

# TABLE OF CONTENTS

## CHAPTER 1

### Introduction and History

§ 1.01	Structured Settlement and Periodic Payment	
	Defined . . . . .	1-4
	[1] Lump Sum v. Periodic Payment . . . . .	1-4
	[2] Periodic Payment vs. Structured Settlement vs. Personal Injury Settlement Planning . . . . .	1-5
	[3] Varieties of Structured Settlement Arrangements . . . . .	1-8
§ 1.02	History of Structured Settlements and Periodic Payment Judgments . . . . .	1-11
	[1] Common Law Reliance on Lump Sum Payment . . . . .	1-11
	[2] Single Recovery Rule and Structured Settlements . . . . .	1-12
	[3] Precedents for Periodic Payment of Damages . . . . .	1-13
	[a] Statutory Exceptions . . . . .	1-13
	[i] Alimony and Child Support . . . . .	1-14
	[ii] Workers' Compensation . . . . .	1-14
	[iii] Medicare Set-Aside Arrangements . . . . .	1-15
	[iv] No-Fault Automobile Insurance . . . . .	1-15
	[v] Medical Malpractice . . . . .	1-16
	[vi] Childhood Vaccination Cases . . . . .	1-16
	[vii] Personal Injury Claims Generally . . . . .	1-17
	[viii] Minors and Incompetents . . . . .	1-18
	[b] Judicial Exceptions . . . . .	1-20
	[4] Early Use of Structured Settlements . . . . .	1-21
	[5] Historical Trends and Transitions . . . . .	1-23

## STRUCTURED SETTLEMENTS

	[a]	Premium Growth . . . . .	1-23
	[b]	Interest Rates . . . . .	1-25
	[c]	Primary Market Participants . . . . .	1-26
	[d]	Shift in Control . . . . .	1-27
	[e]	Settlement Planning . . . . .	1-28
	[f]	Secondary Market. . . . .	1-29
	[g]	Expanding WCMSA Submarket . . .	1-30
[6]		Legislative History. . . . .	1-31
	[a]	Federal Legislation. . . . .	1-31
		[i] Periodic Payment Settlement Act of 1982 . . . . .	1-31
		[ii] Medicare Secondary Payer Act . . . . .	1-32
		[iii] National Childhood Vaccine Injury Act. . . . .	1-33
		[iv] Omnibus Budget Reconciliation Act of 1993 (OBRA 1993). . . . .	1-33
		[v] Internal Revenue Code 468B . . . . .	1-34
		[vi] TAMRA . . . . .	1-34
		[vii] Small Business Jobs Protection Act of 1996 . . .	1-34
		[viii] Taxpayer Relief Act of 1997. . . . .	1-35
		[ix] Internal Revenue Code 5891 . . . . .	1-35
		[x] ABLE Act. . . . .	1-36
		[xi] Tax Cuts and Jobs Act of 2017. . . . .	1-37
	[b]	State Legislation. . . . .	1-38
		[i] Periodic Payment of Judgment Statutes. . . . .	1-38
		[ii] Structured Settlement Protection Statutes . . . . .	1-38
[7]		Significant Historical Developments. . . . .	1-39
[8]		Summary of the U.S. Structured Settlement Experience . . . . .	1-52
§ 1.03		Expanding Use of Structured Settlements . . . . .	1-54
	[1]	The Structured Settlement Market . . . . .	1-54
		[a] Size and Growth. . . . .	1-54
		[b] Professional Stakeholders. . . . .	1-65
		[c] Professional Associations. . . . .	1-65
		[d] Market Surveys. . . . .	1-66
	[2]	Structured Settlement Law . . . . .	1-70
	[3]	Public Policy . . . . .	1-71
		[a] Sources for Structured Settlement Public Policy . . . . .	1-71

## TABLE OF CONTENTS

xiii

	[b]	Lump Sum Dissipation .....	1-71
	[c]	Benefits to Parties .....	1-73
	[d]	Benefits to Society .....	1-75
	[e]	Periodic Payment of Judgments ...	1-77
	[f]	Public Policy Issues .....	1-78
	[4]	Standards and Practices .....	1-79
	[a]	Business Models. ....	1-79
		[i] Claim Management Model. ...	1-79
		[ii] Settlement Planning Model. ...	1-79
	[b]	Business Participants .....	1-80
		[i] Consultants .....	1-80
		[ii] Product Providers .....	1-80
	[c]	Industry Standards .....	1-81
		[i] Vocabulary .....	1-81
		[ii] Qualifications .....	1-82
		[iii] Products .....	1-83
		[iv] Funding Methods .....	1-83
		[v] Documentation .....	1-83
		[vi] Agent Compensation .....	1-84
	[d]	Business Practices .....	1-84
		[i] In General .....	1-84
		[ii] Structured Settlement Practice Standards .....	1-84
		[iii] Guidelines for Use .....	1-86
§ 1.04		Advantages and Disadvantages of Structured Settlements .....	1-93
	[1]	Introduction .....	1-93
	[2]	Advantages to Claimant. ....	1-93
		[a] Lifetime Payment .....	1-93
		[b] Financial Management .....	1-93
		[c] Tax-Free Income or Tax Deferral ....	1-96
		[d] Settlement .....	1-96
		[e] Increasing Benefits .....	1-97
		[f] Workers Compensation MSAs ....	1-97
		[g] Preserving Government Benefits and Potential Exemptions .....	1-98
	[3]	Disadvantages to Claimant .....	1-98
		[a] Creditor Risk .....	1-98
		[b] Factoring .....	1-100
		[c] Inflation .....	1-100
		[d] Lack of Liquidity .....	1-101
		[e] Misperception of Amount of Award .....	1-101
		[f] Low Interest Rates .....	1-102
	[4]	Advantages and Disadvantages to Plaintiff's Attorney .....	1-103

**STRUCTURED SETTLEMENTS**

	[5] Advantages and Disadvantages to Defendant and Insurer . . . . .	1-104
	[6] Advantages and Disadvantages to Defense Attorney . . . . .	1-107
§ 1.05	Use of Structured Settlements Outside the United States. . . . .	1-109
	[1] Canada . . . . .	1-109
	[2] United Kingdom. . . . .	1-111
	[3] Continental Europe. . . . .	1-115
	[4] Australia and New Zealand. . . . .	1-115
	[5] Other Countries . . . . .	1-117
§ 1.06	Impact on Tort System. . . . .	1-119

**CHAPTER 2****Taxation of Damages Received by Claimant**

§ 2.01	Whether and When Settlement and Judgment Proceeds Are Taxable. . . . .	2-4
§ 2.02	History of the Statutory Exclusion. . . . .	2-6.7
§ 2.03	Scope of the Exclusion. . . . .	2-15
	[1] “Damages (Other Than Punitive Damages) Received . . . On Account of Personal Physical Injuries or Physical Sickness” . . . . .	2-15
	[2] Damages “Received . . . as Periodic Payments” . . . . .	2-17
	[a] “Receipt” of Damages . . . . .	2-17
	[i] Actual Receipt . . . . .	2-17
	[ii] Constructive Receipt . . . . .	2-18.5
	[b] Statutory History . . . . .	2-18.12
	[i] Tax Definitions for “Periodic Payment” and “Structured Settlements” . . . . .	2-18.12
	[ii] Legislative History of the Periodic Payment Settlement Act of 1982 . . . . .	2-18.13
	[iii] Tax Rulings Codified by the Periodic Payment Settlement Act of 1982 . . . . .	2-19
	[iv] Limited Repeal of the “General Creditor” Rule by the Technical and Miscellaneous Revenue Act of 1988 . . . . .	2-20
	[v] Conclusions. . . . .	2-23
	[3] Nonexclusion of Damages Due to Prior Medical Deductions . . . . .	2-26

## TABLE OF CONTENTS

xv

	[4] Other Exempt Recoveries . . . . .	2-27
	[5] Practice Tips for Minimizing the Risk of an IRS Settlement Challenge . . . . .	2-28
§ 2.04	Deduction of Expenses . . . . .	2-31
	[1] Attorney Fees and Other Costs of Litigation . . . . .	2-31
	[2] Medical Expenses . . . . .	2-32.1
	[a] Award Does Not Include Periodic Payments . . . . .	2-32.4
	[b] Award Includes Periodic Payments . . . . .	2-32.5
§ 2.05	Tax Consequences of Damage Awards as to a Decedent's Estate . . . . .	2-33
	[1] Tax Consequences Compared: Proceeds from Wrongful Death and Survival Actions vs. Proceeds from Causes of Action That Arise Before the Injured Person's Death . . . . .	2-33
	[a] Wrongful Death and Survival Actions . . . . .	2-33
	[i] Proceeds from Wrongful Death and Survival Actions Are Not Subject to Estate Taxation . . . . .	2-34
	[ii] Income Tax Consequences of Proceeds from Wrongful Death and Survival Actions Are Determined Pursuant to Code Section 104(a)(2) . . . . .	2-34
	[b] Personal Injury Causes of Action in Which the Decedent Had an Interest Prior to Death . . . . .	2-35
	[i] Proceeds from Injury Claims Which the Decedent Had Prior to Death Are Subject to Estate Taxation . . . . .	2-35
	[ii] Income Tax Consequences of Proceeds from Injury Claims Which the Decedent Had Prior to Death Are Determined Pursuant to Code Sections 104(a)(2) and 691 . . . . .	2-36

**STRUCTURED SETTLEMENTS**

[2]	Statutory Grounds for Estate Tax	
	Inclusion of Periodic Payments . . . . .	2-37
	[a] Code Section 2033 . . . . .	2-37
	[b] Code Section 2039 . . . . .	2-37
	[c] Code Section 2041 . . . . .	2-38
[3]	Valuation of the Right to Receive	
	Periodic Payments . . . . .	2-38
	[a] Valuation Formulas for Purposes	
	of Code Section 2031 . . . . .	2-38
	[b] The Right to Receive Periodic	
	Payments Differs from Ownership	
	of a Commercial Annuity . . . . .	2-40
	[c] Alternative Valuation Formulas	
	Which May Apply to Periodic	
	Payments . . . . .	2-40
	[i] Cost of a Commercial	
	Annuity . . . . .	2-40.1
	[ii] Discounting to Present Value	
	at 120% of the Federal	
	Interest Rate . . . . .	2-41
	[iii] Willing Buyer/Willing Seller . . . . .	2-43
[4]	Planning Considerations . . . . .	2-44
	[a] Estate Planning Generally . . . . .	2-44
	[b] A Red Flag—Large Payout with	
	Long Term Certain . . . . .	2-44
	[c] Avoiding Estate Tax Inclusion	
	of Periodic Payments . . . . .	2-45
	[d] Annuity Commutation	
	Provisions . . . . .	2-46
	[e] Liquidations . . . . .	2-46
[5]	Payment of an Estate Tax Liability . . . . .	2-47
	[a] Request for Extension to Pay	
	Estate Tax . . . . .	2-47
	[b] Life Insurance Proceeds . . . . .	2-47
	[c] Liquidating Structured	
	Settlement Rights . . . . .	2-47

**CHAPTER 3**

**Financing Alternatives for Structured  
Settlements and Periodic Payment Judgments**

§ 3.01	Introduction . . . . .	3-8
§ 3.02	The Periodic Payment Obligation . . . . .	3-11
[1]	No Obligation . . . . .	3-11

# TABLE OF CONTENTS

xvii

	[2]	Assumption of Obligation . . . . .	3-12.2
	[a]	Mortality Risk . . . . .	3-12.2
	[b]	Reinvestment Risk . . . . .	3-12.2
	[c]	Insolvency Risk . . . . .	3-12.2
	[d]	Morbidity Risk . . . . .	3-12.3
	[e]	Inflation Risk . . . . .	3-12.3
	[f]	Post-Settlement Events Arising From Claimant's Side . . . . .	3-12.4
	[3]	Transfer of Obligation . . . . .	3-12.4
	[a]	Transfer of Obligation Defined . . . . .	3-12.4
	[b]	Method Recommended for Transfer of Obligation . . . . .	3-12.5
	[c]	Method Not Recommended for Transfer of Obligation . . . . .	3-12.5
§ 3.03		Periodic Payment Financing Alternatives . . . . .	3-13
§ 3.04		Internal Financing . . . . .	3-14
	[1]	Internal Financing of the Duty to Make Periodic Payments Defined . . . . .	3-14
	[2]	Contractual Rights and Duties . . . . .	3-14
§ 3.05		Annuity Financing . . . . .	3-15
	[1]	Annuity Financing of the Duty to Make Periodic Payments Defined . . . . .	3-15
	[2]	Contractual Rights and Duties . . . . .	3-15
	[3]	Legal Interests in the Annuity Contract . . . . .	3-17
	[a]	Annuitant . . . . .	3-17
	[b]	Owner . . . . .	3-17
	[c]	Payee . . . . .	3-18
	[d]	Beneficiary . . . . .	3-18
	[4]	Settlement Annuities . . . . .	3-20.1
	[a]	Fixed Annuities . . . . .	3-20.1
	[b]	Other Types of Settlement Annuities . . . . .	3-21
	[c]	Immediate v. Deferred Annuity . . . . .	3-22
	[d]	Life Annuity . . . . .	3-22
	[e]	Period Certain Annuity . . . . .	3-22
	[f]	Life Annuity with a Period Certain . . . . .	3-22
	[g]	Installment Refund Annuity . . . . .	3-22
	[h]	Increasing Payment Annuity . . . . .	3-22
	[i]	Step Annuity . . . . .	3-23
	[j]	Deferred Lump Sums . . . . .	3-23
	[k]	Survivorship Annuity . . . . .	3-23
	[l]	Temporary Life Annuity . . . . .	3-23
	[m]	Cash Refund Annuity . . . . .	3-23
	[5]	Standard Age Ratings . . . . .	3-23
	[6]	Substandard Age Ratings . . . . .	3-24

**STRUCTURED SETTLEMENTS**

	[a]	Substandard Age Rating Defined . . . . .	3-24
	[b]	Medical Conditions Likely to Qualify for a Substandard Age Rating . . . . .	3-27
	[c]	Information Needed by the Annuity Issuer . . . . .	3-32
	[i]	Information Necessary for Determination of Life Expectancy (LE). . . . .	3-32
	[ii]	Medical Information Necessary for Specific Medical Histories . . . . .	3-34
[7]		Annuity Pricing and Price Changes . . . . .	3-37
	[a]	Pricing Is Related to Investment Yield . . . . .	3-37
	[b]	Changes in Annuity Pricing . . . . .	3-38
	[c]	Settlement Annuity Mortality . . . . .	3-38
[8]		Assessment of Premium Taxes . . . . .	3-38.1
	[a]	States Which Levy a Premium Tax . . . . .	3-38.1
	[b]	Criteria for Determining Whether a Premium Tax Is Levied . . . . .	3-38.2
	[i]	State Where Annuitant Resides . . . . .	3-38.2
	[ii]	State Where Owner Resides . . . . .	3-38.2
	[iii]	State Where Annuity Application Is Executed . . . . .	3-38.2
[9]		Life Insurance Insolvencies . . . . .	3-38.2
[10]		Life and Health Insurance Guaranty Associations . . . . .	3-42
	[a]	What are Life and Health Insurance Guaranty Associations ("GAs")? . . . . .	3-42
	[b]	What Happens If a Life Insurance Company That Has Issued Structured Settlement Annuities Goes Out of Business? . . . . .	3-42
	[c]	Are Payment Obligations Under Structured Settlement Annuities Treated Any Differently Than Payment Obligations Under Other Types of Annuities Issued by Life Insurance Companies? . . . . .	3-43



## TABLE OF CONTENTS

xix

	[d] Determining Which GA(s) Provide Coverage for Any Given Structured Settlement Annuity, and Coverage to Whom? . . . . .	3-44
	[e] What Coverage Limits Apply Under Each of the Various GAs? . . . . .	3-44.1
	[f] How Do the Various GAs Coordinate Their Efforts in the Event of an Insolvency Involving Multiple States? . . . . .	3-44.2
	[g] Why Are GAs and the Consumer Protections They Provide Often Overlooked When Selecting Among Life Insurance Companies for Purchase of Structured Settlement Annuities? . . . . .	3-44.3
	[11] First Executive Corporation and the Executive Life Insurance Companies . . . . .	3-44.4
	[12] Executive Life Insurance Company of California Insolvency . . . . .	3-54
	[13] Executive Life Insurance Company of New York Insolvency . . . . .	3-54.7
	[14] Other Life Insurance Insolvencies Involving Structured Settlements . . . . .	3-54.27
§ 3.06	Qualified Assignment . . . . .	3-54.30
	[1] Qualified Assignment of the Duty to Make Periodic Payments Defined . . . . .	3-54.31
	[2] Contractual Rights and Duties . . . . .	3-54.32
	[3] Compliance with Statutory Requirements . . . . .	3-54.33
	[a] Underlying Claim Must Involve Physical Injury or Physical Sickness . . . . .	3-54.34
	[b] Periodic Payments Must Be Excludable by the Recipient. . . . .	3-54.35
	[c] Assignor Must Be a Party to the Suit or Agreement Which Gives Rise to the Periodic Payment Obligation . . . . .	3-54.35
	[d] Periodic Payments Must Be Fixed and Determinable as to Amount and Time of Payment . . . . .	3-54.36

**STRUCTURED SETTLEMENTS**

	[e]	Periodic Payments Cannot Be Accelerated, Deferred, Increased, or Decreased by the Recipient . . . . .	3-54.37
	[f]	Assignee's Obligation Must Be No Greater Than That of the Assignor . . . . .	3-54.39
	[g]	Assignee Must Purchase a Qualified Funding Asset . . . . .	3-54.39
	[4]	U.S. Government Bond Funds . . . . .	3-54.40
	[5]	Qualified Assignment as a Secured Transaction . . . . .	3-54.49
	[a]	Security Interests in Annuity Contracts . . . . .	3-54.50
	[b]	Security Interests in U.S. Government Obligations . . . . .	3-54.52
	[6]	Qualified Assignment from a Section 468B Fund . . . . .	3-54.52
	[7]	Qualified Assignment from Offshore Company . . . . .	3-54.53
§ 3.06A		Non-Qualified Assignment . . . . .	3-54.55
§ 3.07		Periodic Payment Reinsurance with Transfer of the Duty to Make Periodic Payments . . . . .	3-54.65
	[1]	Indemnity Reinsurance . . . . .	3-54.65
	[a]	Indemnity Reinsurance of the Duty to Make Periodic Payments Defined . . . . .	3-54.65
	[b]	Contractual Rights and Duties . . . . .	3-54.65
	[2]	Periodic Payment Reinsurance with Transfer of the Duty to Make Periodic Payments . . . . .	3-54.67
	[a]	Periodic Payment Reinsurance with Transfer of the Duty to Make Periodic Payments Defined . . . . .	3-54.67
	[b]	Contractual Rights and Duties . . . . .	3-54.71
	[c]	Transfer of the Duty to Make Periodic Payments Other Than 104(a)(2) Payments by Assumption Reinsurance . . . . .	3-54.73
	[d]	Advantages and Disadvantages of Using Periodic Payment Reinsurance to Transfer the Duty to Make Periodic Payments in Comparison to Using Annuity-Funded Qualified Assignments to Achieve Transfer of That Duty . . . . .	3-54.73

# TABLE OF CONTENTS

xxi

§ 3.07A	Settlement Trusts. . . . .	3-54.75
	[1] Introduction . . . . .	3-54.75
	[2] Fiduciary Duty and the UPIA . . . . .	3-54.75
	[3] Types of Settlement Trusts . . . . .	3-54.77
	[a] Qualified Government Bond Trust. . . . .	3-54.77
	[i] Introduction. . . . .	3-54.77
	[ii] Risk of Misappropriation of Trust Assets— <i>Stanwich</i> and <i>SBU</i> . . . . .	3-54.78
	[b] Reversionary Grantor Trust . . . . .	3-54.79
	[c] Settlement Preservation Trusts . . . . .	3-54.79
	[d] Special Needs Trusts . . . . .	3-54.79
	[e] Medicare Set-Aside Trusts. . . . .	3-54.80
	[f] Section 468B Settlement Funds. . . . .	3-54.80
	[g] Trust to Avoid Plaintiff's Tax on Legal Fees. . . . .	3-54.80
	[4] Selecting a Settlement Trustee . . . . .	3-54.81
§ 3.08	Reversionary Grantor Trust . . . . .	3-54.83
	[1] Reversionary Grantor Trust Defined. . . . .	3-54.83
	[2] Rights, Duties, and Powers . . . . .	3-54.83
§ 3.08A	Supplemental Needs or Special Needs Trusts . . . . .	3-54.85
	[1] Supplemental Needs or Special Needs Trust Defined . . . . .	3-54.85
	[2] Characteristics of a Supplemental Needs or Special Needs Trust . . . . .	3-54.87
§ 3.08B	Section 468B Settlement Funds . . . . .	3-54.92
	[1] What Are Section 468B Funds? . . . . .	3-54.92
	[2] Statutory and Regulatory Background . . . . .	3-54.93
	[3] When and Why Are 468B Funds Used? . . . . .	3-54.96
	[4] What Are the Mechanics of Setting Up and Operating a 468B Fund? . . . . .	3-54.97
	[a] Creating the 468B Fund. . . . .	3-54.98
	[i] Motion for Order to Approve Establishing a Fund . . . . .	3-54.98
	[ii] Motion for Order to Appoint Administer and to Establish Terms of Administration . . . . .	3-54.99
	[iii] Notice of Administrator's Acceptance of Appointment . . . . .	3-54.99
	[b] Administering the 468B Fund . . . . .	3-54.99
	[i] Motion for Order to Approve Defendants' Settlement with Fund . . . . .	3-54.99

**STRUCTURED SETTLEMENTS**

	[ii]	Distribution of Attorney Fees . . . . .	3-54.99
	[iii]	Administrator's Declaration of Supporting Materials. . . .	3-54.100
	[iv]	Administrator Signs Settlement Agreements with All Claimants . . . . .	3-54.100
	[v]	Motion for Order to Approve Distributions to Certify Settlement Agreements, and to Authorize Disbursements of Proceeds . . . . .	3-54.100
	[c]	Terminating the 468B Fund . . . . .	3-54.100
[5]		Practice Pointers for Courts, Litigators and Fund Administrators . . . . .	3-54.101
	[a]	Petitions to Establish a 468B Fund . . . . .	3-54.101
	[b]	Selection of a Fund Administrator . . . . .	3-54.102
	[i]	Choosing the Fund Administrator . . . . .	3-54.102
	[ii]	Duties to the Supervising Authority . . . . .	3-54.102
	[iii]	Fiduciary Duties . . . . .	3-54.102
	[iv]	Investment and Accounting Duties . . . . .	3-54.103
	[v]	Negotiating Duties . . . . .	3-54.103
	[vi]	Advising as to Forms of Distribution . . . . .	3-54.103
	[c]	Terms of Fund Administration . . . .	3-54.103
	[i]	Restrictions on Handling Fund Proceeds. . . . .	3-54.103
	[ii]	Compensation of the Fund Administrator . . . . .	3-54.103
	[iii]	Subrogation and Reimbursement Claims . . .	3-54.104
	[iv]	Disagreement as to Allocation of Settlement Shares. . . . .	3-54.105
	[d]	Taxation of Funds . . . . .	3-54.105
	[e]	Petitions for Distribution of Fund Proceeds. . . . .	3-54.106
	[f]	Single Claimant Funds—and Other Issues Requiring Legal Advice. . . . .	3-54.106

## TABLE OF CONTENTS

xxiii

	[g] Choice of Forum for 468B Fund When One or More Claimants Against the Fund Is a Protected Person. . . . .	3-54.111
	[i] Consolidate Probate Proceedings in the Court Where the Complaint Is Filed and the 468B Fund Is or Will Be Established. . .	3-54.111
	[ii] Maintain Probate Proceedings Separate from the Court Where the Complaint Is Filed and the 468B Fund Is or Will Be Established . . . .	3-54.112
	[iii] Establish the 468B Fund in the Court Having Jurisdiction Over the Protected Person's Affairs. . . . .	3-54.112
§ 3.09	Surety Bonds and Other Financial Guarantees. . . . .	3-55
	[1] "Surety" Which Is Not a Surety . . . . .	3-55
	[2] Surety Within Same Economic Family as Assignee . . . . .	3-55
§ 3.10	Other Financing Vehicles . . . . .	3-57
	[1] Introduction . . . . .	3-57
	[2] Personal Injury Settlement Planning . . . . .	3-57
	[3] State Funds and Statutes . . . . .	3-58
	[4] Life Insurance. . . . .	3-59
	[5] Retained Asset Accounts . . . . .	3-59
	[6] Variable Annuities . . . . .	3-61
	[7] Indexed Annuities . . . . .	3-64
	[7A] Market-Based Programs. . . . .	3-64.2
	[8] Commutation Riders . . . . .	3-64.3
	[9] Medical Cost Products. . . . .	3-66
	[10] Previously-Transferred Structured Settlement Payment Rights . . . . .	3-67
	[a] Factoring of Structured Settlement Payment Rights—in General. . . . .	3-67
	[b] Downstream Markets for Previously-Transferred Structured Settlement Payment Rights Factored Payment Rights. . . . .	3-70

**STRUCTURED SETTLEMENTS**

[i]	Downstream Investors Other Than Injury Claimants . . . .	3-70
[ii]	Injury Claimants Who Settle with Deferred Damage Payments Funded by Previously-Transferred Structured Settlement Payment Rights . . . . .	3-71
[iii]	Injury Claimants Who Settle with Lump Sum Damages That Are Invested to Produce a Fixed Income Stream Funded by Previously-Transferred Structured Settlement Payment Rights . . . . .	3-72
[11]	Conclusion . . . . .	3-81

**CHAPTER 4****Role and Responsibilities of Defense Counsel  
in Structured Settlements**

§ 4.01	Why the Nature of the Settlement Matters to the Defense. . . . .	4-2
[1]	Effect of Periodic Payments on the Defense. . . . .	4-2
[2]	Structured Settlement Participants. . . . .	4-4
[3]	Basic Structured Settlement Questions for Defendants . . . . .	4-6
[4]	Structured Settlement and Values Metrics . . . . .	4-6
§ 4.02	Insurance Policy Issues. . . . .	4-10.2
[1]	Control of Decisions . . . . .	4-10.2
[2]	Policy Limits . . . . .	4-10.5
§ 4.03	Financial Impact on Defense Participants . . . . .	4-15
[1]	1099 Reporting of Settlements and Payments to Attorneys . . . . .	4-15
[1A]	Taxable Self-Insured Defendants. . . . .	4-16
[2]	Nontaxable Self-Insured Defendants. . . . .	4-18
[3]	Liability Insurers . . . . .	4-19
[a]	Regulation. . . . .	4-19
[b]	Accounting . . . . .	4-21
[c]	Taxation . . . . .	4-26
[d]	Related Party Transactions . . . . .	4-26

# TABLE OF CONTENTS

xxv

§ 4.04	Privacy . . . . .	4-28
§ 4.05	Defendant Disclosure Issues . . . . .	4-32
	[1] Introduction . . . . .	4-32
	[2] State Structured Settlement Protection Statutes . . . . .	4-32
	[3] Product Disclosures and Representations . . . . .	4-37
	[a] Introduction . . . . .	4-37
	[b] Cost or Value . . . . .	4-39
	[c] NAIC Annuity Disclosure Model Regulation . . . . .	4-40
	[d] NAIC Suitability in Annuity Transactions Model Regulation . . . . .	4-41
	[e] Compensation . . . . .	4-42.2
	[f] “Guaranteed” Payments . . . . .	4-42.3
	[i] “Guaranteed Payments” vs. Payments To Be Made for a “Term Certain” . . . . .	4-42.4
	[ii] Guaranteed Payments Under State Life and Health Guaranty Associations (“GAs”) . . . . .	4-42.5
	[g] Dissipation Studies . . . . .	4-42.6
	[h] Public Assistance . . . . .	4-42.7
	[i] Annuity Ownership and Rights . . . . .	4-42.7
	[j] Taxation . . . . .	4-42.8
	[k] Financial Condition . . . . .	4-42.8
	[4] Conflicts of Interest . . . . .	4-42.9
	[5] Medicaid/Medicare Disclosures . . . . .	4-42.9
	[6] Security Law Issues . . . . .	4-42.10
	[7] Class Action Lawsuits v. Defendants . . . . .	4-42.16
	[a] <i>Macomber v. Travelers</i> . . . . .	4-42.16
	[b] <i>Spencer v. Hartford</i> . . . . .	4-42.18
	[c] <i>Ezell v. Lexington Insurance Company</i> (and Other Insurers of the AIG Group) . . . . .	4-42.21
	[8] Meeting Professional Responsibilities . . . . .	4-42.23
§ 4.06	Drafting of Settlement Documents . . . . .	4-42.25
	[1] Ultimate Responsibility for the Settlement Documents . . . . .	4-42.25
	[2] Release for All but the Obligor . . . . .	4-45
	[3] Definition of Roles and Obligations . . . . .	4-46.1
	[4] Court Approval . . . . .	4-50
	[5] Sealing of Court File . . . . .	4-52
§ 4.07	Multiple Defendants . . . . .	4-53
	[1] Management by the Defense . . . . .	4-53

[2]	Options for Defense Participants . . . . .	4-54
[3]	The Importance of Clear Drafting of Settlement Documents . . . . .	4-55

## CHAPTER 5

### Role and Responsibilities of Plaintiff's Counsel in Structured Settlements

§ 5.01	Why the Nature of a Settlement Matters to the Plaintiff's Attorney . . . . .	5-4
[1]	Effect of Structured Settlements on the Role of the Plaintiff's Attorney . . . . .	5-4
[a]	Ethical Considerations . . . . .	5-6
[b]	Legal Malpractice and Structured Settlements . . . . .	5-8
[c]	Compensating a Structured Settlement Consultant . . . . .	5-19
[2]	Assistance Available to Plaintiffs and Their Attorneys . . . . .	5-22
[a]	Getting Off on the Right Foot: Knowing What Should Be Included—and Excluded—from the Attorney's Scope of Representation . . . . .	5-22
[b]	Getting Help from Settlement Consultants . . . . .	5-22
[c]	Getting Help from Tax Specialists . . . . .	5-25
[d]	Getting Help from Lien Resolution Specialists . . . . .	5-26
[3]	Checklist . . . . .	5-28
[4]	Plaintiff Attorney Surveys . . . . .	5-28
§ 5.02	Comparing Lump Sum and Structured Settlements . . . . .	5-31
[1]	Many Different Criteria are Appropriate for Decision Making . . . . .	5-31
[2]	Financial Criteria . . . . .	5-33
[a]	Cost to the Defense . . . . .	5-33
[b]	Benefit to the Claimant . . . . .	5-33
[i]	Net Yield . . . . .	5-33
[ii]	Equivalent Yield . . . . .	5-35
[3]	Comparing Settlement Alternatives . . . . .	5-36
[4]	Interrelationship with Government Benefits . . . . .	5-37



## TABLE OF CONTENTS

xxvii

	[a] Social Security Disability Payments . . . . .	5-38
	[b] Supplemental Security Income . . . . .	5-38
	[c] Aid to Families with Dependent Children . . . . .	5-38
	[d] Medicare and Medicaid . . . . .	5-39
	[e] ABLE Accounts . . . . .	5-39
	[f] Planning a Strategy . . . . .	5-40
	[5] Ability to Liquidate a Structured Settlement. . . . .	5-43
	[6] The Special Case of Minors and Incompetents . . . . .	5-44
	[7] Efforts to Get a Lump Sum and Then Structure It . . . . .	5-48
§ 5.03	Using a Qualified Assignment to Make the Plaintiff a Secured Creditor . . . . .	5-49
	[1] Deciding Whether and How to Grant Secured Creditor Rights . . . . .	5-49
	[2] Impact of Article 9 of Uniform Commercial Code . . . . .	5-50
	[a] Article 9 Prior to Its 1999 Revision . . . . .	5-51
	[b] 1999 Revision of Article 9 . . . . .	5-52
	[3] Methods of Securing the Transaction . . . . .	5-53
	[a] Methods to Avoid . . . . .	5-53
	[b] Methods to Use . . . . .	5-54
	[i] Pledges . . . . .	5-54
	[ii] Guarantees. . . . .	5-55
	[iii] Surety Bonds . . . . .	5-56
	[iv] Capital Maintenance Agreement . . . . .	5-57
	[v] Other Methods . . . . .	5-58
	[4] Security Interests in Annuity Contracts . . . . .	5-58
	[5] Security Interests in U.S. Government Obligations . . . . .	5-58.1
§ 5.04	Addressing the Risk of Nonpayment to a Claimant . . . . .	5-58.3
	[1] Protecting the Claimant . . . . .	5-58.3
	[a] Legislative and Regulatory Role . . . . .	5-58.3
	[b] Attorney's Role . . . . .	5-58.5
	[2] Creditor Rights Against the Obligor . . . . .	5-58.5
	[a] "General Creditor" Rule . . . . .	5-58.5
	[i] Judicial Liens . . . . .	5-58.6

**STRUCTURED SETTLEMENTS**

	[ii]	Irrevocable Payees . . . . .	5-58.6
	[b]	Insolvency of Obligor . . . . .	5-58.7
	[i]	Insurance Company as Obligor . . . . .	5-58.7
	[ii]	Non-Insurance Company as Obligor . . . . .	5-58.15
[3]		Other Rights and Remedies for Collecting Periodic Payments . . . . .	5-58.19
	[a]	Rights Against Additional Obligor, Guarantors, or Sureties . . . . .	5-58.20
	[b]	Rights Against the Provider of Structured Settlement Financing . . . . .	5-58.21
	[i]	Annuity Issuer . . . . .	5-58.21
	[ii]	Liability Reinsurer . . . . .	5-58.22
	[c]	Rights Against an Insurance Guaranty Association . . . . .	5-58.23
	[i]	Guaranty Associations Covering Liability Insurers . . . . .	5-58.23
	[ii]	Guaranty Associations Covering Life Insurers . . . . .	5-58.24
[4]		Evaluating the Obligor and Others Involved in Making Periodic Payments . . . . .	5-58.26
	[a]	Evaluating the Strength of Insurance Companies— Risk-Based Capital Analysis Overview . . . . .	5-58.27
	[b]	Evaluating the Strength of Insurance Companies— The Rating Agencies . . . . .	5-58.27
	[c]	Evaluating the Strength of Insurance Companies—NRSRO Ratings . . . . .	5-61
	[d]	Evaluating the Strength of Non-Insurance Companies . . . . .	5-63
[5]		Obtaining Representations from the Defense . . . . .	5-63
§ 5.05		Controlling Decision Making About Structured Settlements . . . . .	5-65
	[1]	Control Issues . . . . .	5-65
	[a]	Settlement or Trial . . . . .	5-65
	[b]	The Type of Settlement . . . . .	5-65
	[c]	Qualified Assignments . . . . .	5-66
	[d]	Funding . . . . .	5-66
	[e]	Payments and Payees . . . . .	5-67

## TABLE OF CONTENTS

xxix

	[2]	How Plaintiffs Can Increase Control . . . . .	5-69
	[a]	Involving a Plaintiff's Consultant . . . . .	5-69
	[b]	Section 468B Funds . . . . .	5-71
	[c]	Trusts . . . . .	5-72
§ 5.06	[3]	Privacy . . . . .	5-73
		Drafting Settlement Documents . . . . .	5-75
	[1]	Ultimate Responsibility for Certain Aspects of Settlement Documents . . . . .	5-75
	[2]	Definitions of Payees . . . . .	5-75
	[3]	Other Matters of Plaintiff's Concern . . . . .	5-77
	[4]	Addressing Subrogation Rights . . . . .	5-80
§ 5.07		Attorney Compensation . . . . .	5-83
	[1]	Determining the Amount of a Contingent Fee . . . . .	5-83
	[a]	The Requirement of a Communication . . . . .	5-83
	[b]	Amount of the Fee . . . . .	5-83
	[i]	Establishing the Attorney Fee When the Cost of the Periodic Payments Are Unknown and Issues Attendant . . . . .	5-84
	[ii]	Obstacles to Establishing Present Value . . . . .	5-85
	[iii]	Methods of Establishing Present Value . . . . .	5-86
	[iv]	Sample Language for Fee Agreement . . . . .	5-89
	[v]	Disclosure of Cost . . . . .	5-91
	[vi]	Avoiding Conflicts . . . . .	5-92
	[vii]	Avoiding Jail . . . . .	5-94
	[c]	Timing of the Fee . . . . .	5-95
	[2]	Deferred Compensation of Attorney Fees . . . . .	5-96
	[a]	Tax Considerations . . . . .	5-96
	[i]	The Early Years of Attorney Fee Structured Settlements and the IRS Opposition . . . . .	5-96
	[ii]	The Post- <i>Childs</i> Years . . . . .	5-100
	[iii]	New Deferral Products and Pushing the Bounds of the <i>Childs</i> Decision . . . . .	5-103

**STRUCTURED SETTLEMENTS**

	[iv] IRS 2022 GLAM .....	5-105
	[b] Nontax Considerations .....	5-106
[3]	Products Available to Attorneys .....	5-107

**CHAPTER 6****Case Preparation**

§ 6.01	Increased Need for Information about the Claimant .....	6-3
§ 6.02	Structured Settlement Consultants .....	6-4
[1]	Roles and Responsibilities of Consultants .....	6-4
	[a] Product Sales .....	6-4
	[b] Other Services .....	6-9
	[i] Cost and Benefit Analysis. ....	6-9
	[ii] Evaluation of Damages .....	6-10
	[iii] Negotiation Assistance .....	6-10
	[iv] Government Benefits .....	6-10
	[v] Expert Testimony .....	6-10
	[vi] Verdict Analysis .....	6-11
	[vii] Sample Closing Documentation .....	6-11
	[viii] Settlement Transfers .....	6-12
	[c] Product Suitability .....	6-12
	[i] Historical Industry Standards .....	6-12
	[ii] NAIC Model Annuity Suitability Regulation. ....	6-13
	[iii] NSSTA and SSP Guidance. ....	6-14.2
	[iv] Other Settlement Planning Standards .....	6-14.3
[2]	Selecting Structured Settlement Consultants .....	6-14.5
	[a] Introduction .....	6-14.5
	[b] Professional Trade Associations. ....	6-14.5
	[i] National Structured Settlement Trade Association (NSSTA). ....	6-14.5
	[ii] The Society of Settlement Planners (SSP) .....	6-14.6
	[iii] The National Association of Settlement Purchasers (NASP) .....	6-14.7

# TABLE OF CONTENTS

xxxi

	[iv]	Other Professional Trade Associations . . . . .	6-14.7
	[c]	Selection Criteria . . . . .	6-14.7
[3]		Business Practices of Consultants . . . . .	6-14.10
	[a]	Introduction. . . . .	6-14.10
	[b]	Laws and Regulations . . . . .	6-14.10
	[c]	Industry Standards . . . . .	6-14.12
	[d]	Issues. . . . .	6-14.14
		[i] Anti-Competitive Practices. . . . .	6-14.14
		[ii] Commission Disputes. . . . .	6-14.15
		[iii] Privacy . . . . .	6-14.16
		[iv] Representations and Disclosures . . . . .	6-14.16
§ 6.03		Evaluation and Argumentation of Damages . . . . .	6-14.18
	[1]	Determinants of Future Loss. . . . .	6-14.18
		[a] Future Medical Expenses. . . . .	6-14.18
		[i] Duration of Loss. . . . .	6-14.18
		[ii] Medical Expense Base . . . . .	6-14.18
		[iii] Medical Expense Growth Rate. . . . .	6-14.19
		[b] Future Lost Earnings . . . . .	6-14.22
		[i] Duration of Loss. . . . .	6-14.22
		[ii] Lost Earning Base . . . . .	6-14.22
		[iii] Earnings Growth Rate . . . . .	6-14.22
		[c] Future Expenses—All Components . . . . .	6-14.24
	[2]	Present Value of Future Loss . . . . .	6-14.25
		[a] Discount Rate . . . . .	6-14.25
		[b] Inflation. . . . .	6-14.26
		[c] Income Tax. . . . .	6-14.26
§ 6.04		Sample Evaluation of Damages . . . . .	6-15
	[1]	Hypothetical Claim for Brain-Damaged Child . . . . .	6-15
	[2]	Purpose of Evaluation . . . . .	6-15
	[3]	Findings of Economic Loss. . . . .	6-15
	[4]	Comparison of Key Assumptions . . . . .	6-15
	[5]	Effect of Alternative Assumptions . . . . .	6-17
	[6]	Application of Periodic Payment . . . . .	6-18
		[a] Schedule of Benefits . . . . .	6-18
		[b] Cost of Benefits . . . . .	6-18
§ 6.05		Discovery Issues . . . . .	6-22
	[1]	Scope of Discovery . . . . .	6-22
	[2]	Potential Bars to Discovery. . . . .	6-22
		[a] Work Product Protection . . . . .	6-23
		[i] Protection is Qualified . . . . .	6-23

**STRUCTURED SETTLEMENTS**

	[ii]	Protection Does Not Include Facts . . . . .	6-23
	[iii]	Protection is Strengthened by Involvement of Counsel . . . . .	6-23
	[iv]	Protection May be Weakened by Involvement of a Testifying Expert . . . . .	6-24
	[b]	Consulting Expert Protection . . . . .	6-24
[3]		Direct Discovery from a Settlement Consultant . . . . .	6-25
	[a]	Discovery of the Consulting Expert's Identity . . . . .	6-25
	[b]	Subpoena <i>Duces Tecum</i> . . . . .	6-26
[4]		Data Privacy . . . . .	6-26
§ 6.06		Using a Checklist . . . . .	6-31
	[1]	Contents of Checklist . . . . .	6-31
	[2]	Checklist of Documents . . . . .	6-35

**CHAPTER 7****Case Negotiation**

§ 7.01		Introduction . . . . .	7-3
§ 7.02		Guidelines for Negotiating Structured Settlements . . . . .	7-5
	[1]	Initial Case Review . . . . .	7-5
		[a] Statutory Requirements and Limitations . . . . .	7-5
		[b] Reviewing Information Checklists . . . . .	7-7
		[c] Obtaining Preliminary Quotes . . . . .	7-7
	[2]	Assemble Supporting Materials . . . . .	7-8
		[a] Tax Materials . . . . .	7-8
		[b] Financial Materials . . . . .	7-8
		[c] Offer Materials . . . . .	7-8
		[d] Economic Materials . . . . .	7-9
		[e] Settlement Documentation Forms . . . . .	7-9
	[3]	Determine Each Participant's Position on Use of Periodic Payment . . . . .	7-9
		[a] Inquiries by Plaintiff's Attorney . . . . .	7-9
		[b] Inquiries by Defense Counsel . . . . .	7-10.1
	[4]	Identify Specific Objectives for Each Negotiating Session . . . . .	7-11

## TABLE OF CONTENTS

xxxiii

	[5]	Making an Offer . . . . .	7-12
	[a]	Describe a Rationale . . . . .	7-12
	[b]	State Terms With Precision . . . . .	7-12
	[i]	Timing of Periodic Payments. . . . .	7-13
	[ii]	Certain v. Life Contingent Payments. . . . .	7-13
	[iii]	Increase Factors . . . . .	7-14
	[iv]	Choice of Obligor. . . . .	7-14
	[v]	Expiration of Offer. . . . .	7-14
	[c]	Reduce All Offers to Writing . . . . .	7-15
	[6]	Analyzing an Offer . . . . .	7-16
	[a]	Wait for a Complete Response to Each Prior Offer . . . . .	7-17
	[b]	Determine the Cost of Each Element. . . . .	7-17
	[c]	Compare Price Differentials . . . . .	7-18
	[d]	Set-Offs, Public Benefits, and Other Matters . . . . .	7-19
	[7]	Concluding a Negotiation . . . . .	7-20
	[a]	Provide a Written Confirmation . . . . .	7-21
	[b]	Review Documentation . . . . .	7-21
	[c]	Review Tax and Financing Issues . . . . .	7-22
	[d]	Obtain Third Party Approvals . . . . .	7-23
§ 7.03		Defense Strategies. . . . .	7-24
	[1]	Evaluate and Confirm the Role of Structured Settlements. . . . .	7-24
	[2]	Define a Negotiation Strategy. . . . .	7-25
	[3]	Establish Value by Reference to Claimant's Economic Needs. . . . .	7-25
	[4]	Negotiate Benefits, Not Cost. . . . .	7-26
	[5]	Make Only One Offer at a Time . . . . .	7-26
	[6]	Condition Any Structured Settlement Offer or Counter Offer on the Client's Preferred Method of Financing. . . . .	7-27
	[7]	Condition the Offer on Confidentiality From Third Parties. . . . .	7-27
	[8]	Make All Mandatory Disclosures . . . . .	7-28
	[9]	Life Company Approved Lists . . . . .	7-28
§ 7.04		Claimant's Strategies . . . . .	7-30
	[1]	Determine Whether Structured Settlement is Appropriate . . . . .	7-30
	[2]	Determine Defendants' Structured Settlement Policy and Strategy . . . . .	7-30

**STRUCTURED SETTLEMENTS**

	[3]	Identify and Retain Structured Settlement Experts . . . . .	7-30
	[4]	Use a Period Certain That Approximates the Claimant's Life Expectancy . . . . .	7-30.1
	[5]	Negotiate Benefits Separately for Each Claimant . . . . .	7-30.1
	[6]	Consider Alternatives to Big Balloon Payments With Long Deferrals . . . . .	7-30.1
	[7]	Evaluate Attendance by a Claimant . . . . .	7-30.2
	[8]	Ask the Defense to Unbundle the Financing . . . . .	7-30.2
	[9]	Utilize QSFs When Appropriate . . . . .	7-30.2
§ 7.05	Other	Issues . . . . .	7-30.4
	[1]	Liens on Amounts Recoverable by Claimant . . . . .	7-30.4
	[2]	Bad Faith . . . . .	7-33
	[3]	Offers of Judgment . . . . .	7-35
	[4]	Post-Judgment Settlements . . . . .	7-35
	[5]	Disclosure of Cost . . . . .	7-35
	[6]	Attorney Fees . . . . .	7-36
	[a]	Sequence of Negotiation of the Fee . . . . .	7-36
	[b]	Amount of the Fee . . . . .	7-36
	[c]	Timing of the Fee . . . . .	7-36
	[7]	Structured Settlement Compensation . . . . .	7-37
	[8]	Representations Regarding Taxation and Financing . . . . .	7-37
	[9]	Complex Litigation . . . . .	7-38
	[a]	Treatment of Partial Periodic Payment Settlements . . . . .	7-38
	[b]	Settlement Funds . . . . .	7-39
	[10]	The Court's Role . . . . .	7-40
	[11]	"Approved Annuity Provider Lists" . . . . .	7-42
§ 7.06		Negotiation Checklist . . . . .	7-44

**CHAPTER 8****Case Closing**

§ 8.01	Introduction . . . . .	8-2
§ 8.02	Administrative Steps in Closing. . . . .	8-3
	[1] Defense Counsel Gives Notification of Settlement or Judgment . . . . .	8-3
	[2] Consultant Confirms a Financing Commitment. . . . .	8-3



# TABLE OF CONTENTS

xxxv

	[3]	Obtaining Court Approval . . . . .	8-4
	[4]	Defense Team Submits All Closing Materials to Consultant . . . . .	8-12
	[5]	Consultant Obtains Financing and Sends Evidence to Defense Team . . . .	8-13
§ 8.03		Closing Documentation. . . . .	8-14
	[1]	Need for Careful Drafting . . . . .	8-14
	[2]	Settlement Agreement . . . . .	8-17
	[3]	Supplemental Schedule . . . . .	8-25
	[4]	Annuity Contract . . . . .	8-25
	[5]	Qualified Assignment. . . . .	8-28
	[6]	Advisory Disclosure. . . . .	8-29
	[7]	Surety Bond and Guarantees. . . . .	8-30
	[8]	Commutation Rider . . . . .	8-31
	[9]	Indemnity Reinsurance. . . . .	8-31
	[10]	Assumption Reinsurance . . . . .	8-32
	[11]	Reversionary Grantor Trust. . . . .	8-33
	[12]	Special Needs Trust. . . . .	8-33
	[13]	Medicare Set-Aside Trust . . . . .	8-35
§ 8.04		Issues Arising After Closing of the Case . . . . .	8-36
	[1]	Claimant's Divorce . . . . .	8-36
	[a]	Periodic Payments as Marital Property . . . . .	8-36
	[b]	Periodic Payments as Separate Property . . . . .	8-37
	[c]	Periodic Payments as a Mix of Marital and Separate Property . . . .	8-38.1
	[d]	Child Support . . . . .	8-42
	[2]	Claimant's Indebtedness . . . . .	8-43
	[a]	Bankruptcy . . . . .	8-43
	[b]	Assignment of Future Payment Rights . . . . .	8-54
	[c]	Garnishment of Damage Payments . . . . .	8-55
	[3]	Claimant's Death . . . . .	8-56
	[4]	Attempts to Set Aside Settlement Agreement Because of Adverse Tax Impact. . . . .	8-62
	[5]	Overpayment . . . . .	8-63
	[6]	General Releases in Structured Settlements May Not Bar Fraud in the Inducement Claims . . . . .	8-63
§ 8.05		Settlement Hearing . . . . .	8-64
§ 8.06		What Judges Need to Know Before Approving a Structured Settlement Plan . . . . .	8-67

**STRUCTURED SETTLEMENTS**

[1]	The Problem: Inadequate Judicial Review of Settlement Plans for Protected Persons . . . . .	8-67
[2]	Proposed Solution: Using a Checklist to Inform Judicial Review of a Proposed Settlement Plan, and Mandating Key Disclosures from Its Proponents . . . . .	8-69
[a]	Using a Sample Checklist . . . . .	8-69
[b]	Mandating Key Disclosures . . . . .	8-79

**CHAPTER 9****Uniform Periodic Payment of Judgments Act**

§ 9.01	History of the Uniform Act . . . . .	9-5
[1]	The National Conference of Commissioners on Uniform State Laws . . . . .	9-5
[2]	The Model Act . . . . .	9-5
[3]	The Uniform Act . . . . .	9-6
§ 9.02	Summary of the Uniform Act . . . . .	9-8
[1]	Scope of the Act . . . . .	9-8
[2]	Election for the Act to Apply . . . . .	9-8
[3]	Required Damages Findings . . . . .	9-10
[4]	Determining the Form of the Judgment . . . . .	9-13
[a]	Step One: Apply Any Rules of Law, Other Than Setoff or Credit, That Increase or Reduce the Recovery . . . . .	9-13
[b]	Step Two: Account for Any Lump-Sum Setoff or Credit . . . . .	9-13
[c]	Step Three: Account for Any Periodic-Payment Setoff or Credit . . . . .	9-14
[d]	Step Four: Specify Attorney's Fees and Litigation Expenses . . . . .	9-15
[e]	Step Five: Adjust the Periodic Payments as Necessary to Provide Funds to Pay Any Attorney's Fees and Litigation Expenses Owed in Lump Sum . . . . .	9-15
[f]	Step Six: Adjust the Periodic Payments as Necessary to Pay Anything Else Owed in Lump Sum . . . . .	9-16

## TABLE OF CONTENTS

xxxvii

	[g] Step Seven: Specify All Lump Sums and Periodic Payments in the Judgment . . . . .	9-16
	[h] No Interest on Periodic Payments . . . . .	9-17
	[i] Step Eight: Describe the Qualified Funding Plan in the Judgment . . . . .	9-18
[5]	Effect of Death . . . . .	9-18
[6]	Funding the Judgment . . . . .	9-19
	[a] Qualified Funding Plans . . . . .	9-19
	[i] Defendant Is the Obligor . . . . .	9-19
	[ii] Defendant's Liability Insurer Is the Obligor . . . . .	9-21
	[iii] Assignee Is the Obligor . . . . .	9-21
	[iv] Reinsurer Is the Obligor . . . . .	9-22
	[v] Agreement of the Parties . . . . .	9-23
	[b] Time Limit for Providing Funding . . . . .	9-23
	[c] More Than One Defendant Liable . . . . .	9-23
	[d] Liability Insurer's Obligation . . . . .	9-23
	[e] Inability to Fund . . . . .	9-24
[7]	Bonding the Judgment on Appeal . . . . .	9-25
[8]	Satisfaction of Judgment . . . . .	9-25
[9]	Assignment and Exemption of Periodic Payments . . . . .	9-26
[10]	Arbitrations and Settlement Agreements . . . . .	9-27
[11]	Duties of the Insurance Commissioner . . . . .	9-27
[12]	Effective Date of the Act . . . . .	9-28
§ 9.03	Analysis and Evaluation of the Uniform Act . . . . .	9-29
	[1] Scope of the Act . . . . .	9-29
	[a] Limited to Bodily Injury . . . . .	9-29
	[b] Limited to Future Economic Damages . . . . .	9-29
	[2] Election for the Act to Apply . . . . .	9-30
	[a] \$100,000 Threshold . . . . .	9-30
	[b] Essentially Mandatory . . . . .	9-31
	[3] Required Damages Findings . . . . .	9-32
	[a] Inflation Is Key . . . . .	9-32
	[b] Special Verdict Defines the Periodic-Payment Schedule . . . . .	9-33
	[c] Special Verdict Increases the Complexity of the Jury's Task . . . . .	9-33

**STRUCTURED SETTLEMENTS**

	[d] No Need to Determine Life Expectancy for Lifetime Medical Expenses .....	9-34
[4]	Determining the Form of the Judgment .....	9-35
	[a] For Any Given Verdict There Is But One Possible Periodic-Payment Judgment.....	9-35
	[b] Present Value Equals Cost of Funding.....	9-36
	[c] No Interest on Periodic Payments...	9-37
[5]	Effect of Death.....	9-37
[6]	Funding the Judgment .....	9-38
	[a] Regulation of Participants in Funding Plans.....	9-38
	[b] Provision for Secured-Creditor Status .....	9-39
	[c] Flexibility in Funding .....	9-40
	[d] Future Insolvency Not Addressed.....	9-41
[7]	Liability Insurer's Obligation .....	9-41
[8]	Assignment and Garnishment .....	9-42
[9]	Judicial Receptivity to the Uniform Act .....	9-42
§ 9.04	Hypothetical Applications of the Uniform Act.....	9-45
	[1] Assumptions Underlying Three Hypothetical Cases .....	9-45
	[2] First Scenario: Adjustment of Verdict for One-Third Lump-Sum Attorney's Fee .....	9-46
	[a] Case 1 .....	9-46
	[i] Calculation of Fee .....	9-46
	[ii] Source of Funds to Pay Fee...	9-46
	[iii] Judgment.....	9-46
	[b] Case 2 .....	9-46
	[i] Calculation of Fee .....	9-46
	[ii] Source of Funds to Pay Fee.....	9-46
	[iii] Judgment.....	9-47
	[c] Case 3 .....	9-47
	[i] Calculation of Fee .....	9-47
	[ii] Source of Funds to Pay Fee.....	9-47

**TABLE OF CONTENTS**

xxxix

	[iii]	Judgment . . . . .	9-47
[3]		Second Scenario: Adjustment of Verdict for (1) Prior Settlement of \$300,000 in Cash and (2) One-Third Attorney's Fee . . . . .	9-48
	[a]	Case 1 . . . . .	9-48
		[i] Settlement Setoff . . . . .	9-48
		[ii] Calculation of Fee . . . . .	9-48
		[iii] Source of Funds to Pay Fee . . . . .	9-48
		[iv] Judgment . . . . .	9-48
	[b]	Case 2 . . . . .	9-49
		[i] Settlement Setoff . . . . .	9-49
		[ii] Calculation of Fee . . . . .	9-49
		[iii] Source of Funds to Pay Fee. . .	9-49
		[iv] Judgment . . . . .	9-50
	[c]	Case 3 . . . . .	9-50
		[i] Settlement Setoff . . . . .	9-50
		[ii] Calculation of Fee . . . . .	9-50
		[iii] Source of Funds to Pay Fee . . . . .	9-50
		[iv] Judgment . . . . .	9-50
[4]		Third Scenario: Adjustment of Verdict for (1) Prior Settlement of \$300,000 in Cash and Periodic Payments That Cost \$400,000 and (2) One-Third Attorney's Fee . . . . .	9-51
	[a]	Case 1 . . . . .	9-51
		[i] Settlement Setoff for \$300,000 in Cash . . . . .	9-51
		[ii] Settlement Setoff for Periodic Payments That Cost \$400,000 . . . . .	9-51
		[iii] Calculation of Fee . . . . .	9-51
		[iv] Source of Funds to Pay Fee. . .	9-51
		[v] Judgment . . . . .	9-51
	[b]	Case 2 . . . . .	9-52
		[i] Settlement Setoff for \$300,000 in Cash . . . . .	9-52
		[ii] Settlement Setoff for Periodic Payments That Cost \$400,000 . . . . .	9-52
		[iii] Calculation of Fee . . . . .	9-52
		[iv] Source of Funds to Pay Fee. . .	9-52

## STRUCTURED SETTLEMENTS

	[v] Judgment . . . . .	9-53
[c]	Case 3 . . . . .	9-53
	[i] Settlement Setoff for \$300,000 in Cash . . . . .	9-53
	[ii] Settlement Setoff for Periodic Payments That Cost \$400,000 . . . . .	9-53
	[iii] Calculation of Fee . . . . .	9-54
	[iv] Source of Funds to Pay Fee . . . . .	9-54
	[v] Judgment . . . . .	9-54
[5]	Hypothetical Case in the Commissioners' Comment to the Uniform Act . . . . .	9-55

## CHAPTER 10

### Survey of State Statutes Periodic Payment Judgments

§ 10.01	Introduction . . . . .	10-2
§ 10.02	Damages Subject to Periodic Payment . . . . .	10-7
	[1] Injuries Covered by State Statutes . . . . .	10-7
	[2] Threshold Amounts . . . . .	10-10
	[3] Damages Which May Be Paid Periodically . . . . .	10-11
	[4] Applicability to Torts Prior to Statute's Passage . . . . .	10-14.1
	[5] Arbitration . . . . .	10-14.1
§ 10.03	Roles of Parties, Judge and Jury . . . . .	10-15
	[1] Optional Periodic Payments . . . . .	10-15
	[2] Judge's Discretion to Order Periodic Payments . . . . .	10-17
	[3] Role of the Jury . . . . .	10-22.1
	[4] Determination of Damages . . . . .	10-25
§ 10.04	Form of the Periodic Payment Judgment . . . . .	10-27
	[1] Essential Terms of the Judgment . . . . .	10-27
	[2] Assurance of Payment . . . . .	10-30
	[3] Availability of Adjustments . . . . .	10-34
	[4] Reversions and Beneficiaries . . . . .	10-37
§ 10.05	Treatment of Attorney Fees . . . . .	10-39
§ 10.06	Constitutionality of State Statutes Authorizing Periodic Payment Judgments . . . . .	10-42.2

## TABLE OF CONTENTS

xli

[1]	Constitutionality of Statutes Singling Out Medical Malpractice Cases . . . . .	10-42.2
[2]	Constitutionality of Statutes Generally Authorizing Periodic Payment of Judgments. . . . .	10-50

## CHAPTER 11

### Procedure for Fashioning a Periodic Payment Judgment

§ 11.01	The Request for a Periodic Payment Judgment. . . . .	11-2
	[1] Initial Pleadings . . . . .	11-2
	[2] Pre-Trial Motion. . . . .	11-3
	[3] Post-Verdict Motion. . . . .	11-4
§ 11.02	Discovery. . . . .	11-5
§ 11.03	Itemized Verdicts . . . . .	11-7
	[1] Needed Elements . . . . .	11-7
	[2] Alternatives. . . . .	11-13
§ 11.04	Presentation of Damages . . . . .	11-14.1
	[1] Generally . . . . .	11-14.1
	[2] Plaintiff's Presentation. . . . .	11-14.1
	[3] Defense Presentation . . . . .	11-14.3
	[4] Annuity Testimony. . . . .	11-14.4
§ 11.05	Post-Verdict Events. . . . .	11-15
	[1] Translating the Verdict's Numbers into a Judgment . . . . .	11-16
	[2] Offsets and Other Reductions . . . . .	11-19
	[3] Attorney Fees . . . . .	11-19
	[a] Amount of the Fee. . . . .	11-20
	[b] Allocating Fees Among Portions of the Judgment. . . . .	11-23
	[c] Timing of Fee Receipt. . . . .	11-24
	[4] The Periodic Payment Plan . . . . .	11-26
	[a] Who Will Pay? . . . . .	11-26
	[b] Assurances that Future Payments Will Be Made. . . . .	11-28
	[c] Modifications and Reversionary Rights . . . . .	11-28.2
	[5] Post-Verdict Hearing . . . . .	11-28.3
	[6] An Example of a Verdict Translated into a Periodic Payment Judgment. . . . .	11-28.5
	[7] Interest . . . . .	11-28.8

§ 11.06	Appeals . . . . .	11-29
§ 11.07	Conclusions . . . . .	11-33

## CHAPTER 12

### Annuity Testimony

§ 12.01	Introduction . . . . .	12-2
§ 12.02	Use of Annuity Testimony . . . . .	12-5
	[1] The Economics of Present Cash Value . . . . .	12-5
	[2] Annuity Testimony As An Alternative Method of Present Value Calculation . . . . .	12-7
	[3] “Annuitist” Defined . . . . .	12-8
§ 12.03	Standards of Review . . . . .	12-9
	[1] Trial Court Discretion . . . . .	12-9
	[2] Misleading, Confusing, or Prejudicial Nature of Evidence v. Its Probative Value . . . . .	12-9
	[3] Statutes or Rules Requiring or Permitting Use of Annuity Testimony . . . . .	12-10
	[a] Specific Evidentiary Rules. . . . .	12-10
	[b] Periodic Payment Judgment Statutes . . . . .	12-10
§ 12.04	Distinguishing Types of Annuity Testimony. . . . .	12-12
	[1] Annuity Tables or Neutral Figures . . . . .	12-12
	[2] Single v. Multiple Quotes as Indication of Market Rate. . . . .	12-13
	[3] Economist Testifying About Annuity Prices . . . . .	12-15
§ 12.05	Objections to Annuity Testimony . . . . .	12-16
	[1] Hearsay . . . . .	12-16
	[2] Quote Expiration . . . . .	12-17
	[3] Rated Age v. Life Expectancy . . . . .	12-17
	[4] Risk Allocation. . . . .	12-18
	[a] Tort Victim is Entitled to Risk-Free Discount Rate . . . . .	12-18
	[b] Risk of Default. . . . .	12-19
	[c] Risks of Inflation and Consumption . . . . .	12-19
	[5] Future Medical Expenses. . . . .	12-20
	[6] Possible Affiliation with Defendant’s Insurer . . . . .	12-21



## TABLE OF CONTENTS

xliii

	[7] Double Discounting . . . . .	12-22
	[8] Failure to Identify the Annuitist as an Expert . . . . .	12-22
§ 12.06	Strengths of Annuity Testimony . . . . .	12-23
	[1] Present Value Calculation in Real World Terms . . . . .	12-23
	[2] Risk of Life Expectancy is Transferred to the Annuity Issuer. . . . .	12-23

## CHAPTER 13

### Periodic Payments in Environmental Cases

§ 13.01	Introduction . . . . .	13-1
§ 13.02	Environmental Personal Injury Claims . . . . .	13-2
§ 13.03	Superfund Cases . . . . .	13-4
§ 13.04	Resolving Environmental Claims With Section 468B Qualified Settlement Funds . . . .	13-7
§ 13.05	Caveat on Use of Section 468B in Environmental Settlements with a Remote Obligation . . . . .	13-11

## CHAPTER 14

### Structuring Workers' Compensation Claims

§ 14.01	Nature of Workers' Compensation Laws . . . . .	14-2
§ 14.02	Statutory Benefits . . . . .	14-3
§ 14.03	Funding Workers' Compensation Benefits . . . . .	14-4
§ 14.04	Tax Treatment of Benefits . . . . .	14-5
§ 14.05	Claim Financing Techniques . . . . .	14-7
	[1] Compromise Settlements and Redemptions. . . . .	14-7
	[2] Financing of Statutory Obligations . . . . .	14-8.1
	[a] Accounting Issues. . . . .	14-8.1
	[b] Economic Results. . . . .	14-12
	[3] Post-Settlement Treatment of Benefits . . . .	14-14
§ 14.06	Workers Compensation Medicare Set-Aside Arrangements. . . . .	14-19

**STRUCTURED SETTLEMENTS**

[1]	Introduction . . . . .	14-19
[2]	WCMSA Structured Settlement Metrics . . . . .	14-21
[3]	Structured Settlement WCMSA Cost Advantage . . . . .	14-23
[4]	CMS WCMSA Reference Guide Overview . . . . .	14-25

**CHAPTER 15****Government Benefits and Structured Settlements**

§ 15.01	Introduction . . . . .	15-4
§ 15.02	Social Security . . . . .	15-5
[1]	History of Disability Programs . . . . .	15-5
[a]	Traditional Sources of Economic Security . . . . .	15-5
[b]	Formal Systems of Economic Security . . . . .	15-5
	[i] English Poor Laws . . . . .	15-5
	[ii] Colonial America . . . . .	15-5
	[iii] Civil War Pensions . . . . .	15-5
	[iv] Corporate Pensions . . . . .	15-6
	[v] State Old-Age Pensions . . . . .	15-6
	[vi] Demographic Changes . . . . .	15-6
	[vii] Social Insurance Movement . . . . .	15-6
[2]	Social Security Act . . . . .	15-6
[a]	Original Enactment and Expansion . . . . .	15-6
[b]	Major Provisions . . . . .	15-7
[c]	Program Growth . . . . .	15-7
[3]	The Social Security Administration . . . . .	15-7
[4]	Social Security Benefits for People with Disabilities . . . . .	15-8
[a]	Definition of “Disability” . . . . .	15-8
[b]	Social Security Disability Insurance (SSDI) . . . . .	15-8
	[i] Introduction . . . . .	15-8
	[ii] Eligibility . . . . .	15-9
	[iii] Benefits . . . . .	15-9
	[iv] SSD, Medicare and Workers Compensation . . . . .	15-10
	[v] Disabled Adult Children’s Benefits . . . . .	15-10

## TABLE OF CONTENTS

xlv

	[c]	Supplemental Security Income (SSI) . . . . .	15-11
	[i]	Introduction. . . . .	15-11
	[ii]	Eligibility Requirements. . . . .	15-11
	[iii]	Benefits . . . . .	15-13
	[iv]	SSI and Structured Settlements . . . . .	15-13
§ 15.03		Medicare . . . . .	15-15
	[1]	Introduction . . . . .	15-15
	[2]	Medicare Secondary Payer Rules . . . . .	15-15
	[3]	Conditional Payment Process . . . . .	15-27
	[4]	Medicare, Medicaid and SCHIP Extension Act of 2007. . . . .	15-32
	[5]	Medicare Set-Aside Arrangements . . . . .	15-33
	[a]	Introduction. . . . .	15-33
	[b]	Workers Compensation MSAs . . . . .	15-35
	[c]	Liability MSAs. . . . .	15-37
	[6]	SMART Act of 2012. . . . .	15-41
	[a]	Section 201: Requirement that CMS Maintain a Secure Website. . . . .	15-42
	[b]	Section 202: Reimbursement and Reporting Thresholds. . . . .	15-42
	[c]	Section 203: Reporting Requirement . . . . .	15-43
	[d]	Section 204: Use of Social Security Numbers and Other Identifying Information in Reporting Is Optional . . . . .	15-43
	[e]	Section 205: Three-Year Statute of Limitations. . . . .	15-43
§ 15.04		Medicaid . . . . .	15-44
	[1]	Introduction . . . . .	15-44
	[2]	Medicaid Omnibus Reconciliation Budget Act. . . . .	15-45
	[3]	Deficit Reduction Act of 2005 . . . . .	15-45
	[a]	Annuity Rules Under the DRA . . . . .	15-45
	[i]	Lack of Guidance as to Applicability of DRA Annuity Rules to Structured Settlements and Special Needs Trusts. . . . .	15-46
	[ii]	The Role of Annuities in Preserving Medicaid Eligibility . . . . .	15-47

**STRUCTURED SETTLEMENTS**

	[iii]	The Requirement of Disclosure . . . . .	15-47
	[iv]	“Safe Harbor” Annuity Rules . . . . .	15-47
	[b]	Annuity and/or Structured Settlement Design . . . . .	15-49
	[c]	Pre-DRA Annuity Purchases . . . . .	15-51
[4]		Structured Settlement DRA Issues . . . . .	15-51
[5]		Regulation . . . . .	15-52
	[a]	Social Security Administration (SSA) . . . . .	15-52
	[b]	Centers for Medicare and Medicaid Services (CMS) . . . . .	15-52
	[c]	State Medicaid Agencies . . . . .	15-53
[6]		Medicaid Liens . . . . .	15-53
[7]		Special Needs Trusts . . . . .	15-55
	[a]	Introduction . . . . .	15-55
	[b]	Self-Settled Special Needs Trusts . . . . .	15-56
	[i]	Definition and General Requirements . . . . .	15-56
	[ii]	Availability of Assets . . . . .	15-57
	[iii]	Transfer Rules . . . . .	15-58
	[iv]	Disbursement Rules . . . . .	15-58
	[v]	Payback Rules . . . . .	15-58
	[vi]	Pooled Trusts . . . . .	15-59
[8]		Structured Settlement Rules for Special Needs Trusts . . . . .	15-59
	[a]	Definitions . . . . .	15-59
	[b]	Social Security Administration Rules . . . . .	15-60
	[c]	Centers for Medicare and Medicaid Services Rules . . . . .	15-61
	[i]	Deficit Reduction Act . . . . .	15-61
	[ii]	Secondary Market . . . . .	15-61
§ 15.05		ABLE Accounts . . . . .	15-63
	[1]	Federal Law . . . . .	15-64
	[a]	The Federal ABLE Act . . . . .	15-64
	[b]	Federal Requirements for Qualified ABLE Programs . . . . .	15-66
	[i]	Requirements Under the ABLE Act and Code § 529A . . . . .	15-66
	[ii]	Proposed IRS Regulations on “Qualified ABLE Programs” . . . . .	15-67

**TABLE OF CONTENTS**

xlvii

	[iii] Interim Guidance Published in the Internal Revenue Bulletin . . . . .	15-68
	[iv] IRS Publishes Final ABLE Regulations . . . . .	15-69
	[c] Response by Affected Federal Agencies . . . . .	15-70
	[i] Social Security Administration . . . . .	15-70
	[ii] Other Affected Federal Agencies . . . . .	15-74
	[d] Additional Federal and State Benefits . . . . .	15-74
[2]	State ABLE Programs . . . . .	15-75
[3]	ABLE Accounts in Practice . . . . .	15-76
	[a] Eligibility for an ABLE Account . . . . .	15-76
	[b] Use of an ABLE Account . . . . .	15-77
	[c] Management of ABLE Accounts . . . . .	15-78.1
[4]	Comparison of Special Needs Trusts (SNTs) and ABLE Accounts . . . . .	15-78.1
	[a] Similarities Between SNTs and ABLE Accounts . . . . .	15-78.2
	[b] Differences Between SNTs and ABLE Accounts . . . . .	15-78.2
[5]	Using Structured Settlements to Fund ABLE Accounts . . . . .	15-78.6
	[a] Indirect Funding via an SNT or Pooled Trust . . . . .	15-78.6
	[b] Thoughts on Direct Funding of ABLE Accounts from a Structured Settlement . . . . .	15-78.6
	[c] Thoughts on Solving the Problem of Using Structured Settlements for Direct Funding of ABLE Accounts . . . . .	15-78.8
§ 15.06	Veterans Benefits . . . . .	15-78.9
§ 15.07	Federally Assisted Housing . . . . .	15-81
	[1] Section 202 Program . . . . .	15-81
	[2] Section 8 Rental Assistance . . . . .	15-81
§ 15.08	Patient Protection and Affordable Care Act . . . . .	15-82

## CHAPTER 16

## Transfers of Structured Settlement Payment Rights

§ 16.01	Introduction . . . . .	16-4
	[1] Background . . . . .	16-4
	[2] Definitions . . . . .	16-5
	[3] Public Policy . . . . .	16-6
	[4] Consumer Financial Protection Bureau ("CFPB") . . . . .	16-8
	[a] Enforcement Activities by the CFPB . . . . .	16-8
	[b] CFPB "Warning" on Factoring . . . . .	16-11
	[5] Other Government Actions Against/Inquiries Into Factoring Company Business Practices . . . . .	16-11
	[6] Purpose of Chapter . . . . .	16-12
§ 16.02	History of Structured Settlement Transfers . . . . .	16-12.1
	[1] Origin and Participants . . . . .	16-12.1
	[2] Business Practices and Issues . . . . .	16-12.2
	[a] In General . . . . .	16-12.2
	[b] Contract Rights v. Annuity Rights . . . . .	16-12.8
	[c] Anti-Assignment language . . . . .	16-12.9
	[d] Validity of Assignments . . . . .	16-17
	[e] UCC Article 9 . . . . .	16-18.3
	[f] <i>Restatement (Second) of         Contracts</i> . . . . .	16-22
	[g] Taxation Issues . . . . .	16-24
	[h] Fixed v. Life Contingent Payments . . . . .	16-26
	[i] Purchase v. Loan . . . . .	16-26.2
§ 16.03	IRC § 5891 . . . . .	16-27
	[1] Introduction . . . . .	16-27
	[2] Summary of Act . . . . .	16-28
	[a] Imposition of Tax . . . . .	16-28
	[b] Exception for Certain Approved Transactions . . . . .	16-28
	[i] In General . . . . .	16-28
	[ii] Qualified Order . . . . .	16-29
	[iii] Applicable State Statute . . . . .	16-29
	[iv] Applicable State Court . . . . .	16-29
	[v] Qualified Order as Dispositive . . . . .	16-29

**TABLE OF CONTENTS**

xlix

[c]	Definitions . . . . .	16-30
	[i] Structured Settlement . . . . .	16-30
	[ii] Structured Settlement Payment Rights . . . . .	16-31
	[iii] Structured Settlement Factoring Transaction. . . . .	16-31
	[iv] Factoring Discount . . . . .	16-31
	[v] Responsible Administrative Authority. . . . .	16-32
	[vi] State. . . . .	16-32
[d]	Coordination with Other Provisions. . . . .	16-32
	[i] In General. . . . .	16-32
	[ii] No Withholding of Tax . . . . .	16-33
	[iii] Effective Dates . . . . .	16-33
[3]	Analysis of IRC § 5891. . . . .	16-34
	[a] In General. . . . .	16-34
	[i] Public Policy. . . . .	16-34
	[ii] Effect on Structured Settlement Industry . . . . .	16-34
	[iii] Structured Settlement Factoring Transactions. . . . .	16-35
	[b] Imposition of Tax. . . . .	16-36
	[c] Approved Transactions. . . . .	16-36
	[d] Definitions . . . . .	16-38
	[i] Structured Settlement . . . . .	16-38
	[ii] Structured Settlement Payment Rights . . . . .	16-39
	[iii] Structured Settlement Factoring Transaction. . . . .	16-39
	[iv] Factoring Discount . . . . .	16-40
	[v] Responsible Administrative Authority. . . . .	16-41
	[e] Related Tax Provisions . . . . .	16-41
	[f] Impact of IRC § 5891 . . . . .	16-42
	[i] Claimants and Their Attorneys . . . . .	16-42
	[ii] State Legislatures . . . . .	16-43
	[iii] State Judges . . . . .	16-44
	[iv] Transfer Companies . . . . .	16-45
	[v] Defendants and Their Attorneys . . . . .	16-45
	[vi] Annuity Providers. . . . .	16-46
	[vii] Structured Settlement Industry. . . . .	16-46

## STRUCTURED SETTLEMENTS

	[viii] Critics and Alternatives . . . . .	16-46.1
§ 16.04	Structured Settlement Protection Acts (SSPAs) . . .	16-47
	[1] Legislative Recognition of the Need for SSPAs. . . . .	16-47
	[2] Model Legislation . . . . .	16-49
	[3] How the SSPAs Work. . . . .	16-50
	[a] Required Disclosures . . . . .	16-51
	[b] Court Approval. . . . .	16-51
	[c] Procedural Requirements . . . . .	16-52
	[d] Supplemental Protections. . . . .	16-53
	[4] Procedure for Seeking Court Approval . . . . .	16-57
	[a] Where to File the Transfer Application. . . . .	16-57
	[b] Contents of the Transfer Application. . . . .	16-58
	[i] Application for Approval of Transfer . . . . .	16-58.1
	[ii] Transfer Agreement . . . . .	16-58.1
	[iii] Disclosure Statement . . . . .	16-58.1
	[iv] Notice to Interested Parties. . . . .	16-58.1
	[v] Listing of the Payee's Dependents. . . . .	16-59
	[vi] Full Details of Underlying Structured Settlement Documentation . . . . .	16-59
	[5] Opposed v. Unopposed Applications . . . . .	16-62
	[a] Unopposed Applications . . . . .	16-62
	[b] Objections Based on Contractual Anti-Assignment Provisions, Including Choice of Law Considerations . . . . .	16-62
	[c] Objections Based on Other Grounds . . . . .	16-66
	[6] Transfers v. Commutations . . . . .	16-66
	[7] Proceedings. . . . .	16-68
	[8] Post-Transfer Matters. . . . .	16-69
§ 16.05	Judicial Review of Transfer Applications . . . . .	16-72
	[1] Role of the Court as Gatekeeper. . . . .	16-72
	[2] Identifying the Applicable SSPA(s) . . . . .	16-74
	[3] Conduct of Proceedings. . . . .	16-74.1
	[a] Importance of Conducting a Hearing. . . . .	16-74.1
	[b] Importance of Questioning the Payee . . . . .	16-74.2



## TABLE OF CONTENTS

li

	[c] Importance of Questioning the Applicant's Counsel. . . . .	16-74.2
	[d] Burden of Proof . . . . .	16-74.3
[4]	Issues the Court Is Required to Address. . . . .	16-75
	[a] Payee's Best Interest . . . . .	16-75
	[b] Compliance with SSPA Requirements . . . . .	16-91
	[i] Notice Requirements . . . . .	16-91
	[ii] Other Objective Requirements . . . . .	16-92
	[c] Noncontravention of Applicable Law. . . . .	16-94
	[i] Proscription of Split Payments Under Some SSPAs. . . . .	16-94
	[ii] Workers' Compensation Laws . . . . .	16-95
	[iii] Tort Reform Statutes . . . . .	16-97
	[iv] Court Orders Approving Settlements . . . . .	16-97
	[v] Contractual Anti-Assignment Restrictions. . . . .	16-98
	[vi] Arbitration Clauses. . . . .	16-100
	[vii] Sovereign Immunity . . . . .	16-101
	[d] Independent Professional Advice. . . . .	16-102
	[5] Conflicting Interests in Payment Rights. . . . .	16-103
	[6] Legal Effects of an Approved Transfer. . . . .	16-105
§ 16.06	Restrictions on Factoring Imposed in Court Orders Approving a Structured Settlement Affecting the Interests of a Minor or Other Protected Person. . . . .	16-107
§ 16.07	Determining Whether the Excise Tax on Transferee Applies Under IRC § 5891 . . . . .	16-109
§ 16.08	Recycling and Securitization of Structured Settlement Payment Rights . . . . .	16-113
<b>Index</b>	. . . . .	<b>I-1</b>

**APPENDICES**

**(Available online at**

**<http://www.lawjournalpress.com/cd/879292>)**

<b>Appendix A:</b>	Federal Tax Materials
<b>Appendix A(1):</b>	Internal Revenue Code § 104
<b>Appendix A(2):</b>	Treasury Regulation § 1.104-1
<b>Appendix A(3):</b>	Internal Revenue Code § 130
<b>Appendix A(4):</b>	Internal Revenue Code § 468B
<b>Appendix A(5):</b>	Treasury Regulations §§ 1.468B and 1.468B-1 through B-5
<b>Appendix A(6):</b>	Revenue Procedure 93-34
<b>Appendix A(7):</b>	Internal Revenue Code Section 5891
<b>Appendix A(8):</b>	Technical Explanation of the Victims of Terrorism Tax Relief Act of 2001
<b>Appendix B:</b>	Uniform Periodic Payment of Judgments Act
<b>Appendix C:</b>	State Periodic Payment of Judgments Act
<b>Appendix C(1):</b>	State Periodic Payment Acts
<b>Appendix C(2):</b>	Summary of Provisions of State Periodic Payment Acts
<b>Appendix C(3):</b>	Text of Selected State Periodic Payment Acts
<b>Appendix C(4):</b>	Sample Jury Verdict Forms and Special Interrogatories
<b>Appendix C(4) Form 1:</b>	RESERVED
<b>Appendix C(4) Form 2:</b>	Long Form of Itemized Verdict
<b>Appendix C(4) Form 3:</b>	Special Verdict Form (Devised by Florida Legislative Panel)
<b>Appendix C(4) Form 4:</b>	Special Verdict Form (Returned by Jury IN National Bank of Commerce v. HCA Health Services of Midwest)
<b>Appendix C(4) Form 5:</b>	Special Interrogatories for Use in Applicable Cases
<b>Appendix D:</b>	State Structured Settlement Protection Acts (SSPAs)
<b>Appendix D(1):</b>	Model SSPA
<b>Appendix D(2):</b>	Listing of SSPAs
<b>Appendix E:</b>	Structured Settlement-Related Amendments to Revised UCC Article 9
<b>Appendix E(1):</b>	Listing of State Amendments
<b>Appendix F:</b>	Structured Settlement Forms
<b>Appendix F(1):</b>	Qualified Assignment with Annuity Funding

## TABLE OF CONTENTS

liii

<b>Appendix F(1)(a):</b>	Qualified Assignment
<b>Appendix F(1)(a)(i):</b>	Notes on Use of Qualified Assignment Agreement
<b>Appendix F(1)(a)(ii):</b>	(NSSTA) Model Qualified Assignment Agreement
<b>Appendix F(1)(a)(iii):</b>	(NSSTA) Annotated Model Qualified Assignment Agreement
<b>Appendix F(1)(b):</b>	Qualified Assignment and Release
<b>Appendix F(1)(b)(i):</b>	Notes on Use of Qualified Assignment Agreement and Release Agreement
<b>Appendix F(1)(b)(ii):</b>	(NSSTA) Model Qualified Assignment and Release Agreement
<b>Appendix F(1)(b)(iii):</b>	(NSSTA) Annotated Model Qualified Assignment and Release Agreement
<b>Appendix F(1)(c):</b>	Qualified Assignment, Release and Pledge
<b>Appendix F(1)(c)(i):</b>	Notes on Use of Pledge Agreement
<b>Appendix F(1)(d):</b>	Supplemental Forms and Materials
<b>Appendix F(1)(d)(i):</b>	Commutation Rider and Related Language for Settlement Agreement and Qualified Assignment
<b>Appendix F(2)(a):</b>	Settlement Agreement and Release
<b>Appendix F(2)(b):</b>	Annuity Contract
<b>Appendix F(2)(c):</b>	For Settlement Agreement—Alternative Language for Qualified Assignment
<b>Appendix F(2)(d):</b>	Advisory Disclosure
<b>Appendix F(3):</b>	Irrevocable Reversionary <i>Inter Vivos</i> Medical Trust
<b>Appendix F(4):</b>	Assumption Reinsurance:
<b>Appendix F(4)(a):</b>	Notes on Use of Assumption Reinsurance
<b>Appendix F(5)(a):</b>	Petition to Approve QSF
<b>Appendix F(5)(b):</b>	Conditional Release of Transferors
<b>Appendix F(5)(c):</b>	Release of QSF
<b>Appendix G:</b>	Individual Special Needs Trust (Intended to Qualify for the Medicaid Exclusion Under 42 U.S.C. § 1396p(d)(4)(A))
<b>Appendix G(1):</b>	Notes on Use of (d)(4)(A) Trusts
<b>Appendix G(2):</b>	Sample Utah-Specific (d)(4)(A) Trust
<b>Appendix H:</b>	Pooled Income Special Needs Trust (Intended to Qualify for the Medicaid Exclusion Under 42 U.S.C. § 1396(d)(4)(C))
<b>Appendix H(1):</b>	Notes on Use of (d)(4)(C) Pooled Trusts
<b>Appendix H(3):</b>	Utah-Specific (d)(4)(C) Pooled Trust
<b>Appendix H(3)(a):</b>	Master Pooled Trust

<b>Appendix H(3)(b):</b>	Joinder Agreement for Master Pooled Trust
<b>Appendix H(3)(c):</b>	Addendum to Joinder Agreement (Determines Third-Party or Self-Settled Option)
<b>Appendix I:</b>	Ethics and Professional Responsibility Standards
<b>Appendix I(1):</b>	National Structured Settlement Trade Association Statement of Ethics and Professional Responsibility
<b>Appendix I(2):</b>	Society of Settlement Planners Standards of Professional Conduct for Settlement Planners
<b>Appendix I(3):</b>	Settlement Planning Practice Standards Overview
<b>Appendix J:</b>	Transfer of Structured Settlement Payment Rights
<b>Appendix J(1):</b>	Transfer Application
<b>Appendix J(2):</b>	Transfer Agreement
<b>Appendix J(3):</b>	Disclosure Statement
<b>Appendix J(4):</b>	Notice to Interested Parties
<b>Appendix J(5):</b>	Order Approving Transfer
<b>Appendix K:</b>	Life and Health Guaranty Associations
<b>Appendix K(1):</b>	Model Act
<b>Appendix K(2):</b>	State Statutes
<b>Appendix K(3):</b>	Proceedings Citations
<b>Appendix K(4):</b>	Coverage Limits Under the Enabling Statute for Each U.S. Life & Health Insurance Guaranty Association (“GA”)
<b>Appendix L:</b>	Post-Assessment Property and Liability Insurance Guaranty Association
<b>Appendix L(1):</b>	Model Act
<b>Appendix L(2):</b>	State Positions
<b>Appendix L(3):</b>	Legislative History
<b>Appendix L(4):</b>	Case Law
<b>Appendix M:</b>	Insurers Rehabilitation and Liquidation Model Act
<b>Appendix M(1):</b>	Model Act
<b>Appendix M(2):</b>	State Positions
<b>Appendix M(3):</b>	Legislative History
<b>Appendix N:</b>	Risk-Based Capital for Insurers Model Act: State Positions
<b>Appendix O:</b>	Workers Compensation
<b>Appendix O(1):</b>	Benefits that May be Resolved Under Statute by Lump Sum: State Positions

## TABLE OF CONTENTS

lv

<b>Appendix O(2):</b>	Valuation of Lump Sum Settlements: State Positions
<b>Appendix O(3):</b>	Use of Structured Settlements: State Positions
<b>Appendix P:</b>	Forms Needed by Plaintiff Attorneys
<b>Appendix P(1):</b>	Contingent Fee Agreement
<b>Appendix P(3):</b>	Forms for Requesting Medical Records
<b>Appendix P(3)(a):</b>	Authorization to Release Health Information (HIPAA Compliant)
<b>Appendix P(3)(b):</b>	Authorization to Release Confidential Information (HIPAA Compliant, Includ- ing as to Federal Regulations Governing Drug Abuse Patient Records)
<b>Appendix P(3)(c):</b>	HIPAA Compliance Policy
<b>Appendix Q:</b>	Disclosure Forms
<b>Appendix Q(1):</b>	Claimant's Consultant Sample Structured Settlement Disclosure Statement
<b>Appendix Q(2):</b>	Defendant's Sample Structured Settlement Disclosure Statement
<b>Appendix R:</b>	Liability Insurer Structured Settlement Statements
<b>Appendix R(1):</b>	Sample Liability Insurer Structured Settlement Mission Statement
<b>Appendix R(2):</b>	Sample Liability Insurer Structured Settlement Disclosure Statement
<b>Appendix S:</b>	Medicare Set-Aside Trust
<b>Appendix S(1):</b>	Glossary: Terms Relating to Transfers of Structured Settlement Payment Rights

