

## PROTECTING PERSONAL INJURY RECOVERIES FOR PEOPLE ON PUBLIC BENEFITS

### STRUCTURED SETTLEMENTS

#### I. STRUCTURED SETTLEMENTS IN GENERAL - BENEFITS

A. **Structured Settlements Provide Benefits that the Plaintiff Cannot Outlive:** If properly designed, a stream of guaranteed, tax-free periodic payments can be established so that the beneficiary can never outlive the payments. In other words, no matter what else happens in the plaintiff's financial affairs, a lifetime payment stream can continue for as long as the payee is living and breathing. Additionally, that payment stream can be guaranteed for a minimum number of years to protect the beneficiaries of the payee. The guaranteed portion of the lifetime payment can also be adjusted so that there is no downside on the premium invested. The payment stream can also have an inflation rider of up to 5% per year. However, there is either a significant decrease in immediate payouts or a significantly increased premium for such an inflation rider.

1. **Structured Settlements are the only Financial Product to use "Rated Ages" to Enhance Lifetime Benefits.**

B. **Structured Settlements Can Provide Discounted Funding for Replacement of Hard Assets such as Durable Medical Equipment.** If properly designed, structured future payments can be setup, not only to meet future monthly recurring expenses, but to also provide for set dollar lump sum amounts at future intervals to meet anticipated future needs when durable medicals or hard assets need to be replaced. Common examples include a plaintiff funding for the replacement of a handicapped van, wheelchairs, prosthetic devices, etc., every 5 years structures the ability to satisfy the escalating costs of such needs using today's dollars. An example of the funding for the replacement of a wheelchair van every five years is set forth below:



# Paramount Settlement Planning, LLC

3686 Seneca Street  
Buffalo, New York 14224  
(716)712-0127

## Settlement Proposal for: **Suzy Smith Handicapped Van until 60**

Owner State : Delaware (0.00% tax)  
Rate Series: RB190109  
Rates Effective: 01/09/2019  
Case Type: Assigned

Quote Date: 02/10/2019  
Purchase Date: 03/17/2019  
Expiration Date: 02/17/2019

**For : Suzy Smith** **Female, Date of Birth: Unknown, Age: 20**

<u>Benefit Description</u>	<u>Guaranteed Benefit</u>	<u>Expected Benefit</u>	<u>Cost</u>
• Handicapped Van Age 25 • <b>Guaranteed Lump Sum</b> - \$50,000.00 paid on 03/17/2024.	\$50,000.00	\$50,000.00	\$44,759.50
• Handicapped Van Age 30 • <b>Guaranteed Lump Sum</b> - \$57,500.00 paid on 03/17/2029.	\$57,500.00	\$57,500.00	\$41,061.33
• Handicapped Van Age 35 • <b>Guaranteed Lump Sum</b> - \$65,000.00 paid on 03/17/2034.	\$65,000.00	\$65,000.00	\$37,895.65
• Handicapped Van Age 40 • <b>Guaranteed Lump Sum</b> - \$72,500.00 paid on 03/17/2039.	\$72,500.00	\$72,500.00	\$34,508.55
• Handicapped Van Age 45 • <b>Guaranteed Lump Sum</b> - \$80,000.00 paid on 03/17/2044.	\$80,000.00	\$80,000.00	\$31,028.00
• Handicapped Van Age 50 • <b>Guaranteed Lump Sum</b> - \$91,000.00 paid on 03/17/2049.	\$91,000.00	\$91,000.00	\$29,361.15
• Handicapped Van Age 55 • <b>Guaranteed Lump Sum</b> - \$105,000.00 paid on 03/17/2054.	\$105,000.00	\$105,000.00	\$28,182.00
• Handicapped Van Age 60 • <b>Guaranteed Lump Sum</b> - \$120,000.00 paid on 03/17/2059.	\$120,000.00	\$120,000.00	\$26,793.60
<b>Subtotal For: Suzy Smith</b> .....	<b>\$641,000.00</b>	<b>\$641,000.00</b>	<b>\$273,589.78</b>

*Quote requires MetLife approval as the quote does not meet standard MetLife guidelines. Please contact MetLife by fax (877)874-8635 or e-mail the export file to (QUOTES@metlife.com).*

*The life expectancy used for this quote assumes an average life expectancy for all persons of the age illustrated. The life expectancy is based on standard actuarial assumptions.*

*Date of birth has not been provided. Proof of birth will be required at a later date for life contingent benefit types.*

*Quote requires MetLife approval since case does not meet the payment deferral guidelines.*

Quote ID: Suzy Smith Handicapped Van until 60  
Prepared by: Paul K. Isaac, JD

Feb 11, 2019  
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Paramount Settlement Planning, LLC  
MetLife Version v10.00/r10.00

The foregoing hypothetical allocation demonstrates the ability to use the growth of today's dollars on a tax-free basis to provide benefits to meet future anticipated needs having a much greater cost. In the above example, eight handicapped-equipped vans are purchased over the next forty years at a total cost of \$641,000 – but that obligation can be satisfied with a structure costing less than \$275,000.

- C. **Structured Settlements Provide Protection from Dissipation and from the Claims of Creditors**: In Swimelar v. Baker (In re Baker), 604 F.3d 727, 728, 2010 U.S. App. LEXIS 9871, the Bankruptcy trustee argued that the debtor's claimed state law exemption for the Structured Settlement proceeds did not apply because the insurance company owned the annuity, and the debtor did not pay consideration for the annuity contract. On appeal, the court found that New York law permitted the debtor to exempt the annuity payments and that the debtor gave consideration for the annuity contract when he released a wrongful death claim. In particular, 11 U.S.C.S. § 522(b)(3) permitted the debtor to exempt property that was exempt under state law. New York State Debtor & Creditor Law § 282 exempts annuity contracts and proceeds, as provided by New York State Insurance Law § 3212, which in turn, provided that annuity contracts for an annuitant, who paid the consideration for the annuity contract, were not subject to execution. In affirming the District Court's determination, the United States Court of Appeals for the Second Circuit held, that contrary to the trustee's contention, while the insurance company owned the annuity contract, the proceeds were owned by the debtor because they were payable solely to him. Further the court held that New York law did not exempt only the annuity, but also *its proceeds*. In addition, the debtor provided the requisite consideration because he obtained the annuity in exchange for releasing a wrongful death claim. Swimelar v. Baker (In re Baker), 604 F.3d 727, 728, 2010 U.S. App. LEXIS 9871, \*1, Bankr. L. Rep. (CCH) P81,760
- D. **Structured Settlements Help to Reduce/Eliminate Trustees' Commissions, Management Fees, Taxes and Accounting Fees**: Structured settlements provide the ability to meet future needs through tax-free periodic payments and reduces the need for large sums of upfront cash against which management fees and expenses are charged annually.
- E. **Structured Settlements Provide Guaranteed Benefits Which Pass Directly to Beneficiaries Outside of the "Estate"**: As will be illustrated here, providing the ability to transfer creditor protected, tax-free benefits to the next generation upon submission of a death certificate, without passing through an "estate" proceeding in Surrogate's Court.
- F. **Structured Settlements Significantly Reduce Costs of Medicare Set-Asides**: In appropriate cases, structured settlements provide the ability to significantly reduce the immediate out of pocket financial exposure of a Medicare Set-Aside (MSA).
- G. **Structured Settlements Help to Maintain MAGI Medicaid Coverage**: In appropriate cases, maintaining the plaintiff's ability to continue enrollment in the Affordable Care Act extension version of Medicaid without disqualification (MAGI Medicaid).

## II. STRUCTURED SETTLEMENTS IN GENERAL – DISADVANTAGES

- A. Due to Internal Revenue Code considerations (Section 130), the settlement plan, once selected, cannot be altered, amended or accelerated.
- B. The corpus utilized to fund the future periodic payments is exchanged for the guarantee of future payments and is therefore exhausted and out of reach for the plaintiff.

## III. STATUTORY AUTHORITY FOR STRUCTURED SETTLEMENTS

- A. **Internal Revenue Code (IRC) Section 104 (a) (2):** Structured settlements were essentially created by an amendment to the provision of the federal tax code which added “periodic payments” to the already existing, narrow exception to taxation of damages for “personal physical injuries or sickness.” On January 14 of 1983 public law 97 – 473 amended the tax code as follows:

**SEC. 101. TREATMENT OF RECIPIENT OF SETTLEMENT PERIODIC PAYMENTS.**

(a) **TREATMENT OF RECIPIENT.**—Paragraph (2) of section 104(a) 26 USC 104. (relating to compensation for injuries or sickness) is amended by striking out “whether by suit or agreement” and inserting in lieu thereof “whether by suit or agreement and whether as lump sums or as periodic payments”.

That amendment gave us our current IRC section 104 (a)(2) which reads as follows:

§ 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—

(1) amounts received under workmen’s compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as **periodic payments**) on account of personal physical injuries or physical sickness\*

\* \*

Since periodic payments on account of personal physical injuries are an exception to the general rule that “gross income means all income from whatever source derived,” 26 USCS § 61, the language in any settlement documents purporting to create a structured settlement should mirror the statutory language. In other words, the settlement

document should set forth the obligation of the defendant or insurer (whoever is seeking the deduction) to make periodic payments. This is precisely why the structured settlement language in any settlement agreement and Court Order should read as follows:

2.0 PAYMENTS

In consideration of the release set forth above, the Insurers on behalf of the Defendant agree to pay to the individual(s) named below ("Payee(s)") the sums outlined in this Section 2 below:

2.1 Payments due at the time of settlement as follows:

- a. The Insurer, Wildcat Insurance Company of NY, shall issue payments as follows:

Payee: Smith & Wesson, LLP

\$333,487.03 for attorney fees and disbursements.

- b. Payee:

Elvira Smith and Michael Smith, as and for their net derivative claims.

\$100,000.00

- c. Payee:

The Suzy Smith First-Party Supplemental Needs Trust

\$124,111.64

- 2.2 Additionally, The Insurer, Wildcat Insurance Company of NY, shall issue Periodic payments made according to the schedule as follows (the "Periodic Payments"):

Payee: The Suzy Smith Supplemental Needs Trust

\$1,739.75 payable on the 15th of each month, beginning April 1, 2019. These payments are guaranteed for 30 years or for the life of Suzy Smith, whichever is longer. The final guaranteed payment will be March 1, 2049.

And not like the following:

The Insurer, Wildcat Insurance Company of NY shall pay:

(D) The sum of Five Hundred Thousand and 00/100 (\$500,000.00) Dollars payable to the order of PASSCorp for the purchase of a policy from Prudential Insurance Company of America which will fund an annuity that will make periodic payments to the The Suzy Smith . First-Party Supplemental Needs Trust in the amount of One Thousand Seven Hundred Thirty-nine and 75/100 (\$1,739.75) Dollars per month, guaranteed for thirty (30) years, and thereafter for the life of Suzy Smith with the first payment beginning on April 1, 2019 and with the last guaranteed payment to be made on March 1st, 2049; and

In the latter example, there is no recitation of the Defendant's/ Insurer's obligation to make periodic payments anywhere in the settlement document. From time to time, an adjuster unfamiliar with structured settlement procedure will reject the obligation to make periodic payments. When that occurs, we draw their attention to the second Internal Revenue Code section applicable to structured settlements, IRC § 130. Section

130 allows for the defendants and or their insurer to assign the obligation to a third-party assignment Company and;

- a.) Eliminate their liability and
- b.) Obtain the tax deduction for the payments made.

B. **Internal Revenue Code Section 130:** Section 130 allows for the assignment of the periodic payment obligation and the corresponding tax deduction when certain conditions are met as set forth in the statute.

(c) Qualified assignment. For purposes of this section, the term "qualified assignment" means any assignment of a liability to make periodic payments as damages (whether by suit or agreement), or as compensation under any workmen's compensation act, on account of personal injury or sickness (in a case involving physical injury or physical sickness)--

(1) if the assignee assumes such liability from a person who is a party to the suit or agreement, or the workmen's compensation claim, and

(2) if--

(A) such periodic payments are fixed and determinable as to amount and time of payment,

(B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments,

(C) the assignee's obligation on account of the personal injuries or sickness is no greater than the obligation of the person who assigned the liability, and

(D) such periodic payments are excludable from the gross income of the recipient under paragraph (1) or (2) of section 104(a) [26 USCS § 104(a)].

**26 USCS § 130.**

In your author's opinion, the failure to comply with all of these requirements, could potentially subject the annuity to treatment as a taxable annuity, with the non-excludable percentage of each payment required to be reported as income on the tax returns of the plaintiff/ payee/trust.

C. **CPLR 1206 and EPTL 2220.** Both of these sections **of the law** contain restrictions on the disposition of settlement proceeds for both minors and incompetents. However, each of these statutes specifically authorizes structured settlements for use in the disposition of those recoveries. The statutes differ slightly, however.

1. **NEW YORK STATE CPLR §1206: Disposition of proceeds of claim of infant, judicially declared incompetent or conservatee.**

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

(c) the court may order that money constituting any part of the property be deposited in one or more specified insured banks or trust companies or savings banks or insured state or federal credit unions or be invested in one or more specified accounts in insured savings and loan associations, or it may order that a structured settlement agreement be executed, which shall include any settlement whose terms contain provisions for the payment of funds on an installment basis, provided that with respect to future installment payments, the court may order that each party liable for such payments shall fund such payments, in an amount necessary to assure the future payments, in the form of an annuity contract executed by a qualified insurer and approved by the superintendent of financial services pursuant to articles fifty-A and fifty-B of this chapter. ... *NY CLS CPLR § 1206 (c)*

2. **NEW YORK STATE SURROGATE'S COURT PROCEDURE ACT § 2220. Payment of share of infant, incompetent or conservatee or person under disability.**

If any proceeds payable to an infant, incompetent or person under disability pursuant to this section are proposed to be paid by way of a structured settlement, which shall include any settlement whose terms contain provisions for the payment of funds on an installment basis, the court may approve such settlement, provided that, with respect to future installment payments, the court may order that each party liable for such payments shall fund such payments, in an amount necessary to assure the future payments, in the form of an annuity contract executed by a qualified insurer and approved by the superintendent of financial services pursuant to articles fifty-A and fifty-B of the civil practice law and rules. *NY CLS SCPA § 2220 (5)*

**CONTROVERSY SURROUNDING STRUCTURE PAYMENT BEYOND THE AGE OF 18 IN WRONGFUL DEATH CASES.**

A few surrogate courts have taken the position that structured settlements payable to infant beneficiaries cannot extend beyond the age of 18. The argument advanced in some of those cases has been that, since the guardianship of an infant must end upon the infant attaining the age of 18, the guardian can take no action which restricts access to the proceeds beyond the age of 18. Your author submits that there is absolutely no statutory basis for that position and it is directly contrary to

the long history of the New York courts' protection of minors and consideration of their long-term best interests.

Consistent with the declaration of legislative intent in the Bill Jacket, nothing in the law even implies that the fiduciary obligation of a guardian requires the guardian to make decisions which do not have repercussions beyond the age of the infant ward's attaining majority. The legislature had the opportunity to impose such a limitation when adding subsection (5) to SCPA § 2220 and did not.

Neither the SCPA, including SCPA Article 17, imposes such a restriction. To the contrary, the legislature in adding subsection (5) to SCPA §2220 in 1988, specifically recognized the antiquated restriction against deferral of payments until beyond the age of majority and noted that that rule was obsolete and inconsistent with the current trends in the law of New York since the advent of structured settlements in the 1980's. As to the impairment of a minor's access to funds, even after the minor reaches the age of majority in a structured settlement format, the New York Senate's Law Revision Commission in supporting the 1988 legislative changes stated the following:

Moreover, the rule against impairment of a minor's assets, to the extent it may still exist, has certainly been further eroded by the Legislature's recent enactments of CPLR Articles 50-A and 50-B, which mandate that, in certain personal injury and malpractice cases, judgment be entered for periodic payment of damages, regardless of the age of the plaintiff. *Recommendation of the Law Revision Commission to the 1988 Legislature Relating to Payments to Infants, Incompetents and Conservatees*, Bill Jacket, L 1988, ch 635, §§ 3, 4 at 4

\* \* \*

Although there is early case law citing equitable principles as precluding the impairment of an infant's funds beyond the infant's attaining the age of majority, this issue does not appear to have been raised in the cases governing the recent advent of structured settlements. . . . In any event, it would be difficult to argue that withholding approval of a structured settlement for an infant or incompetent is "equitable" when the court genuinely believes such a settlement to be in the best interest of the infant or incompetent. *Id.* at 5-6.

Another clear declaration of the legislative intent was issued by the Commission encouraging deferrals beyond the age of majority by specifically referring to "future installment payments" for anyone under the age of 18 (infants):

Purpose of the Bill: To provide express statutory language allowing the courts of New York State to approve, in their discretion, the use of “structured settlements”, which call for ***future installment payments***, in cases involving plaintiffs who are infants, incompetents, or conservatees (emphasis mine). *Id* at 7.

In fact, in the practice commentaries after NY CLS EPTL§ 5-4.6 suggest that the ability to defer is what makes structured settlements an attractive option for infant beneficiaries in wrongful death cases. *STRUCTURED SETTLEMENTS IN THE COMPROMISE OF WRONGFUL DEATH ACTIONS* By Andrew L. Martin, Nassau County Surrogate's Court NY CLS EPTL § 5-4.6 Commentary.

#### **Postpone vesting beyond age of majority**

One of the most attractive features of the structured settlement is that it enables the share of a minor to be invested so the infant is not entitled to receive his or her entire share on attaining the age of majority. Many parents, guardians, and others concerned with the welfare of a minor are apprehensive about the prospect of an 18-year-old becoming vested with a large sum of money, as would be the case if the child's share were simply paid in cash to the guardian of the child's property. The courts are authorized to approve settlements postponing the vesting of an infant distributee's share beyond the age of majority. SCPA 1707(2), 2220(5); CPLR 1206(c); Matter of Green, 127 Misc. 2d 266, 486 N.Y.S.2d 131 (Sur. Ct. Nassau County 1985). NY CLS EPTL § 5-4.6

### **IV. CALCULATING THE STRUCTURE AND DEVELOPMENT OF A SETTLEMENT PLAN**

#### **A. The Settlement Planning Module – A must**



## Settlement Planning Proposal For Suzy Smith

### Settlement Statement

	\$2,000,000
Less Litigation Costs, Disbursements and Expenses	\$50,000
Less Attorneys Fees	\$650,000
<b>Subtotal</b>	<b>\$1,300,000</b>

### Healthcare and other Lien Amounts

Workers' Compensation	\$0
Medicare Conditional Payment	\$0
Medicaid/Social Services	\$0
ERISA	\$0
<b>Plaintiff's Portion</b>	<b>\$1,300,000</b>

### Settlement Related Expenses

Settlement Advancement/Loan Repayment	\$100,000
Medicare Set-Aside (MSA) Fund	\$100,000
MSA Administrator Setup Fee (One-Time Fee)	\$0
MSA Administrator Year One Fee	\$0
MSA Seed Money	\$0
<b>Plaintiff's Net Proceeds</b>	<b>\$1,100,000</b>

**Structured Settlement Funding Amount** \$500,000

**Plaintiff's Settlement Proceeds in Up -Front Cash** \$600,000

### Immediate Needs

Automobile loans	\$28,000
Home Loan	\$97,500
Home Renovations	\$50,000
Credit Card Debt Repayment	\$40,000
Student Loan	\$7,000
Re-tooling/ Schooling	\$30,000
Personal loans	\$11,000
<b>Total</b>	<b>\$263,500</b>

**Client's Remaining Cash Settlement Pr**  
*After Immediate Needs and Struture Fundin*  
**\$336,500**

Note: Red flag re: inability to manage \$\$

1. Oftentimes structured settlement brokers are called upon by Plaintiff's counsel to quote and amount without knowing the client. However, the preference should be to, at the least, determine the plaintiff's current and future needs and goals. In that endeavor, we, at a minimum consider the following factors:
  - a. The elimination (or significant reduction) of high interest debt should be a priority.

- b. Housing needs. Is the purchase of a home a realistic possibility to eliminate recurring monthly rental expenses for someone who will never work? Securing future living arrangements is always a significant factor in bringing about peace of mind.
- c. The establishment of an emergency fund.
- d. The establishment of a medical fund.
- e. The creation of a budget. It is often helpful to match obligations with a payment stream to meet/exceed those obligations.
- f. The establishment of a fund to meet future obligations. Oftentimes, a primary concern after satisfying the aforementioned objectives is to provide for college education or a future wedding fund for their children. Most parents hope their children will need both. An example of a parent satisfying his future financial needs as well as contributing to the future education of his or her children is set forth here.



Paramount Settlement Planning

3686 Seneca Street  
Buffalo, New York 14224

**Settlement Proposal for: Suzy Smith College Plan for Children**

Owner State :	Delaware (0.00% tax)	Quote Date:	02/15/2019
Rate Series:	RB190109	Purchase Date:	04/15/2019
Rates Effective:	01/09/2019	Expiration Date:	02/22/2019
Case Type:	Assigned		

**For : Suzy Smith** **Female, Date of Birth: Unknown, Age: 35**

<u>Benefit Description</u>	<u>Guaranteed Benefit</u>	<u>Expected Benefit</u>	<u>Cost</u>
<ul style="list-style-type: none"> <li>• Rachel's (2 years old now) Fall semester college tuition •</li> <li><b>Period Certain Annuity</b> - \$10,000.00 payable annually, guaranteed for 4 year(s), beginning on 08/15/2035, with the last guaranteed payment on 08/15/2038.</li> </ul>	\$40,000.00	\$40,000.00	\$20,817.40
<ul style="list-style-type: none"> <li>• Rachel's (2 years old now) spring college tuition •</li> <li><b>Period Certain Annuity</b> - \$10,000.00 payable annually, guaranteed for 4 year(s), beginning on 01/15/2036, with the last guaranteed payment on 01/15/2039.</li> </ul>	\$40,000.00	\$40,000.00	\$20,467.60
<ul style="list-style-type: none"> <li>• Joey (1 year old now) Fall semester college tuition •</li> <li><b>Period Certain Annuity</b> - \$10,000.00 payable annually, guaranteed for 4 year(s), beginning on 08/15/2036, with the last guaranteed payment on 08/15/2039.</li> </ul>	\$40,000.00	\$40,000.00	\$19,988.60
<ul style="list-style-type: none"> <li>• Joey (1 year old now) Spring semester college tuition •</li> <li><b>Period Certain Annuity</b> - \$10,000.00 payable annually, guaranteed for 4 year(s), beginning on 01/15/2037, with the last guaranteed payment on 01/15/2040.</li> </ul>	\$40,000.00	\$40,000.00	\$19,652.20
<b>Subtotal For: Suzy Smith</b> .....	<b>\$160,000.00</b>	<b>\$160,000.00</b>	<b>\$80,925.80</b>

SUMMARY INFORMATION				
	<u>Guaranteed Benefit</u>	<u>Expected Benefit</u>	<u>Cost</u>	<u>IRR</u>
<b>ANNUITY COST</b> .....			<b>\$80,925.80</b>	
Assignment Fee .....			\$750.00	
<b>TOTAL ANNUITY COST W/ FEES</b> .....	<b>\$160,000</b>	<b>\$160,000</b>	<b>\$81,675.80</b>	<b>3.70%</b>
Case IRR 3.70%				

*The life expectancy used for this quote assumes an average life expectancy for all persons of the age illustrated. The life expectancy is based on standard actuarial assumptions.*

*Date of birth has not been provided. Proof of birth will be required at a later date for life contingent benefit types.*

*This quote is pre-approved by MetLife even though the normal guidelines are not satisfied.*

Quote ID: Suzy Smith College Plan for Children  
Prepared by: Paul K. Isaac, Esq.

Feb 15, 2019  
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Paramount Settlement Planning  
MetLife Version v10.00/r10.00

In the above scenario, not only does Suzy have the peace of mind that \$20,000 per year of each of her children's college obligation has been funded, for about ½ the cost, she knows in the event her untimely demise, her children will guaranteed those payments, payable directly to each of them without passing through the estate, provided that they are named as beneficiaries. On the other hand, in the event that Suzy is still alive when the payments

arrive, they will payable to Suzy for her *discretionary* distribution on a tax-free basis. A similar format can be used for wedding funds, house purchase funds etc.

## V. USE AND ABUSE OF RATED AGES

- A. **Rated Age- What is it?** As rated age differs from the natural achieved age of a Plaintiff by taking into consideration life or health events and factors which have a documented influence on the plaintiff's health. Importantly, these factors can be related or unrelated to the claim in question. Examples of these factors include: heart issues, diabetes, cancer, quadriplegia, smoking, high blood pressure, depression etc. These impact the monthly payment on a lifetime payment stream, only.

Typically, when quoting a lifetime payment, each company uses actuarial tables and actuaries to determine approximately how long they will be expected to pay out on a lifetime benefit. The monthly or annual payment is based on that projected life expectancy.

However, when a **rated age** is obtained, the monthly or annual lifetime payment is often enhanced based on the expectation that the life company will not have to payout for as long of a period. For example, suppose a 35-year-old female wishes to maximize a periodic payment stream for the remainder of her life and wishes to guarantee it for 30 years in the event of her premature death.

As of the date of this writing there are six (6) New York licensed life insurance companies offering structured settlements in New York (several others are licensed in other states and come in to and out of NY from time to time.) I will compare only 2 of those companies using today's rates for the illustration that follows. MetLife quotes would typically illustrate a life expectancy until age 84. Pacific Life uses different actuarial tables and projects lifetime payments until age 86. The illustration below is not intended to suggest that any one life insurance company is more competitive in one scenario than another. Further, rates affecting this comparison change weekly.

Based on the above scenario, the expected payout for each company is different. The monthly tax-free payments offered under these two scenarios, assuming **no rated ages** are as follows:



Paramount Settlement Planning, LLC  
 3686 Seneca Street  
 Buffalo, New York 14224  
 (716)712-0127

**Settlement Proposal for: Sally Smith \$500k Life with 30**

Owner State :	Delaware (0.00% tax)	Quote Date:	02/11/2019
Rate Series:	RB190109	Purchase Date:	03/18/2019
Rates Effective:	01/09/2019	Expiration Date:	02/18/2019
Case Type:	Assigned		

**For : Sally Smith** **Female, Date of Birth: Unknown, Age: 35**

Benefit Description	Guaranteed Benefit	Expected Benefit	Cost
<b>Life with Certain Period Annuity</b> - \$1,739.74 for life, payable monthly, guaranteed for 30 year(s) which is 360 payments, beginning on 04/18/2019 at age 35, with the last guaranteed payment on 03/18/2049 at age 65.	\$626,306.40	\$1,040,364.52	\$499,250.00
<b>Subtotal For : Sally Smith</b>	<b>\$626,306.40</b>	<b>\$1,040,364.52</b>	<b>\$499,250.00</b>

SUMMARY INFORMATION				
	Guaranteed Benefit	Expected Benefit	Cost	IRR
<b>ANNUITY COST</b> .....			\$499,250.00	
Assignment Fee .....			\$750.00	
<b>TOTAL ANNUITY COST W/ FEES</b> .....	<b>\$626,306</b>	<b>\$1,040,365</b>	<b>\$500,000.00</b>	<b>3.46%</b>
Case IRR 3.46%				

**Settlement Proposal for: Sally Smith \$500k Life with 30**

Owner State :	Colorado (0.00% tax)	Quote Date :	02/11/2019
Rate Series :	PL258	Purchase Date :	03/18/2019
Rates Effective :	01/24/2019	Expiration Date:	02/18/2019

**For : Sally Smith** **Female, Date of Birth: Not Supplied Age: 35**

Benefit Description	Guaranteed Benefit	Expected Benefit	Cost
<b>Life with Certain Annuity</b> - \$1,841.90 for life, payable monthly, guaranteed for 30 year(s) which is 360 payments, beginning on 04/18/2019 at age 35, with the last guaranteed payment on 03/18/2049 at age 65.	\$663,084	\$1,130,926	\$499,750.00
<b>Subtotal For : Sally Smith</b>	<b>\$663,084</b>	<b>\$1,130,926</b>	<b>\$499,750.00</b>

SUMMARY INFORMATION				
	Guaranteed Benefit	Expected Benefit	Cost	IRR
<b>ANNUITY COST</b> .....			\$499,750.00	
Assignment Fee .....			\$250.00	
<b>TOTAL ANNUITY COST W/ FEES</b> .....	<b>\$663,084</b>	<b>\$1,130,926</b>	<b>\$500,000.00</b>	<b>3.85%</b>
Case IRR: 3.85%				

MetLife: \$1,739.74 per month

Pacific Life: \$1,784.90 per month

Now, assume that based upon documented health issues both companies have increased their rated age for Ms. Smith to "46" years.

By virtue of that age rating, the payments are enhanced as follows:

MetLife: \$1,878.28 per month

Pacific Life: \$1,973.78 per month



Paramount Settlement Planning, LLC

3686 Seneca Street  
Buffalo, New York 14224  
(716)712-0127

**Settlement Proposal for: Sally Smith rated 46 \$500k Life with 30**

Owner State :	Delaware (0.00% tax)	Quote Date:	02/11/2019
Rate Series:	RB190109	Purchase Date:	03/18/2019
Rates Effective:	01/09/2019	Expiration Date:	02/18/2019
Case Type:	Assigned		

<b>For : Sally Smith</b>		<b>Female, Date of Birth: Unknown, Age: 35, Rated Age: 46</b>	
<b>Benefit Description</b>	<b>Guaranteed Benefit</b>	<b>Expected Benefit</b>	<b>Cost</b>
<b>Life with Certain Period Annuity</b> - \$1,878.28 for life, payable monthly, guaranteed for 30 year(s) which is 360 payments, beginning on 04/18/2019 at age 35, with the last guaranteed payment on 03/18/2049 at age 65.	\$676,180.80	\$1,123,211.44	\$499,250.00
<b>Subtotal For: Sally Smith</b> .....	<b>\$676,180.80</b>	<b>\$1,123,211.44</b>	<b>\$499,250.00</b>

SUMMARY INFORMATION				
	Guaranteed Benefit	Expected Benefit	Cost	IRR
<b>ANNUITY COST</b> .....			\$499,250.00	
Assignment Fee .....			\$750.00	
<b>TOTAL ANNUITY COST W/ FEES</b> .....	<b>\$676,181</b>	<b>\$1,123,211</b>	<b>\$500,000.00</b>	<b>3.91%</b>
Case IRR 3.91%				

PACIFIC LIFE

**Settlement Proposal for: Sally Smith rated 46 \$500k Life with 30**

Owner State :	Colorado (0.00% tax)	Quote Date :	02/11/2019
Rate Series :	PL258	Purchase Date :	03/18/2019
Rates Effective :	01/24/2019	Expiration Date :	02/18/2019

For : Sally Smith	Female, Date of Birth: Not Supplied	Age: 35, Rated Age: 46
-------------------	-------------------------------------	------------------------

<u>Benefit Description</u>	<u>Guaranteed Benefit</u>	<u>Expected Benefit</u>	<u>Cost</u>
Life with Certain Annuity - \$1,973.78 for life, payable monthly, guaranteed for 30 year(s) which is 360 payments, beginning on 04/18/2019 at age 35, with the last guaranteed payment on 03/18/2049 at age 65.	\$710,559	\$1,211,898	\$499,750.00
<b>Subtotal For : Sally Smith</b> .....	<b>\$710,559</b>	<b>\$1,211,898</b>	<b>\$499,750.00</b>

SUMMARY INFORMATION				
	<u>Guaranteed Benefit</u>	<u>Expected Benefit</u>	<u>Cost</u>	<u>IRR</u>
ANNUITY COST.....			\$499,750.00	
Assignment Fee .....			\$250.00	
<b>TOTAL ANNUITY COST W/ FEES</b> .....	<b>\$710,559</b>	<b>\$1,211,898</b>	<b>\$500,000.00</b>	<b>4.26%</b>
Case IRR: 4.26%				

In both cases, the life companies are still obligated to make “rated” payments for as long as the plaintiff is alive. The life company assumes the risk that the client may outlive their adjusted mortality projections. As you can see, as a result of obtaining rated ages, the plaintiff or her beneficiaries will receive an additional \$131.00, almost \$47,000 in additional guaranteed benefits over the contract. If the plaintiff lives to her natural life expectancy of 86 years as estimated under the Pacific Life quote, she will receive an additional \$81,000 over her lifetime. More, if she should live longer.

**B. Abuse of Rated Ages**

The flip-side of the age uprating is that it can lead to premium scalping to a defendant who wishes to illustrate a monthly lifetime benefit to assist in the settlement of a case. For instance, suppose the plaintiff above needed exactly \$1,739 monthly for her lifetime to replace her lost income. Prior to the enactment of New York State General Obligations Law Section 5-1702 (2), the Structured Settlement Protection Act, the Defendant/Insurer could misrepresent the costs of the structured settlement. This is precisely what was alleged in Lyons v. Medical Malpractice Insurance Association. 286 A.D.2d 711 , 730 N.Y.S.2d 345 (N.Y. App. Div. 2d Dep’t 2001)

In Lyons, the defendant offered \$265,000 in cash and offered a structured settlement annuity which would pay \$3,000 per month for the plaintiff's life, with 20 years guaranteed. The represented cost for this structure was \$675,180. The total represented settlement value was \$940,180. The plaintiff's attorney accepted this at face value and calculated his fee based upon this represented value. Defendants conducted medical underwriting and obtained an Age Uprate, which lowered the actual cost of the structured annuity to \$409,544.50. TOTAL Settlement Value is really \$674,544.50

Specific disclosures are required by statute. NY General Obligations Law Section 5-1702 requires the defendant or defendant's legal representative to disclose in writing to claimant or claimant's legal representative all of the following:

- (a) the amounts and due dates of the periodic payments to be made under the structured settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;
- (b) the amount of the premium payable to the annuity issuer;**
- (c) the nature and amount of any cost that may be deducted from any of the periodic payments;
- (d) where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law; and
- (e) a statement that the claimant is advised to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences and that the defendant or defendant's legal representative may not refer any advisor, attorney or firm for such purpose.

**Such statutory protections should eliminate the issues which arose in the Lyons case.**

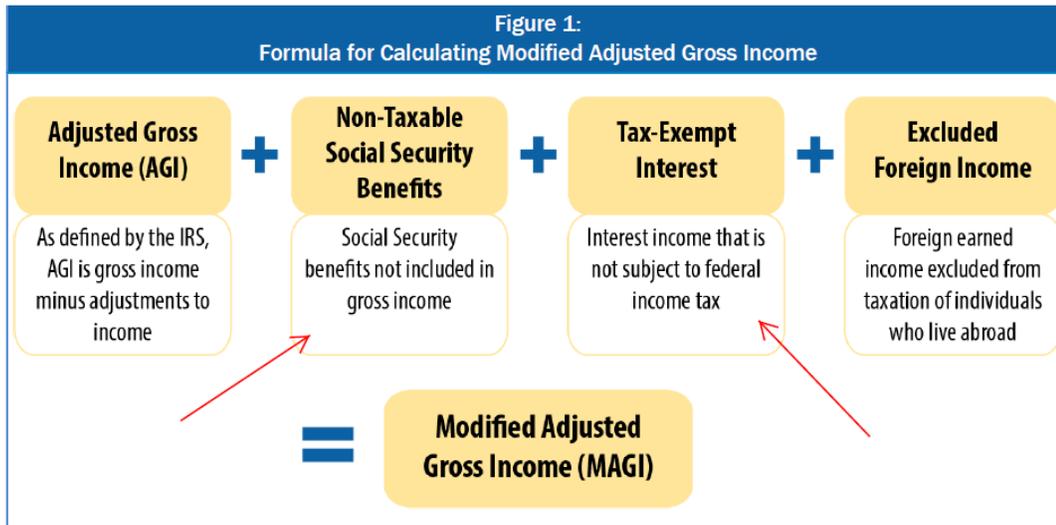
## VI. PLANNING STRATEGIES FOR THOSE WITH MAGI MEDICAID

CHART 1



MAGI POPULATION						
CATEGORY	INCOME COMPARED TO	HOUSEHOLD SIZE		RESOURCE LEVEL		SPECIAL NOTES
		1	2	1	2	
PRESUMPTIVE ELIGIBILITY FOR PREGNANT WOMEN	223% FPL	N/A	3,059	NO RESOURCE TEST		Qualified provider makes the presumptive eligibility determination. Cannot spenddown to become eligible for presumptive eligibility.
PREGNANT WOMEN	223% FPL			NO RESOURCE TEST		A woman determined eligible for Medicaid for any time during her pregnancy remains eligible for Medicaid coverage until the last day of the month in which the 60th day from the date the pregnancy ends occurs, regardless of any change in income or household size composition. If the income is above 223% FPL, the A/R must spenddown to the Medicaid income level. The baby will have guaranteed eligibility for one year.
CHILDREN UNDER ONE	223% FPL	2,257	3,059	NO RESOURCE TEST		If the income is above 223% FPL, the A/R may apply for CHPlus or if chooses to spenddown, must spenddown to the Medicaid level. One year guaranteed eligibility if mother is in receipt of Medicaid on delivery. Eligibility can be determined in the 3 months retro to obtain the one year extension.
CHILDREN AGE 1 THROUGH 5	154% FPL	1,558	2,113	NO RESOURCE TEST		If income is above 154% FPL, the A/R may apply for CHPlus or if chooses to spenddown, must spenddown to the Medicaid level.
CHILDREN AGE 6 THROUGH 18	110% FPL	1,113	1,509	NO RESOURCE TEST		If income is above 154% FPL, the A/R may apply for CHPlus or if chooses to spenddown, must spenddown to the Medicaid level.
	154% FPL	1,558	2,113			
PARENTS/CARETAKER RELATIVES	138% FPL	1,397	1,893	NO RESOURCE TEST		If income is above 138% FPL, the A/R may apply for APTC or if chooses to spenddown, must spenddown to the Medicaid level.
19 AND 20 YEAR OLDS LIVING WITH PARENTS	138% FPL	1,397	1,893	NO RESOURCE TEST		If income is above 155% FPL, the A/R can apply for APTC or if chooses to spenddown, must spenddown to Medicaid level.
	155% FPL	1,569	2,127			
SINGLE/CHILDLESS COUPLES AND 19 AND 20 YEARS LIVING ALONE	100% FPL	1,012	1,372	NO RESOURCE TEST		S/CCs cannot spenddown, but can apply for APTC. 19 and 20 year olds if income over 138% may apply for APTC or if chooses to spenddown, must spenddown to the Medicaid level.
FAMILY PLANNING PROGRAM	223% FPL	2,257	3,059	NO RESOURCE TEST		Eligibility determined using only applicant's income.

New York State Income Standards for MAGI Population Effective January 1, 2019														
House Hold Size	LIF LEVEL		100% FPL		110% FPL		138% FPL		154% FPL		155% FPL		223% FPL	
	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY
One	12,482	1,041	12,140	1,012	13,354	1,113	16,754	1,397	18,696	1,558	18,817	1,569	27,073	2,257
Two	15,861	1,322	16,460	1,372	18,106	1,509	22,715	1,893	25,349	2,113	25,513	2,127	36,706	3,059
Three	19,121	1,594	20,780	1,732	22,858	1,905	28,677	2,390	32,002	2,667	32,209	2,685	46,340	3,862
Four	22,401	1,867	25,100	2,082	27,610	2,301	34,638	2,887	38,654	3,222	38,905	3,243	55,973	4,665
Five	25,774	2,148	29,420	2,452	32,362	2,697	40,600	3,384	45,307	3,776	45,601	3,801	65,607	5,468
Six	28,489	2,375	33,740	2,812	37,114	3,093	46,562	3,881	51,960	4,330	52,297	4,359	75,241	6,271
Seven	31,288	2,609	38,060	3,172	41,866	3,489	52,523	4,377	58,613	4,885	58,993	4,917	84,874	7,073
Eight	34,630	2,886	42,390	3,532	46,618	3,885	58,485	4,874	65,266	5,439	65,689	5,475	94,508	7,876
Nine	36,948	3,079	46,700	3,892	51,370	4,281	64,446	5,371	71,918	5,994	72,385	6,033	104,141	8,679
Ten	39,268	3,273	51,020	4,252	56,122	4,677	70,408	5,868	78,571	6,548	79,081	6,591	113,775	9,482
Each Add't Person	2,321	194	4,320	360	4,752	396	5,962	497	6,653	555	6,696	558	9,634	803



wages by the employer. Since this income isn't taxed, it doesn't count towards a household's MAGI. The wages in Box 1 of Form W-2 already exclude any pre-tax benefits so they don't appear on the tax return as income or deductions.

**Does MAGI count any income sources that are not taxed?**

Yes. Some forms of income that are non-taxable or only partially taxable are included in MAGI and affect financial eligibility for premium tax credits and Medicaid. Specifically:

- **Tax-exempt interest.** Interest on certain types of investments is not subject to federal income tax but is included in MAGI. These investments include many state and municipal bonds, as well as exempt-interest dividends from mutual fund distributions.
- **Non-taxable Social Security benefits.** For many people, particularly those with no other source of income, Social Security benefits are not taxed at all. However, if there is other income, a portion of the benefit might be taxed. Social

Security benefits are reported on Form SSA-1099 (the Social Security Benefit Statement) and, whether or not those benefits are taxable, the full amount is included in MAGI.

- **Foreign income.** Under section 911 of the Internal Revenue Code, U.S. citizens and resident aliens living outside the U.S. can exclude up to \$104,100 (in 2018) of earned income for tax purposes if they meet certain residency or physical presence tests. Any foreign income excluded under this section must be added back when calculating MAGI.

**Whose income is included in household income?**

Household income is the MAGI of the tax filer and spouse, plus the MAGI of any dependent who is required to file a tax return. A dependent's income is only included if they are required to file taxes; if they file taxes for another reason but had no legal filing requirement, their income is not included.

**Table 1:**  
**Examples of Taxable and Non-Taxable Income**  
*(See IRS Publication 525 for details and exceptions)*

Examples of Taxable Income	
Wages, salaries, bonuses, commissions	Jury duty fees
Annuities	Military pay
Awards	Military pensions
Back pay	Notary fees
Breach of contract	Partnership, estate, and S-corporation income
Business income/Self-employment income	Pensions
Compensation for personal services	Prizes
Debts forgiven	Punitive damages
Director's fees	Unemployment compensation
Disability benefits (employer-funded)	Railroad retirement—Tier I (portion may be taxable)
Discounts	Railroad retirement—Tier II
Dividends	Refund of state taxes
Employee awards	Rents (gross rent)
Employee bonuses	Rewards
Estate and trust income	Royalties
Farm income	Severance pay
Fees	Self-employment
Gains from sale of property or securities	Non-employee compensation
Gambling winnings	Social Security benefits (portion may be taxable)
Hobby income	Supplemental unemployment benefits
Interest	Taxable scholarships and grants
Interest on life insurance dividends	Tips and gratuities
IRA distributions	
Examples of Non-Taxable Income	
Aid to Families with Dependent Children (AFDC)	Meals and lodging for the employer's convenience
Child support received	Payments to the beneficiary of a deceased employee
<b>Damages for physical injury (other than punitive)</b>	Payments in lieu of worker's compensation
Death payments	Relocation payments
Dividends on life insurance	Rental allowance of clergyman
Federal Employees' Compensation Act payments	Sickness and injury payments
Federal income tax refunds	Social Security benefits (portion may be taxable)
Gifts	Supplemental Security Income (SSI)
Inheritance or bequest	Temporary Assistance for Needy Families (TANF)
Insurance proceeds (accident, casualty, health, life)	Veterans' benefits
Interest on tax-free securities	Welfare payments (including TANF) and food stamps
Interest on EE/I bonds redeemed for qualified higher education expenses	Workers' compensation and similar payments



Department  
of the  
Treasury  
**Internal  
Revenue  
Service**

# Your Federal Income Tax

For Individuals

Publication 17

Catalog Number 10311G

For use in preparing

**2015** Returns

AT PAGE 94

**Court awards and damages.** To determine if settlement amounts you receive by compromise or judgment must be included in your income, you must consider the item that the settlement replaces. The character of the income as ordinary income or capital gain depends on the nature of the underlying claim. Include the following as ordinary income.

1. Interest on any award.
2. Compensation for lost wages or lost profits in most cases.
3. Punitive damages, in most cases. It does not matter if they relate to a physical injury or physical sickness.
4. Amounts received in settlement of pension rights (if you did not contribute to the plan).
5. Damages for:
  - a. Patent or copyright infringement,
  - b. Breach of contract, or
  - c. Interference with business operations.
6. Back pay and damages for emotional distress received to satisfy a claim under title VII of the Civil Rights Act of 1964.
7. Attorney fees and costs (including contingent fees) where the underlying recovery is included in gross income.

Do not include in your income compensatory damages for personal physical injury or physical sickness (whether received in a lump sum or installments).

**AS YOU CAN SEE FROM THE CHARTS ABOVE, PERIODIC PAYMENTS OF PERSONAL INJURY SETTLEMENTS WILL NEVER BE PART OF THE COMPUTATION IN A MAGI MEDICAID SITUATION.**

## Simplistic Comparison

So, let's say that Suzy Smith has a household of two (2). She runs into her aunt who tells her about her excellent financial planner has done so well for her. The financial planner finds a number of conservative bonds and dividend paying stocks generating approximately 3 ½%. She decides to invest \$750,000 with her to generate approximately \$26,250 a year in income. Suzy did not have enough work hours in the market to be eligible for Social Security disability. Her personal injury case was not work related and so she is not eligible for workers' compensation. She has used up all of her no-fault benefits. Consequently, this is the only income stream that

she now has. Unfortunately, however, not only is the proposed “market-based” income stream not regularly reoccurring, it is not guaranteed. Further, it is likely partially taxable. Worse, however, it also disqualifies her from MAGI Medicaid eligibility according to chart number 2 highlighted above.

On the other hand, had Suzy elected to utilize a structured settlement methodology set forth earlier she would be receiving \$1973 per month, or \$23,676.00 per year, tax-free none of which would be counted for her MAGI Medicaid eligibility. Therefore, she could receive those proceeds and continue to receive MAGI Medicaid at no cost to her (under current rules.)

Ideal candidates for the MAGI MEDICAID STRUCTURED SETTLEMENT STRATEGY:

- Those who have not worked enough quarters in the previous 10 years to qualify for Social Security Disability (SSD.);
- Those who otherwise will not be eligible for SSD;
- The working poor;
- Part-timers;
- Those receiving long term workers compensation benefits (WC) who have not become eligible for SSD. (Remember WC benefits do not count against the MAGI cap);
- College students;
- Those hypothetical (because I have never seen a client like this) clients who seem to have cash flow but have no declared income (perhaps they work “off the books”);
- Those who have been awarded marginal amounts of SSD but who have not yet become eligible for Medicare;
- Those receive only “American Indian Income”;
- Those who survive on child support.

Who are excluded from MAGI Medicaid eligibility?

- Generally, those who are enrolled in MEDICARE

**You may have a choice between MAGI or Non-MAGI Medicaid.**

- If you are certified as being disabled and you are under the age of 65 - you may choose MAGI or Non-MAGI Medicaid.
    - This is true unless you are getting coverage through Medicare. Once you receive coverage through Medicare, you cannot be covered by MAGI Medicaid. However, there is an exception if you live with and care for a child or other relative under the age of 18, or the age of 19 if they are a student.
  - Parent/caretaker relatives who are disabled or 65 or older may choose either MAGI or Non-MAGI. This is true *even if they receive Medicare*.
  - Disabled children may choose MAGI or Non-MAGI, *unless they are in a waiver program*.
- Those who earn too much to qualify for MAGI Medicaid

# Eligibility Groups

MAGI	Non-MAGI
<p><u>New Adult Group</u>: Childless adults, which include individuals that are:</p> <ul style="list-style-type: none"> <li>• Not pregnant</li> <li>• Age 19-64 (19 &amp; 20 living alone) without Medicare</li> <li>• Could be certified disabled but don't have Medicare yet</li> </ul>	<p><u>SSI</u>:</p> <ul style="list-style-type: none"> <li>• SSI recipients</li> <li>• State Supplement only</li> </ul>
Infants and Children under 19	<p><u>SSI-related Medically Needy</u>:</p> <ul style="list-style-type: none"> <li>• Aged, Disabled, or Blind</li> </ul>
Parents/Caretaker Relatives	<p><u>ADC-related Medically Needy</u>:</p> <ul style="list-style-type: none"> <li>• Under 21 years old</li> <li>• Parent Caretaker Relatives</li> <li>• Pregnant Women</li> </ul>
Pregnant Women	Medicare Savings Program
19 & 20 Year Olds Living with Parents	AIDS Health Insurance Program (AHIP)
Family Planning Benefit Program: if applying through NYSoH & are eligible for FPBP <i>only</i>	Medicaid Buy-In for Working People with Disabilities
Child in Foster Care (Chaffee): MAGI administered in WMS	COBRA

<https://empirejustice.org/wp-content/uploads/2018/08/MAGI-Medicaid-presentation-8.14.18-1.pdf>

## VII. CHECKLIST FOR REVIEW OF A SETTLEMENT AGREEMENT AND RELEASE (SAR)

The following are just a few of the most common and most important areas to review in a settlement agreement and release.

- A. Pay attention to the defined terms that are used to make sure they are consistent throughout the document. (i.e. Plaintiff is used, rather than Releasor or Claimant).
- B. Make sure that the following or similar language is included:
 

*The parties acknowledge that punitive damages were not sought or proven against Defendant and that no monies are being paid herein as and for punitive damages.*
- C. The following sentence MUST always be included:

***All sums set forth herein constitute damages on account of personal physical injuries or sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.***

- D. Make sure the word “doubtful” is not included with “disputed claim.” We see this often: “Plaintiff acknowledges that this is a settlement of a doubtful and disputed claim.”
- E. Where applicable, (i.e. where plaintiff is a passenger and is entitled to no-fault coverage from Insurer of Defendant or where plaintiff made and settled a claim against his/ her own SUM coverage and has no-fault benefits remaining) make sure the following provision is included:
- Moreover, nothing herein contained shall be deemed to release any rights the Plaintiff may have to receive No Fault benefits from Insurer or under the so-called “No-Fault” provisions of the Insurance Law of the State of New York.***
- F. Plaintiff’s counsel should never agree to indemnify or hold harmless the defense for the repayment of any obligations or liens. To do is a violation of ethical rules. In fact, the defendant asking Plaintiff’s counsel to do so is also a violation.

NEW YORK STATE BAR ASSOCIATION  
Committee on Professional Ethics

Opinion 852 – 2/10/11

**Topic:** Settlement agreements requiring attorney to indemnify client’s obligation to third party

**Digest:** An attorney may not agree to indemnify a client’s obligations to a third party as part of a settlement of the client’s claim.

**Rules:** 1.2(a); 1.8(e); 5.6(a); and 8.4(a).

- G. In heading entitled: “Payee's Rights to Payments”, the following or similar language should be included:

***None of the Periodic Payments, nor any Payee’s rights to such payments, may be accelerated, deferred, increased or decreased by Plaintiffs or any Payee; nor shall Plaintiffs or any Payee or any other person who becomes a recipient of Periodic Payments pursuant to the terms of a Qualified Assignment, Release and Pledge Agreement or by operation of law, have the power to sell, mortgage, encumber, or anticipate the Periodic Payments, or the rights to such payments, or any part thereof, by assignment or otherwise, except as pursuant to a qualified order under Internal Revenue Code Section 5891.***

Be careful that the language above in bold is included. Otherwise, the plaintiff could be precluded from liquidating her structure even under the direst of circumstances.

- H. In the case of an infant settlement, the following should also be included:

***Furthermore, any attempt to sell, transfer, or assign any part of the settlement shall require a showing of extreme, unforeseen and unanticipated financial hardship before the Court, in addition to such other and further requirements as may be imposed under Section 5-1706 of the General Obligation Laws of the***

***State of New York, as well as IRC § 5891, or such similar provisions as may be promulgated in the future.***

- I. Was confidentiality agreed upon? If so, make sure the obligations are mutual. Substitute the word “parties” where “plaintiff/claimant” is used in the confidentiality section. Also provide an exception that the Plaintiff/Claimant may discuss to tax preparers, accountants, etc.
- J. Always, always make sure that the periodic payment obligation of Defendant Insurer is spelled out. This is what makes it compliant with IRC § 104(a)(2) and keeps the structure payments tax free. For instance:

## 2.0 PAYMENTS

In consideration of the release set forth above, the Insurers on behalf of the Defendant agree to pay to the individual(s) named below ("Payee(s)") the sums outlined in this Section 2 below:

2.2 Additionally, The Insurer, Wildcat Insurance Company of NY, shall issue Periodic payments made according to the schedule as follows (the "Periodic Payments"):

Payee: The Suzy Smith Supplemental Needs Trust

\$1,739.75 payable on the 15th of each month, beginning April 1, 2019. These payments are guaranteed for 30 years or for the life of Suzy Smith, whichever is longer. The final guaranteed payment will be March 1, 2049.

- K. Never agree to language requiring Plaintiff to “Satisfy” all liens standing alone. We insert:

**“Plaintiff agrees to *fully resolve* or satisfy any *valid and enforceable* liens or claims against the proceeds.”**

**In the case of *Fried v City of New York*, the settlement stipulation placed on the record during trial required the plaintiff to satisfy all existing liens. Fortunately, fortunately the parties also agreed that the entire agreement between the parties would be the subject of a written Settlement Agreement. In that agreement we inserted the above language. There was a \$1,300,000 Medicaid lien assessed against the proceeds by the City of New York HRA. On our motion to dismiss the lien, the City argued that they were a third-party beneficiary of the stipulation on the record and attempted to use this to force the plaintiff to pay the lien in full.**

**The court ruled that the terms of the written agreement superseded the stipulation and allowed the motion to proceed on the merits. THE COURT ULTIMATELY DISMISSED THE LEIN IN ITS ENTIRETY. *FRIED V CITY OF NEW YORK*, SUPREME COURT OF NEW YORK, KINGS COUNTY FEB 29, 2012 35 MISC. 3D 601**



## VIII. Medicare Set-Asides and Structured Annuities: Reducing Your Client's Exposure

### A. Medicare Set-Asides (MSAs): An Overview

1. What is an MSA? Simply, an MSA is a projection of the Medicare covered medical expenses and Medicare covered prescription drug expenses that a Plaintiff will require for treatment of his claim related injury over the duration of his life expectancy.
2. An MSA Account is a financial account set up for future potential claim related Medicare covered medical payments.
3. It is important to note that currently there is no federal or state statute mandating the establishment of an MSA in *any* personal injury case.
4. Moreover, there is **no statute or regulation**, Federal or State, which mandates that an MSA be established in any case. While CMS has published memoranda and regulations regarding the establishment of MSAs in a Workers' Compensation environment, there is no such regulation or guidance in the liability or "non-comp" arena which exists.
5. The only written, and somewhat authoritative, communication addressing MSAs in pure liability actions came in the form of a handout from the Department of Health & Human Services, Centers for Medicare & Medicaid Services, Division of Financial Management and Fee for Services Operations, Region IV, dated May 25, 2011 which that provides a nice summary of LMSAs in general including the following:

Medicare's interests must be protected; however, CMS does not mandate a specific mechanism to protect those interests. **The law does not require a "set-aside" in any situation. The law requires that the Medicare Trust Funds be protected from payment for future services whether it is a Workers' Compensation or liability case.** There is no distinction in the law.

\* \* \*

We are still asked for written confirmation that a Medicare set-aside is, or is not, required. As we have already covered the "set aside" aspect of that request we only need to state that IF there was/is funding for otherwise covered and reimbursable future medical services related to what was claimed/released, the Medicare Trust Fund must be protected. **Each attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding for future medicals, and if so, a need to protect the Trust Funds. They must decide whether or not there is funding for future medicals. If the answer for plaintiff's counsel is yes, they should see to it that those funds are used to pay for otherwise Medicare covered services related**

**to what is claimed/released in the settlement judgment award.** If the answer for defense counselor the insurer, is yes, they should make sure their records contain documentation of their notification to plaintiff's counsel and the Medicare beneficiary that the settlement does fund future medicals which obligates them to protect the Medicare Trust Funds. It will also be part of their report to Medicare in compliance with Section III, Mandatory Insurer Reporting requirements. [Emphasis added].

6. Please keep in mind that a Medicare Set-Aside is NOT a life care plan or a document regarding ALL the treatment that a Plaintiff may require. It only deals with a "reasonable" amount of Medicare covered medical expenses.
7. Workers' Compensation claims are handled by the WCMSA review contactor and CMS Regional Office and have promulgated review thresholds and submission manuals for Workers' Compensation Lump Sum Medical Settlements whereby the carrier is seeking to be relieved of their obligation for future accident-related medicals expenses for an injured worker.

A summary of the Workers' Compensation Medicare Set-Aside (MSA) Thresholds are as follows:

A WCMSA may be submitted to CMS for review in the following situation

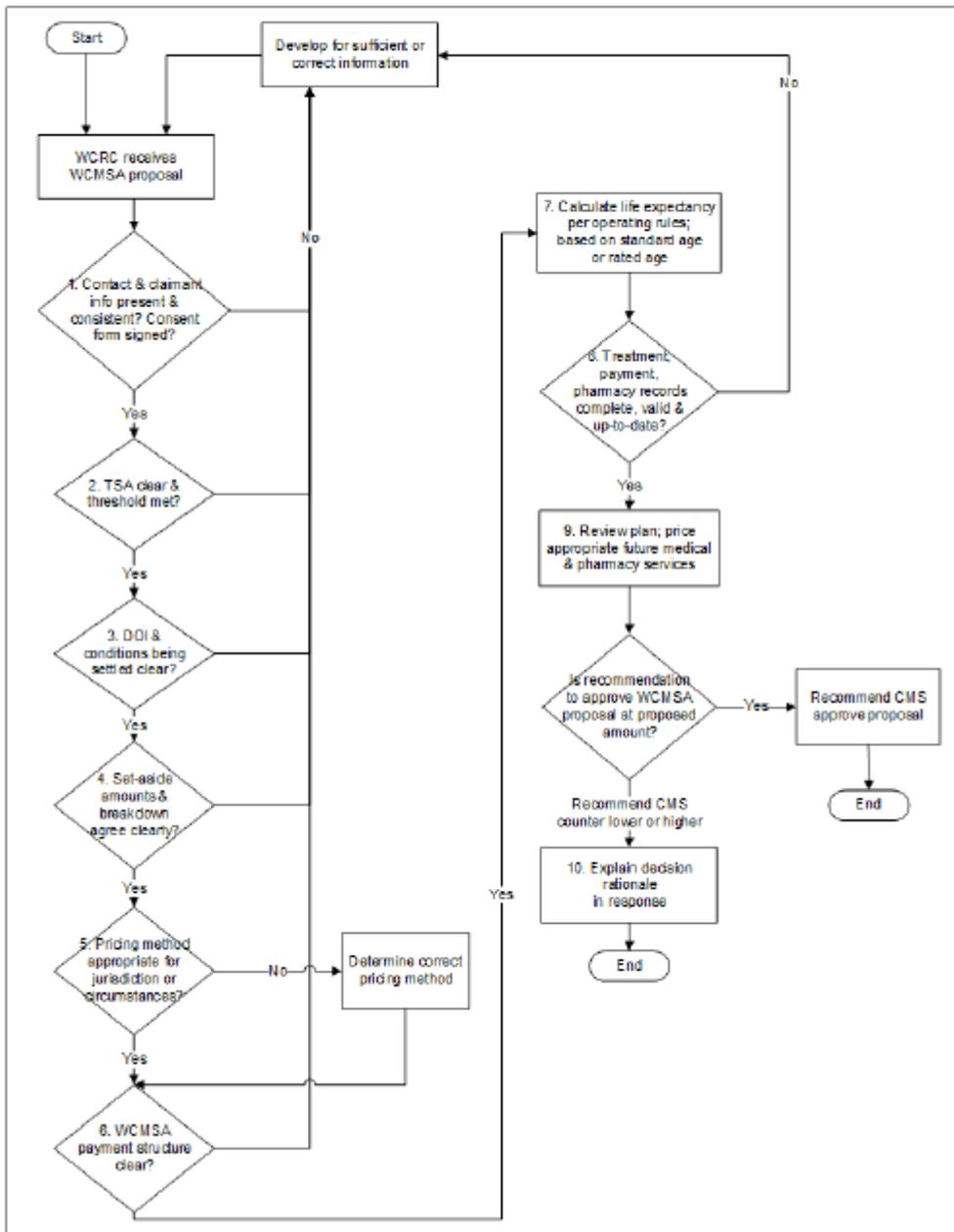
The claimant is currently a **Medicare beneficiary** and the total settlement amount is **greater than \$25,000**;

**OR**

The claimant has a "reasonable expectation" of Medicare enrollment **within 30 months of the settlement date** and the anticipated total settlement amount for future medical expenses and disability/lost wages over the life or duration of the settlement agreement is expected to be **greater than \$250,000**.

Additionally, in the Workers' Compensation realm, there is also a procedure for the review of submitted WCMSAs:

Figure 9-2: WCRC Medical Review Steps



8. Liability claims are handled by the CMS Regional Office with jurisdiction over the claim and there currently **no** promulgated review thresholds and submission manuals for liability cases. Nor are there any review procedures or steps which have been established.

As mentioned before, the Stalcap Handout provides the current guidelines for protecting Medicare’s interests with an MSA in the liability realm:

Each attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding for future medicals, and if so, a need to protect the Trust Funds. They must decide whether or not there is funding for future medicals. If the answer for plaintiff's counsel is yes, they should see to it that those funds are used to pay for otherwise Medicare covered services related to what is claimed/released in the settlement judgment award.

**B. How are MSA funded once an MSA has been allocated in a Workers' Compensation or Liability Claim?**

1. The general rules for establishing an MSA Account as provided by CMS is as follows:

**Establishing and Using your Medicare Set-Aside Account**

- MSA funds must be placed in an interest-bearing account, separate from any personal savings or checking account.
- Any funds and interest not used in a given year must remain in the account.
- MSA funds may only be used to pay for medical services related to your liability-related injury that would normally be paid by Medicare.
- Examples of some items that Medicare **does not** pay for are: acupuncture, routine dental care, eyeglasses or hearing aids and therefore, these items cannot be paid from the MSA account. You may obtain a copy of the booklet "Medicare & You" from your Social Security office for a more extensive list of services not covered by Medicare.
- If you have a question regarding Medicare's coverage of a specific item or service to determine if you may pay for it from the MSA account, call 1 800-MEDICARE (1-800-633-4227) or search the following CMS websites:

The complete form for "Administering Your Structured Medicare Set-Aside Arrangement (MSA)" is attached hereto.

2. There are two ways recognized by CMS/Medicare to fund an MSA Allocation.
  - a. **Cash Payment:** By "setting aside" the actual dollar amount that the Allocator has arrived at for future claim related Medicare covered medical payments.
  - b. **Future Periodic Payments and Cash:** CMS will accept the purchase of an annuity as a security to fund the Medicare Set-Aside on an annual basis.
3. This is recognized in the Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide (version 2.0, January 4, 2019):

## 5.0 WCMSA Funding Structures

There are two kinds of WCMSAs. An individual or a beneficiary may obtain a settlement that provides for a lump-sum WCMSA or a structured WCMSA.

### 5.1 Lump-Sum WCMSAs

A WCMSA can be established as a lump-sum arrangement where the beneficiary accepts a single payment intended to pay for all future medical expenses and disability benefits related to the work injury or disease. When a WCMSA is designated as a lump-sum commutation settlement, Medicare will not make any payments for the claimant's medical expenses (for work-related injuries or diseases) until all the funds within the WCMSA (including any interest earned on the funds in the account) have been completely exhausted. These same basic principles also apply to structured settlements. Generally, WCMSAs that are lump sums are easier to monitor than structured arrangements.

### 5.2 Structured WCMSAs

A WCMSA can also be established as a structured arrangement, where payments are made to the account on a defined schedule to cover expenses projected for future years. In a structured WCMSA, an initial deposit is required to cover the first surgical procedure or replacement and two years of annual payments. The initial deposit ("seed money") is followed by subsequent annual deposits (or a shorter time period if CMS agrees to such), based on the anniversary of the first deposit. If in any given coverage year the deposited funds are not exhausted (i.e., used up, spent), they are carried forward to the next period and added to the next annual deposit. The whole fund, including carry-forwards, must be exhausted before Medicare will pay primary for any WC injury-related medical expenses. If the fund is exhausted appropriately in a given annual period, Medicare will pay primary for further WC injury-related medical expenses during that period. In the next annual period, the replenished WCMSA funds again must be used, until the WCMSA amount is appropriately exhausted.

4. Electing to annuitize the MSA obligation removes the necessity of keeping the entire MSA amount on deposit in a separate bank account to only be spent on those accident-related medical expenses for which Medicare would have been responsible.
5. When electing to fund an annuity which pays out annually to cover the expensed of the Set-Aside, the first two years of projected medical expenses must be deposited into the plaintiff's Medicare Set-Aside banking account. The cost of the first two years of anticipated medical payments will be calculated by the Allocator.
6. An example demonstrating such savings is set forth below.

Sample Medicare Set-Aside Allocation Amount

**Recommended Total Set-Aside Amount: \$397,981.19**

The recommended Set-Aside amount is comprised of medical treatment total \$140,970.07 and future prescription drug cost totaling \$257,011.12.

**Annuity Information**

**Recommended Seed Amount: \$18,090.05**  
**Anticipated Annual Medicare-Covered Expenses**  
**for 43 Years: \$8,834.68**

By using the cash method, this MSA Allocation can be funded simply with **\$397,981.19** in cash.

The alternative CMS authorized funding option of a structure, involves initial up-front money to “seed” the MSA account representing the first two years of anticipated future treatments and the first surgical procedure and durable medical good.

An illustration of such an annuity quote is set forth below.



Moreover, by utilizing the annuity funding option, at any time MSA account is depleted, Medicare may be billed for future treatments until next annual payment is received then start over again. This may have the benefit of prolonging the MSA funds as with the lump sum cash option the entire amount must be depleted before Medicare will resume making accident-related medical expenses.

7. In certain circumstances, a Life Company may provide a favorable age-uprating for a plaintiff. In such cases, rather than quoting for a period certain, a lifetime structure may be utilized taking advantage of the favorable rated age.

Using the above-referenced MSA scenario, if a Rate Age of 40 years were obtained, the quote would be as follows:

Paramount Settlement Planning  
4134 Seneca Street  
West Seneca, New York 14224  
(716)712-0127

**Settlement Proposal for: Smith MSA Quote- Lifetime with Rated Age**

Owner State : Colorado (0.00% tax)	Quote Date : 02/12/2019
Rate Series : PL258	Purchase Date : 03/12/2019
Rates Effective : 01/24/2019	Expiration Date: 02/19/2019

<b>For : John Smith</b>	<b>Male, Date of Birth: Not Supplied</b>	<b>Age: 27, Rated Age: 40</b>
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<u>Benefit Description</u>	<u>Guaranteed Benefit</u>	<u>Expected Benefit</u>	<u>Cost</u>
• <b>MSA Seed Money •</b> Cash Up Front to Claimant - \$18,090.05	\$18,090	\$18,090	\$18,090.05
• <b>MSA Annual Payment •</b> Life with Certain Annuity - \$8,834.68 for life, payable annually, guaranteed for 43 year(s), beginning on 03/01/2020, with the last guaranteed payment on 03/01/2062.	\$379,891	\$485,907	\$194,584.00
<b>Subtotal For : John Smith</b> .....	<b>\$397,981</b>	<b>\$503,997</b>	<b>\$212,674.05</b>

SUMMARY INFORMATION			
	<u>Guaranteed Benefit</u>	<u>Expected Benefit</u>	<u>Cost</u>
Total Cash Up Front .....	\$18,090	\$18,090	\$18,090.05
<b>ANNUITY COST</b> .....			<b>\$194,584.00</b>
Assignment Fee .....			\$250.00
<b>TOTAL ANNUITY COST W/ FEES</b> .....	<b>\$379,891</b>	<b>\$485,907</b>	<b>\$194,834.00</b>
<b>TOTAL ANNUITY W/ CASH &amp; FEES</b> .....	<b>\$397,981</b>	<b>\$503,997</b>	<b>\$212,924.05</b>

The total cost to fund the MSA Allocation in this illustration with an annuity (including the seed money) would cost **\$212,924.05**.

By electing to fund an annuity and setting aside the first two (2) years of projected medical costs in cash, rather than pay the total recommended Set-Aside allocation amount of \$397,981.19 in one lump sum of cash, the plaintiff has effectively saved **\$185,057.14** that can go back into their pocket rather than having the entire sum sitting

in an MSA account to be used on accident-related Medicare expenses over the plaintiff/claimant's lifetime.

Thus, an even greater savings may be obtained.

8. Each case is distinct, however, by utilizing a structured settlement annuity to fund an MSA further cost savings to your client may be realized.

#### **IX. ESTATE RECOVERY ISSUES**

**Recall that in the event of the death of the primary payee, future structured benefits are payable directly to the beneficiaries outside the "estate." This can be a very significant benefit of a structured settlement. For instance, recall that in Suzy Smith's College plan for her children, the plan established an income stream to satisfy future college tuition obligations.**

**What happens if, at age 50 our friend Suzy becomes "permanently" incapacitated and "institutionalized" due to the progression of her injuries and is forced to go into a nursing home, that she cannot otherwise afford, and, becomes Medicaid dependent. Suppose the unreimbursed Medicaid cost is \$150,000 per year and Suzy passes away on her 52<sup>nd</sup> birthday.**

**Q. Will Medicaid's estate recovery reach out to deny Rachel's and Joey's college tuition payments?**

**A. No. The college proceeds pass by beneficiary designation (if set up correctly) and do not pass through the Estate.**

This same result will occur with any future guaranteed payments due after the death of the Plaintiff. Consider how helpful this could be to transfer assets to the next generation and avoid Estate recovery in other situations.