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July 11, 2003

Kenneth L. Zwick, Director
Office of Management Programs
Civil Division, U.S. Department of Justice
Main Building, Room 3140
950 Pennsylvania Avenue, NW
Washington, DC 20530

In re: Minimum Qualifications for Annuity Brokers in Connection with Structured Settlements Entered Into by the United States, 68 Fed. Reg. 18119 (April 15, 2003)

Dear Mr. Zwick:

I preface my specific comments to the interim rule by saying that just about everything that could be wrong with a program is evident in the way the Torts Branch of the Civil Division has been conducting structured settlements for at least a decade. I submitted a detailed letter dated March 12, 2001, with supporting documentation by Certified U.S. Mail to U.S. Attorney General John Ashcroft, presenting a litany of grievances. I have never, to this date, received even the courtesy of an acknowledgement. For the record, I am resubmitting that letter with this submission, to be incorporated by reference.

The following comments are provided with regard to proposed new 26 C.F.R. § 50.24:

The conference report summary for the bill, H.R. 2215, described section 11015, "Use of Annuity Brokers in Structured Settlements," as follows:

> This section reforms the Department of Justice's practice for using annuity brokers in structured settlements in two ways. First, it directs the Attorney General to establish a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States. Second, this provision permits the United States Attorney (or his designee) involved in any settlement negotiations (except those negotiated exclusively through the Civil Division of the Department of Justice) to have the exclusive authority to select an annuity broker from the list of such brokers established by the Attorney General, provided that all documents related to any settlement comply with Department of Justice requirements.

The Civil Division misses the point entirely in its attempt to promulgate the "reforms" intended by the statute. Certainly, Congress did not intend for the Torts Branch to continue business as usual. And, it is even less likely that Congress intended to provide any authority to the Torts Branch to ignore the procurement statutes and regulations, which it has systematically violated for many years.

Brokers Should Be Retained for Advisory Services and Paid Accordingly

The whole business of broker selection by the Department of Justice turns on the question of whether the services to be performed are professional services, for which fees are paid, or whether the selection of a broker amounts to a circumvention of the procurement process. I submit that the Torts Branch has attempted to collapse the two concepts—selecting brokers as professional consultants, while paying them exorbitant fees that are disproportionate to the value of the services performed, by awarding the brokers lucrative opportunities to sell annuities to the United States without following statutory procedures to award such business. Further, the selection process for at least the last 10 years is well documented to be rampant cronyism. Time and again, when Congress has initiated investigations of who is being awarded this lucrative business, the results confirm that a few brokers get the majority of government business.

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The U.S. Department of Justice is in clear violation of 41 U.S.C. § 5, pertaining to Public Contracts, by failing to advertise for proposals for purchases and contracts for supplies or services in the appointment of structured settlement consultants who are compensated by commissions of annuity sales to the United States.

Government regulations for the procurement of supplies or services are designed to prevent cronyism and nepotism in the awarding of government business, giving all persons an equal right to compete for government contracts, and to secure for the government the benefits of competition. *U.S. v. Brookridge Farm*, C.C.A.Colo. 1940, 111 F.2d 461. See also 1937, 39 Op.Atty.Gen. 71. Government policy pertaining to advertisements is codified at 41 U.S.C.:

> § 5. Advertisements for proposals for purchases and contracts for supplies or services for Government departments; application to Government Sales and contracts to sell and to Government corporations.
>
> Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis...."

The only conceivable exception to the advertising requirement applicable to the selection of a structured settlement broker might be (4), if the services are considered to be of a technical and professional nature or, while under Government supervision, paid for on a time basis. However, neither is claimed by the U.S. Department of Justice. Therefore, there is no exception to the statutory advertisement requirement.

This Torts Branch practice of restricting broker selection also runs afoul of the procurement laws, which, consistent with the formal DOJ policy, require a fair, equal opportunity for all brokers to participate. Based on responses given in a question and answer session at the ATLA convention Atlanta in July 2002, it appears that Torts Branch Director Jeffrey Axelrad is acting under the impression that, because the United States does not pay brokers directly, the selection of brokers by the United States is not a procurement. He is mistaken. See *Century 21–AAIM Realty, Inc*., 92-1 CPD ¶ 345 (1992) (selections of relocation firms providing "no-cost" services to the government are procurements); *T.V. Travel, Inc*., 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640 (same for travel agency services); *Gino Morena Enters*., 87-1 CPD ¶ 121 (1987) (same for concession for haircuts paid by recruits).

As in my letter of March 12, 2001, I am recommending now that all damage payments made under the Federal Tort Claims Act be made into a designated settlement fund (DSF), authorized by 26 U.S.C. § 468B, or a qualified settlement fund (QSF), authorized under the same section of the Internal Revenue Code, but further described in 26 C.F.R. § 1.468B-1. A single payment is made into the DSF or QSF and the United States is released unconditionally. Revenue Procedure 93-34 lets the DSF or QSF create periodic payment obligations (structured payments), then assign them under 26 U.S.C. § 130.

With the use of the DSF or QSF, there is no recourse whatsoever to the United States, and there are no other concerns, such as will be discussed below, such as liability of the United States in the event of insolvency of the annuity company or violation of the Anti-Deficiency Act. And, there are no risks to the claimants of adverse tax consequence, as there are now because there is no authority for payment from an annuity under the method developed by the Torts Branch, because the only authorized method, prescribed in 26 U.S.C. § 130, is not followed.

Use of the DSF or QSF would remove the United States completely from the structured settlement process, allowing the claimant, who is the ultimate consumer, to select his or her own consultant to handle the structured settlement transaction.

This would not necessarily eliminate the need for the Torts Branch or United States Attorneys to engage the services of qualified structured settlement brokers, who would be able to run quotes and provide information to the attorney handling the settlement on behalf of the United States to help evaluate the claim. However, the structured settlement broker would be retained on a service contract, to be paid according to a reasonable scale in accordance with the value of the services performed. The structured settlement broker engaged by the United States should not be allowed to sell the annuity, since this would be a conflict of interest for having also served as the advisor in a paid capacity, and since the injury victim, as the ultimate consumer, should have the right to select the broker and the annuity market. It would still be consistent with the intent of Congress that the Department of Justice should have the ability to engage the services of structured settlement brokers.

Existing Congressional and DOJ Policy

The dominant and controlling congressional policy as expressed in various sections of the Internal Revenue Code is to encourage the use of structured settlements. In structured settlements, the victims of serious injuries do not receive all of their compensatory funds in a lump sum, but instead take some or all of their recoveries in periodic payments over the course of their lives.

Congressional Enactments

Beginning with the Periodic Payment Settlement Tax Act of 1982, Congress has encouraged structured settlements and has codified a system that provides important benefits for qualifying personal injury claimants. Provided the rules set forth in IRC §§ 104(a), 130, and 5891 are met, personal injury claimants do not incur any federal law on their investment income. These same rules require defendants to pay some or all of the settlement proceeds to a third party by means of a "qualified assignment," rather than being paid directly to the accident victim. The third-party assignee assumes the contractual liability to make future payments and then procures one or more products available in the structured settlement market to provide periodic payments to the accident victim. IRC § 130; see also IRC §§ 104(a)(2), 468B (qualified assignee can be settlement fund); see generally W. United Life Ass. Co. v. Hayden, 64 F.3d 833, 839-40 (3d Cir. 1995).

More recently, Congress added IRC § 5891 as part of the Victims of Terrorism Tax Relief Act of 2001. This provision provides important additional rights to qualifying personal injury victims by providing them with an approved method for refinancing (factoring) their structured settlements in the event of unforeseen circumstances. In section 5891, Congress has continued to express its preference for structured settlements by (a) codifying a definition of them; (b) imposing a punitive tax penalty on factoring transactions that do not have prior state court or agency approval as being in the best interests of the victims and their dependents; and (c) confirming the continuation of favorable tax treatment for all structured settlement participants following an approved factoring transaction.

Congressional Purposes

The reasons that Congress has encouraged the use of structured settlements relate both to a protection of the victims' rights to receive periodic payments and, derivatively, protection of the public fisc. Advantages of receiving settlement proceeds in periodic payments include providing spendthrift protection; transferring the mortality and other risks to a life insurance company issuing the annuity, rather than requiring it to be shouldered by either the victim or the defendant; and exempting the future payment stream from attachment by creditors in a bankruptcy action. *See In re Belue,* 238 B.R. 218 (S.D. Fla. 1999). Because structured settlements allow victims to enjoy secure, management- and tax-free income their entire lives, they help assure that tort victims will not later have to rely principally on Medicare and Medicaid benefits to address their typically greater-than-average health care needs.

Senator Baucus, who sponsored the Periodic Payment Settlement Act of 1982, commented at the time that “many of these successful litigants, particularly minors, have dissipated their awards in a few years and then are without means of support. . . . Periodic payments, on the other hand, provide plaintiffs with a steady income over a long period of time and insulate them from pressures to squander their awards.” 127 Cong. Rec. 30462 (daily ed. Dec. 10, 1981). On the more recent occasion of consideration of a predecessor bill to IRC § 5891, Senator Chafee stated that “Congress sought to shield victims and their families from pressures to prematurely dissipate their recoveries. This is done to preserve the injured person’s long-term financial security.” 145 Cong. Rec. S5283 (daily ed. May 13, 1999). Similarly, the Joint Committee on Taxation in 1999 elaborated on the purposes of the tax benefits intended by Congress for structured settlements (when commenting on both the President’s and Congress’ similar predecessor proposals to what became IRC § 5891) as follows:

> If a recipient chooses a lump sum settlement, there is a chance that the individual may, by design or poor luck, mismanage his or her funds so that future medical expenses are not met. If the recipient exhausts his or her funds, the individual may be in the position to receive medical care under Medicaid or in later years under Medicare. That is, the individual may be able to rely on Federally financed medical care in lieu of the medical care that was intended to have been provided by the personal injury award. Such a “moral hazard” potential may justify a subsidy to encourage the use of a structured settlement arrangement in lieu of a lump sum payment to the recipient, to reduce the probability that such individuals need to make future claims on these government programs. . . .

Staff of Joint Comm. on Taxation, 106th Cong., 1st Sess., Tax Treatment of Structured Settlement Arrangements 5 (Comm. Print 1999) (footnote omitted).

Similarly, when submitting the Administration’s proposed legislation, President Clinton commented that “recipients of structured settlements are less likely than recipients of lump sum awards to consume their awards too quickly and require public assistance.” Id. at 7.

In sum, Congress has clearly established a policy of encouraging victims to receive their compensation in the form of structured settlements that will provide them periodic payments for their lifetime. Congress implements that policy by giving favorable tax relief to victims by allowing the income on amounts in structured settlement instruments to grow tax-free and by discouraging factoring arrangements.

Structured Settlement Brokers

The structured settlement industry works in cooperation with independent, professional settlement planners, who commonly are also brokers. These professionals provide valuable services to the parties, especially to victims, by surveying the available products in the industry, matching the victim’s needs with those products, negotiating with insurance companies about particular product offerings, providing risk analysis, and receiving quotations from various companies, which often have to assess the mortality and other insurance rating factors individually for the particular victim. Brokers are typically paid a commission by the insurance company with whom the annuity is placed.

Torts Branch Has a Long History of Abuses

I am concerned that informal practices and internal guidelines of the Torts Branch have deviated from stated DOJ policy and congressional intent as expressed in various statutes related to structured settlements. Moreover, current DOJ policy and practices do not take into account recent legislation concerning structured settlements and the selection of brokers. I respectfully suggest that there is a need for additional, formal Departmental guidance, by rule or formal guideline, to assure fidelity to congressional enactments and existing DOJ policy concerning structured settlements. These guidelines could easily be incorporated into new 28 C.F.R. § 50.24.

Over the last 10 years, there has been congressional concern about DOJ practices in structured settlement situations in which the United States is the defendant. The complaint has been that government attorneys have insisted on using brokers of their own selection, rather than those of the victim's selection, as a condition to executing a structured settlement and that government attorneys have refused to work with brokers who generally are retained by victims, rather than defendants.

Partly as a result of this concern, on June 30, 1997, Acting Associate Attorney General John C. Dwyer distributed a memorandum (Attachment A) for all Assistant Attorneys General and U.S. Attorneys reaffirming Department policy and the "cardinal rule with regard to selection of brokers. The cardinal rule has been – and continues to be – that the [DOJ attorneys] should avoid favoritism in selection." Among other rules set out in that June 1997 memorandum are these:

- Every broker should be given an opportunity to promote his, her, or its services.

- No lists of "approved," "preferred," or "disapproved" brokers are to be maintained.

- Our policy is to afford an opportunity to qualified brokers to provide services. . . .

. . .

- Finally, it is important that each office maintains the appearance as well as the reality of fairness in its use of brokers. . . .

Complaints did not end with the publication of the June 1997 Dwyer memorandum. Following additional congressional inquiries and continuing concerns about DOJ broker selection practices, the Comptroller General issued a report that showed a serious concentration in brokers selected by DOJ attorneys. See GAO Rep. No. GGD-00-45, Structured Settlements: The Department of Justice's Selection and Use of Annuity Brokers (B-283058, Feb. 16, 2000).

Restrictive Broker Policy

DOJ practice did not change after this GAO review. In his June 2000 memorandum, Director Axelrad gave internal guidance to U.S. Attorneys and agency counsel that they should refuse to allow the victim to select the broker for a structured settlement in which the United States is a party. After paying lip service to the guidance given in the June 1997 Dwyer memorandum, Director Axelrad stated as follows:

> We advise against using any broker who is brought to a particular settlement by the injured party's attorney. However, the fact that you will not use a broker in a particular settlement because the broker was brought to the settlement by the injured party's attorney does not preclude you from using that broker in another settlement where the broker has not been contacted by the injured party's attorney. We suggest, however, that brokers who work primarily or exclusively on behalf of persons funding the settlement (e.g., defendants) be utilized.

Most Recent Investigation Shows Cronyism is Still Rampant at DOJ

This informal guidance reflects standard operating procedure for government attorneys, both within and without the Torts Branch. Statistics provided by DOJ to GAO for a two-year period between 1997 and 1999 showed that 70 percent of the structured settlements involving DOJ, amounting to almost 80 percent of the dollar value, were awarded to four brokerage companies. GAO Rep. No. GGD-00-45 at 8-9. Removing the small cases of under $1 million in value that likely were not handled by the Torts Branch, the top four companies handled almost 80 percent of the cases. Statistics provided by DOJ in response to a congressional inquiry for the period between May 1, 2000, and August 10, 2001, showed no change in practice. Despite there being approximately 450 full-time brokers, almost 80 percent of the settlements during that period were brokered by only seven companies, all of whom predominantly service defendants, rather than tort victims. Letter from Assistant Attorney General Bryant, dated September 21, 2001, to Representative Wes Watkins.

The “Structured Settlement Broker Selection” form itself, including the “factors that influenced” the selection of the broker, shows that the process developed by the Civil Division is a sham. It was the Civil Division’s way of thumbing its nose at Congress and the GAO, saying to its FTCA staff and AUSAs, “keep on doing things the way you always have been, just be sure you fill out a form.” One has to read only a few of these completed forms (attached) to see how absurd the process of justifying a selection of a broker has become.

This practice of the Torts Branch to refuse to cooperate with a victim’s structured settlement broker—a practice that has been published as the operative “advice” throughout all U.S. Attorney offices in the country, as well as to agency counsel dealing with tort claims—runs directly counter to the “cardinal rule” reiterated in the June 1997 Dwyer memorandum to “avoid favoritism.” It violates that policy statement’s guidelines that “[e]very broker should be given an opportunity to promote his, her, or its services” (emphasis added) and that all “qualified brokers” ought to be afforded an opportunity to provide services. It was this informal Torts Branch practice and guidance in violation of Departmental policy that directly resulted in the enactment of section 11015 of the DOJ Authorization Act, even though that section does not cover the larger cases, which are handled by the Torts Branch.

Foisting a Defense Broker on the Claimant is Both Illegal and Illogical

In addition to being against stated congressional and DOJ policy, the informal Torts Branch practice and guidance makes bad sense both legally and practically. Having only a defense-aligned broker advising on the structured settlement results in a less-than-satisfactory job for the victim almost by definition. With the broker looking out for the interests of the United States, instead of the victim, the victim is much less likely to be advised of the varying annuity investment options that could be tailored to the victim’s personal circumstances. Moreover, there will be much less of an incentive to find the best price for the victim of any particular investment option. As a result, victims will less often choose a structured settlement and, even when they do, will often have reduced benefits, increasing the chances of victims having to avail themselves of public assistance in the future. Both results are contrary to congressional intent.

The risks to the United States because of an insistence on using its own broker for the transaction are significant, as well. Director Axelrad in his June 2000 memorandum warns DOJ attorneys that it is “essential” that they “make no representations, orally or in writing, as to the tax consequences of a settlement. . . . To repeat, you should not make any representations about tax consequences of a structured settlement.” (Emphasis in original.) This sound advice obviously stems from the fact that, despite being attorneys, tort attorneys are not tax attorneys. Tax law is complicated, and representations made by government attorneys during negotiations which are relied upon by victims and later turn out to be false could unravel a settlement based on claims of negligent or intentional misrepresentation.

It is more than ironic, then, that, although in his memorandum (at 4-7) he repeatedly recognizes that annuity investment options are varied, multiform, and complicated—and despite recognizing that brokers, not lawyers, are the qualified professionals in the annuity business—Director Axelrad makes it Torts Branch practice to insist upon a government-selected broker to advise on and complete the structured settlement transactions, going so far as to advise “against using any broker who is brought to a particular settlement by the injured party’s attorney.” By engaging in this practice, DOJ arguably assumes a fiduciary capacity to tort victims and certainly makes it much more likely that a settlement will be collaterally attacked because of negligent, or simply bad, advice given the victim by the broker insisted upon by the United States. *See Lyons v. Med. Malpractice Ins. Ass’n*, 286 A.D.2d 711, 730 N.Y.S.2d 345 (2d Dept. 2001) (misstatement of present value of structured settlement by defendant’s insurance company gives victim cause of action for fraudulent, intentional, and negligent misrepresentation); *Macomber v. Travelers Property and Cas. Corp.*, 804 A.2nd 180 (Conn. 2002) (victim states causes of action against annuity issuer for breach of contract, fraud, negligent misrepresentation, conspiracy, unjust enrichment, and unfair trade practices flowing from structured settlement negotiations). After all, it is the victim that effectively pays the broker insisted upon by DOJ.

SSP believes that the Department, by either rule or formal guidance, should establish a policy that

- overrules the informal advice and practice of the Torts Branch in which it refuses to use any broker brought to a particular settlement by the victim; and

- requires government attorneys negotiating torts cases in which the United States is a defendant to

- communicate to victims their rights to a structured settlement;

- announce DOJ policy that the United States will cooperate in a structured settlement arrangement of the victim's selection;

- actively encourage the victim to retain the services of a qualified structured settlement broker; and

- as with tax advice, affirmatively disclaim any intent to provide brokerage services or advice to the victim.

The Department should also affirmatively inform DOJ attorneys and agency counsel that should government counsel believe the circumstances warrant, they may retain qualified brokerage services to assist them,

(i) but not to the exclusion of the victim's broker or to the victim's broker placing the structured settlement investment arrangement with the appropriate issuer;

(ii) at no cost to the victims, directly or indirectly;

(iii) and consistent with section 11015 of the DOJ Authorization Act and applicable procurement laws and regulations.

Current Torts Branch Practices Are Inconsistent with Congressional and DOJ Policy

Current Torts Branch practices are in substantial dissonance with these clear congressional and DOJ policies in several important particulars. First, the Torts Branch has institutionalized a practice of requiring victims to take less money from the United States in a structured settlement than in a lump sum settlement. Second, it has required annuities to provide for a reversionary interest in the United States should there be any guaranteed payments remaining at the victim's death. Both of these practices are directly contrary to congressional intent to encourage structured settlements and to leave in victims' hands the decision whether to take the proceeds of a settlement or judgment in a lump sum or in periodic payments by using any one of a great number of annuity vehicles.

The Torts Branch has also provided informal guidance that restricts victims from selecting brokers of their choice and requires the transaction to be handled by brokers of the government attorney's sole selection. Once again, this discourages structured settlements and is contrary to existing DOJ policy. These Torts Branch practices in combination are a direct contributor to the fact that structured settlements make up only a small part (estimated by DOJ at one to two percent in the February 2000 GAO report) of all settlements, despite the tax benefits Congress intended for victims to encourage their taking funds in the form of periodic payments.

Conditioning Structured Settlements on a Reduced Payment

Torts Branch Director Jeffery Axelrad in a June 28, 2000, memorandum to the FTCA staff, AUSAs, and agency counsel discussed at some length "Structured Settlements in FTCA Matters." In that memorandum, Director Axelrad mentioned several of the benefits to victims of structured settlements and their periodic payments, as well as the tax benefits Congress set up in the Internal Revenue Code to encourage the use of structured settlements by victims.

Director Axelrad in his memorandum then goes on to instruct (at 8-9) as follows:

> You should, of course, be aware of probable tax consequences so that the United States may obtain value received for the anticipated tax benefits as part of any negotiated settlement.
>
> . . . Thus, even though the flow of annuity payments will include the distribution of some investment earnings by the insurance carrier, the payments appear to be exempt from taxation. This is an important negotiating point. Conversely, the availability of a tax-free lifetime series of annuity payments, for example, should not be conferred on a plaintiff without an offsetting benefit to the government: that is, an adequate quid pro quo. You should be aware of all of the government's interests and take them into account when you negotiate a settlement on behalf of the United States.

The message is obvious – AUSAs, Torts Branch attorneys, and agency counsel must try to capture the tax benefits when agreeing to a structured settlement with tort victims. Government attorneys must settle at a lesser amount than they would if the government made a lump-sum payment. My experience confirms that this is exactly what is insisted upon by government attorneys—a reduced payout to victims who desire to take their funds in structured settlements. Government attorneys can insist upon this reduced payout because the cooperation of the United States as defendant is needed—under the present system (that should be abandoned)—to perfect a structured settlement and receive the favorable tax treatment provided by Congress in the Internal Revenue Code. See IRC § 104(a)(2).

This Torts Branch practice runs directly counter to congressional policy. Congress gave the tax benefits to victims to incentivize them to enter into structured settlements. It is nonsensical to suggest that Congress intended to give victims those benefits with one hand and to have another arm of government take them away with the other. It is obvious that, because of the Torts Branch practice to reduce the principal amount and the resulting periodic payment stream, fewer victims will select structured settlements. It is also obvious that, whether because structured settlements are then rejected altogether or because there is a smaller periodic payment, tort victims are more likely to have to rely on the Medicaid and Medicare system—exactly the result Congress was attempting to avoid.

To correct this DOJ practice that runs directly counter to congressional policy, the Department should formally adopt a policy, either by regulation or formal guidance, such as inclusion in new § 50.24, that· prohibits government attorneys from trying to recapture the tax benefits of structured settlements given by Congress to the victims. The Department should state, instead, an affirmative policy that

- the United States will pay the identical principal amount to a victim for its (identical) release, whether the victim chooses a lump sum or a structured settlement or a combination; and

- the United States will cooperate fully with victims who choose a structured settlement payment approach.

Conditioning Structured Settlements on a Reversionary Interest

A second way in which the Torts Branch discourages structured settlements is by requiring a reversion to the United States. In his June 2000 memo (at 2), Director Axelrad points out the obvious – that "a reversionary trust is financially beneficial to the government"—while leaving the necessary corollary unstated—that it is not financially beneficial for the victim. In the "New Model Stipulations for Compromise Settlement" distributed by Director Axelrad to FTCA staff on November 6, 2001, these reversions are made part of the standard DOJ structured settlement paperwork. In paragraph 3.B (at 4), the model language provides,

> In the event of the death of a beneficiary of an annuity contract during a period of guaranteed payments, all remaining guaranteed payments shall be made payable to the United States Treasury and sent to the Torts Branch. . . .

In paragraph 3.C (at 5), this is reinforced:

> Upon the death of the beneficiary of said trust [the victim], the trustee shall, to the extent permitted by the terms of said trust, . . . liquidate and distribute the remaining trust estate to the United States . . . .

This practice of insisting upon a reversionary interest in the United States is beset by a basic illogic—the United States would not get any reversionary interest if it paid in a lump sum, so why should it receive a reversionary interest in a structured settlement? But, again, the problems go deeper. The practice of insisting upon a reversionary interest discourages, rather than encourages, the use of structured settlements. In the first place, a reversion means there will be a significant chance that victims will receive even less of a principal payout to themselves or their heirs than the settlement sum negotiated. In the second place, a reversionary interest often lessens the periodic payment, making it a less attractive option for this reason as well.

The practice of the Torts Branch of requiring a reversionary interest in the United States directly conflicts with the congressional policy of encouraging victims to take structured settlements, as fewer victims will. Moreover, because the payouts for those who still do are less in structured settlements that include a reversionary interest to the United States, it also increases the likelihood that the victim will later have to rely on Medicaid or Medicare payments, also directly contrary to congressional intent. There is no countervailing public policy. *Cf. Massie v. United States*, 166 F.3d 1184, 1186-87 (Fed. Cir. 1999) (reversionary interests in claimants' estate in structured settlement agreement under Military Claims Act).

The Department should adopt a policy, either by regulation or formal guidance, such as in new § 50.24, that renounces the practice of requiring a reversionary interest in the victim's settlement assets. Instead, the Department should affirmatively provide, just as would be the case in a lump-sum settlement, that DOJ will make the full settlement amounts available to the victim to apply to the structured settlement arrangement of the victim's choice, with any remainder interest negotiated with the annuity issuer to be in the victim's sole discretion and to belong to the victim's estate.

One-Size-Fits-All Settlement Forms

The Model Stipulations for a structured settlement issued by the Torts Branch in November 2001 also discourage structured settlements. By imposing particular types of structured settlement financing methodologies and investments, the Torts Branch prevents qualifying claimants from evaluating or selecting from other financing methods and investments which meet the qualifications for a structured settlement as that term is now defined in IRC § 5891 (c)(1). For example, IRC § 1396p(d) allows a victim to establish special needs trusts that provide them with certain benefits, but the Tort Branch forms do not allow it. The Torts Branch settlement forms, in restricting these options, short-circuit innovation to tailor structured settlement arrangements to particular victims' needs and require procedures that are contrary to industry standards. These practices discourage victims from adopting structured settlements, contrary to congressional policy.

The Torts Branch through its forms also eliminates rights expressly given to victims by Congress. Under newly enacted IRC § 5891, Congress expressly allows victims, under prescribed circumstances, to factor their periodic payments. The Torts Branch forms (in paragraph 3.b) provide the opposite—specifically, that the victims "shall not have the power to sell, assign, . . . or anticipate said annuity payments, or any part thereof, by assignment or otherwise." Moreover, Congress under IRC §§ 5891(c) and (d) gives factoring rights and tax relief to victims only if the requirements of IRC § 130 have been followed, but the DOJ forms do not comply with IRC § 130, as they do not establish a qualified assignment. If only to conform to new IRC § 5891, the Torts Branch settlement forms would have to be revised to allow victims to take advantage of these “structured settlement payment rights” accorded by Congress.

The requirement in the Torts Branch forms that the United States pay the settlement amounts to the broker, who then buys the annuity, also invites abuse. A broker can lock in a quoted rate and then continue to shop for a better deal after receiving the funds. Not only will he earn interest on the funds as they sit in his bank account, but the broker can also pocket the difference in cost for the same annuity payout stream if he is able to find a better deal during the lock-in period. The industry practice of having settlement proceeds paid in the name of the annuity issuer or third-party assignee avoids these practical problems.

The Department should establish a policy, by either rule or formal guidance, that DOJ will not insist upon any particular structured settlement arrangement for a particular victim. The Department should affirmatively state that

- DOJ will cooperate with the victim’s choice of structured settlement arrangement, and

- DOJ will cooperate with the victim’s selection of a qualified assignment procedure intended to comply with IRC §§ 130 and 5891, including under the terms of IRC § 468B, without making representations as to acceptability under those or other tax provisions.

The Department should also revise its model structured settlement forms to be consistent with IRC §§ 5891, 130, and other relevant sections and to allow cooperation with the victims’ choice of structured settlement arrangement.

The Truth About Designated Settlement Funds (DSFs) and Qualified Settlement Funds (QSFs)

Much has been said by those who oppose the use of the DSF or QSF, because they stand to lose control of the structured settlement process and lose lucrative business that they now obtain through unfair trade practices, in an attempt to discredit this concept and scare potential users with untrue statements. Specifically, the detractors say that the use of a DSF or QSF established for a single claimant triggers the judicially-created doctrine of “economic benefit,” which causes the DSF or QSF the inability to make a “qualified assignment” of periodic payment obligations under 26 U.S.C. § 130. Application of the economic benefit doctrine to prevent a qualified assignment by a DSF or QSF would be contrary to the clear statutory override of that judicial doctrine. This opinion is contained in a letter dated June 19, 2003, jointly to the Assistant Secretary of the Treasury for Tax Policy and the general counsel of the Internal Revenue Service by two individuals who each served at different times in both of those positions. Fred T. Goldberg and Kenneth W. Gideon, partners in Skadden, Arps, Slate, Meagher & Flom, LLP, and Jody J. Brewster, also of the law firm’s Washington, C.C., office, have requested guidance clarifying that the assignment of a liability to make periodic payments does not fail to be a “qualified assignment” for purposes of section 130 solely because the settlement proceeds are held temporarily in a qualified settlement fund before the liability is assigned. Goldberg and Gideon both formerly served as Assistant Secretary of the Treasury for Tax Policy and the general counsel of the Internal Revenue Service. Additionally, Goldberg was IRS commissioner before moving to the tax policy post. I am appending a copy of this letter, which was published on-line by *Tax Notes* on July 7, 2003, as part of the record to be incorporated by reference.

Congressional Intent Was to “Reform” DOJ Practices

Congress, to "reform" DOJ practices, recently enacted section 11015 of the 21st Century Department of Justice Appropriations Authorization Act ("DOJ Authorization Act"), Pub. L. No. 107-273, 116 Stat. 1758, 1824 (signed Nov. 4, 2002).

Under section 11015, by May 4, 2003, the Attorney General was to establish "a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States." The list is to be "updated upon request by any annuity broker that meets the minimum qualifications," and the U.S. Attorney or AUSA involved in any settlement negotiation is given exclusive authority to select an annuity broker from the list. However, these provisions do not apply to any structured settlement that is negotiated exclusively by the Civil Division Torts Branch, which handles the larger cases as a matter of Department policy and can also handle smaller cases if it so chooses. Once again, through this recently enacted law, Congress has expressed concern about DOJ practices in the selection of structured settlement brokers and has confirmed its desire that the selection be fair and open to all qualified brokers.

The interim rule ignores the intent of Congress by stating at § 50.24(b)(8): "The list of annuity brokers established pursuant to this section will be updated periodically, but not more often that twice every calendar year, beginning in calendar year 2004." Clearly, this is not consistent with the congressional intent that the list is to be "updated upon request by any broker who meets the minimum qualifications." It is no administrative burden to update such a list, especially if it is updated and posted on-line on the Department's web site, where it is accessible not just by AUSAs but also by the general public. The Department already admits the utility of the Department's website in disseminating such information, as it says at § 50.24(b)(1) that the prescribed Declaration will be posted on the website.

The intent to purge brokers from the approved list if they fail to file a new declaration every year between January 1 and April 10 also violates the spirit of Congress. Presumably, under the interim rule, if an individual fails to submit a new affidavit during the prescribed window, that broker will be dropped without notice and refused the opportunity to be restored to the list until the Torts Branch's semi-annual update. Besides violating congressional intent, this plan invites further abuse by Torts Branch officials by allowing them to selectively send renewal notices to their cronies, while not sending renewal notices to others, hoping to drop the others from the approved list. If there is to be an annual renewal requirement, there should also be a requirement that each broker on the list be sent a renewal notice. Evidence of past cronyism is justification for denying the Torts Branch additional opportunity for abuse. The requirement to send a renewal notice would also serve as confirmation to the individual of that person's name being on the list. (I submitted a declaration, confirmed by U.S. Certified Mail, prior to the April 24, 2002, initial deadline, and have received no confirmation that my name is on the list that supposedly was published on May 1, 2003, and distributed to United States Attorneys. Further, the list is not readily accessible by the public, so a broker has no way of knowing whether he or she is on the list.)

Conclusion

The Department should review its structured settlement practices and these comments concerning them. In summary, I suggest that the Department, by rule or formal guidance, such as through new § 50.24, adopt the following policies:

- **prohibit government attorneys from trying to recapture the tax benefits of structured settlements given by Congress to the victims**

- **pay the identical principal amount to a victim for its release, whether the victim chooses a lump sum or a structured settlement or a combination**

- **cooperate fully with victims who choose a structured settlement payment approach**

- **renounce the practice of requiring a reversionary interest in the victim's settlement assets**

- **make the full settlement amounts available to the victim to apply to the structured settlement arrangement of the victim's choice, with any remainder interest negotiated with the annuity issuer to be in the victim's sole discretion and to belong to the victim's estate**

- **prohibit insistence upon any particular structured settlement arrangement for a particular victim**

- **cooperate with the victim's choice of structured settlement arrangement**

- **cooperate with the victim's selection of a qualified assignment procedure intended to comply with IRC §§ 130 and 5891, including under the terms of IRC § 468B, without making representations as to acceptability under those or other tax provisions**

- **overrule the informal advice and practice of the Torts Branch in which it refuses to use any broker brought to a particular settlement by the victim**

- **require government attorneys negotiating torts cases in which the United States is a defendant to**

  (i) communicate to victims their rights to a structured settlement;

  (ii) announce DOJ policy that the United States will cooperate in a structured settlement arrangement of the victim's selection;

  (iii) actively encourage the victim to retain the services of a qualified structured settlement broker; and

  (iv) as with tax advice, affirmatively disclaim any intent to provide brokerage services or advice to the victim

- **advise government counsel that, should they believe the circumstances warrant, they may retain qualified brokerage services to assist them,**

  (i) but not to the exclusion of the victim's broker or to the victim's broker placing the structured settlement investment arrangement with the appropriate issuer;

  (ii) at no cost to the victims, directly or indirectly;

  (iii) and consistent with section 11015 of the DOJ Authorization Act and applicable procurement laws and regulations.

Sincerely,

Addressee's Tel: 202-514-4552
Addressee's Fax: 202-514-8071

Richard B. Risk, Jr., JD

This letter is being sent via fax without attachments. Original, with attachments, will follow.

Attachments:

1. Letter from Richard B. Risk to U.S. Attorney General John Ashcroft, March 12, 2001
2. Report by U.S. General Accounting Office, B-283058, dated February 16, 2000, to Senator James Inhofe, "Structured Settlements: The Department of Justice's Selection and Use of Annuity Brokers."
3. Memorandum, subject: "Federal Tort Claims Act Settlements," dated May 10, 2000, from Jeffrey Axelrad, Director, Torts Branch, Civil Division, U.S. Department of Justice, to FTCA Staff, Assistant United States Attorneys, and Agency Counsel.
4. Memorandum, subject: "Structured Settlement Broker Selection," dated June 26, 2000, from David W. Ogden, Acting Assistant Attorney General, U.S. Department of Justice, to United States Attorney's Offices and Agencies Handling Structured Settlement Matters.
5. Memorandum, subject: "Structured Settlements in FTCA Matters," dated June 28, 2000, from Jeffrey Axelrad, Director, Torts Branch, Civil Division, U.S. Department of Justice, to FTCA Staff, Assistant United States Attorneys, and Agency Counsel.
6. Letter, dated July 28, 2000, from Robert Raben, Assistant Attorney General, to U.S. Senator Henry J. Hyde.
7. Memorandum, subject: "Selection of Structured Settlement Brokers," dated June 30, 1997, from John C. Dwyer, Acting Associate Attorney General, U.S. Department of Justice, to Assistant Attorneys General and United States Attorneys.
8. Memorandum, subject: "Structured Settlements," dated July 16, 1993, from Jeffrey Axelrad, Director, Torts Branch, Civil Division, U.S. Department of Justice, to Reviewers.
9. Memorandum, subject: "Review of the Department's Use of Brokers in Structured Settlements," dated January 17, 1995, from Michael R. Bromwich, Inspector General, U.S. Department of Justice, to John R. Schmidt, Associate Attorney General; Frank W. Hunger, Assistant Attorney General, Civil Division; Carol DiBattiste, Director, Executive Office for United States Attorneys.
10. "Review of the Department of Justice's Use of Annuity Brokers in Structured Settlements," undated, attachment (excised) to document 9 above.
11. Letter, dated July 29, 1994, from United States Senator Don Nickles to Sheila F. Anthony, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice.
12. Letter, dated July 22, 2002, from Assistant Attorney General Daniel J. Bryant to U.S. Representative Wes Watkins
13. Letter, dated September 21, 2002, from Assistant Attorney General Daniel J. Bryant to U.S. Representative Wes Watkins
14. "Response to Congressman Watkins' Letter" from DOJ, undated, attached to document 13 above.
15. "Structured Settlement Broker Selection" forms, attached to document 13.
16. Tally sheet (handwritten) by Richard B. Risk, regarding sampling of 158 cases between May 2000 and August 10, 2001, as reflected in individual forms attached above as document 15.
17. Settlement authorities, undated
18. Letter from Skadden Arps to Assistant Secretary of the Treasury and General Counsel of the IRS, June 19, 2003