REMARKS OF:
RICHARD B. RISK, JR., ESQ.
BEFORE THE INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
PERTAINING TO PROPOSED REVISION OF 26 C.F.R. § 1.104
FEBRUARY 23, 2010, 10 A.M.

NOTE: TIME CONSTRAINTS PREVENTED THE ORAL DELIVERY OF THIS ENTIRE TEXT. SEVERAL PARAGRAPHS WERE NOT READ ALOUD. THESE PREPARED COMMENTS WERE HANDED TO THE REPORTER FOLLOWING THE HEARING, ALONG WITH MY *VIRGINIA TAX REVIEW* ARTICLE, CITED IN THESE REMARKS. FOLLOWING IS WHAT I WOULD HAVE READ IF GIVEN ADEQUATE TIME.

Mr. Chairman, ladies and gentlemen, thank you for the opportunity to appear at this hearing. My name is Richard B. Risk, Jr. I reside in both Tulsa, Oklahoma, and St. Petersburg, Florida. I am an attorney whose entire law practice focuses on the aspects of tort claim settlements. I have written documents to establish more than 250 qualified settlement funds and have administered the majority of them. I have been published extensively in legal journals and have chaired tax panels for a professional association, the Society of Settlement Planners, including guest panelists from Treasury and the Internal Revenue Service. I am appearing today on my own.

Structured settlements are a very important tool in the resolution or satisfaction of claims originally asserted by injury victims against the tortfeasors after the liability for such claims has been transferred by novation to the qualified settlement fund. I will get to the tax issues in a few minutes, but first I want to present a little background on the undercurrent within the structured settlement industry that may serve to explain why we may have differences of opinion among ourselves as to how the Tax Code should be interpreted.

I first came into the structured settlement community in 1986 as a producer and eventually joined the National Structured Settlements Trade Association because it was required of anyone who sought to be appointed by the major annuity markets. At the time I joined the trade association, the marketing orientation for structured settlements was almost entirely from the defense side. Structured settlement producers worked with corporate risk managers and liability insurance claim adjusters to propose periodic payments to injury victims, along with the attractive tax subsidy, as a way the responsible party could save money in settling claims.

If the claimant or claimant's attorney wanted to know the cost of the funding asset—the annuity—the response was that knowledge of the amount would cause the claimant to be in constructive receipt of the funding asset and, thus, would lose the tax benefits.

If the claimant felt uncomfortable allowing the structured settlement producer engaged by the defendant to handle perhaps the biggest financial transaction of the claimant's life, and wanted to engage a consultant with a fiduciary duty to the claimant, the response was "take the structure that we offer or take cash." These were hardball tactics designed to keep control of the structured settlement process for the defendants and their insurers. Loss of control meant loss of a money-saving tool for the defense and, in some cases, it also meant the loss of profitable annuity business for insurance groups that had life insurance affiliates, because the liability insurer could control where a significant amount of settlement dollars were spent. The National Association of Insurance Commissioners calls this practice "steering" and describes it as an "inappropriate solicitation activity."

Loss of control of the structured settlement transaction also meant the loss of sales commissions paid by the life insurance companies to life insurance agents who like to call themselves "brokers," as a reward for their efforts on behalf of the defendants or their insurers.

When one thinks about it, the refusal by the defense to allow an injury victim the right to engage his or her own structured settlement specialist to handle the periodic payment arrangement is morally indefensible. After all, the claimant was the ultimate consumer of the annuity, even though tax considerations prevent actual ownership.

By the mid-1990s, the defense canard that knowledge of an annuity's cost causes constructive receipt had been revealed to the plaintiff's bar as untrue, and the amount of the proposed annuity premium to be spent by the defense became integral to the settlement negotiations. The mediation paradigm had shifted from "we offer you a cash lump sum and periodic payments as described in this proposal" to "let's settle on the total cost to the defense of settlement, and then we'll decide how much will be spent on the periodic payments." With that paradigm shift, the commission for the annuity sale, which was bundled into the annuity premium was now part of the gross settlement amount offered by the defense. And, the issue became which side had the right to pay its structured settlement specialist using the built-in commission. Claimants began to assert that the commission was part of the settlement offer and, therefore, they were entitled to engage the services of a structured settlement specialist loyal to them and to use the commission as compensation. This notion upset the unconscionable marketing model built by the liability insurance claims departments and structured settlement agencies when they were in total control of structured settlements, and the battle over who gets the commission still rages today.

The Society of Settlement Planners was formed in 2001 to promote the rights of plaintiffs. In 2003, several members of the SSP risked losing their life insurance company appointments by resigning their memberships in NSSTA. It was obvious to them that NSSTA did not represent their interests and that the trade association was spending their dues on causes adverse to their interests. The life insurance markets evidently realized that this group of advocates for plaintiff rights represented a large block of annuity premium production, and did not terminate their appointments, apparently changing their former stance that those appointed to sell structured settlement annuities must be members of NSSTA.

One of the reasons for the success of these plaintiff-oriented structured settlement producers was the use of the qualified settlement fund. Plaintiff's lawyers who were concerned about their own exposure to legal malpractice claims by their own clients for allowing the defense to take control of their clients' financial future became enamored with the qualified settlement fund. They could give the defendants an immediate release and dismiss them from the litigation while preserving the opportunity for their clients to structure—without the pressures of quick decision making that usually occur at mediations, and without the involvement of the opposing side.

These resignations in 2003 by a number of successful structured settlement producers were also very significant because it meant, for the first time, NSSTA did not represent the entire structured settlement industry. NSSTA cannot seem to let go of its claim to represent the entire structured settlement community, as they arrogantly repeat that claim whenever they think somebody will listen. But, it is a blatant misrepresentation of their constituency.

The Society of Settlement Planners decided to demonstrate its independence from NSSTA in June 2003 when it asked Treasury to clarify the tax treatment of a section 130 qualified assignment of a periodic payment obligation when made by a qualified settlement fund that was established to settle with a single claimant. The request was signed by three distinguished alumni of the Service: Jody J. Brewster, former assistant chief counsel, Income Tax and Accounting; Kenneth W. Gideon, former chief counsel; and Fred T. Goldberg, former chief counsel and commissioner. Mr. Gideon and Mr. Goldberg both also served as assistant secretary of the Treasury for Tax Policy. All three are law partners at Skadden, Arps, Slate, Meagher & Flom, LLP.

I subsequently wrote an article published in the *Virginia Tax Review* (23 Va. Tax Rev. 639), titled "A Case for the Urgent Need to Clarify Tax Treatment of a Qualified Settlement Fund Created for a Single Claimant." I submit that article for the record. When the editor wrote to me in April 2004, I believe, that the final editing was complete, I emailed my article to about a dozen senior officials at Treasury and the Service. About three days after that, this issue first appeared on the Treasury-IRS Priority Guidance Plan, where it remained until late 2009—about four and a half years with no visible results—before it was unceremoniously removed—and without explanation.

NSSTA fears the use of the qualified settlement fund because it gives the plaintiffs the opportunity to structure without involvement of the defense. As early as 1997, NSSTA began to discourage the use of the QSF, except in mass torts. It turned to its tax counsel, the law firm of Hogan & Hartson, who came up with the theory that a qualified settlement fund created for a single claimant resulted in that claimant having economic benefit in the funds. In more than one instance Hogan & Hartson claims that some officials at the Service agree with their theory of economic benefit attaching when there is but a single claimant. Details of that effort appear in my *Virginia Tax Review* article, beginning at page 673.

The economic benefit theory being promulgated by the defense is the new canard to replace the old one. You remember: "Knowledge of the cost of the annuity is constructive receipt."

The irony here was that NSSTA's stated mission is to promote the use of structured settlements. But, in this case, it was looking for a way to stop them from being arranged without the defense participation. They were—and still are, in effect, discouraging the use of structured settlements, rather than promoting them.

As soon as NSSTA discovered the request to Treasury in June 2003 by the Society of Settlement Planners for published guidance on the single-claimant issue, it wrote a letter urging that the guidance not be published. NSSTA did not advance any viable tax theory as to why a single claimant should be deemed to have economic benefit. They simply didn't want the guidance to be published. That seems to be their mantra. "Just don't publish the guidance." I note that John Stanton of Hogan & Hartson has submitted written comments for this hearing and is scheduled to appear on behalf of NSSTA. I believe Mr. Stanton has submitted the 2003 NSSTA letter for the record of these proceedings. This is simply another way of saying "Just don't publish the guidance." Mr. Stanton's stated purpose of being here today is to refute my suggestion that the economic benefit issue can be resolved easily in the proposed revision to section 1.104 of the Regulations, on the basis that my suggestion exceeds the scope of the proposed revision. Of course, the scope should be whatever is "needful" in order to clarify Code section 104. I suppose

I should be flattered that NSSTA views me as a threat to disrupting the status quo. I hope that speaks for the credibility of my remarks today.

Now, let's get to the tax issues:

I understand that the branch responsible for this project—Branch 4—has limited the scope of the proposed revision to a couple issues in order to avoid the type of controversy that has stalled this project in the past. But, the scope of this project should be determined by the necessity for guidance related to Tax Code section 104, and not limited for the convenience of the staff. This issue is primarily a Code section 104 issue, and the corresponding Regulation is an appropriate place to clarify how the Code will be interpreted. I sincerely hope that you will recognize the legitimate need to clarify and that the law requires such clarification.

Section 7805(d) of the Code says "[T]he Secretary of the Treasury shall prescribe all needful rules and regulations for the enforcement of this title." [Meaning title 26 of the U.S. Code, of course.] There is simply a duty to the taxpayer constituency—a statutory duty at that—to provide the guidance. This need is compounded by the fact that certain people within this building reportedly have made comments being used by the defense community to promote fear among those who would otherwise employ the qualified settlement fund for the benefit of their clients.

The campaign against the use of the qualified settlement fund has been effective in at least one other regard. Several life insurance company members of NSSTA refuse to accept qualified assignments from 468B funds when there is a single claimant, by their definition, which often includes a family group with competing claims.

I am not asking the Service to develop a new policy to clarify this issue. I submit that the policy is already in existence, except that one must go to several sources to piece it together. The proposed scope of the revision is to incorporate some legislative history dating back to 1996. That's 14 years ago. What about the legislative history from 1982 that never got included in the Regulations? That's 28 years ago, twice as long.

I have elaborated in my earlier written submission on the policy that already exists. That submission is cited as 2009 TNT 192-21. I also covered it in more depth in my Virginia Tax Review article. Here is a summary:

- Revenue Rulings 77-230, 79-220 and 79-313 creating an exception to the constructive receipt and economic benefit doctrines for structured settlements
- Periodic Payment Settlement Tax Act of 1982, which codified the revenue rulings, concurring with the Service
- Technical and Miscellaneous Revenue Act of 1988, allowing security interest in the annuity without causing economic benefit or constructive receipt.
- Victims of Terrorism Tax Relief Act of 2001, confirming congressional intent that the economic benefit doctrine should not be expansively interpreted
- Revenue Ruling 2003-115, providing guidance for a structured settlement with a qualified settlement fund established for the benefit of a single claimant from the 9/11 attack
- *Childs v. Commissioner,* 103 T.C. 634 (1994), *aff'd* 89 F.3d 865 (11^{th} Cir. 1996), providing controlling authority that economic benefit does not attach to any payee in

a structured settlement, so long as the payee has only the rights to the future payments and does not control the qualified funding asset

- PLR 97-36032, favoring four taxpayers who were each sole beneficiaries of identical qualified settlement funds, declaring that there would be no inclusion in their gross income
- PLR 97-03038, allowing periodic payments to a single claimant from a trust acting as an assignee
- PLR 200836019, recognizing the concept of a “non-qualified assignment” and that it can defer current year recognition of income

I urge this panel to consider also the writings of Jeremy Babener, who has submitted his article on the single claimant issue for the record. It is titled “Structured Settlements and Single-Claimant Qualified Settlement Funds: Regulating in Accordance with Structured Settlement History” and it has been accepted for publication in the New York University *Journal of Legislation & Public Policy*. Mr. Babener makes a similar analysis.

The point is that all of these events that I have described above and in detail in my previous submission, as well as in my *Virginia Tax Review* article, demonstrate that Congress, Treasury (including the IRS) and the Courts have spoken on the single claimant issue, confirming that economic benefit does not attach in periodic payment arrangements. The rule distilled from all of these events can be appropriately inserted into the corresponding Regulations for Code section 104. I have previously provided proposed text—one single paragraph—for your consideration.

I understand the workings of bureaucracies, having served as a commander, general’s aide and staff officer in the U.S. Air Force and having headed a bureau-level federal agency. I know that there may be a reluctance to take on this issue when Treasury let it languish for more than four years before finally dropping it. But, the need to clarify the single claimant issue still exists, and so does the opportunity to clarify with this revision to the Regulations.

I support the expansion of the scope for other reasons than the economic benefit issue. Attorneys David Higgins and John McCulloch have proposed some thoughtful suggestions for defining what constitutes a “personal physical injury or physical sickness” within the meaning of Code section 104(a)(2).

As a practitioner who has been involved in periodic payment tax issues since 1986, I can attest to the need for published rules on the application of the economic benefit doctrine to amounts received to resolve claims. I urge Treasury and the Service to adopt the text I have proposed and incorporate it into Income Tax Regulations section 1.104.

Please don’t forget: You are here to serve the people—not the other way around.

Thank you for this opportunity to speak on the record and for your thoughtful consideration.