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From Verdict to Judgment: The Evolution, Confusion and Reformation of CPLR Articles 50-A and 50-B

STEPHANIE L. ARGENTINE*

INTRODUCTION

Structured settlements have become increasingly popular in the latter part of this century. This popularity has been fueled by escalating verdicts and the growing judicial acceptance of evidence concerning rates of wage growth and the effects of inflation on future earnings. These factors have united with favorable tax reform provisions and advocacy by commentators1 to encourage many jurisdictions2 to enact statutory provisions which mandate or encourage the periodic payment of judgments. The decision to enact structured judgment legislation may also be regarded as a desperate response to the insurance crises of the 1980s. This article is particularly concerned with the New York structured settlement statute, CPLR Articles 50-A and 50-B [hereinafter Article 50], but in order to understand the strengths and weaknesses of the statute and

* J.D. Candidate, SUNY at Buffalo School of Law, May 1993. The author would like to thank Professor Kenneth F. Joyce for his guidance and comments and LeRoy T. Watkins, F.S.A., F.C.A., for his mathematical calculations. In addition, she is especially grateful to her mentor William S. Reynolds, Esq. for assigning her the project three years ago that led to this article and for his unfailing support. Finally, she wishes to thank her editors, Michael Griffen and Maxine Lee, without whom this article would not have been possible.


2. According to the Prefatory Note to the UNIFORM PERIODIC PAYMENT OF JUDGMENTS ACT, in 1980 elective or mandatory statutes had been enacted in 14 states. By 1990 when the Uniform Act was approved, more than 30 states had enacted some legislative scheme for the periodic payment of judgments. UNIFORM PERIODIC PAYMENT OF JUDGMENTS ACT, Prefatory Note, 14 U.L.A. 8 (Supp. 1992).
the author's recommendations for reform, it is first necessary to examine the policies behind damage awards and the evolution of structured settlements. These areas will be addressed in Part One.

Courts nationwide have utilized a variety of methodologies to arrive at structured settlements which take into account various inflationary components and discounting methods. These methodologies, as well as the relevant underlying financial, economic and mathematical concepts, will be discussed in Part Two. An in-depth critique of these methods, however, is beyond the scope of this article.

In Part Three, the text of Article 50 and the few cases that apply it will be closely examined. This section will focus primarily on the problems concerning the appropriate treatment of inflation and discounting. The language of the statute does not clearly specify the appropriate mathematical model to be followed; the cases instead use several of the formulations discussed in Part Two. The complex interaction of Article 50 with other statutory provisions will be examined in passing since the courts seem to be coping with these complexities fairly well.

Although some have recommended or demanded repeal of CPLR Article 50, this author believes that although the statute is somewhat flawed, periodic payment of judgments is a concept worthy of being retained. To this end, Part Four will offer recommendations for amendments to Article 50 which will simplify its language, lead to greater judicial efficiency and more accurately reflect the economic realities of inflation, wage growth, discounting and individual differences.

PART ONE

Damage Awards and the Historical Approach to Discounting and Inflation

As a fundamental common law principle, any person injured due to the negligence of another is entitled to be made whole. This is most


often accomplished through a court-ordered award of money damages, payable by the tortfeasor to the injured party. Often, "making the plaintiff whole" entails compensation for losses and expenses both past and future, since many injuries have continuing expenses and losses.6 Past damages have been, and continue to be, awarded and paid in lump-sum form.7 Future damages are most often awarded in lump-sum form,8 but they are increasingly being paid in a form other than a lump sum. The future damage award and its payment schedule require extensive proof of the amount of loss per year and the corresponding duration of each loss, as well as extensive computations to arrive at an approximation of future damages.9 Historically,10 discounting to present value11 has been one of these computations. More recently, allowances have been made for inflation and wage growth.12

In Chesapeake & Ohio Railway, Co. v. Kelly,13 the Supreme Court stated that discounting to present value was the proper method of "limiting the recovery to compensation [for actual damages]."14 The Court's rationale was expressed in terms of the future "earning power of money."15 Although this language could very easily apply to the addi-

6. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.1, at 540 (1973). There are three types of losses: wage and earning capacity losses, losses resulting from the injury (special) and pain and suffering losses. All of these may have been incurred in the past and may continue to be incurred in the future.

7. At common law a single lump sum judgment is provided in the "typical accident case." 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.2, at 1303 (1956).

8. M & P Stores, Inc. v. Taylor, 326 P.2d 804 (Okla. 1958), appears to be the first "other than lump-sum" case. There, the jury awarded $36,000 "[t]o be paid at $150 per month for 20 years." This language was originally struck from the verdict, but was reinstated even though it was improperly rendered and received, since neither party objected then nor later claimed it to be void. Id. at 808-09.


10. Discounting became the norm around the turn of the century. The Supreme Court approved the practice in Chesapeake & Ohio Railway Co. v. Kelly, 241 U.S. 485 (1916).

11. Present value is "[t]he worth today of funds acquired or spent in the future when these funds are discounted at a particular rate of interest." SYLVAN D. SCHWARTZMAN & RICHARD E. BALL, ELEMENTS OF FINANCIAL ANALYSIS 233 (2d ed. 1984).

12. Most often this allowance is done by a computation which compounds an inflation rate (combines the principal and the inflation rate) upon the amount of the first loss.


14. Id. at 491.

15. Id.
tion of interest to the principal through investment, it is more likely based upon the economic atmosphere of the Civil War and Reconstruction Periods, when price levels dropped approximately 40% in twenty-nine years. Thus, the rationale for discounting originally seemed to be falling prices, and not the investment potential of money. In other words, keeping money in your mattress during this period was only slightly less advantageous than putting it in the bank. The dollar in the mattress would have gained increased buying power due to deflation; the one in the bank would have been able to buy more due to deflation and investment interest.

Escalation of an award to compensate for anticipated inflation is a practice of more recent origin than discounting. Since one of the historical bases for discounting to present value was the existence of deflationary price patterns, inflationary calculations were contrary to economic reality during periods of deflation. This reality contributed to a persistent rejection by courts of inflationary considerations. The economy from the time of the Civil War through the Industrial Era, World War I, the Stock Market Crash, the Depression and World War II was generally unstable, making any economic prediction highly speculative. During this era, courts were understandably unwilling to consider any effects of future economic conditions in their damage computations. By the mid-1950s inflation had become more commonly understood,17 but because significant inflation was of relatively recent origin, or considered too “speculative,” courts were still reluctant to allow for inflation.18 It is unclear why discounting to present value remained in practice through-


17. Since 1950 the GNP (Gross National Product) deflator and since 1954 the CPI (Consumer Price Index) have not fallen. Note, *Future Inflation, Prospective Damages, and the Circuit Courts*, 63 VA. L. REV. 105, 105 & n.2 (1977) [hereinafter Note, Future Inflation]. Inflation was running at an annual average of 2% and less than 2.4% for the 1950s and 1960s, respectively. Bureau of Labor Statistics, *Current Labor Statistics*, MONTHLY LAB. REV., Nov. 1970, at 76, 93 (Consumer Price Index). This low level of inflation was likely a factor in the courts’ reluctance to consider it. See Brody, *supra* note 9, at 1007 n.14.

18. Professor John P. Henderson terms this a “social and economic lag” and states that it “exists whenever the courts view human behavior in conflict with what is contemporarily in vogue in society at large.” Henderson, *Consideration, supra* note 16, at 307 n.1. He lists the following examples of this phenomena: sexual behavior and The Kinsey Report; “separate and equal” and Brown v. Board of Education, 347 U.S. 483 (1954); and capital punishment as a deterrent. Id. This blind following of precedent is apparent in the case of Sleeman v. Chesapeake & O. Ry., where the Sixth Circuit Court of Appeals required a reduction to present value based on precedent, but refused to allow inflation to offset the reduction since inflation was speculative and inconclusive as a prospect. 414 F.2d 305, 307 (6th Cir. 1969).
out this time period. The Supreme Court precedent of *Chesapeake* was likely the most significant factor. It seems that the most significant basis for discounting shifted from deflationary pressures to investment considerations without any perceptible change in the legal analysis.

The retention of discounting and the realization that inflation and wage growth were not speculative, or at least no more speculative than discounting to present value, led courts to begin to admit evidence and permit consideration of the effects of inflation in the computations. Inflationary components can be classified into two types: individual components (productivity or "merit" based) and societal components (erosion of the buying power of a dollar due to price escalation). The individual factors that effect wage growth include educational level, experience, productivity levels and collective bargaining agreements or other employment contracts.

Societal inflation, on the other hand, is often a largely self-perpetuating phenomenon, where people expect prices to increase and so prices and wages rise to keep up with the price increases, and the inflationary cycle repeats.

The Growth of Structured Settlements

A structured settlement is commonly defined as a settlement "wherein payments are made in more than one installment." Two typical methods are commonly used to fund a structured settlement: (1) an annuity payable by the liability carrier or purchased from a life


23. Structured settlement is commonly abbreviated to "structure" in colloquial use.


25. The most obvious method of funding a structure, where the defendant makes payments directly to the plaintiff over time, is rarely accepted by courts because it places the risk of defendant's default upon the plaintiff, defeating one of the fundamental purposes of ordering a structure in the first place.
insurance company or (2) a trust.26

Structured settlements became popular when the obvious advantages of periodic payments of settlements became apparent to members of both the plaintiff and defense bars. Plaintiffs sought to take advantage of the tax and financial management aspects of structured settlements. Defendants were faced with escalating verdicts, sometimes payable to plaintiffs with highly speculative futures, and an insurance liability crisis. These forces combined to encourage the use of structured settlements.

The popularity of structured settlements began with cases in which the plaintiff's future, and hence the amount of damages to which plaintiff was entitled, was highly uncertain. A leading example of a situation where unknown and unknowable damages led to the use of structured settlements is the thalidomide tragedy.27 Thalidomide is a drug that causes serious birth defects when ingested during pregnancy. The drug was developed as a sedative and sleeping aid and was widely prescribed and distributed to pregnant women for a number of years before its deleterious effects on developing fetuses became known. It was subsequently taken off the market, but a large number of suits were brought against its manufacturer on behalf of victims seeking damages for their birth defects. Had these cases proceeded to trial, their outcomes could have varied tremendously, with negligible damage awards if juries believed the predictions of short life expectancy made by defense experts, or enormous awards if juries believed life expectancies to be longer and awarded large amounts for medical expenses and pain and suffering. Structured settlements are well suited to such situations by shifting the risks of unknown life expectancies and other factors to a disinterested annuity company better able to assess risk and life expectancy.

In other cases, the utility of structured settlements is related to liability that is uncertain.28 In these cases the risk is "all or nothing,"


27. Vasilios B. Choulos, Structured Settlements: Cure or Curse?, TRIAL, Nov. 1980, at 73, 73 [hereinafter Choulos, Cure or Curse]. Thalidomide (an effective sleeping aid and sedative) allegedly caused phocomelia in unborn children. Phocomelia is a congenital limb deficiency which manifests itself as poor development of the long bones of the limbs with "relatively good development of the hands and feet" (seal limbs). LUCILLE F. WHALEY & DONNA L. WONG, ESSENTIALS OF PEDIATRIC NURSING 963 (2d ed. 1985). The incidence of congenital malformations reached 100% when thalidomide was used between gestational days 34 and 50. Id. at 55. The product liability suits against the manufacturers were settled with the use of structured settlements in 1968. Verbeck & Michaels, supra note 26, at 18; see also, Annuities to Settle Cases, 42 INS. COUNS. J. 367, 370-71 (1975).

28. Choulos, Cure or Curse, supra note 27, at 74.
whereas in the cases where damages are certain the risk is one of “how much.” The use of structured settlements when liability is uncertain removes the plaintiff’s risk of non-recovery and the defendant’s risk of being found liable for a greater amount by virtue of a jury verdict.

Large verdicts have become increasingly common, if not commonplace. In 1966, only one verdict in the entire United States totaled $1 million or more; in 1970 there were eleven such verdicts, in 1978 there were fifty-six, and by 1980 verdicts of this size were being awarded weekly in all states.

Structured settlements aid plaintiffs in preventing premature dissipation of awards by making payments over time and by more accurately replicating losses as they actually accrue, thereby protecting against the potential mismanagement of a large lump sum of money. Given the available data and the burden that such dissipation places on the public

29. Id.
30. The lower cost-higher payout of a structured “compromise” settlement often appeals to both parties, leading them to reject the traditional cash “compromise” settlement.
33. Choulous, Cure or Curse, supra note 27, at 296.
34. Id.
37. There are many studies which examine and detail the problems inherent in lump sum personal injury awards or other windfalls, such as lotteries, gambling, and sweepstakes. See, e.g., Kolbach, supra note 36, at 144 n.50 (citing 1 U.S. RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY 1938-40, at 176 (1947)); James N. Morgan et al., Lump Sum Redemption Settlements And Rehabilitation (1959). Another peril of lump sums, overcompensation or undercompensation for medical costs, can be addressed with a trust fund where the insurance company replenishes the fund when it is near zero and where the company receives a reversion if the plaintiff dies. See Hillard, supra note 1, at 245.
welfare system, it is clear that these problems should not be ignored any longer.\(^{38}\)

The liability insurance crisis\(^{39}\) and various tax reforms have also encouraged the use of structured settlements. Large self-insured companies and insurance companies can get a better deal with less financial management expense than can a single claimant,\(^{40}\) thereby helping to reduce costs and maximize the payout/policy limits ratio.\(^{41}\) This in turn helps to keep insurance costs down, conferring an additional benefit upon the public at large.\(^{42}\)

Damages received for personal injury have been exempted from taxation under the Internal Revenue Code since its enactment.\(^{43}\) Soon after structured settlements came into vogue, Revenue Ruling 79-220 added an increased incentive for plaintiffs to structure their settlements, holding

\(^{38}\) Henderson, \textit{supra} note 1. This article discusses increasingly large verdicts, the availability and affordability of insurance, income tax treatment and the improvident disposition of awards as “important matters . . . that call for re-examination of how large awards of future damages in bodily injury cases are calculated and paid.” \textit{Id.} at 734.


The New York State Insurance Department stated that “[u]nless major actions are taken soon, it is clear that the [medical malpractice liability insurance] system will collapse in the not-too-distant future, with severe impact on New York’s health care delivery system.” \textit{REPORT OF THE NEW YORK STATE INSURANCE DEPARTMENT ON MEDICAL MALPRACTICE, A BALANCED PRESCRIPTION FOR CHANGE} vi (1988). \textit{See infra} notes 99-106 and accompanying text (discussing the legislative history of Chapter 184 of the Laws of 1988).

\(^{40}\) Henderson, \textit{supra} note 1, at 736.

\(^{41}\) Choulos, \textit{Cure or Curse}, \textit{supra} note 27, at 74.

\(^{42}\) \textit{Id.}


\textbf{SEC. 104. COMPENSATION FOR INJURIES OR SICKNESS}

(a) IN GENERAL. - Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include— . . .

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness; . . .

. . . \textbf{Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.}

that as long as there is no "constructive receipt" by the plaintiff, the compounded interest is also tax free.\textsuperscript{45}

\textbf{PART TWO}

\textit{Growth and Interest Rates}

There are many different methods used to calculate the present value of a damage award. Although these methods can be a source of disagreement in structured settlements, they are most often not directly at issue and typically only become an issue in cases of structured judgments.\textsuperscript{46} There is no dearth of commentary, by legal and economic scholars, on the subject.\textsuperscript{47} The most confusing aspect of this area is the number of unfamiliar and often interchangeable terms.

The terms "structured judgment" and "periodic payment of a judgment" are often interchanged. Both terms refer to an arrangement for a series of payments, rather than a lump sum payment, in satisfaction of a judgment.\textsuperscript{48} "Future value" refers to the total amount due under a structured judgment. It can also be referred to as the "total pay out,"\textsuperscript{49} and

\begin{footnotesize}
\textsuperscript{44} This is a tax doctrine whereby "income which is subject to unfettered command of taxpayer and which he is free to enjoy at his option is taxed to him. . . . An example would be accrued interest on a savings account. Under the constructive receipt of income concept, such interest will be taxed to a depositor in the year it is available rather than the year actually withdrawn." \textit{Black's Law Dictionary} 285 (5th ed. 1979).

\textsuperscript{45} Rev. Rul. 79-220, 1979-2 C.B. 74, the substance of which was later incorporated into § 101(a) of the Periodic Payment of Settlements Act, Pub. L. No. 97-473, 96 Stat. 2605 (1982) (codified as amended at I.R.C. § 104(a)(2) (1982)). Section 6079(b)(1) of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3709-10 (1988), amending I.R.C. § 130, added incentives for the defendant, the annuity company and the plaintiff. The defendant gets the benefit of a novation, since it is required for the plaintiff to achieve favorable tax benefits. The premiums are not taxed to the annuity company as income. The plaintiff gets secured creditor rights. The tax benefits inure to the benefit of plaintiffs by protecting the investment interest from taxation, if it accrues and is paid via an annuity. In addition to fueling the growth of structured settlements, these tax benefits for annuity companies have also fueled the growth of companies which specialize in facilitating structured settlements.

\textsuperscript{46} The parties negotiating a structured settlement rarely argue over the method of computation. The only discussion concerns the "bottom line" — the present value, the stream of payments and the total payout. Inflation and discount rates are also haggled over, but the formulas are not since only the numbers need to be agreed upon. In a structured judgment, however, the formulas become central to the plaintiff-defendant battle since the judge ultimately must choose a method or a formula. Thus, the advocacy is over which formula or method is to be employed, and not the "bottom line."

\textsuperscript{47} See sources cited \textit{supra} note 20 and \textit{infra} note 67.

\textsuperscript{48} \textit{See generally} \textit{Black's Law Dictionary} 82 (5th ed. 1979) (defining annuity as a fixed sum payable to a person at specified intervals for a specific period of time or for life).

\textsuperscript{49} \textit{See generally} James S. Marello, Comment, \textit{Periodic Payment Plans: Are Annuities Adequately Protecting the Personal Injury Plaintiff from Inflation, Providing Accurate Attorney's Fees and
often has as its components: (1) a baseline amount; (2) a term, or time period over which payments are to be made; (3) a growth/inflation rate; and (4) an interest, or "discount," rate. The baseline amount and the term are generally determined by the trier of fact. The rates of growth and interest are compounded, with the interest in each successive period accruing to the sum of principal and interest of prior periods.\(^5\)

The rates of growth and inflation are two of the most significant and controversial aspects of future value. Some commentators confuse or use the terms interchangeably, but they are different concepts and should be distinguished. Growth increases are commonly termed "merit" increases or productivity increases, compensating the individual for losses most closely related to his or her specific abilities to earn increasing amounts of money over time.\(^5\) Inflation, on the other hand, is used to refer to compensation for price inflation over time, attributable to broader societal or macroeconomic factors.

The interest rate is a critical element in discounting, or reducing to present value, and it is often a source of controversy in the context of structured settlement determinations. Present value in this context is simply a determination of how much money must be invested today to give the plaintiff, the recipient of an award, the amount to which s/he is entitled at some future time, taking into consideration the rate of interest. For example, if a plaintiff is entitled to a payment of $11 one year from today, and the prevailing rate of interest is 10%, an investment by the defendant of $10 today will be sufficient to allow the plaintiff to receive that $11 payment in one year.\(^5\) In other words, $10 today, invested at


50. SCHWARTZMAN & BALL, supra note 11, at 226.


52. Henderson has listed four factors which influence the rate at which earnings increase: "(1) the educational attainment of participants prior to their entry into the labor market; (2) the influence of age upon the earnings of participants over their life cycle; (3) the significance of productivity and growth; and (4) the impact of inflation." Henderson, Consideration, supra note 16, at 312. The first three of these four factors relate specifically to the individual and are affected by different variables than the fourth factor which is a broader term. Note, Future Inflation, supra note 17, at 106. This subject is discussed in greater detail in John P. Henderson, Income Over the Life Cycle: Some Problems of Estimation and Measurement, 25 FED’N INS. COUNS. Q. 15 (1974).

53. Gary A. Anderson & David L. Roberts, Economic Theory and the Present Value of Future Lost Earnings: An Integration, Unification, and Simplification of Court Adopted Methodologies, 39 U. MIAMI L. REV. 723, 732 (1985) [hereinafter Anderson & Roberts, Economic Theory]. Schwartzman and Ball have defined present value as "[t]he worth today of funds acquired or spent in the future when these funds are discounted at a particular rate of interest. The result may be a single amount or a series of amounts paid over a given period of time." SCHWARTZMAN & BALL, supra note 11, at 233.
10%, is the equivalent of $11 in one year. This concept can be expressed by the formula:

$$PV = \frac{FV}{1 + k} = \frac{\$11}{1 + 10\%} = \frac{\$11}{1.10} = \$10$$

where PV is the present value, FV is the future value and k is the prevailing interest rate.

Contrary to the beliefs of many lawyers and other non-economists, complex present value computations are not matters of mere arithmetic. The computations for future value and present value are typically combined into one formula, often called a present value formula, even though it reflects both processes. These formulas are very sensitive to small changes in input values. They are particularly sensitive to any alterations in the inflation and discount rates, since these figures are often subject to exponential calculations which have the effect of magnifying any error in the original choice of input upon which they operate.

The nominal, or market, rate of interest encompasses two components, one which reflects profit on the investment and one which reflects the anticipated rate of inflation. This latter factor protects the buying power of the lender's money while the borrower has it for his use. The first component is the true rate of return for the lender. But the nominal rate is not the simple sum of the real interest rate and the anticipated inflation factor, since the lender must also protect the buying power of the interest of which the lender has also lost temporary possession and

54. Landsea & Roberts, supra note 3, at 121.
55. Id. at 98-101. These two commentators state "[t]his sensitivity is often underestimated" and "is often the reason why, for the same case, two economic experts may arrive at widely different estimates of the present award deemed appropriate." Id.
56. The growth and discount rates have the time period as an exponent. In the example infra note 57, "2" or "2.1" would be the rate and "10" would be the time period.
57. This is the sensitivity to which supra note 55 and the accompanying text refer. For example, 2^10 is 1024 and 2.1^10 is 1667.99. Thus, in this example, a change in the base number of 0.1 results in a change of 643.99.
58. There may be an additional factor of risk which may come into play. Although this author is unsure that this is not entirely accounted for in the real rate, at least one commentator has stated that this risk factor does not enter into the formulas used in the context of damage awards because the courts assume a risk-free investment. Brody, supra note 9, at 1009.
59. Anderson & Roberts, Economic Theory, supra note 53, at 730. These authors consider $i + i(k_e)$ as representing the premium for expected price inflation. Id.
use. As such, the nominal interest rate (k) is the sum of the real interest rate (kr), the inflation rate (i) and the product of the two (i(kr)), i.e.,

\[ k = kr + i + i(kr). \]

Hence, the nominal or market rate of interest is the rate at which lenders are willing to lend money, and at which borrowers are able to borrow money, in an inflationary economy. The real, or below-market interest rate, is the rate that would prevail if there were no inflation.

The same nominal/real distinction also exists with respect to growth in earnings rates. Earnings grow because of personal and societal factors, such as increased productivity and inflation. Consider the case of a wage increase of 8.15%, granted during a period of 5% inflation. The rate of nominal growth in earnings may be expressed by the equation

\[ g = g_r + i + i(g_r) \]

where \( g_r \) is the real growth rate, \( g \) is the nominal growth rate, and \( i \) is the rate of inflation. Solving for \( g_r \),

\[ g_r = \frac{g - i}{1 + i} = \frac{8.15\% - 5\%}{1 + 5\%} = \frac{3.15\%}{1.05} = 3\% \]

yields the rate of real growth in earnings, or 3%.

This relationship between nominal and real rates is referred to as the "Fisher effect," after the economist Irving Fisher, who described this relationship in his book, *The Theory of Interest*. This article will make no attempt to explain or analyze the Fisher effect, but it is clear from Professor Fisher's formulas that growth in the rates of earnings and interest are related, co-varying due to the fact that both contain a term for expected future inflation. This relationship is widely recognized and utilized by economists and financial analysts, although it is not universally

60. Id.

61. Id. at 729. The real interest rate (kr) can also be expressed as:

\[ k - i \]
\[ 1 + i \]

This expression is obtained by solving the equation in the text accompanying note 60 for kr. Id. at 730.

62. See supra notes 20-22 and accompanying text.

63. The numbers for this example have been taken from Anderson & Roberts, *Economic Theory*, supra note 53, at 731.


Judicial Applications of the Methods

Courts have utilized many different methods for reducing awards to present value. The Traditional Approach uses a nominal discount rate and ignores the potential for growth in earnings. The Penrod Approach is a variation of the Traditional Approach, where sometimes a real growth rate may be used in conjunction with the nominal discount rate. The Nominal Rates Approach, also referred to as the Independent Incorporation Method, the Simultaneous Growth and Discount Approach, or the Inflate/Discount Approach, utilizes the nominal growth rate and the nominal discount rate. The Alaska Approach, also known as the Total Offset Approach, is characterized by its assumption that any growth in earnings is completely offset by the discount rate. The Feldman Approach assumes a 0% growth rate and is applied with a real interest rate. The Modified Feldman Approach assumes a 0% nominal growth rate and sets the discount rate as the difference between the nominal discount rate and the expected nominal growth rate. This approach is also known as the Partial Offset or Net Discount Approach. The final approach to be discussed will be the Annualized or Average Annual Damage Approach. In this approach the first year loss is inflated using a growth rate yielding a stream of increasing payments. This stream is then summed and an average annual loss is computed. This new average is then used as the periodic payment, creating a series of equal discounted payments.

66. Fisher postulated that the real rates are generally constant and that the adjustment for future price inflation evidences itself in the nominal rate. There are some real life limits on this adjustment, namely that inflation is not totally foreseeable and that it may take some time for the adjustment to occur. Note, Future Inflation, supra note 17, at 129. There is criticism of Fisher and his theory that the adjustment for future price inflation is completely reflected in the nominal rates. See John A. Carlson, Short-Term Interest Rates as Predictors of Inflation: Comment, 67 Am. Econ. Rev. 469 (1977).

67. The following articles each discuss at least three of the various approaches: Landsea & Roberts, supra note 3; Anderson & Roberts, Economic Theory, supra note 53; Brody, supra note 9; Note, Future Inflation, supra note 17; Maxwell, supra note 20; James R. Eck et al., Present Value of the Future Income Stream: Testing the Experts' Methodologies, FOR DEF., July 1986, at 28.

68. The prior section of this article used the term “interest” rate and the symbol “k” to refer to the rate of return on an investment. This is in keeping with economics texts. Courts, however, use the rate of return on an investment to “discount” awards. Thus, courts refer to this rate as a “discount” rate and the formulas use the symbol “d.” Although the terms interest (k) and discount (d) are often used by different authors to refer to the same concepts, they will be used in this article in accordance with their respective sources.
In *Jones & Laughlin Steel Corp. v. Pfeifer*, the Supreme Court approved the use of three of the above approaches for calculating damage awards in federal cases: the Nominal Rates Approach, the Feldman/Real Interest Rate Approach and the Alaska/Total Offset Approach. Economists Gary A. Anderson and David L. Roberts have written that these three approaches favored by the Supreme Court are all mathematically equivalent, contrary to the Court's belief that the various approaches will yield differing present values. This mathematical equivalence only occurs if the input parameters are correctly defined and estimated by the trial court. Most judges, however, do not want to turn a damage calculation proceeding into a "graduate seminar on economic forecasting" and this timidity results in a lack of uniformity and precision.

An exposition of the intricacies of the various approaches is not integral to this article and is omitted. The sources that appear in the footnotes may be consulted if more detail is desired. Although formulas for the approaches are not critical to an understanding of the concepts, they have been set forth in the footnotes because they aid in a comparison of the approaches and because some readers may be interested in them.

**The Traditional/ Penrod Approach**

The Traditional/ Penrod Approach greatly favors the defendant by its failure to account for any potential growth in earnings. This omission was historically based on the perception of trial courts that inflation was "speculative." The unfairness of this approach is apparent when one considers that a portion of the nominal discount rate is based on an ex-

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71. Id. at 727.


73. In addition, these formulas were used to calculate the present value of a hypothetical $1 million verdict to be paid $50,000 a year for twenty years. See infra note 96.

74. This approach can be expressed as follows:

\[
PV = \sum_{t=1}^{N} \frac{X_t(1 + g - g)^t}{(1 + d)^t} = \sum_{t=1}^{N} \frac{X_0}{(1 + d)^t}
\]

where PV equals the present value of expected future damages, \(X_t\) is the level of damages at the beginning, \(d\) is the annual discount rate, \(N\) is the number of years over which damages will be incurred and \(t\) is a variable which goes to \(N\) and represents the compounding of \(d\). Landsea & Roberts, supra note 3, at 107.

75. See supra notes 17-18 and accompanying text.
pectation of future price inflation.\textsuperscript{76} The Traditional/penrod Approach was finally overruled due to this bias in favor of defendants.\textsuperscript{77} In \textit{Doca v. Marina Mercante Nicaraguense, S.A.} the Court of Appeals for the Second Circuit pointed out that although all may not agree on whether governmental action could erase the "strong and persistent"\textsuperscript{78} inflation inherent in our economy, it would take "Draconian measures, at the very least"\textsuperscript{79} for inflation to be completely eliminated.

\textbf{The Nominal Rates Approach}

The Nominal Rates Approach has support in the economic community\textsuperscript{80} and from at least one court.\textsuperscript{81} This method takes the damage award, projects the yearly amount of the award at the compounded growth rate, discounts each of these yearly values at the discount rate and totals the discounted figures to arrive at the final present value of the entire award. A criticism of this approach is that it requires numerous cumbersome calculations,\textsuperscript{82} but the formula is capable of being programmed into a computer or moderately sophisticated calculator for simple application.

\textsuperscript{76} Landsea \& Roberts, \textit{supra} note 3, at 106.


\textsuperscript{79} \textit{Id.}

\textsuperscript{80} Landsea \& Roberts, \textit{supra} note 3, at 94 and Eck et al., \textit{supra} note 67, at 31, both list this approach as their preferred method based on its accuracy. This approach also avoids any criticism that may be attached to the Fisher effect, the accuracy of co-variancing and any of the differential rate approaches. The formula for this approach is as follows:

\[ PV = \sum_{t=1}^{N} \frac{X_0(1 + g)^t}{(1 + d)^t} \]

where PV equals the present value of future damages, \( X_0 \) is the level of damages at the beginning, g is the expected annual damage growth rate, d is the annual discount rate, N is the number of years over which damages will be incurred and t is a variable which goes to N and represents the compounding of g and d. Landsea \& Roberts, \textit{supra} note 3, at 97.


\textsuperscript{82} Eck et al., \textit{supra} note 67, at 29.
The Alaska Approach

In its purest form, the Alaska Approach\(^{83}\) assumes that the rate of growth in earnings and the discount rate completely cancel each other out.\(^{84}\) This effectively sets the growth rate equal to the discount rate. Since the discount rate is in reality normally greater than the earnings growth rate, this approach favors the plaintiff.\(^{85}\) Support for this approach is often based on its predictability, accuracy and efficiency.\(^{86}\) The efficiency and predictability are clear, since there are no computations to be performed other than a multiplication of the initial award by the number of years, but the accuracy of the approach has been questioned.\(^{87}\)

The Differential Rate Approaches

The Feldman/Real Interest Rate Approach and the Modified Feldman/Net Discount Approach are both differential discount, or partial offset, methods. They differ only in their assumptions regarding growth rates. The Feldman Approach assumes a 0% growth rate and then sets the discount rate at the nominal discount rate minus price inflation (\(k - i\)).\(^{88}\) The Modified Feldman also sets the nominal growth rate at 0% but then subtracts the nominal growth rate from the nominal discount rate to

\[
PV = \sum_{t=1}^{N} \frac{X_0(1 + g - g)^t}{(1 + d - i)^t} = N(X_0)
\]

where PV equals the present value of future damages, \(X_0\) is the level of damages at the beginning and \(N\) is the number of years over which damages will be incurred. Landsea & Roberts, supra note 3, at 109.

83. The formula for this approach is as follows:

84. For more on the "wash" analysis, see Brody, supra note 9, at 1023 n.85.

85. A proponent of this approach acknowledges that it ignores the historical fact that the discount rate exceeds the growth rate by 1%. Wolfgang W. Franz, Simplifying Future Lost Earnings, TRIAL, Aug. 1977 at 34, 36.

86. Note, Future Inflation, supra note 17, at 125.

87. The inaccuracies in this approach are due to the fact that it "arbitrarily changes the assumptions." Eck et al., supra note 67, at 30. As is obvious from the formula in supra note 83, this approach removes the growth rate (\(g\)), the discount rate (\(d\)), and expected price inflation (\(i\)) from the analysis.

88. The formula for this approach is as follows:

\[
PV = \sum_{t=1}^{N} \frac{X_0(1 + g - g)^t}{(1 + d - i)^t} = N \sum_{t=1}^{N} \frac{X_0}{(1 + d - i)^t}
\]

where PV equals the present value of future damages, \(X_0\) is the level of damages at the beginning, \(g\) is the expected annual damage growth rate, \(d\) is the annual discount rate, \(i\) is the expected rate of price inflation, \(N\) is the number of years over which damages will be incurred and \(t\) is a variable which goes to \(N\) and represents the compounding of \(g\) and \(d\). Landsea & Roberts, supra note 3, at 112.
arrive at the "Modified Feldman" nominal growth rate \((k - g)\). These approaches differ by a factor of \(g - i\) in the denominator of the equation.

The Feldman formulas are mathematically flawed since they ignore the final component, \(i(g)\) or \(i(k)\), of the nominal rate formulas. These approaches are judicial attempts to account for co-variance between the nominal rates and inflation by offsetting them. This calculation, however, is not a simple algebraic process, and definitional problems at the beginning of the analysis can cause large discrepancies.

**The Average Annual Damage/Annualized Approach**

The final approach that courts have used is the Average Annual Damage/Annualized Approach. This approach is heavily flawed and highly inaccurate due to its assumption that the timing of the payments is not important. This is a serious flaw since the very purpose of these present value calculations is to accurately reflect the time value of money and replicate the plaintiff's actual losses as they accrue.

89. The formula for this approach is as follows:

\[
PV = \sum_{t=1}^{N} \frac{X(1 + g - g)^t}{(1 + d - g)^t}
\]

where \(PV\) equals the present value of future damages, \(X\) is the level of damages at the beginning, \(g\) is the expected annual damage growth rate, \(d\) is the annual discount rate, \(N\) is the number of years over which damages will be incurred and \(t\) is a variable which goes to \(N\) and represents the compounding of \(g\) and \(d\). Landsea & Roberts, *supra* note 3, at 114.

90. **Landsea & Roberts, *supra* note 3, at 111-12.**


92. See *supra* notes 55-57 and accompanying text explaining multiplication and magnification of small errors. There has been an attempt to arrive at a differential rate that is accurate over the long term. Gary A. Anderson & David L. Roberts, *Stability in the Present Value Determination of Future Lost Earnings: An Historical Perspective with Implications for Predictability, 39* U. MIAMI L. REV. 847 (1985). The authors recommend a "benchmark after-tax differential discount rate of -0.5%." *Id.* at 871. The authors do not claim this will lead to perfect results, but claim it is "exceptionally stable both over time and across different occupations." *Id.* at 870.

93. The equation for this approach is as follows:

\[
PV = \left( \sum_{t=1}^{N} \frac{X(1 + g)^t}{N} \right) \left( \sum_{t=1}^{N} \frac{1}{(1 + d)^t} \right)
\]

where \(PV\) equals the present value of future damages, \(X\) is the level of damages at the beginning, \(g\) is the expected annual damage growth rate, \(d\) is the annual discount rate, \(N\) is the number of years over which damages will be incurred and \(t\) is a variable which goes to \(N\) and represents the compounding of \(g\) and \(d\). Landsea & Roberts, *supra* note 3, at 118.

94. See *id.* at 119.

Conclusion

The various approaches detailed above are confusing because of their complexity, their difficulty of application and the different results they produce given identical assumptions and inputs. Choosing one as superior is thus made difficult. This author feels the Nominal Rates Approach is the best approach for judicial use in structuring award payments. It does not attempt to utilize the Fisher effect in the name of simplicity. It allows for advocacy by both plaintiffs and defendants regarding the appropriate growth and discount rates. And it uses the more familiar "nominal" or "market" rates, rather than "real" rates. There is no dispute about its validity or technical accuracy.

The Traditional/Penrod Approach is biased in favor of defendants because it fails to incorporate any growth rate. The Alaska Approach is technically flawed since it assumes the growth rate and the discount rate are equal, thereby canceling each other out. Since the discount rate usually exceeds the growth rate, this approach is biased in the plaintiff's favor. The Differential Rate Approaches inaccurately attempt to utilize the Fisher effect. Differential rates should be avoided because in their attempts to simplify, they accept and inaccurately apply a principle that is not universally accepted. The Average Annual Damage/Annualized Approach essentially "front-loads" the growth component by calculating the stream of payments and then averaging it, thus resulting in a severe bias in favor of the plaintiff.

96. The phenomenon by which the different approaches detailed above yield different results despite identical inputs and assumptions is best demonstrated by example. Assume the following:

\[ X_0 = 50,000 \quad g = 2.0\% \]
\[ d = 8.5\% \quad i = 5.0\% \]
\[ N = 20 \]

Inputting these values into the various approaches yields:

- Traditional/Penrod: $473,167
- Nominal Rates: 556,547
- Alaska: 1,000,000
- Feldman ("Real Interest Rate"): 720,620
- Modified Feldman (Net Discount): 550,925
- Average Annual Damage: 536,332


97. This approach has support from at least six leading economists in this area. Eck et al. supra note 67; Vincent M. Jolivet, Present Value of Future Earnings Revisited, 49 Ins. Couns. J. 316 (1982); Landsea & Roberts supra note 3.

CPLR Article 50 had its origins in the concern over the medical malpractice insurance crisis, a concern which led to the enactment of CPLR Article 50-A as part of the Medical Malpractice Reform Act of 1985. This act had three purposes: (1) to increase the efficiency of the medical malpractice litigation process by encouraging settlement and by expediting such litigation through various pretrial procedures; (2) to contain the liability of physicians and dentists within limits that maintain a fair and full recovery for the plaintiff and limit contingent attorney's fees by replacing the standard one-third arrangement with a sliding fee scale; and (3) to reduce medical malpractice litigation. A year later, as part of the Toxic Tort legislation, the legislature expanded Article 50 to cover actions for personal injury, property damage and wrongful death. When word of the contemplated expansion of Article 50 reached the legal community, it was presumed that the legislature would merely extend the scope of Article 50-A from malpractice actions to tort actions in general. Instead, the legislature enacted a separate article, CPLR Article 50-B, leading some to fear that there would be substantial differences between the two. Those fears were unfounded, since Article 50-B is nearly identical to Article 50-A, differing only in the type of action it covers. Because these differences do not have any effect on the substantive issues, they will not be analyzed in this section.

99. The complete text of Article 50 appears in the Appendix.
106. The differences between Article 50-A and Article 50-B are flagged in the Appendix. Language that differs is italicized in the text of Article 50-B and the language that replaces it in 50-A is underlined.
107. The language of Article 50-A and 50-B differ only by the substitution in 50-B of the language "personal injury, injury to property or wrongful death" for the Article 50-A language "dental, medical or podiatric malpractice." The Articles are structured identically, with Article 50-A utilizing the section numbering convention 5031-5039, and Article 50-B utilizing 5041-5049. Section 5031 is identical to 5041, except for its coverage, and so forth. For the sake of convenience, references to particular sections of Article 50 will be in the form "5031/41," reflecting the near identity of the sections. References to Articles 50-A and 50-B in their entirety will be to "Article 50."

There are additional problems of greater importance that will also not be addressed in this article. First, Article 50 seems to have been hastily enacted in that it is not well coordinated with other
There is very little case law on Article 50, due in large part to its complexity. Cases that do proceed to trial and verdict often settle
soon after a verdict is rendered, rather than proceed to the complex and costly process of entering judgment under the statute. Judges often encourage settlement rather than wrestle with the statute and all of its difficulties. Due to this dearth of case law much of the analysis that follows is the opinion of the author. Discussion and criticism of the analysis, suggestions and conclusions are encouraged.

The heart of Article 50 is section 5031/41, which creates a multiple

(Sup. Ct. 1990) (referencing problem with N.Y. Civ. PRAC. L. & R. 4111(f) and Article 50-B and addressing a similar problem in interaction of N.Y. Civ. PRAC. L. & R. 4111(f) and N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 relating to pre-verdict interest in wrongful death cases); Frey v. Chester E. Smith & Sons, Inc., 751 F. Supp. 1052 (N.D.N.Y. 1990) (the first case to apply subdivision (a) to a verdict; also computes present value despite circularity of subdivisions (c) and (e)); Hudson v. Manhattan & Bronx Trans. Auth., 568 N.Y.S.2d 503, 504, 505 (Sup. Ct. 1990) (addressing gap in the effective dates of N.Y. Civ. PRAC. L. & R. 4111(d) and Article 50 and dealing with the problem as an excessive verdict); Milano v. Freed, 767 F. Supp. 450, 452 (E.D.N.Y. 1991) (referencing Article 50 and the holding in Alisandrelli in a dispute over pleading damages in federal court medical malpractice cases); In re E. and S. Dists. Asbestos Litig., 772 F. Supp. 1380, 1410 (E.D.N.Y. and S.D.N.Y. 1991) (appropriate discount rate is 6.88% based on one-year Treasury Bills); Gambardelli v. Allstate Overhead Garage Doors, Inc., 576 N.Y.S.2d 770, 774 (1991) (holding that 4% increase in the annual payment under § 5041(e) has no impact on inflation testimony); In re New York City Asbestos Litig., 572 N.Y.S.2d 1006, 1010 (Sup. Ct. 1991) (one sentence mention of the requirements of § 5041); Hill v. Muchow, 579 N.Y.S.2d 254, 255 (App. Div. 1991) (defendant does not waive application of Article 50 by failing to submit proof of a discount rate, since the statute “unequivocally places the onus on the court to structure the judgment”); Stiles v. Batavia Atomic Horseshoes, Inc., 579 N.Y.S.2d 790, 794 (1992) (failure to itemize a verdict pursuant to N.Y. Civ. PRAC. L. & R. 4111 harmless error since § 5041(e) did not apply and since plaintiff’s expert reduced future damages to present value); Reed v. Harter Chair Corp., 586 N.Y.S.2d 401, 404 (Sup. Ct. 1992) (stating that it was error for trial court to not “structure an annuity contract for a part of the award for future damages”); Rohring v. City of Niagara Falls, 584 N.Y.S.2d 513 (Sup. Ct. 1992) (addressing the circularity of subdivisions (c) and (e), but not computing two present values); Peterson v. Zuercher, 584 N.Y.S.2d 968 (Sup. Ct. 1992) (explicitly describing steps taken to calculate attorney’s fees and present value, stating that the 4% represents inflation and that Article 50 is to be applied separately to verdicts in derivative causes of actions). Hill v. Muchow, No. H-84795 (Sup. Ct. Erie County Sept. 11, 1992) (setting forth subdivision (c) and (e) calculations and stating that inflation, step increases, productivity, real rate of growth and promotions are included in the statutory 4%) will likely be reported shortly.

109. In Rohring v. City of Niagara Falls, 584 N.Y.S.2d 513 (Sup. Ct. 1992), judgment was entered more than one year after the verdict was rendered. The February 14, 1991 verdict totaled $2,501,311.00. Id. at 513. A hearing for Article 50 purposes was held July 30, 1991. Id. The court did not enter judgment for the present value of the annuity contract, but for an annuity contract to provide certain payments. Id. at 516. Assuming a discount rate of 7.5% and applying the statutory 4%, this author calculated the present value of the required annuity to be $997,324.28. The total lump sum portion of the judgment was $949,637.27. Id. Thus the total judgment was $1,946,961.55. The plaintiff was awarded interest. Id. The CPLR provides for 9% interest from the date of verdict to the date of entry of final judgment. N.Y. Civ. PRAC. L. & R. 5002, 5004 (McKinney 1992). Interest earned in one year on the $1.9 million plus award amounts to more than $175,000. This provides a strong incentive to settle. At least one defendant has attempted to halt this accrual of interest by tendering payment to the clerk pursuant to N.Y. Civ. PROC. L. & R. 5021(a) (McKinney 1992). Hill v. Muchow, No. H-84795 (Sup. Ct. Erie County Sept. 11, 1992).
step process by which courts are to enter judgment for damage awards under the statute. This process, while relatively simple and straightforward at first glance, is in practice confusing and difficult to apply. The statute directs a court to make a variety of adjustments to the jury’s, or its own, damage verdicts, and to reduce portions of those verdicts to present value, but it does not provide crucial guidance regarding whether certain of these adjustments are to be made before or after the reduction to present value. Nor does the statute provide adequate guidance to courts regarding the proper derivation of interest and growth rates to be used in the present value calculations. Such ambiguity and confusion have undoubtedly led courts and parties to avoid the application of the statute by encouraging and accepting lump sum settlements on more easily understandable terms.

Subdivisions (a), (c) and (e) of § 5031/41 present the greatest complexity and the most interesting problems associated with § 5031/41. Subdivision (a) contains a direction to courts that damages be adjusted to reflect set-offs, credits, and other adjustments other than reduction to present value. Subdivision (c) relates to litigation expenses and attorney’s fees. Subdivision (e) requires that future damages in excess of $250,000 be reduced to present value.

Subdivisions (b), (d) and (f) are not particularly problematic and will only be discussed in passing. Subdivision (b) instructs the court to calculate the portions of the judgment that remain payable in lump sum form, such as past damages and future damages up to $250,000, and to enter judgment upon these amounts. Subdivision (d) provides for reimbursement to subrogees and lien holders. Subdivision (f) allows the

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110. This direction applies to all past damages, future damages not in excess of $250,000, and fees and costs pursuant to subdivisions (c) and (d). The $250,000 lump sum that is a portion of future damages shall be deducted from each item of future damages in the same proportion as that item of future damages bears to total future damages. For example, assume a jury awards $200,000 future lost wages, $300,000 future medical costs and $500,000 future pain and suffering. The $250,000 lump sum that is due from the total future award should then be deducted from the above three categories in the following manner: 20% from lost wages ($200,000/1,000,000 x 100); 30% from medical costs ($300,000/1,000,000 x 100); and 50% from pain and suffering ($500,000/1,000,000 x 100).

111. Subdivision (d) relates to the right of subrogees and lien holders to recover, in lump sum form, payments they have made that have now been recovered by the plaintiff. Subdivision (e) states that these adjustments should be made before reduction to present value. As suggested in the discussion of subdivision (a), infra text accompanying notes 113-15 and 120, the timing of any adjustments in relation to subdivision (e) computations should hinge on the nature of the adjustment. If the adjustment is a gross amount, it should be made before the subdivision (e) calculations are performed; if the adjustments are themselves reduced, they should be made after the calculations under subdivision (e). It is a problem of treating like numbers alike.
parties to waive the provisions of the entire Article.\textsuperscript{112}

\textit{Sections 5031/41}

Subdivision (a) of § 5031/41 directs the court to make adjustments to the findings of the trier of fact for setoffs, credits, comparative negligence,\textsuperscript{113} additurs and remittiturs. This direction is not as explicit as it seems, however, given that: (1) the statute is not clear as to whether these adjustments are to be made before or after the award is reduced to present value pursuant to subdivision (e) and (2) it is not clear whether these adjustments are the type of adjustments that are within the intended meaning of subdivision (e), but which are not expressly mentioned therein.\textsuperscript{114} These two problems are actually so interrelated as to be one. Whether these are adjustments within the scope of subdivision (e) flows from a determination of whether they are adjustments that precede or follow the reduction to present value.

If the subdivision (a) adjustment is itself a discounted amount, it is an adjustment that is more properly made after the subdivision (e) present value computations are made.\textsuperscript{115} In contrast, remittitur is a function

\textsuperscript{112} Waiver of the provisions of the Article requires the consent of the plaintiff (now claimant) and any or all of the defendants (now parties liable). N.Y. Civ. Prac. L. & R. 5041(f) (McKinney 1992). Since waiver is allowed, the statute is not truly mandatory. But since mutual consent is required, the statute is not truly elective, either. In \textit{Hill v. Muchow}, the Appellate Division, Fourth Department, held that a defendant does not waive the application of Article 50 by failing to submit proof of a discount rate, since the statute places the onus on the court. 579 N.Y.S.2d 254, 255 (App. Div. 1991).

\textsuperscript{113} At first blush, it appears that the plaintiff’s comparative negligence could be deducted either before or after the reduction to present value. However, this might not be the case since comparative negligence is expressed as a percentage of total fault. The lump sums that are due up front may alter the calculation so that a 10\% deduction from the gross verdict is not equivalent to a 10\% deduction from the total lump sums due, together with the present value of the periodic payments.

\textsuperscript{114} Although this was not at issue in \textit{Ursini} (one of the earliest and most thorough cases applying Article 50), Judge Gammerman stated in dicta that these “adjustments” should be made before the reduction to present value. \textit{Ursini v. Sussman}, 541 N.Y.S.2d 916, 919 (Sup. Ct. 1989). This decision to make the subdivision (a) adjustments before reduction to present value fits with the requirement that amounts to be paid to subrogees and lien holders under § 5031/41(d) be deducted prior to the reduction to present value under § 5031/41(e).

\textsuperscript{115} This arguably would be the case when the plaintiff and a co-defendant have settled in the shadow of Article 50, that co-defendant is ultimately found partially liable and a non-settling joint tortfeasor is seeking the benefit of N.Y. Gen. Oblig. Law § 15-108. N.Y. Gen. Oblig. Law § 15-108 gives a non-settling defendant who is faced with a verdict against him, credit for the larger of: (1) the jury-assessed percentage of liability of the settling defendant or (2) the dollar value of the settlement. The issue arises as to whether this is to be done before Article 50 is applied, after it has been applied or whenever it is most beneficial to the non-settling defendant. CPLR § 5031/41(a) would seem to require that credit pursuant to N.Y. Gen. Oblig. Law § 15-108 be done first, as it is
of "excessiveness," which is measured by the amount of the gross verdict and as such is more appropriately an adjustment that should be made before the subdivision (e) computations are made.

Subdivision (c) presents its own set of difficulties. Subdivision (c) directs the payment of litigation expenses and attorney's fees in a lump sum comprised of three different amounts: (1) expenses and fees related to past damages; (2) attorney's fees related to the first $250,000 of future damages; and (3) attorney's fees related to the present value of future damages greater than $250,000. While the first two components of this expense and fee amount are easily determinable, the third component is not because of the complexity of its interaction with subdivision (e) and the resulting problem of "circularity." 116

This problem of circularity stems from the cross-referential language of subdivisions (c) and (e). Subdivision (c) requires that the third component of the expense and fee award be based on the present value of a portion of future damages, with that present value calculated pursuant to subdivision (e). Subdivision (e), however, requires that adjustments pursuant to subdivisions (b), (c) and (d) be made prior to reduction of the remaining amount to present value. Thus, it is not clear whether the subdivision (c) calculation or the subdivision (e) calculation is to be performed first, or even whether this particular subdivision (c) calculation is one contemplated by subdivision (e). Despite this ambiguity, it seems that this subdivision (c) adjustment is one more properly made after the subdivision (e) reduction to present value is made, given that the amount is based on present value and that the statute does not facilitate a clearer reading of the proper sequence in which the calculations are to be made. 117

Subdivision (e) presents the thorniest problems associated with Arti-

an "applicable rule of law." The policy and rationale of GEN. OBLIG. LAW § 15-108 would seem to require that credit be given in the manner that is most beneficial to the non-settlor, since the plaintiff bears the burden of a bad settlement.

116. In Ursini, Judge Gammerrman was confronted with this circularity and chose to attempt to address it by first calculating a "dummy" present value under subdivision (e), calculating the attorney's fee based on this number, subtracting the attorney's fee (which is a percentage of a present value) from the remaining gross future damages, and then "recalculating" the present value under subdivision (e). 541 N.Y.S.2d, 916, 919-20 (Sup. Ct. 1989).

117. There is an alternative reading of subdivision (c) which would remove the circularity. Subdivision (c) reads, in part, as follows: "Payment of that portion of the attorney's fees related to the future periodically paid damages shall also be payable in a lump sum, based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to subdivision (e) of this section." N.Y. CIV. PRAC. L. & R. 5041(c) (McKinney 1992) (emphasis added). If the phrase "pursuant to" is read as modifying the more adjacent verb "purchased" rather than the more distant verb "based," the mathematical circularity is removed.
It is this section that provides for the conversion of future damages into a present value upon which judgment is entered. Subdivision (e) directs courts to enter judgment for the present value of future damages over $250,000, to be calculated after adjustments prescribed by subdivisions (b), (c) and (d) have been made and in accordance with "generally accepted actuarial practices." It further directs courts to increase the annual payments at a rate of 4%. These directions cause four major problems: (1) the meaning of "adjustment" is not defined and it is not clear which adjustments pursuant to subdivisions (b), (c) and (d) should be made before the subdivision (e) calculations are performed and which should be made after; (2) the directions contribute to the circularity problem of subdivisions (c) and (e); (3) the directions do not define what is meant by the term "generally accepted actuarial practices" nor make clear whether this term implicates a particular discounting method or discount rate; and (4) the directions do not make clear the purpose of the 4% rate mandated for use in increasing the annual payments.

(1) Adjustments. In applying § 5031/41, the adjustments of subdivisions (a), (b), (c) and (d) should be timed in relation to the subdivision (e) calculations by the nature of the adjustment. If an adjustment is itself an amount that has been reduced to present value, it should be made after the subdivision (e) calculations are made. If a subdivision (a), (b), (c) or (d) adjustment is a gross or unreduced amount, the adjustment should be made before the subdivision (e) calculations. Adjustments should only be made when the amounts are in the same reduced or unreduced state.

119. Id.
120. See supra text accompanying notes 113-15 for a discussion of subdivision (a). Frey v. Chester E. Smith & Sons, Inc. is the only Article 50 case which applies subdivision (a) to a verdict. 751 F. Supp. 1052, 1054-56 (1990). The Frey court made adjustments for the plaintiff's comparative negligence, prior settlement and social security as a collateral source. Id. All of these adjustments were made prior to the reduction to present value, in accordance with a literal reading of subdivisions (a) and (e). The prior settlement was worth a total value of $525,690 ($200,000 cash, plus $300,000 to purchase an annuity, plus $25,690 representing two-thirds of a waiver of the worker's compensation lien). Id. at 1054-55. The $300,000 award to purchase an annuity is clearly a present value, and the statute should allow for its deduction after the subdivision (e) calculations are performed. In all likelihood, the worker's compensation lien was in part attributable to a lump sum payment of the present value of future damages, as determined by the worker's compensation schedules, and should be made after the subdivision (e) calculations. The statute should be capable of differentiating between reduced and unreduced (gross) adjustments.
(2) Circularity. Two premier cases applying subdivision (e), *Ursini v. Sussman*\textsuperscript{121} and *Frey v. Chester E. Smith & Sons, Inc.*,\textsuperscript{122} differ in their approach to handling the circularity problem of subdivisions (c) and (e) and in the choice of the method for reduction to present value. *Ursini* attempted to apply the statute literally — computing two present values, one before the attorney fee computation and one after the attorney fee deduction.\textsuperscript{123} In addition to the complexity of the calculations this circularity creates,\textsuperscript{124} it also leads to mathematical errors.\textsuperscript{125} *Frey*, by ignoring the circularity problem, seems to have adopted the better, and simpler, approach.\textsuperscript{126}

*Frey* avoids both of the mathematical errors of *Ursini* by utilizing the Nominal Rates Approach and by ignoring circularity. After reducing the future damage award to present value and determining the amount of future periodic installment payments, the *Frey* court simply calculated one third of each of the installment payments in accordance with the contingency payment agreement reached between the plaintiff and the attorney. The court then summed these amounts over the payment term and entered judgment on the sum as the future damages portion of the attorney’s fee.\textsuperscript{127} This approach is both simple and economically sound.

\textsuperscript{121} 541 N.Y.S.2d 916 (Sup. Ct. 1989).

\textsuperscript{122} 751 F. Supp. 1052 (N.D.N.Y. 1990). The case of Alisandrelli v. Kenwood, 724 F. Supp. 235, 242 (S.D.N.Y. 1989), stated that the New York statute must apply in diversity actions since it substantially affects a state right and to do otherwise would invite forum shopping and subvert the state interest which led to the enactment of the statute.

\textsuperscript{123} 541 N.Y.S.2d at 919. Other cases have taken the same or a similar position. See Rohring v. City of Niagara Falls, 584 N.Y.S.2d 513 (Sup. Ct. 1992); Peterson v. Zuercher, 584 N.Y.S.2d 968 (Sup. Ct. 1992); Hill v. Muchow, No. H-84795 (Sup. Ct. Erie County Sept. 11, 1992).

\textsuperscript{124} See e.g., *Ursini*, 541 N.Y.S.2d at 919.

\textsuperscript{125} This approach requires that an annual deduction for each item of future damages be computed by dividing the total of each (after reduction for the proportion of the $250,000 lump sum) by its term. This annual deduction can then be inflated at 4% over the term. These figures are next reduced to present value. The attorney fee on the present value is subsequently deducted in the proper proportion to arrive at the new annual deduction (this can be done by subtracting the total proportion from the total of each item or by dividing the proportion by the term and then subtracting the result from the original annual deduction). This new annual deduction is inflated at 4%, and finally the present value is recalculated on a new stream of annual amounts. This recalculation of the present value actually increases the present value of the original jury award as can be seen when comparing the second present value added to the attorney fees portion of the first present value with the first present value.

\textsuperscript{126} There is support for the proposition that courts should avoid a literal interpretation of a statute when such an interpretation would produce an absurd or unjust result. See Milbrandt v. A.P. Green Refractories Co., 588 N.E.2d 45, 49 (N.Y. 1992). Apparently, *Frey* thought this circularity produced an absurd or unjust result.

(3) "Generally Accepted Actuarial Practices." The term "generally accepted actuarial practices" seems to implicate the Nominal Rates Approach, since only this approach (1) avoids the controversial aspects of the Fisher effect; (2) allows for advocacy in terms which are familiar to the judge, the jury and the attorneys involved in the case; and (3) is technically sound. The approach to be implemented is not clear from the statute, however, so the word "nominal" should be placed in front of any rate cited in the statute as a means of alleviating confusion.\textsuperscript{128}

The Nominal Rates Approach, adopted by Judge McAvoy in Frey,\textsuperscript{129} is the only approach that has been explicitly adopted in a case applying Article 50. It is unclear from Judge Gammerman's decision in Ursini\textsuperscript{130} which approach was used in that case.

(4) Purpose of the 4% Rate. The adoption of a 4% escalation figure is one of the most perplexing aspects of the statute. It is not based on any of the approaches discussed in Part Two, nor is its purpose revealed in the legislative history. If it is intended to represent inflation or the rate of growth,\textsuperscript{131} its adoption runs contrary to the widely accepted premise that the nominal growth rate and the nominal discount rate are interdependent.\textsuperscript{132} If it is not intended to represent inflation or growth,\textsuperscript{133} but is instead compensation\textsuperscript{134} to the plaintiff for receiving the judgment over time instead of as a lump sum, it runs contrary to Article 50's purpose of

\textsuperscript{128} The courts which have applied Article 50 and which discuss the discount rate have used rates which range from 6.88% to 8.00%. \textit{See} Ursini, 541 N.Y.S.2d at 916 (applying a discount rate of 7.5% based on the testimony of nine economists in prior cases); Frey, 751 F. Supp. at 1057 (using the 7.0% interest rate the Federal Reserve charges banks); In re E. and S. Asbes. Litig., 772 F. Supp. 1380, 1410 (E.D.N.Y. and S.D.N.Y. 1991) (choosing 6.88% based on the rate of one year Treasury Bills); Rohring v. City of Niagara Falls, 584 N.Y.S.2d 513, 515 (Sup. Ct. 1992) (choosing 7.5% based on the testimony of the economists referenced in Ursini and the prevailing market situation); Peterson v. Zuercher, 584 N.Y.S.2d 968, 971-72 (Sup. Ct. 1992) (applying an 8% discount rate based on the testimony of the defendant's economist which was supported by the Treasury Department's long-term rate of 8% or 8.3% depending on the compounding period); Hill v. Muchow, No. H-84795, slip op. at 2 (Sup. Ct. Erie County Sept. 11, 1992) (choosing 7.0% as the discount rate since it was the "Federal Reserve discount rate").

\textsuperscript{129} 751 F. Supp. 1052 (N.D.N.Y. 1990).

\textsuperscript{130} 541 N.Y.S.2d 916 (Sup. Ct. 1989).


\textsuperscript{132} \textit{See supra} notes 64-66 and accompanying text.


\textsuperscript{134} Gammerman, \textit{supra} note 131, at 11; \textit{see also} Kelner & Kelner, \textit{supra} note 4.
containing liability.\(^{135}\)

The 4% rate is not supported by any theoretical or practical basis and should be eliminated from the statute. The words "nominal inflation rate . . . determined by the trier of fact" should be substituted. This solution would be technically accurate and would allow greater advocacy and flexibility in the determination of the appropriate rates, since different components of the award may increase at different rates depending on external macroeconomic factors. This would also clarify whether testimony should be allowed regarding the rate of inflation.\(^{136}\)

These problems have led one judge to comment that "the complexity of the statute is exceeded only by the complexity of its application."\(^{137}\) This complexity is evidenced by Judge Gammerman's decision in \textit{Ursini}, and by the paucity of cases applying the statute at the trial level or reviewing the application of the statute at the appellate level. This complexity intimidates attorneys from pursuing a judgment under the statute, encouraging them instead to settle after a verdict has been rendered. The statute is clearly having an effect upon the payment of judgments, albeit not the intended one.

\textit{Sections 5032-39/42-49}

The remaining sections (§§ 5032-39/42-49) of Article 50 present problems, largely beyond the scope of this article, that are of lesser importance than the problems of § 5031/41. Sections 5032-36/42-46 of the statute provide security for the plaintiff by mandating the purchase of annuity contracts from qualified insurers, by requiring the posting of adequate security, by providing for payment of the structured award to the plaintiff's estate in event of his death and by allowing payment of a lump sum to the plaintiff in event of his financial hardship. Sections 5032/42\(^{138}\) and 5033/43\(^{139}\) expand upon the posting of security first mentioned

\(^{135}\) See supra note 101 and accompanying text.

\(^{136}\) See Kelner & Kelner, supra note 4, for a discussion of both sides of the inflation testimony issue. Gambardelli \textit{v. Allstate Overhead Garage Doors} decided that inflation testimony was allowed since Article 50 (providing for the 4%) only has post-verdict applicability and CPLR § 4111 controls the verdict to be rendered by the jury. 576 N.Y.S.2d 770, 770 (Sup. Ct. 1991).


\(^{138}\) Section 5032/42 states that security "must be in the form of an annuity contract, executed by a qualified insurer and approved by the superintendent of insurance." This language implies that the superintendent must approve each annuity contract. Given the reference to § 5039/49, it is more likely that this section was intended to require the superintendent to approve each qualified insurer who executes an annuity contract and was not meant to require the superintendent to approve annuity contracts.
in § 5031/41(e). Some ambiguities and circularities exist in these sections, but their most important implication is the potential for unfavorable tax treatment. \(^{140}\) Section 5037/47 explicitly provides that the statute does not limit the parties' rights to settle their dispute in any manner they consider appropriate. Section 5038/48 provides for a limited right of assignment of periodic installments. \(^{141}\) Finally, under § 5039/49 the

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139. Section 5033/43(c) relates to the failure of a party (who is the only party liable for a portion of the judgment) to post security in the form of an annuity contract. It refers to the right of the claimant to a lump sum. Section 5034/44 reveals some of the cross-referencing problems of Article 50. The last two subdivisions of § 5034/44 contain instructions for accelerating the remaining periodic payments in the event a periodic payment is not timely made. The court is instructed to total the remaining periodic payments "as calculated pursuant to subdivision (b)" without converting payments to present value. The reference to subdivision (b) of § 5031/41 is misplaced. Subdivision (b) refers to entering judgment for the lump sums. It is subdivision (e) that contains the bulk of the instructions for calculating the periodic payments.

140. Internal Revenue Code § 130 gives to the recipient of an annuity rights that are superior to those of a general creditor of the assignee (usually a life insurance company). There is some disagreement over whether I.R.C. § 130 applies to judgments under Article 50. This disagreement seems to relate to the use of the word "agreeing" in I.R.C. § 130(a). Since Article 50 is neither mandatory nor elective and since there are benefits associated with compliance with I.R.C. § 130, the most cautious approach may be to ensure that the terms of the judgment comply with the seven requirements of I.R.C. § 130(c). These seven requirements are spelled out in detail in the materials compiled by the New York State Bar Association for a seminar on Article 50. Scott H. Novak, Tax Aspects of Structured Settlements, in STRUCTURED SETTLEMENTS AND PERIODIC JUDGMENTS UNDER CPLR ARTICLES 50-A AND 50-B — DURING THE NINETIES AND BEYOND 15 (N.Y. State Bar Ass'n ed. 1991).

If I.R.C. § 130 does apply, these sections may not comply with its requirements since:

1. Sections 5032/42 and 5033/43 do not provide defendant with a novation after security has been posted;

2. Section 5034/44 allows the plaintiff to petition to receive the total payout with interest if there is a default. The judge then must accelerate the payments. S/he has no discretion to fashion the remedy s/he feels appropriate. There also may be an issue as to whether acceleration of the total payout and interest on the outstanding amount constitutes an acceptable disincentive (deterrent) or an excessive penalty.

3. Section 5035/45 may raise constructive receipt/acceleration issues as well as assignment issues by allowing as payment to dependents or the estate those portions of the periodic payments which are for future lost wages in the event of the judgment creditor's death; and

4. Section 5036/46 allows for acceleration of the periodic payments if the plaintiff can show hardship, thus raising constructive receipt problems again. The judge must make four factual findings before s/he may order a lump sum of future payments not yet due. One of these findings is that the need was unanticipated. This should be interpreted to mean that the jury did not and could not anticipate this expense. Otherwise, a plaintiff under Article 50 would have a right to return to court for expenses the jury may have considered and decided upon. Another finding is that the adjustment will not impose a hardship on the judgment debtor(s). The potential hardship to the annuity company should also be a consideration.

141. The three permissible assignment purposes are: (1) alimony, maintenance or child support obligations of the judgment creditor; (2) health care costs; and (3) attorney's fees and costs "incurred in securing the judgment." N.Y. Civ. Prac. L. & R. 5038, 5048 (McKinney 1992). The last provision seems to be anomalous. The plaintiff typically has an agreement with his attorney to
Superintendent of Insurance is assigned the duty of promulgating and implementing new rules to determine which insurers are qualified to fund judgments under the Article.¹⁴²

PART FOUR

The author proposes for the sake of simplicity and uniformity that Articles 50-A and 50-B be merged into a single Article 50 and that a number of revisions be made to correct the problems discussed in Part Three. The text of Article 50-B is set forth below, with the author’s suggested changes highlighted. Proposed deletions are struck out (e.g., deleted). Proposed additions are underlined (e.g., added). The rationale for each proposed revision is set forth following the text of the proposal.

§ 5041. Basis for determining judgment to be entered

In order to determine what judgment is to be entered on a verdict in an action to recover damages for personal injury, injury to property or wrongful death under this article, and not subject to Article fifty-A of this chapter, the court shall proceed as follows:

Rationale: This alteration integrates the two sections into one section.

(a) The court shall apply:

(i) to the findings of past and future damages any applicable rules of law, including set-offs, credits, comparative negligence pursuant to section fourteen hundred eleven of this chapter, additurs, and remittiturs, in calculating the respective amounts of past and future damages claimants are entitled to recover and defendants are obligated to pay; and

(ii) to the findings of future damages any applicable rules of law, including set-offs, credits, comparative negligence pursuant to section fourteen hundred eleven of this chapter, additurs, and remittiturs, in calculating the respective amounts of future damages claimants are entitled to recover and defendants are obligated to pay. Any applicable rules of law which the court finds more proper as adjustments after the reduction to present value shall be applied after the present value computations under subdivision (e) are performed.

Rationale: These changes separate adjustments made pursuant to subdivision (a) into two classes: those to be made before the subdivision (e) present value calculation and those to be made after said subdivision (e)

handle the case for a contingent fee. Since “the case” includes entering judgment under Article 50, the fees associated with entering judgment have already been provided for in § 5031/41(c).

¹⁴². The duties require the superintendent to formulate rules and procedures to determine which insurers are qualified to fund judgments under this Article. N.Y. Civ. Prac. L. & R. 5039, 5049 (McKinney 1992).
calculation.\textsuperscript{143}

(b) The court shall enter judgment in lump sum for past damages, for future damages not in excess of two hundred fifty thousand dollars, and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section. For the purposes of this section, any lump sum payment of a portion of future damages shall be deemed to include the elements of future damages in the same proportion as such elements comprise of the total award for future damages as determined by the trier of fact.

(c) Payment of litigation expenses and that portion of the attorney’s fees related to past damages shall be payable in a lump sum. Payment of that portion of the attorney’s fees related to future damages for which, pursuant to this article, the claimant is entitled to a lump sum payment shall also be payable in a lump sum. Payment of that portion of the attorney’s fees related to the future periodically paid damages shall also be payable in a lump sum, be based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages as computed pursuant to subdivision (e) of this section.

Rationale: These changes eliminate the redundancy of this subdivision by stating in one sentence what was previously stated in three sentences. In addition, these changes contribute to the elimination of the circularity problem of subdivisions (c) and (e).

(d) Upon election of a subrogee or a lien holder, including an employer or insurer who provides workers’ compensation, filed within the time permitted by rule of court, any part of future damages allocable to reimbursement of payments previously made by the subrogee or the lien holder shall be paid in lump sum to the subrogee or the lien holder in such amount as is calculable and determinable under the law in effect at the time of such payment. Such lump sum shall be deducted after the present value computations pursuant to subdivision (e) and before entering judgment for the present value of an annuity contract pursuant to subdivision (e).

Rationale: Since prior payments that compensate for future losses are likely already reduced to present value by the stage that this adjustment is specified, this subdivision should be amended to specify adjustment after subdivision (e) adjustments have been made.\textsuperscript{144}

(e) With respect to awards of future damages in excess of two hundred fifty thousand dollars in an action to recover damages for personal injury, injury to property or wrongful death, the court shall enter judgment as follows:

\begin{itemize}
\item See \textsuperscript{supra} notes 113-15 and 120 and accompanying text for the discussion relating to subdivision (a) adjustments.
\item See generally \textsuperscript{supra} notes 113-15 and 120 and accompanying text for the discussion of the timing of the subdivision (a), (b), (c) and (d) adjustments.
\end{itemize}
Rationale: This non-apparent alteration continues the integration of the two Articles by including malpractice actions within the reference to personal injury.

After making any adjustment prescribed by subdivisions (a)(ii), (b), (c), and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments less any adjustments prescribed by subdivisions (a)(ii), (c) or (d). The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages, less any adjustments prescribed by subdivisions (a)(ii), (c) or (d), over the period of time determined pursuant to this subdivision. The present value of such contract future damages shall be determined in accordance with generally accepted actuarial practices by applying the nominal discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract such future damages shall be the period of years determined by the trier of fact in arriving at the itemized verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subdivision. The inflation rate for each item of damages shall be the nominal inflation rate for the corresponding item of damages as determined by the trier of fact in the itemized verdict.145 The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment the product of the previous year's payment and the nominal inflation rate applicable to that item of damages as determined by the trier of fact. The remaining present values shall then be totaled, adjustments prescribed by subdivisions (a)(ii), (c) and (d) shall be made, and the court shall enter judgment for the remainder. Where pay-

145. CPLR § 4111 will have to be amended so that the jury will indicate the inflation rate it determines to be appropriate for each item. The author suggests that the penultimate sentence of subdivisions (d) and (f) of § 4111 be amended as follows: "In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation and the inflation rate at which such amounts are expected to grow."
ment of a portion of the future damages terminates in accordance with the provisions of this article, the four-percent nominal inflation rate added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance.

Rationale: The changes to the first sentence allow for the classification of the adjustments into adjustments to be made before the subdivision (e) calculations and those to be made thereafter. The second and third sentences have merely been moved from their prior location, from which they have been stricken, for the sake of enhanced comprehension. Minor changes have been made. The change from “annuity contract” to “future damages” or “damages” is suggested for the sake of clarity. The addition of the term “nominal” and the deletion of the “4%” rate is suggested to make it clear that the Nominal Rates/Frey Approach is to be used. The direction of a factual finding of the appropriate nominal inflation rate allows for advocacy and flexibility. The changes in the sentence beginning “The remaining present values shall then be totaled...” eliminate the circularity of subdivisions (c) and (e), enacting the Frey method of deducting attorney’s fees from the award.

(f) With the consent of the claimant and any party liable, in whole or in part, for the judgment, the court shall enter judgment for the amount found for future damages attributable to said party as such are determinable without regard to the provisions of this article.

§ 5042. Form of security

Security authorized or required for payment of a judgment for periodic installments entered in accordance with this article must be in the form of an annuity contract, executed by a qualified insurer, and approved by the superintendent of insurance pursuant to section five thousand forty-nine of this article, and approved by the court.

Rationale: This change eliminates an ambiguous reference by making it clear that the Superintendent of Insurance is to approve insurers, not annuity contracts. The second change continues the integration of the two Articles.

146. See supra notes 113-15 and 120 and accompanying text. The reference to subdivision (b) has been deleted from this sentence in its entirety since subdivision (b) is an instruction for entering judgment and is not an “adjustment” section. The introductory paragraph to subdivision (e) makes adequate reference to the $250,000 lump sum so that it is clear that this amount is to be deducted from the gross future damages before proceeding with the subdivision (e) calculation.

147. See supra notes 128-36 and accompanying text.

148. See supra notes 116-17 and 121-27 and accompanying text.

149. See supra note 138.
§ 5043. Posting and maintaining security

(a) If the court enters a judgment for periodic installments, each party liable for all or a portion of such judgment shall separately or jointly with one or more others post security in an amount necessary to secure payment for the amount of the judgment for future periodic installments within thirty days after the date the judgment is entered. A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment for periodic installments on behalf of a judgment debtor is obligated to post security to the extent of its contractual or adjudged obligation if the judgment debtor has not done so. Once security is posted in compliance with section five thousand forty-two and section five thousand forty-three, the plaintiff shall then release the liable party for whom security has been posted.

Rationale: This change protects the tax-free nature of the judgment for the plaintiff\textsuperscript{150} and frees the defendant from the burden of a judgment after she has satisfied her obligations under the statute.

(b) A judgment creditor or successor in interest and any party having rights may move that the court find that security has not been posted and maintained with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that security complying with this article be posted within thirty days. If the security is not posted within that time and subdivision (c) of this section does not apply, the court shall enter a judgment for the lump sum as such sum is determinable under the law without regard to this article.

(c) If a judgment debtor who is the only person liable for a portion of a judgment for periodic installments fails to post and maintain security, the right to lump sum payment described in subdivision (b) of this section applies only against that judgment debtor and the portion of judgment so owed.

(d) If more than one party is liable for all or a portion of a judgment requiring security under this article and the required security is posted by one or more but fewer than all of the parties liable, the security requirements are satisfied and those posting security may proceed under subdivision (b) of this section to enforce rights for security or lump sum payment to satisfy or protect rights of reimbursement from a party not posting security.

§ 5044. Failure to make payment

If at any time following entry of judgment, a judgment debtor and annuity company fails for any reason to make a payment in a timely fashion according to the terms of this article, the judgment creditor may petition the court which rendered the original judgment for an order requiring payment by the judgment debtor and annuity company of the outstanding pay-

\textsuperscript{150} See supra note 140 and accompanying text.
ments in a lump sum. In calculating the amount of the lump sum judgment, the court shall total the remaining periodic payments due and owing to the judgment creditor, as calculated pursuant to subdivision (b) (e) of section five thousand forty-one of this article, and shall not convert these amounts to their present value. The court may also require the payment of interest on the outstanding judgment.

Rationale: These changes shift the responsibility for payment of the award from the defendant to the annuity company once security has been posted and the defendant has satisfied her obligations under the statute. The change from "(b)" to "(e)" corrects a cross-referencing problem.151

§ 5045. Effect of death of judgment creditor

(a) Unless otherwise agreed between the parties at the time security is posted pursuant to section five thousand forty-three of this article, in all cases covered by this article in which future damages are payable in periodic installments, the liability for payment of any installments for medical, dental or other costs of health care or non-economic loss not yet due at the death of the judgment creditor terminates upon the death of the judgment creditor.

Rationale: This non-apparent alteration continues the integration of the two Articles by including malpractice actions within the reference to personal injury.

(b) The portion of any periodic payment allocable to loss of future earnings shall not be reduced or terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support immediately prior to his death to the extent that such duty of support exists under applicable law at the time of the death of the judgment creditor. Such payments to such persons shall continue for the remainder of the period as originally found by the jury or until such duty of support ceases to exist, whichever occurs first. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the future payments of such unpaid future damages in accordance with this subdivision which apportioned amounts shall be payable in the future as provided for in this article. In the event that the judgment creditor does not owe a duty of support to any person at the time of death of the judgment creditor or such duty ceases to exist, the remaining payments shall be considered part of the estate of the judgment creditor. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, convert those portions of such periodic payments allocable to the loss of future earnings to a lump sum by calculating the present value of such payments in order to assist in the settlement of the estate of the creditor.

151. See supra note 139.
§ 5046. Adjustments of payments

(a) If, at any time after entry of judgment, a judgment creditor or successor in interest can establish that the continued payment of the judgment in periodic installments will impose a hardship, the court may, in its discretion, order that the remaining payments, or a portion thereof, for medical, dental, or other health needs shall be made to the judgment creditor in a lump sum. The court shall, before entering such an order, find that: (i) unanticipated and substantial medical, dental or other health needs which could not have been anticipated and which are substantial have arisen that warrant the payment of the remaining payments, or a portion thereof, in a lump sum; (ii) ordering such a lump sum payment would not impose an unreasonable financial burden on the annuity company or the judgment debtor or debtors; (iii) ordering such a lump sum payment will accommodate the future medical, dental and other health needs of the judgment creditor; and (iv) ordering such lump sum payment would further the interests of justice.

Rationale: The insertion of the phrase "medical, dental and other health" is a minor change that integrates the two sections while retaining the broader language of the two. The rephrasing of subdivision (i) makes it clear that the proper standard is whether the trier of fact could have anticipated these needs. The addition of the term "annuity company" requires consideration of the burden to the party who is responsible for the payments.\textsuperscript{152}

(b) If a lump sum payment is ordered by the court, such lump sum shall be:

(i) calculated on the basis of the present value of remaining periodic payments, or portions thereof, that are converted into a lump sum payment. Unless specifically waived by all parties, the annuity contract executed pursuant to section five thousand forty-two of this article shall contain a provision authorizing such a lump sum payment if such payment is approved pursuant to this section. The remaining future periodic payments, if any, shall be reduced accordingly. For the purposes of this section, present value shall be calculated based on the interest rate and mortality assumptions at the time such a payment is made as determined by the insurer who has provided the annuity contract, in accordance with the regulations issued by the superintendent of insurance. The subdivision (i) shall apply only when subdivision (ii) of this subsection does not apply.

(ii) made by the medical malpractice insurance association created pursuant to article fifty-five of the insurance law and shall not be the obligation of the insurer providing the initial annuity contract. Such insurer shall thereafter make all future payments due under its annuity contract to the association, except that, if the lump sum payment ordered by the court is a portion of the remaining periodic payments, such insurer shall

\textsuperscript{152} See supra note 140 for the discussion of § 5036/46.
appropriately apportion future payments due under its annuity contract between the association and the judgment creditor or successor in interest. Such lump sum payment to be paid to the judgment creditor or successor in interest by the association shall be calculated on the basis of the present value of the annuity contract, which shall be based on its cost at such time, for remaining periodic payments, or portions thereof, that are converted into a lump sum payment. In no event shall such lump sum payment be greater than the present value of the annuity contract for the remaining periodic payments. This subdivision (ii) shall apply to judgments rendered in medical, dental or podiatric malpractice actions.

Rationale: This creation of subdivisions is necessary since this is the only place where the two Articles differ to a degree that prevents integration.

§ 5047. Settlements

Nothing in this article shall be construed to limit the right of a plaintiff, defendant or defendants and any insurer to settle property damage, personal injury or wrongful death claims as they consider appropriate and in their complete discretion.

Rationale: This alteration completes the integration of the two Articles.

§ 5048. Assignment of periodic installments

An assignment of or an agreement to assign any right to periodic installments for future damages contained in a judgment entered under this article is enforceable only as to amounts: (a) to secure payment of alimony, maintenance, or child support; or (b) for the cost of products, services, or accommodations provided or to be provided by the assignee for medical, dental or other health care; or (c) for attorney's fees and other expenses of litigation incurred in securing the judgment.

Rationale: This change reflects the idea that the assignment of attorney's fees is anomalous since attorney's fees are normally controlled by a retainer agreement, and encompass all costs, including those incurred in entering judgment, associated with the case.\(^{153}\)

§ 5049. Duties of the superintendent of insurance

The superintendent of insurance shall establish rules and procedures for determining which insurers, self-insurers, plans or arrangements are financially qualified to provide the security required under this article and to be designated as qualified insurers.

\(^{153}\) See supra note 141.
Structured settlements are deeply entrenched in the landscape of personal injury litigation. They reduce settlement costs for the defendant, help prevent dissipation of awards by the plaintiff and provide tax benefits to both parties. These benefits are also available if judgments are structured. Escalating jury verdicts and the insurance crisis made it inevitable that some jurisdictions would enact mandatory structured judgment legislation. New York is one of thirty states to have enacted some form of a periodic payment statute by 1990.

The discount rate and the inflation rate are the most critical elements of any framework for structured settlements or judgments. There are many mathematical models that courts have used in their attempts to inflate and discount verdicts. Traditionally, courts recognized only discounting. Later, some courts assumed that rates totally offset each other and thereby disregarded any potential effect of inflation and discounting. Other courts have combined real and nominal rates or have offset real and nominal rates, with unpredictable results. A final approach has been to obtain an annual average of inflated amounts for use as the annual payment to be discounted. All of these approaches are mathematically flawed.

The Nominal Rates Approach utilizes nominal rates for growth and discounting. This approach is mathematically accurate, utilizes nominal rates, which are familiar to most attorneys, jurors and judges, and allows for greater advocacy and flexibility in the process of determining both rates. In order to facilitate the use of the Nominal Rates Approach in New York, however, Article 50 must be amended. Subdivision (e) of § 5031/41 is the heart of Article 50 and is in need of the most work. The 4% provision of this subdivision should be removed to allow for advocacy by attorneys regarding the proper growth rate to be used and to prevent repetition of this calculation. Subdivision (e) should also be amended to allow the trier of fact to set the “nominal” growth rate based on evidence of economic conditions presented at trial. Since some post-verdict adjustments are made to future values and some are made to present values, subdivisions (a), (d) and (e) of § 5031/41 should be amended to reflect this and to alleviate confusion and error. Subdivisions (c) and (e) should be amended so that attorneys receive that percentage of the present value which was agreed upon in the retainer agreement.

Article 50 has become an accepted part of the New York litigation landscape. It makes many positive contributions, but since it is mandatory, unless waived, it must be amended to correct its faults.
Often, only implementation and use can reveal the problems of any statutory scheme. The weaknesses of the statute are now evident and the legislature should act to correct them.
§ 5041. Basis for determining judgment to be entered

In order to determine what judgment is to be entered on a verdict in an action to recover damages for personal injury, injury to property or wrongful death dental, medical or podiatric malpractice under this article, and not subject to article fifty-A of this chapter, the court shall proceed as follows:

(a) The court shall apply to the findings of past and future damages any applicable rules of law, including set-offs, credits, comparative negligence pursuant to section fourteen hundred eleven of this chapter, additurs, and remittiturs, in calculating the respective amounts of past and future damages claimants are entitled to recover and defendants are obligated to pay.

(b) The court shall enter judgment in lump sum for past damages, for future damages not in excess of two hundred fifty thousand dollars, and for any damages, fees or costs payable in lump sum of otherwise under subdivisions (c) and (d) of this section. For the purposes of this section, any lump sum payment of a portion of future damages shall be deemed to include the elements of future damages in the same proportion as such elements comprise of the total award for future damages as determined by the trier of fact.

(c) Payment of litigation expenses and that portion of the attorney’s fees related to past damages shall be payable in a lump sum. Payment of that portion of the attorney’s fees related to future damages for which, pursuant to this article, the claimant is entitled to a lump sum payment shall also be payable in a lump sum. Payment of that portion of the attorney’s fees related to the future periodically paid damages shall also be payable in a lump sum, based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to subdivision (e) of this section.

(d) Upon election of a subrogee or a lien holder, including an employer or insurer who provides workers’ compensation, filed within the time permitted by rule of court, any part of future damages allocable to reimbursement of payments previously made by the subrogee or the lien holder shall be paid in lump sum to the subrogee or the lien holder in
such amount as is calculable and determinable under the law in effect at the time of such payment.

(e) With respect to awards of future damages in excess of two hundred fifty thousand dollars in an action to recover damages for personal injury, injury to property or wrongful death, dental, medical or podiatric malpractice, the court shall enter judgment as follows:

After making any adjustment prescribed by subdivisions (b), (c) and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemized verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subdivision. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. Where payment of a portion of the future damages terminates in accordance with the provisions of this article, the four percent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance.

(f) With the consent of the claimant and any party liable, in whole or in part, for the judgment, the court shall enter judgment for the amount found for future damages attributable to said party as such are determinable without regard to the provisions of this article.
§ 5042. Form of security

Security authorized or required for payment of a judgment for periodic installments entered in accordance with this article must be in the form of an annuity contract, executed by a qualified insurer and approved by the superintendent of insurance pursuant to section five thousand forty-nine thirty-nine of this article, and approved by the court.

§ 5043. Posting and maintaining security

(a) If the court enters a judgment for periodic installments, each party liable for all or a portion of such judgment shall separately or jointly with one or more others post security in an amount necessary to secure payment for the amount of the judgment for future periodic installments within thirty days after the date the judgment is entered. A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment for periodic installments on behalf of a judgment debtor is obligated to post security to the extent of its contractual or adjudged obligation if the judgment debtor has not done so.

(b) A judgment creditor or successor in interest and any party having rights may move that the court find that security has not been posted and maintained with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that security complying with this article be posted within thirty days. If the security is not posted within that time and subdivision (c) of this section does not apply, the court shall enter a judgment for the lump sum as such sum is determinable under the law without regard to this article.

(c) If a judgment debtor who is the only person liable for a portion of a judgment for periodic installments fails to post and maintain security, the right to lump sum payment described in subdivision (b) of this section applies only against that judgment debtor and the portion of judgment so owed.

(d) If more than one party is liable for all or a portion of a judgment requiring security under this article and the required security is posted by one or more but fewer than all of the parties liable, the security requirements are satisfied and those posting security may proceed under subdivision (b) of this section to enforce rights for security or lump sum payment to satisfy or protect rights of reimbursement from a party not posting security.
§ 5044. Failure to make payment

If at any time following entry of judgment, a judgment debtor fails for any reason to make a payment in a timely fashion according to the terms of this article, the judgment creditor may petition the court which rendered the original judgment for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum. In calculating the amount of the lump sum judgment, the court shall total the remaining periodic payments due and owing to the judgment creditor, as calculated pursuant to subdivision (b) of section five thousand forty-one thirty-one of this article, and shall not convert these amounts to their present value. The court may also require the payment of interest on the outstanding judgment.

§ 5045. Effect of death of judgment creditor

(a) Unless otherwise agreed between the parties at the time security is posted pursuant to section five thousand forty-three thirty-three of this article, in all cases covered by this article in which future damages are payable in periodic installments, the liability for payment of any installments for medical, dental or other costs of health care or non-economic loss not yet due at the death of the judgment creditor terminates upon the death of the judgment creditor.

(b) The portion of any periodic payment allocable to loss of future earnings shall not be reduced or terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support immediately prior to his death to the extent that such duty of support exists under applicable law at the time of the death of the judgment creditor. Such payments to such persons shall continue for the remainder of the period as originally found by the jury or until such duty of support ceases to exist, whichever occurs first. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the future payments of such unpaid future damages in accordance with this subdivision which apportioned amounts shall be payable in the future as provided for in this article. In the event that the judgment creditor does not owe a duty of support to any person at the time of the death of the judgment creditor or such duty ceases to exist, the remaining payments shall be considered part of the estate of the judgment creditor. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, convert those portions of such periodic payments allocable to the loss of future earnings to a lump
sum by calculating the present value of such payments in order to assist in the settlement of the estate of the judgment creditor.

§ 5046. Adjustment of payments

(a) If, at any time after entry of judgment, a judgment creditor or successor in interest can establish that the continued payment of the judgment in periodic installments will impose a hardship, the court may, in its discretion, order that the remaining payments or a portion thereof shall be made to the judgment creditor in a lump sum. The court shall, before entering such an order, find that: (i) unanticipated and substantial medical, dental or other health needs have arisen that warrant the payment of the remaining payments, or a portion thereof, in a lump sum; (ii) ordering such a lump sum payment would not impose an unreasonable financial burden on the judgment debtor or debtors; (iii) ordering such a lump sum payment will accommodate the future medical, dental and other health needs of the judgment creditor; and (iv) ordering such lump sum payment would further the interests of justice.

(b) If a lump sum payment is ordered by the court, such lump sum payment shall be calculated on the basis of the present value of remaining periodic payments, or portions thereof, that are converted into a lump sum payment. Unless specifically waived by all parties, the annuity contract executed pursuant to section five thousand forty-two of this article shall contain a provision authorizing such a lump sum payment if such payment is approved pursuant to this section. The remaining future periodic payments, if any, shall be reduced accordingly. For the purposes of this section, present value shall be calculated based on the interest rate and mortality assumptions at the time such a lump sum payment is made as determined by the insurer who has provided the annuity contract, in accordance with the regulations issued by the superintendent of insurance. made by the medical malpractice insurance association created pursuant to article fifty-five of the insurance law and shall not be the obligation of the insurer providing the initial annuity contract. Such insurer shall thereafter make all future payments due under its annuity contract to the association, except that, if the lump sum payment ordered by the court is a portion of the remaining periodic payments, such insurer shall appropriately apportion future payments due under its annuity contract between the association and the judgment creditor or successor in interest. Such lump sum payment to be paid to the judgment creditor or successor in interest by the association shall be calculated on the basis of the pres-
ent value of the annuity contract, which shall be based on its cost at such
time, for remaining periodic payments, or portions thereof, that are con-
verted into a lump sum payment. In no event shall such lump sum pay-
ment be greater that the present value of the annuity contract for the
remaining periodic payments.

§ 5047. Settlements

Nothing in this article shall be construed to limit the right of a
plaintiff, defendant or defendants and any insurer to settle property dam-
age, personal injury or wrongful death dental, medical or podiatric mal-
practice claims as they consider appropriate and in their complete
discretion.

§ 5048. Assignment of periodic installments

An assignment of or an agreement to assign any right to periodic
installments for future damages contained in a judgment entered under
this article is enforceable only as to amounts: (a) to secure payment of
alimony, maintenance, or child support; (b) for the cost of products,
services, or accommodations provided or to be provided by the assignee
for medical, dental or other health care; or (c) for attorney's fees and
other expenses of litigation incurred in securing the judgment.

§ 5049. Duties of superintendent of insurance

The superintendent of insurance shall establish rules and procedures
for determining which insurers, self-insurers, plans or arrangements are
financially qualified to provide the security required under this article
and to be designated as qualified insurers.