MINUTES OF THE
MEETING OF THE SENATE COMMITTEE
ON JUDICIARY

SIXTY-FIRST SESSION
NEVADA STATE LEGISLATURE
March 16, 1981

The Senate Committee on Judiciary was called to order by Chairman Melvin D. Close at 9:05 a.m., Monday, March 16, 1981, in Room 213 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Melvin D. Close, Chairman
Senator Keith Ashworth, Vice Chairman
Senator Don W. Ashworth
Senator Jean E. Ford
Senator William H. Hernstadt
Senator Sue Wagner

COMMITTEE MEMBER ABSENT:

Senator William J. Raggio

STAFF MEMBER PRESENT:

Shirley LaBadie, Committee Secretary

SENATE BILL NO. 308--Provides for periodic payments of certain damages recovered in malpractice claims against providers of health care.

Mr. Richard Pugh, Executive Director of the State Medical Association, stated he was testifying in support of S. B. No. 308. See Exhibit C for additional remarks of Mr. Pugh. In conclusion, Mr. Pugh asked the committee to consider the bill favorably and vote a Do Pass in 1981.

Senator Wagner stated she recalled passing the medical legal screening panel and asked Mr. Pugh how it has worked out so far. Mr. Pugh stated he and Senator Close have a meeting next week for an in-depth look at the screening panel and how effective it has been. Preliminary statistics indicate it is effective to a point of screening out perhaps 60% of the cases. Approx-

imately 30% of the cases decided in favor of the physician still go to court anyhow. This is causing alarm, particularly in the southern part of the state.

Senator Wagner asked in Washoe County, approximately how many malpractice cases have gone to court in the last biennium. Mr. Pugh stated it would take a staff person at the court house tabulating the cases. Last year there were 27 cases in Washoe County, 80 cases in Clark County. Most of the cases were decided in favor of the physician in terms of there was no malpractice performed and no damages assessed. About one-third of those were yes, yes, there were damages, and malpractice. Of the cases the panel decided there was no malpractice and no damages, about one-third of those are going to court regardless. Some conclusions may be reached after the meeting with Senator Close.

Senator Wagner questioned the language on page 2, lines 45 to 47, which stated the court shall award costs and attorneys' fees to the prevailing party where the motion for modification is contested. She wanted to know where the money comes from. Senator Hernstadt answered the intention of the committee was that if a person's medical conditions changed and the periodic payments are not enough, the plantiff can go back and alter the award and the court costs are then awarded. The costs would be borne by the losing party.

Senator Wagner stated the committee had been given information on a Supreme Court decision which declared unconstitutional, legislation in New Hampshire and Idaho, which relates to periodic payments. See Exhibit D which is filed with the secretary's minutes. Nevada Trial Lawyers Association furnished the information. Mr. Pugh stated in each of the states having this legislation, malpractice premiums have stablized, not necessarily because of this bill, but should be considered.

Mr. Robert Heaney, President, Nevada Trial Lawyers Association, stated he was testifying against S. B. No. 308. His association feels, philosophically, the bill is inappropriate. There is a recognition among trial lawyers there is a place for structured settlement or periodic payments, especially in the areas of minors and incompetents. Structured settlements are being done now by mutual stipulation between the wrongdoer and the person harmed and with the approval of the court. It is done taking into consideration all of the variables which exist in a particular case, this legislation takes a mandatory approach and tries to make all situations fit, this is wrong. The law now permits structured settlements where there is good cause for that to be

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done, the association would like the system left voluntary as it is now. The problem with S. B. No. 308 is that upon the request of one party, normally the defendant or insurance carrier, the court must if the award of future damages is in excess of $100,000 or more, enter an order for payment under the periodic payment scheme. The damages in any case in injury or malpractice cases are owed as of the time the wrong was done. By the time it is heard in court, it is often a year or two and no payment has been made. The plantiff has been kept waiting and all those people connected with him and now this bill causes that person to wait longer and received the payments doled out as specified in the judgment over a period of years. The plantiff should have the option to decide how to take his payment, unless it is in the case of an incompetent or minor.

Mr. Heaney stated under Section 9, it opens doors for potential lawsuits. It states, each periodic payment of future damages upon becoming due under the terms of a judgment for periodic payments constitutes a separate judgment upon which execution may issue. The possibility is that a judgment may have to be enforced each time in the cases of a marginal defendant. Lawyers are encouraging finality of judgments, if the judgment is not appealed, the person should not have to go back to court to enforce payment.

Chairman Close stated under Section 4, the damages are ordered to be placed in a trust all monies due under periodic payment. The only time a plantiff would have to go back to court would be to enforce judgment is when the insurance company has failed to abide by the court to put in adequate money to cover the judgment. Mr. Heaney agreed and stated this is an attempt to avoid this situation by putting money on deposit in a bank in Nevada, this is different from some other states which have adopted the model bill which has been proposed. A situation has occurred where a woman had used a trustee and the trustee had spend $40,000 in money paid into an account for the wrongful death of her husband. In that case she had an action against the bank, however this points out a problem that can occur when the money is not given to the plantiff. It should be a mutual agreement for the plantiff to accept a structured settlement. Mr. Heaney stated he appreciated the efforts of the committee to provide a safeguard under Section 9, but for whatever reason the parties may be required to return to court, it should not be a situation which they have been mandated into, but one they have accepted voluntarily by agreement. This may be a rare case however.

Mr. Heaney stated this bill interferes with the parties freedom to contract and he believes in the freedom to contract and this bill takes that away. He stated in large award situations, the insurance company has a great deal to gain by asking the court for a structured settlement. Senator Keith Ashworth asked if it would be better to put the total amount of the award in the trust and the plantiff got all of the interest, then would Mr. Heaney be opposed to the bill. Mr. Heaney stated it would make it less onerous, but felt it should be the decision of the plantiff and not that of the insurance company. Senator Keith Ashworth asked if the plantiff died, what would happen to the balance of the trust. Mr. Heaney, stated under S. B. No. 308, the amount would be returned to the judgment debtor or his insurer, another aspect of the bill the association is not in agreement.

Mr. Heaney stated where the system is voluntary, insurance carriers will make a reasonable offer of a structured settlement pre-trial in order to settle the case. With a mandated aspect of this type of legislation, that will happen far less often, then the insurance carrier is much more willing to take the case into court and see what happens, then if there is a judgment against them, they can offer the structured settlement. The decision should be made by the injured party, with advice of his lawyer and accountant, as to where and how the money is to be given out to him.

Senator Hernstadt pointed out in a case involving a minor or incompetent, the money can be spend by the responsible person, leaving the minor or imcompetent without funds and an obligation to the taxpayer. Mr. Heaney stated there is a provision in the law that any judgment involving a minor must be paid into a trust arrangement approved by the court, $2,500 or less can be paid to the parents, over that amount, it must be a trust arrangement. This is until the child reaches the age of majority. Senator Hernstadt stated after the minor reaches 18, the money could still be gone and left a ward of the state. Mr. Heaney state in terms of social engineering, the bill may have some overall good social impact in terms of keeping these people from becoming a public charge and encouraging the money to go where it belongs. However there is provision for that now and it should be on a voluntary aspect, in large awards these abuses are not happening.

Senator Wagner asked Mr. Heaney if it was his statement the insurance companies are settling out of court and using the structured settlement as suggested in S. B. No. 308 and if it is mandated, they will skip that and go to court because they

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can get the same thing. Mr. Heaney said there would be more likelihood of this being done. He said the structured settlement is being used more now and presented the committee with the last two issues of the Advocate, the Nevada Trial Lawyers Association publication, which had a two part series on structured settlements. (See Exhibit E attached hereto). This is still on a voluntary basis and feel it should not be mandated. He stated he is offended by the idea of mandating structured settlements and it should be the decision of the injured party, whether or not to accept the settlement.

Chairman Close stated in times of inflation, the plantiff loses if he can take the settlement out and invest it at 14 of 15% now and the bill provides that he can only get the rate presently allowed by law which is 8%. Mr. Heaney agreed, the statutory rate is 8%, but is hoping the legislature will increase that rate, a bill has been drafted and is on the Assembly side for that purpose, to go to 12%. If the plantiff, on advice of legal counsel and an attorney, invests wisely, he can do better than 8%. With inflation and a locked in interest rate, the money can dissapate quickly because medical care has tripled in cost in the last 10 years. Mr. Heaney stated one of the most offensive aspects of the bill is the denial of equal protection. This takes a class of seriously injured people, at the hands of a medical provider, and forces them to accept a settlement on the terms dictated by the wrongdoer.

Mr. Heaney stated a test case in New Hampshire threw out this aspect of the bill, having a $50,000 threshold on peridic payments and $250,000 on total award, and the court found there was a denial of equal protection. They found there was more bad about the bill than their statutory scheme, by comparison, Nevada has done a much better job in drafting the bill. He further stated, this is not a good bill, he is opposed to it and would hope the law would remain as is and to allow the voluntary entering into of structured settlements. In larger settlements, the companies are using these settlements because they can stay out of court and costly litigation.

Mr. Warren Goedert, Nevada Trial Lawyers Association, stated every time future damages are set in a trial, the jury is instructed to reduce that to present value. This bill does not address itself to that problem. When it is reduced to present value by the jury and the verdict comes in, the amount is reduced again and it is paid with tomorrow's dollars, today's judgment, by way of structured settlement. A person getting a judgment is getting less than he thought he was getting. If the money is

put in a trust, all the persons will get back is the periodic payment ordered by the court, plus 8%, anything above that which is earned goes into principal. That may or may not go to the injured party. The reason for this bill is that the defendant who is obligated to pay, wants to pay it cheaper than the way previously paid. The plantiff is locked in to what he will ultimately get but the defendant can pay less, if the plantiff dies and the money is turned over to the defendant or insurance carrier. People seriously injured sometimes die as a result of the injuries, the heirs still suffer and the windfall should go to them, not the person who caused the injury.

Mr..Goedert further stated he did not like the fact that the bill does not take into consideration the difference in people. Many people are capable of handling a settlement, rather than having it done for them. Under this bill, the court designates a financial institution to handle the settlement. Senator Hernstadt pointed out if the money is spent by a family or client then the party becomes a charge of society and the taxpayers are paying for the support. Mr. Goedert said to protect against that situation, anyone incompetent or incapable of handling money, there are guardianship provisions in the statutes which are available and mandatory if the person is incompetent and sets up a trustee system. To be very clear, that money belongs to the injured party, anyone else interfering with that money creates a liability and can be sued. Mr. Goedert said structured settlements do have their place and with some clients would favor it. With large settlements, this bill will allow the defendant to go all the way with the attitude of not paying and statistically the defense wins, three out of five times. The slant is in favor of the defendant. The idea of socially legislating structured settlements does not take into account all the different variables that go into it.

Mr. Goedert told the committee he occasionally sits on the medical legal screening panel. During the last year he has set on eight to ten cases, and the last two years between ten and twenty. In all that time he has only seen two cases that returned a yes, yes situation, that there is a possibility of negligence and there are some damages and they were minor so far as damages were concerned. Most of the cases have been no, both by the doctors sitting on the panel and the lawyers. In about 50% to 70% of those cases he had talked to the plantiff's attorney afterwards, after a decision has been reached, and they wanted to know if they should proceed and none of the cases, even those which he felt had liability have gone forward. Medical malpractice cases are

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difficult to win, something gross has to be done by the health care provider and the cost is high, at least $10,000. Mr. Goedert stated the bill is limited and is not a practical resolution of the problem. Premiums have stablized in the state because there have not been high malpractice suits and judgments.

Mr. Heaney, Nevada Trial Lawyers, gave the committee a copy of a report, "Structured Injustice: Compulsory Periodic Payment of Judgments", written by Philip H. Corboy, Chairman, section of litigation of the American Bar Association. (See Exhibit F attached hereto.) Mr. Corboy states in the article why he feels compulsory periodic payments of judgments is wrong.

Senator Wagner directed a question to Mr. Pugh, since his basic thrust in support of the bill is one that it reduces malpractice premiums, and two, they would be passed on to the consumer, did he have any background material in states having this legislation, what the current rate of malpractice insurance premiums are compared to this state. Also how that need has been passed on to the consumer. Mr. Pugh stated he would get the information and return it to Senator Wagner.

Chairman Close stated he agreed with Mr. Goedert that damages are reduced to present value, then the allowance is only 8% on a judgment once it has been recovered, that is unfair. He said a greater rate of interest should be allowed on the judgment on the funds put in a trust, which would go automatically to the injured party, not added on to the principal. Senator Keith Ashworth suggested the entire amount of the judgment be put in trust, not just a portion of the amount. Mr. Pugh said he would look into these suggestions.

SENATE BILL NO. 28--Creates committee to select sites and design for prisons.

Chairman Close advised the committee the language in Section 3, lines 20 through 21 are not clear because it appears as through they select the site most suitable and it may confuse future legislatures in that is what was intended to be the site to be selected. Senator Ford suggested the language be changed by putting a period after the word purpose. Chairman Close said Section 3 should read, the committee shall meet after the director of the Department of Prisons has determined that he will request for the construction of a new prison and has so advised the governor, the committee shall list all potential sites and, continue on, for the prison in order of the suitability. Then new

language would read, to the effect, that that recommendation would be presented to the legislature. The language would be deleted which says, for the purpose and select from the list the one site which, in its opinion, is the most suitable.

Chairman Close said the bill drafter had not changed Section 8. There would be four public members on the committee, the governor appoints two, the speaker appoints one and the joint foliolate appoints one. Chairman Close said on line 3, Section 2, Page 1, the language should be changed to read study and recommend rather than select. He said he would get an amended amendment to reflect the changes.

The committee discussion Section 8 which provides for a committee to select sites for a prison. Chairman Close said it was not a good idea to have a committee sitting around with nothing to do. The money is not appropriated for the committee to meet. Senator Wagner said there is a fiscal note for the people who serve on the committee. Chairman Close stated the way the bill has been changed, the committee has no authority to meet until a prison site is recommended to the governor. Senator Keith Ashworth suggested the appointments be held until the time a determination has been made that a new prison will be built. Senator Ford advised the committee the amendment says the warden notifies the governor, then the governor would appoint the committee and the bill does not read that way. Section 8 could be amended further to handle this situation. The committee decided the concept would be changed so that the appointment process takes place only after notice has been given to the governor for the purpose of constructing the prison.

SENATE BILL NO. 28--Creates committee to select sites and design for prisons.

> Senator Hernstadt moved to reamend and Do Pass S. B. No. 28 with the changes discussed by the committee.
>
> Senator Ford seconded the motion.
>
> The motion carried unanimously.

The following Bill Drafting Requests were presented and received for committee introduction:

SENATE COMMITTEE ON JUDICIARY
March 16, 1981

BDR 10-1232 (Senator Gibson from Attorney George Ogilvie) (S.B. 415)

Expands definition of "condominium" to cover mobile home parks.

BDR 16-1423 (Senator Wagner from Department of Prisons) (S.B. 416)

Specifically allows employment of prisoners on public works projects.

BDR 41-752 (Gaming Control Board) (S.B. 413)

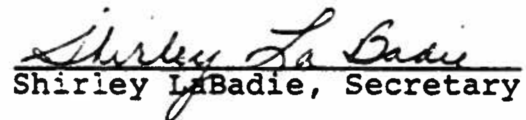
Makes various changes in provisions regarding supervision of certain gaming establishments.

BDR 41-986 (Gaming Control Board) (S.B. 414)

Limits requirements for termination of employment of persons denied gaming license.

There being no further business, the meeting adjourned at 10:25 a.m.

Respectfully submitted:



Shirley LaBadie, Secretary

APPROVED BY:

Senator Melvin D. Close, Chairman

DATE: March 24, 1981

SENATE AGENDA

COMMITTEE MEETINGS

EXHIBIT A

Committee on JUDICIARY, Room 213.

Day Monday, Date March 16, Time 9:00 a.m.

S. B. No. 308--Provides for periodic payments of certain damages recovered in malpractice claims against providers of health care.

ATTENDANCE ROSTER FOR COMMITTEE MEETINGS

SENATE COMMITTEE ON JUDICIARY

EXHIBIT B

DATE: March 16

PLEASE PRINT NAME	PLEASE PRINT ORGANIZATION & ADDRESS	PLEASE PRINT TELEPHONE
WARREN GOEDERT	NTLA	329-6275
Bob Shriver	NTLA	883-3577
Richard Pugh	Nev. St. Med. Assn.	825-6738
PATSY REDMOND	NEVADA INS. DIV.	885-4270
CHUCK KNAUS	NEVADA INS. DIV.	885-4270
Janice Powell	visitor	423-3778
ROBERT E HEANEY	NEVADA TRIAL LAWYERS ASSOC	786-1020

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STATE
MEDICAL
ASSOCIATION

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ROBERT L. BROWN, M.D., AMA Alternate Delegate
RICHARD G. PUGH, CAE, Executive Director

3660 Baker Lane • Reno, Nevada 89509 • (702) 825-6788

March 16, 1981

TO: Senate Judiciary Committee

FROM: Richard G. Pugh, CAE

EXHIBIT C

SUBJ: Testimony - S.B. 308

Testimony of the Nevada State Medical Association in favor of S.B. 308, a bill regarding periodic payments of awards in professional liability insurance litigation.

I want to express the gratitude of all Nevada physicians and their patients for your efforts, past and present, to help alleviate professional liability insurance problems. The combined efforts of both houses of the legislature have enabled Nevada medicine to be practiced in an environment of temporary liability comfort for the past six years. S.B. 308 is before you. I would like to relate a brief history on the concepts embodied in this bill - periodic payments of awards.

... The 1975 Interim Subcommittee on Medical Malpractice Insurance (SCR-21) endorsed a bill on periodic payments which passed the Senate and the Assembly; however, concurrence on amendments in conference committee was not reached. The bill died.

... The 1977 Interim Subcommittee on Professional Liability Insurance (SCR-12), after study, recommended S.B. 292, a periodic payments bill.

... In 1979 the Senate Judiciary Committee introduced S.B. 292 (as recommended by SCR-12) as a committee bill and, after extensive study and deliberation, recommended a DO PASS. The bill received a second reading and was re-referred to Judiciary Committee for some finishing touches. The session ended shortly thereafter.

... This bill has been made law in 13 states. The California legislature is presently attempting to have this concept of periodic payments apply to all tort awards, not just malpractice awards.

We all know that health costs in our state have escalated. Inflationary pressure is certainly responsible for some of that increased cost. However, since the beginning of the malpractice insurance

crisis four legislative sessions ago, premiums have increased astronomically. This may well be the single largest factor in increased health costs in Nevada and, indeed, in the nation.

We are told by some concerned parties that the liability insurance providers are "ripping off the people" with inappropriately inflated premiums. If that is true, I am at a loss to understand why so many reputable and experienced insurance companies have withdrawn from this supposedly extremely lucrative market. If this is indeed accurate, I am certain that our insurance division will evaluate and correct this situation. Our Association feels that legislation protecting only malpractice insurance is inappropriate. We must protect the entire liability market. Whatever final corrective legislation is adopted should apply to all liability insurance.

We endorse the actions of previous legislatures and strongly support and urge the adoption of all the proposals of the SCR-12 Com. of the 1977 legislature, particularly the bill on periodic payments with the reversionary features. Periodic payments do not change the total amount of an award, abrogate rights, or change the spirit of the tort system or the intent of the court. Medical bills, awards for pain and injury, loss of income, attorney's fees and out-of-pocket expenses come off the top of the award. S.B. 308 very carefully addresses these issues and defines future damages which are for maintenance and custodial care. It is only those future damages for maintenance and custodial care that are structured and reversionary. This is applicable only to future damages of $100,000 or more. Therefore, appropriate funds are made available for the purpose they were intended. Passage of this bill may well stabilize premiums for professional liability insurance in Nevada and cut the rate of inflation of health care costs. This type of legislation has been passed in a host of states over the past several years and may have been responsible for significant premium reductions, hence, decreased costs to patients.

My testimony on S.B. 308 is short, but allow me to recap:

1. The bill has been well thought out. Two previous Interim Study Committees have recommended it.
2. It was nearly passed into law in the 1977 session.
3. The Senate Judiciary Committee has worked on this bill extensively, voting a DO PASS in 1979.
4. Please consider this bill favorable and vote a DO PASS in 1981.

Exhibit D

THIS EXHIBIT IS MISSING FROM BOTH THE ORIGINAL MINUTES AND THE MICROFICHE.

NEVADA TRIAL LAWYERS ASSOCIATION

ADVOCATE

VOLUME IV | NUMBER 11 | DECEMBER 1980

PRESIDENT'S FORUM

Robert E. Heaney

United Flight 238 from Denver is cruising at 35,000 feet carrying a small group of passengers back to Reno. Among the passengers are a weary, but wiser Trial Lawyer's President and Executive Director. Weary from two days of intensive leadership and legislative training. Wiser from the multitude of ideas and material crammed into our respective craniums and briefcases.

The two day ATLA Leadership Legislative conference in Denver is the product of the newly created Department of National, State, and Public Affairs (NSPA) created under the direction of ATLA President Harry Philo. The Denver conference is the second meeting of its kind, the first having taken place one week earlier in Boston. The conferences are a direct result of the long overdue recognition of the need to more effectively assist state trial lawyer associations in meeting the common goals of our profession in the major areas of membership, education and legislative preparedness. ATLA has invited newly elected trial lawyer presidents, president-elects, executive directors and association lobbyists. Attendance is excellent with representatives from most of our western United States. The agenda covers such topics as public relations, money-making and program ideas, board executive director relations, political awareness, anticipated legislative issues, how to be an effec-

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Structured Settlements

By JACK LEVINE
Phoenix, Arizona

EXHIBIT E

PART ONE OF A TWO PART SERIES

Jack Levine is a partner in the law firm of Levine & Harris, Phoenix, Arizona.

In personal injury litigation, particularly in cases involving death or catastrophic injuries, there is a growing tendency on the part of plaintiffs and insurance companies to seriously consider a "structured" or "annuity" settlement in lieu of the more traditional lump sum settlement. The objective of this paper is to merely underscore certain aspects of this rather new approach to economic justice for our clients. It is not intended to be a complete discussion of structured settlements, for the nuances are many-fold and can only be appropriately discussed at great length.

Historically and initially, structured settlements were conceived as a device to protect funds due to minors or legally incompetent individuals from being wasted or dissipated. However, as liability concepts and the magnitude of verdicts have increased, the insurance industry has increasingly come to recognize that the structured settlement of larger claims can be far more palatable than the traditional lump sum payment, while at the same time actually increasing the benefits received by the injured party.

In the proper case and if very carefully considered and analyzed, a structured or annuity type of settlement can be far more advantageous to both parties than a lump sum settlement or verdicts. This advantage flows from several fundamental considerations that effect the payment and investment of large sums of money in the context of a personal injury case.

First of all, under § 104 of the Internal Revenue Code, amounts received as damages on account of personal injuries or death are excluded from gross income, and under current revenue regulations, this is true whether such payment of damages is made in a lump sum or in periodic payments. However, a studied review of the Code with its attendant rules, regulations and interpretations is recommended.

Secondly, a large casualty company or group of companies with many millions of dollars to invest in the various money markets can normally be expected to command a far greater return on its investment than the individual plaintiff, no matter how skilled or sophisticated such plaintiff might be in investment matters. Over an extended period of time, an insurance company might net as much as a 15% return on its money while an individual plaintiff might earn far less in some type of secure investment. In addition, because of the diversity of an insurance company's investment portfolio, there is far less risk in its overall investment program than is found in the individual investor's case who does not have the same diversification ability.

It is the interaction between the effect of our current tax laws and the ability of the insurance company to effect a far larger return on its investment that produces increased benefits of the structured or annuity type settlement as compared with the lump sum settlement or lump sum payment of a jury verdict.

If a catastrophically injured plaintiff receives a lump sum settlement of $1,500,000, there may be $1,000,000 available to provide for the plaintiff's needs over his lifetime after payment of attorney's fees and costs. This $1,000,000 is, of course, received tax free. However, if we assume that this money is individually invested at a 10% rate of interest, the $100,000 income that is produced will be taxed at the very highest rates (up to

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Structured Settlements

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70%] under current tax laws. Thus, the annual net return, after taxes on the $1.000.000 lump sum investment, may be only $30.000.

On the other hand, if the $1.000.000 is retained by the insurance company and not paid out in a lump sum, the company could conceivably earn in excess of 15% in its investment portfolio, thereby producing a return of $150.000 in income. With the lower tax rates applicable to corporations and with the cost-of-doing-business deductions that the insurance company implements, the tax impact, based on its overall operations, may be negligible and thus the insurance company could pay out tax free to the plaintiff $120.000 more than the plaintiff could earn for himself, after taxes, on the same $1.000.000 available for investment.

In addition to this investment advantage, there are other reasons why an insurance company or self-insurer may prefer to pay out a larger sum of money over a period of years than a smaller amount in a lump sum. Often times, significant sums of money paid out in lump sums (as in a major airline disaster) may cause a temporary cash flow problem or might produce a dismal profit and loss statement during the fiscal year in which the money is paid which could cause repercussions for the management of the company with the Board of Directors or Stockholders.

An insurance company might prefer to compensate an injured plaintiff with annuity payments for the life of the plaintiff rather than a lump sum because, if the plaintiff fails to reach a normal life expectancy, the cost to the defendant will, in such a case, be far less than it would otherwise be. In fact, in many cases involving catastrophic injuries, such individuals are frequently subject to disease or other future medical complications as a long range residual effect of their condition and thus, theoretically, have a far shorter life expectancy than the average person of the same age in the general population. In view of the fact that compensation to the victim is the goal of the tort system rather than creating a windfall for the plaintiff's heirs and survivors, a convincing argument can be made from the insurance company's standpoint that lump settlements often over-compensate the severely injured plaintiff in those situations where the plaintiff fails to live a normal life expectancy.

On the other hand, if the injured plaintiff is the wage earner of the family and has a foreshortened life as a long range residual effect of his injury, his spouse and children are thus denied those future earnings that would have otherwise been earned by the decedent. In such a situation, a structured settlement can provide for guaranteed payments for a specified number of years payable either to the plaintiff, to his estate, or to specified survivors rather than requiring payments which terminate upon the plaintiff's death. We are here discussing an annuity to be paid for a set number of years without reference to the life of the injured party.

A structured settlement also has the advantage of being as flexible as the requirements of the plaintiff and his family require and demand. It can provide for an "up front" cash payment to compensate the plaintiff for any medical bills or lost earnings that have been incurred from the date of the accident up to the time of settlement as well as payments that increase as the anticipated needs of the family increase. For example, if the plaintiff anticipates sending his children to college ten or fifteen years in the future, the settlement can provide for greatly increased payments in those college years so that these needs can be resolved without placing an undue strain on the other financial requirements of the plaintiff and his family. Even attorneys' fees can be, and often are, paid at the time of settlement through the "up front" money.

In a wrongful death case where there are minor children surviving, a structured settlement can provide for future payments to the surviving children to commence when they are eighteen years of age or older. In this way, adequate provisions can be made for a college education or to provide a fund for the adult child to start a family of his own. This device of deferring payments to a minor will not only avoid the cost and expense of an active conservatorship to hold and preserve funds for a child during minority, but will also avoid the consequences of an eighteen year old coming into a large sum of money that he or she may not be mature enough to handle.

The annuity, or periodic payment, may be made on an annual, semi-annual, quarterly, or even monthly basis. However, if it is paid annually, the insurer can normally afford to pay out a larger total sum of money, because the insurer's cost of funding the annuity will be less when it has a greater interval of time to invest the funds before the periodic payment becomes due. Provisions can also be made for payments to increase progressively so as to provide for the diminished value of the inflated dollar. Although it is theoretically possible to base future payments on the Consumer Price Index or some other reliable economic indicator, because it is normally necessary for the defendant to fund these annuities through a life insurance company with a present lump sum payment, such proposals to tie the annuity payments to an inflationary index cannot, as a practical matter, be accomplised unless the defendant is a self-insurer and is willing and able to make the future periodic payments out of annual revenues.

The strategies and concepts involved in settlement negotiations in a case that has the potential for being resolved on the basis of a structured settlement are considerably different than those which involve the contemplated payment of a lump sum. In framing a settlement demand or offer in the ordinary case, each side attempts to predict the probable jury verdict range in the event the plaintiff prevails. In negotiations leading towards a structured settlement, this same process is involved but in addition, there are other factors to consider.

In almost every case involving the negotiation of the settlement of a personal injury claim, the plaintiff is expected to make the initial offer. If the value of the case is large enough to warrant consideration of a structured settlement, the plaintiff should normally make a lump sum offer, coupled with the alternative of accepting periodic future payments totaling a much larger sum of money to compensate for receiving the bulk of the settlement proceeds over a future period of time.

In order to determine how much greater the total sum of the future payments should be (if the alternative of a structured settlement is acceptable to the defendant) a thorough understanding of the concepts used to calculate the "present value" of a sum of money to be paid in the future is required. We all know that it is better to receive a sum of money today rather than that same sum one year from now. Conversely, in order to pay future money today one need not pay as much because "future" money must be "discounted" to present value in order to account for the interest that a sum of money would earn if received and invested today.

In an economy that is stable and where the rate of inflation is slower and more predictable than we have been experiencing in recent years, one can arrive at the present value of future money with far more confidence than one could do today. During the 1960's, most economists testifying in trials involving future loss of earnings that required a jury to discount such future losses to present value were using a 3%, 4%, or 5% discount rate. Today, an appropriate discount rate may be as high as 7%, 8%, or 9%, although it is recognized that with an extended recession, the present high interest rates may again fall far below their present levels. Whatever reasonable discount rate is used, the difference between the total sum of the future payments and the present value of those future payments may be staggering depending upon the discount rate selected and the number of years into the future that the payment is deferred. This results from accumulating the interest that is earned on the principal amount and adding this interest to the principal each year so as to produce a still greater amount of money each succeeding year.

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Corrections, Deletions, Explanations . . .

In the previous "Advocate", [illegible] Jerry Polaha of Reno as the chairman of NTLA's Criminal Justice Committee. That committee is chaired by Jeff Sobel of Las Vegas.

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NEVADA TRIAL LAWYERS ASSOCIATION

ADVOCATE

VOLUME IV NUMBER 12 DECEMBER 31, 1980

PRESIDENT'S FORUM

Robert E. Heaney

"Legislative Thoughts For The 1981 Session"

On January 19, 1981, the Nevada Legislature will convene. As expected, a substantial number of bills will be introduced by the insurance industry, manufacturers and other special interest groups including state and local governments. The avowed purpose of many of these bills will be to cut the cost of doing business, but all too often at the expense of the public in those cases where the people are injured. By necessity, those of us who represent the public must be prepared to speak out in defense of the tort system and the body of common law by which the rights of litigants have been preserved.

However, it is not necessary that we must, as trial lawyers, limit ourselves to the traditional role of defending against repressive legislation. We have a duty to take affirmative action by way of proposing legislation whenever it will serve to improve our body of statutory law and strengthen the rights of those we represent. With this philosophy in mind, your Board of Governors has discussed and is considering pursuit of legislation in the following areas:

1. Increase minimum insurance and financial responsibility limits from 15/30/5 to 25/50/10 by amending NRS 485.105 and 485.210. The change is simply recognition of our climbing inflation and the need for minimum limits to more realistically reflect the economic facts of life.

2. Increase time limit and guaranteed minimums under the Insurance Guarantee Act, NRS 687A.060, from 30 to 60 days for submission of claims after insolvency and guaranteed minimums from $300,000 to $500,000 for payment of claims. Those changes are needed to better protect victims of tortfeasors whose insurance carriers become insolvent.

3. Clarify NRS 178A.120 (2) regarding a lawyer's right to police witness statements, diagrams, photographs, test results, and other records necessary in civil cases. Some of our members have met resistance in this area. The law should provide a clear direction to police agencies to furnish such information upon proof of representation and without necessity of subpoena.

4. Increase prejudgment interest and interest on judgments to limits which reflect economic reality. As long as interest rates

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Structured Settlements

By JACK LEVINE
Phoenix, Arizona

PART TWO OF A TWO PART SERIES

Jack Levine is a partner in the law firm of Levine & Harris, Phoenix, Arizona.

During the process of negotiations in a case suitable for a structured settlement, the insurance company will normally not be willing to reveal what the settlement package is really costing it, because to do so would to some extent erode the psychological advantage that they possess by virtue of their ability to offer a large total sum of money over a long period of time which, in a given case, may involve many millions of dollars. It can justify this refusal to reveal the true cost of the settlement because under traditional concepts of compensatory damages for tortious conduct that injures another, fair compensation to the victim for his injuries and losses is the objective to be attained. Therefore, if an offer in the form of future payments is sufficient to provide for the plaintiff's future needs, it should theoretically make little difference to the plaintiff how much the "settlement package" is actually costing the defendant or his insurance company in terms of present day dollars. Of course, if the case involves aggravated liability and part of the objective is thus to punish the defendant for his wrongdoing, a more compelling argument can be made for

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Best Wishes for the Holiday Season!

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Structured Settlements

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requiring the defendant to reveal the cost to it of the settlement package. Additionally, in order for the plaintiff to frame a counter-offer, it is essential that the plaintiff have a clear idea of what the defendant is offering in terms of present day dollars because even though adequate compensation to the plaintiff is the objective, there is, nevertheless, the tendency and even the necesity to try to compare the present value of the defendant's offer with the amount of the predicted jury verdict. It is only in this way that the plaintiff has any idea of where the insurer is likely to "draw the line" on its settlement position and thus better determine the prospects for persuading it to increase the settlement proposal. Furthermore, there is probably a justifiable reluctance to permit the insurer to benefit by discharging an obligation for less present value dollars by virtue of its investment advantage and the tax savings available in a structured settlement than it could for a case involving the payment of a judgment. If anyone should be given the benefits of this, why not the plaintiff? After all, he is the injured party and the plaintiff is, by his willingness to accept a structured settlement, giving up his right to receive the immediate payment of a large sum of money in a lump sum. Furthermore, if the plaintiff took a lump sum of money and then purchased an annuity policy from a life insurance company, he could obtain some of the same investment benefits that a structured settlement would provide. However, the cost to the plaintiff of purchasing an annuity policy would normally be significantly more (25% to 35%) than the cost to a casualty insurer because of the heavy front-end loading that is often placed on an individual's purchase of a policy for costs as salesmen or broker's commissions, other administrative expenses, and leverage in the market place.

Ideally, the increased benefits of a structured settlement over that of a lump sum settlement should be equitably shared by both sides.

Unless the fee agreement makes provisions for it, one of the major problems that may arise during the settlement of a substantial case utilizing the structured settlement approach is that of computing the attorneys' fee. Under present practice, most personal injury cases are handled on a contingent fee basis, payable at the time of "recovery". In a structured settlement, the attorney is often times unwilling to accept his fee on the same annuity basis as the client for a variety of reasons.

First of all, in a major case the attorney may have spent a substantial amount of time and a good deal of his financial resources and may not be in a financial position to postpone receipt of payment for his services as would be required if he deducted his fee from the client's annuity checks to be received over many years into the future. Secondly, if the annuity payments are to be made for the benefit of a minor child, as in a wrongful death case, payments under the settlement agreement may not even begin until the child reaches adulthood. Of course, if the attorney is in a high income tax bracket, he might very well be agreeable to having a substantial fee deferred on an annuity basis which will be paid when he is in his later declining income years or during his retirement.

Unless the client has substantial independent wealth outside of the asset created by the acquired contractual right to receive future periodic payments, there are usually no funds with which to pay the attorneys' fee at the time the case is settled. Furthermore, even assuming that a client is able to pay the attorneys' fee at the time of settlement, a considerable difference of opinion might arise as to the amount of money which sould be paid. The typical contingent fee agreement calls for the payment of a percentage of the total recovery without reference to a structured settlement. How then is the attorneys' fee computed when the clients opt for a structured settlement? If the total recovery is a guaranteed \$3,000,000 payable over 30 years and the contingent fee is 33⅓%, should the attorney be entitled to a lump sum of \$1,000,000 to be paid in cash at the time of settlement? Under a literal interpretation of the standard provisions of most fee agreements, this would be the result if the payments to be made were guaranteed to the plaintiff or his estate. In those cases where annual payments are to be made but which terminate with the death of the plaintiff (no guaranteed total annuity amount) the amount of the eventual total recovery will be uncertain and different approaches must then be entertained.

Another approach, it might be argued, is to base the attorneys' fee on the "present value" of the client's future payments, but in such a case there might be some difference of opinion among experts as to the appropriate discount rate to be applied to reduce the future payments to present value.

Although there are no easy answers in this area because the entire area of structured settlements is not shaped in tradition, custom, and practice, perhaps the insurer should agree to pay the attorneys' fees in an amount which is arrived at by mutual agreement between the insurer, the plaintiff, and plaintiff's attorney. In some cases, the insurer may also be persuaded to pay any costs that have been advanced by plaintiff's attorney and in cases where the plaintiff is not receiving any "up front" cash at the time of the settlement, this may be the only practical way of being currently reimbursed for these costs.

Of course, if settlement negotiations break down and the case goes to trial and a large plaintiff's verdict is obtained, the opportunity may again be presented for a structured annuity type settlement based on that verdict. Presumably, the same considerations of the higher interest rate to be earned by the liability carriers and the deferred distribution of the accumulations, tax free to the plaintiff, would again apply to make such a device attractive to both sides as opposed to payment of the judgment in a lump sum.

When a settlement agreement is reached, it should obviously be reduced to writing and signed by all parties. The agreement should be clear as to the dates on which payments are to commence and terminate, the amounts to be paid, and if payable for a guaranteed period of years regardless of the earlier death of the payee, this should also be clearly set forth. It would also be advisable to file a copy of the settlement agreement with the Court in which the action is pending as part of the Stipulation and Order of Dismissal.

The foregoing discussion is not designed to be all-encompassing. This entire area is extremely complicated and fraught with potential pitfalls, yet at the same time provides economic options that can be dramatically beneficial to the client. This option of the structured settlement is one that, in the interest of the client in major injury or death situations, should be carefully considered and evaluated.

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Legislative Workshop January 10

Arne Werchick of San Francisco, and the immediate past president of the California TLA will conduct a legislative workshop at NTLA President Bob Heany's office on Saturday, January 10, 1981.

The three-hour workshop will cover lobbying, testifying before legislative committees and the overall scope of proposed legislation.

Werchick, who has been a chief lobbyist for the California TLA the past ten years, is the Vice-Chairman of ATLA's State Legislation Committee.

"Arne is an extremely articulate and knowledgeable lobbyist who can do nothing but improve our abilities during the upcoming 1981 Legislature," said NTLA President Heaney.

"I urge all Board members, committee members or any member of the Association who will have occasion to testify during the Legislature to attend," added Heaney.

The workshop is free to any NTLA member.

For information call the NTLA office in Carson City at 883-3577.

Invite a Friend to Join

Structured Injustice: Compulsory Periodic Payment of Judgments

EXHIBIT F

The Uniform Law Commissioners model act would force tort victims to accept unfavorable restrictions on payments of their awards.

By Philip H. Corboy

IN THE June, 1980, issue of the *American Bar Association Journal* (page 734), Roger Henderson, dean of the University of Arizona College of Law, stated the case for the Model Periodic Payment of Judgments Act, which the National Conference of Commissioners on Uniform State Laws has approved and for which Henderson was the reporter. I offer an alternative view that I believe represents as well as any the feelings of the personal injury bar. My conclusion may also reflect, although for very different reasons, the ultimate opposition of the insurance industry, without whose co-operation this legislative system will never work.

I am a personal injury lawyer. I try many cases, but I settle more than I try. When I try a case, the result is a lump-sum payment of damages that my client (with or without my assistance) invests in order to realize the future income that will make his later life as comfortable as possible under the circumstances. In some cases it makes life itself possible. When I settle a case, the damages are often paid in the same way, but in some cases the option to employ structured settlements is available. While that technique will usually tend to benefit the defendants who pay the damages, I enter into a structured settlement because, under all of the circumstances, it will benefit my client or his or her family.

I rarely make such an arrangement to protect an adult client from his own supposed weaknesses, because I rarely see evidence that a client who has received a million dollars in damages thinks that he is now well-off and can afford the things he could not afford before. The money awarded is intended to replace that which would have been earned and to pay the bills due in the future. Given that, victims should be free to choose their own investments and to alter them to optimize their chances for an adequate return, just as others do.

These arrangements are settlements, not judgments. They are voluntary for all parties. They also are always in the best interest of all parties or they simply are not made. There is no coercion, and everyone is served to some extent. The model act is quite a different mechanism, and the trial bar, including the American Bar Association Litigation Section, has formalized its opposition to it.

The prefatory note to the model act begins with a complaint about the typical lack of information as to the victim's actual future condition. This is a problem to be solved by lawyers in court. If they cannot do so, surely no legislature can. The note then specifies three reasons for re-examining the "inherent problems in the lump-sum system:" (1) the size of damage awards and their effect on the cost of liability insurance; (2) the present state of the tax laws; and (3) the way in which successful claimants spend the money they receive through judgments. The note, however, neither elaborates on these issues nor cites a single outside source.

No one would doubt that the size of damage awards has increased, but we should not scrap the common law rule on damages until the proof of an insurance crisis is a good deal stronger. The tax laws are not a persuasive reason to change the present system, because ample tax shelter devices (municipal bonds, for example) are available to victims, and judgment income spent on medical care is fully deductible. The note is inaccurate in stating that "any income earned on [a personal injury] award is subject to income tax." On the third point, the note says that "the disposition of large lump-sum awards by successful claimants is not a matter than can be ignored when the public is demanding closer scrutiny of government spending, particularly in the welfare area." This statement fairly implies a substantial problem in this area, yet I know of very little hard information on this problem.

In the absence of hard evidence (of the same quality as that which would have to be provided to support claims of a "liability insurance crisis"), individuals should not be treated differently from corporations that sue one another. When the litigation between MCI Communications Corporation and AT&T ended recently with a $1.8 billion judgment, no one that I know has suggested that the loser should have 70 years to pay off the damages, or asked if MCI might squander its award, big as it is.

Section 1 of the model act sets out its three purposes—"(1) to alleviate some of the practical problems incident to unpredictability of large future losses and to facilitate more accurate awards of damages for actual losses; (2) pay damages as the trier of fact finds the

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losses will accrue: and (3) assure that payments of damages more nearly serve the purposes for which they are awarded." While these purposes seem innocuous, there is a sound of steel behind them. The later Section 3(d) turns the purposes of the act against claimants by allowing a party who does not want the act to have compulsory effect on his case to escape by showing that "the purposes of this act would not be served" by conducting the trial under it. But how, for instance, would a plaintiff who did not want the act to govern his claim go about showing that use of the act would not "alleviate some of the practical problems incident to unpredictability"? The "purposes" section thus is not informational. Its generality is part of the over-all scheme of compulsion, and as such it is a violation of the principle of freedom of contract.

Section 3 is one of the most offensive parts of this legislative scheme. It provides for mandatory effect of the act if one party to the lawsuit has made "an effective election" to come under it. While the scheme that sets up the election process looks elaborate, its real effect in most cases will be to allow a defendant to impose the periodic payment device on all other parties merely by showing that security in the amount of $500,000, regardless of the amount of damages or the amount of the claim, whichever is less, can be provided. Virtually the only chance a reluctant party has to avoid this result is to show, under Section 3(d), that the purposes of the act will not be served by employing it in a specific case.

Section 3(e) provides for separate trials when there are multiple claimants, some of whose claims would come under the act and others for whom the act would work an injustice. That would turn a single trial under the present rules into two separate ones, and the impact on judicial economy, while perhaps not severe, would be unnecessary and contrary to the public interest.

The worst thing about this section, however, of the act as a whole, is that it would bring the full coercive power of the state to bear to keep claimants from exercising their right of contract in settling their own cases—or not—as they wish.

Section 5 would forbid consideration of inflation. It would wipe out at a stroke the trial bar's hard-won victories in recent years to incorporate inflation into damage calculations to achieve the very certainty to which the act aspires.

Section 6 would establish a $100,000 net damages "threshold" to be met before the act would apply. This arbitrary threshold would be subject to all of the equal protection arguments that have been raised against no-fault automobile insurance plans. The threshold would be crossed literally "by accident" and is irrational. Wealthy individuals, who do not need the protection of the act as much as people of more modest means (if anyone does), would find themselves reaching the threshold sooner because their medical care is more expensive.

Act uses index factor based on Treasury bills

The index factor of Section 7—the discount rate for 52-week Treasury bills—is curious. Dean Henderson in his article stated that one of the reasons we need the act is to avoid untoward tax consequences of the payment of a lump-sum judgment. The drafters specifically suggest that any person who wants to secure a periodic payment judgment "can invest the funds necessary in the Treasury bill specified to produce the income to make the required yearly adjustments," thus taking care of security and inflation problems at the same time. Yet that action would precipitate additional tax problems because the income from the Treasury bills would be taxable. And if investment of the funds in Treasury bills would solve the problems of security, inflation, and liquidity (which is a very doubtful aggregate effect), it appears that the act itself would serve no purpose other than to coerce plaintiffs into doing what their lawyers can now advise them to do.

After designing this elaborate system, however, the drafters acknowledge, "At present, there does not appear to be a market for the type of annuity that would best secure the periodic-installment judgment contemplated in this act." It seems incredible to me that the drafters would go through at least nine drafts of an act and recommend its final approval when its operation hinges on such an elusive contract. A fixed annuity is, of course, available, but the drafters' opposition to any chance windfall to the victim (as shown in Section 11) makes this simple solution unacceptable to them.

While Sections 8 and 9 are generally innocuous, they would allow defendants to post security and satisfy the judgment on the bare showing of "an agreement by one or more qualified insurer or insurers to guarantee payment of the judgment." This would subject the accident victim to a risk of insurance company insolvency, which does occasionally happen.

Section 10 governs the discount rate to be applied to any future damages paid ahead of time. This is the one area where the drafters cite authority for their decisions, and they take pains to show why a discount rate of 3 per cent (representing the "real rate of interest") is appropriate. The analysis is esoteric, however, and it is not unchallenged and does not result in a significant difference in the number of dollars that would change hands. In the interest of fairness, if the victim is to have no allowance for inflation, no control over the investment, no right to keep the award in his estate if he dies prematurely, and a serious injury, he should not suffer a discount to his award to boot!

The authority the drafters cite here (an article by Frederick C. Kirby in the August, 1978, *Insurance Law Journal*) appears to contradict their own premises in three particular areas.

First, they quote Kirby to the effect that the "economically rational person prefers present cash or liquidity to future cash." If the drafters accept that proposition, one must assume that the voluntary acceptance of the terms of the act as a whole would be an economically irrational act and that the imposition of the terms of the act by statute would be enforced irrationality.

Second, Kirby notes that "all borrowers (except perhaps the United States government) have some probability of not being able to repay the loan when due." If this is an acknowledgement that government obligations are inherently safer investments than the other forms of security allowed under the act, then the plaintiff who could be forced to accept a plan secured in some other way would be subjected to greater risk than he would choose on his own.

Third, Kirby acknowledges that "interest rate movements lag behind price level changes." That apparently means that interest rates and hence income from principal invested under the act, even in Treasury bills, will not tend to keep pace with the increasing costs of health care and the cost of living generally. Theoretically, they would remain high for a time after living and medical costs began to drop, but our recent ex-

perience gives us no hope that s[illegible] costs will drop at any time in the foreseeable future. Security agreements pegged to the rate of Treasury bills will virtually guarantee that the payout provisions of periodic payment plans will be inadequate to maintain accident victims for extended periods in the future. This suggests that the government's estimates of the rate of inflation, not the interest on Treasury bills, should be the index on which Section 7 is based.

Section 11 is probably the most offensive provision of the entire act. It does not merely offend economic theory or logic the way the rest of the act does. It offends elementary ideas of justice and for the worst of all possible reasons: maximization of the insurers' profits. Section 11 would terminate benefits of any periodic payment judgment in the event of death of the victim, to the extent of "health-care costs or noneconomic loss." In effect, it would allow the defendants to bet on the victim's death and reopen the judgment if they won.

Why wipe out compensation for pain and suffering?

While the first (health-care) component of the modification might be defensible on grounds of sheer rationality, and in fact is used in many structured settlements, the second (noneconomic loss) is not. This provision would wipe out compensation for pain and suffering—compensation that is personal to the plaintiff, recoverable by him during his lifetime, and should remain a part of his estate if he has recovered it before his death. The drafters observe that a purpose of the act is to pay for losses as they accrue, stating, "since death precludes the accrual of losses for such items of damage, it was felt that these items would be a windfall to the recipient." The other side of the "windfall" problem is the case in which losses turn out to be higher than expected, not lower.

If symmetry were a goal, the drafters would provide a means for reopening the judgment on behalf of the plaintiff as well as for the defendant, as Section 11 does, and to their credit they once attempted to do so. A provision for additional hearings on increased damages, however, was eliminated from the fifth tentative draft by the commissioners' committee of the whole at their 1978 annual meeting. The comments to Section 11 state: "It was argued there that the insurance industry could not cost its product where a liability was open-ended, court congestion would be worsened, and some injured persons might be motivated to resist rehabilitation and recovery.... In short, the conference voted to abandon the suggestion because of the seemingly intractable practical problems involved." In effect, the conference institutionalized part of the guesswork they eschew, and in so doing they violated the first two stated legislative purposes of Section 1.

While neither the commissioners nor I know how an insurer would go about pricing an annuity of uncertain payout over an uncertain period of time during uncertain economic conditions, I do know that that problem does not exist now, as long as parties are free to enter into these agreements without coercion. The problem will only arise if this act is adopted by some state. Some structured settlements and some lump-sum payments, too, will tend to create small "windfalls" if a victim dies prematurely, but good structured settlements anticipate those eventualities by guaranteeing a minimum payment to victims or their families but terminating the payments at the time of death. To claim that a plaintiff's but not a defendant's windfall must be avoided—one of which is bound to occur at the time of the victim's death—shows the true bent of the drafters and the true beneficiaries of the proposed act. The entity that would benefit financially from every one of the act's provisions is the person whose culpable conduct generated the lawsuit or the person who insures the culpable party and so stands in his place for this purpose. In my view, this is simply unconscionable.

Section 13 on assignability of benefits would forbid the recipient from anticipating his payments for all but a few purposes. It is much too restrictive. If accident victims are to be restricted in their use of judgment payments much in the way spendthrift trusts operate, without regard to their real propensity to dissipate assets, why should all of us not be restricted in the same way, so that we, too, will not become a burden to society?

Section 15, in the words of the commissioners, "makes clear that the provisions of the act are available to parties in fashioning settlement agreements and consent judgments." No one needs to look to this act to learn that structured settlements are available. Anyone who represents a personal injury client negotiating that sort of settlement should guard his client's rights more carefully than this act does.

The Model Periodic Payment of Judgments Act would benefit only one segment of the public, would actually worsen the condition of accident victims, and has as its only real purpose the facilitation of ever-diminished costs of operation for liability insurers. Insurers now have the benefit of a discount when they pay a lump sum. One must assume that they pay even less when they purchase an annuity to fund a structured settlement. This model act would go one step further and impose on litigants, by legislative fiat, several provisions that insurers would like to get but would never be able to force on victims represented by competent counsel. This act would mandate structured judgments, not settlements. The difference between a settlement and a judgment is compulsion.

Beyond the technical and legal doubts I have about this act, it is disheartening to see the Uniform Laws Commissioners clinging to a statute that is based on such uneven scholarship, that would do so little good and so much harm, that would satisfy so few of the interested institutional constituents, and about which the commissioners have serious doubts.

Through eight tentative drafts this act was referred to as a "uniform act." As approved by the commissioners, it is a "model act." According to the 1977 *NCCUSL Handbook*, the term "model act" is reserved for "any act which does not have a reasonable possibility of ultimate enactment in a substantial number of jurisdictions or which the commissioners from a substantial number of states oppose as unsuitable or as impractical for enactment in their states." The conference's change in terminology to "model act" suggests significant reservations on the part of a large number of the commissioners and their bureaucracy. Although Dean Henderson in his article stated that the drafting committee "feels that the act is workable and that its time has come," the reasons why it is still being proposed for passage are beyond the scope of this article and the limits of my imagination. Journal

(Philip H. Corboy practices law in Chicago and is the immediate past chairman of the American Bar Association Section of Litigation.)

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