UNIFORM PERIODIC PAYMENT OF JUDGMENTS ACT

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UNIFORM PERIODIC PAYMENT OF JUDGMENTS ACT

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UNIFORM PERIODIC PAYMENT OF JUDGMENTS ACT

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UNIFORM PERIODIC PAYMENT OF JUDGMENTS ACT

PREFATORY NOTE

The Conference approved the Model Periodic Payment of Judgments Act in 1980. At that time approximately 14 states had adopted some type of statute either permitting or requiring that certain tort awards for future damages be paid in installments over the time that the losses upon which the awards were based would accrue. Today over 30 states have adopted some type of periodic-payment legislation. Originally, most of the statutes were limited to cases involving medical malpractice and product liability claims, but the more recent legislation encompasses much broader areas of tort law. A number apply to bodily injury awards generally. In addition, the United States Internal Revenue Code has been amended to accommodate a system of discharging claims for bodily injury in periodic payments. See Sections 104(a)(2) and 130, Internal Revenue Code of 1986, as amended. Thus, periodic-payment plans for tort awards are quite common today, having evolved from the experimental status they occupied a decade ago.

The Model Act was promulgated at a time when structured settlements were relatively new. Much has been learned since that time concerning the practicalities of funding settlements of tort awards through the use of annuities and similar financial arrangements. Although the Model Act was very influential in improving the general design and language of periodic-payment statutes since 1980, only one state – South Dakota – has adopted the Act, and then it was limited to medical malpractice cases. It was said by some that the Model Act was ahead of its time and that it was too large a step to take all at once. Although the merits of this statement are subject to debate, the fact that the Model Act was not widely adopted is not. Thus, the Conference appointed a new committee to revise and simplify the Model Act.

In the process of reviewing the Model Act, the Committee concluded that, in accordance with Conference criteria, the Act should be designated as a Uniform Act. See Reference Book, National Conference of Commissioners on Uniform State Laws 107-08 (1989-90). This recommendation was approved by the Executive Committee and ultimately adopted by the Conference when the Act was approved at its Annual Meeting in Milwaukee, Wisconsin in July of 1990.

The purposes of the Act remain the same – to compensate tort victims suffering bodily injury fully and fairly by requiring that certain awards for future economic damages be paid periodically as the losses accrue and thereby:

(1) alleviate some of the problems inherent in calculating damage awards by eliminating the need to have the trier of fact discount future damage awards to present value;

(2) effectuate more accurate awards of damages for actual losses by paying health care costs for the actual life of the tort victim;

(3) assure that payments of economic damages more nearly serve the purposes for which they are awarded;

(4) reduce the burden on relatives of personal injury victims and public assistance costs created by the premature dissipation of lump-sum payments;

(5) implement the income tax policies in the United States Internal Revenue Code and corresponding state and commonwealth tax laws by providing the same favorable income tax consequences to judgment creditors as are provided to claimants who enter into structured settlements; and

(6) make the tort-liability insurance system more efficient so as to keep liability insurance available and affordable.

A discussion of the purposes of and some of the problems giving rise to the need for the legislation embodied in the Act are explained in the prefatory note to the original Model Act. This note is set out below.

MODEL PERIODIC PAYMENT OF JUDGMENTS ACT

(1980)

Commissioners' Prefatory Note

The common law system of awarding damages in bodily injury cases is that of lump-sum payment. The trier of fact must determine at the time of trial all damages, past and future, that are owing to a claimant. Perhaps this system is the only one the courts could realistically administer when the law regarding damages in bodily injury cases developed. Yet, it is not free from problems. There are a number of things that are relatively uncertain at the time of trial in serious injury cases. Even with the passage of time, we will never know, in many of these cases, what the claimant would have been like if he had not been injured. On the other hand, passage of time will reveal the answers to the question of what the seriously injured claimant actually will be like in the future. We will also know the answers to other questions such as the state of the economy that now looms as a serious

question for the trier of fact in ascertaining large damage awards for losses that will accrue far into the future.

In addition to these inherent problems in the lump-sum system, other matters have developed that call for reexamination of how large awards of future damages in bodily injury cases are calculated and paid. First, half million and multi-million dollar awards have become so frequent in the last few years that they no longer represent the exceptional case. Such awards have a great impact on the availability and affordability of bodily injury liability insurance. The most acute problems have been experienced in the areas of product liability and medical malpractice, situations that give rise to some of the most serious injury cases.

Second, the income tax laws are such that it is to the benefit of claimants, and even their attorneys, to think about alternatives to the present system. Payment of damages as they accrue can provide substantial tax savings. Finally, the disposition of large lump-sum awards by successful claimants is not a matter that can be ignored when the public is demanding closer scrutiny of government spending, particularly in the welfare area.

Largely as a result of the availability and affordability problems in bodily injury liability insurance markets, but also because of the other factors mentioned above, a number of states have adopted legislation, mainly in the field of products liability, that permits judgments for damages for bodily injury to be paid in periodic installments rather than in a lump sum. In the main, this legislation has not been thorough and creates more problems than it answers. The problems not only affect the litigants in the adopting states, but are exacerbated because of the national and international nature of products liability and similar litigation. Needless to say, the problems of affordability and availability of bodily injury liability insurance are not intrastate in nature either, but also transcend governmental boundary lines.

The Model Periodic Payment of Judgments 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 losses will accrue. At the election of any party, subject to certain safeguards, a case involving large amounts of damages that will accrue in the future will be tried under this Act and, if appropriate, the court will fashion a periodic-installment judgment. The Act answers the problems left untended in legislation passed to date and does it at the state level so that each state can tailor various parts of the legislation to its own needs.

There are advantages to both claimants and defendants, as well as to the public, in the Act. A claimant’s award for bodily injury is not subject to the federal income tax. Under Section 104(a)(2) of the Internal Revenue Code 1954, a

claimant may exclude from gross income the amount of any damages received on account of bodily injury. The same rule usually prevails with regard to state income taxes. However, any income earned on such an award is subject to income tax. 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 which will generate income by investment and, in turn, produce the total amount of damages awardable to the claimant. Thus, a portion of the claimant's damages is taxable under the lump-sum system.

Recently, casualty insurers have undertaken to settle very serious personal injury cases by employing annuities and similar financial devices. The insurer of the tort defendant may offer to provide a series of payments to the tort victim extending over the victim's life or a period certain. By paying today's claims with tomorrow's dollars the insurer can offer an attractive package, including cost-of-living escalator clauses and other features, at a lower cost than paying the claim in a lump sum. This type of settlement is being referred to in the insurance industry and literature as a "structured settlement." Annuities are often used to fund it. There are considerable income tax and other advantages to this type of settlement as compared to a lump-sum settlement.

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 Model Act is designed to provide the same favorable income tax consequences to the tort claimant who receives a periodic-payment judgment in which future damages are paid out as the losses accrue. 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. The Act facilitates such an arrangement. However, counsel would be well advised to consult with those who have special expertise in income taxation matters and structured settlements to ensure that the form of a periodic-installment judgment and the method of securing it conform to Rev. Rul 79-220 and any subsequent rulings or modifications by the Internal Revenue Service. [The Internal Revenue Code was amended in 1986 to explicitly recognize that periodic payments of personal injury awards, either by judgment or agreement, are excludable from gross income. See Section 104(a)(2), Internal Revenue Code of 1986, as amended.]

Under the present accident loss system, the risk of investment of large lump-sum payments for future damages is forced on the accident victim. Many claimants lack the financial expertise to handle and invest large sums of money.

Services of others can be obtained, but there is always a risk of improvident investments. Moreover, there is usually a fee involved for such services. Under the periodic-payment scheme in this Act, the defendant or the defendant's insurer will shoulder these burdens. Presumably, they will have easier access to sources of financial expertise and can better absorb the risks and costs involved. In short, the accident victim should not have to bear the risks and costs associated with the management of a large sum of money paid in a lump sum.

Defendants will also benefit by being permitted to pay large awards for future damages in periodic installments as the losses accrue. Many defendants in the very serious cases are either large or, at least, solvent corporations, which carry liability insurance or act as self-insurers. These corporations, or their insurers, are often in a better position than a single claimant to secure the most advantageous arrangements. In addition, the Act contemplates that awards for certain damages which never accrue because the loss is never suffered shall terminate.

The Act also eliminates the guesswork and speculation involved in the lump-sum system where the trier of fact, usually a jury, is asked to discount awards of future damages to present value . . . . Since damages will be paid as losses accrue, there is no need for the trier of fact to discount to present value. . . .

Overall, the Act contemplates payment of claimants for the actual losses incurred through a system which should be more efficient, all to the benefit of the public. . . .

UNIFORM PERIODIC PAYMENT OF JUDGMENTS ACT

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Bodily injury" means bodily harm, sickness, disease, or emotional or mental distress sustained by an individual, including death resulting from any of those conditions at any time.

(2) "Claimant" includes an individual suffering bodily injury, an individual claiming on behalf of or as a result of bodily injury to another, the representative of the estate of a deceased individual, and a beneficiary of an action for wrongful death.

(3) "Economic loss" means pecuniary harm arising from bodily injury for which damages are recoverable[, but the term does not include prejudgment interest].

(4) "Future damages" means economic and noneconomic loss that will accrue after trial of a claim under this [Act].

(5) "Medical expenses" means the cost of medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses.

(6) "Noneconomic loss" means nonpecuniary harm arising from bodily injury for which damages are recoverable, but the term does not include punitive or exemplary damages.

(7) "Past damages" means economic and noneconomic loss that has accrued by the time a claim is tried under this [Act].

Comment

This section contains definitions of words and phrases employed elsewhere in the Act.

The Act applies only to bodily injury cases as opposed to cases involving property damage or other forms of personal injury. The definition of "bodily injury" 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.

Any person bringing a claim for bodily injury, whether in a representative capacity or in his or her own behalf, is a claimant. This avoids having to use more elaborate descriptions throughout the Act when referring to various types of people who may assert, or be entitled to benefits under, a claim arising out of bodily injury.

The Act makes a distinction between "economic loss" and "noneconomic loss." The trier of fact is asked to make specific findings as to the future losses in each category. See Section 4. This is necessary not only for the purpose of determining which damages are to be paid periodically, but it is also necessary because the Act provides for the lapse of awards for medical and other costs of health care which never accrue because of the unpredicted intervention of death. The distinction is also important in determining how to apply any setoffs, credits or other reductions in the damage awards in fashioning a periodic-payment judgment. See Section 7. 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, however, does not attempt to change the measure of damages. It is left to the adopting jurisdiction, based on existing law, to determine into which category particular elements of damages fall. Consortium claims may provide a good example.

The Act uses the term "medical expenses" as a shorthand technique to cover all forms of health related costs involved in the treatment and care of those suffering bodily injury, thereby eliminating the need to spell out the complete list at various places in the Act.

Payment of damages on a periodic basis applies only to certain losses accruing in the future. It is customary to speak of past and future damages and the term "future damages" is used to mean those accruing after the damage findings are made by the trier of fact. These are to be distinguished from "past damages," which are damages accruing as of the time of trial. All past damages will continue to be paid in a lump sum as under the present system.

Punitive or exemplary damages and prejudgment interest are neither "past damages" nor "future damages" as these terms are used in the Act. The Act treats punitive or exemplary damages and prejudgment interest separately from all other damages. Like past damages, punitive or exemplary damages and prejudgment interest will continue to be paid in a lump sum as under the present system. If the adopting jurisdiction does not permit prejudgment interest on tort awards, the bracketed language in subsection (3) may be omitted. See also Section 8.

SECTION 2. ELECTION FOR [ACT] TO APPLY.

(a) This [Act] applies to claims for future damages for economic loss and requires that certain awards for those damages be paid periodically. The parties may agree at any time to invoke this [Act], or a party may elect to invoke this [Act] in accordance with this section.

(b) An election must be made [in accordance with rules of court] [by motion directed to the court with notice to all parties filed not less than [120] days before trial]. An objection to the election must be made [in accordance with rules of court] [by motion directed to the court with notice to all parties not more than [30] days after notice of the election]. [The court may excuse failure to comply with these time limits upon a showing of good cause.]

(c) An election is effective if filed by a party claiming or responding to a claim for future damages for economic loss unless:

(1) the claimant stipulates or admits that the claim for future damages for economic loss, without reduction to present value, does not exceed [$100,000]; or

(2) the court finds, pursuant to Section 3, good cause why the trial of a claim affecting the objecting party should not be conducted under this [Act].

[(d) A determination as to whether the claim is to be tried under this [Act] must be made [in accordance with rules of court] [by the court at least 30 days before trial].]

[(e)] [(d)] If an effective election is on file at the commencement of trial, all claims, including third-party claims, counterclaims, and claims consolidated for trial, must be tried under this [Act] unless there is a finding that, in the interest of justice, a separate trial or other proceeding should be held on some or all of the claims that are not the subject of the election.

[(f)] [(e)] An effective election may be withdrawn only by consent of all parties to the claim to which the election relates.

Comment

The policy underlying this section is to permit any party to an action which involves a claim for future damages for economic loss to elect that the case be tried under the procedures set out in this Act. Economic loss is defined to mean pecuniary harm arising out of bodily injury. See Section 1(3).

The Act does not require that an award of future damages for noneconomic loss be paid periodically. Although most states consider noneconomic loss to be sufficiently quantifiable to permit a jury to assign a lump-sum dollar amount to such loss, it does not appear to be realistic to carry the concept of quantification to the point of yearly (or monthly) payments for noneconomic loss, adjusted for inflation (see Section 5). There is no universal measure of the value of pain, embarrassment over facial scars, or the crippling loss of limbs or bodily functions. Yet, juries do determine the monetary value of these injuries. Asking a jury to annualize a value for these types of noneconomic losses and fix an inflation factor for each future year seems to compound the unreality of the task. It can be argued that an injured victim is entitled to a lump-sum payment for noneconomic damages to pay for whatever goods and services can be purchased to ease the burden of these immeasurable losses. For these reasons and because practicality requires that funds be made available for the payment of attorney's fees and expenses, it was decided that future damages for noneconomic loss should not be subject to periodic payments under the Act. Future damages for noneconomic loss provide a principal source of funds to pay attorney's fees and expenses. Fees and expenses are not taken from future damages for economic loss, which are subject to periodic payments, unless and until all future damages for noneconomic loss have been applied to the fees and expenses. See Section 7.

If all parties consent to try the action under the Act or there is no objection to an election filed by any party, the court will proceed to secure the necessary fact findings (see Sections 4 and 5), make any required adjustments and enter judgment for annual periodic payments, as well as for any lump sum amounts, in accordance with the Act. See Section 7.

If a party objects to the invocation of the Act, further proceedings must be held by the court unless the claimant stipulates or admits that the amount of future damages for economic loss, without any reduction to present value, does not exceed the figure selected by the legislature. Careful thought needs to be given to the figure because it provides an unchallengeable opportunity for the claimant to defeat an election. Given the benefits the Act conveys on all parties and the fact that a periodic-payment judgment may be warranted in cases involving relatively small amounts of future damages, the threshold amount should probably not exceed $100,000.

If there is an objection and the claim exceeds the threshold amount, the court must hold a hearing to determine if the objecting party can establish good cause as to why the claim should not be tried under the Act. See Section 3.

The next to the last subsection deals with multiple-claim cases. The court will want to take into consideration the question whether the trial of the objecting

party's claim will somehow interfere with the trial of claims which clearly should be subject to the provisions of this Act and *vice versa*. In a case in which there are multiple claimants who were injured in one accident, it may not be advisable to try in the same proceedings claims under the procedures of this Act with claims that are not being tried under the procedures of this Act. The Act prohibits discounting future economic losses to present value because these damages will not be paid until the losses accrue. See Section 4(b). Thus, instructions to the jury could differ as to the various claimants with regard to discounting. Jury instructions may differ in other material respects too.

The confusion engendered by trying claims with different jury instructions regarding damages in the same proceeding could be a basis for the court to decide that there should be separate trials. For example, the court could sever some or all of the damages issues and dispose of them in separate proceedings. 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. Assuming the interests are equal, however, all claims will be tried under the Act.

The bracketed language in subsection (b) and the bracketed subsection denominated (d), dealing with the time periods within which an election or objection must be filed and when the court must rule, respectively, anticipates the problem in some states as to whether the legislature has the power to prescribe such rules or whether this is solely within the jurisdiction of the supreme court of the state. The adopting state should choose the appropriate language. Also, if the time period suggested is not appropriate, the adopting state should feel free to tailor the provision to its own situation. It should be kept in mind that the trial of a case under the procedures of this Act might entail different methods of preparation and should not give an undue advantage to, or work a hardship on, any party. Time periods should be determined accordingly.

The election to try the case under the procedures of this Act may be made for the first time after a mistrial is declared, a motion for new trial is granted, or a case is remanded on appeal for a new trial. A court may even permit an election to be filed after a severance.

Once an effective election is made, it may be withdrawn only by consent of all parties to the claim to which the election relates.

An election or attempted election is not to be taken as evidence that the claim is worth more or less than the figure that is finally adopted in subsection (c)(1), nor should any argument to the jury referring to such be allowed.

If an effective election is filed and the case is tried under this Act, but the respondent is unable to fund a periodic-payment judgment in accordance with Section 10, the claimant has the option to have either a periodic or a lump-sum judgment entered. See Section 9. Thus, the claimant can force the respondent to pay future economic loss periodically regardless whether the prescribed funding is provided. In many cases, the respondent will be covered by liability insurance and the insurance regulator is empowered under Section 18 to take appropriate action against any liability insurer that refuses to fund a periodic-payment judgment if it is capable of doing so.

SECTION 3. GOOD CAUSE WHY [ACT] SHOULD NOT APPLY.

(a) In a proceeding to determine whether good cause exists for not trying a claim under this [Act], the burden is on the objecting party. Good cause may be found only if:

(1) the time over which payments would be made is too short, or the amount of damages is too small in relation to the time over which the payments would be made, to warrant periodic payments rather than payment in a lump sum; or

(2) a party responding to a claim for future damages is unable to fund a periodic-payment judgment under Section 10.

(b) Unless the court finds by clear and convincing evidence that good cause exists, it shall overrule the objection to the election to try a claim under this [Act].

(c) If the court finds that good cause exists for not trying a claim under this [Act], it shall set forth in the record the reasons for the finding.

Comment

If a party files a timely objection to an election under Section 2 and the claim to which the election relates exceeds the threshold figure, the court must hold a good cause hearing. The objecting party has the burden and may defeat the election only by proving "good cause" as defined in this section. The objecting party may show that the amount of future damages for economic loss likely to be recovered is too small in relation to the time over which the payments would be made; or that the time over which any payments, no matter the size, would be made is too short to warrant a periodic-payment judgment. The only other basis for establishing good cause is to show that the responding party is unable to provide the funding required by Section 10 of the Act to pay any lump-sum awards and to

finance the expected periodic payments for future economic loss. If there is a reasonable possibility that funding can be provided, the objection to trying the claim under the Act should be overruled. Section 9 prescribes the procedure to follow if, after trial, it turns out the party responding to the claim for future damages is unable to fund a periodic-payment judgment. Prior to trial, an objection to trying the claim under the Act should be sustained on the ground of inability to fund only if there is no reasonable possibility that funding will be provided. Section 10 also explains how to determine whether the expected periodic-payment judgment will exceed the limits of any applicable insurance policy.

Failure to prove any one of the two prescribed grounds for not trying a claim under the Act requires that the objection be overruled.

The burden of proof is that of clear and convincing evidence. This is to ensure that the Act is not evaded where there is only some question or doubt. This is important because the grounds regarding the amount of future damages and the time over which they will be paid may not be capable of quantification without a full-blown trial and necessarily may involve some judgment by the court. Thus, the court must be clearly convinced that the claim is not an appropriate one for trial under the Act before sustaining the objection.

Where good cause is demonstrated, the reasons for such a finding must be set forth in the record in order to provide a basis for appellate review. This, again, is to make sure that the Act is not easily evaded.

SECTION 4. SPECIAL FINDINGS REGARDING FUTURE DAMAGES.

(a) If liability is found in a trial conducted under this [Act], the trier of fact, in addition to any other appropriate findings, shall make separate findings for each claimant specifying the amount of:

(1) any past damages in a lump sum;

(2) any future damages for noneconomic loss in a lump sum; and

(3) any future damages for medical expenses and other economic loss and the annual periods over which each will accrue.

(b) Future damages for economic loss may be discounted to present value only in accordance with Section 9.

(c) In an action other than for wrongful death, the findings for future damages for medical expenses and noneconomic loss must be based on the losses during the period the trier of fact finds the claimant will live, and findings for future damages for economic loss other than medical expenses must be based on the losses that the claimant will sustain over the period the claimant would have lived but for the bodily injury upon which the claim is based.

(d) In an action for wrongful death, the findings for future damages must be based on the losses the claimant will sustain over the period the claimant is entitled to recover damages under the wrongful death law governing the claim.

(e) In all actions tried to a jury under this [Act], if the evidence would support the finding, the jury must be instructed that it is permissible to find that future damages for medical expenses 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 in order to award those damages. If the jury so finds, the jury shall determine the amount of medical expenses 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.

(f) For the purposes of this section, the annual period commences on the date the jury returns its verdict or the court makes its findings of damages.

Comment

Trial of an action under the Act should not be dramatically different than under the lump-sum system. First, there is no change in the rules with regard to liability. Second, there is no change in the measure of damages except for one matter authorized in subsection (e) 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 under Section 2 and liability is found, Section 4 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-payment judgment can be fashioned. Both past and future damages are defined in the Act. See Section 1. Certain categories of future damages are subject to periodic payment, 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. The findings are to be set out in annual amounts. 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.

By paying future damages for economic loss periodically as the losses accrue, there is an opportunity to simplify the trial. 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 equal the damages accruing in the future. Under a periodic-payment plan, the money for future damages will not be paid until the losses accrue. Thus, there is no reason for the trier of fact to discount an award for future damages to present value when the award is not paid in advance of the period when the losses will be sustained. However, there may be a need to discount to present value where the claim is tried under the Act and it is subsequently learned that the defendant is unable to fund the judgment. In that event, the claimant may elect to have a lump-sum judgment, in which case, there will be a need to discount the future damages for economic loss. The Act requires that any such discounting be done in accordance with Section 9.

Future damages for noneconomic loss are to be paid in lump sum. The Act does not speak to the issue of whether these damages should be discounted to present value. The adopting jurisdiction is free to continue to use any rule currently in existence for lump-sum awards of future damages for noneconomic loss. However, if the jurisdiction does not permit discounting of future damages for noneconomic loss, it should not permit inflation to be taken into consideration for this element of damages either. See Section 5 and the Comment thereto.

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 in nonwrongful death cases 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, i.e., the so-called lost years. 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. See D. Dobbs, *Handbook on*

the Law of Remedies, 549 (1973). The 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 seem to be any American authority for the proposition that medical bills or other health care costs should be calculated on the basis of pre-injury life expectancy. In fact, these damages are nonexistent because death will prevent their accrual. This same argument can be made for noneconomic loss. The clearest case of nonaccrual, though, is with regard to medical and other health care costs because the dependents of the 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 the medical services.

One can look to the survival statutes and the wrongful death statutes for support for these conclusions. Under the orthodox survival acts, the deceased's cause of action terminates upon death except to the extent that the statute permits the bringing of an action for those damages incurred prior to 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 or on behalf of the dependent survivors for their own losses. Weaving the two 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 here and dictates that post-injury life expectancy be used in calculating damages for health care and related expenses and noneconomic loss in nonwrongful death cases.

In a wrongful death case, the Act simply refers to existing law to determine the period that the trier of fact will use to calculate future damages. The Act does not cross reference to the wrongful death statute of the adopting state because, under conflict of law rules, the claim may be governed by the wrongful death law of another jurisdiction.

One of the criticisms of the Model Act was that periodic payments for medical care and noneconomic loss terminated on the death of the claimant, but that nothing was done for claimants that lived longer than the trier of fact determined. Under the Uniform Act this problem is remedied. Future damages for noneconomic loss are to be paid in lump sum and do not terminate. In addition, the trier of fact is authorized to find that damages for medical expenses will be incurred for the life of the claimant, however long that may be. The cost of a qualified funding plan that would meet the funding requirements of the Act will not be appreciably enhanced by permitting this type of recovery. In fact, a lifetime annuity

is frequently used to fund structured settlements. Thus, the Act provides an opportunity that does not exist under a lump-sum system to more fairly compensate accident victims. This is a key feature of the Act.

The trial court, where necessary, may require more detailed findings separating different types of damages and may 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 with regard to contribution, indemnity, or comparative fault. Allocation of damage awards among wrongful death claimants or beneficiaries may be required. Also, more detailed findings with regard to 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, requirements for onetime medical procedures or separate medical procedures at different points in the future. Whatever findings are necessary to fashion a periodic-payment judgment, the court is empowered to obtain.

Subsection (a)(3) requires that the trier of fact find future damages for medical expenses and other economic loss on an annual basis. Subsection (f) makes it clear that the annual period is not a calendar year, but a fiscal year that commences at the time the damages findings are made.

Model jury instructions are contained in the Comments to Section 5.

SECTION 5. EVIDENCE AND FINDINGS REGARDING CHANGES IN PURCHASING POWER OF DOLLAR.

(a) In a trial under this [Act], evidence of future changes in the purchasing power of the dollar is admissible on the issue of future damages [for economic loss].

(b) In a jury trial in which special findings of future damages are required under this [Act] and future changes in the purchasing power of the dollar are to be taken into account, the court shall instruct the jury either to:

(1) include future changes in the purchasing power of the dollar, if any, in its findings of future damages [for economic loss]; or

(2) exclude future changes in the purchasing power of the dollar, if any, from its findings of future damages [for economic loss], but make a separate finding of the annual percentage rate or rates of change in the purchasing power of

the dollar, if any, that will occur over the period the future damages [for economic loss] will accrue.

(c) If a court serves as the trier of fact, the court shall make the findings referred to in subsection (b).

Comment

The Model Act employed a formula to account for the fact that there may be fluctuations in the purchasing power of the dollar in the future. This was in lieu of the trier of fact performing the task. The formula produced an index factor that changed over time in accordance with actual changes in the economy. Although this was the most accurate way to adjust for inflation, it introduced complexities into the Act and was met with much resistance. The insurance industry did not market an annuity that could be used to fund a periodic-payment judgment that would vary over time based on fluctuations in the purchasing power of the dollar. This would require issuance of an annuity which would be adjusted annually in an amount unknown at the time of issuance. Whether the insurance industry would be willing to assume this type of risk is unknown because no market for this product has ever been given an opportunity to develop. In theory it was an important advance, but in practice it was a hindrance to getting the Act passed.

As a consequence, the Drafting Committee for the Uniform Act considered various alternatives involving some type of formula that would produce an index factor that varied over time but that would be fixed as to any particular judgment. Again, this introduced complications that seemed to outweigh the benefits of using a formula rather than having the trier of fact make any adjustments for inflation. Since the use of a formula is believed to be one of the main reasons for the Model Act not being adopted, the Committee ultimately decided to retain the current system of having the trier of fact make the adjustments. The Act takes into account that some jurisdictions do not permit the trier of fact to adjust awards for noneconomic loss for fluctuations in the purchasing power of the dollar. Thus, those states following this rule should retain the bracketed language "for economic loss" if that rule is to be preserved. Those states that permit inflation to be calculated on all elements of future damages should delete the bracketed language.

Future damages that are to be paid periodically are not discounted to present value. See Comment to Section 4. Thus, methods of calculating inflation that set off the rate of inflation, either partially (see *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384 (2d Cir. 1975)) or totally (see *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967)), against the discount rate, cannot be used under this Act in calculating inflation on future damages for medical expenses or other economic loss.

This section does detail the form of the jury verdict regarding inflation. The court is required to instruct the jury to return a verdict in one of two ways – to calculate the inflation as part of the damage findings or to merely find the annual rate of inflation so that the court may perform the calculations. In the latter case, the trier of fact may be asked to find more than one rate of inflation since, for example, inflation for medical expenses has for some time now exceeded the rate of inflation for other goods and services in the economy. Model jury instructions for obtaining the necessary findings are set out below:

MODEL SPECIAL VERDICT FORMS

PAST DAMAGES:

1. What damages, if any, do you find plaintiff has sustained to date as a proximate result of defendant's conduct?

Answer: $__________

FUTURE NONECONOMIC DAMAGES:

2. What damages, if any, stated in a lump sum, do you find plaintiff will sustain in the future for noneconomic loss as a proximate result of defendant's conduct?

Answer: $___________

FUTURE MEDICAL EXPENSES; LIFETIME AWARD IS NOT AN ISSUE; FIRST ALTERNATIVE:

3. What damages, if any, do you find plaintiff will sustain in the future for medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, as a proximate result of defendant's conduct? Include an allowance for inflation, if any, in the annual amounts for those damages, and write in the annual amounts below:

Year	**Amount**
19__	$__________
19__	$__________
19__	$__________
19__	$__________
19__	$__________

FUTURE MEDICAL EXPENSES; LIFETIME AWARD IS NOT AN ISSUE; SECOND ALTERNATIVE:

3. What damages, if any, do you find plaintiff will sustain in the future for medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, as a proximate result of defendant's conduct? Write in the annual amounts in (a) or (b) below **without** accounting for inflation; Question 4 will cover the subject of inflation.

If, **without** accounting for inflation, the annual amounts will remain constant over time, answer (a) and omit (b). If, **without** accounting for inflation, the annual amounts still will change over time, omit (a) and answer (b).

(a) $__________ per year through the year ______.

(b)

Year	Amount
19__	$__________
19__	$__________
19__	$__________
19__	$__________
19__	$__________

4. What will be the annual rate of inflation, if any, for future medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses?

Answer: ____% per year

FUTURE MEDICAL EXPENSES; LIFETIME AWARD IS AN ISSUE; FIRST ALTERNATIVE:

3. Will plaintiff sustain damages for future medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, as a proximate result of defendant's conduct, for the remainder of (his) (her) life?

Answer yes or no: _____

If the answer to Question 3 is "yes," go to Question 4. If the answer to Question 3 is "no," omit Questions 4 and 5 and go to Question 6.

4. What is the annual amount, **without** accounting for inflation, of the damages for future medical, hospital, attendant, and rehabilitative care, services, and

supplies, and related expenses, that plaintiff will sustain for the remainder of (his) (her) life?

Answer: $_________ per year

5. What will be the annual rate of inflation, if any, for future medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, during the remainder of plaintiff's life?

Answer: ____% per year.

If you answered Questions 4 and 5, omit question 6.

6. If the answer to Question 3 is "no," what damages, if any, do you find plaintiff will sustain in the future for medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, as a proximate result of defendant's conduct? Include an allowance for inflation, if any, in the annual amounts for those damages, and write in the annual amounts below:

Year	**Amount**
19__	$__________
19__	$__________
19__	$__________
19__	$__________
19__	$__________

FUTURE MEDICAL EXPENSES; LIFETIME AWARD IS AN ISSUE; SECOND ALTERNATIVE:

3. Will plaintiff sustain damages for future medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, as a proximate result of defendant's conduct, for the remainder of (his) (her) life?

Answer yes or no: _____

If the answer to Question 3 is "yes," go to Question 4. If the answer to Question 3 is "no," omit Questions 4 and 5 and go to Question 6.

4. What is the annual amount, **without** accounting for inflation, of the damages for future medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, that plaintiff will sustain for the remainder of (his) (her) life?

Answer: $_________ per year

5. What will be the annual rate of inflation, if any, for future medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, during the remainder of plaintiff's life?

Answer: _____% per year.

If you answered Questions 4 and 5, omit questions 6 and 7.

6. If the answer to Question 3 is "no," what damages, if any, do you find plaintiff will sustain in the future for medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses, as a proximate result of defendant's conduct? Write in the annual amounts in (a) or (b) below **without** accounting for inflation; Question 7 will cover the subject of inflation.

If, **without** accounting for inflation, the annual amounts will remain constant over time, answer (a) and omit (b). If, **without** accounting for inflation, the annual amounts still will change over time, omit (a) and answer (b).

(a) $_________ per year through the year _____

(b)

Year	Amount
19__	$__________
19__	$__________
19__	$__________
19__	$__________
19__	$__________

7. What will be the annual rate of inflation, if any, for future medical, hospital, attendant, and rehabilitative care, services, and supplies, and related expenses?

Answer: _____% per year

FUTURE LOST EARNINGS; FIRST ALTERNATIVE:

[8.] What damages, if any, do you find plaintiff will sustain in the future for lost earnings as a proximate result of defendant's conduct? Include an allowance for earnings growth attributable to inflation [and productivity], if any, in the annual amounts for these damages, and write in the annual amounts below:

Year	**Amount**
19__	$__________
19__	$__________
19__	$__________
19__	$__________
19__	$__________

FUTURE LOST EARNINGS; SECOND ALTERNATIVE:

[8.] What damages, if any, do you find plaintiff will sustain in the future for lost earnings as a proximate result of defendant's conduct? Write in the annual amounts in (a) or (b) below **without** accounting for earnings growth attributable to inflation [or productivity]; Question [9] will cover the subject[s] of inflation [and productivity].

If, **without** accounting for inflation [or productivity], the annual amounts will remain constant over time, answer (a) and omit (b). If, **without** accounting for inflation [or productivity], the annual amounts still will change over time, omit (a) and answer (b).

(a) $_________ per year through the year _____.

(b)

Year	**Amount**
19__	$__________
19__	$__________
19__	$__________
19__	$__________
19__	$__________

[9.] What will be the annual rate of earnings growth, if any, attributable to inflation [and productivity]?

Answer: _____% per year.

SECTION 6. PAYMENT OF FUTURE DAMAGES. Future damages for medical expenses and other economic loss must be paid in the years that the trier of fact finds they will accrue. Unless the court orders or approves a different schedule for payment, the annual amounts due must be paid in 12 equal monthly installments, rounded to the nearest dollar. Each installment is due and payable on the first day of the month in which it accrues.

Comment

The overall design of the Act is to pay future economic loss periodically when an election has been made under Section 2 to try the claim under this system. Section 4 prescribes the findings that are necessary to fashion a periodic-payment judgment and defines the way in which various elements of future damages are to be measured. Section 5 addresses the issue of inflation and prescribes the form of the verdict in that regard. Both Sections 4 and 5 contemplate that the trier of fact will make the findings for future economic loss in terms of annual periods.

Section 6 specifies that the future damages, which have been calculated on the basis of annual increments, must be paid during the years that the trier of a fact has predicted that they will accrue. However, the court has some flexibility with regard to whether the payments within each annual period will be made monthly or at other intervals. For example, if the jury finds that a surgical procedure will take place in a particular year and awards a specific sum of money to cover the total expense in that year, the court may order that the entire sum awarded be paid in one installment at the beginning of the year. In the absence of a good reason for doing otherwise, the court should order that each annual amount be paid in twelve monthly installments with each installment due and payable in advance, i.e., on the first day of the month in which it is due. This is more consistent with how most people are compensated for expenses and earnings in today's society.

SECTION 7. ENTERING JUDGMENT.

(a) In this section, "present value" means the cost of a qualified funding plan complying with Section 11 which would pay the annual amounts found by the trier of fact or portions thereof referred to in the subsection in which the term is used.

(b) If special findings for future damages are made in a case tried under this [Act], the court shall make the adjustments and enter judgment pursuant to this section.

(c) The court shall first apply to the findings of past and future damages any applicable rules of law other than setoff or credit[, including additurs, remittiturs, a **pro rata** or percentage reduction in a [claim for relief] [cause of action] based on a settlement with a joint tortfeasor, comparative fault, and limitations on damages,] which have the effect of increasing or reducing the damages the claimant is entitled to recover. Those adjustments must be applied in the following order: [specify the order]. Further adjustments must be made in the order specified in subsections (d), (e), and (f).

(d) The court shall apply to the findings for past and future damages any applicable setoff or credit[, including any **pro tanto** reduction based upon a settlement with a joint tortfeasor,] that has the effect of reducing the damages the claimant is entitled to recover, in the following manner:

(1) If the setoff or credit includes a lump-sum payment to the claimant, the setoff or credit for the lump sum must be applied first to past damages and then to future damages for noneconomic loss. If the setoff or credit exceeds the amount of those damages, the remainder of the setoff or credit must be applied to future damages for medical expenses and other economic loss, and it has the effect of reducing each annual amount for future medical expenses and other economic loss by the percentage that the setoff or credit bears to the present value of those future damages after any adjustments pursuant to subsection (c).

(2) If the setoff or credit includes periodic payments to be made to the claimant, the amount of the setoff or credit for the periodic payments is the amount paid to fund the payments. The setoff or credit for the periodic payments must be applied first to future damages for medical expenses and other economic loss, then to future damages for noneconomic loss, and lastly to past damages. The setoff or credit applied to future damages for medical expenses and other economic loss reduces each annual amount for medical expenses and other economic loss by the percentage that the setoff or credit bears to the present value of those future damages after any adjustments pursuant to paragraph (1) and subsection (c).

(3) The manner of allocating a setoff or credit prescribed in paragraphs (1) and (2) governs notwithstanding any other allocation previously made by contract, law, or court ruling.

(e) The court shall specify payment of attorney's fees and litigation expenses pursuant to any agreement between the claimant and the claimant's attorney, except as limited in this subsection:

(1) Under a percentage attorney's fees agreement, a lump-sum fee for obtaining future damages for medical expenses and other economic loss must be

computed by multiplying the fee percentage times the present value of those future damages after any adjustments pursuant to subsections (c) and (d); and

(2) Funds for paying attorney's fees and litigation expenses attributable to an award of punitive or exemplary damages must be taken from the punitive or exemplary damages. Funds for paying all other attorney's fees and litigation expenses owed in a lump sum must be taken first from [any prejudgment interest award and then from] future damages for noneconomic loss. If those attorney's fees and litigation expenses exceed the amount of [prejudgment interest and] future damages for noneconomic loss, the funds for paying the remainder of those fees and expenses must be taken proportionately from past damages and other future damages.

(3) Any use of future damages for medical expenses and other economic loss to pay attorney's fees or litigation expenses in a lump sum has the effect of reducing each annual amount for future medical expenses and other economic loss by the percentage that the fees or expenses bear to the present value of those future damages after any adjustments pursuant to subsections (c) and (d).

(f) If, for any other reason, including a right of subrogation, a portion of future damages for medical expenses or other economic loss must be paid in a lump sum, the effect is to reduce each annual amount for those damages by the percentage that the lump sum bears to the present value of those damages after any adjustments pursuant to subsections (c), (d), and (e).

(g) After taking into account the foregoing matters, the court shall enter judgment in a lump sum for any punitive or exemplary damages, [prejudgment interest,] past damages, future damages for noneconomic loss, and future damages for medical expenses and other economic loss payable in a lump sum under subsections (e) and (f). The judgment must also provide for periodic payment of the remaining future damages for medical expenses and other economic loss. The periodic payments must be set out in the judgment in a schedule showing the annual amount due in each year the trier of fact has found that losses will accrue. If a finding has been made that medical expenses will continue for the duration of the claimant's life under Section 4(e), the judgment must set forth the finding and the annual amount of those damages. The judgment must describe the qualified funding plan approved by the court pursuant to Section 11.

(h) For the purpose of determining present value under this section, a party liable for future damages shall select a qualified funding plan and submit evidence of the cost of the plan to the court. If the cost of the plan is disputed, the court shall make a finding of the cost.

Comment

There should be but one judgment entered, and it must include both the lump-sum amounts and the periodic payments owed. Section 7 prescribes the manner in which the trier of fact's award is converted into a judgment.

The first step is to apply any rules of law, other than setoff or credit, that have the effect of increasing or reducing the damages awarded by the trier of fact. The possibilities include additur, remittitur, *pro rata* or percentage reduction of the damages based on a settlement with a joint tortfeasor, comparative fault, and limitations on damages. The enacting state should choose the applicable language based on the law in that jurisdiction. For example, if the effect of a settlement with one joint tortfeasor is to reduce the claimant's cause of action against the remaining nonsettling tortfeasors by a percentage of fault attributable to the settling tortfeasor, that adjustment should take place at this point. If the effect is a *pro tanto* or dollar for dollar reduction, this is more in the nature of a credit or setoff and should be taken into account as an adjustment under subsection (d).

It is important that the Act specify the order in which these rules of law are to be applied so unnecessary litigation over this first step may be avoided. In particular, if the state has any limitations on damages, e.g., a statutory limit on noneconomic damages, it is important to specify in the Act whether that limit should be applied before or after the damages are reduced for comparative fault (or are reduced pro rata to reflect a settlement with a joint tortfeasor).

To understand why, assume the state has a $500,000 statutory limit on noneconomic damages and has adopted the rule of comparative fault. Assume also that the jury awards $1,000,000 in noneconomic damages and finds the plaintiff 25% responsible for the injury sustained. If the limit on damages is applied first to reduce the noneconomic damages to $500,000, and then the 25% comparative fault finding is applied, the result is $375,000 in noneconomic damages. In contrast, if the 25% comparative fault finding is applied first to reduce the noneconomic damages to $750,000, and then the limit on damages is applied, the result is $500,000 in noneconomic damages.

Now change the assumption so the jury awards $600,000 instead of $1,000,000 in noneconomic damages. If the limit on damages is applied first, followed by the 25% comparative fault finding, the final result is $375,000. In contrast, if the 25% comparative fault finding is applied first, the final result is $450,000.

In each example, if the limit on damages is applied first, both the limit and the rule of comparative fault have an impact. In contrast, if the rule of comparative

fault is applied first and reduces the damages to an amount below the limit, the limit has no impact. Or if the rule of comparative fault is applied first and reduces the damages to an amount above the limit, the rule of comparative fault has no impact.

If the limit on noneconomic damages is considered to be a limit on recovery rather than damages, it may make sense to apply the limit after applying the rule of comparative fault. On the other hand, if the limit on noneconomic damages is considered to be a legislative definition of the maximum monetary value of noneconomic loss, it makes more sense to apply the limit first.

Whatever sequence is used to adjust the damages awarded by the trier of fact, that sequence should be specified in subsection (c).

The next step in the process of converting the trier of fact's award to a periodic-payment judgment is to account for any applicable setoff or credit, e.g., a *pro tanto* or dollar for dollar reduction in the damages based on a settlement with a joint tortfeasor. Proper allocation of a settlement setoff between past damages, future damages for noneconomic loss, and future economic damages is essential because only the latter are subject to periodic payments. Until the settlement setoff is allocated it cannot be determined how much of the award is subject to periodic payments.

A settlement may be entirely in lump sum, or it may be entirely structured, i.e., periodic payments, or it may be a combination of both. To the extent a settlement requires payment in lump sum, it is credited first against up-front cash otherwise to be received under the Act. A claimant is entitled to receive damages for past loss and for future noneconomic loss in lump sum, but not damages for future economic loss. If the claimant has received a lump-sum payment from a joint tortfeasor, that payment is credited first to past loss, and then to future noneconomic loss, due in lump sum under the Act. Like is credited against like.

To the extent a settlement involves periodic payments, that portion of the settlement is credited first against the future economic damages because those are the damages subject to periodic payments under the Act. Again, like is credited against like.

The monetary value of the structured portion of a settlement is the amount actually paid to fund the structure at the time of the settlement. This applies to periodic payments already made between the date of the settlement and the date of the judgment in the case *sub judice* as well as to periodic payments to be made in the future. Periodic payments already made are not to be treated as a lump-sum portion of the settlement; rather, the cost, at the time the settlement was entered

into, of the funding for all of the periodic payments determines the amount of the setoff for the structured portion of the settlement.

While it is theoretically possible to set off each periodic payment due under the structured portion of a settlement against the corresponding periodic payment otherwise due under the judgment, this approach would be unduly complex in many cases. The payment schedules in the settlement and the judgment often will not coincide, the payments under the settlement and the judgment frequently will increase at different annual rates, and structured settlements may include extra-large payments at regular intervals in the future (sometimes referred to as "pops") which usually will not coincide with anything in the judgment. Therefore, under the Act, the setoff is always the amount paid to fund the structure.

Because the purposes of the Act are defeated to the extent future economic damages are not payable periodically, and because the manner in which a setoff is allocated has a substantial impact on the extent to which such damages can be paid periodically, subsection (d) provides that the method of allocation prescribed in the Act is controlling over any other allocation made by contract, law, or court ruling.

To the extent it is necessary to set off a settlement against future economic damages, the annual amounts for those damages must be reduced to reflect the setoff. Start with the annual amounts for future economic damages awarded by the trier of fact. Make any necessary adjustments under subsection (c) to account for additur, remittitur, comparative fault, *et cetera*. Then assume for the moment that the resulting annual amounts are the periodic payments due under the judgment. Determine what it would cost to fund them by means of a qualified funding plan. Under subsection (h), the qualified funding plan is selected by the defendant and the defendant submits the cost. If the cost is disputed, the court makes a finding.

It should be noted that the cost of a qualified funding plan is a combination of the cost of each element of the plan. For example, if a qualified assignment under Internal Revenue Code Section 130 is used, and the annuity provider is not a qualified insurer but the assignee's obligation to the claimant is bonded by a qualified insurer, the cost of the plan is the assignment fee plus the annuity premium plus the premium for the surety bond. (See the Comment to Section 11.)

Once the cost of the qualified funding plan is determined, each of the annual amounts for future economic damages is reduced by a percentage that is computed by dividing the portion of the setoff allocated to the future economic damages by the cost of the qualified funding plan for the future economic damages.

The cost of a qualified funding plan is used as the basis for setoff in order to be consistent with the method used to calculate the attorney's fees on a periodic

payment settlement or judgment. Courts considering the attorney's fees issue generally have held that percentage fees are to be computed on the actual cost of funding structured settlements or periodic-payment judgments. See *Schneider v. Kaiser Foundation Hospitals*, 215 Cal. App. 3d 1311, 1319, 264 Cal. Rptr. 227, 232 (Cal. Ct. App. 1989), and cases cited therein. Logically, if the cost of funding periodic payments is the measure of present value for purposes of calculating fees, then it should be the measure of present value for setting off settlements as well. Under the Act, the measure of the present value of periodic payments for all purposes (except in Section 9) is the cost of funding.

The next step in the process of converting the trier of fact's award to a periodic-payment judgment is to calculate the amount of any prejudgment interest owed. Not all jurisdictions provide for prejudgment interest in tort cases and if the adopting state is one of those that do not, the bracketed language referring to prejudgment interest in this section may be omitted. It should be noted that prejudgment interest is not awardable on future damages subject to periodic payments. See Section 8.

The next step is to account for the claimant's attorney's fees and litigation expenses. The judgment must be in a form that permits the claimant to pay the fees and expenses in the manner required by the fee agreement. If the fee agreement provides that the fees on periodic payments shall be taken from the payments as they come due, the judgment need only so state. However, if the fee agreement provides for lump-sum payment of all the fees, it is necessary to determine how the lump-sum fees on the future economic damages are to be computed. Also, it is necessary to determine the source of the funds to pay lump-sum fees and expenses.

The amount of the lump-sum fees on the future economic damages is computed by multiplying the fee percentage times the cost of funding the future economic damages **after** any adjustments pursuant to subsections (c) and (d). In other words, the judgment does not provide for payment of the attorney's fees owed by the claimant on the proceeds of a settlement with a joint tortfeasor. The amount of the fees on the proceeds of a settlement is determined pursuant to the fee agreement, and the source of the funds to pay those fees is the settlement proceeds.

To calculate the amount of the lump-sum fees on the future economic damages subject to periodic payments, start with the annual amounts for future economic damages awarded by the trier of fact. Make any necessary adjustments under subsections (c) and (d). Then assume for the moment that the resulting annual amounts are the periodic payments due under the judgment. Determine what it would cost to fund them by means of a qualified funding plan. As discussed above, under subsection (h) the qualified funding plan is selected by the defendant

and the defendant submits the cost. If the cost is disputed, the court makes a finding. Once the cost is determined, the fee percentage is applied to that cost.

In addition to calculating the lump-sum fees on the future economic damages, calculate the lump-sum fees on the prejudgment interest, past damages, and future noneconomic damages by multiplying the fee percentage times the sum of those damages. Add the fees together and include any litigation expenses owed by the client to the attorney. Then separately calculate the fees and expenses on any punitive or exemplary damages.

The next step is to determine the source of the funds to pay the fees and expenses. If punitive or exemplary damages are awarded, the fees and expenses attributable to the punitive or exemplary damages are paid out of those damages. The Act provides that the funds for paying all other fees and expenses owed in lump sum are to be taken first from any prejudgment interest and then from future noneconomic damages. Again, the reason for this is that the purposes of the Act are defeated to the extent future economic damages are not payable periodically. Portions of the trier of fact's award which are not subject to periodic payments should provide the first source of funds to pay lump-sum fees and expenses. Prejudgment interest is the most desirable source of such funds because it is in addition to the money needed to directly compensate for the bodily injury. The Act requires lump-sum rather than periodic payment of future noneconomic damages, but this is balanced by using those damages as a principal source of funds to pay fees and expenses.

If the attorney's fees and litigation expenses exceed any prejudgment interest and future noneconomic damages, then the funds to pay the remainder of the fees and expenses are taken proportionately from past damages and future economic damages. It would not be appropriate to use all the past economic damages to pay fees and expenses; past economic damages usually are needed to pay already-incurred medical expenses and compensate for already-incurred earnings losses. All of the past **noneconomic** damages could be used to pay fees and expenses, but this would leave the claimant without any uncommitted funds payable immediately under the judgment. Accordingly, if all future noneconomic damages are exhausted to pay the attorney's fees and litigation expenses, the remainder of the fees and expenses is taken proportionately from each remaining category of damages.

To the extent it is necessary to carve out money from future economic damages to apply toward lump-sum fees and expenses, the annual amounts for those damages must be reduced to compensate. The reduction process is the same as that used for setoffs. Each of the annual amounts is reduced by a percentage that is computed by dividing the portion of the future economic damages payable in

lump sum by the cost of the qualified funding plan for the future economic damages.

If it is necessary to carve out money from future economic damages for any other purpose, such as to satisfy a lump-sum right of subrogation which cannot be wholly satisfied from the other categories of damages, this is done after adjusting the annual amounts for future economic damages pursuant to subsections (c), (d), and (e). The remaining annual amounts for the future economic damages must be reduced to compensate for the additional lump sums carved out. The reduction process is the same as that described above for attorney's fees and litigation expenses and for setoffs.

After making all the necessary adjustments, the court enters judgment for lump-sum payment of the past damages, the future noneconomic damages, and any future economic damages payable in lump sum. The judgment must set out the payment schedule for the future economic damages payable periodically, in annual amounts. Under Section 6, unless there is good reason to do otherwise, the annual amounts are payable at monthly intervals; the judgment should so specify.

The judgment must describe the qualified funding plan approved by the court pursuant to Section 11. A brief description will suffice. For example: "X" Property/Casualty Insurance Company shall be liable for the periodic payments set forth in this judgment. X Property/Casualty Insurance Company's obligation to make the payments shall be guaranteed by a surety bond issued by Y Property/Casualty Insurance Company." Another example: "Liability for the periodic payments set forth in this judgment shall be assigned to X Settlement Corporation, which shall purchase an annuity contract from Y Life Insurance Company and provide the plaintiff a perfected security interest in the annuity contract."

For a better understanding of how Section 7 works, consider the following hypothetical:

Assume a comparative fault jurisdiction which gives *pro tanto* credit for prior settlements with joint tortfeasors. Assume the jury's verdict is:

Past damages:	$300,000
Future noneconomic damages:	$400,000
Future medical expenses:	$ 50,000 per year increasing 5% per year for life
Future other economic loss:	$ 25,000 per year increasing 4% per year for 30 years.

Assume the jury found the plaintiff to be 25% at fault. Assume a codefendant settled prior to trial for $150,000 in cash and a structure paying $10,000 per year increasing 3% per year for life. Assume the settling codefendant's cost for the structure was $250,000.

Under subsection (c), the effect of the jury's 25% comparative fault finding is to reduce the verdict to:

Past damages:	$225,000
Future noneconomic damages:	$300,000
Future medical expenses:	$ 37,500 per year increasing 5% per year for life
Future other economic loss:	$ 18,750 per year increasing 4% per year for 30 years.

Under subsection (d)(1), the $150,000 lump-sum portion of the settlement is deemed to have paid $150,000 of the $225,000 in past damages, leaving $75,000 in unpaid past damages.

Under subsection (d)(2), the $250,000 cost of the structured portion of the settlement is credited first against future economic damages. Assume the cost of a qualified funding plan submitted by the defendant which would pay $37,500 per year increasing 5% per year for life, and $18,750 per year increasing 4% per year for 30 years, is $750,000. This, then, is the present value of the future economic damages awarded by the jury after reduction for comparative fault. The percentage that the $250,000 credit bears to the $750,000 present value of the future economic damages is $250,000 ÷ $750,000 = 33.33%. Therefore, the effect of the $250,000 credit is to reduce each annual payment by 33.33%, from $37,500 per year for medical expenses to $25,000 per year (still increasing 5% per year per life), and from $18,750 per year for other economic loss to $12,500 per year (still increasing 4% per year for 30 years).

In summary, the verdict after reduction for (1) comparative fault and (2) settlement setoff is:

Past damages:	$ 75,000
Future noneconomic damages:	$300,000
Future medical expenses:	$ 25,000 per year increasing 5% per year for life
Future other economic loss:	$ 12,500 per year increasing 4% per year for 30 years.

To apply subsection (e), assume the attorney's fees agreement provides for a lump-sum 40% fee.

The effect of the settlement setoff was to reduce the annual payments for future economic damages by one-third. This also reduced the $750,000 cost of the qualified funding plan by one-third to $500,000. Thus, under subsection (e)(1), the fee owed on the future economic damages is $200,000 (40% of $500,000).

In addition, a fee totaling $150,000 is owed on the $75,000 in past damages remaining after the setoff and the $300,000 in future noneconomic damages (40% of $375,000 = $150,000). Thus, the total fee owed is $350,000.

Under subsection (e)(2), the funds for paying the $350,000 fee are taken first from the $300,000 in future noneconomic damages. Thus, the entire $300,000 in future noneconomic damages will be paid in a lump sum to the attorney. This leaves $50,000 in fees to be taken proportionately from the $75,000 in past damages and the $500,000 present value of future economic damages. The $75,000 and the $500,000 total $575,000. The $50,000 in fees is 8.6957% of $575,000. Therefore, the funds to pay the remaining $50,000 in fees are obtained by multiplying $75,000 by 8.6957% and $500,000 by 8.6957%. The result is that $6,522 of the $75,000 in past damages will be paid in lump sum to the attorney and $68,478 will be paid in lump sum to the plaintiff. As for the future economic damages, 8.6957% of the $500,000 present value, or $43,478, will be paid in lump sum to the attorney.

Under subsection (e)(3), the effect of paying $43,478 of future economic damages in lump sum to the attorney is to reduce each annual payment for these damages by 8.6957%. Thus, the $25,000 per year for medical expenses is reduced to $22,826 per year (still increasing 5% per year for life), and the $12,500 per year for other economic loss is reduced to $11,413 per year (still increasing 4% per year for 30 years).

Accordingly, the judgment is:

Lump sums:

Past damages:	$ 75,000 ($6,522 payable to the attorney and $68,478 payable to the plaintiff)
Future noneconomic damages:	$300,000 (payable to the attorney)
Future economic damages:	$ 43,478 (payable to the attorney)

Periodic payments:

Future medical expenses:	$ 22,826 per year increasing 5% per year for life
Future other economic loss:	$ 11,413 per year increasing 4% per year for 30 years.

In addition to the judgment, the plaintiff receives $150,000 in cash from the settling codefendant plus $10,000 per year increasing 3% per year for life.

SECTION 8. INTEREST ON PERIODIC PAYMENTS. Interest does not accrue on a periodic payment before payment is due. If the payment is not made on or before the due date, interest accrues as of that date.

Comment

Interest should not accrue on periodic payments for any period of time before the payments are due. Where judgments are concerned, interest is awarded on amounts which are owed but as yet unpaid. By definition, a future periodic payment is not owed until some date in the future. It is not "unpaid" until after that future date. See *Schneider v. Kaiser Foundation Hospitals*, 215 Cal. App. 3d 1311, 1320 n.7, 264 Cal. Rptr. 227, **modified** 266 Cal. Rptr. No. 2, at 15 (Cal. Ct. App. 1989) ("[T]he intent of the arbitrators was to award Jacob $3,650 per month for his life expectancy, which would not justify any augmentation for interest. Interest is only awardable to compensate for a delay in payment and compensation for future needs involves no such delay.").

Moreover, where the trier of fact has taken inflation into consideration in determining the amount of future damages, to award interest on the periodic payments before they are due would be to account for inflation a second time. This

is because interest rates consist of a real rate of return plus a premium for risk **plus a premium to compensate for expected inflation**.

The Act's preclusion of interest on periodic payments for any period of time before the payments are due applies to prejudgment as well as postjudgment interest. Allowing prejudgment interest to run on periodic payments until they are paid would be the same as allowing postjudgment interest. To the extent a state allows prejudgment interest in actions for bodily injury as an element of damages or as a penalty, prejudgment interest will not be awardable on periodic payments or on damages otherwise subject to periodic payments but payable in lump sum under Section 7(e) or (f).

SECTION 9. INABILITY TO FUND PERIODIC-PAYMENT JUDGMENT.

(a) Upon petition of a party after trial and before entry of judgment and upon a finding of inability to fund the judgment under Section 10, the court, at the election of the claimant, shall discount the annual amounts found by the trier of fact for future medical expenses and other economic loss to present value pursuant to subsection (b), make any adjustments prescribed in Section 7, and enter judgment in a lump sum for the total amount found for past and future damages.

(b) The court shall compute the present value of the future damages for medical expenses and other economic loss by discounting each annual amount by a rate of interest equal to the rate of the most recent issue of three-year United States Treasury notes sold before the date the damages are discounted. For purposes of discounting under this subsection, each annual payment is due at the beginning of the year.

(c) To compute the present value of a lifetime award of future damages for medical expenses determined under Section 4(e), the duration of the term of payments is the life expectancy of an individual of the same sex and age as the claimant, at the time the computation is made, prescribed by a race-neutral life-expectancy table based on the most recent Current Population Survey collected by the Bureau of the Census for the Bureau of Labor Statistics of the United States Department of Labor.

Comment

The Act is designed to eliminate, insofar as possible, trying a claim 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-payment judgment. See Section 3 (a)(2).

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-payment judgment has been impaired during or after the trial is concluded. 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 satisfy any lump-sum awards and to properly fund the periodic payments before the time the judgment is to be entered, the plaintiff should be entitled to have a traditional lump-sum judgment entered. If this is the case, the court would need to discount the future periodic payments to present value and then make any adjustments prescribed in Section 7 before entering judgment for the lump-sum amounts involved.

It should be noted, however, where the claimant wants to have a periodic-payment judgment entered even though there is an incapacity to fully fund it, the claimant has that right. For example, a situation may arise where the defendant is not able to fully satisfy the entire judgment because of the limits under a liability insurance policy, but could discharge the lump-sum amounts for past damages and noneconomic loss and partially fund the periodic payments. The claimant might choose to forego the right to a lump-sum judgment because of the benefits of the periodic-payment system. It may also be the case that a defendant would be more financially able to pay the difference between his or her liability insurance limits and the cost of a qualified funding plan which would fully fund the periodic payments, as compared to paying the difference between the insurance limits and the discounted value of the periodic payments. This could occur where the cost of the qualified funding plan is substantially less than the discounted value.

Where it becomes necessary to commute the periodic payments to present value, the Act prescribes that the discount rate shall be the interest rate of the most recent issue of three-year United States Treasury notes sold before the date the damages are to be discounted. Selection of this type of security as the basis for the discount rate is realistic as it is one in which claimants may safely invest. Three-year notes provide an approximate mid-point between the average interest rates of Treasury bills which are short-term investments and Treasury bonds which are long-term investments.

Selection of the current interest rate on three-year U.S. Treasury notes as the discount rate, however, does not account for the need to reinvest the interest paid on the notes before they mature or the need to reinvest the principal of the notes every

three years. The interest rate on three-year notes is highly unlikely to remain constant over the next 10 or 20 or 50 years in the future. It would be more accurate to use the historical trend of interest rates on three-year notes to project an interest rate for the future, and use the projected interest rate as the discount rate. To calculate the historical trend, however, it would be necessary to select both a time period in the past over which to measure the trend and a statistical method. There appears to be no consensus among forensic economists with regard to these two factors.

Accordingly, and particularly in light of the fact that a present value calculation under Section 9 seldom should be necessary, the Act keeps the calculation of present value as simple as possible. This means using the current interest rate on three-year U.S. Government notes as the discount rate rather than devising a formula to calculate the historical trend.

The 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 prescribes that a 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 Bureau of Labor Statistics of the United States Department of Labor be used to determine the necessary figure. Such tables are published by the National Center for Health Statistics. The most current table published by the National Center is contained in *Vital Statistics of the United States*, 1986, Vol. II, Mortality, Part A, Sec. 6, p. 11 (DHHS Pub. No. (PHS) 88-1122. Public Health Service, Washington, D.C.) and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The publication is also available in many public and university libraries.

SECTION 10. FUNDING PERIODIC-PAYMENT JUDGMENTS.

(a) If a judgment containing periodic payments is entered under this [Act], each party liable for all or a portion of the judgment, unless found to be unable to do so under Section 9, shall provide funding, separately or jointly with one or more others, by means of a qualified funding plan complying with Section 11. The funding must be provided not later than [30] days after the judgment is entered, unless the court allows additional time upon a showing of good cause. During that period, the judgment is not subject to execution. The funding need not be provided if the judgment is superseded under Section 12.

(b) A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment entered under this [Act] on behalf of a judgment debtor is obligated to provide funding to the extent of its contractual or adjudged obligation. To determine whether or to what extent a judgment containing periodic payments for future damages for medical expenses and other economic loss entered under this [Act] exceeds limits under a liability insurance policy, the court shall add the cost of the qualified funding plan, as determined under Section 7(h), to the total of lump-sum damages contained in the judgment and compare the sum so computed to applicable limits under the policy.

(c) If only one person is liable for a portion of a judgment for periodic payments and is unable to provide funding, the right to payment in a lump sum prescribed in Section 9 applies only against that person and the portion of the judgment so owed.

(d) If more than one person is liable for all or a portion of a judgment requiring funding under this [Act] and the required funding is provided by one or more but fewer than all of the persons liable, the funding requirements are satisfied. A person providing funding may proceed to enforce rights of reimbursement for funding from a person who is obligated to but has not provided funding. The cost of the funding provided must be the basis upon which contribution or indemnity is awarded.

Comment

If large awards of future damages are to be paid periodically in the future rather than in lump sum, it is important that the judgment obligation be funded so as to assure payments. This section defines the obligation to provide funding, including that of a liability insurer, and clarifies rights where there is more than one person who is obligated. Section 11 describes the forms of funding that will suffice to provide the requisite security.

The Act suggests that funding for a periodic-payment judgment be provided within 30 days after the judgment is entered, unless the court allows additional time upon a showing of good cause. The adopting state should consider whether to increase the 30-day period to 60 days in order to minimize the likelihood that motions for extensions of time will become routine. Another approach would be to use the same time period for filing a notice of appeal. Funding need not be provided if an appeal is filed and the judgment is superseded in accordance with Section 12.

Subsection (b) requires a liability insurer, or anyone else who has been adjudged liable to pay all or part of the judgment on behalf of a judgment debtor, to

provide funding. This covers the situation, in addition to that of a liability insurer, in which a manufacturer, or someone else in the marketing chain, enters into an agreement to indemnify or otherwise discharge all or part of the obligation of a party adjudged liable, but limits it to situations in which there has been a court determination of liability. Subsection (b) also addresses the problem whether liability insurance limits have been exceeded under a periodic-payment judgment. It was thought best to spell this out in the Act, rather than leaving it to the insurance industry to draft policy language or to leave it to litigation under present policy language.

The last two subsections deal with situations in which there are multiple obligors under a periodic-payment judgment. Subsection (c) deals with the situation in which one of the obligors is solely liable for a portion of the periodic payments in a judgment. In this case, the right to a lump-sum judgment for failure to provide funding by this obligor is limited to the amount owed by the obligor. The balance of the periodic payments in the judgment, which is owed by one or more other judgment debtors, is unaffected.

Subsection (d) deals with a variety of situations involving multiple obligors under a periodic-payment judgment when one or more of the obligors fails to provide funding in accordance with this section. Situations contemplated include those of joint and several liability in which contribution or indemnity is owed; where there is no joint and several liability, but a right of indemnity is owed as in the case in which a manufacturer owes indemnity to a retailer who has sold a defective product originating with the manufacturer; or in which an employer is vicariously responsible for the acts of an employee, and the employee, as a third-party defendant, owes indemnity to the employer. This subsection provides that any party who is obligated to pay part or all of the judgment, whether primarily or secondarily liable, may provide funding to satisfy the requirements of this section. Once having provided funding, the providing party is entitled to protect any rights that party has against a defaulting party by seeking contribution or indemnity for the amounts it paid. This provides the maximum accommodation in that the judgment creditor is not deprived of the benefits of a periodic-payment judgment merely because one among several judgment debtors fails to provide funding. At the same time, it provides protection to those judgment debtors who do provide funding. It prevents one judgment debtor from depriving the other parties to the judgment, be they creditors or debtors, of the benefits of the Act.

The cost of the funding provided, for example where an annuity is purchased to provide the periodic payments, will ordinarily be the basis upon which contribution or indemnity is sought. In some cases, however, for example where a liability insurer qualifies to self-fund the installments, there may be no cash outlay other than the installment payments as they become due because no annuity will be

purchased. In that event, the funding liability insurer must adduce evidence of the cost. If there is a dispute, the court must make a finding as to the cost.

SECTION 11. QUALIFIED FUNDING PLANS.

(a) A qualified funding plan must be approved by a court having jurisdiction to enter the periodic payment judgment and be one of the following:

(1) A funding plan may be one in which the judgment debtor is obligated to make the periodic payments. If the judgment debtor is a governmental entity, it may elect to participate in a self-funding plan enacted by the state or the federal government. Otherwise, in order for the plan to qualify:

(i) the judgment debtor's obligation to the judgment creditor must be guaranteed by a surety bond issued by a qualified insurer listed pursuant to Section 18; or

(ii) the judgment debtor must purchase an annuity contract from a qualified insurer listed pursuant to Section 18 and the judgment creditor must have a perfected security interest in the annuity contract pursuant to subsection (c).

(2) A funding plan may be one in which the judgment debtor's liability insurer is obligated to make the periodic payments. In order for such a plan to qualify:

(i) the liability insurer must be a qualified insurer listed pursuant to Section 18;

(ii) the liability insurer's obligation to the judgment creditor must be guaranteed by a surety bond issued by a qualified insurer listed pursuant to Section 18; or

(iii) the liability insurer must purchase an annuity contract from a qualified insurer listed pursuant to Section 18 and the judgment creditor must have a perfected security interest in the annuity contract pursuant to subsection (c).

(3) A funding plan may be one in which an assignee of the judgment debtor or an assignee of the judgment debtor's liability insurer is obligated to make the periodic payments. In order for such a plan to qualify:

(i) the assignee must be a qualified insurer listed pursuant to Section 18;

(ii) the assignee's obligation to the judgment creditor must be guaranteed by a surety bond issued by a qualified insurer listed pursuant to Section 18; or

(iii) the assignee must purchase an annuity contract from a qualified insurer listed pursuant to Section 18 and the judgment creditor must have a perfected security interest in the annuity contract pursuant to subsection (c).

(4) A funding plan may be one in which the judgment debtor or the judgment debtor's liability insurer is released from liability and a qualified insurer listed pursuant to Section 18 assumes the obligation to make the periodic payments pursuant to an insurance contract, such as an assumption reinsurance agreement.

(5) A funding plan may be one to which all the affected parties agree.

(b) An annuity contract issued by a qualified insurer listed pursuant to Section 18 is not a qualified funding plan under subsection (a)(1)(ii), (a)(2)(iii), or (a)(3)(iii) unless the applicable federal income tax laws permit a security agreement without treating the annuity payments as gross income to the judgment creditor.

(c) A security interest in an annuity contract may be created and perfected by giving notice thereof in writing to the insurer issuing the annuity. The security interest is subject to [Article 9 of the Uniform Commercial Code], but no security agreement, other than as represented by the written notice, is necessary to make the security interest enforceable, and the security interest has priority over conflicting perfected security interests in the annuity contract. This subsection applies to structured settlements as well as to periodic-payment judgments.

Comment

In any system where an obligation is to be discharged over a period of time, it becomes important to use reasonable devices to assure that the means for discharging the obligation continue to exist over the period in question. Under a system of paying future damages over the period the losses will accrue, particularly if the judgment debtor is empowered to make this election, it is crucial that the method of funding the judgment obligation be secure. Section 10 requires that a periodic-payment judgment be funded by each party liable for all or a portion of the judgment. Section 11 details the acceptable form of the funding, referred to as qualified funding plans.

Except under certain circumstances where the judgment debtor is a governmental entity, each qualified funding plan requires the participation of an insurance company. This permits the state's insurance regulator to oversee the

financial security of funding for periodic-payment judgments. The requirements an insurance company must meet in order to be qualified to participate in funding periodic payment judgments are set forth in Section 18. These requirements go considerably beyond the requirements insurers must meet in order to be admitted to write insurance in the state.

Even though this section describes the types of funding plans available, court approval is still required for the plan chosen.

Under the first qualified funding plan set forth in Section 11, the judgment debtor is obligated to make the periodic payments. Most likely, this method would be used when the judgment debtor is uninsured or self-insured. If the judgment debtor is a governmental entity, and the state has enacted a self-funding plan in which the governmental entity is entitled to participate, then the governmental entity may elect to participate in the state plan. Otherwise, i.e., if the state has not enacted a self-funding plan, or the governmental entity is not covered by the state's plan, or the governmental entity elects not to use the state's plan, or if the judgment debtor is not a governmental entity, the judgment debtor's obligation to the judgment creditor must be guaranteed by a surety bond issued by a qualified insurer, or an annuity contract must be purchased from a qualified insurer and the claimant must have a perfected security interest in the annuity contract.

As of the time this Comment is written, the annuity-contract option is not available under the first funding plan because a security agreement would make the periodic payments taxable. See Revenue Ruling 79-220, 1979-2 C.B. 74; Revenue Ruling 79-313, 1979-2 C.B. 75; Internal Revenue Code of 1986 Sections 104(a)(2), 130(c). Subsection (b) states that subparagraph (a)(1)(ii) is not applicable unless the federal income tax laws permit such a security agreement without treating the annuity payments as gross income to the judgment creditor. The Act is drafted in such a way that no amendment will be necessary if and when the federal income tax law is changed to permit such agreements. This is also the case with subparagraphs (a)(2)(iii) and (a)(3)(iii). As the tax law currently stands, however, unless the judgment debtor is a governmental entity electing to participate in a state self-funding plan, the only way the judgment debtor can be the sole obligor is if a qualified insurer provides a surety bond.

In some circumstances a surety bond may appear superfluous, for example, where the judgment debtor is a major, self-insured corporation. It is too difficult, however, to draw lines defining which self-insureds need bonding and which do not. The only practical rule is to require everyone to be bonded, unless and until federal income tax laws are changed to permit a claimant to have a secured interest in an annuity owned by the original judgment debtor (see the discussion of "qualified assignments" below).

The second qualified funding plan is one in which the judgment debtor's liability insurer is obligated to make the periodic payments to the judgment creditor. If the liability insurer is itself a qualified insurer, no further steps need be taken. However, if the liability insurer is not a qualified insurer, then a surety bond must be provided by a qualified insurer, or an annuity contract must be purchased from a qualified insurer and the claimant must have a perfected security interest in the annuity contract. As discussed above, the annuity-contract option is not available as of the time this Comment is written because the security agreement would make the periodic payments taxable.

The third qualified funding plan involves assigning the obligation to make the periodic payments to a third party. The financial security provided by the assignee is of primary importance. Thus, the assignee must be a qualified insurer, or a surety bond must be provided by a qualified insurer, or an annuity contract must be purchased from a qualified insurer and the claimant must have a perfected security interest in the annuity contract. As of the time this Comment is written, the annuity-contract option **is** available where there is an assignee because Internal Revenue Code section 130(c) permits a security agreement without treating the periodic payments as gross income. However, if the Internal Revenue code were to be changed so as to make the annuity payments part of the judgment creditor's gross income, this option would not be available because of subsection (b).

There is some uncertainty concerning how a security interest in an annuity contract is perfected. Accordingly, subsection (c) of Section 11 provides that a security interest in an annuity contract may be perfected by giving written notice of the security interest to the annuity issuer. This method of perfecting a security interest is applicable to structured settlements as well as periodic-payment judgments. The security interest is subject to the provisions of Article 9 of the Uniform Commercial Code. However, no security agreement other than the written notice is required.

If the assignee is a qualified insurer, or a surety bond is provided by a qualified insurer, it is not necessary for the annuity provider to be a qualified insurer. Conversely, so long as the annuity provider is a qualified insurer and there is the requisite security interest on the part of the claimant, it is not necessary for the assignee to be a qualified insurer or, for that matter, even an insurer.

The fourth qualified funding plan is one in which the judgment debtor or the judgment debtor's liability insurer transfers the obligation to make the periodic payments to a qualified insurer by means of an insurance contract such as an assumption reinsurance agreement.

The fifth qualified funding plan is any plan to which all the parties agree. This permits flexibility to accommodate funding mechanisms which may develop in the future and be of sufficient financial strength that claimants may prefer them to the methods of funding set forth in the Act. Even if all the parties agree to a funding plan, however, the court still must approve it.

SECTION 12. SUPERSEDEAS BOND. The amount of a bond to supersede a periodic-payment judgment must be determined in accordance with [the applicable state law]. For the purpose of determining the amount of the damage award in the judgment, the present value of the periodic payments must be added to the total lump-sum damages contained in the judgment. The present value of the periodic payments is the cost of a qualified funding plan complying with Section 11, as determined under Section 7(h), at the time the [judgment is entered] [notice of appeal is filed].

Comment

This section clarifies how a judgment containing periodic payments is to be superseded for appeal or other post trial purposes. The existing statutes of the adopting state will dictate how the amount of the supersedeas bond is determined, but the amount of the damage award in the judgment must be defined before that can be done because of the *in futuro* payments. Section 12 addresses this issue. The present value of the periodic payments must be calculated in accordance with Section 7(h) and added to the lump-sum awards contained in the judgment.

The adopting state should consider whether the cost of the funding plan referred to in Section 7(h) is to be based on the cost at the time the judgment is entered or the cost at the time the notice of appeal is filed. Normally, it should suffice to use the cost at the time judgment is entered. However, if the state's procedures permit a considerable delay between the date a judgment is entered and the date a notice of appeal is filed, it may be appropriate to require the court to redetermine the cost as of the date the notice of appeal is filed.

SECTION 13. EFFECT OF DEATH.

(a) In cases covered by this [Act], liability to a claimant for periodic payments not yet due for medical expenses terminates upon the claimant's death.

(b) In an action other than for wrongful death, if a judgment for periodic payments is entered and a claimant entitled to receive payments for economic losses, other than for medical expenses, under the judgment dies, any periodic

payments for those economic losses not yet due at the death must be paid to the estate of the decedent.

(c) In an action for wrongful death, if a judgment for periodic payments provides payments to more than one claimant entitled to receive benefits for future damages and one or more but fewer than all of them die, the surviving claimants are entitled to shares proportionate to their shares in the periodic payments not yet due, but they are not entitled to receive payments beyond the respective periods specified for them in the judgment. If periodic payments are payable to only one wrongful death claimant, liability for payments not yet due ceases upon the claimant's death. Payments that have become due on the death of a claimant are payable to the estate of the deceased claimant.

Comment

In ascertaining damages under the common law lump-sum system, the trier of fact is ill-informed as to two matters. One of these matters can be ascertained with the passage of time and the other will never be known. In permanent injury cases, it will never be known what the victim would have been like had he or she not been injured. Mere passage of time, however, will reveal what the victim will be like. The Act does not attempt to modify the damages award based on revelations with the passage of time, with one exception.

A policy decision was made to terminate any installments not yet due upon death which represent medical or other health care costs. The trier of fact may determine the post-injury life expectancy of the victim for these items of damage or make an indeterminate finding that they will accrue for as long as the claimant lives. See Section 4. In the event of the former, death may result prematurely from causes having no relation to the original injury. In either event, since death precludes the accrual of losses for such items of damage, they would be a windfall to the recipient. Thus, subsection (a) provides that any installments representing medical expenses not yet due at death terminate.

As to other economic loss, in a nonwrongful death action the trier of fact is to use the pre-injury life expectancy of the victim. See Section 4(c). Periodic payments representing these damages shall continue to be paid regardless of death. Where premature death results from causes having no relation to the original injury, it may be argued that periodic payments for other economic loss should terminate. However, in order to avoid litigation over the issue whether the death was related to the original injury and for other reasons, a policy decision was made to continue periodic payments for other economic loss regardless of the cause of death.

The last subsection deals with the wrongful death case. The Act is drafted on the assumption that the wrongful death act of the state permits findings that detail the loss to each wrongful death beneficiary and the time over which the losses will be sustained. If the statute of the adopting state does not permit such findings, this subsection may have to be modified. If it is not possible to pay wrongful death claims on a periodic-payment basis, this subsection should be deleted and subsection (a) of Section 2 should be modified to exclude wrongful death actions.

If a periodic-payment 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 shares of the deceased beneficiaries. The surviving beneficiaries are to divide the deceased beneficiaries' shares in the proportion that each surviving beneficiary's share bears to the total of the surviving beneficiaries' shares. However, the surviving beneficiaries are not entitled to receive a deceased's share for any period longer than they are entitled to receive benefits in their own right. When their benefits expire, the benefits of a deceased beneficiary may have to be reallocated. If there was only one wrongful death beneficiary originally, any installments payable to that beneficiary terminate on death, just as they will upon the death of the last survivor in the multiple beneficiary situation. Any payments that are due but unpaid on the death of a beneficiary are to be paid to the estate of the deceased beneficiary.

This treatment of future damages for wrongful death claims is consistent with how wrongful death claims are generally treated under a lump-sum system. Under the latter system, a question has arisen in a number of jurisdictions regarding 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, depending on the specific wording of the statute in question and when the beneficiary died. See 1 S.M. Speiser, *Recovery for Wrongful Death* § 8:17 *et seq.* (2d ed. 1975). In some states, the wrongful death action abates upon the death of the beneficiary. However, in those states 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.* at § 8:21.

Under a periodic-payment system, the wrongful death beneficiary will have received or be entitled to receive lost support or other damages through the time of his or her death. The decision to have the deceased beneficiary's periodic payments that have yet to come due prorated under the Act is a compromise between having the periodic payments continue until all 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 somewhat

contrary to the general rule under the lump-sum system. The latter approach runs counter to the common sense notion that the wrongful death victim would probably have provided more support to the surviving beneficiaries had he or she been alive at the time of the deceased beneficiary's death, i.e., that some, if not all, of the support going to the deceased beneficiary would be given to the surviving beneficiaries. Thus, the Act declares that the payments that have matured on the death of the beneficiary will pass to the heirs or legatees of that individual, but that the future payments that have yet to come due will be prorated among other wrongful death beneficiaries who are still collecting periodic payments in their own right. This comports with the general rule under the lump-sum system where the wrongful death action survives the death of a beneficiary, but only for the damages incurred prior to the beneficiary's death.

SECTION 14. SATISFACTION OF LIENS AND OTHER RIGHTS. An assignment of or an agreement to assign a right to periodic payments for future damages contained in a judgment entered under this [Act] is not enforceable except for:

(1) attorney's fees and other expenses of litigation incurred in obtaining or enforcing the judgment;

(2) costs of products, services, or accommodations provided by the assignee for medical expenses; or

(3) alimony, maintenance, spousal support, child support, or a division of marital property.

Comment

One of the purposes of the Act is to pay out losses periodically in the future to assure that the awards serve the purposes for which they are made. In furtherance of this purpose, this section places limitations on the assignability of periodic payments. Moreover, for federal income tax reasons, the claimant must be prohibited from assigning voluntarily the right to receive future payments. Section 14 limits such assignments by the claimant to situations in which the assignee has a right as a lienholder or as a result of familial obligations to the future payments. In those states in which such lien or familial rights are more limited than those authorized by Section 14, the section should be modified to exclude such assignees.

It is to be noted that assignments may be made under subsection (2) for medical expenses even though the expenses have no relation to the accident or injuries which gave rise to the periodic-payment judgment.

SECTION 15. EXEMPTION OF BENEFITS. Periodic payments for future damages for loss of earnings or economic support are exempt from garnishment, attachment, execution, and any other process or claim to the extent wages or earnings are exempt under applicable law. Except to the extent they may be assigned under Section 14, periodic payments for all other future damages are exempt from garnishment, attachment, execution, and any other process or claim.

Comment

This section complements Section 14 and is based on the same policy grounds. Periodic payments representing loss of earnings are treated as earnings are otherwise treated in the adopting state.

SECTION 16. RELEASE OF JUDGMENT DEBTORS AND LIABILITY INSURERS. If all lump-sum amounts in a judgment, including costs and interest, have been satisfied and funding has been provided under Section 10 for all periodic payments and approved under a judgment entered pursuant to this [Act] which has become final, the judgment debtor on whose behalf the funding is provided is discharged and any lien against the judgment debtor as a result of the judgment is released. A liability insurer that provides a qualified funding plan on behalf of a judgment debtor complying with Section 11 has satisfied its duty to pay damages under any applicable liability insurance contract.

Comment

In many states, a judgment when entered creates a lien on the judgment debtor's property. The Act, however, requires that funding be provided under Section 10 for all future damages due to be paid periodically under the judgment. The funding serves the same purpose as the lien and is a more suitable method of assuring payment of this type of judgment. Accordingly, this section provides that the judgment is satisfied where the requisite funding is provided, assuming that all other amounts due under the judgment are also satisfied. Since the judgment is satisfied, there is no lien created under the laws of the adopting state.

The second sentence of this section discharges a liability insurer's contractual obligation where funding which meets the requirements of Section 11 is provided by the insurer.

SECTION 17. RETENTION OF JURISDICTION. If a judgment for periodic payments is entered under this [Act], the court entering judgment retains jurisdiction to enforce this [Act].

Comment

Once a periodic-payment judgment is entered and a qualified funding plan is implemented, the rights and obligations of the parties are defined by the terms of the qualified funding plan. Jurisdiction to enforce those rights and obligations is given to the court in which the case was tried.

SECTION 18. DUTIES OF [COMMISSIONER] OF INSURANCE.

(a) The [Commissioner] shall publish a list of insurers designated by the [Commissioner] as qualified to participate in the funding of periodic-payment judgments under Section 11. The list must be updated as often as necessary to keep it current.

(b) In order for an insurer to be designated by the [Commissioner] as a qualified insurer, it must:

(1) request the designation;

(2) be an admitted insurer;

(3) have a minimum of $100,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and

(4) have one of the following ratings from two of the following rating organizations:

(i) A.M. Best Company: A+, A+g, A+p, A+r, or A+s;

(ii) Moody's Investors Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;

(iii) Standard & Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;

(iv) Duff & Phelps Credit Rating Company Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

(c) The list of rating organizations in subsection (b) is not exclusive. The [Commissioner] may accept a rating equivalent to those listed from any other nationally recognized rating organization.

(d) In addition to the requirements of subsection (b), a qualified insurer must meet any other requirements the [Commissioner] considers necessary to assure that funding to satisfy periodic-payment judgments will be provided and maintained under this [Act].

(e) A previously qualified insurer that no longer meets the requirements of subsection (b) and any additional requirements prescribed by the [Commissioner] pursuant to subsection (d) must be removed from the list of qualified insurers published by the [Commissioner].

(f) The [Commissioner] by rule shall establish standards and procedures to:

(1) determine the accounting conventions to be used to measure an insurer's capital and surplus and any mandatory security valuation reserve under subsection (b)(3);

(2) determine whether a rating organization not listed in subsection (b)(4) is nationally recognized and, if so, determine which of its ratings are equivalent to the ratings specified in subsection (b)(4);

(3) establish any additional requirements under subsection (d) which an insurer must meet in order to be designated as a qualified insurer;

(4) determine whether an insurer should be removed from the list of qualified insurers pursuant to subsection (e); and

(5) require a liability insurer to provide funding under Section 10 if the court finds that the insurer is obligated to provide and capable of providing funding.

(g) A qualified insurer issuing an annuity contract pursuant to a qualified funding plan under Section 11 may not enter into an assumption reinsurance agreement for the annuity contract without the approval of the [Commissioner], the owner of the annuity contract, and the claimant having a secured interest in the annuity contract. The [Commissioner] may not approve assumption reinsurance unless the reinsurer is a qualified insurer.

Comment

As discussed in the Comment to Section 11, because periodic-payment judgments permit the discharge of an obligation over time, it is important to assure that the means for discharging the obligation continue to exist for as long as necessary. The Act requires court approval for the funding of periodic-payment judgments, but that is not enough. It is not realistic to ask judges to shoulder the primary responsibility for evaluating the financial security of funding plans. Instead, the Act relies primarily on the state's insurance regulator to oversee financial security. Under Section 11, each qualified funding plan requires the participation of a qualified insurer (except under certain circumstances where the judgment debtor is a governmental entity). Under Section 18, the insurance regulator decides which insurers are qualified to participate in the funding of periodic-payment judgments.

The requirements a qualified insurer must meet go considerably beyond the requirements insurers must meet in order to be admitted to write insurance in the state. The schedule of payments in a periodic-payment judgment may extend as far as 70 or 80 years into the future. Claimants are entitled to the assurance that insurers participating in the funding of such long-term obligations are of exceptional financial strength.

Under Section 11, if the judgment debtor retains the liability to make the periodic payments, the obligation to the judgment creditor must be guaranteed by a surety bond or an annuity contract must be purchased. If a surety bond is purchased, the property-casualty insurer issuing the bond bears the risk of completing the payments if the judgment debtor defaults. In pricing the risk, the insurer must carefully assess the judgment debtor's ability to successfully complete a payment schedule which may continue for many years into the future. It is important that insurers writing this business have the necessary expertise in underwriting and pricing the product.

If an annuity contract is purchased, it may be period-certain, i.e., for a specified period, or it may be a life annuity with payments continuing for the life of the claimant. The long-term payment stream, especially for life annuities, generates two primary risks in issuing these contracts: reinvestment risk and mortality (survival) risk. The insurer can base only part of its pricing on the currently-available investment opportunities. It also must make assumptions about the timing of reinvestment and about future interest rates. These assumptions will determine both the competitiveness of the quote and the extent of the reinvestment risk assumed. In addition to reinvestment risk, there is mortality risk. Annuities for periodic-payment judgments are individual contracts that require individual underwriting to ensure proper pricing. This is particularly true when the claimant is

a substandard risk. Substandard risks are individuals with shorter-than-average life expectancies. Because of the shorter life expectancy, the annuity provider expects to make fewer payments and will charge less, perhaps substantially less, than for an individual with an average life expectancy. In such cases, careful medical underwriting is critical to the pricing of the contract. It is important that insurers writing this business have the necessary expertise in underwriting and pricing the product.

All the qualified funding plans described in Section 11 involve risks similar to those described above. Because of these risks created by long-term payment schedules and individual mortality underwriting, it is not realistic to permit every insurer admitted to do business in the state to automatically qualify to participate in the funding of periodic-payment judgments. Section 18 establishes additional requirements which must be met.

To become qualified to participate in the funding of periodic-payment judgments, an insurer must be admitted in the state and request designation as a qualified insurer. The insurer must have a minimum of $100,000,000 of capital and surplus exclusive of any mandatory security valuation reserve. This is simply a recognition that sheer size affords some necessary leeway for miscalculation.

A qualified insurer also must receive one of the highest ratings from two nationally recognized rating organizations. The Act lists the acceptable ratings from four of the best-known rating organizations currently in existence, but the insurance regulator is given the discretion to accept equivalent ratings from other rating organizations as well. Only the highest ratings are acceptable because of the very lengthy time periods over which obligations may exist.

The Act's minimum standards may be supplemented by the insurance regulator. The insurance regulator may not go below the minimum standards set by the Act, but may add to them. For example, the insurance regulator may increase the $100,000,000 minimum for capital and surplus exclusive of mandatory security valuation reserve, but not decrease it. The insurance regulator also has the authority to impose additional requirements beyond those specifically mentioned in the Act.

The insurance regulator will maintain a list of qualified insurers and update it as often as necessary to keep it current. If an insurer is added or removed from the list, a new list will be published without delay. This is particularly important if a previously-qualified insurer subsequently falls below the minimum requirements. Such an insurer should not be permitted to participate in the funding of new periodic-payment judgments.

Once a qualified life insurer accepts a premium for an annuity contract, that insurer cannot transfer its obligation to a reinsurer unless the reinsurer is a qualified insurer and the transaction is approved by the insurance regulator. This requirement is imposed because the owner of the annuity contract often will be an insurance company or other entity related to the annuity provider and willing to give permission for the transfer, and the claimant with a secured interest in the annuity payments will not be in a position to know if permission should be withheld.

The Act imposes strict financial security requirements for the funding of periodic-payment judgments in order to minimize the risk that funding mechanisms will fail before the payment schedule is completed. But the Act does not address the problem of funding mechanisms which, despite exceptional strength at the outset, fail before the obligation is discharged. There appears to be no way of addressing that problem other than by means of an insurance guaranty fund. Existing guaranty funds may provide some protection, and the creation of a special guaranty fund to deal solely with structured settlements and periodic-payment judgments may be considered. It is important to realize, however, that while qualified funding plans for periodic-payment judgments cannot be made absolutely foolproof, they are a substantial improvement over the practice of placing lump-sum awards for future economic damages in the hands of claimants, many of whom dissipate the money and then turn to relatives and public assistance. There always will be risk that a claimant will end up relying on relatives and public assistance. But the risk that a lump-sum award will be dissipated is far greater than the risk that a qualified funding plan will fail.

SECTION 19. ARBITRATIONS AND SETTLEMENT AGREEMENTS.

(a) This [Act] also applies to claims for bodily injury that are subject to arbitration by law or by contract if the contract so provides.

(b) Parties to an action on any claim for bodily injury may file with the clerk of the court in which the action is pending or, if none is pending, with the clerk of a court of competent jurisdiction over the claim, a settlement agreement to pay future damages periodically. The settlement agreement may provide that one or more sections of this [Act] apply to it.

Comment

Subsection (a) attempts to take advantage of at least one method of alternative dispute resolution in a limited way. Where a claim for bodily injury is required by law to be resolved by arbitration, the Act will apply. It is contemplated

that the findings of fact required, for example, under Section 4 would be made by the arbitrator(s). Other matters which might involve questions of law are left to the respective jurisdictions of the courts and arbitrator(s) as determined by the law of the state involved.

Where parties have agreed by contract to subject themselves to the Act, it also applies. However, this does not mean that every contract that calls for arbitration of disputes, such as uninsured and underinsured motorist coverages, is automatically covered by the Act. There must be a specific agreement for the Act to apply.

Subsection (b) merely makes clear that the provisions of the Act are available to parties in fashioning settlement agreements and consent judgments. Such agreements and judgments may incorporate the provisions of this Act or adopt them by reference.

SECTION 20. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 21. SHORT TITLE. This [Act] may be cited as the Uniform Periodic Payment of Judgments Act.

SECTION 22. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 23. REPEALS. The following acts and parts of acts are repealed:

(1)

(2)

(3)

SECTION 24. EFFECTIVE DATE. This [Act] takes effect _______________ and applies to claims for relief accruing after that date.