

## **WHEN LIFE EXPECTANCY, TRUSTS, STRUCTURES & OTHER SELF INTERESTS COLLIDE**

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The authors wish to acknowledge Rich Halpern<sup>1</sup>, Don Weeks<sup>2</sup>, and Neil Johnson<sup>3</sup> for their assistance in preparation of this paper.

This paper will attempt to provide an overview to complicated and complex issues involving life expectancy, trusts, structured settlements and self interests. Attorneys are encouraged to consult with plaintiff structured settlement brokers, CPAs, family law, probate and tax attorneys concerning these areas before resolving any issues involving life expectancy, structured settlements, self interests and trusts. These area of law are complex and may involve tax and entitlement issues that are beyond the scope of most trial attorneys specializing in personal injury and medical malpractice.

### **I. LIFE EXPECTANCY**

No one can say exactly how long anyone is going to live. However, in medical malpractice cases that is something that the jury will be evaluating in a case involving all injuries, especially catastrophic injuries. Life expectancy is looking at the average survival time of an individual. It is important from the start of a case when you are evaluating the case be sure to find out your own client's health history. It may not seem fair, but a jury will most likely look at an 80 year old, retired, widow with adult children, differently than they look at a 35 year old, who works fulltime, is married and has minor children. In addition, you need to keep in mind that if your client has a terminal or progressively debilitating condition, unrelated to the injuries for which you are suing, you will need to adjust your damages accordingly.

It goes without saying that the defendant will always be trying to minimize life expectancy while the plaintiff's attorney will be trying to maximize life expectancy.

### **How Plaintiffs Often Evaluate Life Expectancy:**

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<sup>2</sup> Don Weeks, Structured Annuities, Inc., 4330 West Vickory Boulevard, Fort Worth, Texas 76107-6399 (817) 763-8100.

<sup>3</sup> Neil Johnson, CPCU, Johnson Settlement Resources, 202 N. Allen Drive, Suite E, P.O. Box 918, Allen, Texas 75013 (972-396-1377 or 1-800-451-4075).

The government's mortality tables<sup>4</sup> are often used by Plaintiff's experts on life expectancy. These government tables are provided by the U.S. government and encompass all people in the United States.<sup>5</sup> These government tables look at a person's overall life expectancy based upon their age and race, and incorporate persons with any and all health conditions.

### **How Defendants Often Evaluate Life Expectancy:**

The defense life expectancy expert will often use studies, other than the U.S. government tables, that sub-categorize specific health conditions and give generalities about persons with those health conditions, i.e. cerebral palsy, traumatic brain injury, permanent vegetative state, etc. For example, the defendants may lump people with spinal cord injuries together and not give any consideration to age, gender, type of care provided or look at any other individual factors that may apply to your case.

### **Defense Literature on Life Expectancy:**

The literature regarding life expectancy is usually not favorable to plaintiffs who have catastrophic type of injuries, but the research has some limitations. One of the biggest studies of life expectancy in the United States comes from a project out of Riverside, California called the Life Expectancy Project. The Life Expectancy Project was conducted in the 1980s under the direction of Dr. Richard Eyman (now deceased). When Dr. Eyman retired, Dr. David Strauss directed the project. Now the project is directed by David Strauss and Robert Shavelle. Both Strauss and Shavelle serve as defense expert witnesses on the area of life expectancy. Although they want to be referred to as "scientists" and/or "researchers" they are statisticians that use data (called the Client Development Evaluation Forms or "CDER") from the California Department of Developmental Services to support their research. Their databank and studies are limited to people in California receiving government assistance.

They are quick to criticize a physician who may be called as a life expectancy expert as unqualified, unless the physician relies upon their research studies or similar studies. Neither Strauss, Shavelle or their colleague, Steven Day, are physicians or trained in the care and treatment of patients. The main emphasis of Strauss and Shavelle's statistical analysis is using criteria of mobility and feeding to evaluate the injured person's life expectancy. From utilizing these two criteria, everyone is pigeon holed into classifications.

Ironically, The Life Expectancy Project has a web site that provides copies of their articles and until recently (approximately July, 2002) had information on their website concerning questions to ask life expectancy experts and information about them

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<sup>4</sup> Anderson, RN: United States life tables, 1998. National vital statistics reports; vol. 48 no18. Hyattsville, Maryland: National Center for Health Statistics: 2001.

<sup>5</sup> The National Vital Statistics Report can be obtained from the U.S. Department of Health & Human Services at the Centers for Disease Control & Prevention, National Center for Health Statistics, 6625 Belcrest Road, Hyattsville, Maryland, 20782-2003 and is DHHS Publication No. (PHS) 2001-1120 1-0093 (2/01). The document is certified as an official Federal document and is fully admissible in Federal court under Federal Rule of Evidence 902.

serving as expert witnesses. If anyone needs a copy of their prior website information, feel free to contact our office.

Most of the medical literature does not have significant life expectancies for the catastrophically injured patient, especially if there is an inability to hold up the head, lack of voluntary movement, or inability to feed oneself or take oral nourishment. The most important thing to recognize is that you should look for differences in the conditions described in the particular medical article(s) used by the defense compared to the condition of your client, as well as determining whether the group forming the basis of the study was large or small. Don't simply take the results of a medical article as gospel. Many of these studies have flaws, or fail to take into consideration the fact that optimum medical care would potentially make a difference in the life expectancy. In other words, many of the patients in these studies were not receiving optimum medical care, so it would be an invalid comparison between the situation you are striving to achieve for your client and the situation of most of those in the studies.

### **Challenging the Qualifications of the Defense Life Expectancy Expert:**

Challenging the qualifications of the expert are outside the area of this paper, but general cases in this area include: *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993); *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex. 1998); and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). A consideration that must be undertaken is whether the greater benefit would actually be cross-examining the defense expert in front of the jury. Sometimes you may not wish to challenge the qualifications of the expert, but simply anticipate gaining more from his actual appearance at trial and the results of your cross-examination.

### **How to Counter Defense Life Expectancy Opinions and Experts:**

Look at the following areas as you prepare to cross examine the defense life expectancy expert:

1. The flaws in the literature and data bases on life expectancy, including any criticisms in peer reviewed scientific journals on the expert's own literature or literature upon which the expert is relying.
2. The amount of testimony they give for defendants.
3. What happens when the injured person lives longer than their projected shortened life expectancy of the defense expert and how many people in their database will live beyond the "average" life expectancy they have projected?
4. Quality care will prolong a person's life. Poor care will shorten it.
5. Considering the medical science advances during the last 15 years, no one can fully anticipate the extent of breakthroughs the next 15 years that would potentially increase the plaintiff's life expectancy.

### **Example of Cross-Examination of Defense Life Expectancy Expert:**

An example of cross-examination of a life expectancy expert (Robert Shavelle) is attached as Appendix "A" to this paper and is from a case my office tried to a Tarrant County, Texas jury in June, 2002 involving a 48 year old gentleman with severe

neurological injuries caused by the inappropriate administration of verapamil in a hospital emergency room.

**How to bolster and argue life expectancy for the plaintiff:**

As a plaintiff's attorney it is important to develop the damages fully in your case and for a catastrophically injured client, to show what they had achieved in the past and what they desired and their potential was for the future.

The following life expectancy areas will have to be overcome for a jury to award significant damages: an old client; not having a projected normal life expectancy; chronic health problems; and/or severe neurological impairments.

A double-edged sword is the way that we characterize our own clients and cases. The more you state or emphasize "catastrophic brain damage," "neurological devastation," or similar type of phrases (even through expert testimony), the more you may actually be playing into the defense's argument of limited life expectancy. There is no absolute, clear-cut way to approach this. It is something that simply needs to be remembered when using descriptive phrases. You may want to consider simply characterizing the condition as a "permanent brain injury," and the evidence regarding the condition of the patient will speak for itself.

Always start from the presumption of a full life expectancy. To most juries, life expectancy translates to future medical expenses more so than any other type of damage in most cases. Standard arguments about the jury essentially will be the one who determines how long the plaintiff will live by how much is awarded in medical expenses are often effective. If the jury believes that the life expectancy will be shortened based on evidence provided by the defense (and thereby will probably award less in future medical expenses), consider arguing that the defendant is seeking to benefit by the very fact that he/she/it has caused the harm and shortened a person's life. If full future medical expenses are not awarded, then the equivalent of such medical expenses should be placed in other areas of damage, e.g., impairment, disfigurement, consortium, etcetera.

If a defense expert gives an opinion regarding a shortened life span, use this testimony against the defendant. For example, "If there is evidence in this case that the negligence of the defendant caused the Plaintiff's injuries, then what you are telling this jury is that the defendant has also caused the Plaintiff to lose "x" years of his life. You will probably get an objection to this question, but the point will be made.

Another question to ask a defense expert is whether the expert will agree to be responsible the plaintiff's future medical expenses should the plaintiff outlive the expert's shortened life expectancy. You will also probably get an objection to this question, but the point will be made.

As some examples, your attention is directed to Appendix A.

### **Life Expectancy and Texas Caselaw:**

Life expectancy issues are not widely addressed in current published Texas caselaw opinions or Texas law review or bar articles. One recent bar journal article, Mark Rothstein, *Should Genetic Information Be Used to Predict Life Expectancy of Plaintiffs in Tort Cases*, 34 Hous. Law 49, October 1996 sets out some of the ethical issues and harm that could be caused by allowing genetic testing evidence to be sought and used in litigation.<sup>6</sup> “Issues such as life expectancy, medical advances and the future costs of products and services, are, by their very nature, uncertain, and therefore, appellate courts are particularly reluctant to disturb a jury’s award of these damages.” *Brownsville Pediatric Association v. Reyes*, 68 S.W.3d 184, 191 (Tex. App. – Corpus Christi, 2002 n.w.h.). See also, *Volkswagen of America, Inc. v. Ramirez*, 79 S.W.3d 113, 127 (Tex. App. – Corpus Christi, 2002, writ filed).

Texas courts usually give the fact finder “considerable latitude” in awarding personal injury and wrongful death damages because those damages cannot be proven with great certainty. See, *Harris County Hosp. Dist. v. Estrada*, 872 S.W.2d 759, 763-764 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1993, writ denied). *Isern v. Watson*, 942 S.W.2d 186, 196-197, (Tex. App. – Beaumont, 1997, review denied).

Life expectancy is akin to future loss of earning capacity. “Loss of earning capacity that a party will suffer in the future is always uncertain and left largely to the jury’s sound judgment and discretion” *Wal-Mart Stores, Inc. v. Ard*, 991 S.W.2d 518, 522-523 (Tex. App. -- Beaumont, 1999) quoting *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 524 (Tex. App. -- Corpus Christi 1993, writ dismissed by agr.). “Proof of life expectancy is not required to recover lost future earnings, because the jury may reach its own conclusion as to life expectancy based upon evidence of the injured party’s age, health and physical condition prior to the injury and the permanence of the injury.” *Wal-Mart Stores, Inc.*, supra at 523.

Life expectancy is also akin to damages for physical impairment. “No mathematical standard exists for the determination of the money damages a jury may award for physical impairment, and the jury may assess those damages in its discretion.” *Roberts v. Williamson*, 52 S.W.3d 343, 351 (Tex. App. – Texarkana, 2001, review granted).

## **II. TAX CODE – on Personal Injury Awards**

I.R.C., Section 104(a)(2) (West 2002) relates to Compensation for Injuries or Sickness. The I.R.C. rule states in Sections 104(a)(1)(2) & (3) (West 2002) in pertinent part:

- (a) In general.

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<sup>6</sup> Some of the areas covered in this bar article are privacy, confidentiality, misuse of the information, and requiring genetic testing of Plaintiffs to establish genetic or environmental factors in causing Plaintiffs’ injuries.

Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include –

- (1) amounts received under workmen’s compensation acts as compensation for physical injuries or sickness;
- (2) **the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;**
- (3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee or (B) are paid by the employer).  
(*emphasis added*)

**What is and is not taxed?** Generally, payments for physical injuries are not taxed and payments for punitive damages are taxed. Your client should be given the opportunity to consult with a CPA or tax attorney of their choice prior to settlement of a case and after a verdict to fully explore tax consequences of a verdict or settlement.

### **III. MEDICAID ELIGIBILITY**

The Social Security Administration determines ongoing Medicaid eligibility for people who receive Supplemental Security Income (SSI), while the Texas Department of Human Services (DHS) determines eligibility for everyone else. According to the Texas Department of Human Services website<sup>7</sup> “Medicaid is a state-administered program that helps pay the costs of certain medical services for eligible individuals. It is funded through a combination of federal and state funds, and provides an array of benefits based upon financial and medical needs. It should not be confused with Medicare, a federal program administered by the Social Security Administration.”

**To Qualify for Long-Term Medicaid in Texas your client MUST:**

- Require RN/LVN nursing care.
- Meet certain health conditions that put them at risk for long-term care.
- Be a Texas resident and a U.S. citizen or an alien with approved status (e.g., lawful permanent resident).

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<sup>7</sup> <http://www.dhs.state.tx.us/programs/Elderly/medicaid.html> (visited Sept. 4, 2002)

- If the client chooses to live in a nursing facility, they must have been living for 30 consecutive days in a medical facility that has a contract to accept Medicaid patients.
- Be either be age 65 or older or have a health condition that the Social Security Administration guidelines define as a disability.

**If your client is on SSI, they automatically qualify for Medicaid.**

The forms for applying for Medicare Cost Sharing programs *Application for Assistance — Aged and Disabled [Medicaid/Medicare Cost-Sharing and Other Community Programs] (Form 1200EZ)* is attached as Appendix “B” and for Institutional Care Programs complete *Application for Assistance — Aged and Disabled (Form 1200)* is attached as Appendix “C”. Updated additions of these documents are posted at the Texas Department of Human Services web site, [www.dhs.state.tx.us/Forms/Form 1200.html](http://www.dhs.state.tx.us/Forms/Form 1200.html).

**IV. MEDICARE**

Forms for Medicare can be obtained online at <http://www.ssa.gov/online/forms.html>.

You may obtain a copy of [Disability Evaluation Under Social Security \("The Blue Book"\) \(5/02; SSA Publication No. 64-039\)](#) which contains the medical criteria that Social Security Administration uses to determine disability. It is intended primarily for physicians and other health professionals.

If you believe that your client meets the qualifications for Social Security disability benefits, see the Social Security Administration’s instructions for applying for disability benefits at <http://www.ssa.gov/disability.html>

**V. SPECIAL NEEDS TRUSTS/SUPPLEMENTAL CARE TRUSTS:**

Special needs trusts allow severely disabled persons to have a trust and remain on governmental entitlement benefits, i.e. Medicaid.

In Texas, [Tex. Prop. Code § 142.005](#) (g)(West 2002) allows for the creation of special needs trusts.

Special needs trusts are authorized by 42 U.S.C.A. Section 1396p (d)(4)(A) (2002) and allow for a disabled person under the age of sixty-five (65) to have a trust established by the disabled person’s parent, grandparent, legal guardian or a court IF the State will receive all amounts remaining in the trust upon the death of the disabled person up to an amount equal to the total medical assistance paid by the State plan on behalf of the individual.

EXAMPLE: If your disabled client was on Medicaid and had a special needs trust set up, and had \$250,000.00 worth of medical expenses that the State’s Medicaid program paid, then on the death of your disabled client, the estate of the disabled client must repay the State \$250,000.00 for the medical expenses previously paid under Medicaid. Thereby, the special needs trust delays the

payment to the state of the Medicaid expenditures until the death of the disabled person.

**Specialized Language that Must be Included:**

Specialized language must be included in any structured settlement if a special needs trust is being utilized. According to the Medicaid Eligibility Handbook, Section 15.442(g)(2): To avoid a transfer of assets penalty, an annuity purchased by or for the client must:

- (1) be irrevocable;
- (2) pay out principal and interest **in equal monthly installments** to the client in sufficient amounts that the principal is paid out during the life expectancy of the client [using the life expectancy tables in Appendix IX (Appendix “A” to this paper)]  
and
- (3) name the State of Texas, Texas Department of Human Services, or its successor agency as the residual beneficiary of funds remaining in the annuity, not to exceed any Medicaid funds expended on the client during his lifetime. [Use Form 1210, Subrogation (Trusts/Annuities/Court Settlements), to report to the Provider Claims Payment Section any potential paybacks to the state as the residuary beneficiary of irrevocable annuities.]

**Other information you need to know:**

A special needs trust must have a trustee that is a trust company or a state/national bank that has trust powers in Texas. Tex. Prop. Code Section 142.005(a) (West 2002). Individuals cannot serve as the trustee.

\* Please note that if your client is purchasing an annuity, the expected life expectancy remaining for your client, must equal or exceed the stated life of the annuity. A penalty will be assessed to your client based upon the transfer of assets that is considered to have occurred at the time the annuity was purchased, minus any principal paid to the client prior to the filing date for Medicaid benefits. Therefore, an annuity purchased for a person with a poor life expectancy (i.e. a very old client) may not be in the client’s best interest as the projected pay-out may be less than the client’s life expectancy.

**VI. STRUCTURED SETTLEMENTS**

In Black’s Law Dictionary (6<sup>th</sup> Ed. 1990) structured settlements are defined as:

“Type of damages settlement whereby Defendant agrees to make periodic payments to injured Plaintiff over his or her life. Commonly such settlement consists of an initial lump-sum payment with future periodic payments funded with an annuity.”

Probably the biggest reason Plaintiffs choose structured settlements are that there are tax benefits to a structure that are not available with a lump-sum payment. So long as there is no actual or constructive receipt by the Plaintiff of the periodic payments, the Plaintiff (or their estate) can claim that the payments are excluded from gross income under the I.R.C. Section 104(a)(2) (West 2002) and Revenue Ruling 79-220.

In a structured settlement the interest earned for the life time payout are currently tax-free. Many plaintiffs choose structured settlements because it forces the plaintiff to obtain the money over a period of time, where there is less likelihood of the plaintiff going on a spending spree and dissipating their award.

## **STATUTES**

The Structured Settlement Statutes are found in the Tex. Civ. Prac. & Rem. Code, Chapters 139, 141 & 142 (West 2002).

### **Chapter 139:**

#### Section 139.101 Written Offer Required

An offer of structured settlement made after a suit to which this chapter applies has been filed must be:

- (1) made in writing; and
- (2) presented to the attorney for the claimant.

#### Section 139.102 Presentation to Claimant

- (a) As soon as practicable after receiving the offer under Section 139.101, but not later than any expiration date that may accompany the quotation that outlines the terms of the structured settlement offered, the attorney receiving the offer shall present the offer to the claimant or the claimant's personal representative.
- (b) To the extent reasonably necessary to permit the claimant or the claimant's personal representative to make an informed decision regarding the acceptance or rejection of a proposed structured settlement, the attorney shall advise the claimant or the claimant's personal representative with respect to:
  - (1) the terms, conditions, and other attributes of the proposed structured settlement; and
  - (2) the appropriateness of the structured settlement under the circumstances.

### **Chapter 141:**

#### Section 141.001 Short Title

This chapter may be cited as the Structured Settlement Protection Act.

#### Section 141.002 Definitions

In this chapter:

- (1) “Annuity Issuer” means an insurer that has issued a contract to fund periodic payments under a structured settlement.
- (2) “Court” means:
  - (A) the court of original jurisdiction that authorized or approved a structured settlement; or
  - (B) if the court that authorized or approved the structured settlement no longer has jurisdiction to approve a transfer of payment rights under the structured settlement under this chapter, a statutory county court or a district court located in the county in which the payee resides.
- (3) “Dependents” includes a payee’s spouse, minor children, and all other persons for whom the payee is legally obligated to provide support, including alimony.
- (4) “Discounted present value” means the present value of future payments determined by discounting the payments to the present using the most recently published Applicable Federal Rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.
- (5) “Gross advance amount” means the sum payable to the payee or for the payee’s account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from the consideration.
- (6) “Independent professional advice” means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser.
- (7) “Interested party” means, with respect to any structured settlement:
  - (A) the payee;
  - (B) any beneficiary irrevocably designated under the annuity contract to receive payments following the payee’s death;
  - (C) the annuity issuer;
  - (D) the structured settlement obligor; and
  - (E) any other party that has continuing rights or obligations under the structured settlement.
- (8) “Net advance amount” means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under Section 141.003(5).
- (9) “Payee” means an individual who is receiving tax-free payments under a structured settlement and proposes to transfer payment rights under the structured settlement.
- (10) “Periodic payments” includes both recurring payments and scheduled future lump-sum payments.
- (11) “Qualified assignment agreement: means an agreement providing for a qualified assignment within the meaning of Section 130, Internal Revenue Code of 1986 (26 U.S.C. 130), as amended.
- (12) “Settled claim” means the original tort claim or workers’ compensation claim resolved by a structured settlement.
- (13) “Structured settlement” means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or

judgment in resolution of a tort claim or for periodic payments in settlement of a workers' compensation claim.

- (14) "Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement.
- (15) "Structured settlement obligor" means, with respect to any structured settlement, the party that has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.
- (16) "Structured settlement payment rights" means rights to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, if:
  - (A) the payee is domiciled in or the domicile of principal place of business of the structured settlement obligor or the annuity issuer is located in this state;
  - (B) the structured settlement agreement was authorized or approved by a court located in this state; or
  - (C) the structured settlement agreement is expressly governed by the laws of this state.
- (17) "Terms of the structured settlement" include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement, and any order or other approval of the court.
- (18) "Transfer" means any sale, assignment, pledge, hypothecation, or other alienation or encumbrance of structured settlement payment rights made by a payee for consideration, except that the term does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to the insured depository institution, or is agent or successor in interest, or to enforce the blanket security interest against the structured settlement payment rights.
- (19) "Transfer agreement" means the agreement providing for a transfer of structured settlement payment rights
- (20) "Transfer expenses" means all the expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including court filing fees, attorney's fees, escrow fees, lien recording fees, judgment and lien search fees, finders' fees, commissions, and other payments to a broker or other intermediary, except that the term does not include preexisting obligations of the payee payable for the payee's account from the proceeds of a transfer.
- (21) "Transferee" means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

#### Section 141.004 Approval of Transfers of Structured Settlement Payment Rights

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order based on express findings by the court that:

- (1) the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents;
- (2) the payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received the advice or knowingly waived the advice in writing; and
- (3) the transfer does not contravene any applicable statute or an order of any court or other governmental authority.

#### Section 141.005, Effects of Transfer of Structured Settlement Payment Rights

Following a transfer of structured settlement payment rights under this chapter:

- (1) the structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments;
- (2) the transferee shall be liable to the structured settlement obligor and the annuity issuer:
  - (A) if the transfer contravenes the terms of the structured settlement, for any taxes incurred by the parties as a consequence of the transfer; and
  - (B) for any other liabilities or costs, including reasonable attorney's fees, arising from compliance by the parties with the order of the court or arising as a consequence of the transferee's failure to comply with this chapter;
- (3) the transferee shall be liable to the payee:
  - (A) If the transfer contravenes the terms of the structured settlement, for any taxes incurred by the payee as a consequence of the transfer; and
  - (B) For any other liabilities or costs, including reasonable attorney's fees, arising as a consequence of the transferee's failure to comply with this chapter;
- (4) neither the structured settlement obligor nor the annuity issuer may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees; and
- (5) any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this chapter.

#### Section 141.006, Procedure for Approval of Transfers

- (a) An application under this chapter for approval of a transfer of structured settlement payment rights shall be made by the transferee and shall be brought in the court.
- (b) At least 20 days before the date of the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under Section 141.004,

the transferee shall file with the court and serve on all interested parties a notice of the proposed transfer and the application for authorization, including with the notice:

- (1) a copy of the transferee's application;
  - (2) a copy of the transfer agreement;
  - (3) a copy of the disclosure statement required under Section 141.003;
  - (4) a listing of each of the payee's dependents, together with each dependent's age;
  - (5) notice that any interested party is entitled to support, oppose, or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing; and
  - (6) notice of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed to be considered by the court.
- (c) Written responses to the application under Subsection (b)(6) must be filed on or after the 15<sup>th</sup> day after the date the transferee's notice is served.

Section 141.007 General Provisions: Construction

- (a) The provisions of this chapter may not be waived by any payee.
- (b) Any transfer agreement entered into by a payee who resides in this state must provide that disputes under the transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of this state. The transfer agreement may not authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.
- (c) Transfer of structured settlement payment rights may not extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and agreed to maintain procedures reasonably satisfactory to the structured settlement obligor and the annuity issuer for
- (1) periodically confirming the payee's survival; and
  - (2) giving the structured settlement obligor and the annuity issuer prompt written notice in the event of the payee's death.
- (d) A payee who proposes to make a transfer of structured settlement payment rights may not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on any failure of the transfer to satisfy the conditions in this chapter.
- (e) Nothing contained in this chapter may be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into before the effective date of this chapter is valid or invalid.

- (f) Compliance with the requirements in Section 141.003 and fulfillment of the conditions in Section 141.004 are solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor nor annuity issuer bear any responsibility for, or any liability arising from, noncompliance with the requirements of failure to fulfill the conditions.

## **Chapter 142, Management of Property Recovered In Suit by A Next Friend or Guardian Ad Litem**

### Section 142.008 Structured Settlement

- (a) In a suit in which a minor or incapacitated person who has no legal guardian is represented by a next friend or an appointed guardian ad litem, the court, on a motion from the parties, may provide for a structured settlement that:

- (1) provides for periodic payments; and
- (2) is funded by:
  - (A) an obligation guaranteed by the United States governmental or
  - (B) an annuity contract that meets the requirements of Section 142.009.

- (b) The person obligated to fund a structured settlement shall provide to the court:

- (1) a copy of the instrument that provides funding for the structured settlement; or
- (2) an affidavit from an independent financial consultant that specifies the present value of the structured settlement and the method by which the value is calculated.

- (c) A structured settlement provided for under this section is solely for the benefit of the beneficiary of the structured settlement and is not subject to the interest payment calculations contained in Section 117.054, Local Government Code.

### Section 142.009 Annuity Contract Requirements for Structured Settlement

- (a) An insurance company providing an annuity contract for a structured settlement as provided by Section 142.008 must:

- (1) be licensed to write annuity contracts in this state;
- (2) have a minimum of \$1 million capital and surplus; and
- (3) be approved by the court and comply with any requirements imposed by the court to ensure funding to satisfy periodic settlement payments.

- (b) In approving an insurance company under Subsection (a)(3), the court may consider whether the company;

- (1) holds an industry rating equivalent to at least two of the following rating organizations:

- (A) A.M. Best Company: A++ or A+;
  - (B) Duff & Phelps Credit Rating Company Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA;
  - (C) Moody's Investors Service Claims Paying Ability Rating: Aa3, Aa2, Aa1, or aaa; or
  - (D) Standard & Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
- (2) is an affiliate, as that term is defined by Article 21.49-1, Insurance Code, of a liability insurance carrier involved in the suit for which the structured settlement is created; or
- (3) is connected in any way to a person obligated to fund the structured settlement.

**What to Look for in Selecting an Annuity Company:**

When selecting an annuity company, factors you may want to look at include:

- a. price of the annuity
- b. cash refund option at the death of the measuring life
- c. high rated age

Structured settlements may be useful in cases involving death, guardianship cases, reduced or lost retirement benefits, catastrophic injuries, inadequate policy limits or where there is questionable liability.

You can devise structured settlements that pour over into special needs trusts.

**3 Step Process for Structured Settlement:**

1. The parties to the settlement agreement agree that the Defendant will pay Plaintiff periodic payments as part of the negotiated settlement.
2. The Defendant transfers the obligation to make the periodic payments to a third party Assignee by means of a qualified assignment.
3. The Assignee purchases and owns a qualified funding asset (annuity) to fund the stream of future periodic payments.

**Pit-falls to Avoid in the Drafting of Structured Settlement Documents:**

1. It should not be stated that the plaintiff is purchasing the annuity. The defendant, its liability carrier or its assignee is purchasing the annuity.
2. The cost of the annuity is not consideration being paid to the plaintiff (releasor) and should not be mentioned as such in the structured settlement documents.
3. Punitive damages should not be part of the document. Allocate that the amount being paid is for compensatory damages only.

4. Watch out for conflicting language in the terms of the structured settlement and the Settlement Agreement and Release.

**V.A. T.S. Ins. Code, Article 21.22 – Unlimited Exemption of Insurance Benefits and Certain Annuity Proceeds From Seizure Under Process**

Sec. 1. Notwithstanding any provision of this code other than this article, all money or benefits of any kind, including policy proceeds and cash values, to be paid or rendered to the insured or any beneficiary under any policy of insurance or annuity contract issued by a life, health or accident insurance company, including mutual and fraternal insurance, or under any plan or program of annuities and benefits in use by any employer or individual, shall:

- (1) inure exclusively to the benefit of the person for whose use and benefit the insurance or annuity is designated in the policy or contract;
- (2) be fully exempt from execution, attachment, garnishment or other process;
- (3) be fully exempt from being seized, taken or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of the insured or of any beneficiary, either before or after said money or benefits is or are paid or rendered; and
- (4) be fully exempt from all demands in any bankruptcy proceeding of the insured or beneficiary.

Sec. 2. The exemptions provided by Section 1 of this article apply without regard to whether:

- (1) the power to change the beneficiary is reserved to the insured; or
- (2) the insured or the insured's estate is a contingent beneficiary.

Sec. 3. The exemptions provided by Section 1 of this article do not apply to:

- (1) premium payments made in fraud of creditors subject to the applicable statute of limitations for the recovery of the premium payments;
  - (2) a debt of the insured or beneficiary secured by a pledge of the policy or its proceeds;
- or
- (3) a child support lien or levy under Chapter 157, Family Code.

Sec. 4. This article does not prevent the proper assignment of any money or benefits to be paid or rendered under an insurance policy or annuity contract to which this article applies, or any rights under the policy or contract, by the insured, owner, or annuitant in accordance with the terms of the policy or contract.

Sec. 5. Wherever any policy of insurance, annuity contract, or plan or program of annuities and benefits mentioned in Section 1 of this article shall contain a provision against assignment or commutation by any beneficiary thereunder of the money or benefits to be paid or rendered thereunder, or any rights therein, any assignment or commutation or any attempted assignment or commutation by such beneficiary of such money or benefits or rights in violation of such provision shall be wholly void.

Sec. 6. For purposes of regulation under this code, an annuity contract issued by a life, health, or accident insurance company, including a mutual company or fraternal company, or under any plan or program of annuities or benefits in use by an employer or individual, shall be considered a policy or contract of insurance.

Sec. 7. The exemptions and protection from seizure under this article are in addition to the exemptions from garnishment, attachment, execution, or other seizure under Chapter

42, Property Code.

### **Structuring Attorney's Fees**

An attorney can structure earned fees by a structured settlement and purchasing an annuity for the attorney's fees. In doing this, the income is taxed as the periodic payments are received, and not on the entire lump sum at one time. This may be helpful to the attorney to spread the income over several years and to defer the income taxes for a later time, especially if the attorney suspects he or she may eventually be in a lower tax bracket.

## **VII. ANNUITIES**

Defense attorneys often designate individuals with annuity backgrounds as defense experts (usually seen: economists, life care planners, statisticians, and/or life expectancy experts) in order to try to slant the jury to award less money for the plaintiff's long term needs. Obviously, this defense tactic is just another way the defense carrier is trying to save themselves from paying a larger award. The defense annuity expert will tell the jury that the plaintiff's needs could be met by an annuity with a lower present value than the plaintiff is seeking. Be prepared to try to limine out this testimony and to object to any introduction of this testimony.

## **VIII. Section 468B QUALIFIED SETTLEMENT FUND:**

Section 468B of the Internal Revenue Code of 1986 and the underlying Treasury Regulations are the laws governing the qualified settlement fund ("QSF").

26 U.S.C.A. Section 468b (West 2002) provides:

- (a) In general.--For purposes of section 461(h), economic performance shall be deemed to occur as qualified payments are made by the taxpayer to a designated settlement fund.
- (b) Taxation of designated settlement fund.--
  - (1) In general.--There is imposed on the gross income of any designated settlement fund for any taxable year a tax at a rate equal to the maximum rate in effect for such taxable year under section 1(e).
  - (2) Certain expenses allowed.--For purposes of paragraph (1), gross income for any taxable year shall be reduced by the amount of any administrative costs (including State and local taxes) and other incidental expenses of the designated settlement fund (including legal, accounting, and actuarial expenses)--
    - (A) which are incurred in connection with the operation of the fund, and
    - (B) which would be deductible under this chapter for purposes of determining the taxable income of a corporation.

No other deduction shall be allowed to the fund.

- (3) Transfers to the fund.--In the case of any qualified payment made to the fund--

- (A) the amount of such payment shall not be treated as income of the designated settlement fund,
- (B) the basis of the fund in any property which constitutes a qualified payment shall be equal to the fair market value of such property at the time of payment, and
- (C) the fund shall be treated as the owner of the property in the fund (and any earnings thereon).
- (4) Tax in lieu of other taxation.--The tax imposed by paragraph (1) shall be in lieu of any other taxation under this subtitle of income from assets in the designated settlement fund.
- (5) Coordination with subtitle F.--For purposes of subtitle F--
  - (A) a designated settlement fund shall be treated as a corporation, and
  - (B) any tax imposed by this subsection shall be treated as a tax imposed by section 11.
- (c) Deductions not allowed for transfer of insurance amounts.--No deduction shall be allowable for any qualified payment by the taxpayer of any amounts received from the settlement of any insurance claim to the extent such amounts are excluded from the gross income of the taxpayer.
- (d) Definitions.--For purposes of this section--
  - (1) Qualified payment.--The term "qualified payment" means any money or property which is transferred to any designated settlement fund pursuant to a court order, other than--
    - (A) any amount which may be transferred from the fund to the taxpayer (or any related person), or
    - (B) the transfer of any stock or indebtedness of the taxpayer (or any related person).
  - (2) Designated settlement fund.--The term "designated settlement fund" means any fund--
    - (A) which is established pursuant to a court order and which extinguishes completely the taxpayer's tort liability with respect to claims described in subparagraph (D),
    - (B) with respect to which no amounts may be transferred other than in the form of qualified payments,
    - (C) which is administered by persons a majority of whom are independent of the taxpayer,
    - (D) which is established for the principal purpose of resolving and satisfying present and future claims against the taxpayer (or any related person or formerly related person) arising out of personal injury, death, or property damage,
    - (E) under the terms of which the taxpayer (or any related person) may not hold any beneficial interest in the income or corpus of the fund, and
    - (F) with respect to which an election is made under this section by the taxpayer.

An election under this section shall be made at such time and in such manner as the Secretary shall by regulation prescribe. Such an election,

once made, may be revoked only with the consent of the Secretary.

(3) Related person.--The term "related person" means a person related to the taxpayer within the meaning of section 267(b).

(e) Nonapplicability of section.--This section (other than subsection (g)) shall not apply with respect to any liability of the taxpayer arising under any workers' compensation Act or any contested liability of the taxpayer within the meaning of section 461(f).

(f) Other funds.--Except as provided in regulations, any payment in respect of a liability described in subsection (d)(2)(D) (and not described in subsection (e)) to a trust fund or escrow fund which is not a designated settlement fund shall not be treated as constituting economic performance.

(g) Clarification of taxation of certain funds.--Nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current income tax. The Secretary shall prescribe regulations providing for the taxation of any such account or fund whether as a grantor trust or otherwise.

#### **Other Information on QSFs:**

These QSFs are utilized when deciding where to put the settlement money and the defendant is ready to pay. An escrow account or fund is set up and the defendant is then released from liability and the plaintiff is not considered to be in "constructive receipt" of the settlement funds. Under section 130, a physical injury tort claim is the only cause of action where damage payments may be assigned. A fund administrator, on behalf of the qualified settlement fund, settles claims against the defendant and the defendant pays the agreed upon settlement amount into the fund, which then extinguishes any alleged liability of the defendant. When the settlement funds are paid out to plaintiffs, lien holders, the attorneys, or to a third party assignee, then the trust closes and the administrator files a final tax return. Usually the qualified settlement fund exists for only a short duration.

#### **IX. SELF DEALING BY INSURANCE COMPANIES:**

In some cases you will see the defendant insurance company try to broker the settlement and then try to use only their affiliated annuity company or "approved" companies for funding any structured part of the settlement. What this does is allow the insurance company to recoup some of the settlement money through their affiliated company or "approved" company. It is a type of shell game. They make your client believe they are offering a certain amount to settle the case and then the defendant's insurance company says you have to use one of their affiliated annuity companies or "approved list" companies. Why do the insurance companies do this? To save money. The defendants get a considerable present discount using future periodic payments. "Present value" from the defense is often based on an estimated number from their annuity broker and is subject to manipulations according to what assumptions are used. Beware that sometimes the "approved" companies and brokers give kickbacks to the

insurance carriers for using them and other times the defendant's carrier is sending your money in fees back to themselves in a subsidiary that does structured settlements.

A recent Supreme Court case from Connecticut, *Macomber v. Travelers Property and Cas. Corp.*, 2002 WL 1965001 (CT., 2002 – decided Sep. 3, 2002) addresses the self dealing and rebating issues. In *Macomber*, Travelers Casualty provided a structured settlement annuity to the Plaintiffs in which Travelers Casualty used insurance brokers that had an affiliation or other special relationship with them whereby Travelers Casualty got 25-75% of the commission back. The Connecticut court found that the payment plan that the plaintiffs had agreed to was “induced by a representation as to its cost, and that the cost was not accurately reported to the plaintiffs in good faith.” The court stated, “The key to the plaintiff's argument, is that, once Travelers Casualty made a representation as to how much the annuity would cost for it to purchase, Travelers Casualty had a duty to disclose any rebates or other schemes that would reduce the final cost of the annuity to Travelers Casualty.”

Make sure that the financial ratings of the insurance company used is strong and have your broker check several different insurance companies' proposals to insure that your client is receiving the most competitive rates available on the market. Often times the defense's approved companies have unfavorable rated age for the plaintiff when compared with other companies. This is especially true if lifetime benefits are wanted.

Further, the defendant will release themselves and the selected structure from all future liability, including liability for them picking a flawed structured settlement vehicle.

Some insurance companies that have appeared in the past to have requirements to use their own structured settlement brokers and/or affiliated life insurance companies include: Travelers; AIG; St. Paul; CNA; and Hartford. In these situations, you have some choices:

- a. Allow the defendant's insurance company to pick the structured settlement company. (In some cases, the defendant's structured settlement companies may have the best rates available with well rated annuity companies that you would want your clients to use but you need to independently confirm this with a plaintiff's broker also checking for structured settlements.
- b. Have a co-broker for the plaintiffs work with the defendant's insurance company but be aware that often times the plaintiff's cobroker is going to share fees with the defendant's broker/insurance company.
- c. **Have a 468b qualified settlement fund established by filing motions with the court and then having the settlement money held in escrow until the court determines the proper distribution.** (This option will probably cost somewhere in the neighborhood of \$4000.00 but could be well worth it for your client when the insurance company is dragging their feet or trying to strong arm your client into working ONLY with their brokers/approved list companies.)
- d. Try the case and not use the defendant's structured settlement company.
- e. Also consider looking at Treasury Bond settlements as a real option.

## **X. Words of Caution:**

A prudent plaintiff's attorney will have the input of structured settlement specialists and probate/trust attorneys as these are outside the common knowledge of most plaintiff's attorneys. The rules and regulations surrounding tax can change and the client should be advised to consult with a certified public accountant/tax attorney to answer any questions they might have concerning tax implications of their settlement proceeds prior to the plaintiff selecting their best option. Independent tax advice should be sought from a tax professional by your client.

By way of example, persons knowledgeable in the following areas may be of assistance to you and your clients:

### Attorneys with experience in Family Law:

Becky Beaver – Austin, Texas  
Law Offices of Becky Beaver  
816 Congress Avenue, Suite 1600  
Austin, Texas 78701  
512-474-5791

Syd Beckmann – Fort Worth, Texas  
5201 West Freeway, Suite 100  
Fort Worth, Texas 76107  
817-735-4000

\*\* Family law attorneys may be of assistance in making sure the structured settlement, verdict, and/or trusts and comply with any family law matter, including child support and/or spousal support.

### Attorneys with experience in 468B and 142 Special Needs Trusts, tax issues, probate and creative side trusts:

Phil McCrury – Fort Worth, Texas  
Shannon, Gracey, Ratliff & Miller, L.L.P.  
777 Main St. #3800  
Fort Worth, TX 76102  
817- 336-9333 Main number

Ron Cresswell – Dallas, Texas  
Locke, Liddell & Sapp, L.L.P.  
2001 Ross Avenue, Suite 3000  
Dallas, Texas 75201  
214-849-5500 – Main Number

Attorney with experience with in governmental entitlements, continued protection of governmental entitlements, special needs trusts and probate:

Deborah Green – Austin, Texas  
Green & McCullar  
7200 N. Mopac, Suite 250  
Austin, Texas 78731  
Phone: 512-342-9933