal injury cases, postponing judgment until 2012, by which time the Irish parliament is expected to have enacted enabling legislation.⁵⁷ As of June 2012, no legislation has been enacted, pending ongoing actuarial review by the National Treasury Management Agency. The review centers on the feasibility and cost-effectiveness of moving to a periodic payment model for catastrophic injury cases, which would include both private sector and governmental defendants and insurers.⁵⁸

(Text continued on page 1-49)

⁵⁷ “Lifelong payments for injured worker warmly welcomed,” Irish Independent (July 30, 2010) (where the High Court approved a structured settlement agreement for a badly injured workman, but postponed its finalization until October 2011 in order for tax exemption to be statutorily enacted); “Teen Secures EUR 6m Settlement in Medical Negligence Case,” Irish Independent (Apr. 16, 2010) (postponing approval of an index-linked periodic payment judgment until October 2011).

⁵⁸ Coulter, “NTMA Considers Replacing Lump Sums With Periodic Payments,” Irish Times (Apr. 21, 2012) <http://www.irishtimes.com/newspaper/ireland/2012/0421/1224315010027.html> (last visited June 19, 2012).

§ 1.06 Impact on Tort System

Structured settlements and periodic payment judgments have made fundamental changes to the tort system. Insurance companies that traditionally paid claims are now engaged in the business of financing claims. They have begun to view claimants not merely as adversaries, but as potential clients for financial services and products. This new perspective requires adjustments in claims procedures, resources and culture. It also necessitates the restructuring of insurance and reinsurance relationships the contractual terms and scope of which have been premised upon the assumption of a lump sum resolution.

As structured settlements become an established part of personal injury practice, it has altered the roles of litigating attorneys. The plaintiff's attorney can no longer be content to assume that the only job is to obtain the biggest lump sum of money possible for a client, and ignore the person's financial and estate planning needs. Because structured settlements must be discussed intelligently with the client as an alternative, plaintiff's counsel (either directly or by association with informed co-counsel) must be familiar with the concepts of financial planning, taxation, contractual drafting and potential insolvency that are central to proper evaluation and effectuation of a structured settlement program.

The defense attorney must be aware that considerations come into play with structured settlements that are not present with lump sums. Structured settlements have changed how damages are defended and how settlements are negotiated. This change affects every aspect of litigation from discovery through final judgment or settlement. Structured settlements have complicated the defense attorney's practice, and in so doing has created opportunities for how claims are defended and can be resolved.

Structured settlements and periodic payment judgments have changed the traditional tort system. When a periodic payment judgment is required, it entails an itemized verdict, thus both complicating and rationalizing the determination of damages. When a structured settlement is created, it provides a complex and long-term arrangement that benefits the claimant while promoting important societal interests in the long-term effective care of injured persons. Whether claimants or the defense benefits the most from a periodic payment system remains to be determined. The result in a given case will depend on the relative knowledge, skills and resources of plaintiffs and defendants, as well as on how the rules of the game are written and applied by the courts.

All parties should benefit from the flexibility and attention to long-term needs that periodic payments entail. Periodic payments present an opportunity to improve substantially the traditional tort system.