

# New York Settlement Math Made Easy!

Date: January 19<sup>th</sup>, 2017

CLE: "New York's Settlement Math Made Easy!"

The New York State Insurance Fund  
199 Church Street, New York, NY

Date: 19 Jan 2017 5:30 PM

2 Hour CLE - 2.0 Credits will be granted in Professional Practice

**Introduction**     Kira Krieger Senders  
                              EPS Settlements Group

**Presentation:**    Sam Senders  
                              EPS Settlements Group

**Expert Panel:**    Joshua Cohen, Esq. - DeCorato Cohen Sheehan & Federico, LLP  
                              Edward Guardaro, Esq. - Kaufman Borgeest & Ryan LLP  
                              Emilio Grillo, Esq. - Goldberg Segalla

- I. **New York has a different settlement formula for every conceivable tort claim.**
  - A. Attorney Fees are calculated differently on **Personal Injury** and **Medical Malpractice** claims. **Wrongful Death** claims have distinct formulas for Conscious Pain and Suffering and Wrongful Death allocations, with different tax implications to the estate. The **Medical Indemnity Fund** has its own unique formula for the elimination of future damages from a settlement or judgment. **CPLR 50 A** has been revised more favorably to the defense of a medical malpractice claim, but **CPLR 50 B** still remains a "shark in the water." And then there is **Medicare** and the required Set-Aside accounts. Settlement math needs to be more user friendly and accessible.
  - B. Structured Settlements are often required or desired components of the above tort claims and MSA's. Either mandated by statute, judicial preference, or the insistence of the defense or plaintiff...it is important both sides know the basics so the correct allocation to a structured settlement can be made.
  - C. Structured Settlement Defined and Basics
  
- II. **Personal Injury & Medical Malpractice**
  - A. Personal Injury and Medical Malpractice settlements are broken down into fees, disbursements, liens, up-front cash and any allocation for a structured settlement. Understanding that breakdown and having a visual representation to either calculate for Settlement Breakdown or for Settlement Cost can help guide settlement demands and offers.
  
- III. **Medical Indemnity Fund** ([http://www.dfs.ny.gov/insurance/mif/mif\\_indx.htm](http://www.dfs.ny.gov/insurance/mif/mif_indx.htm))
  - A. #131 of approximately 160 recommendations by the Medicaid Redesign Team (MRT)
  - B. Opposed by the NYSBA, threatened litigation by the Academy of Trial Lawyers, the Fund was approved in 2011. And soon followed by Mendez v New York & Presbyt. Hosp., 34 Misc.3d 735 (2011).
  - C. How should disbursements be allocated? How should a parent's derivative claim be treated? How should economic damages be treated?

- D. Calculating for Total Value vs. Total Cost. ALL parties should know the MIF %'s and cost when agreeing to settlement.

#### IV. **Wrongful Death Claims**

- A. Wrongful Death vs. Conscious Pain & Suffering (CPS) – Taxable vs Non-Taxable
- B. Calculating CPS pursuant to EPTL §4.1.1
- C. Calculating pursuant to Matter of Kaiser 198 Misc. 582 (1950) & Matter of Acquafredda
- D. History of EPTL §5-4.6 and how to create a structured settlement.
- E. Pollicina 82 N.Y.2d 332 and “one stop shopping.”
- F. Using a Wrongful Death calculation to make an accurate settlement offer.

#### V. **CPLR 50A & CPLR 50B**

- A. §5041 Basis for determining judgment to be entered.
  - 1. Past Damages vs. Future Damages.
  - 2. Shultz vs. Harrison Radiator 90 N.Y.2d 311 (1997)
  - 3. Bryant v. New York City Health and Hospitals Corp., 93 N.Y.2d 592 (1999)
  - 4. Desiderio v. Ochs, 100 N.Y.2d 159 (2003)
- B. §5031 Basis for determining judgment to be entered.
  - 1. Eliminates “double counting of inflation.”
  - 2. Specifies the method of establishing the discount rate.
  - 3. There is no present value formula applied to Wrongful Death claims.
  - 4. Jury can determine start dates of future payments owed.

#### VI. **Settlement Distributions Approved For Minors & Incompetents**

- A. CPLR 1206(c) (Encourages the use of structured settlements on behalf of minors and incompetents.)
- B. SCPA 2220 (Encourages the use of structured settlements on behalf of minors and incompetents.)

#### VII. **Eliminate “Surprise Structures”**

- A. Compromise Orders, Surrogate Court Decrees & Ex Parte filings.
  - 1. Language for court documents, on the record settlements, mediation agreements, and confirming settlement correspondence.
  - 2. NSSTA resources for discussions about structured settlements.

#### VIII. **Panel Discussion**

## MATTER OF KAISER

198 Misc. 582 (1950)

"The court determines, in accordance with such cases, that the net amount received upon the settlement of the present action should be distributed to decedent's spouse and next of kin based on the period they might reasonably have looked to decedent for support. Decedent, at the time of his death, was forty-four years of age, and left surviving as his only distributees, his wife, the administratrix, who was several years younger, and a child about one year old, with twenty years to reach majority. The expectancy of life of the decedent, based on the American Experience Table of Mortality, was 25.27 years. By adding together 20 and 25.27 it appears that the total years of anticipated support of the wife and child aggregate 45.27. Using that figure as the *denominator* and using the respective years of the anticipated dependencies of the surviving spouse and child as *numerators*, the percentage of the net amount received in settlement of the action to be allocated to the surviving spouse is .558, and the *percentage* to be allocated to the child is .442. The court determines, therefore, that the net amount to be received in settlement is payable .558 to the widow and .442 to the child."

## MATTER OF ACQUAFREDDA

189 A.D.2d 504, 596 N.Y.S.2d 839

"Appeal from so much of a decree of the Suffolk County Surrogate's Court (Ernest L. Signorelli, S.), entered November 2, 1990, as, after a hearing, directed distribution of the proceeds of the wrongful death action *equally* among the decedent's surviving spouse and his two children."

**New York Estates, Powers and Trusts Law § 5-4.6** Application to compromise action.

- (1) *Upon collection of the settlement funds and creation of an interest bearing escrow account*, the attorney for the administrator or personal representative shall pay from the account all due and payable expenses, excluding attorneys fees, approved by the court, such as medical bills, funeral costs and other liens on the estate.
- (2) All attorneys fees approved by the court for the prosecution of the action for wrongful act, neglect or default, inclusive of all disbursements, shall be immediately payable from the escrow account upon submission to the trial court proof of filing of a petition for allocation and distribution in the surrogate's court on behalf of the decedent's estate.

**New York Estates, Powers and Trusts Law § 4-1.1** Distribution of a decedent's estate.

- (1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.
- (2) A spouse and no issue, the whole to the spouse.
- (3) Issue and no spouse, the whole to the issue, by representation.



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## CPLR 50 A & CPLR 50 B

§ 5031 & § 5041. Basis for determining judgment to be entered.

Shultz vs. Harrison Radiator 90 N.Y.2d 311 (1997)

Bryant v. New York City Health and Hospitals Corp., 93 N.Y.2d 592 (1999)

“As a concluding observation, we note that as CPLR articles 50–A and 50–B reach their 15th anniversary, having generated a good deal of frustration and litigation, it would perhaps be an opportune time for the Legislature to review these enactments to assure that, in actual operation, they are meeting their objectives and not — as submissions before us urge — egregiously overcompensating or undercompensating anyone.” – Judith Kaye, Chief Judge

Desiderio v. Ochs, 100 N.Y.2d 159 (2003)

§ 5031 – “New & Improved” Basis for determining judgment to be entered

## INTEREST OWED ON JUDGMENT

Toledo v. Iglesia Ni Christo, 18 N.Y.3d 363 (2012)

*Finally, it should be noted that awarding preverdict interest on future damages to plaintiff is not a penalty against defendant. “The purpose of interest is to require a person who owes money to pay compensation for the advantage received from the use of that money over a period of time.”*

Pay v. State of New York 87 N.Y.2d 1011 (1996)

Milbrandt v. Green Refractories Co., 580 N.Y.S.2d 147 (1992)

Rohring v. City of Niagara Falls, 192 A.D.2d 228 (1993)

Love v. State of New York, 577 N.Y.S.2d 359 (1991)



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## Surrogate's Court Procedure

§ 2220. Payment of share of infant, incompetent or conservatee or person under disability

1. Where an infant, incompetent, conservatee, or person under disability is entitled to money or property as beneficiary of an estate or to the proceeds of any action brought as prescribed in EPTL 5-4.1 or to the proceeds of a settlement of a cause of action for personal injuries, the decree or order shall direct that it be paid or delivered to the guardian, committee or conservator of the property of such person upon the filing of sufficient security, except as provided in EPTL 7-4.9 or 11-1.1, unless the money or property payable or deliverable to the infant, incompetent, or conservatee, or person under disability does not exceed in value \$10,000, in which case the decree or order may order it to be paid or delivered to a parent of such person or to some competent adult with whom such person resides or who has some interest in such person's welfare, for the use and benefit of such person.

2. If the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive pursuant to section 29.23 of the mental hygiene law, the decree or order may order it to be paid to such director for use as provided in that section.

3. If there be no guardian, committee or conservator of the property the decree or order may provide that the sum payable to the infant, incompetent or person under substantial impairment within the meaning of the conservatorship provisions of article seventy-seven of the mental hygiene law not disposed of as above be paid into the court or the court may order that money constituting any part of the property be deposited in one or more specified insured banks or trust companies or be invested in one or more specified accounts in insured savings and loan associations subject to withdrawal only upon order of the court, except that no court order shall be required to pay over to the infant who has attained the age of eighteen years all moneys so held unless the depository is in receipt of an order from a court of competent jurisdiction directing it to withhold such payment beyond the infant's eighteenth birthday.

4. If money or property is payable or deliverable under subdivision one of this section to a person under disability as defined in article seventy-seven of the mental hygiene law, the court may pursuant to such article appoint a conservator provided that: the person under the disability resides within the county in which the proceeding is pending; no guardian, committee or conservator has been appointed by the supreme court or county court; and the money or property is to be paid or delivered to the conservator.

5. If any proceeds payable to an infant, incompetent or person under disability pursuant to this section are proposed to be paid by way of a structured settlement, which shall include any settlement whose terms contain provisions for the payment of funds on an installment basis, the court may approve such settlement, provided that, with respect to future installment payments, the court may order that each party liable for such payments shall fund such payments, in an amount necessary to assure the future payments, in the form of an annuity contract executed by a qualified insurer and approved by the superintendent of financial services pursuant to articles fifty-A and fifty-B of the civil practice law and rules.

## Civil Practice Law and Rules

§ 1206. **Disposition of proceeds of claim of infant, judicially declared incompetent or conservatee.** Except as provided in EPTL 7-4.9, any property to which an infant, a person judicially declared to be incompetent or a conservatee is entitled, after deducting any expenses allowed by the court, shall be distributed to the guardian of his property, the committee of his property or conservator to be held for the use and benefit of such infant, incompetent, or conservatee except that:

(a) in the case of an infant who is married to and resides with an adult spouse, the court may order that the property be distributed to such adult spouse for the use and benefit of the infant; or

(b) if the value of the property does not exceed ten thousand dollars the court may order the property distributed to a person with whom such infant, incompetent or conservatee resides or who has some interest in his welfare to be held for the use and benefit of such infant, incompetent or conservatee; or

(c) the court may order that money constituting any part of the property be deposited in one or more specified insured banks or trust companies or savings banks or insured state or federal credit unions or be invested in one or more specified accounts in insured savings and loan associations, **or it may order that a structured settlement agreement be executed,** which shall include any settlement whose terms contain provisions for the payment of funds **on an installment basis,** provided that with respect to future installment payments, the court may order that each party liable for such payments shall fund such payments, **in an amount necessary to assure the future payments, in the form of an annuity contract executed by a qualified insurer and approved by the superintendent of financial services pursuant to articles fifty-A and fifty-B of this chapter.** The court may elect that the money be deposited in a high interest yield account such as an insured "savings certificate" or an insured "money market" account. The court may further elect to invest the money in one or more insured or guaranteed United States treasury or municipal bills, notes or bonds. This money is subject to withdrawal only upon order of the court, except that no court order shall be required to pay over to the infant who has attained the age of eighteen years all moneys so held unless the depository is in receipt of an order from a court of competent jurisdiction directing it to withhold such payment beyond the infant's eighteenth birthday. Notwithstanding the preceding sentence, the ability of an infant who has attained the age of eighteen years to accelerate the receipt of future installment payments pursuant to a structured settlement agreement shall be governed by the terms of such agreement. The reference to the age of twenty-one years in any order made pursuant to this subdivision or its predecessor, prior to September first, nineteen hundred seventy-four, directing payment to the infant without further court order when he reaches the age of twenty-one years, shall be deemed to designate the age of eighteen years; or

(d) the court may order that the property be held for the use and benefit of such infant, incompetent or conservatee as provided by subdivision (d) of section 1210.