Richard B. Risk, Jr.

March 12, 2001

The Honorable John Ashcroft
Attorney General of the United States of America
5111 Main Justice Building
10th Street & Constitution Avenue, N.W.
Washington, DC 20530

Dear Mr. Attorney General,

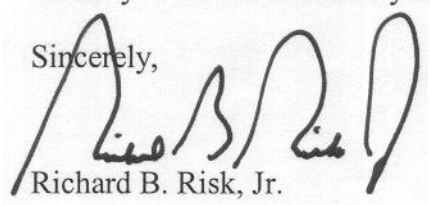
We met nearly two decades ago when I was one of many speakers at the dedication of the Sikeston, Missouri, coal-fueled electric power generating plant. At the time, I was the Administrator of the Southwestern Power Administration of the U.S. Department of Energy, the hydroelectric power marketing agency serving that region, which years before had encouraged the City of Sikeston to construct its own source of electricity. You were then Attorney General of the State of Missouri. Little did I know that our paths would cross at this time.

When you were sworn in as Attorney General of the United States of America, you pledged to "confront injustice by leading a professional Justice Department that is free from politics, that is uncompromisingly fair." The attached litany of grievances under the heading Structured Settlements Under the Federal Tort Claims Act suggests a Justice Department—at least a portion of it—that is unjust, politically motivated, indifferent toward the law and unfair. This presents an early opportunity for you to validate your pledge.

I trust that these allegations involving internal affairs of the Justice Department will receive a full and impartial probe that will not include as an investigator anyone who has been involved in any aspect of the previous acts or investigations.

Thank you for the attention you will devote to these very serious matters.

Sincerely,



Richard B. Risk, Jr.

cc: Hon. Don Nickles, U.S. Senate

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Structured Settlements Under the Federal Tort Claims Act

Grievance to the
Attorney General of the United States of America

Submitted by
Richard B. Risk, Jr.

March 12, 2001

Structured Settlements Under the Federal Tort Claims Act

The purpose of this correspondence is to call to your attention several standard procedures and practices of the U.S. Department of Justice, Civil Division, Torts Branch, that violate statutes, exceed delegated authority, violate the separation of powers doctrine, deny the constitutionally guaranteed rights of due process and equal protection, violate the constitutional prohibition against obligating money from the Treasury before it is appropriated, promote and condone acts of fraud, violate the rights of the states to regulate the insurance industry within their borders, and are contrary to public policy as expressed by Congress. I hereby request that you cause these unconstitutional and otherwise illegal activities within the U.S. Department of Justice to cease and desist immediately and that you take any appropriate remedial action against those employees of the government, as defined in 28 U.S.C. § 2671, who are responsible for them. Additionally, you should identify those who have been victimized by the U.S. Department of Justice, acting on behalf of the United States of America, and notify these victims of their right to pursue a claim for damages under the Federal Tort Claims Act and, if applicable, under Civil Rights Act provisions.

The following documents referred to herein are appended for reference:

a. 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.

b. 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.

c. Memorandum, subject: "Structured Settlements," dated July 16, 1993, from Jeffrey Axelrad, Director, Torts Branch, Civil Division, U.S. Department of Justice, to Reviewers.

d. Letter, dated March 1, 1999, from Richard B. Risk, Jr., to Michael Bromwich, Inspector General, U.S. Department of Justice.

e. Letter, dated May 7, 1999, from Michael R. Bromwich, Inspector General, U.S. Department of Justice, to United States Senator Don Nickles, transmitting Reference f.

f. 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.

g. "Review of the Department of Justice's Use of Annuity Brokers in Structured Settlements," undated, attachment (excised) to document f above.

h. Letter, dated July 7, 1999, Re: "OLA/99-R0474 MAP:MHH:MLF," from Melanie Ann Pustay (signed on her behalf by Michael H. Hughes), Deputy Director, Office of Information and Privacy, U.S. Department of Justice, to Richard B. Risk, Jr., transmitting Reference i.

i. 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.

j. Letter, dated November 17, 1999, Re: "Appeal No. 99-3203 RLH:KMF:CHA," from Richard L. Huff, Co-Director, Office of Information and Privacy, U.S. Department of Justice, to Richard B. Risk, Jr.

k. Memorandum, subject: "Damage Issues in FTCA Cases," dated July 1992, from Jeffrey Axelrad, appended as item I.A.1, to "Damages Under the Federal Tort Claims Act," *Torts Branch Handbook*, U.S. Department of Justice, Civil Division.

l. Specimen "Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677," designated "Use only for litigation structured settlements," September 1998 edition.

m. Letter, dated December 7, 2000, from Richard B. Risk, Jr., to Jeffrey Axelrad, Torts Branch, Civil Division, U.S. Department of Justice.

n. Letter, dated January 25, 2001, from James M. Kovakas, Attorney in Charge, FOI/PA Office, Civil Division.

o. Letter, sent December 9, 2000, from Richard B. Risk, Jr., to the Honorable Janet Reno, Attorney General.

p. Letter, dated December 9, 2000, from Richard B. Risk, Jr., to Carolyn D. Talley (or Her Successor), Assistant General Counsel/Chief Claims Adjudication, General Accounting Office.

q. Letter, dated December 29, 2000, from Carolyn D. Talley, Senior Attorney, Financial Management Service, U.S. Department of the Treasury, to Richard B. Risk, Jr.

r. Letter, dated January 5, 2001, from Richard B. Risk, Jr., to Carolyn D. Talley, Senior Attorney, Financial Management Service, U.S. Department of the Treasury.

s. Letter, dated February 13, 2001, from Marty Weber, Disclosure Officer, Financial Management Service, U.S. Department of the Treasury.

I am a structured settlement broker and consultant, accredited as a Certified Structured Settlement Consultant (CSSC) by the National Structured Settlements Trade Association (NSSTA), of which I am a "Professional Member," in conjunction with the University of Notre Dame. Additionally, I am editor and publisher of the nationally distributed quarterly newsletter, *Structured Settlements*™, which I have distributed for several years to key members of the Torts Branch. I am affected adversely by the policies and standard practices of the Torts Branch, which also impact the operations of the United States Attorneys and their staffs, as these policies and practices impede my ability to earn a living. I have already suffered irreparable economic injury as a result of the illegal conduct of the U.S. Department of Justice. My clients are namely trial attorneys who represent physically injured victims of tortfeasors, sometimes in cases involving the United States of America as the defendant. Their clients, in turn, when the United States of America is the defendant under the Federal Tort Claims Act, are also adversely affected by illegal conduct of the Torts Branch because they are being denied the benefits intended by Congress to which they are entitled.

I am presenting justiciable issues involving case and controversy under 5 U.S.C. § 702, which states in pertinent part: "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Also, see generally *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Both the physical injury victims and I have standing to bring action against the United States, as we have suffered actual injury; our interests fall within the zone of interests protected by the statutes and constitutional provisions that I will identify; our legal interests stem from the invasion of rights arising out of contract, property, tort or statute; we clearly suffered economic injury as a result of the government's action; our financial injuries cause us to be the appropriate persons to vindicate the public interest under the "zone of interests" test; and there is no evidence that Congress intended to preclude judicial review under these facts.

SPECIFIC COMPLAINTS

A. The Department of Justice clearly exceeds its authority delegated by Congress by denying physical injury victims their right to a tax subsidy granted by Congress and codified at 26 U.S.C. § 104(a)(2), also violating the doctrine of separation of powers by creating public social policy that Congress never intended to be within the authority of the U.S. Department of Justice, which is clearly a legislative function.

The Axelrad memorandum of May 10, 2000 (Reference a), at page 8, under paragraph I.C., "Tax Considerations," says:

> An important consideration for any settling plaintiff is the tax consequences of a lump-sum settlement versus a structured settlement. Although lump-sum tort settlements or judgment payments are not income and not subject to income tax, interest or other investment earnings derived from a lump-sum settlement fund are subject to normal tax consequences. Annuity payments and income earned in reversionary trusts are exempt from tax liability[1] so long as there is neither constructive receipt of the purchase cost nor ownership vested in the annuitant. 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.

In a footnote, the Axelrad memorandum tells the recipients—those who handle Federal Tort Claim Act negotiations on behalf of the United States—"This is especially important since tax liabilities affect the Treasury just as do FTCA settlements and judgments." The Axelrad memorandum, at page 9, paragraph I.D.3, further instructs those who handle FTCA claim negotiations:

[1] Interest and investment earnings as internal cash build-up of annuities issued by life insurance companies ultimately is paid income tax-free to physical injury victims, if the annuities are the funding asset for periodic payments, under the authority of 26 U.S.C. § 104(a)(2). We are not familiar with any authority, and none is cited in the May 10, 2000, Axelrad memorandum, to exempt earnings by reversionary trusts from income taxation.

> Unless the parties specifically negotiate a structured settlement, the settlement is presumed to be for cash only. Government counsel should not agree after the fact to structure a settlement that was based upon a cash only payment or authorization to settle for cash. The Attorney General or her designee almost always specifies that settlement authority is conditioned upon a cash settlement or a structured settlement. Accordingly, government counsel handling the settlement is without authority to change the terms of the settlement after the Attorney General or her designee has acted upon the request for settlement authority.

Congress intended through the Internal Revenue Code to subsidize victims in tort claims—without specifying whether they are against a private defendant or against the government—by excluding from gross income the amount of damages (except punitive) in a case involving personal physical injury or physical sickness, codified at 26 U.S.C. § 104(a)(2), as an incentive for that individual or his or her guardian to elect guaranteed future periodic payments rather than a lump sum, which might be dissipated causing the injury victim ultimately to become a ward of society. The term *subsidy* was used in the following excerpt from the Joint Committee on Taxation, *Tax Treatment of Structured Settlement Arrangements*, March 16, 1999:

> [I]t can be argued that the choice of the lump sum settlement may create an externality, that is, a cost to taxpayers at large, not borne by the individual who chooses the lump sum settlement. This externality could arise as follows. The amount of damages in a case involving personal physical injuries or physical sickness may be based on the lifetime medical needs of the recipient. 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. Under the structured settlement arrangement, by contrast to the lump sum, it is argued that because the amount and period of the payments are fixed at the time of the settlement, the payments are more likely to be available in the future to cover anticipated medical expenses. [JCX-15-99, III.]

Unquestionably, Congress intended that the tax benefits under section 104(a)(2) of the Code should inure to the injury victim, not to be used by the defendant as a bargaining lever. A structured settlement is a special gift from Congress to injury victims, not to insurance companies in private tort claims or to the government in federal tort claims. The Department of Justice is acting *ultra vires*—without authority—by claiming that the government has some right or expectation to offset the congressionally intended "subsidy" from income exclusion by reducing the damage amount it was otherwise prepared to pay as a lump-sum. The Department of Justice, by attempting to balance the right of the claimant to being made whole through adequate compensatory damages and the impact that tax-free internal growth of an annuity may have on the Treasury, is engaged in a function that is uniquely a legislative one. The Department of Justice has not been authorized to structure its decision making in a "cost-benefit" model and, in fact has not been given any legislative guidelines at all for determining how the competing concerns of victim indemnification for tort actions by government employees and economic cost are to be weighed. To the extent that the U.S. Department of Justice has built a regulatory scheme on its own

conclusions about the appropriate balance of tradeoffs between indemnification and overall cost to the Treasury, the U.S. Department of Justice is acting solely on its own ideas of sound public policy and, therefore, is operating outside of its proper sphere of authority. In adopting and promulgating the rules to be followed by its FTCA staff, by U.S. Attorneys throughout the country, and by counsels of other agencies to whom FTCA settlement authority has been delegated, the U.S. Department of Justice did not merely fill in the details of broad legislation, such as the Federal Tort Claims Act and other authorizing statutes, describing the overall policies to be implemented. Instead, it created totally its own comprehensive set of rules without benefit of legislative guidance. The U.S. Department of Justice, in promulgating its rules denying a subsidy to injury victims, through exclusion of income from taxation, has transgressed the line that separates administrative rule making from legislating and thereby has exceeded its statutory powers. Consequently, the policy and practice must be abandoned.

B. The Department of Justice clearly exceeds the limits of its authority delegated by Congress by requiring the creation of irrevocable reversionary trusts, such as medical reversionary trusts and non-medical reversionary trusts, and the denial of a physical injury victim's rights to establish supplemental needs trusts for disability under the provisions of 42 U.S.C. § 1396p(d)(4)(A).

The Axelrad memorandum (Reference a) of May 10, 2000, at pages 2-4, under paragraph I.B.1, "Irrevocable Reversionary Trust," promulgates rules applicable to FTCA staff members, U.S. Attorney offices throughout the country, and counsels to other agencies delegated to settle FTCA claims, pertaining to: a.) "Reversionary Medical Trusts," b.) "Special Needs Trusts," and c.) "New Model Reversionary Trust."

Regarding reversionary medical trusts, the Axelrad memorandum states:

> The underlying justification and reasons for using a reversionary trust are basically two-fold. First, in cases with uncertain life expectancy or medical expenses, a trust provides an essential, guaranteed fund of money for the payment of enumerated future medical costs and expenses, while at the same time avoiding a "windfall" to the estate of the beneficiary. In addition, the trust minimizes the risk of dissipation of settlement proceeds, particularly, for example, in the case of severely brain-damaged parties.
>
> Second, a reversionary trust is financially beneficial to the government. In many cases, the cost to the government may be less than a lump-sum cash payment for significant future medical costs and expenses which may or may not be incurred depending on the claimant's survival. In addition, the government retains a reversionary interest in the corpus and unused accumulated earnings.
>
> Axelrad memorandum (Reference a), paragraph I.B.1.a., page 2.

Regarding special needs trusts, the Axelrad memorandum states:

> Recently, a number of plaintiffs' attorneys have requested that our model trust agreement be revised to assure that trust assets not be deemed available to the beneficiary under the Social Security rules and regulations. The requested modifications are apparently designed to make our model qualify as a "special needs" or "supplemental needs" trust under the Omnibus Budget Reconciliation Act of 1993.[2] An essential requirement of the Act is that the special needs trust preserves the right of [M]edicare or [M]edicaid to have

[2] The supplemental need trust to which the memorandum refers is codified at 42 U.S.C. § 1396p(d)(4)(A).

> a reversionary interest in the trust up to the value of its lien for payments made to or on behalf of the beneficiary.[3] Generally, the model reversionary trust should not be modified to make it qualify as a special needs trust; while the beneficiary's right to reimbursement from the trust might thereby limit his or her right to reimbursement from other sources, the economic incidence of the benefits is thereby recognized fairly and other governmental programs are not tapped unnecessarily.
>
> Axelrad memorandum (Reference a), paragraph I.B.1.b., page 3.

The Axelrad memorandum does not elaborate regarding new model reversionary trusts, except to state that the allowable list of stated benefits must be negotiated by the parties.

The Federal Tort Claims Act, at section 2672, clearly intends that "any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud." The creation of a trust with a reversionary interest to the United States, whether for medical payments or otherwise, is not "final and conclusive" within the meaning of this statute. There is no authority granted by Congress to the U.S. Department of Justice, express or implied, that intends for the U.S. Department of Justice to remain involved intrusively in the lives of physically injured victims of government employee or agent tortfeasors. Additionally, every claim under the Federal Tort Claims Act that is submitted to the Treasury be funded must be certified as to its finality. [28 U.S.C. § 2414.]

In the private sector, if a defendant or its liability insurer creates for itself a reversionary interest in a trust, it may lose the ability to write off the amount it pays to fund the trust for there being no economic performance. For that and other reasons, including the lack of finality, parties in private civil physical injury litigation rarely agree to reversionary interests in settlements. The U.S. Department of Justice must presume that, because there are no tax consequences to the government as settlor, the government is entitled to some special privilege to reversionary interest. There is no such privilege in the law.

The U.S. Department of Justice seeks to avoid a "windfall" to the estate of the decedent when funds intended for lifetime medical care of a severely injured victim are no longer needed. The memorandum by Jeffrey Axelrad (Reference k), dated July 1992, "Damage Issues in FTCA Cases," discusses the need to avoid payment of "excessive awards." The memorandum discusses punitive damages, collateral source rule issues, damage caps and costs. But, the memorandum cites no statutory authority or controlling case law that even suggests that the U.S. Department of Justice has been delegated the right to disregard the "final and conclusive" language in the FTCA and impose a reversionary right of the government to money set aside for medical care or other benefits upon the death of the injury victim. While there is a need for stewards of the government's resources to protect the Treasury from having to make damage payments that are unjustified in size, there is no authority to give then take back. If a victim of government employee negligence dies prematurely due to the injuries that gave rise to the tort claim, it is fully justified that payments set aside for medical care should be converted to damages for wrongful death. It is less than making the victim whole to take back money intended for long-term medical care when the injury victim dies prematurely as a result of injuries resulting from government negligence. It should not matter that all past, present and future claims are settled. The claimant's estate has a right to be compensated for the wrongful death of the claimant, and such compensation should be

[3] The trust provides a "safe haven" for funds that would otherwise be considered in a "means test" to determine Medicaid and Supplemental Security Income eligibility. It does not affect Medicare eligibility. The trust provides a reversionary interest usually to the state agency administering Medicaid funds. There is no reversionary interest to the Social Security Administration, which administers SSI benefits.

provided for under the terms of the compromise settlement. In no way does it constitute double payment or other excessive payment if money once intended to pay for future medical care is now considered to compensate the heirs of the decedent if the government was responsible for the victim's early demise. It is not a "windfall" to the heirs to be compensated for the death of a loved one due to tortious behavior.

There may be some justification to the U.S. Department of Justice's position that a victim should not receive Medicaid payments under Title 42, then be compensated again by damage payments under Title 28 for future economic losses due to anticipated medical needs. The case law in the July 1992 Axelrad memorandum (Reference k) seems to support the contention that collateral source rules may be challenged under certain circumstances. However, there is no justification or authority for the denial of a person's right to establish a supplemental needs trust to preserve Medicaid benefits. An appropriate way to avoid double compensation would be for the government FTCA negotiators to assist the victim in obtaining Medicaid benefits, then take them into consideration when arriving at an appropriate damage payment figure under the FTCA.

Once again, the U.S. Department of Justice is acting *ultra vires* by engaging in a territory that is exclusively reserved to the legislative branch. It has created its own version of a public policy by applying "cost-benefit" analysis arriving at a good faith assessment of damages. As stated earlier, the U.S. Department of Justice has not been given any legislative guidelines at all for determining how the competing concerns of victim indemnification for tort actions by government employees and economic cost are to be weighed. Absent such delegation, there is no authority.

C. 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.

The Axelrad memorandum (Reference a) of May 10, 2000, at page 6-7, paragraph I.B.3.b.i., "Annuity Brokers," states:

> Few, in any, insurance carriers will sell a settlement annuity directly to either the annuitant or defendant. The industry standard of practice requires the use of a licensed broker or insurance agent. As a practical matter, although the agent or broker's fee or commission received from the insurance carrier is ultimately passed on to the purchaser and is invariably reflected in the premium cost quotation..., an effective agent can provide valuable services and advice. In the case of a potential substandard life annuity, the agent should be familiar with the variable underwriting practices of the insurance companies and the proclivities, biases, or other tendencies relative to mortality. Additionally, annuity rates may vary from week-to-week or month-to-month depending on interest and investment return rates. Finally, most annuity brokers will, without charge, attend and participate in negotiation sessions, thereby ensuring greater flexibility and immediacy in the calculation of changes in the structured settlement package and the availability of reassuring information in response to questions or doubts expressed by opposing counsel. You should not agree to defray any of the broker's costs and expenses since these costs of doing business are recouped from annuity settlements that are consummated.
>
> The selection of a broker is left to the discretion of the government attorney handling the settlement. The Torts Branch does not keep a list of brokers and we do not approve brokers. The Department of Justice's policy regarding the selection of brokers is attached [as Reference b to this letter].

Clearly, the U.S. Department of Justice does not classify the services of the broker as being "of a technical or professional nature" that would warrant an exception to the statutory advertising requirement. There is an issue, however, as to whether the broker should be selected to provide an annuity at the lowest cost to the government or to provide "valuable services and advice," as described above, or both. The Axelrad memorandum (Reference a) makes it clear that the annuity sale is the principal transaction, since that is the basis of the payment to the broker. ("You should not agree to defray any of the broker's costs and expenses since these costs of doing business are recouped from annuity settlements that are consummated.") And, if that is the basis for engaging the broker, there is no justification for ignoring the statutory advertising requirement.

As a practical matter, it is the broker who works with the injury victim to design an annuity to provide periodic payments that best suit the needs of the plaintiff, in terms of timing and amounts of payments, within the limits of how much the government is willing to spend on the periodic payments. Once the plaintiff's needs are determined, the approximate cost to provide the periodic payments is reflected in the cost of the annuity quotation based on the rates of the specific company quoted. The lowest available cost to provide the future benefits is determined only by producing an annuity quotation from every life insurance company that will issue such an annuity. The most practical way to achieve this is for a broker who has appointments from all or most major annuity issuing life insurance companies to sell their structured settlement annuity products to shop among these companies for the lowest price.

It is a fact that plaintiffs are more receptive to the structured settlement concept and its benefits if presented by an ally rather than an adversary. Often, it is the structured settlement broker who was engaged by the plaintiff's counsel on behalf of the client who is instrumental in convincing a plaintiff to accept a settlement offer less than the demand. Most demands are expressed in terms of cash, as are most negotiations conducted. It was a defense ploy in the early days of structured settlements in the private sector to deny to the plaintiff the knowledge of the cost of the proposed future payments and the life expectancy assumptions used in calculating the cost, telling the plaintiff that such knowledge would constitute constructive receipt of the amount used to fund the periodic payments and, thus, would result in the loss of the significant tax benefits from exclusion of the payments from gross income. (At least two private letter rulings, 83-33035 and 90-17011, confirm that knowledge of the cost or present value of the annuity does not cause the plaintiff to be in constructive receipt.) Despite these clarifications, similar statements are still being made today by defense brokers, including those selected illegally by the Department of Justice. An impartial and competent investigation will confirm this.

Another ploy devised by defense brokers in the private sector is to tell the plaintiff that engaging a broker by the plaintiff to serve as the plaintiff's agent constitutes constructive receipt. I believe it can be documented that such misrepresentations are being made by brokers illegally selected by the U.S. Department of Justice. A broker is at all times primarily an agent for the life insurance companies represented. A broker probably can also be a dual agent for either the defendant (and/or its insurer) or the plaintiff. But, as long as that agent does not have the ability to negotiate the funds made available to purchase the annuity, there is no constructive receipt within the meaning of Treasury Regulations, at 26 C.F.R. § 1.451-2(a), which say:

> Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received in the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

The U.S. Department of Justice has instigated the procedure of paying the money to the broker, who in turn pays it to the life insurance company or companies from whom the annuity or annuities are purchased. In such case, there would be a risk of causing constructive receipt for the plaintiff if the broker were engaged by the plaintiff. I believe the entire settlement amount is routinely paid to the structured settlement broker by the U.S. Treasury, including the amount to be paid as a cash lump sum at the time of settlement as well as the amount intended to fund the periodic payments. However, the standard of the industry is for lump sum cash payments to be made to the plaintiff and plaintiff's attorney. Payments to fund periodic payments are made directly to the annuity issuer directly or, in cases where the periodic payment liability is to be assumed by an assignee-obligor, payments are made to the assignee-obligor as consideration for assuming the periodic payment liability. The broker is never paid either of these amounts directly when the industry standard is followed. The assignee-obligor actually purchases the annuity. To cause the settlement funds to be paid directly to the structured settlement broker, which seems to be the practice of the U.S. Department of Justice, is not only unnecessary but it is a practice that easily could result in fraud against the United States of America.

Annuity costs are subject to change on any given day, according to daily market conditions that affect the cost of underlying investments purchased by the life insurance company asset investment departments. If an annuity is quoted using a life insurance company's book rates, that quote is fairly stable and might be valid for several days after an announced increase in book rates. This gives the

broker the opportunity to "lock in" a quote based on the lower rates before the new rates take effect. Conversely, if a rate decrease is announced, the broker can take advantage of a lower cost for the benefits promised to the plaintiff. If a settlement is based on a book rate, the U.S. Department of Justice requests that payment be made to the broker to include the cost of the annuity reflected in the quote. If the annuity company announces a rate decrease after the payment request has been initiated to the U.S. Treasury, the broker has the opportunity to do nothing. That is, the broker simply waits for the payment from the U.S. Treasury, a process that often takes several weeks, with no way to predict when the funds actually will be received by the broker. If rates drop a second time, the broker can continue to do nothing. If rates are announced to increase, the broker can "lock in" at the lower rate. Once the funds are received by the broker, if the annuity cost is less than the amount quoted to the U.S. Department of Justice at the time the settlement documents were executed, the broker can "lock in" the lower rates with the annuity issuer and send payment for an amount less than quoted to the U.S. Department of Justice. The broker is in a position to pocket the difference. In the private sector, such fluctuations in cost may go to the benefit of the liability insurer, if the transaction is handled by a defense broker, or to the injury victim in the form of a cost savings or increased periodic payments, if the transaction is handled by a plaintiff's broker.

To disguise the fact that a rate decrease has reduced the cost of the annuity to fund the promised periodic payments, the broker engaged by the U.S. Department of Justice might send in the amount reflected on the quote prepared at the time of the settlement. The broker's check to the annuity issuer, thus, will match the amount reflected in the quote. However, because the payment to the annuity issuer comes from the broker and not the U.S. Treasury, any refund for overpayment is sent to the broker. This type of transaction happens in the private sector and very well could be happening in transactions involving the Federal Tort Claims Act and the U.S. Department of Justice. Whether the broker benefits from the rate reduction by paying less to the annuity issuer or by receiving a refund for overpayment, the broker has defrauded the United States of America, if such practice exists. The point is that the government has created a bad procedure of paying the broker as a "middle man" rather than to pay the annuity issuer directly, putting the government at risk to fraud and providing no checks and balances to detect it.

If the government paid the annuity premium directly to the annuity issuer, such opportunities for dishonesty would be eliminated. But, I contend that there are several more compelling reasons for the government to get out of the business of purchasing annuities altogether, leaving that to someone else. Therefore, all of this discussion is academic, which will be explained below in detail. The U.S. Department of Justice has demonstrated that it is incapable and unwilling to establish and follow a system of fairness, in compliance with the procurement statutes, for the selection of structured settlement brokers. More importantly, it violates the constitutional prohibition against obligating the United States beyond the current fiscal year. The only method available to it that avoids this problem and still provides the opportunity for an injury victim to take advantage of the generous tax "subsidy" intended by Congress through 26 U.S.C. § 104(a)(2).

D. The Department of Justice is engaged in a cover-up of unjust favoritism, collusion and fraud in the letting of contracts for the purchase supplies by misapplication of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), by illegally withholding the names of those who benefited by their relationship with key individuals within the Department of Justice.

My original request for such information, dated December 7, 1998, was met with noncompliance with the statutory deadlines for response and, in general, lack of response mandated by the Freedom of Information Act. My frustration was expressed to Michael Bromwich, the Inspector General for the U.S.

Department of Justice, in Reference d. With the able assistance of United States Senator Don Nickles, eventually I was able to obtain a document that had been prepared by none other than Mr. Bromwich in late 1994 (References f and g) detailing strong evidence of cronyism that existed then in the U.S. Department of Justice in the selection of brokers to handle the annuity sales and, thus, sometimes receive very large commissions. The investigation by the Inspector General had been prompted by an earlier request from Senator Nickles to look into "the process Department of Justice (DOJ) attorneys follow in selecting annuity brokers for structured settlements." The result was not entirely responsive, since it was based on a sample rather than on a complete record of all such transactions. The U.S. Department of Justice told the senator "certain information, such as the names of the individual brokers, was not available from the Civil Division's case management system," and claimed that a full response would have required "extensive interviews" that "would not be an effective use of OIG resources." Instead, the Inspector General took a sample of cases and based his findings on that sample.

Actually, the sample may have been prepared for the late U.S. Representative Mike Synar and originally provided to him on November 10, 1994, although it is not certain whether information provided to Representative Synar was the same information provided to Senator Nickles. Both requests had come in about the same time and likely were prompted by the same constituent. It is also not clear whether Senator Nickles received a redacted copy of the information from the Inspector General, which is suggested by the author of Reference j. I note that, while both of these members of Congress were from Oklahoma, I did not initiate the 1994 study nor was I aware of its existence at the time.

I submit that, even in late 1994 and early 1995 when the report was released, the U.S. Department of Justice was engaging in a cover-up of its blatant cronyism practice by feigning lack of information to be able to provide names of brokers who received these favors, for all cases settled with an annuity or Treasury obligation in 1992 through 1994, and covering up the full extent to which these favors were being granted. The amount of money spent on the purchase of annuities for the 25 cases in the sample, $13,194,752, was only a fraction of what was spent over the period of three years, 1992 through 1994, specified in Senator Nickles' request. The U.S. Department of Justice admits that 217 settlements under the Federal Tort Claims Act during that period involved either an annuity or a U.S. Treasury obligation, all of which would have been handled by brokers. This is nearly nine times as many cases as were in the sample. The total dollar amount was not provided to Senator Nickles, although it certainly was available within the U.S. Department of Justice's case management system.

The report on the sample showed that 42.7 percent of the total dollar value of annuities in the sample went to the Ringler Associates, Inc., office located in Rockville, Maryland, and 24.7 percent went to JMW Settlements, Inc., which has its main office in Washington, D.C. (a fact not indicated on the chart). This represents 67.4 percent of the total dollar value of annuities in the sample, or $8,892,606. Universally, the commission rate for a structured settlement annuity is four percent of the annuity's premium, which is the cost. That figures to be a total of $355,704.24 paid to these two brokerages, based on the sample alone. If we extrapolate using number of cases, 25 out of 217, since we do not have the total dollar amount spent on annuities during the period requested by Senator Nickles for the period in question, these two brokerages likely received something on the order of $3,087,512.80 in gross commissions. All of this business was awarded by cronyism, in violation of 41 U.S.C. § 5, which requires invitations to bid and that such invitations be advertised.

Incredibly, the Inspector General said in his report, "[we] found no direct evidence to support the allegations that members of the FTCA staff in the Civil Division's Torts Branch deliberately funneled structured settlement business to favored brokers." [Reference g at page 6.] After a full investigation that showed more than two-thirds of the annuity dollars were going to two brokerage offices in the Capitol

area, and that former employees of the Civil Division staff were brokers in both of these offices, the officer of the U.S. Department of Justice charged with such internal investigations says there was no structured settlement business deliberately funneled to favored brokers. A reasonable person will find this conclusion to be totally without even the least grain of credibility.

The copy of the Inspector General's report sent to me (through Senator Nickles) was a redacted version, excising the names of the individual brokers. Mr. Bromwich explained in the transmittal letter (Reference e), "[a]fter consultation with other Departmental components, it has been determined that certain portions of such document have been excised inasmuch as the information could reasonably be expected to constitute an unwarranted invasion of personal privacy." He cited 5 U.S.C. § 552(b)(6) as authority for withholding the names of the brokers. What really happened, as his own statement suggests, is that the Inspector General collaborated with, aided and abetted the Torts Branch in a cover-up of illegal activity, inappropriately applying a provision of the Freedom of Information Act to deny the requested information. I appealed the denial of the requested information by the Inspector General to the Office of Information and Privacy, which affirmed the initial action, saying "[c]ertain information was properly withheld from you pursuant to 5 U.S.C. § 552(b)(6), which pertains to material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. This material is not appropriate for discretionary release." [Reference j.] The author of that letter, Richard L. Huff, Co-Director, Office of Information and Privacy, U.S. Department of Justice, by that action, also joined the cover-up of illegal activity by the Torts Branch.

The exception referred to by those denying my Freedom of Information Act request reads at 5 U.S.C. 552(b) "This section does not apply to matters that are – (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Under the principle of *ejusdem generis,* when a general term in a statute follows specific ones, the general term should be understood as a reference to subjects akin to the ones specifically enumerated. [*Brogan v. U.S.*, 522 U.S. 398 (1998).] Applying this rule of construction, the term "similar files" means and is limited to subjects akin to "personnel and medical files." Clearly, the statute did not mean to provide government bureaucrats the authority to hide the names of individuals who benefited from cronyism of the U.S. Department of Justice Torts Branch staff members, in violation of the applicable procurement statute, 41 U.S.C. § 5. These withheld names simply are not in the same category of personnel and medical records of individuals. It is not a violation of privacy to reveal that someone was previously employed in the Civil Division of the U.S. Department of Justice if that fact is relevant to providing an explanation for cronyism. It is in the public interest. It produces an absurd result to apply the "personnel and medical files" exception to protect the names of people who received hundreds of thousands of dollars—perhaps millions of dollars—as a result of illegal favoritism from Torts Branch employees.

Additionally, any privilege to withhold information is waived once it has been released. The Inspector General indicates in Reference g at page 3 that names of brokers who handled structured settlements in cases completed by four United States Attorneys' offices during the immediate previous three years, in a survey also conducted by the Inspector General, were released in the "response" to Representative Synar. It would be difficult to conclude whether the "response" to Representative Synar involved the same representative sample forming the report sent to Senator Nickles. In any case, the U.S. Department of Justice did not claim the privacy exemption in releasing the requested information to a member of Congress on behalf of a constituent. Yet, Mr. Huff in Reference j denies that the names of brokers were ever released by the Office of Inspector General "to any other individual in any form."

The cover-up continues. My December 7, 2000, Freedom of Information Act request to the Torts Branch (Reference m) received a response dated January 25, 2001 (Reference n), which claims that fulfillment

of my request is impossible because it is not readily retrievable within the Case File System of Records. I view this response as a bureaucratic tactic to deny a legitimate request for information that the bureaucracy does not want released. In addition, the response was untimely as it failed to comply with the response period allowed under the Freedom of Information Act at 26 U.S.C. § 552(a)(6)(A)(ii). My Freedom of Information Act request submitted on December 9, 2000 (Reference o), to then-Attorney General Janet Reno has not yet received even an interim reply. A separate Freedom of Information Act request submitted to the U.S. Department of the Treasury on December 9, 2000 (Reference p), received an initial response (Reference q) likely intended to discourage me, suggesting that the request will involve a major research effort and that my costs will be significant. The response fails to comply with Treasury's own internal guidelines, its *Freedom of Information Act Handbook*, which I cited in my January 5, 2001, reply (Reference r). I am encouraged by the February 13, 2001, interim reply (Reference s), which at least assigns an identification number to my request (FOIA 01-01-02).

In fairness to the Inspector General, he did concede in his January 17, 1995, transmittal memo (Reference f): "We are, however, concerned that the substantial amount of structured settlement business provided to two particular brokers could give the appearance of favoritism. Therefore, the report suggests issuing a Department-wide policy on the selection of annuity brokers." The Inspector General noted in his report (Reference g at page 2): "We found no Department-wide policies addressing the selection of brokers for structured settlements." He noted that "[s]pecific guidance on broker selection was limited to a July 16, 1993, memorandum from a Torts Branch Director to reviewers of FTCA settlements," which is appended to this document as Reference c. In his conclusion, the Inspector General said:

> As previously noted, DOJ has no Department-wide policy or guidelines dealing with the selection of annuity brokers. Furthermore, the selection process is not guided by specific rules and regulations like those in the Federal procurement process, which are designed to promote open competition and fairness. In our judgment, issuing Department-wide policy similar to that of the Civil Division's FTCA staff [Reference c] would help to ensure that all Department attorneys involved in structured settlements are mindful of the need to avoid the appearance of preferential treatment when selecting annuity brokers.
>
> We suggest that the Department use the FTCA staff's policy as a framework for developing and issuing Department-wide policy on the selection of annuity brokers. We also suggest that the Department-wide policy assign responsibility for monitoring the broker selection process to appropriate management officials. [Reference g at page 6.]

The result of this recommendation evidently was the June 30, 1997, memorandum (Reference b), which appears to be a remake of the 1993 FTCA staff policy memorandum (Reference c), addressed to a wider distribution. It is worthy of note that it took nearly two and a half years to remake the 1993 memorandum into a Department-wide memorandum, indicating an obvious lack of response to the Inspector General's finding and possible lack of agreement with its substance. And, we could find no evidence in the Congressional Record that this Department-wide substantive rule, which violates 41 U.S.C. § 5 on its face and severely impacts the public, was ever submitted to the rule-making procedures mandated in 5 U.S.C. § 553, requiring notice and opportunity for public comment.

It is also a curiosity as to why the Inspector General made a comparison to "specific rules and regulations like those in the Federal procurement process, which are designed to promote open competition and fairness," but failed to observe that the selection process for structured settlement brokers clearly comes under the very procurement statute (41 U.S.C. § 5) to which he referred.

The June 30, 1997, remake (Reference b) of the 1993 memorandum failed to implement the Inspector General's recommendation that responsibility for monitoring the broker selection process be assigned to "appropriate management officials." [Reference g at page 6.] There is no monitoring activity mentioned, not even a point of contact within the Civil Division to serve as a focal point for questions from the FTCA staff members and United States Attorney offices throughout the country. Obviously, there was only lip service being given to the Inspector General's recommendations and certainly no intention to enforce a policy to avoid favoritism. The June 30, 1997, memorandum was signed by John C. Dwyer, Acting Associate Attorney General, addressed to "Assistant Attorneys General, United States Attorneys," and said in its entirety:

> The Inspector General has reviewed the process Department of Justice attorneys follow in selecting annuity brokers for structured settlements. Following his review, the Inspector General recommended that policy guidance be disseminated more widely within the Department. The guidance below was developed through collaboration between the Civil Division and the Attorney General's Advisory Committee of U.S. Attorneys. This guidance does not, of course, change the cardinal rule with regard to the selection of brokers. The cardinal rule has been—and continues to be—that the Department should avoid favoritism in selection.
>
> The following rules should be followed:
> - 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. While brokers who have performed well in the past obviously will be appropriately considered for repeated use, such use <u>cannot</u> [emphasis in original] be to the exclusion of new brokers.
> - It is logical and expected that attorneys will look to supervisory attorneys for assistance in selection of a broker (and, of course, for assistance and review during other aspects of the process of consummating a structured settlement); however, the decision as to selection of a broker should be finally made by the attorney negotiating the settlement.
> - When a structured settlement in a Federal Tort Claims Act (FTCA) case will include a reversionary interest in favor of the United States, the Torts Branch's FTCA Staff must be consulted to maintain appropriate records and foster consistencies. The Torts Branch is available to be consulted whenever a structured settlement is contemplated and consultation is encouraged. The Torts Branch's Damages Handbook also provides useful guidance on structured settlements.
> - Finally, it is important that each office maintains the appearance as well as the reality of fairness in its use of brokers. Therefore, any activity tending toward an appearance of favoritism, any action contrary to any rules in this memorandum, or any activity incongruent with the spirit of this memorandum must be scrupulously avoided.

This memorandum is nothing but a sham. It provides no guidance and allows selection at will. It encourages, almost mandates, that the Torts Branch be consulted in the selection of a broker, which is a primary reason the two Beltway brokerages seem to get all the plum cases. This memorandum is intended not to be enforced and certainly intended not to disturb the cronyism that the Inspector General uncovered but failed to declare as such.

I had been called into the case of *Schaefbauer v. United States*, U.S. District Court for the Western District of Oklahoma, Case No. CIV 98-440, by an attorney for the plaintiff to participate in a settlement conference held in Oklahoma City on December 2, 1998, in the offices of the plaintiff's counsel. Representing the United States was Robert A. Bradford, an Assistant United States Attorney out of the Western District for Oklahoma. An employee of the U.S. Postal Service, N. Duane Lacy, was also present inasmuch as the physical injury to the plaintiff allegedly arose out of negligence in an accident involving the driver of a U.S. Postal Service vehicle. I had done a considerable amount of preparation for that settlement conference, including submitting the victim's medical records to several life insurance companies for the assignment of a rated age for an impaired life expectancy, which would result in a larger life-contingent periodic payments to the victim that would be made for the same premium amount to someone with a normal life expectancy. I prepared several annuity illustrations for the plaintiff's counsel, which were to be shared with the representatives of the Defendant United States during the conference, showing benefits and their cost as a means of helping to bring the parties into agreement. It was the intent of the plaintiff's counsel who invited me that I would be the broker of record for any annuity transaction that would result from any settlement involving periodic payments. At the outset of the settlement conference, the plaintiff's counsel introduced me as such. Mr. Bradford responded immediately that the selection of a structured settlement broker was the prerogative of the United States of America and that such decision in this case would be made "inside the Beltway," referring of course to the highway that circumscribes Washington, D.C. Later in the evening, he again used the term "inside the Beltway" in remarks directed to me.

On December 4, 1998, I spoke by telephone on two occasions to Roger D. Einerson, Assistant Director, Torts Branch, Civil Division, U.S. Department of Justice, complaining that I was being excluded from the Schaefbauer case. Between the two conversations, he spoke by telephone with Mr. Bradford to get details of what had occurred on December 2, then responded to me. Mr. Einerson told me that the selection of a structured settlement broker by U.S. Department of Justice attorneys was "kind of like selecting a barber—you find one you like and you tend to stick with him." I could hardly believe this statement, as it confirmed there were no restrictions on the selection of brokers or using one repeatedly, and certainly there was opportunity for favoritism in the selection. Mr. Einerson denied being involved in the Schaefbauer case and said he was simply trying to answer my questions about the selection process. He then said he would send me a copy of the memorandum (Reference b) setting forth the guidelines on the selection of brokers, which he did. What Mr. Einerson had told me was in direct conflict with the guidance contained in the memorandum. I handled two U.S. government structured settlements, one in 1994 and the other in 1995, both involving the Eastern District of Oklahoma U.S. Attorney's office. The first case settled for under $1 million, which meant the settlement authority was local. The second case (the "Consolidated Humvee" case) exceeded $1 million and involved three plaintiffs. Those were the only two cases I can recall ever doing that involved the U.S. Department of Justice. When I mentioned that fact to Mr. Einerson in 1999, he told me that I would not have been selected to handle the Consolidated Humvee case except that I was already involved at the invitation of an attorney with the Eastern District of Oklahoma U.S. Attorney's office before his office had an opportunity to become involved in the broker selections. Again, that statement conflicts directly with the policy supposedly in force at the time. (Reference c.)

Mr. Einerson is the number two person in charge of the Torts Branch and is one of two individuals named in the July 16, 1993, memorandum to reviewers (Reference c) as someone to provide assistance to federal attorneys in the selection of brokers (the other being an individual named Larry Klinger). At that time, according to Jeffrey Axelrad, the memo's author, "The usual procedure is for the broker or its representative(s) to meet with Roger Einerson and Larry Klinger." The memorandum dated May 10, 2000, by Mr. Axelrad (Reference k at page 10) identifies Mr. Einerson singularly has having "acquired

considerable expertise and experience in dealing with structured settlements," designating him as "a point of contact on structured settlement matters." If Mr. Einerson's explanation to me reflects his attitude toward the selection of brokers, it is highly inappropriate and flies in the face of the U.S. Department of Justice's official policy recited in Reference b. As the number two officer in the branch that oversees the selection of structured settlement brokers and the branch's designated point of contact on structured settlement matters, it is clear that the Department's policy is not being enforced.

I subsequently made another trip to Oklahoma City and visited personally with Tom Majors, Chief, Civil Division, U.S. Attorney's Office, Western District of Oklahoma, about being the broker of record for *Schaefbauer*. He was very hospitable and introduced me to his staff attorneys (including Mr. Bradford), but confirmed that the selection would be made "inside the Beltway." I never heard from him again and was excluded from the case from that point on, except that I attempted to stay informed through the plaintiff's attorneys, whose hands were tied on the matter of selecting the broker. *Schaefbauer* was settled in May 1999, I believe, involving a structured settlement. The total settlement amount was already well into seven figures by the time I was shut out by the U.S. Department of Justice, and the amount spent on the annuity to fund the periodic payments was several million dollars, I believe. (I am attempting to confirm these figures through my Freedom of Information Act requests shown in References m through s.) I understand that the name of Michele M. Feldheim of the JMW Settlements, Inc., office in Washington, D.C., appeared on annuity quotes dated February 17, 1999, that were presented to Mr. Schaefbauer's representatives at a subsequent settlement conference by Mr. Bradford. Neither Ms. Feldheim nor Mr. Bradford were licensed at that time to transact insurance business in the State of Oklahoma, according to the Insurance Department's records, which is required by 36 Oklahoma Statutes § 105. (Mark S. Feldheim, also of the JMW Washington, D.C., office, was licensed at that time in Oklahoma. However, Mr. Feldheim's name was not on the quote nor did he make the presentation.) By decree of the U.S. Department of Justice, in violation of public policy against cronyism as promulgated in 41 U.S.C. § 5, I was excluded from this transaction and JMW was awarded the opportunity to receive the lucrative commission from the annuity sale. The very agency charged with enforcing the laws of the United States of America itself violated the law.

Currently, my partner and I are being excluded from another large physical injury settlement in Oklahoma under the Federal Tort Claims Act, in a case where I was invited by the plaintiff's counsel to serve as the structured settlement broker with the intention that I would be compensated by the annuity commission. Like *Schaefbauer*, this case will be well into seven figures. And, like *Schaefbauer*, the brokerage office anointed by the U.S. Department of Justice to receive the commission is JMW Settlements, Inc. Again, this selection is being done in violation of the procurement statute.

In both *Schaefbauer* and the present case, the U.S. Department of Justice has tortiously interfered with our business relationship with the plaintiffs and plaintiffs' attorneys, causing us great economic loss.

The Inspector General contacted the nine attorneys out of 25 cases in the sample who contacted the Federal Tort Claims Act staff to seek recommendations for annuity brokers. Out of the nine, apparently just two brokers were the choice of seven attorneys. The names in the report were excised, but it is highly suspected that one each was from the Ringler and JMW brokerage offices in the Capitol area. The Inspector General reported these seven attorneys "gave various reasons for selecting the two brokers including: (1) reports from other AUSAs or trial attorneys that these brokers provide excellent service; (2) knowledge that these brokers had handled cases similar to theirs; and (3) positive experiences working with another broker from the same firm." [Reference g at page 5.] Considering that these attorneys contacted by the Inspector General were part of an investigation over allegations of favoritism, the answers given obviously were orchestrated and designed to disguise the fact that

decisions are made "inside the Beltway" and that there are, in fact, favorites who get the business. No reasonable person who considers the numbers and other circumstances that point to cronyism will believe any other explanation. Mr. Einerson, in a telephone conversation with me on May 21, 1999, described the selection of brokers as a result of the brokers "marketing their services." That term has a nefarious connotation in the context of brokers who "market their services" to liability insurers in the private sector.

It is a common practice in the private sector for structured settlement brokers and the brokerage organizations to which the individual brokers belong to pay undisclosed rebates—kickbacks or bribes—to self-insured corporations that become defendants in physical injury tort litigation or to liability insurers, for the privilege of being designated as "approved brokers," eligible to be brought into settlement negotiations to present periodic payment proposals to the plaintiffs. If not as a result of a rebate arrangement, there exists almost always some form of *quid pro quo* between the broker and the defendant or liability insurer. Such arrangements are designed to prevent the plaintiff from engaging a broker who would work on behalf of the plaintiff and handle the periodic payment transaction, to be compensated from the commission on the annuity sale. Such arrangements are in restraint of trade and likely violate the antitrust statutes of the various states. Defense brokerages commonly refer to these arrangements as "marketing." A reasonable person will find it very supportable to believe that "marketing" to a brokerage organization that engages in *quid pro quo* arrangements with defendants in the private sector would have a meaning no different to that same brokerage when doing business with the government.

E. The Department of Justice is participates in common-law fraud, in collaboration with the structured settlement brokers it engages, by misrepresenting the value of its settlement offer in order to entice a physical injury victim to give up its property right of a tort claim against the United States of America.

The common-law definition of fraud, according to *Black's Law Dictionary*, 7th Edition, at 670, is: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." An impartial and competent investigation will show that U.S. Department of Justice employees, in collusion with the structured settlement brokers they select, regularly misrepresent to plaintiffs the true anticipated cost to the government of the periodic payments they offer during settlement negotiations. The cost of a specific set of periodic payments produced on an annuity software quoting system, using published book rates and assuming a normal life expectancy of the measuring life (the annuitant), is invariably higher that what the government will actually pay when daily rates, rated ages based on impaired life expectancy, and market competition among competitors is considered. If these factors are not presented to the plaintiff, and the plaintiff is misled as to the likely true cost of the future payments, the U.S. Department of Justice has perpetrated fraud on the plaintiff to induce the plaintiff to give up his or her right to the damages for the tort claim against the government. This practice is a carry-over from the common practices in the private sector, where it is also fraudulent.

F. The Department of Justice unduly exposes the United States Treasury to fraud by the structured settlement brokers it engages, by causing the brokers to serve as intermediaries in the purchasing of annuities from life insurance companies.

As explained at the end of Section C above, there is no check or balance in place that monitors the transaction between the broker and the life insurance company, specifically the cost of the annuity. This condition is caused by the practice of paying the entire settlement amount to the broker, who disburses both the cash portion paid to the plaintiff at the time of settlement as well as the amount paid as annuity

premium. (*See* Reference l at 2.) The industry standard is that the cost of the periodic payments is paid directly to the annuity issuer or, in the case of a qualified assignment of the future payment obligation, to the assignee-obligor.

G. The Department of Justice regularly and systematically violates the rights of the individual states, in violation of the McCarran-Ferguson Act, 15 U.S.C. § 1012, by transacting insurance business within these sovereign states without being appropriately licensed by those states.

Most states, including Oklahoma, have laws requiring anyone who transacts insurance business within that state to hold a valid and current license issued by that state for the line of insurance transacted. The Oklahoma Insurance Commissioner has determined that an annuity sale for the benefit of an injury victim who is an Oklahoma consumer, regardless of where the actual owner is domiciled or conducts its primary business, is considered an insurance transaction in Oklahoma for purposes of requiring that the person who handled the transaction be licensed in Oklahoma. Notwithstanding the special privileges granted to the U.S. Department of Justice under the Federal Tort Claims Act, there is no supremacy over the sovereign states under the McCarran-Ferguson Act, 15 U.S.C. § 1012, when it comes to regulating insurance business within the borders of the sovereign states. As discussed above in Section D above, neither Michele M. Feldheim nor Robert Bradford was licensed to transact insurance business in Oklahoma, which both did in the *Schaefbauer* case, at the time the business was transacted (which includes preliminary discussions in Oklahoma).

H. The Department of Justice is in clear violation of Article I, Section 9, Clause 7 of the U.S. Constitution by establishing periodic payment liabilities of the United States to injury victims that exceed current fiscal year appropriations by Congress.

The May 10, 2000, memorandum (Reference a), paragraph I.D.2., at page 9, states:

> A private defendant or its insurer usually "guarantees" periodic or other scheduled payments. There is no legal authority for such a guarantee on the part of the government, and statutory requirements mandate that settlements forwarded for payment certify the finality of the claim. See, 28 U.S.C. § 2414. The insurance industry and many litigants want to enter into "qualified assignments." The United States should not agree to a qualified assignment unless the assignment contract is modified to make clear that the government has no obligation to assign. However, we do not object to the insurance company assigning its obligations.

The U.S. Department of Justice is very confused as to the anatomy of a structured settlement transaction, as indicated by the above statement. A promise to make future payments that extends beyond the current year is an obligation on the part of the party that makes it. There are only two ways authorized under the Internal Revenue Code that a victim of a personal physical injury or physical sickness, or someone else who has a derivative claim that arises from the physical injury or physical sickness to another person, can receive damage payments (other than punitive) funded by an annuity that are excluded from taxable income, including the internal buildup of the annuity. First, if the defendant or insurer owns the annuity, all payments made to the claimant are excluded under 26 U.S.C. § 104(a)(2), whether paid at the time of settlement or in future periodic payments (including deferred lump sums). Prior to this being codified, the exclusion of payments from an annuity, including accumulated earnings, were exempt under Revenue Rulings 79-220 [1979-2 C.B. 74] and 79-313 [1979-2 C.B. 75]. Second, as long as the payments qualify for exclusion under 26 U.S.C. § 104(a)(2), the obligation may be assigned to a third party under the provisions of 26 U.S.C. § 130, called a "qualified assignment." In this arrangement, the

third party substitutes for the defendant or its insurer through a total novation. A novation substitutes a new party and discharges one of the original parties to a contract by agreement of all parties. [See *Restatement (Second) of Contracts* § 280.] In both arrangements, there must exist a future payment obligation.

This dilemma obviously is what creates a constitutional problem for the U.S. Department of Justice, because any admission that the government has assumed an obligation beyond the current fiscal year appropriation is in violation. To pretend, through some wishful thinking and a "blue smoke and mirrors" scheme, that no obligation exists on the part of the United States to make future payments to the plaintiff is nonsense. The arrangement invented for use by the Torts Branch does not cure the problem. The specimen Stipulation for Compromise Settlement and Release used for litigation structured settlements (Reference l) at page 3 says:

> The annuity contract(s) will be owned solely and exclusively by the United States and will be purchased as soon as practicable following the execution of this Stipulation for Compromise Settlement and Release. The parties stipulate and agree that the United States' only obligation with respect to said annuity contract(s) and any annuity payments therefrom is to purchase the annuity contract(s), and they further agree that the United States does not guarantee or insure any of the annuity payments. The parties further stipulate and agree that the United States is released from any and all obligations with respect to the annuity contract(s) and annuity payments upon the purchase of the annuity contract(s).

This document seems to intertwine two distinct things: (1) the guarantee of the future payments to be made from the annuity contract and (2) the obligation itself to make the future payments. It is doubtful that the United States can avoid the obligation to make the payments good in the event the annuity issuer defaults, because the United States is the owner of the annuity and remains the owner throughout the period the annuity is making payments to the plaintiff. This obligation to guarantee the payments from the annuity contract can be avoided only if the annuity is owned by the plaintiff, which would cause loss of tax-free growth of the annuity's assets, or if the annuity were owned by a third party as a "qualified funding asset" as defined under 26 U.S.C. § 103(d) in a qualified assignment of the future payment liability to the annuity owner.

The United States cannot successfully assert that it never had and never will have an obligation to make future payments as consideration for being released by the plaintiff for the plaintiff's tort claim for damages against the United States. It is simply impossible for an entity (the government) to purchase an annuity contract, intend to own it and have it pay the plaintiff, then say to the plaintiff "we never had an obligation to you to do anything but purchase the annuity."

It is also a very significant contradiction for the U.S. Department of Justice to be required by statute [28 U.S.C. § 2414] to certify the finality of every claim submitted to be funded, while claiming it has a mission to recover any unused funds designated for future medical care, if the claimant dies, by creating an Irrevocable Reversionary Inter Vivos Medical Care Trust. That is not "finality" of the claim. Instead, it leaves the claim open and requires a bureaucracy to monitor the trusts and receive reversionary funds. This meddling by the U.S Department of Justice into matters that are exclusively the domain of the Congress additionally violates the separation of powers doctrine and is *ultra vires*. Medical trusts were discussed in further detail in Section B above.

The objective of the U.S. Department of Justice is to pay a single sum without creating an obligation of the United States that extends beyond the current fiscal year. The plaintiff who desires to have future periodic payments, including deferred lump sums, desires to have them entirely excluded from income within the intent of 26 U.S.C. § 104(a)(2) as reiterated by the Joint Committee on Taxation [JCX-15-99, III]. Under the current scheme employed by the U.S. Department of Justice, whether it realizes it or not, these objectives are mutually exclusive. The solution is simple: Pay all proceeds into a qualified settlement fund.

Congress has authorized through 26 U.S.C. § 468B, and the Secretary of the Treasury has created through the adoption of 26 C.F.R. § 1.468B, a device called a qualified settlement fund (QSF). The enactment of 26 U.S.C. § 468B created special rules for designated settlement funds, which the Secretary of the Treasury, through statutory and inherent authority, broadened in concept through the issuance of Treasury Regulations § 1.468B-1, creating the QSF to "resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability...(ii) Arising out of a tort...." [26 C.F.R. § 1.468B-1(c)(2).] The authority of the court to create and oversee the QSF is absolute:

> A fund, account, or trust satisfies the requirements of this paragraph (c) [defining a qualified settlement fund] if...it is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority. [26 C.F.R. § 1.468B-1(c)(1).]

The fund administrator, on behalf of the qualified settlement fund, settles claims originally asserted against the defendant resulting from the event by entering into settlement agreements with persons asserting those claims. Once the fund is established and defendant has paid the agreed upon settlement amount into the fund's account, the liability for all such claims originally asserted against the original defendant are transferred to the qualified settlement fund through a novation. A novation has the effect of adding a new party as substitute obligor which was not a party to the original duty, and discharging the original defendant by agreement of all parties, completely extinguishing any alleged liability of the defendant.

The fund then is considered "a party to the suit or agreement" for purposes of making a qualified assignment of the future payment liability under section 130(c) of the Code. This has been affirmed by the Internal Revenue Service through the issuance of Revenue Procedure 93-34, which says in pertinent part:

> This revenue procedure provides rules under which a designated settlement fund described in section 468B(d)(2) of the Internal Revenue Code or a qualified settlement fund described in section 1.468B-1 of the Income Tax Regulations will be considered ‘a party to the suit or agreement’ for purposes of section 130. In general, section 130 provides that an assignee may exclude from gross income amounts it receives for assuming the liability of a party to a suit or agreement to make described periodic payments of damages to a claimant. [Rev. Proc. 93-34 § 1.]

Once the settlement funds are paid out, either to the plaintiffs, lien holders, their attorneys, or to a third-party assignee under a section 130 qualified assignment, the trust closes and the administrator files a final tax return. Usually the existence of a QSF is of short duration.

By cooperating in the creation of a qualified settlement fund, which would be administered by someone of the plaintiff's choosing, the U.S. Department of Justice would avoid the creation of an obligation to the plaintiff that extends beyond the current fiscal year, because the United States would be released once the settlement funds are paid into the QSF. The settlement is final, meeting all conditions of title 28, sections 2414 and 2672. The plaintiff's ability to receive periodic payments beyond the current fiscal year can be from an obligation created by the QSF, after the United States has been released, under the black letter authority of sections 104(a)(2), 130 and 468B of the Internal Revenue Code, as well as Treasury Regulations § 1.468B and Revenue Procedure 93-34. The QSF would stand in the shoes of the United States to create the future payment obligation, then assign that obligation to a third party before going out of existence.

The U.S. Department of Justice, by agreeing to the QSF procedure, would avoid altogether the illegal acts of cronyism created by selecting structured settlement brokers, because there would be no brokers engaged by or on behalf of the United States. The selection of brokers would be the prerogative of the QSF administrator.

There is enough information available to the FTCA staff to determine, for negotiation purposes, what benefits can be purchased to benefit the plaintiff and for what price. Such information could be shared by the broker engaged by the plaintiff, which could be certified to the FTCA staff or the trial attorney negotiating on behalf of the United States.

Case law is very clear that the courts have no intention of ruling against a taxpayer, considering that the regulations are plainly consistent with the statute.[i] The U.S. Department of Justice would also avoid the myriad of unconstitutional acts and other illegalities in which it now engages while engaged in its existing structured settlement practices.[ii] THE USE OF THE QUALIFIED SETTLEMENT FUND IS THE ONLY AVAILABLE SOLUTION.

I. The Department of Justice unduly puts injury victims at risk to adverse tax consequences by imposing a method of providing periodic payments that is without authority under the Internal Revenue Code, specifically 26 U.S.C. § 130(c).

If we accept the theory of how U.S. Department of Justice believes its structured settlement transactions work, the United States purchases and owns an annuity which makes payments to the plaintiff after the government's tort liability has been extinguished. But, the government says it has no liability to the plaintiff to make the future payments or to guarantee those payments being made by the annuity issuer. The government claims it never had an obligation to make future payments to the plaintiff, so there was no assignment of such obligation to the annuity issuer. That means the annuity issuer is paying money to the plaintiff on its own behalf, not on behalf of the United States. Thus, the money from the annuity issuer is not compensation for personal physical injuries or physical sickness, since the annuity issuer never had a tort claim liability to the plaintiff, and therefore must be income to the plaintiff—taxable income.

In determining what amounts paid under the Stipulation for Compromise Settlement and Release (Reference l) are excludable from the plaintiff's gross income, the terms of the Stipulation must be examined to determine the intent of the payor (the United States) of the amounts. [*Agar v. Comm'r*, 290

F.2d 283 (2d Cir. 1961).] For periodic payments to be excludable under 26 U.S.C. § 104(a)(2), the Stipulation must set forth a promise by the United States to make periodic payment as compensation for the personal physical injury or physical sickness. There is no authority for excluding future payments from gross income using the language set forth in the specimen Stipulation for Compromise Settlement and Release used by the U.S. Department of Justice. It would appear that the only amount excludable by the plaintiff from gross income, with respect to the annuity portion of the settlement, is the premium paid by the United States for the purchase of the annuities because periodic payments are not part of the defendant's obligation to the plaintiff under the Stipulation.

Had the U.S. Department of Justice used the "qualified assignment" authorized under 26 U.S.C. § 130, there would have been authority for the plaintiff to receive all payment amounts, including the annuity's internal earnings, excluded from gross income. But, a qualified assignment first requires that a future payment liability be established. Section 130 says: "For purposes of this section, the term 'qualified assignment' means any assignment of a liability to make periodic payments as damages...." Obviously, this statute contemplates the creation of a future payment liability before it can be assigned. But, the U.S. Department of Justice has avoided this "qualified assignment" device because the creation of a liability on the part of the United States to make payments to a plaintiff beyond the current fiscal year violates the constitutional restriction imposed in Article I, Section 9, Clause 7.

Perhaps thousands of plaintiffs who have settled with the United States have relied to their detriment that the United States has acted in good faith. All the while, structured settlement brokers engaged by the U.S. Department of Justice and acting as agents for the United States have unknowingly misrepresented to the plaintiffs that their future payments will be excluded from gross income, thus free from income tax liability, under 26 U.S.C. § 104(a)(2). Such representation is conspicuously omitted from the text of the Stipulation for Compromise Settlement and Release, but it is without doubt made orally to the plaintiff during settlement negotiations. These same thousands of plaintiffs are at risk to adverse tax consequences being imposed by the Internal Revenue Service on the basis that there is no authority for the annuity's internal earnings to be paid out to the plaintiffs as being excluded from their gross income.

J. The Department of Justice has engaged in illegal rule making, in violation of the Administrative Procedure Act, at 5 U.S.C. § 553, by failing to provide notice and opportunity to comment in promulgating rules governing the selection of structured settlement brokers.

Any proposed rule meeting the criteria of 5 U.S.C. § 553 requires that the agency proposing it shall provide general notice by publishing it in the Federal Register. After notice, the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. [5 U.S.C. § 553(c).]

There is an exception under subsection (b)(3)(A) for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." The defining rule of law for exempting policy statements from the Administrative Procedure Act (APA) section 553 is *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974). It was held that an agency need not comply with APA section 553 when issuing a policy statement, although it must when issuing a substantive rule. Otherwise, such substantive rules would be invalid. A policy is distinguishable from a substantive rule in that a policy (i) is not finally determinative of the issues and/or rights addressed, (ii) is a pronouncement of tentative intentions for the future, (iii) must be supported as if the policy had never

been issued, (iv) is subject to complete attack before its application in future cases, and (v) is subject to a broader scope of judicial review.

The July 16, 1993 memorandum (Reference c) that was remade into a broader policy by the June 30, 1997, version (Reference b) starts out: "This memorandum is intended to supplement the guidance on structured settlements included in our Damages Handbook and is intended, in particular, to codify guidance previously stated informally on the selection of structured settlement brokers." [Emphasis added.] The use of the words "codify" and "previously stated informally" suggests that this is a substantive rule that is finally determinative of the issues addressed. Its successor was addressed to a broader group, including all Assistant Attorneys General and all United States Attorneys across the country. It purported to establish rules applicable both within the U.S. Department of Justice and to plaintiffs who have or will have claims against the United States under the FTCA, their attorneys, and structured settlement brokers who wish to be selected to handle the annuity sale transaction and receive the lucrative commissions. It also established a policy that clearly is in violation of the procurement laws, specifically the requirement to advertise for bids, codified at 41 U.S.C. § 5. Therefore, the effect of the June 30, 1997, memorandum is null and void.

The May 10, 2000, memorandum (Reference a) also constitutes a substantive rule, which required notice and hearing under the provisions of 5 U.S.C. § 553. Additionally, it creates a social policy in excess of the authority delegated to the Attorney General to create by claiming a duty to capture tax savings on behalf of the United States that otherwise would go to the injury victims under a structured settlement. This is discussed in detail in Section A above. Consequently, the effect of the May 10, 2000, memorandum is null and void.

K. The Department of Justice illegally denies non-favored structured settlement brokers their individual rights to the pursuit of happiness by depriving them of property, including the right to earn a livelihood, without due process of law, guaranteed under the 5th Amendment to the U.S. Constitution. It also tortiously interferes with business relationships between other parties.

This denial by the U.S. Department of Justice of my constitutional rights to due process is discussed in detail throughout the sections above. Additionally, it is discussed above how the Torts Branch is tortiously interfering in my business relationships with other parties.

SUMMARY

I respectfully request that the Department of Justice cease and desist immediately from any and all unconstitutional and other illegal activity as described above. I also request that it take all appropriate remedial action against any employees of the government, as defined in 28 U.S.C. § 2671, who are responsible for them. Additionally, it should identify those who have been victimized by the Department of Justice, acting on behalf of the United States of America, and notify these victims of their right to pursue a claim for damages under the Federal Tort Claims Act and, if applicable, under Civil Rights Act provisions. Specifically:

1. Abandon the policy of settling Federal Tort Claims Act claims using a different standard for cash settlements than for periodic payment settlements in reaching settlement amounts.

2. Abandon the policy of settling Federal Tort Claims Act claims by requiring, as a condition of settlement, the establishment of a medical reversionary trust.

3. Abandon the policy of settling Federal Tort Claims Act claims by requiring, as a condition of settlement, the establishment of a non-medical reversionary trust.

4. Abandon the policy of settling Federal Tort Claims Act claims by denying, as a condition of settlement, the right of the injury victim to preserve Medicaid and Supplemental Security Income benefits by the establishment of a disability supplemental needs trust specifically provided by Congress under the provisions of 42 U.S.C. § 1396p(d)(4)(A).

5. Terminate all relationships with structured settlement brokers and adopt a practice of allowing the injury victims, through their counsel, to select the individual to assist them in setting up periodic payments.

6. When requested by the plaintiff, for the purpose of establishing tax-free periodic payments, agree to the establishment of a qualified settlement fund (QSF) under the authority of 26 C.F.R. § 1.468B, which allows the United States of America to be released and dismissed as a defendant, and allows the plaintiff to negotiate with the QSF to receive periodic payments under the provisions of 26 U.S.C. § 130(c), without violating Article I, Section 9, Clause 7 of the U.S. Constitution.

7. Rescind the Dwyer memorandum of June 30, 1997 (Reference b) as an act of illegal rule making in violation of 5 U.S.C. § 553.

8. Rescind the Axelrad memorandum of May 10, 2000 (Reference a) as an act of illegal rule making in violation of 5 U.S.C. § 553.

9. Relinquish all claims on behalf of the United States of America to reversionary benefits from medical and non-medical reversionary trusts, upon the demise of the trust beneficiary or other triggering event, as illegally obtained concessions in compromise settlements in excess of authority granted by Congress under 28 U.S.C. § 2677.

10. Release all claimants who have settled with the United States of America under a compromise pursuant to 28 U.S.C. § 2677 from any prohibition to exercise their rights to establish a disability supplemental needs trust as authorized by Congress under 42 U.S.C. § 1396p(d)(4)(A).

11. Investigate these allegations of unconstitutional and other illegal acts within the Department of Justice, and take appropriate action.

12. Make restitution to all persons who have been victimized by unconstitutional and other illegal acts committed by employees of the Department of Justice.

This letter is intended to constitute a presentation of any claims described above against the United States for money damages to which I am entitled for injury or loss of property caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, within the meaning of 28 U.S.C. § 1675(a). It is also a presentation of any claims that may fall outside the scope of the Federal Tort Claims Act, but within another title or provision of the United States Code, for violation of my constitutional rights, which I have against the United States, or for illegal acts outside the scope of federal employment, which I have against the individual employees who committed them.

It is a serious matter that the chief law enforcement agency for the United States of America is so deeply engrossed in unconstitutional and other illegal activity.

Respectfully submitted,

Richard B. Risk, Jr.

Attachments

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[i] Detractors claim that the QSF cannot be used in situations involving a single plaintiff, somehow trying to make us believe that the language in 26 C.F.R. § 1.468B-1(c)(2) that says "one or more" actually means "two or more." But, these are the same people who tried to make us believe that knowledge of the cost of the annuity in a structured settlement constitutes constructive receipt and that a structured settlement broker engaged by a plaintiff will cause the plaintiff to be in constructive receipt. These are largely the defense brokers and others, including liability insurers, who want to maintain the status quo that tends to protect the defense broker's *quid pro quo* relationship with the defendant or insurer.

Ever since the Secretary of the Treasury issued regulations in 1993 for the qualified settlement fund (QSF), 26 C.F.R. 1.468B, there has been debate within the structured settlement industry as to whether the phrases "one or more" and "at least one" really mean what they say. Assuming the Treasury Secretary meant to use those phrases in their plain meaning, some have expressed opinions that the Secretary exceeded the intent of Congress in authorizing the creation of a QSF for a single claimant. To understand why this debate has been taking place, one must examine the effects of the QSF on structured settlements.

Those who would like to see the QSF unacceptable for use with a single claimant include some liability insurers and the structured settlement brokers who work with them, often under some rebate arrangement, to settle claims on behalf of the tortfeasor. Use of a QSF eliminates them from the structured settlement transaction because the insured is left with no more liability. Plaintiff attorneys, who feel uneasy about turning over their client's financial future to an adversary, are discovering the QSF as a means of being able to select someone of their choice as the broker. Most structures involve single claimants.

Aside from the general contention that Congress never intended the QSF to be applied to a single claimant because the QSF was meant for mass tort claims, the main argument advanced by those who do not want the single-claimant QSF to be allowed is that it triggers constructive receipt under the "economic benefit" doctrine. If this doctrine becomes operative, there is loss of future tax benefits by the claimant. Under this common-law principle, the creation by an obligor of a fund in which the taxpayer has vested rights will result in immediate inclusion by the taxpayer of the amount funded. A "fund" is created when an amount is irrevocably placed with a third party, and a taxpayer's interest in such a fund is "vested" if it is nonforfeitable.

It is well established in law that, when a statute or regulation is more current and more specific, the statute or regulation overrides the common law. Such is the case of the qualified assignment transaction under section 130, when the payee is given a security interest in the annuity contract. Clearly, that ordinarily would trigger the economic benefit doctrine. Yet, the periodic payments are not taxed. The Internal Revenue Service has acknowledged in at least one Private Ruling (9703038) that the 1988 amendment to section 130(c) of the Code "was intended to allow assignments of periodic payment obligations without regard to whether the recipient has the current economic benefit of the sum required to produce payments." Yet, section 130 does not mention this intention, proving that a statute does not need specifically to spell out an override of the "economic benefit" doctrine.

The same thing applies to the single-claimant QSF. Congress was specific in its delegation of authority to the Treasury Secretary, who in turn specifically authorized a single-claimant QSF. The economic benefit common-law rule is overridden, even though the Code (section 468B this time) is once again silent on this question.

The congressional intent and current economic benefit arguments by those opposed to them were persuasive for several years, and the annuity companies would not accept assignments from single-claimant QSFs. Recently, others began to dispute these arguments. Major life insurance markets have begun to accept, through their assignment entities, periodic

payment liabilities from QSFs in which a single claimant is the beneficiary. John Hancock Life and CGU Life recently announced that they will assume the future payment obligation from single-claimant QSFs. Otto J. Preikszas, Jr., an attorney in John Hancock's tax law department, provided the following opinion to his company's management:

> I do not believe that a single claimant is in constructive receipt of a fund's assets merely because he or she is the only claimant and, therefore, at some time must receive such assets.... Such single claimant must have some right to recover or to use the assets without restriction or limitation in order to be in constructive receipt of the fund's assets.
>
> Income Tax [Treasury] Regulations § 1.451-2(a) provides that income is constructively received in the taxable year during which it is credited to the individual's account, set apart for the individual, or otherwise made available so that the individual may draw upon it at any time. Income is not constructively received if the individual's control of its receipt is subject to substantial limitations and restrictions. Typically an individual is found to be in constructive receipt of income if the individual has the right to either elect a cash payment in lieu of deferring receipt of income, has the right to terminate a deferral arrangement at will (without giving up any "valuable rights") and receive a cash payment and, in some cases, if the arrangement is funded.
>
> Unless a single claimant of a fund has a right to elect a cash payment in lieu of fund establishment or to terminate the fund at will and receive a cash payment (or has a similar such right), it is my position that such a claimant is not in constructive receipt of the fund's assets merely because that person is a single claimant....
>
> In addition, please note that, in Revenue Procedure 93-34, the IRS provides rules under which a 468B fund will be considered a "party in interest" for purposes of Code section 130. I am not aware of any provision under section 130 that would cause a single claimant to be in constructive receipt of any amount of a qualified assignment established on his or her behalf merely because there is only one claimant. In fact, the Conference Committee Reports with respect to TAMRA provide that a liability assignment is treated as a qualified assignment notwithstanding that the recipient is provided creditor's rights against the assignee greater than those of a general creditor. [Emphasis his.] No amount is currently includible in the recipient's income solely because the recipient is provided creditor's rights that are greater than the rights of a general creditor. (This is the funding aspect of constructive receipt.)
>
> Finally, I note that Income Tax Regulations § 1.468B-3(f)(2)(ii) provides that, to the extent that the transferor of amounts to fund acquires a right to a refund or reversion of the fund's assets, it is in constructive receipt of such assets. There is no other regulation under section 468B (or section 130) dealing with instances in which a claimant may be in constructive receipt.
>
> Based on the above, it is my opinion that a single claimant of a section 468B fund is not in constructive receipt of the fund's assets merely because such person is the only claimant.

A further examination of Congress' intent creating designated settlement funds and in delegating authority to the Secretary of the Treasury to promulgate regulations governing these funds demonstrates conclusively that such funds may be used when there is only a single claimant.

The Code, 26 U.S.C. § 468B(d)(2), defines a "designated settlement fund" as any fund "which is established pursuant to a court order and which extinguishes completely the taxpayer's tort liability with respect to claims described in subparagraph (D)...[and] which is established for the principal purpose of resolving and satisfying present and future claims against the taxpayer (or any related person or formerly related person) arising out of personal injury, death, or property damage...." The Code also authorizes a tax deduction for payment into the fund by saying "[f]or purposes of section 461(h), economic performance shall be deemed to occur as qualified payments are made by the taxpayer to a designated settlement fund." [26 U.S.C. § 468B(a).] There is no suggestion whatsoever in the language of the Code that more than one claimant is required, unless one unreasonably construes the term found in subparagraph (d)(2)(D), "satisfying present and future claims," to mean a requirement of multiple claimants. The Treasury Secretary obviously did not make this interpretation.

Section 468B was created to give a defendant in a mass tort claim the ability to settle it even before all the plaintiffs have been identified. But, there is no way to be sure that there would be multiple claimants if they have not been identified at the time the QSF is established.

Suppose there was an explosion and fire in a building with the potential to have killed several people, but with the number of occupants at the time of the explosion and fire unknown. One body is recovered and the spouse brings suit on a negligence theory against the building owner. The liability insurer obtains a court order to establish a QSF on the probability that there were more victims, obtaining release of tort liability from all victims, known and unknown. The QSF is substituted for the building owner under a novation and assumes all liability for the damages caused by the explosion and fire. If no more victims are identified, the entire fund assets may be paid to only one claimant.

Certainly, the drafters of this statute anticipated this scenario or one similar and never intended that the surviving spouse of the single victim would lose the tax benefits that otherwise would have resulted had there been more than one victim.

The Secretary of the Treasury, in issuing 26 C.F.R. § 1.468B, defined a "qualified settlement fund" as a "fund, account, or trust [that] satisfies the requirements...if

"(1) It is established pursuant to...and is subject to the continuing jurisdiction of [a] governmental authority;

"(2) It is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability [Emphasis added.] (i) Under [CERCLA]; or (ii) Arising out of a tort, breach of contract, or violation of law; or (iii) Designated by the Commissioner in a revenue ruling or revenue procedure; and

"(3) The fund, account, or trust is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related persons)."

In the unlikely event that the Secretary inadvertently used the word "one" more than once in defining a QSF, intending to mean "two" (as some claim), there was plenty of opportunity to say that a fund involving a single-claimant did not qualify. Subparagraph (g) lists "excluded liabilities" and fails to name any liability involving a single claimant.

Additionally, the proposed Treasury Regulations § 1.468B, in its entirety, was subject to the rule making procedure prescribed in section 553 of the Administrative Procedure Act. This process calls for publication in the Federal Register and the opportunity for the public to voice opinions before the rule can take effect. If the use of the word "one" was inadvertent, any perceived unintended impact could have been raised during this process. Evidently, the use of the word "one" was not questioned. The reasonable conclusion is that it was intended.

Treasury Regulations § 1.468B-1(k) gives seven scenarios, stating whether or not the acts taken would result in a QSF or what actions must be taken to qualify the fund. In no example is it suggested that having only a single claimant would disqualify the fund. And, as Preikszas notes, section 1.468B-3(f)(2)(ii) is the only instance in both the Code and Treasury Regulations, based on Code sections 130 and 468B, where an instance of constructive receipt is described. There was plenty of opportunity for Congress or the IRS, through the Code and Treasury Regulations, to preclude the use of a QSF for a single claimant on the economic benefit theory. Its use in single-claimant cases was not precluded.

It would seem reasonable that, because it promulgated the regulations authorizing a single-claimant QSF, the IRS has no inclination to challenge the validity of a fund so created. The IRS must live by its own rules, just as a taxpayer has a right to rely on them.

It has been suggested by some that the Secretary exceeded the authority granted by Congress under the statute in authorizing the use of the QSF for "at least one claim asserting liability." As such, these people contend, there is no authority for the single-claimant QSF. Section 7805(a) of the Code provides this authority:

> Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

With this broad charter granted to the Secretary, there have been challenges over the years to the Secretary's authority. It may be helpful to review some rules of construction from the United States Supreme Court cited in 26 U.S.C.A. § 7805:

"Treasury Department is authorized to make regulations governing collection of internal revenue by Congress, which in turn is authorized by Constitution to make all laws necessary for executing the powers vested in government or any department." *Boske v. Comingore*, 177 U.S. 459 (1900).

"Incidental to Commissioner's authority to administer income tax law is power to make regulations for information of taxpayers, guidance of the collectors, and realization of purposes of the taxing acts." *Spreckels v. Commissioner*, 119 F.2d 667 (1941), *aff'd* 315 U.S. 626.

"Where plain meaning of provision of Internal Revenue Code does not require contrary interpretation, statute must be construed to accord with clearly expressed congressional purposes and relevant Treasury Regulation." *United States v. Stapf*, 375 U.S. 118 (1963).

"Treasury regulations made pursuant to provision of revenue act are valid unless unreasonable or inconsistent with statute." *Fawcus Machine Co. v. United States*, 282 U.S. 375 (1931).

"As contemporaneous constructions by those charged with administration of Internal Revenue Code..., Treasury Regulations must be sustained unless unreasonable and plainly inconsistent with revenue statutes, and should not be overruled except for weighty reasons." *Fulman v. United States*, 434 U.S. 528 (1978).

If there is a challenge to the regulation in question, it would need to come from the Treasury Department, in contravention to its own rules. And, that is unlikely because an agency must abide by the rules it sets. And Treasury Regulations can be cited as evidence in a court proceeding as to how the agency responsible for administering the Internal Revenue Code interprets it.

[ii] There would be one additional issue if the Internal Revenue Service were to cause an adverse tax consequence to a taxpayer who relied on the words "one or more" in 26 C.F.R. § 1.468B-1(c)(2) to the taxpayer's detriment, claiming that the intent was "two or more." Such action would constitute lack of notice, which would be denial of due process, which would offend the 5th Amendment to the U.S. Constitution, which states: "No person shall be...deprived of life, liberty, or property, without due process of law." Due process requires notice and the opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). To enforce a regulation duly created under the Administrative Procedure Act, at 5 U.S.C. § 553, in a manner contrary to the clear language of that regulation, would constitute lack of notice and, thus, deny due process to the affected taxpayer.