Bill as Introduced

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HB 470 – AS AMENDED BY THE HOUSE

1999 SESSION

99-0650
03/09

HOUSE BILL *470*

AN ACT relative to settlement of personal actions.

SPONSORS: Rep. DePecol, Ches 14

COMMITTEE: Judiciary

AMENDED ANALYSIS

This bill permits plaintiffs in personal injury or wrongful death actions, where the parties have agreed to a structured settlement, to designate a structured settlement broker and an entity to receive the structured payments.

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Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 470 – AS AMENDED BY THE HOUSE

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99-0650
03/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord One Thousand Nine Hundred and Ninety-Nine

AN ACT relative to settlement of personal actions.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Proceedings in Court; Judgments; Settlement of Personal Actions. Amend RSA 524 by inserting after section 6-a the following new section:

524:6-b Settlement of Personal Actions. In any action for personal injury or wrongful death where the parties have agreed to settlement, and where the parties have agreed that all or part of the settlement proceeds be used to provide for structured periodic payments, upon making such agreement:

I. The plaintiff shall have the exclusive right to designate a structured settlement broker to place the structured settlement; and

II. The plaintiff shall have the exclusive right to designate the insurance company or other entity to which settlement proceeds, or any portion thereof, are to be paid to fund structured periodic payments.

2 Effective Date. This act shall take effect January 1, 2000.

Q: Why would an award for PI or WD be taxable?

Committee Minutes

Date: June 9, 1999
Time: 11:40 a.m.
Room: Roo 102, LOB

The Senate Committee on Judiciary held a hearing on the following:

HB 470 relative to settlement of personal actions

Members of Committee:

Senator Pignatelli
Senator Gordon
Senator K. Wheeler
Senator Squires
Senator Trombly
Senator Brown
Senator Cohen
Senator Fernald

The Chair, Senator Pignatelli, opened the hearing on HB 470.

Transcriber's note: This transcript begins with tape recording identified as #2. #1 was not in the file.

Attorney George Roussos: So, what this bill risks, under that analysis, is sort of the first part of that equation. It takes it away from the insurance company to enter into a structured settlement.

Senator Debora B. Pignatelli, D. 13: I don't see any further questions. Thank you.

Attorney Roussos: Thank you.

Senator Debora B. Pignatelli, D. 13: It looks like Tim Sullivan. Did you want to speak?

Ron Sullivan: Ron Sullivan.

Senator Debora B. Pignatelli, D. 13: You did want to speak?

Mr. Sullivan: Please.

Senator Debora B. Pignatelli, D. 13: OK. Come on up. Your penmanship is horrendous.

Attorney Kevin Dugan: Madam Chairman, we are here together. My name is Kevin Dugan. I am a private attorney in Manchester and with the Trial Lawyers Association.

Senator Debora B. Pignatelli, D. 13: Do you want to testify together?

Attorney Dugan: Please.

Senator Debora B. Pignatelli, D. 13: Come on up. Your penmanship is much better.

Attorney Dugan: Thank you, Madam Chairman and members of the Committee.

By way of brief introduction, structured settlements, as most of you probably know, are reached only after parties to a lawsuit agree to resolve a claim and agree to use some or all of the money to fund a structured settlement. And, all that means is that, instead of the insurance company paying a lump sum of cash to a plaintiff, the insurance company uses that money to purchase, typically an annuity, from yet another company, which then pays a monthly benefit to the plaintiff rather than the lump sum cash payment.

This bill will not do anything earth shattering. It doesn't do anything really novel. The bill only comes into play after the parties in a lawsuit have agreed to settle the claim for an agreed-upon amount of money and the parties have agreed to use part or all of the money for a structured settlement. So, this wouldn't compel a structured settlement. It only comes into play when the case is settled and the parties have agreed on a structured settlement. Then, and only then, the bill would give the plaintiff the right to pick the structured settlement broker and pick the company from which the annuity is to be purchased.

That is extremely important for the reason pointed out by the Madam Chairman's question, being, what happens if the annuity company becomes insolvent? And, the answer to that is that the plaintiff is left holding the bag and, typically in cases where structured settlements are done, because the plaintiff has catastrophic injuries and either has monumental medical bills to meet or cannot work and they need this monthly guaranteed income, typically for life, to protect them. If the annuity company goes belly up, they

are left holding the bag and it only makes sense that, if the plaintiff is the one bearing the risk of the company becoming insolvent, the plaintiff ought to be the one to pick the company. I think everyone would agree that, if they were in that position, they would want to pick a company from whom their monthly payments for life would be coming.

The other issue has to do with the selection of a broker once a settlement is reached. It only makes sense that the plaintiff be allowed to retain their own broker to shop around among the various insurance companies to get the best deal from the best-rated company. Ron Sullivan is such a broker. He is someone we had worked with in the past and he can explain to you some of the problems that we have run into which gave rise to this bill.

But, what has happened in the past and the reason why we are here is that, fairly recently, insurance companies have said that, after they agreed to settle a case and to structure a case, they tell the plaintiff, "We will agree to a structured settlement, but you have to use our broker and we are going to pick the company that is going to fund your annuity, even though, if that company goes belly up, we are off the hook". That is simply not fair. All this bill does is give the plaintiff the right to pick the company and the broker. It doesn't lock the original company out. If they want to use the defendant's selection, they can, but they are not required to. It is simply common sense that the plaintiff, as the person bearing the risk of loss, ought to be able to pick their own broker to help them and pick the company which is to fund the annuity.

A related problem has been the responsiveness of some brokers who are working for the insurance company and not the plaintiff. They have no accountability to the plaintiff. Therefore, the level of service has been much less, in our experience, and the plaintiff ought to be able to hire their own broker, someone who is accountable to them, to provide the service and the kind of support that they need.

To answer one thing that came up in Mr. Roussos' presentation, something about the tax treatment, I am not sure where that came from because the IRS addressed this many years ago and held that constructive receipt, as it is called in the business, does not trigger any tax liability. Mr. Sullivan, I think, has a copy of that Revenue Ruling and can address that further. But, there is no tax issue. In cases where plaintiffs pick the brokers and the companies now, which is done, there is no adverse tax implication. So, I am not sure what the source of that information is.

One of the questions had to do, I believe it was Senator Fernald, had to do with what benefit do the insurance companies derive from handling these

things and requiring the plaintiff to use their broker and their company? The fact is, the benefit that they derive is the kickback in the form of commission from the broker. Kickbacks are common in the industry.

And, another benefit they sometimes derive is by requiring that the plaintiff purchase the annuity from an affiliated company, that is a company either owned by the same company as the original company so that they essentially keep the business in house. When they do that, they are effectively narrowing the marketplace of possible other companies to shop among so that you really can't go out and get the best rate from the best company. In cases where the defense controls it, as is the situation is now, you have to take their broker and their company and their interests, obviously, are different from those of the plaintiff and they don't have the incentive to go out and pick the most highly rated company at the best rate.

So, for that reason, we support the bill. I originally got into this issue, not on behalf of the Trial Lawyers, but personally because this has come up many times in our practice and the Trial Lawyers has shared that experience and I can voice that group's support for this bill as well.

Mr. Sullivan has some personal experiences he can relate that can better illustrate the problem.

Ron Sullivan: Good morning, Madam Chairman. Thank you. Sorry about my penmanship.

Senator Gordon: I have a question. If an insurance company is negotiating on the basis that it is going to buy this annuity from a defendant, as George indicated, why isn't it a matter of the negotiation? If the plaintiff or the plaintiff's attorney decides that he wants to use his company, why aren't they, when they are negotiating on behalf of the client, saying, "I will enter into the structured agreement, but only if we are going to use a company of my choice, too"?

Attorney Dugan: Well, that happens. When we say that, what the response is, "Well, if you want to structure the money, you have to use our broker and we get to pick the company. Otherwise, we are not going to structure the money. So, if you don't use our people, we are just going to pay you cash". The problem with that is that once the plaintiff takes the cash, they then go out and buy an annuity, you lose the tax benefits and all of the annuity payments are taxable as ordinary income, whereas, if the annuity is purchased directly by the defendant's insurance company, those annuity payments are tax free, which is an obvious huge benefit and that is the whole reasoning behind structured settlements.

As it is now, we have no recourse, we have no leverage. The defense says, "You use our people or you take cash".

Senator Gordon: But, there is no legal obligation for the insurance company to provide a structured settlement?

Attorney Dugan: True.

Senator Gordon: So, what you are doing is, in essence, trying to compel the insurance companies, putting them in a position where you are saying, "OK, if you want to negotiate a structured settlement, you have got to use our agent". I guess, in the long term, doesn't that disadvantage the insurance companies in terms of doing their negotiations? Why shouldn't they be able to say, "If you don't want to use our agent, we are just going to give you cash"?

Attorney Dugan: Well, this bill doesn't force them, doesn't change the landscape at all. As I mentioned, the bill only comes into play after the insurance company agrees to pay a set amount of money and agrees to a structured settlement. Typically, these issues come up after those decisions are made and then the company says, "Well, you have to use our company" and then you get into these arguments. So, here, the bill only comes into play after the insurance company has already indicated its willingness to pay a certain sum and to structure all or part of that money. At that point, the only issue is who is going to pick the insurance company to fund the annuity and it only makes sense that the plaintiff who bears the risk of loss ought to be able to pick the company. Did I make that clear? It only comes into play after the defendant has agreed to structure the money. So, we are not in a position where the bill compels them to do something they don't want to do.

Senator Gordon: Well, you are, in the sense that you are compelling them to use your agent to pay for it and I would think that they would have entered into some decision to provide a structured settlement on the basis of this is

what it is going to cost us and we are willing to provide these payments over time, based upon what they know they can get it for. And, then you are going to come in and pick another agent with an uncontrolled cost. So, if I were them, I would say, "I am just going to pay you cash because I am not going to put myself in the position where I am going to subject myself to unanticipated expense".

Attorney Dugan: I understand your question now. When the parties agree to settle. Let's use, as an example, they settle for $100,000 and they agree to use all or part of that money to buy an annuity. Now, the sum is already fixed. That is, the amount that is going to be spent on the annuity is fixed. There is going to be no more than $100,000. That is the amount the insurance company is willing to pay. The only issue is whether the defendant's broker then goes out and buys that annuity for $100,000 or the plaintiff's broker goes out and buys that annuity for $100,000. So, once the insurance company has agreed to settle for X number of dollars, it doesn't matter who places the annuity; the amount they pay is fixed. That is the amount of the settlement.

One of the problems with the situation now is when they say, "We are going to pay $100,000 and we are going to buy the annuity". What happens in some of the cases is that they then use their captive broker, they get a kick-back on the commission, they wind up only paying, let's say, $90,000 because they got $10,000 of it back on the commission. The numbers, I am only using for an example, not an actual representation of the actual commission. What happens is that they wind up paying less than they agreed to pay. Our feeling is that, if you agree to pay $100,000, you ought to pay $100,000, and if you get a reduced rate, that ought to go to the client's benefit, not the insurance company. So their liability is fixed once they agree to settle. They don't pay any more by using the plaintiff's broker.

Senator Gordon: I have entered into structured settlements where that is not the case. In each single case, I knew who the company was that was going to be providing the annuity and I knew what the future payments were going to be at the time. Otherwise, I felt I would be doing my client a disservice unless I knew in advance how it was going to be paid. I never agreed to get $100,000, buy an annuity and tell me how much I am going to get later and from who.

I don't understand why the attorney would enter an agreement blind saying, "We are going to get $100,000 and now you tell me who is going to pay me later and how much we are going to get".

Attorney Dugan: That is the way it is typically done. We agree on the amount of the settlement and then we shop around for structured settlement. If we don't find one that is attractive, we don't pick a structured settlement. But it is hard to shop around for an annuity until you know how much money you have to work with. You are not going to get a quote until they know what you are willing to pay in the way of premium. So, we agree on the dollar amount and then we use that pre-set figure to get quotes from different annuity companies to see who will give us the most benefits for that premium dollar. As I mentioned, the plaintiff has much more incentive to shop around and get good quotes for that fixed premium dollar than the defense does. They ought to be able to control that, particularly since their future rests with that.

Senator Pignatelli: Senator Fernald?

Senator Fernald: Thank you. This is sort of a follow-up to Senator Gordon's question. You walked us through sort of a negotiation where the plaintiff says, "We will do a structured settlement if we can chose the broker or the company, or whatever" and the defendant insurance company says, "No, we will do the structured settlement only if we can choose who the insurance company is that issues the annuity". I would think at that point in the negotiation, whoever is more motivated to do the structured settlement is the one who gives in on the particular point of who would choose. What this legislation does is try to give you more ammunition for that negotiation or basically decide the issue in advance. There is nothing in the law that requires insurance companies to do structured settlements. So, if the current state of affairs is that the defendant insurance companies don't want to do structured settlements unless they can choose the company and then we pass this law, they just won't do structured settlements, because, if choosing the company is their absolute requirement, then we will end up with no structured settlements. If that is not really where they are in the negotiations, whoever is motivated to structure the settlement will give on this issue?

Attorney Dugan: We have actually had that sort of response from defense brokers who say if this thing goes through, the insurance companies may just say, "Well, we are just going to pay cash now and we are not going to do structureds". But, my strong sense is that when the insurance companies have made the decision that they will settle a case for X number of dollars, they want the case to go away for X number of dollars, regardless of whether it is structured. As I said, this issue only comes up after the agreement has been made to settle the case. The clients we have had in the past have only come up after the company had agreed to pay X number of dollars. I just can't believe that any insurance company is going to let a settlement fall

apart because the plaintiff wants to handle the structure. For them, it is a bottom line analysis. They are willing to write it off for X number of dollars. They have got to believe that the way it works for the insurance company is that, once it gets to that point, if they can do it for that amount of money, then the case is settled.

Senator Fernald: If you are correct that they want to give on this point, then they would be giving now. The reason they are not giving now is apparently because you went first.

Attorney Dugan: The reason they don't give now is that this issue comes up now only after they have agreed to pay and we start talking about a structure. At that point, they have all the cards, they have all the leverage. They know that we have already agreed to a certain amount of money and that we want to structure it. So, when they say, "Hey, it's us or no one", they have us over a barrel and they know that most plaintiffs are not prepared to let a settlement fall apart over that issue. That is why we are hoping to address it with legislation, to make it clear that the plaintiff has the right to pick, after the decision is made to structure the case.

Senator Fernald: I guess I don't see how someone has an advantage there because you know what the number is and the other person is saying, "Are we going to use that number and the tax code to get a tax advantage".

Attorney Dugan: Well, the issue is the agreement is made to pay a certain number of dollars. That is already agreed upon and it is agreed that some of it will be used for a structure. The only question at that point is whether the defense insurance company finds an annuity out in the marketplace or whether the injured plaintiff goes out and buys the annuity. So, it is not changing the settlement landscape at all. The plaintiff ought to be able to pick the annuity company that is responsible for their monthly payments for the rest of their life and it doesn't cost the insurance company any more or any less for that matter, to let the plaintiff do it. They lose nothing except for the fee sharing arrangements. That is really the reason why they are opposing this. But, there is no real downside to the bill.

Now, the plaintiff has some real risks when they allow the defense to control it. We had a case just this week where the defendant insurance company wanted to settle a case for a certain number of dollars and they agreed to use a structured settlement, but they said that we could only pick among certain annuity companies to buy the annuity and they gave us a small number of annuity companies. Mr. Sullivan was able to get a better quote from a better rated insurance company to fund the annuity and the defense insurance company said, "I'm sorry. We don't deal with that company. You can't buy

that". So, with that same amount of money, we could have gone out in the market place and gotten a better deal with a better company and they wouldn't let us do that.

As I say, at this point in the negotiations, they have us over a barrel because the plaintiff has already agreed to settle the case for X number of dollars and, in my experience, most plaintiffs are not willing to let the deal fall apart over who is going to pick a company. It just doesn't work that way. Once they get to that point in the litigation, they want it over.

Senator Gordon: I don't want to sound argumentative, but basically, the insurance company has agreed to settle the case for $100,000. That is all the insurance company is obligated to do. Take the $100,000. That's it. If you want to, buy yourself an annuity. The advantage of a structured settlement is an advantage to your client over time. So, if I were you and I were representing my client, what I would say, is, "Before I settle this and agree to take $100,000, let's talk about structuring, who is going to structure it and what my client is going to get". My experience is different than you because I don't think I have ever agreed to a structured settlement for a present value amount before I understood what the payments were going to be and who was going to be paying my client. So, I am just trying to figure out why that isn't the responsibility of the plaintiff's attorney to make sure you know who is going to be providing the annuity and what those payments are going to be over time.

Attorney Dugan: Well, it is the responsibility of the plaintiff. In the cases now, where we bring that up before settlement talks start, we have run into the same problem where they say, "Well, we are not going to let you use your own broker, we are going to use our own broker and we are going to pick the company". So, we have gotten nowhere with that tack now.

To go back just a little bit, I think the defendant's insurance company still has incentive to structure the money, even if they are not picking the annuity company. So, I don't think it is going to stand in the way of structured settlements. They still derive tax benefits by having this thing structured, regardless of whether they handle it themselves. So, they are still going to have that motivation to structure settlements and they are not going to lose anything by the plaintiff picking the company.

Ron Sullivan: Madam Chairman, thank you for having us here today. I have been a structured settlement broker since 1984 and I venture to say that 70 to 80% of my work is defense. So, I know that, if this bill does pass, that on some occasions I am not going to be the structuring broker. But, I firmly believe that this is the most important financial decision in the plaintiff's life

and, to make it very simple and very concise, the plaintiff should have the best service, the best product, and everything for that nature – best service, product and price. When I am involved on a plaintiff's case, what I see is that we are hampered by the certain life companies that we are able to utilize in the placement of the annuity. We only can use those life companies that are on a defendant's approved list, which sometimes are not the most advantageous life companies to the plaintiff. At the beginning, obviously, of a personal injury case, whether it be malpractice or a car accident or what have you, the defense and the plaintiffs are adversarial in some kind of acrimonious situation and they need an advocate.

I would like to tell you, regarding the tax forms, that I can leave with you, and I would like to read verbatim that just by knowing the cost of the settlement and agreeing to a structured settlement does not have a negative tax consequence. There is a private letter ruling that goes all the way back to May 16th of 1983, Madam Chairman, that states, "Disclosure by the defendants of the existence, cost or present value of the annuity will not cause the injured party to be in constructive receipt of the present value of the amount invested in the annuity". That goes all the way back to 1983.

On top of that, in 1990, to reaffirm the prior ruling of 1983, it says, "Knowledge of the existence, cost and present value of the annuity contract used to fund the settlement offer will not cause the family to be in constructive receipt of the amount payable under the annuity contract or the amount invested in the annuity contract". And, this is after the plaintiff has agreed to a lump sum, conditioned on agreeing to a structured settlement, as it currently stands.

Senator Pignatelli: Any questions? I apologize for eating in front of you, but we are way behind.

Mr. Sullivan: And I realize, too, being mostly a defense broker, in the 20 or 30% I do I realize that, if this bill passes, I will lose cases and maybe rightly so, because the plaintiff doesn't know me, doesn't trust me, has had no relationship with me, and I think the bottom line is very simple, it is extremely simple. The plaintiff needs an advocate, someone he or she, that can come in for them, that can show them the best price, the best product, the best service, and rely upon their good counsel to give them that particular information and not be inhibited by the defense in using that particular information.

Senator Pignatelli: I don't see any questions. Thank you both for coming to testify. Daniel Webers?

Daniel Webers: I am a structured settlement broker. I have been in the business since 1985. I work with a number of the, most of the major life insurance companies that provide this product in the market place and a number of the major property and casualty companies who are my clients.

I don't favor this bill because I think it does create a tax problem. I also feel that it, in essence, is just a way to create an imbalance in what the legal system has created, and that is that you are shifting, as Senator Fernald talked about. You negotiate this up front and what they are looking to do is just to shift all the cards to the plaintiff's side ahead of time. Every element of a structured settlement is negotiable. The amount of cash, the periodic payments, the annuity, the annuity provider, every element is and should be subject to negotiation. If the plaintiff does not like what the defense is offering, they always have the power of acceptance or rejection of the offer. So, there is no need, certainly not a legislative need, to shift the balance of power to the plaintiff.

Some of the things I have heard this morning, it is simply not fair to use the defense broker. Well, the defendants think it is certainly not fair to use the plaintiff broker, because they don't know the plaintiff broker. They don't know who the plaintiff broker represents, they don't know about his or her business practices, or coverage, any of those elements from the plaintiff broker. Nevertheless, in cases that I have been involved in, if a plaintiff broker surfaces, I have always been very willing to work with that plaintiff broker and, in fact, I have worked on cases with Mr. Sullivan where he represented the plaintiff, I represented the defendant, we got the case structured and we both agreed upon the life company, the assignee, and we shared information, because we both represented the same life company.

So, ideally, that is how it should work every time. Now, I am not saying that every broker deals with it that way, but I think both sides should have their representation, no question about that, but I don't think we should be shifting the balance of power to the plaintiff. If you give exclusive right to designate the broker and purchase the annuity and select the assignment vehicle, in essence, all you've got left to negotiate is price. These other negotiation chips, the fact that the defendant is even offered a structured settlement, are often big parts of the negotiation.

As Senator Gordon had recognized, we don't have, the defense industry.,doesn't have an obligation to offer a structure. It is a value added to the settlement. So, if we are going to provide that value added, and I keep on saying we because I do primarily defense work. If that value added is offered as part of the settlement, then I think there has to be some give and take. There has to be the trade off and the trade off is typically, "If we can

meet the needs of the plaintiff for less", then the casualty company has a chance to reduce their overall exposure in the case.

Not all cases are negotiated on a bottom line. Sometimes it is based on benefit. How much benefit does your client need? What are your client's needs? When that need is met through the purchase of the annuity, that determines what the price of the settlement will be, the total settlement.

Now, what I have brought is an educational piece from our trade association. **Please see "What is a Structured Settlement?" attached hereto and referred to as Attachment #1.** It answers a very simple question, "What is a structured settlement?" OK? It is something that I share with a lot of clients because the average individual or the average claimant has no idea that they are entitled to a structured settlement. Now, this has been reviewed by tax attorneys, not only for our trade association, but tax attorneys for all of the major life companies that are members of the association.

On the next to last page, "Relevant Tax Rules". I would like to just point this out to you. Revenue Ruling 79-220 interprets Section 104(a)(2) and sets out the criteria that must be met in order to qualify for tax-exempt status... The basic requirement is that the claimants can have no control over the investment that funds the periodic payments." This current bill brings into question that general rule because we are granting them exclusive, and I quote from the bill, "exclusive control" over the funding. This is why I think George and Liberty Mutual's letter saying, "We think there are some serious tax questions" and I do, too. This has been reviewed by every major life company that is in the industry and have agreed to it.

So, not only to

Tape change...

All this seeks to do is shift the scales of justice in favor of the plaintiffs. They always have the recourse of being able to say, "I accept or I reject your offer". Any questions?

Senator Debora B. Pignatelli, D. 13: Senator Fernald has a question.

Senator Mark Fernald, D. 11: There was some talk about kick back, so-called. As a broker, do you give volume discounts or issue refunds to companies?

Daniel Webers: No volume discounts and the price paid by the life companies is exactly the same, whether it is placed by the plaintiff broker or the defense broker and, in fact, when we are working on a case, if I price a certain life company and let's say I call another one and say, "I know you can do better than your standard rates on this case". And now, if the plaintiff broker has submitted information to that same life company for a grade up, the life company will give me that quote. It is called a daily quote. They will also fax a copy of the daily quote to the other broker. So, they keep us both informed. Anyone who came to them with this information would be given equal treatment. I can't get an unfair advantage over the plaintiff.

Senator Fernald: Why do defense attorneys refuse, why do they have companies they will deal with and companies they won't?

Mr. Webers: Let's talk about life insurance companies first. A property and casualty company will say, "These are the only life companies we want to use in our structured settlements because we have reviewed their financials, we have taken a look at their 10K, and we feel that they are financially solvent and they will be financially solvent in the long term. So, those are the only companies we want to use because we never want to have a case blow up in the future. Even if we create a qualified assignment and transfer the obligation, we just don't want to morally deal with the companies that we don't feel comfortable about."

Senator Fernald: Are their financial benefits for the defense insurance company to deal with a particular life insurance company?

Mr. Webers: Certain life companies?

Senator Fernald: Yes.

Mr. Webers: They usually just look at the life company and decide whether or not it is financially advantageous.

Senator Fernald: But, that is my question. Do they have preferential rates or commission deductions or something?

Mr. Webers: No, because every case is priced individually. So, the P&C companies... Now, if a property and casualty company owns a life insurance company, now they have this affiliate company. Typically, the way the situation works there is, you have an approved list of life companies and you have this affiliated company. The affiliated company will oftentimes reserve the right of last refusal on the case. So, you go out to XYZ Company and you get the best possible rate on the street. If that affiliate company wants to

match it, they get the case. But, the plaintiff still has the right to say, 'I don't feel comfortable with the security offered by your life company. I want that XYZ Company or it is not a done deal." And they will go along with it. I have had that happen many times. They will not deal with the affiliate life company because the affiliate life company may be smaller, may not have the name recognition. I have had people just reject the life company I am using because they don't recognize it. "I want Met. I want a piece of the rock. I want a Pru." Something like that, because of name recognition. Yet, this other company may have even higher ratings from the various ratings services, but because they are not a household word. I think the defendant carriers have the right to select what companies they will buy annuities from and which ones they won't, as well as what broker they will deal with and which ones they won't.

Senator Pignatelli: Senator Wheeler?

Senator Wheeler: Thank you. Mr. Webers, when you said that everything was negotiable, there was a balance of power. The way I look at this basic requirement is that the claimants have no control over the investment that funds the periodic payments. It would seem that your interpretation is only the defendant's can choose the broker, which doesn't seem to be much like a balance of power, nor dies it seem much like a negotiation.

Mr. Webers: The broker can be negotiated. Now, what we are really coming down to is the commission for the broker. I heard from the proponents of this, "I can't believe an insurance company will let it fall apart if it is actually settled, because they won't use their broker". Well, the insurance company might and so might the plaintiff attorney, even though they both had their respective interests to look out for. I would submit to you that the broker is a negotiable item. If my client tells me, "Listen, we don't want to let this thing fall apart" and the plaintiff is coming to me and saying they want to use their broker. "Is there something you can work out?" My answer is absolutely there is something we can work out because I don't want to lose the case either.

Half a loaf is better than none at all and if they are really going to take it in cash or invest it somewhere else, I would much rather get a piece of the commission than being greedy and trying to shoot for all of it. I think the plaintiff broker is in much the same boat. Let me look out for the interests of my client, you look out for the interests of yours and together, we will have a meeting of the minds. We both know the business and we get it done. But, we don't need the legislation to create that.

There is some analogy drawn to the real estate business. At one time there was only sellers' brokers. Now, the seller will have a broker and the buyer will have a broker. Why? Because they are looking out for the interests of both sides. I think a well-informed consumer, someone who has an attorney that is going to tell them about all the issues relating to a structured settlement, is the best candidate for a structured settlement. Information is one thing. Exclusive control is quite another.

Senator Pignatelli: Further questions?

Senator Wheeler: I guess I wasn't even talking about exclusive control. You seem to indicate in this brochure that there is no possibility of any control.

Mr. Webers: Not any. No. If you go back to 79-220, I think the term used was "unfettered control" to the plaintiff. Well, when you say exclusive, I don't know what unfettered means, but exclusive is very close to that. What we should say is that it is negotiable. With the give and take of negotiations, I think anything is possible. We are talking about a contractual arrangement between Company X and plaintiff. You release my insured and, in exchange, I will give you a certain amount of cash and a certain amount of periodic payments. Now, if the plaintiff comes back and says, "By the way, we have got limited settlement proceeds here. I want my expert, who has taken me through all the maze of the products and all of the maze of the options that are available. I want my expert to be compensated. And, you know something, I don't want to pay him a fee out of my settlement proceeds. I want him to be compensated by the purchase of an annuity just like your defense broker is."

We can do that, because I work on a contingent basis. If the case doesn't structure, I don't get paid. I get paid directly from the life company. The plaintiff broker has the option of working both ways – either getting paid on a fee basis from the plaintiff attorney or getting a piece of the commission. So, really what we are finally talking about is the commission to the brokers. I am certainly willing to share that commission assuming the other broker is appointed with the life company because that is the only way I can legally do it and we agree that we are going to reach a structured settlement with certain life companies. We run all those parameters.

Senator Pignatelli: Any further questions? I don't see any. Thank you, Mr. Webers. Is there anyone that would care to testify on this bill?

Rick Newman: Just one comment, Madam Chairman. If you give me ninety seconds, we will go away. I thank you for recognizing me. My name is Rick Newman and I am a lobbyist for the New Hampshire Trial Lawyers

Association. I hadn't planned to speak, but there are a couple of points I think are missed.

The previous speaker said that this is about commissions and I think I would like you to focus back on what this is really about. They talk about negotiating like the negotiating in buying a piece of land. What we are dealing with here are cases where people have been injured through no fault of their own and you are now going to compensate them for the injury that you brought upon them. It seems to me that you shouldn't be using chips, as it was just said, to try to lure somebody into negotiations. We are talking about injured people and insurance companies paying them the compensation that they justly deserve.

Now, this bill clearly says that, once we have agreed on the number, and once we have agreed on structure, then I, the plaintiff, get to choose where that money is going to be invested. That is as simple as that. All this stuff about tax implications and all that. In order for you to believe that, you have to believe that the insurance company, which has spent years fighting the plaintiff, attempting to not pay the plaintiff or pay the plaintiff less, all of a sudden, upon deciding to pay the plaintiff, is now concerned about the plaintiff's tax liability. I don't think that happens. There is no concern about tax liability.

This is about the defendant insurance company that is making money off the structured settlement at the expense of the plaintiff and we are simply saying, "Look, we, the plaintiff, we will use your structured settlement company or your broker, but we may not". As Kevin Dugan said, there are certain instances where our broker or the plaintiff's attorney will find a better deal for the plaintiff. That is what we should be concerned about. We should not be concerned with the ability of the insurance company to earn money off the settlement. We ought to be concerned about the ability of the plaintiff to recover what is rightfully theirs and in the best and most secure manner that they can.

Thank you.

Senator Pignatelli: I have just one question. If this bill passes, will this encourage the insurance company to offer a better deal to the plaintiff knowing that there is going to be some competition or might be some competition?

Attorney Newman: I think that is a possible offshoot. I am not sure it would happen a lot, but certainly I think it is a possible unintended consequence of this legislation. Even if they don't offer a better deal, I think it provides the

plaintiff the ability to potentially get the better deal by shopping it out in the market place. The focus should be here on the plaintiff, not on the commission of the brokers or the kick back the insurance companies get, or anything else. This is about the plaintiff. This isn't found money. This is somebody who is injured and being compensated for something that I probably wouldn't want to take the money for.

Thank you Madam Chairman.

Senator Pignatelli: I don't see any questions. Thank you. Anyone else who wants to testify? Thank you very much for coming today.

Hearing concluded at 12:55 p.m.

Recorded by Laurel Hanlon
Transcribed by L. Gail Brown
8/5/02

1 Attachment

WHAT IS A STRUCTURED SETTLEMENT?



National Structured Settlements Trade Association

WHAT IS A STRUCTURED SETTLEMENT?

Historically, money paid because of a personal injury law suit has been paid in the form of a lump sum at the time of settlement. This kind of payment, especially in very large catastrophic injury cases, places the claimant (or the family) in the position of managing a large sum of money which is intended to provide for a lifetime of medical and income needs. Most people are not experienced in handling large sums of money. As a result, the money often is spent quickly, leaving little or nothing to cover future needs of a seriously injured person. In order to create a more stable financial basis for the claimant, structured settlements were developed.

By definition, a STRUCTURED SETTLEMENT is the payment of money for a personal injury claim where at least part of the SETTLEMENT calls for future payment. The payments may be scheduled for any length of time — even as long as the claimant's lifetime, and may consist of installment payments and/or future lump sums. Payments can be in fixed amounts or they can vary. The schedule is STRUCTURED to meet the financial needs of the claimant.

These arrangements may be voluntary, as in a pre-trial settlement, or they may be required by law or a court order, as in a settlement involving a minor. The defendant may agree to make future payments or it may purchase an annuity contract from a life insurance company to fund the payments. Annuity contracts have been the preferred way of funding because of their pricing and flexibility for settlement design. An alternative, however, is a trust fund which invests only in United States treasury obligations. These trusts add the safety of investment in obligations issued by the U.S. Government.

There are some important benefits to the claimant in structuring the settlement:

1. The claimant receives money when it is needed. Instead of receiving a lump sum which has to be invested at risk, and managed for a fee, the money is paid out over time, better correlated with the actual need for funds.

2. The claimant does not have to pay income tax on the payments received, which includes an "internal buildup" of funds over time. A lump sum received also would be tax-free, but most later income from investing that money would be taxable.

Here is an example of how a structure might look when compared to a lump sum settlement. (Assume that the claimant is a man, age 45)

	TOTAL GUARANTEED	TOTAL EXPECTED
Single payment at settlement	$200,000	? (Depends on how the money is invested, and the taxes on its earnings)
or, for about the same cost		
$1300 per month for life with 20 years guaranteed	$312,000	$536,000 (Assuming a normal life expectancy)

In this illustration, money is received for as long as the claimant lives, with the first 20 years of payments made whether or not the claimant is alive. The total expected payments are tax-free.

In almost every bodily injury situation, a structured settlement should be considered. A more detailed description of these arrangements follows.

WHEN TO CONSIDER STRUCTURES:

* For cases involving the following situations:

    1. Temporarily or permanently disabled plaintiffs/claimants;
    2. Plaintiffs/claimants with limited investment or financial management skills;
    3. Guardianship cases, including minors or incompetents;
    4. Wrongful death cases where the surviving spouse and/or children need monthly or annual income;
    5. Severe injury, especially with shortened life expectancy, or mental incompetency.

* For plaintiffs with specific needs such as:

    1. Significant ongoing medical expenses;
    2. Rehabilitation or permanent care facility expenses;
    3. Deferred payments for college funds, retirement, down payment on a home, or mortgage payment;
    4. Replacement of monthly/annual income or supplemental income.

* Other types of cases to consider (these cannot be assigned, see qualified assignments):

    1. Workers Compensation claims;
    2. Personal injuries other than physical injury.

ADVANTAGES TO THE CLAIMANT/PLAINTIFF:

1. Income — tax-free guaranteed payments;*
2. Avoids risk of mismanagement — insurance industry statistics show that about 25 to 30% of all accident victims completely dissipate their judgments or settlements within two months of recovery, and 90% of them spend it all within five years;**
3. Avoids expense and worry with regard to financial loss — provides a secure, low-risk source of money;
4. Convenience of regular payments designed to meet the individual plaintiff's needs;
5. Claimant can receive more money over time than a lump sum settlement;
6. Competitive with other rates of return — see Internal Rate of Return illustration which shows before tax rate-of-return required to match the benefits offered by a structure;
7. Helps avert risk, expense and delay of going to trial;
8. Transfers the risk of outliving one's income to a life insurance company;
9. Benefits may be made higher if injury decreased life expectancy.

ADVANTAGES TO THE DEFENDANT/INSURER:

1. Earlier settlements — including assistance by structured settlement brokers with negotiations and settlement documents;
2. Reduced litigation costs;
3. May assign future liability;
4. Avoids risk and expense of a jury trial;
5. Can make low policy limits more attractive by making payments over time.

* Check with your own tax advisor for confirmation

** The Rutter Group, Ltd. from Flahavan, Rea, Kelly & Tener, "California Practice Guide: Personal Injury" (TRG 1992) Ch. 4

"QUALIFIED ASSIGNMENTS"

The defendant (or his/her liability insurance company) may transfer the responsibility to make the future payments to a third party by means of a "qualified assignment." The assignment is referred to as "qualified" because, if done properly, it qualifies for special tax treatment. The assignee then takes care of making the payments. This process relieves the defendant of further responsibility for the payments and also transfers the administration and record keeping responsibilities. The assignment company specializes in these activities, and may offer additional financial security.

OTHER USES OF PERIODIC PAYMENTS:

Although the concept of periodic payments has usually been applied to personal injury claims, there are other situations where payout obligations can be made on a periodic basis.

Property Loss Claims:

Periodic payments may be an excellent means of satisfying the claims of home owner groups, or others who are seeking reimbursement for construction defect claims. Instead of receiving a single large sum, payments are made over time in order to more closely match the time when repair costs are incurred.

ENVIRONMENTAL CLAIMS AND POLLUTION LIABILITY:

This area offers the greatest potential for the use of periodic payments outside of personal injury claims. From the superfund designated sites to the thousand of potential municipal and local sites, there is a need for clean-up funding.

When determination has been made that liability for pollution exists, and the terms for clean-up have been established and quantified, the future costs can be funded with an annuity or similar funding agreement offered by a life insurance company. By this means, the potentially responsible party can pay for its future obligations on a more economically efficient basis. It can also turn over to the life insurance company the administrative responsibilities of making the payments.

NOTE: The tax treatment of these alternative uses of structures is not necessarily the same as for the personal injury cases. A qualified tax expert should be consulted before any investment decisions or annuity purchases are made.

RELEVANT TAX RULES:

Structured settlements are governed by the Federal Internal Revenue Code (IRC) and offer tax advantages to the claimant and the assignee.

Section 104(a)(2) of the IRC states that compensation received on account of personal injury or sickness is exempt from gross income whether received in a lump sum or in periodic payments. The reason most often cited as justification for this exemption is that the claimants are merely being compensated monetarily for what they have lost physically or otherwise, and the payments are not a gain for the claimant. If the claimant invests these payments, the interest earned will be taxed. A structure, however, provides more money over time, and all payments received are tax-free.

Revenue Ruling 79-220 interprets Section 104(a)(2) and sets out the criteria that must be met in order to qualify for tax-exempt status under the law. The basic requirement is that the claimants can have no control over the investment that funds the periodic payments. They have only the right to receive future payments.

The Periodic Payment Settlement Act of 1982 gave statutory certainty to various tax rulings concerning personal injury damages paid by periodic payments. It also created Section 130 of the IRC.

Section 130 allows the party accepting the assignment of responsibility for future periodic payments to exclude the amount received for the assignment from gross income to the extent of the amount used to purchase specified funding vehicles. The process is called a "qualified assignment," and the funding vehicle is called a "qualified funding asset."

Section 130 is very specific regarding the requirements necessary to establish a qualified assignment:

1. The assignee assumes the liability from a party to the suit or agreement;
2. The payments are fixed and determinable;
3. The payments cannot be accelerated, deferred, increased or decreased, or otherwise changed after the agreement is reached;
4. The assignee's obligation is no greater than the obligation of the assignor;
5. The periodic payments are excludable from the recipient's gross income under Section 104(a)(2);
6. The injury must be a physical sickness or injury;
7. A qualified funding asset (an annuity or U.S. Government obligation) must be purchased.

SECURED CREDITOR:

Under a structured settlement, the IRC allows the claimant to have no more than a general creditor's interest in the assets of the defendant, to the extent of the future payments. If the liability to make the payments is assigned to a third party, however, the IRC permits the claimant to have a greater interest, i.e., a secured interest. This interest is secured by the annuity or U.S. government obligation purchased by the assignment company to fund its future obligations to the claimant. Should the assignment company fail to pay, the claimant, as a secured creditor, can become the owner of the assets which fund his/her payments. This ensures that the assignee's other creditors cannot use the assets to satisfy their claims against the company. Note that this secured interest applies to the assignment company, not to the life insurance company that issued the annuity contract.

Although the Internal Revenue Service has not ruled on the tax status of payments once an annuitant assumes ownership of the annuity, it is possible that a portion of subsequent amounts received would be subject to ordinary income taxation.

CONCLUSION:

A structured settlement is a proven, effective solution for the needs of personal injury claimants. Claims professionals, plaintiff attorneys, judges and defense attorneys advocate the use of structured settlements because they effectively meet a claimant's needs for security, as well as provide more benefits over time than a single, lump sum settlement. In addition, the periodic payment concept can be applied to a variety of other situations.

There are many other features of structured settlements that are worthy of consideration. If you would like additional information about structured settlements, please contact the Structured Settlement Consultant who provided you with this brochure, or the National Structured Settlement Trade Association at (202) 797-5108.

INTERNAL RATE OF RETURN COMPARISONS

The chart below demonstrates how much interest the self investor would have to earn to equal the payout of a non-taxable structured settlement. The tax brackets refer to the recipient's federal income tax level. The figures do not include state income taxes, which would make the differences even greater.

STRUCTURE RETURN RATE	15% TAX BRACKET	28% TAX BRACKET	31% TAX BRACKET	36% TAX BRACKET
5.00%	5.88%	6.94%	7.25%	7.81%
6.00%	7.06%	8.33%	8.69%	9.38%
7.00%	8.23%	9.72%	10.14%	10.94%
8.00%	9.41%	11.11%	11.59%	12.50%
9.00%	10.60%	12.52%	13.12%	14.06%



National Structured
Settlements
Trade Association

1420 16th Street, NW, Washington, D.C. 20036

Speakers

Senate Judiciary Committee Sign-In HB470

DATE: JUNE 9, '99 TIME: 10:30

APPEARING: IN FAVOR	APPEARING: TO OPPOSE	Please write name, address and who you are representing	WISH TO SPEAK?
✓		REP S. KEANS STRAFFORD 16	No
✓		Rep Doreen Dalton Cheshire 14	Yes
✓		Rep Gail Ullian	Yes
✓		KEVIN LUGAN TRIAL LAWYERS ASSN	YES
	✓	George Roussos NH Assoc. of Domestic Ins. Companies, American Council of Life Insurers	YES
	✓	Jon MARTIN-GROSS AIA	
	✓	Daniel B. Webster Cambridge Galaher Settlements	Yes
✓		Ride Newman	Yes

Testimony

The Senate of the State of New Hampshire

107 N. Main Street, Room 302, Concord, N.H. 03301-4951

CLESSON J. BLAISDELL
President of the Senate
Dean of the Senate
District 10

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June 23, 1999

The Honorable Debora B. Pignatelli
Chairman
Senate Judiciary
Room 102, Legislative Office Building
North State Street
Concord, NH 03301

Dear Chairman Pignatelli:

I have been contacted by the Peerless Insurance Company relative to the four points listed below. Please consider them before passing HB 470 regarding structured settlements.

1. It removes the ability of the company at liability to have any input into the designation of the structured settlement company;

2. Since the company at liability will be unable to compare structure proposals, the expense factor of the structure selected by a plaintiff could have a high expense factor, resulting in less money for the structure itself under the policy's limits;

3. The tax benefit to the plaintiff may be lost if the IRS views plaintiff selection of the structured settlement company as "control" of the structured settlement; and

4. If the tax benefit is lost, the amount of the claim settlement effected through the structure would be required to be returned to the company at liability's books as a reserve.

Thank you for your consideration of the above.

Sincerely,

Clesson J. Blaisdell
President of the Senate

CJB/dlm

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date:

THE COMMITTEE ON **Judiciary**

to which was referred **House Bill 470**

AN ACT **relative to settlement of personal actions.**

VOTE: **6-0**

Having considered the same, report the same with the following resolution:
Resolved, that it is: **INEXPEDIENT TO LEGISLATE.**

Senator Katie Wheeler
For the Committee

|HB470 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: relative to settlement of personal actions.

Date	Body	Description
1/28/1999	**H**	Introduced and ref to Judiciary; HJ18, p271
2/3/1999	**H**	Copy to Chairman on 02/03/1999 due on
2/11/1999	**H**	Hearing Mar 3 1:00 Rm208,LOB
3/4/1999	**H**	Subcom work session Mar 8 3:00 Rm208,LOB
3/5/1999	**H**	(Subcom: Reps J Pratt, J Wall, Craig, Rowe, Withee & J Wood)
3/10/1999	**H**	Subcom work session Mar 23 1:00 Rm208,LOB
3/30/1999	**H**	Subcom work session Mar 31 11:00 Rm208,LOB
4/27/1999	**H**	Maj Report OTP/AM for May 13 (vote 9-3;Reg)
4/27/1999	**H**	Min Report ITL
4/27/1999	**H**	Prop Maj Comm Am{0639}; HC48, p1174
5/13/1999	**H**	Comm Am, AA VV; Passed with Am VV; HJ51, p1347 + 1372
5/27/1999	**S**	Introduction and referring to Judiciary; SJ 21, P 570
6/4/1999	**S**	Hearing, 6/9/99, Room 102, LOB, 10:30 a.m.
6/22/1999	**S**	Committee Report, Inexpedient to Legislate, 6/24/99
6/24/1999	**S**	Senator Fernald Subsitute Motion to Rerefer, Division 9Y-7N, MA; SJ 25, P 642
1/31/2000	**S**	Committee Report, Inexpedient to Legislate, 2/3/2000 ; SC8, Pg. 3
2/3/2000	**S**	Inexpedient to Legislate, MA, VV, ==KILLED== ; SJ 2, Pg.53

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations