## Articles

# DESIGNING A RESPONSIBLE PERIODIC-PAYMENT SYSTEM FOR TORT AWARDS: ARIZONA ENACTS A PROTOTYPE

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## I. INTRODUCTION

In September 1988 Governor Rose Mofford created a Task Force on Medical Malpractice Insurance[1] in response[2] to a new round of escalating liability insurance premiums for Arizona health care providers.[3] The Task Force's mission

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1. Executive Order No. 50, Governor's Task Force on Medical Malpractice Insurance (September 30, 1988).

2. In July of 1988 Governor Mofford vetoed two bills regarding medical malpractice litigation passed during the second regular session of the Thirty-Eighth Legislature. The Governor objected to S. 1009, which provided for periodic-payment of certain medical malpractice awards, on three grounds. First, it was her belief that the bill violated Article 18, Section 6 of the Arizona Constitution, which provides that "[t]he right of action to recover damages for injuries shall never be abrogated." She also stated that the bill was bad public policy because it mandated periodic-payments to the detriment of and over the objection of the plaintiff. Finally, she said that the bill was deficient because it did not contain a provision regarding a guaranteed premium rate reduction. Veto Message, Office of the Governor (July 8, 1988), 1988 Ariz. Sess. Laws, 38th Leg., 2d Reg. Sess., 1512.

The Governor also vetoed H.R. 2054 which limited tort liability of a health care provider in certain emergency situations, i.e., rendering obstetrical services to an expectant mother who had not been previously treated by the provider, or certain others in privity with the provider. The Governor pointed out that representatives of the insurance industry had stated that the House bill would not result in lower insurance premiums for health care providers, or resolve the lack of availability of medical care in rural areas. Further, she feared the bill would discriminate against women who were unable to obtain prenatal care due to poverty or remoteness of location of health care facilities. Veto Message, Office of the Governor (July 13, 1988), 1988 Ariz. Sess. Laws, 38th Leg., 2d Reg. Sess., 1518.

3. In the early 1970s, Arizona health care providers, along with many others across the nation, experienced rapidly rising premium rates and serious problems regarding the availability of medical malpractice insurance. In the mid-1970s Arizona's primary carrier, The Travelers Insurance Company, withdrew from the Arizona market, creating a severe crisis in availability. The Arizona legislature met in special session to respond to the crisis and passed legislation that, among other things, created a joint underwriting plan — commonly referred to as the Arizona Joint Underwriting Plan (AJUP). 1976 Ariz. Sess. Laws, 32d Leg., 1st Spec. Sess., ch. 1, 990. The Mutual Insurance Company of Arizona (MICA) was organized under this legislation and became the servicing carrier for "occurrence" policies issued by the AJUP. MICA also acted as a private carrier, offering "claims made" medical malpractice coverage. Subsequently, the legislature authorized the AJUP to cede its business to Skandia America

was to investigate the reasons why medical malpractice premiums have risen dramatically; to determine the effect of the rising cost of malpractice insurance on the availability of medical services in Arizona; and to evaluate current state laws and recommend changes to deal with the problems of affordability and availability of medical malpractice insurance.[4] Initial findings and recommendations were to be submitted to the Governor no later than January 1, 1989 with a final report, containing any proposed legislation, due by June 30, 1989.[5]

The Task Force was divided into three subcommittees along the lines of the mission outlined by the Governor.[6] Based on the work of these committees, the Task Force concluded in its interim report that there was a strong indication that a serious situation was developing regarding a lack of obstetrical services outside the two major metropolitan areas — Phoenix and Tucson — in Arizona.[7] The Task Force recommended "that steps be taken immediately to attempt to ensure that essential prenatal or obstetrical services do not become completely unavailable to residents of any part of Arizona because of rising medical malpractice premiums or related causes."[8] Further study found that "the primary cause of high medical

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Reinsurance Corporation and to terminate its activities. *See* 1981 Ariz. Session Laws, 35th Leg., 1st Reg. Sess., ch. 41, 247. With the passing of the AJUP, MICA emerged as the primary carrier for physician's medical malpractice insurance, providing well over two-thirds of the coverage sold in Arizona. Report of the Subcommittee on Causes of High Premiums, Governor's Task Force on Medical Malpractice Insurance 5 (1989).

After a relative lull in rate increases during the late 1970s and early 1980s, premium increases for medical malpractice insurance again accelerated. Rate increases filed with the Arizona Department of Insurance by MICA during this time are set out below:

| Effective Date | Overall Rate Increase |
|---|---|
| April 1, 1981 | + 1.8% |
| April 1, 1982 | +13.8% |
| April 1, 1983 | + 8.0% |
| April 1, 1984 | + 7.0% |
| April 1, 1985 | +26.0% |
| April 1, 1986 | +24.8% |
| April 1, 1987 | +36.0% |
| April 1, 1988 | +34.6% |

*Id.* at 4.

4. Executive Order No. 50, *supra* note 1.

5. *Id.*

6. The three committees were: (1) Subcommittee on Causes of High Premiums; (2) Subcommittee on the Effects of High Premiums; and (3) Subcommittee on Possible Solutions. Interim Report of the Governor's Task Force on Medical Malpractice Insurance 4 (Jan. 1989).

7. *Id.* at 11.

8. *Id.* at 12. The specific recommendations were:

> (1) That the Department of Health Services be asked to establish an ongoing mechanism to detect situations where obstetrical prenatal or delivery services may become completely unavailable in any particular locality in the state.
>
> (2) That DHS develop a strategy to provide services to pregnant women in any geographic area in which it determines that obstetrical services have or are about to become completely unavailable. This strategy should ensure continuing contact with adequate obstetrical and gynecological services. Such a strategy might include, among other things, the use of alternative providers in appropriate situations, and provision of transportation of pregnant women to places where care is available. We are advised that additional public funds may be required for new administrative costs and for services to those unable to pay, who are not covered by current public funding. The Task Force believes that such limited expenditures, if necessary, would be strongly justified in order to avoid the enormous human and economic costs that would otherwise be incurred.
>
> (3) These recommendations are proposed as a short-term, limited solution to situations where obstetrical services may be, or may become, completely unavailable. They do not solve the long-term problems that the Task

malpractice insurance rates in Arizona is the increasing cost of medical malpractice insurance claims."[9] This finding was based on information indicating that:

> [B]oth the number of claims per 100 physicians (frequency) and the average cost per claim (severity) have increased substantially in recent years. The overall trend in Arizona insurance rates has correlated very closely to the combined frequency and severity increases associated with Arizona medical malpractice insurance claims.
>
> Between 1980 and 1988, as a result of increases in frequency and severity of claims, claim costs rose almost 390%. A review of the rate increases filed by Arizona's largest medical malpractice insurer during this time shows that the total of all rate increases during the period 1980 through 1988 is also about 390%.
>
> While the direct relationship between increased claims costs and medical malpractice insurance premiums is readily apparent, the Subcommittee [on Causes of High Premiums] also notes that there are other components to medical malpractice rate [sic] and premiums. The proportional relationship found between rates for malpractice insurance and increased claim costs also strongly imply that insurance company expenses have also increased by a similar percent (390%) during the period 1980 to 1988.[10]

In addition, the Task Force found that high medical malpractice premiums were having a serious negative impact on the availability of certain health care services in some areas of Arizona.[11] As the work of the subcommittees proceeded, the Task Force also undertook to study legislative and related proposals in time for consideration during the first regular session of the Thirty-Ninth Legislature.

In March of 1989, the Task Force recommended action in five main areas.[12] One of the recommendations involved the concept of paying future damages in

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> Force is currently investigating. Pending the implementation of successful long-term solutions, however, we believe that every possible effort must be made to maintain the availability of prenatal and delivery services to all women in Arizona.

*Id.* at 12-13.

9. Report of the Subcommittee on Causes of High Premiums, *supra* note 3, at 39.

10. *Id.*

11. Report of the Subcommittee on the Effects of High Premiums, Governor's Task Force on Medical Malpractice Insurance 6 (Feb. 1989).

12. The recommendations were summarized as follows:

> (1) We unanimously recommend development of a governmental plan to *assure adequate medical services for Arizona's rural populations*, including, where necessary, direct state subsidies of the malpractice premiums of physicians and providers who treat underserved rural populations;
>
> (2) We unanimously recommend the enactment of legislation authorizing *increased rate regulation* of medical malpractice insurance premiums and insurance company reserves;
>
> (3) We unanimously recommend the adoption of procedural rules of court *significantly reducing the expense and delay of malpractice litigation*, including limitations on pre-trial discovery and expert witnesses, court approval of lawyers' fees and strong encouragement of alternative methods of dispute resolution;
>
> (4) By a vote of 14 to 9, the Task Force supports the *concept of periodic payments* of some judgments for damages and recommends consideration of periodic payment legislation; and

medical malpractice cases as the trier of fact finds that the losses will accrue, i.e., paying future damages in periodic installments instead of in a lump-sum.[13] Another involved the abolition of medical malpractice liability review panels.[14] Both of these recommendations were adopted in legislation enacted by the Thirty-Ninth Legislature which went into effect on September 15, 1989.[15]

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(5) By a vote of 13 to 9, the Task Force recommends *consideration of the establishment of a joint underwriting authority* which would partially subsidize the malpractice premiums of physicians and providers who agree to pass on the cost savings to their patients and to cooperate with the Department of Health Services in making increased levels of care available to underserved populations.

By a vote of 12 to 4 the Task Force decided not to consider at this time whether to recommend changes in the Arizona Constitution. The Task Force will consider whether to make recommendations for constitutional change prior to the submission of its final report.

Legislative Recommendations, Governor's Task Force on Medical Malpractice Insurance 2 (March 10, 1989).

13. The specific recommendation follows:

4. Periodic Payments of Future Damages

Large damage awards in medical malpractice cases often contain substantial elements of compensation for damages, such as future medical expenses, that will be incurred in the future. Periodic, rather than lump-sum, payment of such future damages may reduce the expenses of the system. When properly designed, periodic-payment awards may also constitute a protection for the injured plaintiff.

By a *vote of 14 to 9*, a majority of the Task Force supports the concept of periodic payments of some future damages along the lines of model legislation being developed by the Commissioners on Uniform State Laws. (A draft of such legislation is attached.) The following concerns must be addressed in any such legislation:

(a) Financial guaranties must exist for the solvency of the insurance carrier and the assignee;

(b) Cost savings to insurance companies must be passed along to policy holders;

(c) There must be no "double-discounting" in the calculation of awards;

(d) Annuities must provide that payments continue even if the plaintiff lives beyond his or her life expectancy;

(e) Periodic payments must not be compulsory in all cases; the circumstances of each particular plaintiff must be taken into account by the court under applicable guidelines; and

(f) The effectiveness of such periodic payment legislation should be studied and reported by the Department of Insurance after an appropriate period of time.

(g) Periodic payment legislation may raise constitutional concerns under the Arizona Constitution.

*Id.* at 5-6.

14. This recommendation, which was unanimously approved by the Task Force, was part of Recommendation No. 3 pertaining to reform of the litigation process. *See supra* note 12.

15. 1989 Ariz. Sess. Laws, 1st Reg. Sess., ch. 289.

The legislature also enacted H.R. 2467 which provides subsidies to physicians who provide obstetrical services in rural areas in order to offset the cost of medical malpractice premiums. 1989 Ariz. Sess. Laws, 1st Reg. Sess., ch. 290, 1353. This legislation implements Recommendation No. 1 of the Task Force. *See supra* note 12. In addition, the legislature passed a concurrent resolution, H.C.R. 2024, urging the Supreme Court of Arizona to revise certain rules of court applying to the handling of medical malpractice cases. 1989 Ariz. Sess. Laws, 1st Reg. Sess., Pamphlet 4, A-6 (West, June 1989). This resolution was based on Recommendation No. 3 of the Task Force. *See supra* note 12. The Arizona Supreme Court has appointed a special committee of attorneys and judges, chaired by attorney William R. Jones, Jr. of Phoenix, to examine current court rules and make recommendations for changes. This committee has reported to the Court and the recommendations are being circulated for input from

While the abolition of medical malpractice review panels calls for relatively little discussion,[16] a mandatory system of paying future damages in periodic installments is a new concept to most Arizona lawyers and judges. Consequently, there is much to learn about the concept in general and this legislation in particular. Although the constitutionality of the periodic-payment legislation no doubt will be challenged, the purpose of this article is not to explore that subject. Instead, this article initiates the discussion of how the periodic-payment system works in order to assist the practitioners, judges, insurance brokers and others who will be implementing it. An intelligent decision about any constitutional concerns is not feasible until one understands how the act affects the rights and obligations of medical malpractice litigants, and other interested parties.

## II. BACKGROUND OF PERIODIC-PAYMENT LEGISLATION

The common law system of awarding lump-sum damages for personal injury cases is familiar.[17] The trier of fact determines all damages at the time of trial, whether they be past, present or future. Perhaps this system is the only one the courts of law could realistically administer when the remedies regarding damages in tort cases developed,[18] but, as the saying goes, things change. Special

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the bench and bar. By the time this article is in print, the rule changes should have been adopted.

The legislature, however, failed to enact H.R. 2546, relating to rate regulation and which was designed to implement Task Force Recommendation No. 2. *See supra* note 12. Recommendation No. 5, relating to the establishment of a joint underwriting authority, *see supra* note 12, was not implemented by the legislature either.

Governor Mofford extended the life of the Task Force until October 3, 1989, to address still pending matters. These include proposals regarding constitutional changes to implement other tort reform measures and medical professional responsibility issues.

16. Any medical malpractice action filed after September 15, 1989, the effective date of H.R. 2123, will not be subject to Section 12-567 of the Arizona Revised Statutes since the medical liability review panel system is repealed as of that date. Accordingly, any case that has been filed but not yet referred to a panel by September 15, 1989, should be treated similarly. Cases pending before a panel on September 15, 1989, should also be treated as if never referred to the panel because the panel loses jurisdictional authority on that date. However, those cases that have completed the panel review process and in which a decision has been duly filed with the presiding judge prior to September 15, 1989 should still be governed by A.R.S. § 12-567 insofar as its provisions affect the trial of the case, authorize the payment of expenses or compensation, and provide immunity from certain causes of action. It also seems appropriate to pay any expenses or compensation incurred in good faith under the panel system prior to September 15, 1989 and, of course, the immunity provision should apply to actions of panel members taken prior to abolition of the panel system.

17. In contrast, Civil Law systems often allow payment of damages for injuries in periodic installments. See Fleming, *Damages: Capital or Rent?*, 19 U. TORONTO L.J. 295 (1969) and Stone, *Separate Trials, Declaratory Rulings and Installment Damages: A Comparative Study*, 35 TUL. L. REV. 597 (1961).

18. Justice Holmes took this position in writing for the majority in Slater v. Mexican National R.R. Co., 194 U.S. 120 (1904). The dependents of a railway worker killed in Mexico as a result of his employer's negligence brought a wrongful death action in the federal district court in Texas. Under the conflict of law rules at the time, the case was governed by Mexican law which provided for periodic payments in the form of a pension. The pension, however, was terminable under Mexican law, for example, where the widow remarried, the children reached majority, or the need of the dependents for subsistence otherwise ceased. The Supreme Court indicated that the federal district court had neither the power to enter such a periodic award or to commute such an award to present value. The Court also said that, for these reasons, the state courts of Texas would refuse to accept jurisdiction over such a case. *Id.* at 128-29.

The English and Canadian courts have also refused to countenance periodic-payment of damage awards at common law. *See* Metcalfe v. London Passenger Transport Board, [1938] 2 All E.R. 352, *rev'd*, [1939] 2 All E.R. 542 (C.A.); Waldron v. Elfros [1922], 70 D.L.R. 726,

interrogatories now permit a court to obtain the necessary fact findings to fashion a judgment requiring a defendant to pay a tort victim for damages at the time the trier of fact has found that the losses will actually accrue. With the merger of law and equity, the court is also in a better position to require that the judgment debtor reasonably secure the obligation to pay a tort award in future installments. Nevertheless, rarely have courts ventured into such uncharted waters[19] without benefit of

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*aff'd*, [1923] 4 D.L.R. 1209 (Sask. C.A.); and Fournier v. C.N.R., [1927] App .Cas. 167 (P.C.). *But see* Jenkins v. Richard Thomas & Baldwins, Ltd., [1966] 2 ALL E.R. 15, 1 W.L.R. 476, 1 Lloyd's Rep. 473 (Lord Justice Salmon, although recognizing that the lump-sum award was the orthodox rule, suggested in dictum that a system of periodic-payment of damage awards, particularly where future wage loss is concerned, might be fairer to both plaintiffs and defendants.).

19. Only two cases involving a personal injury award wherein the court permitted a periodic-payment judgment have been found by the author. M & P Stores v. Taylor, 326 P.2d 804 (Okla. 1958), involved a damage action by a customer against a store owner for negligence in failing to maintain the premises in a safe condition. The jury returned a verdict fixing recovery in the sum of $36,000 to be paid at $150 per month for 20 years. Since neither party objected to the form of the verdict, the court accepted it and discharged the jury. Although the defendant objected subsequently and the trial court rendered judgment in lump sum for $36,000, the Oklahoma Supreme Court held the trial court was without authority to change the verdict after accepting it and discharging the jury. The judgment was reversed and the case was remanded for the trial court to enter judgment on the verdict with interest to run only from the due date of each installment. The Supreme Court of Idaho also upheld an order, based on the equity power of the trial court, that damages be paid in installments in a case where the defendant fraudulently induced a woman to marry him. McGhee v. McGhee, 82 Idaho 367, 353 P.2d 760 (1960).

Other courts continue to deny any common law authority to enter a periodic award in personal injury cases. For example, in Reilly v. United States, 863 F.2d 149 (1st Cir. 1988), the trial court, following a bench trial under the Federal Tort Claims Act (FTCA) of a medical malpractice case involving an irremediable brain damaged baby, entered judgment for plaintiffs for $11,037,964. The government argued that the trial court erred in ruling it was obligated to make a lump-sum award in lieu of a structured payout or periodic installment award. The government also argued, in the alternative, that the court ought to have calculated the size of the verdict in reliance upon the cost of purchasing an annuity sufficient to yield periodic payments mirroring the damages sustained.

The Court of Appeals ruled that the trial court had no authority to implement either of the government's suggestions: "The carefully landscaped terrain of the FTCA allows for no such necromancy to be practiced." *Reilly*, 863 F.2d at 169. The Court of Appeals cited, among other authorities, Frankel v. United States, 321 F. Supp. 1331, 1340-41 (E.D. Pa. 1970), *aff'd sub nom.*, Frankel v. Heym, 466 F.2d 1226 (3rd Cir. 1972), another FTCA case, where the government suggested that the court order it to establish a trust of $500,000 to pay future institutional care costs of the tort victim as they accrue, and to retain jurisdiction to resolve any questions of administration of the trust, including ordering the trust replenished if necessary. Upon the death of the victim, the balance in the fund would revert to the government. The court refused the suggestion on the basis that only Congress could authorize such a remedy. In United States v. Bauman, 56 F. Supp. 109, 117 (D. Or. 1943), the court stated in a condemnation proceeding: "There can be no judgment for an indefinite amount, or a judgment payable by installments." *See also* Gretchen v. United States, 618 F.2d 177, 181 n.5 (2d Cir. 1980) (suggesting that case was ideal for a structured settlement, but that the court had no power to enter a periodic-payment judgment).

The most common examples of periodic-payment judgments outside the personal injury area involve employment disputes where the equity powers of the court are invoked, usually in a suit for specific performance. For example, in Holden v. Construction Machinery Co., 202 N.W.2d 348 (Iowa 1972), involving a suit between two brothers over an employment contract in a closely held corporation, the trial court exercised its equity powers to fashion a remedy whereby the parties could elect to reject the remedy of specific performance, which would necessitate an alternative remedy. Although the parties did not file an election in accordance with the court's directions, the court proceeded to enter an order that could be viewed as a variable periodic-payment award for future damages.

legislation authorizing or requiring a periodic-installment judgment.[20] However, as experience with out-of-court settlements utilizing annuities, commonly referred to as "structured settlements," has developed, more and more states have passed legislation authorizing, or in some instances even mandating, periodic-installment judgments.

Today, over thirty states[21] have some type of periodic-payment legislation dealing with damage claims.[22] Although most of the original statutes were enacted in response to the so-called medical malpractice insurance crisis in the mid-1970s,[23] many of the statutes are currently directed at other situations too. Twenty states have statutes that specifically apply to medical malpractice claims: Alabama,[24] Alaska,[25] Arizona,[26] Arkansas,[27] California,[28] Colorado,[29] Delaware,[30] Florida,[31] Illinois,[32] Indiana,[33] Louisiana,[34] Maine,[35] Missouri,[36] New Mexico,[37] New York,[38] Ohio,[39] South Carolina,[40] South Dakota,[41] Utah,[42] and Wisconsin.[43]

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The Iowa Supreme Court affirmed the trial court order as being within the equitable power of the court, including the *in futuro* aspect whereby the trial court retained jurisdiction to adjudicate the compensation owing to the plaintiff as a result of the breach of contract. *Holden*, 202 N.W.2d at 353-54. *See also* Faunce v. American Can Co., Inc., 407 A.2d 733 (Me. 1979) (specific performance of annuity contract to be preferred so as to avoid increased income tax liability under lump-sum damages) and Stopford v. Boonton Molding Co., 56 N.J. 169, 265 A.2d 657 (1970) (court suggested suit for specific performance of retirement benefit contract would have avoided additional damages sought by plaintiff for increased income tax liability for lump-sum award).

20. The earliest examples of legislation providing periodic-installment payments to injured persons in the United States are embodied in the workers' compensation laws, the enactment of which began at the beginning of this century. *See* Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEX. L. REV. 117, 117-18 (1969). No-fault automobile insurance statutes provide the most recent examples. *See* Henderson, *No-Fault Insurance for Automobile Accidents: Status and Effect in the United States*, 56 OR. L. REV. 287 (1977).

21. *See* D. HINDERT, P. HINDERT & J. DEHNER, STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGMENTS, Appendix C(2) (1986).

22. Three other states attempted such legislation. Both the Kansas (KAN. STAT. ANN. §§ 60-3407 to -3411 (Supp. 1988)) and New Hampshire (N.H. REV. STAT. ANN. § 507-C:7 (1983)) legislation were held to violate the respective constitutions of those states. Kansas Medical Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). Oregon passed a periodic-payment statute pertaining to medical malpractice claims in 1975 (OR. REV. STAT. § 752.070), but repealed it twelve years later. 1987 Or. Laws ch. 774, § 154.

23. Thirteen states had passed legislation containing provisions regarding periodic-installment payments of medical malpractice awards by 1979. *See* Elligett, *The Periodic Payment of Judgments*, 46 INS. COUNS. J. 130, 134 (Jan. 1979).

24. ALA. CODE § 6-5-543 (Supp. 1989).

25. ALASKA STAT. § 09.55.548 (Supp. 1988).

26. ARIZ. REV. STAT. ANN. §§ 12-581 to -594 (Supp. 1989).

27. ARK. STAT. ANN. § 16-114-208 (1987).

28. CAL. CIV. PROC. CODE § 667.7 (West 1987).

29. COLO. REV. STAT. §§ 13-64-201 to -213 (Supp. 1988).

30. DEL. CODE ANN. tit. 18, § 6864 (Supp. 1988).

31. FLA. STAT. ANN. § 768.78(2) (West Supp. 1989).

32. ILL. ANN. STAT. ch. 110, paras. 2-1705 to -1719 (Smith-Hurd Supp. 1989).

33. IND. CODE ANN. §§ 16-9.5-2-2.1 to -2.4 (Burns Supp. 1989).

34. LA. REV. STAT. ANN. § 40:1299.39 (West Supp. 1989) (applying only to malpractice claims arising from state provided health care services); *id.* §§ 40:1299.43-.44 (applying to medical malpractice claims generally).

35. ME. REV. STAT. ANN. tit. 24, § 2951 (Supp. 1988).

36. MO. ANN. STAT. § 538.220 (Vernon 1988).

37. N.M. STAT. ANN. §§ 41-5-1 to -16 (1989).

38. N.Y. CIV. PRAC. L. & R. 5031 - 5039 (McKinney Supp. 1989).

Six states have statutes that specifically apply to tort claims against governmental entities: Hawaii,[44] Kentucky,[45] Louisiana,[46] Ohio,[47] South Dakota,[48] and Utah.[49] Additionally, sixteen states passed periodic-payment statutes that pertain to personal injury actions in general: Alabama,[50] Alaska,[51] Connecticut,[52] Florida,[53] Idaho,[54] Iowa,[55] Maryland,[56] Michigan,[57] Minnesota,[58] Montana,[59] New York,[60] North Dakota,[61] Ohio,[62] Rhode Island,[63] Virginia,[64] and Washington.[65]

Although this legislation was enacted in a relatively short period of time, no particular pattern or form emerged to serve as a model. It varies considerably[66] and generally has not been a very satisfactory solution to either the high cost of

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39. OHIO REV. CODE ANN. § 2323.57 (Anderson Supp. 1988).
40. S.C. CODE ANN. § 38-79-480 (Law. Co-op. 1989).
41. S.D. CODIFIED LAWS ANN. §§ 21-3A-1 to -13 (1987).
42. UTAH CODE ANN. § 78-14-9.5 (1987).
43. WIS. STAT. ANN. § 655.015 (West Supp. 1988) (The Wisconsin plan was amended in 1985 and currently appears to be limited to settlements, panel awards and judgments entered into or rendered before June 14, 1986).
44. HAW. REV. STAT. § 657-24 (Supp. 1988).
45. KY. REV. STAT. ANN. § 65.2004 (Michie/Bobbs-Merrill Supp. 1988).
46. LA. REV. STAT. ANN. § 13:5114 (West Supp. 1989).
47. OHIO REV. CODE ANN. § 2744.06 (Anderson Supp. 1988).
48. S.D. CODIFIED LAWS ANN. §§ 3-22-1 to -25 (Supp. 1989).
49. UTAH CODE ANN. § 63-30-25 (1989).
50. ALA. CODE §§ 6-11-1 to -7 (Supp. 1988) (applying to any civil action based upon tort and any action for personal injury based upon breach of warranty, except certain wrongful death actions).
51. ALASKA STAT. § 09.17.040 (Supp. 1989) (all personal injury claims based on negligence).
52. CONN. GEN. STAT. ANN. § 52-225(d) (West Supp. 1989) (any claim for personal injury, wrongful death, or property damage).
53. FLA. STAT. ANN. § 768.78(1) (West Supp. 1989) (all actions for damages for tort or contract).
54. IDAHO CODE § 6-1602 (Supp. 1989) (any civil action for personal injury or property damage).
55. IOWA CODE ANN. § 668.3(7) (West 1987) (any liability award).
56. MD. CTS. & JUD. PROC. CODE ANN. § 11-109 (Supp. 1989) (personal injury actions).
57. MICH. STAT. ANN. §§ 27A-6307 to -6311 (Callaghan Supp. 1989) (personal injury actions, including wrongful death, unless plaintiff is 60 years of age or older).
58. MINN. STAT. ANN. § 549.25 (West Supp. 1989) (all damage claims).
59. MONT. CODE ANN. §§ 25-9-401 to -406 (1989) (personal injury, property damage or wrongful death claims).
60. N.Y. CIV. PRAC. L. & R. §§ 5041 - 5049 (McKinney Supp. 1989) (actions for personal injury, injury to property and wrongful death).
61. N.D. CENT. CODE § 32.03.2-09 (Supp. 1989) (civil actions for personal injury or wrongful death, whether arising out of tort or contract).
62. OHIO REV. CODE ANN. § 2323.56 (Anderson Supp. 1989) (civil tort actions, other than medical or dental malpractice, for damages for injury to person).
63. R.I. GEN. LAWS §§ 9-21-12 to -13 (Supp. 1989) (personal injury, property damage or wrongful death actions).
64. VA. CODE ANN. § 8.01-424 (Supp. 1989) (any action involving compromises on behalf of persons under disability).
65. WASH. REV. CODE ANN. § 4.56.260 (1988) (any civil action based on fault for personal injury or property damage).
66. The legislation not only varies as to the type of claim subject to the act, but it also varies as to whether it is discretionary or mandatory; whether it applies only to future damages or to past damages as well; whether a minimum amount of damages must be involved, and, if so, the amount; whether certain installment obligations lapse on the death of the tort victim or, in a wrongful death case, the death of a beneficiary receiving installment payments; how any inflation

liability insurance, or to other problems it was intended to resolve. In fact, in many instances, the legislation fails to address most of the legitimate concerns involved in switching from a system of paying personal injury awards in lump sum to one of paying losses as they accrue.[67] Much of the legislation enacted to date not only fails to achieve the proper balance regarding the rights and obligations of tort victims, tortfeasors, and liability insurers and self- insurers; but in many instances it creates more problems than it solves.[68] In short, substantial room for improvement exists.

The National Conference of Commissioners on Uniform States Laws recognized the need for uniform or model legislation in the area of periodic-installment judgments after a number of states passed legislation in the mid-1970s. The Conference appointed a drafting committee that began its work in the spring of 1977. The experience in fashioning and funding structured settlements with annuities was relatively sparse and the concept was still new to most lawyers.[69] Developing a sound statute to implement a system whereby a party might elect, or a court might be required to enter, a periodic-installment judgment was truly a challenge.[70] Not only were the insurance brokers and the annuity industry faced with the new task of designing a product that would provide financing for a periodic-payment judgment, but the drafters of a periodic-payment statute had to consider the evolving technology in designing the legislation. For example, although it was possible to design a statute requiring inflation adjustments in the future periodic installments, was such a plan financially feasible? The most accurate method of accomplishing this task — the use of a floating or continuously changing cost-of-living index factor — required a special type of variable annuity.

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factor is to be calculated on future installments; and whether a liability insurer is considered to be discharged if it is permitted to fund the periodic-installment judgment by purchasing an annuity.

67. For a list of the concerns voiced by the Arizona Task Force on Medical Malpractice Insurance, *see supra* note 13.

68. For example, one of the most common deficiencies pertains to a mechanism for securing the judgment debtor's obligation to pay a substantial sum of money in installments. Although some legislation requires or at least implies that there must be court approval of any annuity or financial arrangement used to fund a periodic-installment obligation, few of the statutes set out any criteria for determining how a court should proceed to determine that one annuity company or arrangement is better than another.

Another example pertains to the termination of certain installment payments upon the premature death of the periodic-installment judgment creditor, i.e., premature in the sense that the person dies prior to the completion of the life expectancy period that the trier of fact has predicted in making future damage awards. Although that may be justifiable, what if the tort victim lives longer than predicted by the trier of fact? The latter seemed like an intractable problem at one point, but experience with structured settlements has proved that there is a solution that achieves the appropriate balance. The only state besides Arizona to address this problem is Illinois. *See* ILL. REV. STAT. ch. 110, para. 2-1706(c) (Smith-Hurd Supp. 1989).

69. For some of the early articles arguing the virtues and explaining the mechanism of settling personal injury cases involving large and extended amounts of future damages through the use of annuities, see Thomas, *Medical Prophecy and the Single Award: The Problem and a Proposal*, 1 TULSA L.J. 135 (1964); Sedgwick & Judge, *The Use of Annuities in Settlement of Personal Injury Cases*, 41 INS. COUNS. J. 584 (1974); Stevenson, *An Alternative to Lump-Sum Damages: The "Exactly Adequate" Award*, 24 DEF. L.J. 455 (1975); Fuller, *Paying Tomorrow's Claims With Tomorrow's Dollars*, 3 LITIGATION 27 (Fall 1976). *See also* Panel Discussion, *Annuities to Settle Cases*, 42 INS. COUNS. J. 367 (1975).

70. The Defense Research Institute developed prototype legislation on the subject as early as 1974. *See* Elligett, *supra* note 23, at n.3.

No such annuity was being marketed in the 1970s. Would one be developed? If not, the drafters were faced with selecting a simpler, but less accurate, plan.[71]

In 1980, after three years of work, the Uniform Law Commissioners approved and recommended for enactment the Model Periodic Payment of Judgments Act.[72] The Model Act provides an alternative to the lump-sum system of paying large awards of future damages arising from bodily injury by facilitating payment over the period which the trier of fact finds that the losses will accrue. Any party may elect for the Act to apply if the claim for future damages is sufficiently large. In the case of an effective election, the court must obtain the necessary fact findings and enter a periodic-installment judgment for the future damage portion. The judgment for past damages, including any punitive damages, continues to be in lump-sum. The Act attempts to address a number of the problems of existing legislation in a way that permits each state to tailor various parts of the statute to its own needs. The Conference thought that a model act would provide state governments the opportunity to develop and compare experiences with existing statutes, and to perfect legislation for paying large personal injury awards for future damages on a periodic, rather than a lump-sum, basis.[73]

Although the Model Act has been very influential in improving the general design and language of periodic-payment statutes enacted since 1980, only South Dakota[74] has adopted the Act. The Model Act has been criticized by some for not going far enough[75] and by others for going too far.[76] No doubt the Act embodied

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71. *See infra* notes 86-88 and accompanying text for a discussion of various alternatives.

72. 14 U.L.A. 21 (Supp. 1989). The Conference utilizes the following criteria in determining whether an act shall be designated as a "Uniform" or "Model" act:

(6) Criteria for designation

(a) An act shall be designated as "Uniform" if

(i) there is substantial reason to anticipate enactment in a large number of jurisdictions; and

(ii) "uniformity" of the provisions of the proposed enactment among the various jurisdictions is a principal objective.

(b) An act shall be designated a "Uniform Law Commissioners' Model" (or "ULC Model") Act if

(i) "uniformity" may be a desirable objective, although not a principal objective;

(ii) the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or

(iii) the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every state.

Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts (Aug. 2, 1988), National Conference of Commissioners on Uniform State Laws Reference Book 97, at 99-100 (1988-89).

73. Prefatory Note, MODEL PERIODIC PAYMENT OF JUDGMENTS ACT, 14 U.L.A. 21-23 (Supp. 1989) [hereinafter MODEL ACT].

74. S.D. CODIFIED LAWS §§ 3-22-1 to -25 (Supp. 1989).

75. *See, e.g.*, Comment, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 IOWA L. REV. 138 (1978) where the author, in commenting on the Sixth Tentative Draft of the Model Act (1978), argues that the Act was deficient because it contemplated that the trier of fact still would determine at the trial the amount of future damages to be paid and that this was bound to produce an inaccurate result. The author proposed the adoption of legislation authorizing variable periodic payments, i.e., paying the actual losses as they accrue, in a manner analogous to no-fault automobile insurance and some workers' compensation plans.

some new concepts, but they were not in any sense radical to those gaining experience with structured settlements. Although it might be debated whether the Act was rejected because it was ahead of its time, the fact remains that the Act was not widely adopted. Thus, in 1987 the Uniform Law Commissioners appointed a new drafting committee to revise and simplify the Model Act. The first reading of the proposed revisions took place at the annual meeting of the Conference in 1989. A final reading is scheduled for the annual meeting in the summer of 1990. In the meantime, the drafting committee will meet to review suggestions made during the first reading and to prepare a final draft for adoption by the Conference. Much of the Arizona Act was taken from the Model Act and its proposed revisions.

## III. GOALS AND ADVANTAGES OF A PERIODIC-PAYMENT SYSTEM

The genesis of periodic payments for future damage awards arose out of the medical malpractice insurance crisis in the 1970s, but a well designed plan can and should address matters other than the high cost of liability insurance. One should not lose sight of the opportunity to more nearly restore the tort victim to his or her pre-injury position, insofar as a monetary award can do so, while one addresses the inefficiencies of the lump-sum system. Benefits of a well designed periodic-payment plan can flow to the public generally, as well as to the immediate parties and liability insurers. In fact, even if the periodic-payment system failed to lower liability insurance premiums at all, a strong argument exists that it would still be a substantial improvement over the current system in many cases. Thus, the goals of a new system for compensating the seriously injured should not focus merely on saving premium dollars, but should also consider new ways of benefiting those affected by the system.

### *A. Benefits to the Tort Victim*

The prospect of having one's lifetime earnings settled in a single lump-sum upon a person who has been severely impaired through the fault of another cannot be completely salutary. That is not how the income would have been earned had the injury never occurred. The accident victim is forced to face complex investment and budgetary choices. When one adds to the balance a substantial sum of money — millions of dollars in some cases — for future medical care, the thought of managing the award to ensure that it is available to pay expenses as they accrue is a very serious and frightening responsibility. The lump-sum award, discounted to present value in most instances, must be invested wisely to produce income adequate for future needs. This compounds the risk of premature dissipation.[77] Attorney fees and other expenses of collection deplete the award and leave little margin for error in one's efforts to manage the lump-sum award actually received to make it last for the duration of the period the award was intended to cover, which may be the victim's life. Finally, to make matters even worse, the income from the investment of the lump-sum award for future damages may be subject to taxation under the income tax laws of the particular state, as well as

76. *See, e.g.*, Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments*, 66 A.B.A. J. 1524 (December 1980) where the author argues that the Model Act would force tort victims to accept unfavorable restrictions on payment of their awards.

77. The fact that professional advice and assistance is available from bankers, stock brokers and the like does not eliminate the risk of improvident investment or dissipation of the

those of the federal government.[78] This may not seem unjust insofar as the award represents lost income,[79] but it certainly is unfair to deprive the tort victim of what can be a significant portion of the investment income that was intended to fully compensate for future noneconomic loss, such as pain and suffering, and some health related expenses.[80] In short, the lump-sum system of paying damage awards is, at best, imperfect, and, at worst, a potential financial disaster for a good number of tort victims, especially those in most need of serious lifetime care. Is it possible to improve on this situation?

A properly designed system of awarding future damages in periodic-installments can reduce and even eliminate some, if not all, of the problems alluded to above. First, the responsibility of investing the funds to generate the necessary stream of income in the future can be shifted to the defendant or, as will often be the case, the defendant's insurer. The tort victim can be assured that the income will be paid as it would have been earned, usually in monthly installments. Such payments can be exempted from garnishment and other debt collection procedures to the same extent as wages are already exempt in the particular jurisdiction. Attempts to assign future installments may also be negated except for certain purposes, such as alimony, child support or health care. In other words, under a periodic-payment system the tort victim can be more nearly returned to a pre-injury position. The assurance of a future stream of income has the inherent salutary effect of placing the injured person on a budget like other wage earners in society. In fact, the tort victim is more secure than many wage earners because future income is assured and because the entire damage award — the lump-sum for past damages and the installments for future damages — can be tax free, at least at the federal level.[81]

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lump-sum although it is likely to reduce it. Moreover, there is usually a charge for these services.

78. To the extent the lump sum is invested in tax free obligations, there may be no tax. However, even though such income may not be taxable by the federal government, it is often taxable by state governments. Additionally, this type of investment may not provide the best rate of return, security or needed liquidity, and the market value can and does fluctuate dramatically depending on changes in the market rate of interest for other securities.

79. The lump-sum award for personal injury damages is excludable from gross income even though it represents lost earnings. Income earned from the award, however, may be taxed. I.R.C. § 104(a)(2) (1986).

80. Insofar as the taxpayer may deduct medical expenses, this will offset the pertinent investment income so that there will be no tax due. To the extent there is no deduction, as there usually would not be for pain and suffering and may not be for some health related expenses, the income is taxable. The plaintiff pointed this out in Frankel v. United States, 321 F. Supp. 1331, 1348 (E.D. Pa. 1970), *aff'd sub nom.*, Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972), and requested the court in a bench trial to add to the verdict an amount to cover taxes on income derived from investment of the lump-sum award where there would be no offsetting tax deduction. The court, following the majority rule, refused to consider income tax consequences in fixing damages in personal injury and death cases. *Id.* at 1349.

81. In 1979 the Internal Revenue Service issued a ruling stating that the entire amount of the proceeds payable to the tort victim under a structured settlement is tax free, where the victim has a right to receive only the periodic payments and does not have the actual or constructive receipt or the economic benefit of the lump-sum amount that is invested to yield that periodic payment. Rev. Rul. 79-220, 1979-2 C.B. 74. The tax free treatment of the receipt of damages, whether by suit or agreement, is now explicitly recognized under Section 104(a)(2) of the Internal Revenue Code of 1986, as amended. In addition, if the claimant's attorney has a contingent fee contract and payment is to be made on a periodic basis under that contract, the attorney may be able to spread the income for tax purposes over the years in which the fee is paid. *See* Winslow, *Opportunities and Hazards in Structuring Attorneys' Fees*, 25 TRIAL 37 (Sept. 1989) and Fuller, *supra* note 69, at 28-29.

Other benefits to tort claimants can result from a well designed periodic-payment system. Under the lump-sum system the trier of fact is obliged to calculate all damages recoverable at the time of trial. This would not change under current versions of periodic-payment legislation. Although the measure of damages will remain the same, and the trier of fact will continue to estimate the actual amount of future damages at the time of trial, the form of the verdict will be different. This may make a significant difference, particularly in those cases involving serious permanent injuries. The jury may be asked to return a special verdict, or to answer certain interrogatories, regarding the amount of damages that will be incurred on an annual basis in the future. This will be required where the evidence shows that the annual increments will not be the same amount each year, i.e., the installments need to fluctuate because of annual changes in the plaintiff's situation. Claimants' attorneys are likely to develop tables and other forensic aids in presenting evidence regarding future damages requiring the jury to focus on annual increments instead of the total. Some believe, as a practical matter, that verdicts may be even larger under a periodic-payment system. Under the lump-sum system jurors may exercise some restraint in awarding a total figure that can amount to millions of dollars, even when there is evidence to support it. Even if awards are not larger, the new system will require the jury to give more thought to particular elements of the damages.

Another practical consequence of a periodic system is that it is easier to eliminate the need, and the cost, for expert witnesses regarding discounting and inflation. Under the lump-sum system, the calculation of future damages can be a very complicated task. Because of the earning power of money, the trier of fact, usually a jury of lay people, is required to discount awards of future damages to present value.[82] In addition, many jurisdictions have come to recognize that the purchasing power of money, which involves inflation, should also be considered.[83] Predictions of future rates of interest and inflation often result in expensive battles between expert witnesses, and introduce complexities into the trial.[84] It is practically impossible to separate the issues of discounting and inflation in such a setting. Thus, the issues must be resolved by the trier of fact where a lump-sum verdict is employed.

On the other hand, where the jury is required to find the various elements of damages in annual increments, it is possible to separate the issues and thus to simplify the trial. First of all, there is no need to discount future damages to present value under a periodic-payment plan[85] because the installments will not be

82. Under the present lump-sum system, awards for future damages are discounted to present value to take into account the earning power of money. A claimant is paid an amount of money now that will generate income by investment and, in turn, produce the total amount of damages awardable to the claimant. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 574 (1973).

83. *Id.* A minority rule has been adopted by some courts that hold that there is no reduction to present value because inflation will offset any interest earned on a lump-sum award. *See, e.g.*, Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967).

84. Many times the experts are also testifying as to predicted increases in productivity, promotions, working life expectancies and similar matters involved in the projected career track of the tort victim. As a result, juries are not held to precise mathematical calculations and the total award takes on a rough approximation of what the jury believes in its collective judgment is owed to the claimant.

85. There still may be occasions where the periodic installments as determined by the trier of fact would have to be commuted to present value. This would involve the use of a discount factor. The judgment creditor-tort victim may want to reduce the judgment to a lump-

paid in advance of the time the damages accrue. Inflation is the only contingency that needs to be addressed. Adjustments for inflation could be made by the court after the verdict through the use of a predetermined index or formula. This method will not be perfect, but it would probably be more accurate than having a jury perform the task on the basis of expert testimony. There is no doubt that it would be less expensive.

Although not completely free from constitutional doubt, one can convincingly argue that a legislatively determined inflation factor or formula, applied after the verdict by the court, would not improperly invade the province of the jury.[86] The legislature could statutorily fix the inflation factor or could prescribe a formula for use by a particular administrative agency, such as the insurance regulator. That agency would be given the responsibility of determining and publishing the factor the court would use. The latter approach could involve a formula that produced a fixed inflation factor for any judgment entered while the particular factor was in effect.[87] Alternatively, a formula could produce a factor that varied over time according to changes in economic conditions so that the future unaccrued installments would be subject to adjustment each year.[88] In any event, a periodic-payment system presents the opportunity to simplify the trial, reducing an expense commonly incurred in the lump-sum system, without any substantial prejudice to plaintiffs or defendants.

The adoption of a periodic-payment plan also presents the opportunity to overcome one of the most serious problems that is inherent in the lump-sum system. At the time of trial, in a serious permanent injury case under the lump-sum system the answers to several issues are very problematic. The trier of fact is often ill-informed as to the resolution, even with the help of experts. One question that looms large is the state of the economy in the future, a problem discussed above. Another pertains to the claimant. Although we will never know what the claimant would be like if he or she had not been injured, the passage of time will answer the question of the actual condition of the seriously injured claimant. A periodic-payment plan can not only eliminate much of the guesswork inherent in the lump-sum system regarding future rates of interest and inflation, but can also more accurately compensate victims of serious injury based on their actual condition. For example, it would be possible to order a defendant to pay a claimant for the actual out-of-pocket losses[89] as they accrue.[90] Presently, medical expenses are paid on an accrued basis under workers' compensation plans and both wage loss and medical expenses are paid as they accrue under many no-fault

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sum amount, for example, where the defendant is unable to fund a periodic-installment judgment to the satisfaction of the court either initially or due to a later insolvency. The periodic-payment plan should provide for this contingency.

86. This could be done through the use of a legislatively created presumption, which could be rebutted, or through a direct usurpation of the task. If there is no issue of fact to be resolved, there is no issue for the jury.

87. *See* MODEL PERIODIC PAYMENT OF JUDGMENTS ACT § 6 (Tent. Draft No. 6, 1989) (The Model Act was adopted by the Uniform Law Commissioners in 1980 and is currently being revised. *See supra* note 72 and accompanying text. This citation is to the sixth tentative draft of the revisions.) [hereinafter Sixth Tentative Draft].

88. *See* MODEL ACT, *supra* note 73, § 7, 14 U.L.A, at 31.

89. Since there is no ready market to ascertain the value of noneconomic losses, such as pain and suffering, it probably would still be advisable for the trier of fact to determine future damages for that element at the time of trial to avoid future disputes over the amount of each installment. However, it would be possible to pay for those elements of damages as they accrue and avoid future disputes by providing for liquidated amounts.

auto insurance plans. Even though these involve compensation systems, there is no inherent, theoretical impediment to prevent the adoption of a similar remedy under tort law. There may be practical reasons, however, that militate against such a plan for tort injuries.

The most serious problem pertaining to a system of paying actual out-of-pocket losses as they accrue begins with the engine that fuels the tort system — liability insurance. Insurers argue that they would not know how to price their product with open-ended liability and, as a result, such a system is not feasible. This position is belied to a great extent by the successful experience of casualty insurers underwriting no-fault auto insurance in states with very high or unlimited benefit levels. This would, however, be a more radical departure from the lump-sum system than any periodic system adopted to date and raises legitimate concerns about costs that are not easy to predict. No doubt such a system raises other concerns such as increased litigation and resulting court congestion; whether some injured persons would have less incentive to engage in rehabilitation; and whether it would be possible to deal effectively with causation issues when changes occur in the tort victim's medical condition. These practical concerns translate into a big political battle for anyone proposing such a dramatic departure from the present system.[91] Nevertheless, one very important improvement emerged from the debates over such proposals. The experience of financing structured settlements and statutorily required periodic-payment judgments with annuities also revealed how the improvement could be implemented. This improvement relates to the inability of the trier of fact to accurately predict how long a particular tort victim may live.

The three basic elements of damages in bodily injury cases are earnings loss, medical expenses, and pain and suffering. As to earnings, most people have a fairly predictable worklife expectancy. Exceptions exist, but by and large most people do not want or expect to work all their lives. When it comes to the task of calculating future loss of earnings, the trier of fact has the benefit of experience for similarly situated persons, as well as evidence concerning the individual victim's intentions. Even if the trier of fact determines the worklife expectancy to be shorter than it would actually have been in cases where there is doubt, arguably no great injustice is done if the award is sufficient to provide for a retirement fund. In any event, the individual who is injured is at no greater risk on this matter than the rest of society. Even though one may not plan to retire, the decision does not always rest solely with the individual. On the other hand, if the trier of fact guesses that the individual will live, at best, only a normal life expectancy and awards future damages for medical expenses and pain and suffering accordingly, and the individual actually lives longer than predicted, a more serious problem

90. Such a system has been proposed. *See* Comment, *supra* note 75.

91. In drafting the Model Periodic Payment of Judgments Act in the late 1970s, the Commissioners on Uniform Laws gave serious consideration to including provisions for modifying an installment judgment when it is learned after the verdict that the tort victim's damages are significantly more or less than found at the trial. A proposed section in an early draft would have permitted a court to hold no more than a certain number of additional hearings after a trial and to modify, within limits, a judgment for future damages based upon subsequent revelations regarding the tort victim-judgment creditor's damages. This proposed section was eliminated from the Fifth Tentative Draft by a vote of the Committee of the Whole at the annual meeting of the Conference in 1978. Opponents argued that the insurance industry could not cost its product if liability was open-ended, court congestion would be worsened, and some injured persons might be motivated to resist rehabilitation and recovery. Difficulty in determining the cause of subsequent medical and other changes in the tort victim was also cited.

exists. The tort victim runs the risk of being seriously undercompensated in this instance. There is, however, no way to avoid this problem under the lump-sum system except to implore the trier of fact to take this contingency into account. Until recently, this was thought to be an intractable problem.

As attorneys and insurance brokers gained experience in settling serious injury cases with structured settlements, it became fairly common to provide a lifetime benefit for certain aspects of the settlement, mainly medical expenses and pain and suffering. The lifetime benefit is usually funded with a life annuity.[92] This type of contract is very common in the life insurance industry and is similar to the lifetime benefit options under standard life insurance contracts and some retirement plans. It is now clear that this same lifetime benefit can be made a part of a statutory plan for periodic payment of personal injury awards, and at a very small cost. After consulting various experts in the structured settlement business, the drafting committee revising the Model Periodic Payment of Judgments Act incorporated the concept of a lifetime benefit for medical expenses and non-economic loss into the Sixth Tentative Draft of the revisions.[93] This is a dramatic improvement over the current lump-sum system and is feasible because an annuity can be used to fund the award just as it is used in a structured settlement. Moreover, the added cost results in relatively minimal increases in the premium for the annuity. Arizona and Illinois are the first states to adopt a lifetime benefit provision.[94]

Finally, under a periodic-payment system that contemplates the use of annuities to fund the installments for future damages, it is possible to get more "bang" for the liability policy limit "buck." Today, the liability insurer is contractually obligated to pay for the tort victim's damages only up to the policy limits. The lump-sum award for past and future damages is compared to the applicable policy limit and the lesser of the two is payable by the insurer. Under a system of paying future damages periodically, there is an alternative way of determining the insurer's obligation. The liability insurer will not actually make the installment payments in most cases, but will purchase an annuity to fund that obligation, just as in a structured settlement. If so, the cost of the annuity should be compared to the policy limits, not the discounted value of the future installments. This can result in much greater coverage because of the more efficient use of the policy limits.

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92. A life annuity is a contract under which an insurance company promises to pay the owner a certain guaranteed minimum income every year as long as the individual lives, with payment ceasing on death (unless a refund feature had been selected). K. BLACK, JR. & H. SKIPPER, JR., LIFE INSURANCE 45 (11th ed. 1987).

93. Sixth Tentative Draft, *supra* note 87, § 4(c) provides:

> In all actions tried to a jury under this [Act], if the evidence would support such a finding, the jury must be instructed that it is permissible to find that future medical expenses and other costs of health care or noneconomic loss, or both, will continue for the duration of the claimant's life, in which case it is not necessary to decide how long the claimant will live. If the jury so finds, the jury shall determine the amount of damages the claimant will incur annually while living. If a court serves as the trier of fact, the court may make the findings and determine the amount of damages.

94. *See* ARIZ. REV. STAT. ANN. § 12-584(c) (Supp. 1989). The lifetime award in Arizona is only applicable to future medical expenses and does not apply to awards for non-economic loss. *See infra* note 146 and accompanying text. Illinois appears to permit lifetime awards for all elements of future damages. *See* ILL. ANN. STAT. ch. 110, para. 2-1706 (Smith-Hurd Supp. 1989).

Typically, the cost of an annuity to fund the future damages portion, where payable in installments, will be less than the discounted value, i.e., the lump-sum equivalent, of those installments.[95] The annuity company is dealing in the law of large numbers. On the average, the life of a severely injured annuitant will be shorter than that of a healthy individual of the same age and sex. Whereas the trier of fact may be inclined to give a particular tort victim the benefit of the doubt as to life expectancy to make sure the compensation is adequate, the annuity company can be more clinical in calculating the actual cost of a large number of contracts promising to pay a lifetime benefit. Competition among annuity companies ensures that the price charged more nearly tracks the actual life expectancy of the severely injured person. Thus, by using the cost of the annuity in determining whether policy limits have been exhausted,[96] the tort victim, as well as the tortfeasor-insured, receives the benefit of the more efficient system.[97]

### *B. Benefits to Defendants and Liability Insurers*

The legal obligations of a liability insurer primarily are to defend the insured and to pay money damages to a tort victim, so any benefit evolving from a change to a periodic-installment system for the defense is necessarily limited to a reduction in costs or a more efficient use of the premium dollar. There is the potential to do both. The opportunities for simplifying the trial were discussed above. This should decrease litigation costs, thus lowering premiums. The use of an annuity to finance future installment obligations can also reduce liability insurance costs. This occurs because the annuity carrier is able in most cases to price its product at a figure lower than the discounted value of the future installments.[98] If a liability insurer has to pay out smaller amounts to discharge the obligation of its insureds, this should also lower premiums. Consequently, the insured has a choice regarding how the benefit may be realized. The insured may choose to pay the same amount to carry liability insurance as the insured previously paid under the

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95. There are some cases where this will not be true. For example, where the payout period for the future damages award is a known quantity and relatively short, for example five years or less, the cost of the annuity may exceed the discounted value of the installments. This is due to the fact that a portion of the cost of an annuity consists of commissions, overhead, and profit. The difference between the cost of the annuity and the discounted value of the future installments may also be affected by the method and rate of discount.

96. Where the cost of the annuity exceeds the present or discounted value of the future installments, *see supra* note 95, a public policy issue arises regarding liability policy limits. It still may be advantageous for the liability insurer to purchase an annuity in such a case, even though the cost exceeds the discounted value, for accounting or tax reasons, or simply because the insurer wants to close the file. In such an event, should the greater or the lesser of the two figures be compared to the policy limits? The Sixth Tentative Draft to Revise the Model Periodic Payment of Judgments Act utilizes the lesser figure. This is based on the theory that the insurer should be encouraged to choose the cheaper method and that the tort victim and the tortfeasor should get the benefit of the more efficient funding mechanism even if the liability insurer chooses not to avail itself of it. *See* Sixth Tentative Draft, *supra* note 87, § 9(b).

97. Where a lifetime benefit is awarded, *see supra* note 93 and accompanying text, and the need arises to compare the discounted value of that benefit with the cost of an annuity to fund it, one should resort to a standard mortality table, such as a race neutral life expectancy table for the appropriate sex based on the Current Population Survey collected by the Bureau of the Census for the Bureau of Labor Statistics of the United States Department of Labor. This should be made explicit in any statute establishing a periodic-payment plan that contemplates a lifetime benefit. *See* Sixth Tentative Draft, *supra* note 87, § 11(b).

98. *See supra*, note 95 and accompanying text.

lump-sum system, thus garnering higher policy limits, or the insured may keep the same limits and pay a reduced premium.[99]

While the lower cost of premiums, or more efficient use of premium dollars, benefits all insureds, there is an additional benefit to those defendants wanting to self-insure in whole or in part. Large governmental entities may more readily self-insure under a periodic-payment plan. The governmental entity could continue to insure against the exposure of potentially large lump-sum awards for past damages either through a self-insurance program or by purchasing insurance from a private carrier, or some combination of the two. Regarding awards of future damages, the governmental entity would be able to appropriate each year the funds necessary to fund the periodic installments due during that year. This would permit the government to budget for the future installments as they accrue. Budgeting for the annual installments may be more feasible, depending on the frequency of periodic-installment awards, than budgeting for very large lump-sum awards. It is an alternative that a governmental risk manager may want to consider.

### *C. Benefits to the Public*

Lower liability insurance costs obviously affect the public in that commercial and professional insureds would be able to reduce their costs and ultimately pass the savings on to the public. For example, the cost of health care is a prime candidate for reduction where the periodic-payment plan applies to medical malpractice cases. Beyond these savings, the public may also benefit where seriously injured people would otherwise dissipate or exhaust a lump-sum award and seek assistance through public health and other social services. Economic dislocation to families and others closely associated with the tort victim may also be avoided. Finally, any periodic-payment plan providing for the possibility of a lifetime health care benefit[100] has to be a fairer and more humane way of dealing with the permanently injured. The public also benefits when the justice system is improved.

## IV. The Arizona Act and How It Works

### *A. Scope of the Act*

#### *1. Types of Actions Covered*

In designing a system for paying future damages in installments as the losses and expenses accrue, one is initially faced with a basic decision: Should all cases be brought within the act or, if not, which cases should be included and which excluded? Most statutes enacted in periods of liability insurance crises focus on cases involving bodily injury. Some could arguably include a broader

99. In theory, the insured could also choose to reduce the costs for liability insurance even further by lowering the policy limits. This would be possible if one could be assured that the insured's tort liability exposure would always be measured by what the liability insurer will be required to pay out (which would be past damages plus the cost of an annuity) instead of the face amount of the tort award (which would be past damages plus the discounted value of future damages). The decision to utilize the insurer's exposure would permit the insured to carry lower limits. However, as long as there is still the possibility that a lump sum for past and future damages may be awarded against the insured, as under those periodic-payment plans that are elective or discretionary with the court, an insured should use caution before carrying lower limits.

100. *See supra* note 93 and accompanying text.

category because they use the term "tort"[101] or "personal injury"[102] in describing the types of actions encompassed within the statute. The broader scope, however, does not appear to be justified. Tort cases which do not involve bodily injury are not as apt to involve awards for prospective or future damages.[103] In the few cases that do, such as defamation cases or perhaps an interference with economic advantage case, the basic concerns that argue for the adoption of a periodic-installment system in bodily injury cases are not prominent. For example, a large award for future medical expenses and wage loss arising from bodily injury usually involves some severe disability. The dissipation, either wholly through improvident investments or even partially through income taxes, is a far more serious social problem than that of the able bodied person whose reputation has been sullied or whose economic opportunities have been unduly eclipsed. In addition, there is no vital service, such as health care, that is being disproportionately impacted by high liability insurance premiums in the nonbodily injury area. Thus, there does not appear to be any need currently to extend a periodic-payment system beyond bodily injury cases.

Although the Arizona Senate passed a version of a periodic-payment plan that would have applied to all tort actions involving a claim for future damages for bodily injury,[104] the final version enacted and signed into law is limited to medical malpractice actions. This legislation was made a part of Chapter 5.1, Title 12, of the Arizona Revised Statutes which was enacted originally to deal with the medical malpractice insurance crisis in the mid-1970s.[105] The original legislation contained, among other provisions,[106] the medical malpractice liability review panel

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101. *See, e.g.*, ALA. CODE § 6-11-1 (Supp. 1988) which applies to "any civil action based upon tort and any action for personal injury based upon breach of warranty."

102. *See, e.g.*, ALASKA STAT. § 09.17.040(a) (Supp. 1988) which applies in every negligence action "where damages for personal injury are awarded."

103. It is possible to have monetary awards for prospective harm in cases other than tort actions, *see supra* note 19, but few, if any, of the periodic-payment statutes currently on the books could be reasonably interpreted to include nontort actions. Compare the provisions of the Utah Governmental Immunity Act, UTAH CODE ANN. §§ 63-30-1 to -38 (1986), which appear to permit the payment of any type of claim or award against a political subdivision in periodic installments. However, this authority is limited to situations where the subdivision is unable to pay the claim or award during the current fiscal year and appears to be more for the benefit of the subdivision than the claimant. *Id.* § 63-30-25.

104. The Senate was acting on H.R. 2123 at the time. There is no separate Senate bill number.

105. *See supra* note 3.

106. The original legislation also attempted to abolish medical malpractice actions based on assault, battery or oral contracts (ARIZ. REV. STAT. ANN. § 12-562); to limit the standard of care to that within the state where the health professional practices (*Id.* § 12-563); to permit the introduction of evidence of collateral sources (*Id.* § 12-565); to prohibit the pleading of a monetary figure (*Id.* § 12-566); to review attorneys' fees (*Id.* § 12-568); and to deny admissibility of certain types of evidence relating to professional liability insurance (*Id.* § 12-569). 1976 Ariz. Sess. Laws, 32d Leg., 1st Spec. Sess., ch. 1, § 3. Subsequently, two more sections were added. One requires a plaintiff's attorney to report the filing of a medical malpractice claim to the regulatory board of the particular health care professional. ARIZ. REV. STAT. ANN. § 12-570; 1986 Ariz. Sess. Laws, 37th Leg., 2d Reg. Sess., ch. 379, §1. The other grants immunity from malpractice actions based on negligence to health professionals providing services without compensation at nonprofit clinics. ARIZ. REV. STAT. ANN. § 12-571; 1988 Ariz. Sess. Laws, 38th Leg., 2d Reg. Sess., ch 166, § 1. All these provisions remain in the current statutes and are effective, insofar as they are constitutional.

As part of the original act regarding actions relating to health care, the legislature enacted a statute of limitations that in general required a cause of action for medical malpractice to be filed within three years from the date of injury. ARIZ. REV. STAT. ANN. § 12-564. A subsection also modified the tolling provision for minors and required that in an action on behalf of such a

system. This system was repealed in the 1989 periodic-payment legislation.[107] The original legislation also contained a definition of "medical malpractice action."[108] By making the periodic-payment plan a part of chapter 5.1, the legislature limited it to medical malpractice actions as defined in that chapter.

*2. Monetary Thresholds*

Many of the states adopting periodic-payment plans utilize a monetary threshold to further limit the scope of their acts.[109] Unless the amount of future

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person, when injured under the age of seven, the statute would begin to run when the minor reached age seven or on death, whichever occurred earlier. *Id.* § 12-564(d). This meant the statutory period, absent some other exception, would expire at age ten without regard to the ability of the minor, the parents, or any other caretaker to bring the action. Both the general provision and the provision regarding minors were held to violate the Arizona Constitution. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984), and Barrio v. San Manuel Div. Hosp. for Magma Copper, 143 Ariz. 101, 692 P.2d 280 (1984), respectively. The section was subsequently repealed. 1985 Ariz. Sess. Laws, 37th Leg., 1st Reg. Sess., ch. 84, § 3, 156.

The Supreme Court of Arizona has also declared that Section 12-569, which prohibits the admissibility of evidence that a witness is covered by the same malpractice insurer as the defendant, violates the Supreme Court's constitutional rule making power and the Separation of Powers Doctrine. *See* Barsema v. Susong, 156 Ariz. 309, 751 P.2d 969 (1988). However, the legislature has not repealed this section.

The attempt of the Arizona legislature in the original legislation to abolish medical malpractice actions based on battery or oral contract is also highly suspect. In one case, the United States District Court for Arizona has held the provision regarding battery to violate the Arizona Constitution. *See* Rubino v. De Fretias, 638 F. Supp. 182 (D. Ariz. 1986).

Section 12-571, which was enacted in 1988, attempts to grant partial immunity to health care providers who provide free health services within the scope of their license at nonprofit clinics. According to the statute, they can only be sued for conduct constituting gross negligence. This statute also raises serious constitutional concerns since an employee or agent of a charitable organization was never cloaked with any immunity granted by the common law to the charitable entity. The individual remained responsible for his or her torts. Thus, the attempt to abolish the negligence action against the individual, which was available at the time the Arizona Constitution was adopted, may be flawed constitutionally. *See generally* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984). Section 12-565, which merely permits the introduction of evidence regarding collateral sources of the malpractice plaintiff without mandating a reduction in any award, has been upheld as constitutional. Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977).

107. *See* 1989 Ariz. Sess. Laws, 39th Leg., 1st Reg. Sess., ch. 289, §. 2, 1348.

108. In this chapter, unless the context otherwise requires:

1. "Licensed health care provider" means a person, corporation or institution licensed or certified by the state to provide health care, medical services, nursing services or other health-related services and includes the officers, employees and agents thereof working under the supervision of such person, corporation or institution in providing such health care, medical services, nursing services or other health-related services.

2. "Medical malpractice action" or "cause of action for medical malpractice" means an action for injury or death against a licensed health care provider based upon such provider's alleged negligence, misconduct, errors or omissions, or breach of contract in the rendering of health care, medical services, nursing services or other health-related services or for the rendering of such health care, medical services, nursing services or other health-related services, without express or implied consent.

1976 Ariz. Sess. Laws, 32nd Leg., 1st Spec. Sess., ch.1, § 4 (codified as ARIZ. REV. STAT. ANN. § 12-561 (1982)).

109. Twenty three states use a monetary threshold in either all or some of the cases that are covered under their acts: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New York, Ohio, Rhode Island, South Carolina, South Dakota, Utah, Washington and Wisconsin. Nine states do not use any monetary threshold: Alaska, Delaware, Indiana, Iowa,

damages involved in the case meets or exceeds a certain monetary figure, the periodic-payment plan as provided in the statute may not be available to the court or parties.[110] These thresholds range from a low of $50,000 in California[111] to a high of $1 million in Hawaii,[112] but most statutes employing a threshold fall within a range of $100,000 to $250,000.[113] Although all of the statutes apply the monetary figures to future damages in determining whether a particular case is governed by the act, two statutes limit the application to future economic loss[114] while another limits it to future medical expenses.[115] Another state requires that future losses less medical and other health care costs meet the dollar threshold.[116]

The wisdom of adopting any monetary threshold, much less one as high as $250,000, is questionable. If one merely emphasizes the savings in premiums that may be generated by a periodic-payment plan, the idea of a monetary threshold is appealing because the smaller the amount of future damages, the less significant the savings to the insurer by purchasing an annuity. This perspective, however, is too narrow when one considers the other benefits that may flow from a periodic-installment judgment. For example, a child suffering serious facial injuries may not incur large amounts of future damages except for certain medical expenses and related noneconomic losses that will only arise from reconstructive surgical procedures performed as maturity is approached. From the child's perspective, it may be advantageous to have an installment award, principally consisting of one large payment, to be made a few years after the trial. Although the savings to the defendant or an insurer may not be much, if any, the necessity of a guardianship may be avoided while assuring that the funds will be available at the time the surgery is needed.

There may also be situations where the defendant has relatively low policy limits that could be more efficiently used to fund future installments.[117] There will be some cases where the total damages if paid in lump-sum would exceed the policy limits, even though the discounted value of the future installments might fall below a particular monetary threshold. In those cases, purchase of an annuity may bring the verdict within the policy limits. Thus, the use of a monetary threshold, particularly as low as $50,000, can be quite an arbitrary determination from the plaintiff's perspective even though it may have some rational basis when viewed from the defendant's perspective.

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Kentucky, Maryland, New Mexico, North Dakota and Virginia. For statutory citations to the various state codes *see supra* notes 24-65.

110. Even though the statutory monetary threshold is not met, it may be possible for the parties to agree to try a case under all or part of the provisions of the act and to petition the court to do so, or adopt and implement parts of an act through a settlement agreement. *See* MODEL ACT, *supra* note 73, § 15, 14 U.L.A., at 41.

111. CAL. CIV. PROC. CODE § 667.7(a) (West 1987) (applies to medical malpractice actions only).

112. HAW. REV. STAT. § 657-24 (Supp. 1988) (applies to tort actions against the state or its political subdivisions).

113. *See, e.g.*, ALA. CODE § 6-5-543 (Supp. 1988) ($150,000); ARK. STAT. ANN. § 16-114-208 (1987) ($100,000); CONN. GEN. STAT. ANN. § 52-225(d) (West Supp. 1988) ($200,000); and FLA. STAT. ANN. § 768.78(1) (West Supp. 1989) ($250,000).

114. FLA. STAT. ANN. § 768.78(1)(a), (2)(a) (West Supp. 1989), and WASH. REV. CODE ANN. § 4.56.260 (1988).

115. WIS. STAT. ANN. § 655.015 (West Supp. 1988).

116. MICH. STAT. ANN. §§ 27A-6306(1)(c), (e), -6307 (Callaghan Supp. 1989).

117. *See supra* note 96 and accompanying text.

The solution to the so-called threshold problem may be a narrative threshold that uses verbal criteria based on the purposes of the act.[118] Although this may result in more disputes regarding whether the act should apply to a particular case as compared to a monetary threshold, this is offset by the opportunity to utilize the act in all cases where the benefit of doing so outweighs any serious disadvantages. Since all the potential fact situations are not foreseeable when the act is passed, use of verbal criteria provides a more flexible system. This is the system Arizona has adopted.

### *B. Invoking the Arizona Act*

#### *1. Election for Act to Apply*

The Arizona Act permits any party to a medical malpractice action[119] involving a claim for future damages arising out of bodily injury[120] to elect trial under the procedures set out in the Act.[121] Although future damages is defined to include both economic loss and noneconomic loss,[122] there would be no occasion to apply the Act if the future damages consist solely of noneconomic loss.[123] This is because the Act goes on to prescribe that only economic loss is to be paid in periodic installments.[124] Noneconomic loss, such as conscious pain and suffering or loss of enjoyment of life, is to be paid in lump sum.[125] Thus, it would serve no purpose to try a case involving only future noneconomic loss under the Act unless the parties agree that the loss should be paid periodically.

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118. The current acts that do not use a monetary threshold use various techniques to determine whether the act applies, but few, if any, employ suitable criteria for judicial determination. For example, Florida has no monetary threshold regarding medical malpractice actions. Instead, the act applies at the request of any party, apparently without any opportunity for an objecting party to contest the appropriateness of the election. *See* FLA. STAT. ANN. § 768.78(2)(a)(2) (West Supp. 1989). In Iowa, on petition of any party, the court may enter a periodic-installment judgment unless it finds:

(a) The payment method would be inequitable.

(b) The payment method provides insufficient guarantees of future collectibility of the judgment or award.

(c) Payments made under the payment method could be subject to other claims, past or future, against the defendant or the defendant's insurers.

IOWA CODE ANN. § 668.3(7) (West 1987), whereas in Indiana the parties must agree before a defendant is able to discharge any liability through a periodic payment scheme. IND. CODE ANN. § 16-9.5-2-2.1 (Burns Supp. 1989). In Alaska, the court, at the request of the injured party, shall "to the maximum extent feasible" order that future damages be paid periodically. ALASKA STAT. § 09.17.040(d) (Supp. 1988). Others leave it completely within the discretion of the court. *See, e.g.*, DEL. CODE ANN. tit. 18, § 6864(a) (Supp. 1988).

119. For the definition of "medical malpractice action" *see supra* note 108.

120. "Bodily injury" is defined to mean "bodily harm, sickness, disease or emotional or mental distress, including death resulting from any of these conditions at any time, sustained by a person." ARIZ. REV. STAT. ANN. § 12-581(1) (Supp. 1989). This definition is one that is commonly used to distinguish bodily injury from harm to property and other types of injury that do not involve physical harm.

121. *Id.* § 12-582.

122. *Id.* § 12-581(5).

123. The Act makes a distinction between "economic" and "noneconomic" loss. *See Id.* § 12-581(4), (6). The distinction between the two types of losses is based on whether the harm results in pecuniary losses. Although not a precise line of demarcation, this is the common understanding in the bar and judiciary. The Act does not attempt to change the measure of damages. It is left to existing law to determine into which category particular elements of damages fall. Consortium claims may provide a good example.

124. *Id.* § 12-584.

125. *Id.*

The election and any objection thereto is to be made in accordance with rules of court.[126] The legislature deferred to the Supreme Court of Arizona because it has no authority to adopt court rules under the Arizona Constitution.[127] Thus, rules need to be adopted regarding the manner and time within which an election is to take place.[128] Until the Supreme Court adopts particular rules, a pre-trial motion,[129] with notice to all parties, stating that the moving party elects to have the case tried under the Act should suffice to initiate the process. If an objection to an election is filed, further proceedings must be held. This is discussed below. Once the election is effective, it may be withdrawn only by consent of all parties to the claim to which the election relates.[130]

The Act provides for the situation where there are multiple claims in a medical malpractice action but it would be inappropriate to try all the claims under the Act.[131] This could occur where a product liability claim is joined in a medical malpractice action. If a claim is not subject to the election and should not be tried under the Act, the court may sever the entire claim or just sever the damages portion. It is a matter for the court to determine, so that the purposes of the Act are served and no injustice is done to either the electing or objecting party after taking all interests into account.

*2. Good Cause Hearing*

The Arizona Act specifies that an election of trial under its provisions shall be effective unless an objecting party shows good cause why the medical malpractice claim affecting the objecting party should not be so conducted.[132] The Act places the burden on the objecting party to persuade the court by clear and convincing "evidence" that under the circumstances good cause exists.[133] The term "evidence" should not be given an overly technical construction. A court should consider or permit the introduction of depositions, affidavits, and similar material which is reasonably reliable, in addition to live testimony where warranted, without strict adherence to the rules of evidence, as it does in similar pre-trial matters.[134] Evasion of an election should not be permitted, however, unless the court is clearly convinced there is good cause for denial. To further assure that good cause does exist, the Act requires that the court facilitate appellate review by setting forth in the record the basis for such a finding.[135]

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126. *Id.* § 12-582(B).
127. *See* ARIZ. CONST. art. VI, § 5(5) (1984).
128. The Supreme Court of Arizona should provide rules for the election process, if for no other reason, to set out the time constraints. For example, a trial under the Act may require discovery and other preparation different from a lump-sum verdict trial and no party should receive any undue advantage in that regard merely because of the timing of an election. A responding party should also be informed as to the time period in which a decision is to be made whether to object to an election and the amount of time permitted to prepare for any hearing on the motion. Perhaps the court should also specify whether an election may be permitted after a mistrial is declared, a motion for a new trial is granted, or a case is remanded on appeal for a new trial.
129. *See* ARIZ. R. CIV. P. 7(b).
130. ARIZ. REV. STAT. ANN. § 12-582(E) (Supp. 1989).
131. *Id.* § 12-582(D).
132. *Id.* § 12-583(A).
133. *Id.* § 12-583(B).
134. *See* ARIZ. R. EVID. 102, 104(a) .
135. ARIZ. REV. STAT. ANN. § 12-583(C) (Supp. 1989).

Unlike most other periodic-payment statutes,[136] the Arizona Act attempts to provide certain verbal criteria for determining whether good cause exists.[137] These criteria, although not exclusive, bear a relationship to the purposes of the Act. Where there is little or no risk that a lump-sum award would be dissipated, or a defendant is unable to adequately fund a periodic-installment judgment a court may find good cause to deny the election. In addition, good cause may be found where the amounts of future wage loss and medical expenses are too small; the time over which the periodic installments would be made is too short; or the economic savings[138] are such as to fail to justify a periodic-installment judgment. The court is to consider these factors as well as the circumstances of the parties, and any other relevant factors in making the good cause determination.

### *C. Trial of the Case*

#### *1. Damage Findings*

Trial of a medical malpractice action under the Arizona Act should not be dramatically different than under the lump-sum system. First, there has been no attempt to change the rules with regard to liability. Second, there was no change in the measure of damages except for one matter that is clearly for the claimant's benefit. The Act merely requires the trier of fact to do in practice what it has always been required to do in theory. The jury, or the judge where the court serves as the trier of fact, ascertains the amount of damages accruing as of the time of the trial and that will accrue, insofar as they may be reasonably determined on the basis of the evidence, in the future. The procedure, however, will differ with regard to the latter.

If an effective election is made and liability is found, the Act requires that the trier of fact make certain types of findings regarding past and future damages. The purpose is to obtain the necessary fact findings so that a periodic-installment judgment can be fashioned. Both past and future damages are defined in the Act.[139] Past damages include any punitive or exemplary damages permitted, and a court can require separate findings with regard to this element. However, certain categories of future damages are subject to payment in periodic installments, so they must be separated from the other damages. The findings with regard to future damages must be delineated between those for noneconomic loss, medical and other health care costs, and other economic loss. The period over which the latter two categories of future damages will accrue, and the amounts of each during these periods must be specified by the trier of fact. Special interrogatories to the jury should provide the necessary findings. All noneconomic loss, however, will continue to be paid in a lump-sum and the trier of fact is not asked to itemize these damages on the basis of the future periods over which they will accrue.[140]

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136. *See supra* notes 109-18 and accompanying text.

137. ARIZ. REV. STAT. ANN. § 12-583(A) (Supp. 1989).

138. Economic savings may include income tax savings to the claimant as well as savings by the defendant or an insurer in utilizing an annuity to fund the judgment.

139. ARIZ. REV. STAT. ANN. § 12-581 (Supp. 1989).

140. Since the framework for obtaining the findings for future damages in periodic segments is established under the Act, it would be possible for the parties to stipulate to have future noneconomic losses determined in a manner so that they too could be paid in periodic installments.

*2. Measuring Future Damages*

Even though the Act does not change the measure of damages as far as the various elements are concerned, it does bring into focus an issue regarding damages that has not been given much attention by the common law. It is commonly said that, in contrast with the English rule, the United States jurisdictions have denied damages for the reduced or shortened life expectancy of an accident victim.[141] On closer examination, this statement proves to be overly broad. To bring the issue into sharper focus, the question is one of whether the trier of fact should use the pre-injury or post-injury life expectancy of the victim in calculating future damages. There is American authority for the proposition that the pre-injury life expectancy is to be used in determining pecuniary losses such as loss of earnings.[142] The Arizona Act recognizes this authority and provides that, in determining loss of earnings, the trier of fact shall calculate future damages on the working life expectancy the claimant would have had but for the injury upon which the claim is based. Any other economic loss, except health care costs, is also governed by the pre-injury life expectancy. The Act follows a different rule for other types of damages.

There does not appear to be any Anglo-American authority for the proposition that medical bills or other health care costs should be calculated on the basis of pre-injury life expectancy.[143] In fact, it would be incongruous to use the pre-injury measure because death will prevent such damages from accruing. This same argument can be made for noneconomic loss. The clearest case of non-accrual, though, is with regard to medical and other health care costs. In this situation, the dependents of the tort victim, whose life has been shortened, would never receive any benefits from the awarding of these damages. Had the victim lived, the money would have been spent for medical goods and services. This is not true with lost earnings though, because the dependents in most cases would have received support during the "lost years."

The situation contemplated may be anomalous only because the common law development with regard to wrongful death claims was truncated. Had there been a cause of action for wrongful death recognized at early common law, perhaps more courts would have gone forward and explicitly recognized a claim for reduced life expectancy, i.e., the "lost years," at least for earnings loss. After all, by definition, the injury has reduced the life expectancy of the victim. It would be a logical extension to permit a cause of action covering the loss of earnings less the amount that would have been spent on the victim or objects other than the beneficiary of the claim.

The common law probably would never have recognized a cause of action for any medical expenses beyond death since these will never accrue. Additionally, the common law probably would not recognize a cause of action for pain and suffering after the victim dies. One can look to the survival statutes and the wrongful death statutes to support these conclusions. Under the orthodox survival acts, the deceased's cause of action ends upon death, except to the extent that the statute permits the bringing of an action for those damages incurred prior to

141. J. STEIN, DAMAGES AND RECOVERY § 46 (1972). Recovery is permitted for conscious suffering by a tort victim for being aware of the potential reduction in life, but the reference here is to the so-called "lost years" themselves.

142. *See* D. DOBBS, *supra* note 82, at 549 and J. STEIN, *supra* note 141.

143. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 303-04 (1935).

death. Even then, in some jurisdictions, damages for such noneconomic loss as pain and suffering do not survive death. The traditional wrongful death statutes create a cause of action in the dependent survivors for their own losses. Weaving the two types of statutes together, it is clear that there is no cause of action for medical expenses or pain and suffering of the deceased beyond death. This pattern is followed under the Arizona Act and dictates that post-injury life expectancy be used in calculating damages for health care and related expenses; the statute, however, is silent as to noneconomic loss.[144]

*3. Lifetime Benefits*

Even though the trier of fact utilizes a post-injury life expectancy for future health care costs, rarely will the tort victim live for the exact period used in determining the award. If the tort victim dies before the expiration of the time period, the periodic installments for health care and some wrongful death benefits will lapse under the Arizona Act.[145] What happens if the tort victim lives longer than expected? Although most periodic-payment plans do not provide for this contingency, Arizona is one of two states that has attempted to remedy this problem.[146] The trier of fact is authorized to find that future damages for health care will be incurred for the life of the claimant, however long that may be, where the evidence supports such a finding. The cost of an annuity that would meet the funding requirements of the Act will not be appreciably enhanced by permitting this type of recovery. In fact, this type of annuity is frequently used to fund structured settlements. Thus, the Act provides an opportunity to more equitably compensate accident victims that does not exist under the lump-sum system. This is a key feature of the Act.

*4. Other Findings Permitted*

The trial court, where necessary, may require more detailed findings separating different types of damages. It may also require findings relative to apportionment or application among the parties. For example, additional findings may be needed to allocate damages among defendants because of rules regarding contribution, indemnity or comparative fault. Allocation of damage awards among wrongful death claimants or beneficiaries may be required. Also, more detailed findings concerning the periods of losses, and the amounts incurred during those periods, could be required because there may be periods of maximum loss, periods of stabilized loss, and requirements for one-time medical procedures or separate medical procedures at different points in the future. It may also be desirable in some cases to have the jury find the inflation rate for the period over which the losses will accrue. Consequently, the court is empowered to obtain whatever findings are necessary to fashion a periodic-installment judgment.

*5. Discounting to Present Value and Adjustments for Inflation*

By paying future damages in installments as the losses accrue, there is an opportunity to simplify the trial in two respects. Under a lump-sum system, the trier of fact must discount the award for future damages to present value. This is due to the fact that money has earning power. The claimant is awarded an amount of money that, once investment income from that sum is taken into account, will

144. *See* ARIZ. REV. STAT. ANN. § 12-584(B) (Supp. 1989).
145. *Id.* § 12-590.
146. *See supra* note 94.

equal the damages accruing in the future. Under a periodic-installment plan, the money for future damages will not be paid until the losses accrue. Thus, there is no reason to discount an award for future damages to present value when the award is not paid in advance of the period when the loses will be sustained. Consequently, the jury or court will not have any occasion to take interest rates or the like into account and the Arizona Act so provides.[147]

The second opportunity to simplify, and concomitantly reduce trial costs, is to use some technique other than the trial process to calculate inflation. By eliminating this as a task of the trier of fact, the parties would be relieved of having to hire experts to testify as to future rates of inflation or to the purchasing power of the dollar.[148] This would reduce the expense and length of the trial. The calculation for inflation could be accomplished by the court after verdict by applying an inflation factor.[149] In practice, this would be done by the attorney who drafts the judgment. This feature was not incorporated into the Arizona Act[150] and evidence of inflation is still to be permitted in medical malpractice actions where relevant.[151] The trier of fact is to calculate inflation on future damages as under the lump-sum system.

### *D. Fashioning and Entering A Periodic-Installment Judgment*

#### *1. Reducing the Award to the Net Obligation Owed by A Defendant*

In fashioning a periodic-installment judgment, the court must first determine the amount that is actually owed to a claimant by a particular defendant or defendants.[152] This may involve ascertaining the amount of any set-offs or credits or reductions due to comparative fault, avoidable consequences, or remittiturs. The court should reduce all categories of damages proportionately, absent some evidence or other basis dictating that the court apply any such adjustment to a particular category of damages, such as health care, wage loss, or to either past or future damages, exclusively. For example, if the jury were to find that the damages were 20 percent the fault of the plaintiff, there should be a presumption that the lump-sum amounts for past damages and future noneconomic loss will be reduced by that figure, as well as the amount of each installment that is to be paid

147. ARIZ. REV. STAT. ANN. § 12-585(A) (Supp. 1989).

148. Expert testimony would not be eliminated completely because there still would be a need for testimony regarding the particular tort victim's future earning capacity, taking into account the attributes of the victim and any increases or decreases in productivity that might result from technology or other changes in a particular industry or trade. However, any statistical data relied on by an expert as the basis for this type of testimony must be adjusted to eliminate factors reflecting predictions as to fluctuations in the future purchasing power of the dollar.

149. *See* MODEL ACT, *supra* note 73, § 7 and comment, 14 U.L.A. at 31 and Sixth Tentative Draft, *supra* note 87, § 6.

150. Two concerns counseled against the adoption of a nonjury alternative regarding calculation of inflation. One involved the complexities of drafting an alternative that would accurately measure and apply inflationary changes to the future installments. The other involved the issue of whether a nonjury alternative would violate Art. II, § 23 of the Arizona Constitution which provides that the right of trial by jury shall remain inviolate.

151. ARIZ. REV. STAT. ANN. § 12-585(A) (Supp. 1989). It should be noted that the statute refers only to future economic losses when it prescribes that inflation is to be taken into account. This raises an issue as to whether inflation is to be calculated on future damages for noneconomic loss, which are to be paid in lump-sum.

152. *Id.* § 12-586(A)(1).

in the future. To do otherwise, without a good reason, runs counter to the basic design of the Act.[153]

*2. Including Plaintiff's Attorney Fees in the Judgment*

Another matter that the court may encounter in fashioning a periodic-installment judgment concerns the plaintiff's attorney fees and litigation expenses. The Act generally leaves the matter of how legal expenses will be paid to the contractual arrangement entered into between the attorney and client.[154] The Act does not require that the matter be brought to the attention of the court unless the contract so provides. After the judgment is entered, the attorney may collect his or her fee and expenses in whatever manner the contract specifies. For example, assuming there is no other legal impediment, the attorney may collect the entire fee from any lump-sum amounts awarded, or take an assignment of future installments[155] or some combination of the two. In fact, the provision for lump-sum awards for past and future noneconomic loss in the Act[156] acknowledges that the legal expenses of the plaintiff are usually satisfied from this category of damages. This was one of the reasons why the Act provides that all noneconomic loss shall continue to be paid in lump sum.

As an alternative, the attorney fee contract may specify that a certain percentage of any future installments be payable to the attorney in satisfaction of the attorney fee, and that this be made a part of the judgment. The contract might specify that the portion of the fee attributable to the future installments be collected periodically as the judgment debtor pays each installment to the plaintiff, or that it be collected in lump sum at the time the judgment is satisfied.[157] In the latter instance, it will be necessary to establish the present monetary value of the periodic installments upon which the percentage is to be applied, even though the plaintiff is not entitled to receive the installments until sometime in the future. On the other hand, where the attorney chooses to receive a fee on a periodic-installment basis, it may be desirable to have the fee incorporated into the judgment. This insures that the attorney's rights run against the judgment debtor, instead of merely entitling the attorney to collect the fee from the client as the client is paid.[158] In any event, the Arizona Act facilitates such an arrangement by providing that the judgment shall specify payment of attorney fees and litigation expenses separately from the

153. Part of the purpose of the Act is to terminate any installments of future health care costs that have not accrued upon the death of the plaintiff. ARIZ. REV. STAT. ANN. § 12-590(A) (Supp. 1989). It would be possible to defeat this cost savings feature by applying the comparative fault figure or any other reduction exclusively to the future installments for health care costs. It may also indirectly defeat some of the protections afforded to a claimant under the provisions limiting assignments and providing exemptions regarding installment payments of future damages. *Id.* §§ 12-591 to -592.

154. *Id.* § 12-586(A)(2).

155. The Act specifically authorizes assignments and agreements to assign periodic installments for future damages for "[a]ttorney fees and other litigation expenses incurred in obtaining or enforcing the judgment." *Id.* § 12-591(3).

156. *Id.* § 12-584(A)(1), (2).

157. This would be the time the defendant pays the lump-sum awards and funds the periodic installments. There may be a problem of fairness to the client in such agreements because a lump-sum attorney fee could exhaust most, if not all, of the "up front" money the client is entitled to receive. This problem is discussed in part 4 of this subsection.

158. It may be possible for the attorney to defer income for purposes of the tax laws through this type of arrangement. *See* Winslow, *supra* note 81, and Fuller, *supra* note 69, at 29.

periodic installments payable to the claimant, if that is what the attorney and client have agreed to do.[159]

*3. Calculation of Plaintiff's Attorney Fee*

At least two problems may arise regarding percentage contingent fees that are to be paid in lump sum where a plaintiff receives an award consisting of a lump-sum amount plus future periodic installments. The first problem concerns how a contingent fee is calculated. In a lump-sum system, the percentage is merely applied to the total amount of money awarded to the plaintiff, either before or after litigation expenses are deducted, in accordance with the attorney-client fee agreement. The problem under a periodic-payment plan relates to how one calculates the "total" amount of money the plaintiff is entitled to receive when part of the award is not payable until some future time. The problem becomes more complicated when part or all of the periodic award may never be paid to the plaintiff. Under the Arizona Act, installment awards for future health care costs terminate if the plaintiff dies prior to the time the trier of fact has determined that the plaintiff will incur these expenses.[160] The Arizona Act also provides for lifetime health care benefits if the trier fact finds that such an award is justified.[161] In addition, the Act provides that some awards in wrongful death actions may lapse upon the death of the survivor who is receiving the award.[162] Essentially, the problem is one of determining the present value of the periodic installments.

There are two different methods by which one can determine the present value of the periodic installments. One is to use the standard system of discounting. However, where the period for payment is indefinite, one must make certain assumptions to discount the installments to present value. First, one has to assume how long the plaintiff will live. This can be done through the use of mortality tables, but there may be disputes over whether a standard or substandard table should be used.[163] Second, one also has to choose an appropriate rate of discount. This may also be subject to considerable dispute, given the wide range of interest rates in the recent past and the inherent difficulty in predicting future economic trends. An alternative method of ascertaining the present value of the future periodic installments is to utilize the cost of an annuity that would provide the stream of future income.[164]

Once a value is placed on the future periodic installments, regardless of the method chosen, the percentage specified in the fee agreement is then applied to

159. ARIZ. REV. STAT. ANN. § 12-586(A)(2) (Supp. 1989).
160. *Id.* § 12-590(A).
161. *Id.* § 12-584(C).
162. *Id.* § 12-590(A), (B).
163. A standard mortality table for annuity contracts is based upon the life expectancy of a normal person. A severely impaired person will in many instances not have a normal life expectancy and there are mortality tables that reflect this reduced life expectancy for certain types of impairments. These are referred to as substandard tables. They may be used to price an annuity where the annuitant suffers from the particular impairment. Where no substandard table is available, the annuity company may obtain medical opinions as to the life expectancy of an impaired annuitant. For example, a severely impaired baby may be predicted to have a life expectancy of a 66 year old person. This means that babies with this impairment would not be expected to live longer than a 66 year old would live. This is referred to as "age rating" for purposes of pricing the annuity. Thus, the cost of an annuity can vary greatly depending on the predicted life expectancy of the annuitant.
164. Both methods involve assumptions as to life expectancy and interest rates, but the assumptions are likely to vary, particularly as to life expectancy, depending on who is asked to make them.

determine the attorney fee with respect to that part of the award. In other words, to calculate a percentage fee, one adds the present value of the future periodic payments, however determined, to the lump-sum amounts awarded and then multiplies the sum obtained by the percentage in the contract. This, of course, does not answer the question as to which method of valuation is the most appropriate. The answer is important because the two methods can produce significantly different present values.

A hypothetical case may prove helpful in deciding which method of valuation is preferable. For this purpose assume that a jury returns a verdict under the Arizona Act on December 29, 1989 in a medical malpractice action. In addition to lump-sum amounts for past damages and future noneconomic losses, the verdict specifies an award of periodic installments for future economic loss. The jury finds that the 55 year old male plaintiff involved has sustained serious, permanent injuries as a result of malpractice and that he will be totally disabled over the remainder of his worklife expectancy. According to the findings, plaintiff is entitled to a total lump-sum award of $500,000 for past damages and future noneconomic loss. The jury also finds that the plaintiff would have earned $20,000 in 1990, and that his wages would have increased by $2,000 a year each year thereafter until 1995 when he would have attained a maximum annual earnings of $30,000 until he retired at the end of 1999. Additionally, the jury finds that the plaintiff will sustain health care costs at the rate of $25,000 per year commencing in 1990, that he will incur these expenses each year for the remainder of his life; and that the sum should be increased 10 percent per year, compounded annually, for as long as he lives because of anticipated cost increases due to changes in medical technology and inflation.[165]

Assume further that all of the periodic installments could be funded through the purchase of annuities that would meet the security requirements of the Act.[166] Since the periodic installments for earnings loss are for a time certain and those for health care costs are for an indefinite period, a separate annuity probably would be needed to fund each stream of income. The cost of these annuities will vary depending on the market, but the cost of the health care annuity can vary more dramatically depending on whether the annuity company uses a substandard mortality table or age rates the tort victim.[167] For example, if the price of this annuity is based on a substandard mortality table or age rated for a severely impaired person, i.e., a person whose life expectancy is greatly reduced as a result of the injury, it might cost as little as $200,000. If there is no age rating and a standard mortality table is used, the cost would probably be in the range of $670,000. If one assumes that the cost of the annuity for the earnings loss will be

165. The example of the jury findings is deliberately set out in a narrative form so as not to imply that any particular verdict form will suffice for every case. The jury may be asked to answer special interrogatories that would require findings, by type of damages, for each year of future loss. Alternatively, where the evidence permits they may be asked to find the total amount due for each type of damages and to state the number of years over which the damage will accrue. In the latter instance, it may also be necessary to have the jury find the rate of inflation that is predicted to occur during the period the future damages will be incurred. In the example, the evidence may have permitted the jury to find that there was a fixed annual amount of health care costs for life and that this would increase due to changes in medical technology and inflation. Although cases will tend to fall into patterns, the verdict form will need to be tailored to particular issues and evidence in some cases.

166. *See* ARIZ. REV. STAT. ANN. §§ 12-588, -593 (Supp. 1989).

167. *See supra* note 163.

$180,000, it is apparent that the total cost of the two annuities could range from $380,000 to $850,000.

Finally, assume that the plaintiff and his attorney have a contingent fee contract specifying that the attorney is to receive "35 percent of all amounts recovered and the entire fee is due and payable in lump sum"[168] to the attorney. The plaintiff has paid all other litigation expenses as they arose. How should the fee be calculated?

If the attorney fee is calculated based on the cost of the annuities as the present value of the periodic installments, the amount is readily ascertainable. Even though it could range between $308,000 ($500,000 + $380,000 = $880,000 x .35 = $308,000) and $472,500 ($500,000 + $850,000 = $1,350,000 x .35 = $472,500), depending on the cost of the annuities, in the hypothetical, the cost of the annuities will not be the subject of dispute where they are actually purchased to fund the future installments. The market will determine the price. Using the discounted value instead, results in a much more speculative process. First, someone has to choose a particular mortality table and then assume that the plaintiff will not live beyond the indicated life expectancy. Second, someone must decide on a discount rate. Since the parties will seldom agree, these matters would be litigated in many cases. However, for the purposes of the hypothetical assume that these issues are resolved and that it is determined that the plaintiff has a life expectancy of at least 22 years at his current age of 55, i.e., he will live to age 77, and that an 8 percent discount rate is the appropriate figure. Using these assumptions, the following calculations would have to be made to ascertain the attorney fee.[169]

168. The contract should specify whether the fee is due and payable in lump sum. If the contract merely says that the attorney is to receive 35 percent of "all amounts recovered," this may be interpreted to mean that the attorney has to take the fee with regard to periodic installments over time as the installments are paid to the client. *See, e.g.*, Sayble v. Feinman, 76 Cal. App. 3d 509, 142 Cal. Rptr. 895 (1978); *In re* Chow, 3 Haw. App. 577, 656 P.2d 105 (1982); Cardenas v. Ramsey County, 322 N.W.2d 191 (Minn. 1982); and *In re* Estate of Muccini, 118 Misc. 2d 38, 460 N.Y.S.2d 680 (N.Y. Sur. 1983).

169. The hypothetical, for the sake of simplicity, assumes that the awards for 1990, the first year after verdict, are not to be discounted. Since the Arizona Act contemplates that the annual award is to be paid in monthly installments, unless the parties have agreed or the court has ordered otherwise, see ARIZ. REV. STAT. ANN. § 12-585(B) (Supp. 1989), it may be argued that each monthly installment in the first year also should be discounted at the appropriate fraction of the annual rate which in this case would be .00667 (.08 ÷ 12 = .00667). However, the Act specifically provides that where future periodic installments are ordered to be commuted to present value that each annual payment not yet due be discounted by an annual discount rate. *Id.* § 12-589. Arguably, the court would be justified in using the same method when discounting to present value for purposes of calculating attorney fees, as when discounting for the purpose of commuting the periodic installments so as to pay them in lump sum for other reasons. This is just one more problem to resolve if the discount method is used to determine the present value of the future periodic award.

| | | Wage Loss | | Health Care Costs | |
|---|---|---|---|---|---|
| Age | Year | Jury Findings | Discounted Value | Jury Findings | Discounted Value |
| 56 | 1990 | $ 20,000 | ($ 20,000) | $ 25,000 | ($ 25,000) |
| 57 | 1991 | 22,000 | ( 20,370) | 27,500 | ( 25,463) |
| 58 | 1992 | 24,000 | ( 20,576) | 30,250 | ( 25,934) |
| 59 | 1993 | 26,000 | ( 20,640) | 33,275 | ( 26,415) |
| 60 | 1994 | 28,000 | ( 20,581) | 36,602 | ( 26,904) |
| 61 | 1995 | 30,000 | ( 20,417) | 40,263 | ( 27,402) |
| 62 | 1996 | 30,000 | ( 18,905) | 44,289 | ( 27,910) |
| 63 | 1997 | 30,000 | ( 17,505) | 48,718 | ( 28,426) |
| 64 | 1998 | 30,000 | ( 16,208) | 53,590 | ( 28,953) |
| 65 | 1999 | 30,000 | ( 15,007) | 58,949 | ( 29,489) |
| 66 | 2000 | | | 64,844 | ( 30,035) |
| 67 | 2001 | | | 71,328 | ( 30,591) |
| 68 | 2002 | | | 78,461 | ( 31,158) |
| 69 | 2003 | | | 86,307 | ( 31,735) |
| ▲ 70 | 2004 | | | 94,937 | ( 32,322) |
| 71 | 2005 | | | 104,431 | ( 32,921) |
| 72 | 2006 | | | 114,874 | ( 33,531) |
| 73 | 2007 | | | 126,362 | ( 34,152) |
| 74 | 2008 | | | 138,998 | ( 34,784) |
| 75 | 2009 | | | 152,898 | ( 35,428) |
| 76 | 2010 | | | 168,187 | ( 36,084) |
| 77 | 2011 | | | 185,006 | ( 36,752) |
| | | $270,000 | ($190,209) | $1,785,069 | ($671,389) |

Based on these calculations, the attorney fee would be $476,559 ($500,000 + $190,209 + $671,389 = $1,361,598 x .35 = $476,559). When this figure is compared with the range produced by using the cost of the annuity method, the difference between the two methods of calculating the fee could be as much as $168,559 ($476,559 - $308,000 = $168,559) or as little as $4,059 ($476,559 - $472,500 = $4,059). The important point, however, is that the market will determine the cost of the annuity whereas the court will have to determine which mortality table and discount rate to use.

Although the discount method is much more subject to dispute because of the variables, the annuity cost method may not be completely free from controversy. Not every case will involve an annuity to fund the future periodic-installments. Some defendants such as large corporations or governmental entities may self-insure. This may be particularly advantageous to governmental entities, such as the federal and state governments, that could annually appropriate the funds necessary to pay the installments as they come due. It may be the case that some liability insurers will be interested in paying the installments as they accrue. In this event, the market value, or cost, of an annuity or annuities that would satisfy the funding requirements will have to be determined. This cost can vary depending on a number of factors.[170] Despite this uncertainty, the annuity cost

170. Annuity companies may come to different assessments and quote a wide range of prices based on disparate appraisals of the health of the plaintiff, investment income projections, profit margins, and the amount of annuity contracts currently in force, just to mention a few. *See* Choulos, *Structured Settlements: Cure or Curse?*, 16 TRIAL 73 (Nov. 1980).

method would produce the least controversy, and is the better method on this score alone. Moreover, when one considers what the attorney has won for the client, it becomes even clearer that the cost method best reflects the present value of the periodic installments.

The attorney has won the right to receive a future source of income to defray losses as they accrue. However, at the time of judgment it is unknown whether certain losses will ever accrue. Under the Arizona Act, in a nonwrongful death case, all of the periodic installments for future economic losses other than health care costs must be paid. The cost of the annuity to fund these future economic losses will reflect the fact that these benefits are fixed. Where the periodic-installments are contingent on the survival of the plaintiff, such as with health care costs and in some wrongful death situations, the cost will reflect the uncertainty of the amount to be paid. The attorney should be adequately compensated for his or her services as to each type of award. To the extent the attorney obtains a known quantity for the client, a percentage fee will be applied to the cost of funding that award. To the extent the quantity is not known except through actuarial predictions, the attorney will be compensated on the basis of those predictions. This is adequate compensation for the service rendered. Thus, market cost of the annuity more accurately reflects the benefit to the client and in turn is the best measure for determining the value of the attorney's services where a percentage fee is to be paid in lump sum.

To base the attorney fee on the assumption that the client will actually collect the entire series of periodic installments for health care costs, $1,785,069 in the above hypothetical, is to indulge a fiction. Not only does the discounted value of the health care costs, i.e., $671,389, assume a benefit to the client that may never be realized, it also assumes that the defendant will have to pay out such an amount. This is contrary to the basic design of the Act. Paying the plaintiff's attorney on this basis reduces the potential savings to the defendant, in comparison with the annuity cost method, because the discount method continues to utilize the traditional lump-sum method for calculating lump-sum percentage fees. It also denies the plaintiff the benefit of using the annuity cost in part in determining whether the liability policy limits have been reached. The amount paid by the defendant's liability insurer would be more, when compared with the amount paid when the annuity cost is used to calculate the fee. This results in charging more against the policy limits. This could be important in a case where the policy limits may be inadequate to satisfy the entire judgment, i.e., pay the lump-sum awards and fund the future periodic payments.

In short, the annuity cost method best reflects the monetary value of the plaintiff's right to periodic installments. It also achieves one of the major purposes of the Act by paying for real, instead of imaginary losses.[171] Decisional law

171. *See* Johnson v. Sears, Roebuck and Co., 291 Pa. Super. 625, 630, 436 A.2d 675, 678 (1981), where the court held:

> We find that the most equitable method of valuing an annuity for the purpose of determining the amount of attorneys' fees due is by the cost of the annuity. *See* Lilly, *Alternatives to Lump Sum Payments in Personal Injury Cases*, Insurance Couns. Journal, Vol. XLIV, No. 2 (April, 1977) 243, 246. The cost of the annuity takes into account the possibility that the minor may live longer or shorter than his anticipated life expectancy and is priced accordingly. While we agree with . . . [plaintiff's counsel's] contention that the lifetime annuity has a value beyond the twenty year guarantee, its cost adequately reflects this value.

supports this method where the court has had to approve plaintiff's counsel's fees, such as in cases involving clients that are not legally competent to contract.[172] It has also been adopted by court rule in two states.[173]

The Arizona Act, absent a contrary agreement by the attorney and client, adopts the annuity cost method in calculating a plaintiff's attorney's lump-sum percentage fee. This approach attempts to skirt any potential dispute under the Separation of Power Doctrine as to whether the legislature has any authority to regulate attorney fees.[174] By recognizing that the attorney and client may contract to calculate a percentage fee on some basis other than the cost of the annuity, it is arguable that the legislature has not attempted to regulate attorney fees. On the other hand, this provision should not be construed as an invitation for the Supreme

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*See also* Hoyle, *Computation of Attorney Fees in Structured Settlements: A Search for a Basis*, 14 CAP. U.L. REV. 567 (1984/85).

172. Wyatt v. United States, 783 F.2d 45 (6th Cir. 1986) (absent submission of contrary evidence, present value determined on basis of cost); Merendino v. FMC Corp., 181 N.J. Super. 503, 438 A.2d 365 (Law Div. 1981) (holding that the market cost of the annuities is the "acid test"); *In Re* Muccini, 118 Misc. 2d 38, 460 N.Y.S.2d 680 (Sur. Ct. 1983); and Johnson v. Sears, Roebuck and Co., 291 Pa. Super. 625, 436 A.2d 675 (1981). *But see* Orellana v. Mejia, 203 Cal. App. 3d 337, 249 Cal. Rptr. 828 (1988), opinion decertified by California Supreme Court, *see* 30 Shepard's Cal. Rptr. Citations 99 (Cum. Supp. No. 3, Dec. 1989) (calculating percentage fee on full amount of future installments which had not been discounted to present value), and Ravsten v. Dept. of Labor and Industries, 108 Wash. 2d 143, 736 P.2d 265 (1987) (using discount method to calculate present value). *See also* Abel v. Tisdale, 673 P.2d 836 (Okla. 1983) (contingent fee based on value of annuities as determined by attorneys even though it exceeded cost of annuities where clients failed to present evidence that value was unreasonable or unfair); Cardenas v. Ramsey County, 322 N.W.2d 191 (Minn. 1982) (trial court used discount method, but case was reversed on appeal on other grounds); and Perez v. Pappas, 98 Wash. 2d 835, 840 n.1, 659 P.2d 475, 478 n.1 (1983) (issue not raised, but court states that testimony indicated that the accepted practice was to use the discount method, but acknowledged that other methods existed). *Cf. In re* Green, 127 Misc. 2d 266, 486 N.Y.S.2d 131 (Sur. Ct. 1985) (attorney agreed to use cost method). *See generally* Franck v. Polaris E-Z Co., 157 Cal. App. 3d 1107, 204 Cal. Rptr. 321 (1984) (court used discounted value in determining the amount by which the judgment award against a nonsettling tortfeasor is reduced when a plaintiff and one or more codefendants in a tort action enter into a structured settlement utilizing periodic payments).

For other New Jersey cases following the cost method established in *Merendino, see* Kingman v. Finnerty, 198 N.J. Super. 14, 486 A.2d 342 (App. Div. 1985); Keller v. Dougherty, 197 N.J. Super. 406, 484 A.2d 1327 (Law Div. 1984); Bambi v. O., 196 N.J. Super. 349, 482 A.2d 536 (Law Div. 1984); A. v. D., 196 N.J. Super. 340, 482 A.2d 531 (Law Div. 1984); Pettiford v. Eskwitt, 189 N.J. Super. 485, 480 A.2d 716 (Law Div. 1983); Landgraf v. Glasser, 186 N.J. Super. 381, 452 A.2d 713 (Law Div. 1982); and Tobias v. Autore, 182 N.J. Super. 328, 440 A.2d 1171 (Law Div. 1982). *See also* Donaghy v. Napoleon, 543 F. Supp. 112 (D.N.J. 1982).

173. The New Jersey rule, which became effective January 16, 1984, only governs the calculation of contingent fees in structured settlements. N.J. Rules of Court 1:21-7 (West 1989). The Florida rule, effective July 1, 1986, applies to litigated cases in addition to structured settlements where the client is to receive a recovery which will be paid on a "future structured or periodic basis." The Florida Bar *Re* Amendment, 494 So. 2d 960 (Fla. 1986).

Two states, however, have adopted the discount method by statute. New York has adopted the discount method for cases litigated under its periodic-payment statutes. N.Y. CIV. PRAC. L. & R. 5031(c), 5041(c) (McKinney Supp. 1989), but the New York Law Revision Commission has recommended that the statutes be amended to utilize the cost method. N.Y. Law Rev. Comm'n Leg. Doc. (1989) No. 65 [L]. Illinois utilizes the discount method under its periodic-payment legislation which is limited to medical malpractice actions. ILL. ANN. STAT. ch. 110, para. 2-1708(3) (Smith-Hurd 1989 Supp.).

174. *See In re* Hoover, 161 Ariz. 529, 779 P.2d 1268 (1989), and Hunt v. Maricopa Cty. Emp. Merit System Comm'n, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980), holding that regulation of the practice of law is exclusively within the authority of the Supreme Court of Arizona.

Court of Arizona to approve the discount method as an acceptable alternative.[175] It merely recognizes that there may be some fee arrangement, other than one based on the cost of an annuity or the discount method, that still would be fair and equitable. The opportunity for such an agreement is left open under the Act.

*4. Source of Plaintiff's Attorney Fee*

The second problem regarding lump-sum percentage fees pertains to the source from which the fee is to be satisfied. Should the fee be satisfiable completely from the "up-front" money or lump-sum awards? To do so may exhaust all or most of this money, leaving the plaintiff with little or no money to pay existing debts. Assuming that the annuity cost method is used to calculate the amount of the fee, the problem may be of less magnitude than where the discount method is used, because the former will usually result in a smaller fee.[176] In any event, it does not require an all or nothing solution, i.e., taking all the "up front" money or denying the plaintiff's attorney the right to a lump-sum fee. Even if the entire fee is to be paid in lump sum, it would still be possible to satisfy the part that is attributable to the periodic installments from those installments without requiring the attorney to be paid over time as the client is paid. If the attorney and client have agreed, for example, to a contingent fee of 35 percent, as in the hypothetical above, all or part of the periodic installments could be reduced by an amount sufficient to generate the funds for the fee.

Since some periodic installments are subject to termination on death, the choice of which elements of damages should be reduced should not be left completely to the plaintiff and his or her attorney, or else the reduction could be applied to minimize the possibility that a particular element, or elements, of the future award would lapse. If the reduction were applied exclusively to future medical expenses, for example, this would permit a present realization of the money for that element of damages even though all of that loss may never accrue because the plaintiff may die prematurely. The Arizona Act addresses this problem by requiring that any reduction in periodic installments to pay the plaintiff's attorney fees "shall reduce proportionally all periodic installments for future damages."[177]

Where future damages are to be reduced proportionally to pay a lump-sum percentage fee, the following example, using the hypothetical situation outlined previously, illustrates the amount of each installment that will be due and payable to the plaintiff-judgment creditor in any particular year.

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175. The Arizona Act may be read as prescribing the annuity cost method in cases where the plaintiff is not competent to contract because there would be no other binding agreement. Were the Arizona Supreme Court to approve the annuity cost method for such cases, as a majority of other courts have done, *see supra* notes 172 and 173, the Separation of Powers problem would not arise. If the problem does arise, it may be argued that the legislature has the authority to regulate attorney fees in this limited area as part of its *paren patriae* role with regard to incompetents.

176. The chances of this problem arising under the Arizona Act are greatly reduced because future damages for noneconomic losses are to be paid in lump-sum. Thus, it will not as often be the case that a lump-sum attorney's fee will exhaust the "up-front" money in such an amount as to work a hardship on the client.

177. ARIZ. REV. STAT. ANN. § 12-586(B) (Supp. 1989).

| Year | Wage Loss Jury Findings x .65 | Health Care Costs Jury Findings x .65 |
|---|---|---|
| 1990 | $ 13,000 | $ 16,250 |
| 1991 | 14,300 | 17,875 |
| 1992 | 15,600 | 19,662 |
| 1993 | 16,900 | 21,629 |
| 1994 | 18,200 | 23,791 |
| 1995 | 19,500 | 26,171 |
| 1996 | 19,500 | 28,788 |
| 1997 | 19,500 | 31,667 |
| 1998 | 19,500 | 34,833 |
| 1999 | 19,500 | 38,317 |
| 2000 | | 42,149 |
| 2001 | | 46,363 |
| 2002 | | 51,000 |
| 2003 | | 56,100 |
| 2004 | | 61,709 |
| 2005 | | 67,880 |
| 2006 | | 74,668 |
| 2007 | | 82,135 |
| 2008 | | 90,349 |
| 2009 | | 99,384 |
| 2010 | | 109,322 |
| 2011 | | 120,254 |
| | $175,500 | $1,160,296 |

In addition to these installments, the judgment debtor would also pay the plaintiff or the plaintiff's attorney, depending on the fee contract, 35 percent of the cost of the annuity, if that is the method employed to calculate present value, that would have been used to fund the unreduced amounts of the periodic installments. If one assumes that the cost of the annuities would be $380,000 in the above example, this would result in a lump-sum fee of $133,000 ($380,000 x .35 = $133,000) attributable to the periodic installments. The total fee would still be $308,000 ($500,000 + $380,000 = $880,000 x .35 = $308,000).[178] The judgment debtor would then purchase an annuity to fund the periodic installments as reduced, or if permitted to do so by the court, pay the reduced installments as they come due.[179]

178. If the cost of the annuities were $850,000, the lump-sum fee attributable to the periodic installments would be $297,500 ($850,000 x .35 = $297,500) and the total fee would still be $472,500 ($500,000 + $850,000 = $1,350,000 x .35 = $472,500). *See supra* note 168 and accompanying text.

179. This method of funding the lump-sum percentage fee attributable to the periodic installments may result in a higher cost to the judgment debtor. This would be the case where the annuity company gives a discount on the premium based on the size of the annuity. For example, the cost per $1,000 of a very large annuity may be less than that for a smaller annuity. Thus, to use the figures in the hypothetical in the text, it may cost more than $247,000 ($380,000 - $133,000 = $247,000) to fund the reduced installments. Should this increased cost be borne by the defendant?

To eliminate this cost from the defendant would result in transferring it either to the plaintiff or to the plaintiff's attorney in the form of reduced benefits or a reduced attorney fee. This raises the rather interesting issue of whether the defendant should have to bear any additional cost resulting from a particular fee arrangement chosen by the plaintiff and his or her

In any event, plaintiff's counsel should be aware of the potential problem of exhausting the "up front" money when negotiating a percentage lump-sum fee where a periodic-installment judgment is involved. Indeed, it may be prudent for the attorney-client contract to provide for an alternative method of collecting such a fee if it appears that the "up front" money may not be sufficiently large to satisfy the fee without working a hardship on the client.[180]

*5. Entry of Judgment*

After the court has determined the net amount of damages owed by each defendant to the plaintiff, there should be but one judgment entered. The judgment should set out any lump-sum amounts separate from the periodic installments.[181] As a general rule, the periodic installments are to be set out in a schedule that shows the amount due each year.[182] The hypothetical schedules of wage loss set out in this section provide examples. Where the trier of fact finds that health care costs will be incurred for a time certain, i.e., will not be incurred for the remainder of the plaintiff's life, a similar schedule may be fashioned. Where a lifetime benefit for health care costs is awarded, a simple statement ordering that a certain amount, or an amount which is to be adjusted by an inflation factor, be paid annually for as long as the plaintiff shall live should suffice.[183] However, where the trier of fact finds varying annual amounts for future health care costs and a lifetime benefit, it may be necessary to schedule the varying amounts in the judgment, and then enter an order that identifies the amount of the lifetime benefit. The periodic installments should be entered as found by the trier of fact, after any adjustments, without any discount for present value since the installments are not scheduled to be paid in advance of the period when the damages will accrue.[184] Finally, any attorney fees or litigation costs that are to be included in the judgment should be set out separately.[185]

### *E. Funding Judgments For Periodic Installments*

Where future damages are to be paid in periodic installments, it is imperative to secure the payments insofar as it is reasonably possible. The Arizona Act attempts to do this in two ways. First, the Act defines who is required to provide funding for periodic installments.[186] Second, the Act prescribes the form of funding that will satisfy the obligation to secure the periodic installments.[187] The requirements as to the form of funding are discussed in subsection F below. This subsection reviews the obligations to provide the required funding.

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attorney. The author believes that, on balance, the cost should be borne by the defendant, at least where the defendant elects to try the case under the Act.

180. *See* Cardenas v. Ramsey County, 322 N.W.2d 191 (Minn. 1982) where the court indicated that it may become necessary for the attorney to renegotiate the fee where no alternative method has been specified in the contract and there is not sufficient "up-front" money to pay the entire fee in lump sum.

181. ARIZ. REV. STAT. ANN. § 12-586(c) (Supp. 1989).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* § 12-586(A)(2).

186. *Id.* § 12-587.

187. *Id.* § 12-588.

*1. Avoiding A Periodic Payment Trial Where the Defendant Is Incapable of Providing Funding At Time of Election*

The Arizona Act is designed to eliminate, insofar as possible, trying a medical malpractice action under the provisions of the Act, against the plaintiff's wishes, when there is little prospect the defendant will be able to completely satisfy the judgment. Thus, one of the grounds for objecting to an election to invoke the Act is that a party responding to a claim for future damages is unable to fund a periodic-installment judgment.[188] Such a showing should avoid a periodic-payment trial in most instances, but it leaves open the possibility for either a plaintiff or defendant to persuade the court that a periodic-payment trial would still be appropriate under some unique set of circumstances.[189]

*2. Inability to Provide or Maintain Funding After Election to Try Case Under the Act*

The more likely scenario regarding an inability to provide funding involves the situation where the problem arises after an effective election is made. It is possible for the defendant to become insolvent or learn that the ability to fund a periodic-installment judgment has been impaired during or after the trial is concluded, or even after a judgment is entered. Another scenario involves the verdict being in excess of the range that was anticipated, and unexpectedly beyond the capacity of the defendant to fund. For whatever reason, if the defendant is unable to properly fund the periodic installments before the time the judgment is to be entered; the plaintiff should be entitled to move to have the periodic installments commuted to present value and to have a traditional lump-sum judgment entered.[190] Even though the Act does not say this explicitly, there is no point in entering a periodic-installment judgment and then immediately having to change it on a *nunc pro tunc* basis. On the other hand, where the inability to fund is only established after the judgment is entered, the Act provides for the possibility of changing the judgment *nunc pro tunc*. The court may give the defendant additional time to procure the funding where there is doubt, but eventually the court is empowered to enter a lump-sum judgment for the periodic installments if the defendant defaults on this obligation.

The Act also contemplates the situation where the defendant originally meets the funding requirements, but subsequently fails to maintain the funding or the funding otherwise proves deficient.[191] If the defendant purchases an annuity, or obtains permission to pay the installments as they become due, in satisfaction of the funding requirement and there is a subsequent default on the installment obli-

188. *Id.* § 12-583(A)(3).

189. A plaintiff conceivably might elect a periodic-payment trial where the defendant has no liability insurance and could not completely fund either a periodic-payment judgment or satisfy a traditional lump-sum judgment. The defendant may be able to partially fund a periodic-installment judgment and the plaintiff may prefer this because of the tax advantages or the prospect of utilizing the defendant's liability coverage in a more efficient way. *See supra* notes 95 - 96 and accompanying text. However, this should not be permitted unless the plaintiff has a reasonable basis for the election. The reason should be separate from any advantage the plaintiff might receive by trying the case under the Act and then moving for a lump-sum judgment after the verdict when the plaintiff knows at the time of the election that the defendant cannot provide or maintain funding for all of the potential periodic installments.

190. ARIZ. REV. STAT.. ANN. § 12-587(C) (Supp. 1989). The statute does not require that a lump-sum judgment be entered. The plaintiff could waive this right and insist on a periodic-payment judgment.

gations, the plaintiff should be permitted to move to commute the outstanding installments to present value. The Act provides that the court entering a periodic-installment judgment shall retain jurisdiction so that it might enforce the provision regarding the maintenance of funding.[192]

Where it becomes necessary to commute the installments to present value, the Act prescribes that the discount rate shall be the interest rate of the most recent issue of fifty-two week United States Treasury bills sold before the date the damages are to be discounted.[193] Not only is this discount rate readily ascertainable since it is published widely, but it is derived from the type of security in which a plaintiff may safely invest. Thus, the Act contemplates that the plaintiff could invest the lump-sum equivalent of the periodic installments, to the extent they are collectible, at a rate and in a type of security that would not vary significantly from what could have been utilized had the Act not been invoked in the first place.

Where there is no showing of incapacity to fund a periodic-installment judgment, the Act requires each liable party to provide funding, separately or jointly,[194] in the form required by the Act.[195] Where multiple judgment debtors are obligated, the Arizona Act provides for a variety of situations where one or more, but less than all, of the judgment debtors default on this obligation. If a defaulting judgment debtor is solely liable for a portion of the judgment, the balance of the judgment that is owed by a nondefaulting judgment debtor or debtors is unaffected. The balance should be satisfied by collecting the periodic installments as they mature. As to the defaulting debtor, the plaintiff may move to have the periodic installments reduced to lump sum,[196] as discussed above, and execute on that part of the judgment along with any other lump-sum award due. If two or more judgment debtors are jointly and severally liable and one or more, but less than all, default on the obligation to provide funding, those providing funding are entitled to move for a court order requiring any nonfunding debtor to pay for a proportionate share of the funding that was provided.[197] This order may or may

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191. *Id.* § 12-587(C).
192. *Id.* § 12-587(G).
193. *Id.* § 12-589(A).
194. Although Arizona enacted a statute abolishing joint and several liability as a general proposition, *see* 1987 Ariz. Sess. Laws, 1st Reg. Sess., ch. 1, § 1, the statute recognizes exceptions. One of these exceptions states: "a party is responsible for the fault of another person, or for payment of the proportionate share of another party, if both parties were acting in concert or if a person was acting as an agent or servant of the party." ARIZ. REV. STAT. ANN. § 12-2506(D)(1) (Supp. 1989). The statute goes on to define "acting in concert" to mean "pursuing a common plan or design to commit a tortious act and actively taking part in it." *Id.* § 12-2506(F)(1).

There are a number of situations where health care providers could be held liable on a *respondeat superior* basis and as a consequence be jointly and severally liable for malpractice. If the "acting in concert" exception is construed in such a way as to limit it to intentional injuries, an interpretation which is plausible, there should be very few situations involving medical malpractice under this part of the exception. Conversely, if the exception is construed to cover common plans or designs that inadvertently result in harm there will be more health care providers, such as members of surgical teams, exposed to joint and several liability.

As this article goes to press, a case is pending before the Arizona Supreme Court regarding the constitutionality of the legislation abolishing joint and several liability. Allyn v. Superior Court, CD 89-80259-SA (argued Oct. 17, 1989).
195. ARIZ. REV. STAT. ANN. § 12-587(A) (Supp. 1989).
196. *Id.* § 12-587(D).
197. *Id.* § 12-587(E).

not be incorporated in the judgment, but it should be subject to immediate enforcement or execution.

This arrangement provides the maximum accommodation because the plaintiff-judgment creditor is not deprived of the benefits of a periodic-installment judgment merely because one among several judgment debtors fails to provide or maintain funding. At the same time, it provides protection to those judgment debtors who do provide and maintain funding. It prevents one judgment debtor from depriving the other parties, be they creditors or debtors, of the benefits of the Act.

*3. Time Period to Provide Funding and Stays of Execution*

In the trial of a periodic-payment case under the Arizona Act, defense counsel will know in advance that funding will be required for any future damage award for economic loss. In fact, the defense may have already engaged an insurance broker, or other expert, in attempting to arrange a structured settlement. Once a periodic-installment verdict is returned, the defendant will need to arrange for the required funding. This funding is to be provided by the date the judgment is subject to execution or 30 days after the judgment is entered, whichever is later, unless the judgment is superseded, or the power to execute on the judgment is otherwise suspended.[198] Under Arizona law,[199] a judgment is immediately enforceable upon entry and, under federal law,[200] it is enforceable 10 days after entry. This means that the defendant in most cases will have at least 30 days after the judgment is entered to arrange for the funding.

Although the defendant has 30 days to arrange for the necessary funding, this does not automatically suspend the power to execute on the judgment. A defendant will need to obtain a stay pending disposition of post trial motions, such as a motion for new trial.[201] As a practical matter, however, since the periodic installments will only become due in the future, only the lump-sum awards, and perhaps the first one or two installments, will be subject to enforcement or execution during this 30 day period. In fact, a defendant may choose to tender into court the amount of money necessary to satisfy the lump-sum portions of the judgment to prevent any interest from accruing, and then arrange for the funding on the periodic-installment portions. Interest should not accrue on the installments until they become due. Regardless, the security required to stay execution should not exceed the amount of those portions of the judgment that are enforceable pending disposition of any post trial matters. However, where a defendant appeals a periodic-installment judgment, it should be necessary to supersede the entire judgment. This will guard against the possibility of the judgment debtor becoming insolvent while the appeal is pending. The cost of the annuity to fund the periodic installments should serve as the measure of the monetary obligation for the periodic installments that need to be superseded. On the other hand, where a defendant chooses to provide the requisite funding pending an appeal, the Act specifies that this qualifies as a *supersedeas* bond.[202]

198. *Id.* § 12-587(A).
199. ARIZ. REV. STAT. ANN. § 12-1551(A) (1982).
200. FED. R. CIV. P. 62(a).
201. *See* ARIZ. R. CIV. P. 62.
202. ARIZ. REV. STAT. ANN. § 12-588(B) (Supp. 1989).

*4. Liability Insurers' Obligation to Provide Funding*

Liability insurance contracts commonly provide that the insurer will pay all sums or amounts that the insured becomes legally obligated to pay as a result of the risks covered under the policy. In addition, they provide for the costs of defense and supplementary items such as appeal or *supersedeas* bonds and interest on the judgment. Even though modern policies constitute contracts to discharge the liability of insureds by paying the tort victim directly, as compared to policies that merely indemnify the insured after the insured pays the victim, the liability policies are not explicit on the obligation of an insurer to provide funding for a periodic-installment judgment. The Arizona Act, however, makes this obligation explicit for a medical malpractice insurer.[203] The Act not only requires this of the liability insurer, but also requires it of any person adjudged to have an obligation to pay all or part of the judgment.[204] This could include an employer, such as a health maintenance organization, that has agreed to hold an employee-doctor or other health care provider harmless if adjudged to be responsible for all or part of an award entered under the Act. However, the liability insurer, or adjudged obligor, is not required to provide funding in excess of the policy limits or adjudged obligation.[205] Where a liability insurer provides funding, it is deemed to have satisfied its contractual obligation to pay damages.[206] Consequently, there is no recourse against the liability insurer if the funding subsequently proves inadequate.

The Act also prescribes the method for determining whether the limits of a liability insurance policy have been exceeded under a periodic-installment judgment.[207] This determination is made by first discounting the periodic installments to present value by using the latest rate of interest on fifty-two week United States Treasury bills.[208] In order to perform this calculation, it is necessary to know the period over which the payments are to be made. The trier of fact has provided this information regarding future economic losses unless a lifetime award has been made for health care costs. In the event of a lifetime award, the Act provides that the time period shall be the life expectancy of the plaintiff, as prescribed by a race neutral life expectancy table for the appropriate sex based on the Current Population Survey collected by the Bureau of the Census for the Bureau of Labor Statistics of the United States Department of Labor, at the time the computation is made.[209] The present value as calculated is then compared to the cost of an annuity that would satisfy the funding requirement under the Act. The lesser of the two amounts is then added to the lump-sum award in the judgment and the total is compared to the applicable limit under the policy.

If the policy limit is exceeded, the plaintiff and the insured still may be in a better position than under a traditional lump-sum judgment that exceeds the policy limit. Where the cost of the annuity is used to ascertain the present value of the periodic installments, as it often will be, it may be more feasible for the insured to fully satisfy the judgment by contributing to the cost of the annuity. The excess

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203. *Id.* § 12-587(B).
204. *Id.*
205. *Id.*
206. *Id.* § 12-587(F).
207. *Id.* § 12-587(B).
208. *Id.* § 12-589(A).
209. *Id.* § 12-589(B). For example, according to the table based on the data referred to in the Arizona statute, at age 55 a male has a life expectancy of 21.8 years and a female has a life expectancy of 26.6 years. *See infra* note 241.

amount that would be required to fully fund the installments could be far less than that required to pay the amount in excess of the policy limits under a traditional lump-sum judgment. On the other hand, if the insured cannot pay for the excess amount, it still would behoove the plaintiff and the liability insurer to consider funding the periodic installments to the extent the policy limit permits. In fact, the liability insurer may have a duty to continue to attempt to negotiate a settlement on that basis, in order to minimize or eliminate the insured's excess exposure.[210] The defendant or the liability insurer, however, could not force the plaintiff to accept a periodic-installment judgment in a case where the policy limits have been exceeded, absent funding that would fully satisfy the judgment. At that point, the plaintiff is entitled to move that the periodic installments be commuted to present value and that a lump-sum judgment be entered.[211]

*5. Discharging the Defendant*

Where the required funding is provided by or on behalf of a judgment debtor, the debt is discharged and the plaintiff-judgment creditor can no longer look to that party for relief.[212] Thereafter, the sole remedy is against the funding obligor.[213] In addition, if a judgment lien has been perfected between the time the judgment is entered and the funding is provided, the Act provides that it is released.[214] Once funding has been provided, there is no occasion for a judgment lien.

### *F. Requirements for the Form of Funding*

The provisions of the Arizona Act establishing the obligation to provide funding, and addressing some of the related problems, were discussed in the previous subsection. This subsection addresses the requirements in the Act ensuring that the funding is as financially sound as is reasonably possible.[215]

*1. Types of Funding Authorized*

A variety of methods are available to a judgment debtor to fund a periodic-installment judgment, but those obligated to provide the funding do not have an unfettered choice in the matter. The foremost limitation is that the court must approve the funding "as sufficient to guarantee financial solvency."[216] Court approval must be obtained though the form of funding meets the criteria established under the Act, and even where the parties have agreed to the form. Two types of funding are explicitly mentioned. Both involve a "qualified insurer" which is defined in the Act to mean "an insurer, plan or arrangement approved by the Director of the Department of Insurance."[217] The Act goes on to describe how

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210. *See* Fulton v. Woodford, 26 Ariz. App. 17, 21-22, 545 P.2d 979, 983-84 (1976), and Keeton, *Liability Insurance and the Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1148-50 (1954).

211. ARIZ. REV. STAT. ANN. § 12-587(C) (Supp. 1989).

212. *Id.* § 12-587(F).

213. *See infra* subsection F regarding the requirements for the form of funding.

214. ARIZ. REV. STAT. ANN. § 12-587(F) (Supp. 1989). In Arizona, unlike some states, the entry of a judgment for money damages does not automatically create a lien on the judgment debtor's real property. A certified copy of the judgment must be filed and recorded in the office of the county recorder in the county where the property is located in order to perfect the lien. ARIZ. REV. STAT. ANN. § 33-961(B) (Supp. 1988).

215. ARIZ. REV. STAT. ANN. § 12-588 (Supp. 1989).

216. *Id.*

217. *Id.* § 12-581(8).

the Director is to make the determination of who is eligible to be a qualified insurer, including certain minimum criteria. The Act also requires that the Director publish and maintain a current list of those designated as meeting the requirements.[218]

The first type of funding mentioned in the Act is an annuity contract issued by one or more qualified insurers.[219] Presently a good number of life insurance companies write annuities to fund structured settlement agreements for seriously injured tort victims. In fact, there are insurance brokers that specialize in developing and funding these agreements. The personal injury bar is quite familiar with structured settlements and the methods of funding involved. Thus, the use of annuity contracts should not present any new problems as long as the annuity carrier is designated as a qualified insurer by the Director of Insurance.

The second type of funding mentioned is "an agreement by one or more qualified insurers to fund the judgment."[220] It is conceivable that some medical malpractice insurers, such as MICA[221] or the state as a self-insurer, may seek to be designated as a qualified insurer. In addition, there may be situations where some liability insurers see an advantage to their paying the installments directly as they accrue. The Act attempts to accommodate these types of arrangements, but only where the funding entity meets the requirements established for a qualified insurer.

The Act also provides for a third type of funding which gives some discretion to the parties. It does not require that the funding be provided by a qualified insurer, but still requires that it be approved by the court. The Act simply says that the funding may be in "any other form . . . which the court approves and to which the claimant consents."[222] One type of funding that has been suggested is that of a trust.[223] For example, United States Treasury bills could be used to fund a periodic-installment judgment. A judgment debtor could establish a trust with a bank whereby the bank would invest a lump sum in such bills, thereby providing the security and the funds for the installment payments. There are also other types of investments providing the requisite security which may be used to produce the income necessary to make the installment payments required by the Act. Thus, the trust might invest in other high quality instruments as long as the parties agree. If the court is satisfied that the funding is adequate and the claimant consents, it could approve such an arrangement. However, the parties should bear in mind that there may be different tax and other consequences that flow from various funding arrangements.

*2. Assuring Tax Free Treatment of Installments*

The funding must meet the conditions set out in the United States Internal Revenue Code in order for the judgment creditor to receive the installment payments on a tax-free basis. An early tax ruling dealt with a situation where a liability insurance company purchased and retained exclusive ownership in a single premium annuity contract to fund monthly payments stipulated in settlement of a

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218. *Id.* § 12-593.
219. *Id.* § 12-588(A)(1).
220. *Id.* § 12-588(A)(2).
221. *See supra* note 3.
222. ARIZ. REV. STAT. ANN. § 12-588(A)(3) (Supp. 1989).
223. *See* Frankel v. United States, 321 F. Supp. 1331, 1340-41 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972), where the government urged the court to approve such an arrangement.

damage suit.[224] The IRS ruled that the exclusion from gross income by Section 104(a)(2) of the Internal Revenue Code of 1954 applied to the full amount of the monthly payments received by the victim in settlement of the damage suit. It was reasoned that the victim had a right to receive only the monthly payments and did not have the actual or constructive receipt or the economic benefit of the lump-sum amount that was invested to yield the monthly payments. If the victim were to die before the end of the period over which the payments were to be made, the payments made to the victim's estate under the settlement agreement would also be excludable from income under Section 104.[225] Subsequent to these rulings, the Internal Revenue Code was amended so that it explicitly recognizes the tax free treatment of structured settlements and periodic-installment judgments.[226] The most recent amendments now permit the plaintiff-judgment creditor to have a secured interest in some situations.[227] However, the parties still need to take care in drafting any funding instruments or agreements to assure that the periodic installments remain entirely tax free if that is desired.

*3. Making the Plaintiff a Secured Judgment Creditor*

As indicated above, originally the plaintiff would not be eligible for tax free treatment of the periodic installments if he or she had the right to receive or had some ownership or secured interest in the principal as compared to a mere right to receive the installments as they came due. This, in effect, relegated the plaintiff to the position of a general creditor under a structured settlement or a periodic--installment judgment. Moreover, not only was the plaintiff a mere general creditor, but in many instances, due to the way the funding was arranged, the plaintiff was only a general creditor of an entity that owned the annuity, which it used to fund the installment payments it was obligated to make to the plaintiff. Thus, the plaintiff was not necessarily a creditor of the life insurance company that issued the annuity.

The income tax laws dictated this arrangement, insofar as the liability insurers were concerned. If the liability insurer wished to deduct the entire cost of a structured settlement or installment judgment when an annuity was used to fund it in the year the annuity was purchased, the Internal Revenue Code required that the liability insurer enter into a novation.[228] In other words, the liability carrier could not own the annuity and use that to generate the income which was needed to pay the installments to the tort victim, and deduct the entire cost of the annuity in the year it was purchased. The annuity was considered an asset of the liability insurer and only the installments paid to the plaintiff-judgment creditor could be deducted. Instead, the insurer had to enter into a "qualified assignment"[229] whereby the obligation to pay the tort victim was assumed by an assignee. The assignee charged the liability insurer a fee, which would cover the cost of the annuity plus an additional amount for operating expense and profit, for assuming the liability insurer's obligation to pay the plaintiff. The assignee would purchase an annuity from a life insurance company and use the proceeds to discharge the installment

224. Rev. Rul. 79-220, 1979-2 C.B. 74.

225. Rev. Rul. 79-313, 1979-2 C.B. 75. It is possible under the Arizona Act for the periodic installments representing future earnings loss to be paid to the estate of a deceased plaintiff-judgment creditor. *See infra* note 251 and accompanying text.

226. I.R.C. § 104(a)(2) (1986), as amended.

227. *See infra* note 231 and accompanying text.

228. I.R.C. § 130 (1986).

229. *Id.*

obligation it had assumed. Through this arrangement, the liability insurer could discharge its obligation, close its file and deduct the entire expense in the year it was incurred. Although this may be a satisfactory arrangement under a structured settlement where the plaintiff has to consent to the novation, it certainly raises legitimate concerns where the arrangement is forced on a plaintiff through a periodic-installment judgment. If the assignee enters into a number of these arrangements, one defaulting annuity company could cause an assignee to default on all of its obligations. Moreover, what keeps the assignee from engaging in other activities that might threaten its solvency?

The Congress took an important step to alleviate some of the concerns regarding the solvency of the assignee when it amended the Internal Revenue Code in the fall of 1988.[230] The Code now provides that the recipient of payments under a qualified assignment may have "rights as a creditor greater than those of a general creditor."[231] The Arizona Act has taken advantage of this amendment in two ways to provide the maximum security for the plaintiff-judgment creditor. First, it requires the Director of Insurance to adopt rules for determining which "insurers *and assignees*" are qualified to provide funding.[232] Thus, the Director is charged with not only scrutinizing the life insurance company that writes annuities, but also the assignee which will purchase and own the annuity under a qualified assignment. Presumably, the Director will require that any assignee be an insurance company, and could require that it meet the same standards of the company that issues the annuity. In addition, the Act states that, "in the event of a qualified assignment under Section 130 of the Internal Revenue Code of 1986, as amended, the qualified assignee and any qualified insurer shall be jointly and severally liable but the qualified insurer's obligation shall be the primary obligation."[233] This provision is an attempt to give the plaintiff-judgment creditor rights against the annuity company and not just the assignee. It is the equivalent of making the plaintiff-judgment creditor a secured creditor of the assignee. The obligation of the assignee is secured by the annuity that was purchased to fund the installments of the particular judgment. No other periodic payment plan in the country has attempted to give the plaintiff-judgment creditor a status greater than that of a general creditor.

### *G. Discounting Future Damages to Present Value*

Under the common law system where damages for bodily injury are awarded in a lump sum, the trier of fact is usually required to reduce awards for future damages to present value. A claimant would be overcompensated if the earning power of money were not taken into account. Whenever an effective election is made to try a case under the Arizona Act, the trier of fact is told to disregard the earning power of money with regard to future economic losses because the Act contemplates paying those damages as the losses accrue. Even though the awards for future damages are determined on a periodic-payment basis, they may not actually be paid in installments in the future. The periodic damage findings, for example, may have to be reduced to present value to pay a subro-

230. Technical & Miscellaneous Revenue Act of 1988, Pub. Law. No. 100-647, § 6079(b)(1)(A-B), 102 Stat. 3709 (1988) (codified as amended at 26 U.S.C. § 130(c) (1988)).
231. I.R.C. § 130(c) (1986), as amended.
232. ARIZ. REV. STAT. ANN. § 12-593(A)(1) (Supp. 1989).
233. *Id.* § 12-588(C).

gee,[234] attorney fees and litigation expenses,[235] or because the respondent fails to provide or maintain funding.[236] The Arizona Act provides for such contingencies.

If installments for future damages are ordered to be actually paid in advance of the period to which they apply, the Act provides that the court shall compute the present value of the future payments. The court does this by discounting each outstanding installment by a rate equal to the interest rate of the most recent issue of fifty-two week United States Treasury bills sold before the date the computation is performed.[237] Discounting to present value is certainly appropriate in those instances where the periodic installments are being converted to a lump-sum amount because of a defendant's failure to provide, or where there otherwise is a failure to maintain, funding. It may also be appropriate where litigation expenses such as depositions, expert witness fees, and court costs must be satisfied from the periodic installments. It may not be the appropriate method, however, to calculate the present value of the periodic installments for other purposes, such as paying a lump-sum percentage attorney fee which is being applied to the installments[238] or to calculate the value of subrogation rights.[239] In some of these cases future damages are not actually being ordered paid in advance of the period when they are due. The present worth of the installments are being valued for other purposes. In fact, with regard to a plaintiff's percentage attorney fee, the Act creates a presumption that the cost of an annuity that would satisfy the funding requirements is the preferred method of calculating present value for that purpose.[240]

The Arizona Act also anticipates the actuarial problem where there is need to discount a lifetime award for health care costs. In order to perform such a computation, there has to be a certain time over which the benefits are to be paid. Since a lifetime award by definition does not provide such a figure, the Act uses the race neutral life expectancy table, for the appropriate sex, which is derived from the Current Population Survey collected by the Bureau of the Census for the

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234. Although the Supreme Court of Arizona has negated medical insurers' attempts to exercise any rights of subrogation against a third-party tortfeasor on the grounds that such attempts violate a public policy against assigning causes of action for personal injury, see Allstate Ins. Co. v. Druke, 118 Ariz. 301, 576 P.2d 489 (1978), rights of subrogation do exist by virtue of both state and federal statutes. *See* Hendry v. Industrial Comm'n, 112 Ariz. 108, 538 P.2d 382 (1975), *cert. denied*, 424 U.S. 923 (1976) (construing state worker's compensation statute), and United States v. Lorenzetti, 467 U.S. 167 (1984) (construing Federal Employers' Compensation Act). *See also* Arizona's uninsured and underinsured motorist statute, ARIZ. REV. STAT. ANN. § 20-259.01(G) (Supp. 1989), which provides for a right of subrogation. It is not inconceivable that a right of subrogation could arise in a medical malpractice action by virtue of one of these statutes.

Where a person is injured on the job, or by an uninsured motorist and seeks medical treatment as a result, and is malpracticed by a health care provider, the person may have a cause of action against a person that wrongfully caused the original injury. There is authority for the proposition that the original tortfeasor may be liable for the health care provider's malpractice, see PROSSER & KEETON ON TORTS 309 (5th ed. 1984), in which case a compensation carrier or uninsured motorist insurer may be subrogated to that action. If the right does arise, the subrogee may move to be paid in a lump sum rather than being paid in installments. Assuming that the court would grant such a motion, it may be that the subrogee should be paid on the basis of the discounted value in some situations rather than on the basis of the annuity cost.

235. This should be the exception rather than the rule as the cost of the annuity would appear to be the preferable basis for calculating a percentage fee that applies to future installments. *See supra* note 164 and accompanying text.

236. *See supra* note 190 and accompanying text.

237. ARIZ. REV. STAT. ANN. § 12-589(A) (Supp. 1989).

238. *See supra* note 164 and accompanying text.

239. *See supra* note 234.

240. ARIZ. REV. STAT. ANN. § 12-586(A)(2) (Supp. 1989).

Bureau of Labor Statistics of the United States Department of Labor.[241] The hypothetical set out in subsection D shows how this computation would be made if the defendant-judgment debtor failed to provide the required funding at the time the periodic-payment judgment is entered. Under the hypothetical, the current life expectancy of a 55 year old male would be 22 years according to the race neutral table for males.[242] Assuming that an 8 percent interest rate for fifty-two week United States Treasury bills is the applicable discount rate,[243] the present value of the periodic installments for health care costs would be $671,389.[244]

On the other hand, if the periodic installments were paid through the year 2005 and the default then occurred in the year 2006, the plaintiff-judgment creditor could move to have the remaining installments commuted to present value in an attempt to satisfy the remainder of the judgment on a lump-sum basis. In that event, the computation regarding the present value would again require that the discount rate and life expectancy be determined. Assuming that in the year 2006 the most current interest rate on 52-week United States Treasury bills is 6 percent and that the life expectancy of a 72 year old male is 11 years,[245] the present value of the remaining unpaid installments would be $1,531,174, as shown below.

Health Care Costs

| Age | Year[246] | Unpaid Installments | Discounted Value |
|---|---|---|---|
| 72 | 2006 | $114,874 | ($ 114,874) |
| 73 | 2007 | 126,362 | ( 119,209) |
| 74 | 2008 | 138,998 | ( 123,708) |
| 75 | 2009 | 152,898 | ( 128,376) |
| 76 | 2010 | 168,187 | ( 133,220) |
| 77 | 2011 | 185,006 | ( 138,247) |
| 78 | 2012 | 203,507 | ( 143,464) |
| 79 | 2013 | 223,857 | ( 148,878) |
| 80 | 2014 | 246,243 | ( 154,496) |
| 81 | 2015 | 270,867 | ( 160,326) |
| 82 | 2016 | 297,954 | ( 166,376) |
| | Total | $2,128,753 | ($1,531,174) |

241. *Id.* § 12-589(B). Such a table is published by the National Center for Health Statistics. The most current table is contained in II VITAL STATISTICS OF THE UNITED STATES, Mortality, Part A, § 6, at 11 (DHHS Doc. No. 88-1122 (1988)) and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The publication is also available at the University of Arizona and Arizona State University libraries.

242. *Id.* The actual figure is 21.8 years, but was rounded to simplify the calculation.

243. The percentage yield or effective interest rate was 7.99 percent on 52-week Treasury bills maturing on Aug. 30, 1990, which was the latest issue as this article was being prepared. Wall St. J., Sept. 15, 1989, at C13, col. 3.

244. *See supra* note 169 and accompanying table.

245. The attained age of the tort victim in the hypothetical will be 72 years in the year 2006. According to the prescribed life table published in 1988, a 72 year old male has a life expectancy of 10.6 years.

246. The installment for the year 2006 should not be discounted since it is due that year. Only installments not yet due should be discounted. *See* ARIZ. REV. STAT. ANN. § 12-589(B) (Supp. 1989).

Once the plaintiff-judgment creditor has legally reduced the periodic installments to a lump-sum obligation, he or she may seek to satisfy this debt from the person or entity that is obligated to pay the installments.[247]

### *H. Effect of Death on Periodic Installments*

In ascertaining future damages under the common law system of lump-sum awards in a serious bodily injury case, the trier of fact is ill-informed concerning at least two matters. One of these matters may be ascertained with the passage of time and the other will never be known. In a permanent injury case, it will never be known what the tort victim would have been like had he or she not been injured. That has been forever altered by the injury. Passage of time, however, will reveal what the victim will be like. As to the latter, under a system of paying future damages periodically there is an opportunity to make adjustments in the damage findings as time passes. However, this raises a host of issues that seemingly makes such an option impractical under the tort-liability insurance system, at least at present.[248] Thus, the Arizona Act does not attempt to modify the future damages awards based on revelations with the passage of time except in two situations. Both have to do with death.

#### *1. Future Earnings Loss in Nonwrongful Death Cases*

Under the Act, the trier of fact is to base awards of future damages on two different predictions of life expectancy. As to future economic loss, other than costs of health care, the trier of fact uses the pre-injury life expectancy.[249] These damages are assumed to accrue over the period the plaintiff would have lived had the injury never occurred.[250] For example, in a nonwrongful death permanent disability case, wage loss would be awarded for the period that the plaintiff would be expected to have worked. If the plaintiff-judgment creditor in fact dies before the end of the time period predicted by the trier of fact, the periodic installments will be paid to a beneficiary designated in writing by the deceased, or in the absence of such a designation, to the estate of the deceased.[251]

#### *2. Future Loss of Support in Wrongful Death Cases*

In a wrongful death case, the periodic installments will continue until there are no surviving beneficiaries who are entitled to collect the installments. For example, if a periodic-installment judgment provides payments to more than one beneficiary of a wrongful death claim, and one or more, but fewer than all, of the beneficiaries die, the surviving beneficiaries succeed to the decedents' shares. The surviving beneficiaries are to divide the shares in proportion to the amounts they are receiving as wrongful death beneficiaries. However, the surviving beneficiaries are not entitled to receive the decedents' shares for any period longer than the survivors are entitled to receive benefits in their own right. If there was only one wrongful death beneficiary originally, any installments payable to that beneficiary terminate on death, just as they will terminate upon the death or the expiration of eligibility of the last survivor in the multiple beneficiary situation.

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247. *See supra* note 213 and accompanying text.
248. *See supra* note 91 and accompanying text.
249. ARIZ. REV. STAT. ANN. § 12-584(B) (Supp. 1989).
250. *See supra* note 142 and accompanying text.
251. ARIZ. REV. STAT. ANN. § 12-590(C) (Supp. 1989).

The termination of periodic installments in some wrongful death cases changes what would otherwise happen under the lump-sum system. This change, however, is necessitated by the new way of paying future damages. In a lump-sum system, once a wrongful death beneficiary obtains and satisfies a judgment, the money may be spent or bequeathed by will or allowed to pass by intestate succession. It would make little sense to attempt to control alienation of the funds after the award is made in lump sum. It is a different matter under a periodic-payment system where payment is yet to be made when the wrongful death beneficiary dies. It is probable that the surviving beneficiaries would have received more support had they been the only dependent survivors at the time the wrongful death action was prosecuted. Moreover, had the trier of fact been omniscient and foreseen the death of one of the surviving beneficiaries, it is reasonable to assume that the awards would have been adjusted to give those beneficiaries who survive more, because the wrongful death victim would have provided more support to them had he or she never been killed. Consequently, the Arizona Act does make a change in wrongful death cases arising out of medical malpractice by distributing the deceased beneficiary's award to any surviving beneficiaries who are collecting periodic payments in their own right.

The Arizona Act functions in medical malpractice cases in a way that is consistent with the general design of the Arizona wrongful death statutes to compensate the "surviving" members of the immediate family.[252] Additionally, it is compatible with a system of paying future damages in periodic installments.[253] As long as there are any surviving beneficiaries collecting wrongful death benefits in periodic installments, the original installment awards will not lapse. On the other hand, if there are no other surviving beneficiaries receiving benefits in their own right, the periodic installments of the deceased beneficiary will lapse. There

252. ARIZ. REV. STAT. ANN. §§ 12-611 to -13 (1982).

253. There is an ambiguity in the Arizona wrongful death statutes. The statutes create a cause of action in favor of certain individuals who survive the tort victim. It is not made clear whether "surviving" refers only to the time of the tort victim's death or whether the beneficiary of the action must survive until either the death action is filed or an award is made. *See Id.* § 12-612(A). Thus, the question arises whether the heirs or estate of a person that is the beneficiary of a wrongful death action may succeed in any manner to the action? This issue has been answered in various ways in other jurisdictions where a lump sum is to be awarded, depending on the specific wording of the statute in question and when the "survivor" died. *See* 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 8:17 (2d ed. 1975). In some states, the wrongful death action abates upon the death of the survivor-beneficiary. In those cases where the action passes to the heirs or estate of a deceased beneficiary, the general rule is the heirs or estate are only entitled to the damages that the deceased beneficiary sustained between the tort victim's death and the beneficiary's death. *Id.* § 8:21. This was the result in the only Arizona case to address the issue. Katz v. Filandro, 153 Ariz. 601, 739 P.2d 822 (Ct. App. 1987).

Under a periodic-payment system, however, the wrongful death beneficiary will have received or be entitled to receive the lost support through the time of his or her death. The decision to have the deceased beneficiary's periodic-payments prorated among the surviving beneficiaries under the Arizona Periodic Payment Act is a compromise between having the periodic payments continue until all installments are paid or having the payments terminate immediately on the death of the beneficiary. The former approach treats the entire award for future payments as having vested in the beneficiary, a result contrary to that in *Katz*. Thus, the legislature decided that the installments that have matured on the death of the beneficiary will pass to the heirs or legatees, but that future installments will be prorated among other wrongful death beneficiaries who are still collecting installments in their own right.

does not appear to be any good reason to continue paying damages for losses that are not being incurred.[254]

*3. Future Health Care Costs*

In addition to the described modification in wrongful death awards, the Arizona Act makes one other change that is now possible under a system of paying future damages in periodic installments. The legislature decided to terminate any installments representing medical or other health care costs not yet due upon death.[255] The trier of fact may use something less than the post-injury life expectancy of the plaintiff for these items of damage, or find that they will accrue for as long as the plaintiff lives. In the event the trier of fact chooses the former time frame, for example in a temporary injury case, death still may result prematurely from causes having no relation to the original injury. But under either choice, since death precludes the accrual of losses for these items of damage, the legislature felt continued payment would be a windfall to the recipient. Had the plaintiff-judgment creditor lived, the installments would have been spent on the necessary medical goods and services.

This has to be balanced against another feature of the Act — the lifetime award. The availability of a lifetime award for health care is an important improvement over the current lump-sum system. There the trier of fact is required to prescribe a definite life expectancy that inevitably will turn out to be inaccurate. Under the Arizona Act the trier of fact will no longer have to guess how long a particular plaintiff will live. Where the trier of fact finds that a lifetime award is justified, medical expenses will be paid as long as the plaintiff incurs the expense. Thus, damages for health care costs will more accurately reflect actual losses. These features of the Act not only promise the greatest improvement in efficiency in the tort-liability insurance system for medical malpractice actions in Arizona,[256] they provide for significant improvements in the justice system.

***I. Assignment and Exemption of Periodic Installments***

One of the purposes of the Arizona Act is to assure that medical malpractice awards serve their stated purpose. Not only does the Act attempt to tailor the awards to actual losses, but it also places limitations on the power of the plaintiff-judgment creditor to assign the periodic installments that are payable in the future. An assignment of or an agreement to assign any right to these installments is not enforceable save for three situations.[257] The Act permits assignments for payment of spousal or child support; costs of products, services or accommodations provided or to be provided by the assignee for health care; and attorney fees and

254. Although the wrongful death action is a creature of the legislature, there may be some limitations under the Arizona Constitution as to the power of the legislature to modify the cause of action. *See* Halenar v. Superior Court, 109 Ariz. 27, 504 P.2d 928 (1972). The approach in the Arizona Periodic Payment Act arguably would skirt any such impediment on the theory that it is constitutional to refuse to pay damages where the Wrongful Death Act never contemplated paying them in the first place, i.e., the cause of action of a deceased beneficiary does not pass to his or her heirs except to the extent of harm the beneficiary suffers prior to death.

255. ARIZ. REV. STAT. ANN. § 12-590(A) (Supp. 1989).

256. It is not so much the actual termination of health care benefits that saves money. The potential for savings results from the fact that the cost of the annuity, which the liability insurer will purchase, on average may be substantially less than the average of the amounts that the trier of fact determines will have to be paid.

257. ARIZ. REV. STAT. ANN. § 12-591 (Supp. 1989).

other litigation expenses incurred in obtaining or enforcing the periodic-installment judgment.[258] It is notable that assignments may be made to secure health care even though the expenses have no relation to the accident or injuries giving rise to the periodic-installment judgment.

The Act also contains a complementary section that generally exempts all periodic installments, except to the extent they may be assigned, from garnishment, attachment, execution and any other process or claim.[259] However, for periodic installments representing loss of earnings or loss of support for the beneficiaries of a wrongful death action, the exemption is not as broad. Periodic installments for these losses are treated as earnings, and the exemption is limited to that provided in other applicable law.[260] Thus, as a general rule, no more than 25 percent of any installment payment representing earnings loss should be subject to garnishment.[261] However, there is no exemption where the creditor is seeking to satisfy a debt arising from a familial support obligation, purchases of health care products or services, or legal services rendered in the malpractice suit which established the right to the periodic installments in the first place.

### *J. Duties of the Director of the Department of Insurance*

The Director of the Arizona Department of Insurance is assigned a very important role in assuring that the Arizona medical malpractice legislation achieves the goals established for a periodic-installment judgment plan. These duties, which are well within the expertise and general jurisdiction of the Department, fall into three categories. The first requires the Director to take steps to identify those entities that will be eligible to secure payment of the periodic installments contemplated in the Act.[262] The second involves the obligation of liability insurers to fund periodic-installment judgments.[263] The third pertains to medical malpractice insurance premium rate reductions.[264] The Director is the most logical person to discharge these duties and that is where the Act places the responsibility.

#### *1. Designating "Qualified Insurers"*

Where the parties to a medical malpractice action voluntarily enter into a structured settlement, the plaintiff must approve the funding entities and the arrangement whereby the funding is provided. In these instances, the plaintiff most certainly will demand the highest degree of financial security possible. Under a periodic-installment judgment plan where either a plaintiff or a defendant is empowered to elect to have future damages paid in periodic installments, it also follows that the plaintiff must be afforded protections equivalent to those under voluntary agreements. Yet, an absolute power to approve or disapprove the

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258. *Id.*
259. *Id.* § 12-592.
260. *Id.*
261. *See* the federal Consumer Credit Protection Act, 15 U.S.C.A. § 1673 (1982), which provides the basic protection from process afforded to a debtor. Under this statute, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed (1) 25 percent of disposable earnings for that week, or (2) the amount by which the disposable earnings for that week exceed thirty times the Federal minimum hourly wage in effect at the time the earnings are payable, whichever is less. Although states may provide more protection to a debtor in some instances than afforded by federal law, Arizona apparently has not done so. *See* ARIZ. REV. STAT. ANN. § 33-1131 (Supp. 1988).
262. ARIZ. REV. STAT. ANN. § 12-593(A)(1) (Supp. 1989).
263. *Id.* § 12-593(A)(2).
264. *Id.* § 12-593(B).

funding arrangements cannot be left to the parties, without seriously threatening the feasibility of the system. Nor should this responsibility be thrust upon the courts. Thus, the question of how best to protect the parties without hamstringing the Act arises.

Arizona is one of the few jurisdictions to enact a plan that attempts to deal with this issue by identifying certain entities in advance as being qualified to provide the requisite funding. The Act cautiously draws the restrictions on eligibility quite conservatively, and over time they may prove to be more than is necessary to accomplish the goal of assuring financial responsibility. Nevertheless, the restrictions do not appear to be unreasonable as a pioneering effort. This is true even though they clearly eliminate a large number of insurance companies, and presumably some sound ones, from the annuity market in Arizona.

The Act provides that the funding for the periodic installments can only be provided by a "qualified insurer" unless the claimant consents to some other form of funding.[265] A "qualified insurer" is defined to mean an insurer, self-insurer, plan or arrangement approved by the Director of Insurance.[266] The Act then goes on to say that the Director is charged with the responsibility of establishing by rule standards and procedures for determining which "insurers and assignees" are financially qualified to be designated as qualified insurers.[267] The reference to insurers and assignees requires the Director to establish criteria concerning the financial soundness of a qualified assignee,[268] as well as those of insurance companies that want to sell the annuities.

It is important that any potential qualified assignee meet high standards since the financial stability of this entity also affects the risk that the plaintiff-judgment creditor may not be paid. In many cases this will be the entity that owes the obligation to pay the tort victim and owns the annuity that is used to fund the periodic installments. For example, the Director of Insurance may want to control whether the qualified assignee can engage in business activities other than novations with liability insurers. In addition, it might make a difference if the assignee limits its business to novations under the Arizona Act; or whether it assumes obligations under structured settlements in general or periodic-payment plans enacted in other states. In short, where a liability insurer assigns its obligation under a periodic-installment judgment to a qualified assignee which purchases an annuity to fund the obligation, the Director should be concerned with the financial stability of the assignee as well as the insurance company selling the annuity contract.

*2. Requirements for Insurance Companies Seeking to Become Qualified Insurers*

As far as insurance companies are concerned, the Act sets out certain minimum requirements for being designated as a "qualified insurer."[269] These requirements apply to a liability insurance company that might want to pay the

265. *Id.* § 12-588.
266. *Id.* § 12-581(8).
267. *Id.* § 12-593(A)(1).
268. For a discussion of the role of a "qualified assignee" under Section 130 of the Internal Revenue Code in funding a periodic-installment judgment or structured settlement, *see supra* note 228 and accompanying text.
269. ARIZ. REV. STAT. ANN. § 12-593(C) (Supp. 1989).

periodic installments as they come due, as well as to a life insurer that sells an annuity to fund a periodic-installment judgment. The Director may adopt additional requirements, but no insurance company may provide funding unless it meets three requirements: (1) it has a rating of A+ (Superior)[270] and at least a Financial Size Category of VIII[271] in the current edition of Best's Insurance Reports as published by A.M. Best Company; (2) it has no more than one ratio falling outside the current ranges of usual values as determined under the Insurance Regulatory Information System (IRIS) by the National Association of Insurance Commissioners (NAIC);[272] and (3) it is licensed to do business in a state that has an applicable guaranty fund that affords protection to an insured in the amount of at least $100,000.

The first criteria alone severely limits the number of life insurers that would qualify under the Arizona Act. For example, although there are over 2,500 life insurance companies or organizations licensed to do business in the United States, the A.M. Best Company only reported on 1,425 of these companies in 1989.[273] Of this number, slightly less than 300 are rated as A+ (Superior),[274] and of the latter only 143 meet the Financial Size Category requirement under the Act. When one applies the second criteria, i.e., no more than one IRIS ratio falling outside the current ranges of usual values, the number of eligible life insurance companies will in all likelihood be further reduced. Some of the 143 may have more than one ratio that fails the IRIS test.[275] Finally, the fact that the insurance company must also participate in a guarantee fund that provides coverage to its insureds of at least

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270. This is the highest rating of the five employed by Best's and is described as follows: "assigned to those companies which in our opinion have achieved superior overall performance when compared to the norms of the life/health insurance industry. A+ (Superior) rated insurers generally have demonstrated the strongest ability to meet their respective policyholder and other contractual obligations." BEST'S INSURANCE REPORTS, LIFE-HEALTH, at x (84th Annual Ed. 1989) (hereinafter BEST'S).

271. The Financial Size Category is an indicator of the relative size of an insurer based on its reported policyholders' surplus and conditional reserve funds. The size of risks, which an insurer may prudently underwrite, assume or retain, is closely tied to its reported policyholders' surplus. Financial Size Categories range from Class I (the smallest) to Class XV (the largest). A life insurance company must have $100 to $250 million in adjusted policyholders' surplus to qualify for a Class VIII Financial Size Category. *Id.* at xi.

272. The Insurance Regulatory Information System (IRIS) was developed by the National Association of Insurance Commissioners (NAIC) to assist state insurance departments in executing their statutory mandates to oversee the financial condition of insurance companies operating in their respective states. The NAIC uses the annual statements of the participating companies to form a data base and to calculate a series of ratios each year. There are twelve ratios for life-health and eleven ratios for property-liability companies. For each ratio there is a "usual range" of values developed by the NAIC from studies of companies that have become insolvent or have experienced financial difficulties in recent years. The NAIC considers the ratios valuable in pointing to companies likely to experience financial difficulties, but cautions that the ratios in themselves are not indicative of adverse financial condition. NAIC, Insurance Regulatory Information System Ratio Results 1 (1988).

273. *See* BEST'S, *supra* note 270, at viii.

274. A.M. Best does not publish tables showing the number of insurers that fall into each rating or size category. The only way to obtain this information is to go through Best's Insurance Reports page by page and tabulate the number of companies falling into each category. Based on the author's research, there are 298 A+ (Superior) life-health companies in Best's 1989 publication.

275. Of the 2001 life-health companies in the NAIC 1989 data base, 1,158 or almost 60 percent had more than one ratio outside the usual ranges. 16 INS. FORUM 45, 47 (Sept. 1989). Thus, it is reasonable to assume that some of the A+ (Superior) rated life-health insurance companies will have more than one IRIS ratio outside the usual ranges of values.

$100,000 per claim may further reduce the number of eligible insurers.[276] This latter requirement, however, is not as formidable as the other two because Arizona has guarantee funds which qualify under the Act, and any insurance company that is licensed to write liability[277] or life insurance[278] in this state must participate in the respective fund. Thus, any insurer that meets the first two requirements can satisfy the third requirement by being admitted to do business in Arizona. If the insurer is otherwise qualified and is already participating in a guaranty fund that provides at least $100,000 protection to an Arizona plaintiff-judgment creditor,[279] it would not be necessary to be licensed in Arizona unless the Director adopts this as an additional requirement.[280] Whether the restrictions are too narrowly drawn remains to be seen. This may turn on how many companies actually compete for this business.

*3. Other Entities That May Qualify to Provide Funding*

The discussion above only pertains to those insurance companies that might seek to be designated as a "qualified insurer." The Act also provides that other entities may be designated as a qualified insurer and thereby be approved to provide funding.[281] For example, the state may seek to be designated as a "qualified insurer" under its risk management program insofar as medical malpractice actions are concerned. If the state is approved, it could fund the periodic installments by appropriating the necessary funds each year to pay the installments that will mature, say, between July 1 and June 30 of the ensuing fiscal year. Or the state might choose to buy an annuity to fund part of the installments and pay the remainder through the process of annual appropriations. It would be possible for the federal government to qualify too, if the Arizona Act applies to medical malpractice actions which are tried under the Federal Tort Claims Act.[282] Although it would be rare for an individual or a private entity to qualify to provide funding as a self-insurer under the Act, that possibility is not foreclosed.[283]

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276. Not all states have guaranty funds, particularly for life insurance companies. For example, California has no guaranty fund for life insurers. Apparently, life insurance companies have resisted the formation of guaranty funds because they feel that this will, in the long run, work to ease other regulatory standards and permit weaker companies to be licensed. Thus, were they required to participate in a guaranty fund, some feel that this would result in a type of subsidy to their weaker competitors.

277. *See* ARIZ. REV. STAT. ANN. §§ 20-661 to -680 (Supp. 1989) for the provisions that establish the guaranty fund for property and casualty insurers.

278. *See Id.* §§ 20-681 to -695 for the provisions that establish the guaranty fund for life insurers. The Arizona statute specifically covers annuities. *Id.* § 20-683(A)(3).

279. Even if a state has a guaranty fund that applies to life insurance companies, there may be an issue as to whether annuities are covered. Moreover, not all guaranty funds extend protection to nonresident insureds. There has been a movement to limit coverage to the residents of the state which has the applicable guaranty fund. Thus, an insurer that is not admitted in Arizona would not qualify under the Arizona Act unless there is a guarantee fund in some state in which the insurer is organized or admitted that provides at least $100,000 coverage for the plaintiff who receives a medical malpractice periodic-installment judgment in Arizona.

280. *See* ARIZ. REV. STAT. ANN. § 12-593(C)(4) (Supp. 1989).

281. *See Id.* §§ 12-581(8), -593(A)(1).

282. 28 U.S.C.A. §§ 2671 - 2680 (Supp. 1989).

283. One of the standards that the Director could impose on a private self-insurer would be to require that the person or entity secure any periodic-installment judgment through a financial guarantee by a licensed surety.

*4. Other Duties of the Director*

In addition to establishing criteria for the designation of qualified insurers, the Director is to publish and maintain a current list of those designated.[284] This will permit the parties involved in medical malpractice litigation to know which insurers meet the requirements of the Act. The Director is also given explicit authority to develop rules to take action against any medical malpractice liability insurer that refuses to provide funding after it is adjudged to be obligated to do so.[285] If such an insurer refuses to provide the required funding when able to do so, the court itself may have the authority to hold the insurer in contempt, or impose other sanctions. In fact, the insurer may be liable in tort for bad faith. The additional threat of license revocation by the Department of Insurance will also help ensure that all admitted carriers discharge this obligation, and thus secure the benefits of the Act. Finally, the Director is also charged with the responsibility of monitoring the effectiveness of the periodic-payment plan by conducting an annual evaluation and review.[286] The purpose of the evaluation is to determine whether the system is producing savings to medical malpractice insurers and, if so, to require that premium rates reflect these savings.[287]

## *K. Effective Date of Act*

The Arizona Act is applicable, when invoked, to all medical malpractice actions filed on or after September 15, 1989.[288] Consequently, a party to a cause of action which accrued prior to the effective date may elect to have the case tried under the provisions of the Act and have a periodic-installment judgment entered in the case. This raises an issue regarding the authority of the legislature to apply the Act to actions that accrued prior to September 15, 1989. The test used to resolve that issue is whether the legislation adversely affects a vested substantive right.[289] The outcome of any challenge based on this test is unclear because the Act affects not only how future damages for economic losses will be paid, but whether some of the elements of those damages will be paid at all.

One can argue that the method of paying the damages in periodic installments is more closely akin to procedure because it only affects the process by which medical malpractice victims are compensated. This process provides certain advantages both to plaintiffs and defendants, and on balance, is a better system than paying future damages in lump sum. The termination of benefits aspect may be more troublesome, but this does not violate the rule that a vested substantive right cannot be altered retroactively. The fact that periodic installments for health care costs are designed to terminate when the plaintiff-judgment creditor dies appears to affect a substantive right. This "right," however, is based on nothing more than an inefficiency that is inherent in the lump-sum system, a system that in theory was designed to pay for actual losses only. If the trier of fact predicts

284. ARIZ. REV. STAT. ANN. § 12-593(A)(3) (Supp. 1989).
285. *Id.* § 12-593(A)(2).
286. *Id.* § 12-593(B).
287. *Id.*
288. Ariz. Sess. Laws, 39 Leg., 1st Reg. Sess., ch. 289, sec. 3. Since there was no emergency clause in the Act, it takes effect at mid-night of the 90th day after the day on which the legislature adjourned *sine die*. Bland v. Jordan, 79 Ariz. 384, 291 P.2d 205 (1955); Donaldson v. Sisk, 57 Ariz. 483, 114 P.2d 907 (1941). The first session of the 39th Legislature adjourned *sine die* on June 16, 1989 and the 90th day thereafter is September 14, 1989.
289. *See* Allen v. Fisher, 118 Ariz. 95, 574 P.2d 1314 (Ct. App. 1977).

perfectly the life expectancy of the plaintiff, there will be no shortfall or windfall in the benefits that are awarded for future damages. It is only where the prediction is inaccurate that there is potentially a "right" to a benefit that is affected by the periodic-payment system. To argue that this "right" should be preserved, essentially, is a counsel of imperfection. If there is some inefficiency in the system that produces a windfall, it is wrong to argue that the legislature cannot correct the inefficiency retroactively. The individual has no "right" to the product of that inefficiency.

This argument also fails to recognize that the change eliminates an inefficiency that disadvantages a plaintiff. The plaintiff may live longer than the trier of fact predicts and endure a shortfall in damages. The Act remedies this with the lifetime benefit provision. Thus, the attempt by the legislature to improve the process, with the attendant changes that are called for in perfecting a periodic-payment plan, is not the type of modification that should be categorized as adversely affecting an important and justifiable substantive right which has vested.[290] To preserve the right to a possible windfall is to deny the opportunity for a lifetime benefit. The plaintiff cannot have it both ways.

## V. Conclusion

A well designed periodic-installment judgment plan offers a number of opportunities to make significant improvements in the way tort victims are compensated. Not only will there be a direct benefit to all those affected by the changes, but further improvements and refinements may ensue. Arizona has taken an important step in that direction with the enactment of a responsible plan for medical malpractice actions.

As to future improvements, some of these may appear to be impractical today, but when attorneys first began to experiment with structured settlements there were a number of problems that must have appeared to be insurmountable. Yet, most of these problems have been overcome and structured settlements are quite common today. There is no reason why periodic-installment judgments cannot fill the same needs in litigated cases, and in turn become the stepping stone for tomorrow's improvements.

290. This not only is a reasonable interpretation, but courts are obliged to construe statutes in such a way as to uphold their validity where possible. *See* Lake Havasu City v. Mohave Co., 138 Ariz. 552, 675 P.2d 1371 (Ct. App. 1983).