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Justice Supreme Court
State of New York
County of Bronx

RULES FOR SETTLEMENT OF CLAIMS BY INFANTS
AND IMPAIRED PERSONS

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RULES FOR SETTLEMENT OF CLAIMS BY INFANTS AND IMPAIRED PERSONS

A. COMPLIANCE WITH RULES AND STATUTES:

These rules are adopted in recognition of the equitable duty of the court to consider infants and impaired persons to be wards of the court and to protect them as such. Thus, in order to zealously safeguard the rights of infants and impaired persons, this court will require strict adherence to its rules and all other applicable laws and rules. Unless there is a waiver for good cause shown, a failure to strictly comply will result either in delay and/or denial. Therefore, make certain before you file that all of the affirmations and affidavits are consistent, and that your application fully complies with and provides all information required by these rules as well as Article 12 of the CPLR; Uniform Court Rule 202.67; and Judiciary Law § 474. If a structured settlement is proposed the application must also comply with General Obligations Law, Article 17, §§ 5-1701 et. seq., as well as with Internal Revenue Code §§ 104 and 130.

These rules also require counsel to complete and file a Worksheet/Checklist. The worksheet/checklist and all of the court's rules and forms are available on the OCA Website.¹ The worksheet/checklist and the supporting affidavits and affirmations must each contain the same information and be consistent.

B. A WORKSHEET/CHECKLIST

On the same day that a compromise application is filed with the Clerk in Room 217, a completed worksheet/checklist must also be delivered to the Clerk. A courtesy copy

¹<http://www.nycourts.gov/courts/12jd/civil/allforms.shtml#IA3>

should be delivered to the Court in Chambers (Room 828). If the worksheet/checklist is not provided to the Court in Chambers, the Court will not be aware that the application has been filed in Room 217; and it may result in a delay of the delivery of the file to the Court.

As stated above, all information provided in the worksheet/checklist and in the supporting affirmations, affidavits and other supporting papers must be consistent, especially as it relates to the issues of liability, injuries, present complaints and damages. An explanation or statement which is set forth in the worksheet, but not set forth in the supporting affirmations, (or visa versa) will result in a denial.

C. AN EX-PARTE APPLICATION

CPLR 1207 provides, among other things, that a settlement application which is made upon behalf of an infant/impaired person, must be made either by motion in a pending action, or if no action is pending, by special proceeding commenced upon a petition. However, in the County of Bronx, (with one exception) it has always been the rule and practice to process an infant/impaired person's settlement application as an ex-parte proceeding, i.e., the court is presented merely with a proposed order and all supporting documentation, none of which is required to be settled or served upon defendants; and the compromise hearing is conducted in the absence of all other parties. The one exception to this wholly ex-parte procedure is when a structured settlement is proposed. (See below).

Notice of Settlement For Structured Settlements

When a "structured settlement" is being proposed, although the ex-parte procedure is still being utilized, a Notice of Settlement of the Proposed Order is required to be served on all defendants and upon all insurance carriers involved in the transaction. However,

only the Notice and Proposed Order need be served; and this should be accomplished only after the hearing has been conducted.

Because of the complexity of such settlements, and the representations and conditions required to be contained in the proposed structured settlement order, the court requires that the defendants and all insurance carriers involved in the structured settlement transaction be served with a Notice of Settlement of the Proposed Order so that they will have an opportunity to object to the proposed order, and be heard before they are bound by its terms. To reiterate: Only the Notice of Settlement and Proposed Order (not the supporting petition or other supporting papers) need be served.

D. THE APPLICATION AND SUPPORTING DOCUMENTS

The application will consist of the following documents:

- 1. The Proposed Order (Use the court's form)**
- 2. Counsel's Affirmation**
- 3. Petitioner's Affidavit**
- 4. Infant's Affidavit (If over 14)**
- 5. Supporting Medical Proof**
- 6. Other Necessary and/or Helpful Exhibits**
- 7. For Structured Settlements, also include,**
 - (a) proposed settlement agreement**
 - (b) proposed assignment agreement**
 - (c) proposed annuity contract**
 - (d) proposed guaranty agreement**
 - (e) the structure settlement broker's affidavit**

(1) THE PROPOSED ORDER.

The court has provided the following form orders on the OCA website, namely: (a) Standard Compromise Order; (b) Simple Order For a Structured Settlement; and (c) Complex Order For a Structured Settlement. Counsel is required to use one of these orders since they

contain all of the decretal paragraphs required by the court. Each proposed order can be adapted to fit the circumstances presented; and each of the form orders for structured settlements are accompanied by a set of instructions which will assist counsel and staff to understand and complete the same.

(2) COUNSEL’S AFFIRMATION

Counsel must provide an affirmation which not only demonstrates full compliance with, and all information required by, CPLR 1208 and UCR 202.67, but also sufficient details concerning the following issues:

- (a) Petitioner’s Standing.** Counsel’s affirmation must demonstrate that petitioner is a person who is qualified and has standing to bring the application as authorized by CPLR 1207 (See also, Petitioner’s Affidavit, below);
- (b) Counsel’s Reasons For Recommending the Settlement** (See below);
- (c) Recent and/or Current Complaints Of Infant/Impaired Person** (See below);
- (d) Medical Services and Expenses.** Counsel and petitioner must obtain written proof of the total amount of the charges incurred for each doctor, medical provider and hospital in the treatment and care of the said plaintiff, and the amount remaining unpaid for such treatment and care (See, USCR 202.67 [b]);
- (e) All Possible Liens and Claims.** Counsel and petitioner must provide sufficient documentary proof of either the absence or existence of liens against plaintiff’s proceeds; obtain an itemized statement for any payments made by a lienor; and provide sufficient details of the efforts made to resolve said liens. Claims for equitable or contractual subrogation or reimbursement by a private medical insurer or employee benefit plan. (ERISA) must be identified; and the reason for paying or not paying or compromising said claim must be explained in detail;
- (f) Other Related Claims and Possible Conflicts.** (See below);
- (g) Fees and Disbursements of Counsel.** Counsel must set forth all services rendered in support of the request for counsel fees; itemize all disbursements, especially those disbursements, if any, which counsel seeks to have reimbursed.
- (h) Retainer Statement Compliance** (See UCR 202.67 (d));

A Fair and Reasonable Settlement. CPLR 1208 (b) (1) requires counsel to provide the

“reasons for recommending the settlement.” These “reasons” must be set forth in the supporting affirmations and affidavits, as well as in the worksheet/checklist. Moreover, the Court requires that counsel provide a detailed explanation as to why the proposed settlement is fair and reasonable. In that regard, counsel must address the issues of liability and damages and the infant’s current complaints, if any. Note: Conclusory assertions (such as “poor liability”; or “full recovery”; or “best interest of the child”) without specification and supporting facts, will not be sufficient.

Recent and/or Current Complaints. The issue of the infant/impaired person’s recent or current complaints, if any, must also be fully addressed in petitioner’s affidavit, as well as in the current medical proof which is provided to the court in support of the application. If plaintiff does have recent or current complaints, the medical proof must provide a prognosis. Counsel is cautioned to make sufficient inquiry in advance so that the court and counsel are not surprised at the hearing concerning the infant/impaired person’s recent, intermittent or current complaints.

All Possible Liens. Note: UCR 202.67 (b) requires the court to make provisions for payment of all medical expenses and liens. The court is concerned that if this issue is not properly addressed, the plaintiff may be surprised and held accountable post settlement. It must be noted that a lien may arise by operation of law if public funds were used to pay for the medicals; and that the lien may have to be satisfied from the proceeds of the settlement regardless of the awareness of counsel or petitioner. See, *Gold v. United Health Services Hospitals Inc.*, 95 N.Y. 2d 683 [2001]; *Arkansas Dept. Health and Human Services v. Ahlborn*, 126 S. Ct. 1752, 2006 U.S . Lexus 3455. Note, that if counsel is proposing a

settlement for an amount which is less than what would be considered the “full value” for the damages and injuries suffered by plaintiff, it may be necessary to conduct a hearing for the purpose of apportioning the lien. [See, Lugo Beth Israel Med. Ctr. 819 N.Y.S. 2d 892 (Sup Ct. N.Y., 2006).

Other Related Claims and Possible Conflicts. A full identification of all claims made by any person, including a parent or other family member, arising out of the same accident must be provided. If any such other claims exist, counsel for petitioner must provide a copy of the Bill of Particulars and all medical records for all other settling parties so that with full disclosure, the court can determine if the proposed apportionment of the settlement proceeds is “fair and reasonable.”[See also CPLR 1208 (a) (8)].

(3) PETITIONER’S AFFIDAVIT.

Petitioner’s affidavit must demonstrate that petitioner is one of the persons authorized by CPLR 1207 to make said application; and it must comply with and contain all information required by CPLR 1208 and UCR 202.67; including details concerning the following issues:

- (a) Qualification and standing of petitioner to bring the application (See below);
- (b) Petitioner’s understanding of the proposed settlement (See below);
- (c) Recent and/or current complaints, if any of the infant/impaired person (See below);
- (d) Medical services rendered, expenses incurred; method of payment; and liens, if any (See below)._____

_____ Qualification of Petitioner. CPLR 1207 provides that the application may be made by

one of the following persons: a guardian of the property; or guardian ad litem of an infant; or a parent having legal custody; or another person having legal custody; or if infant is married, by an adult spouse residing with infant; or a committee of property of a judicially declared incompetent; or a conservator of the property of a conservatee. Note: At times a parent may not qualify, for example, when custody has been removed by the Family Court. Also note, that even where a parent has lawful custody a problem can arise, for example, when the lawsuit is commenced by one parent on behalf of the ward and the compromise application is brought not by that parent, but by the other parent, who was not named as the natural guardian in the underlying claim or action. In such a situation, counsel must also provide, among other things, proof of the authority of the non-party parent to settle or discontinue the loss of services claim.

Petitioner's Understanding of the Settlement. In addition to all of the above, a petitioner must acknowledge an awareness and understanding of all of the reasons given by counsel for recommending the settlement; as well as a full understanding of the proposed apportionment of the settlement proceeds.

Recent and/or Current Complaints. Petitioner must also acknowledge familiarity with all injuries, conditions and complaints, if any, made by the infant/impaired person especially recent and/or current complaints, so that they can be fully addressed at the compromise hearing. At the hearing the following questions will be asked of the petitioner and the infant/impaired person: Does the infant/impaired person have any recent or current pain or limitations? When is the last time any pain or limitations were experienced? How often? Has plaintiff's physical or mental ability or range of motion, or ability to engage in any activities been affected?; and if so, what is the prognosis or plan for the future? (Note: Applications have been denied because,

although all the supporting papers, including the current medical report, reflect in a conclusory way that the infant has “fully recovered,” at the hearing the court discovers otherwise.)

Medical Services, Expenses, Payments and Liens. CPLR 1208 (a) (4) requires that a petitioner provide an itemization of such expenses; and subdivision (a) (7) provides that the affidavit of the petitioner must state whether reimbursement for medical expenses has been received from any source. Note: UCR 202.67 (b) goes further than the CPLR. It not only requires petitioner to provide an itemization of the medical expenses but it compels the court to make provision for payment thereof. Thus, petitioner and counsel are cautioned not to be vague. The court must not be left with only mere speculation as to whether there are any unpaid bills or liens. For example, an unsupported statement that “all medical expenses have been paid”, or that they have been “paid by Medicaid” will not suffice without documentary proof of payment. In addition, vague statements such as, “I have not been aware of any unpaid liens or bills,” also will not suffice. Note : When it is claimed that the medical bills have been paid by “Medicaid”, counsel must obtain and submit the HRA client detailed report [CDR] which will assist the court in determining what, if any, bills have been paid by Medicaid, and which if any such payments are related to the occurrence. Only those bills which are related to the occurrence may be claimed as a lien.

(4) INFANT’S AFFIDAVIT AND ATTENDANCE.

Note that, absent extraordinary circumstances, CPLR 1208 (d) mandates that the attorney, the petitioner and the infant/ incompetent attend the hearing. It has been the longstanding practice in the First Department to require an infant over the age of fourteen to

provide a supporting affidavit, and attend the hearing; and thus this court's rules, forms and worksheets also make it mandatory. At the hearing, the court will question the infant/impaired person as to the episode, the injuries sustained and recent or current complaints and limitations, if any; and where appropriate, their understanding of the terms of the settlement. The court will also view the injured area when it can be accomplished without any embarrassment to the plaintiff and others present.

(5) SUPPORTING MEDICAL PROOF.

CPLR 1208 (c) states that “if the action or claim is for damages for personal injuries to the infant or incompetent, one or more medical or hospital reports, which need not be verified, shall be included in the supporting papers” [emphasis added]. Note that neither the CPLR nor any other statute or rule requires that said reports and records be verified. The Court's rules and worksheet provide, however, as follows:

“Unless waived by the Court this part of the application must include a recent [not stale] medical record, report or affirmation which provides:

- History obtained;
- Infant's complaints of pain and/or limitations (past and present);
- Treatment rendered;
- Details of the examination currently rendered upon which current opinion and conclusion is based;
- Diagnosis;
- Prognosis, especially if there are any present complaints of pain or limitations;
- Opinion, conclusion and recommendations.”

While an affirmation is not required, the court does mandate that a recent [not stale] medical record or report be submitted in support of the application. The said record, report or affirmation should provide all of the above information, especially as it relates to recent or current complaints and/or limitations of the infant/incompetent if any. Note: If the issue of

present or recent complaints and/or limitations is not addressed in the medical proof submitted, the application will probably be denied. In addition, if there are any recent or current complaints and/or limitations, counsel should make sure that the medical proof provides a prognosis so that the Court and the petitioner can make a meaningful determination as to whether the proposed settlement is fair and reasonable. Sparse and conclusory medical reports or affirmations will not be acceptable.

(6) OTHER NECESSARY AND/OR HELPFUL EXHIBITS.

When necessary, the application should have as exhibits a copy of all documents (relating to liability and damages), which would assist the court in arriving at a determination. When such documents are included they should be appropriately identified in the supporting affidavits and affirmations, as well as separated by Exhibit tabs. Note: Additional documents will be necessary when a structured settlement is proposed (See below)

(7) FOR STRUCTURED SETTLEMENTS - OTHER REQUIRED EXHIBITS

When a structured settlement is proposed the following additional exhibits are required to be submitted with the application: (a) the proposed settlement agreement; (b) the proposed assignment agreement; (c) the proposed annuity contract; (d) the proposed guaranty agreement; and (e) the affidavit of the Structure Settlement Broker, (See below, Section F, Structured Settlements).

E. THE HEARING.

CPLR 1208 (d) provides that “at the hearing, the moving party or petitioner, the infant or incompetent, and his attorney, shall attend before the court, unless attendance is excused for good cause” [emphasis added]. If attendance at the hearing would create a hardship

for any of said persons, the court will consider waiving the appearance and allowing a telephone conference, if appropriate assurance can be made as to the identity of the person who appears by telephone.

F. STRUCTURED SETTLEMENTS

(1) COMPLIANCE WITH RULES AND STATUTES.

These rules for a proposed structured settlement are supplemental to the above rules for the conventional settlement of claims for infants and impaired persons. Because of the multiple benefits achievable (even for modest settlement amounts), structured settlements are highly favored by this Court provided, however, compliance with all applicable statutes and rules, including the mandates of Sections 104 and 130 of the Internal Revenue Code and the New York State Structured Settlement Protection Act (Gen. Obligations Law, Article 17, § 5-1701, et. seq.).

(2) COMPLIANCE WITH THE INTERNAL REVENUE CODE

_____ One of the benefits of a structured settlement is that the full amount of the periodic payments received as physical injury damages is excludable from the claimant's income by law. By comparison, a claimant receiving damages in the form of a lump sum must pay tax on the subsequent earnings from investing that lump sum.

The Internal Revenue Code, in essence, allows settlement funds to be "invested" in an annuity and grow tax free (U.S. Internal Revenue Code §§104 and 130) (hereinafter the "Code".) However, it must be noted that the Code does not (without adverse tax consequences) permit a plaintiff to receive (or even constructively receive) settlement funds and then invest same in an annuity. Such a transaction would result in

taxable income. By comparison, in the case of a structured settlement, the plaintiff and the defense agree to settle the physical injury claim in exchange for the defendant's promise to make a stream of periodic payments to the plaintiff. Under section 130 of the Code, the defendant or its liability insurance carrier then assigns its periodic payment obligation to an affiliate of a financially strong life insurance company. The assignment company agrees to receive an assignment of defendant's obligation to pay and then acquires an annuity from the life insurer to fund the periodic payments to the plaintiff. Under the Code, the full amount of these periodic payments (including the appreciation in value between the cost of the annuity and the total benefits paid) is tax-free by law to the plaintiff. In other words, the Code allows a defendant or its liability insurance carrier to use the same settlement proceeds to purchase an annuity and, then assign all payments including the growth thereon, to the plaintiff tax free. Therefore, both the settlement proceeds which are used to purchase the annuity, and the interest earned and paid via that annuity, are tax excludable.

It also has been the court's experience that, in addition to the benefit of providing long-term financial security and fully tax-free compensation for the claimant, structured settlements can assist the parties in reaching a settlement by focusing settlement discussions on what damages the plaintiff actually has suffered and how best to match periodic payments to meet those future needs for medical care, living expenses and educational.

The court therefore, mandates that all settling parties, and all insurance carriers involved in the structured settlement transaction, comply fully with requirements of the Internal Revenue Code.

(3) EX-PARTE APPLICATION AND NOTICE OF SETTLEMENT.

As stated above, the general rule in Bronx County is to process an infant/impaired

person's settlement application as an ex-parte application. However, if a structured settlement or a Qualified Settlement Fund (QSF) is being proposed, Notice to the defendants, as provided below, is mandated by these rules.

When a structured settlement is being proposed, although the ex-parte procedure is still utilized, a "Notice of Settlement" of the proposed "Order" is required to be served upon defendants as well as upon all insurance carriers involved in the structured settlement transaction, so that they will have an opportunity to be heard and object before being bound by its terms. Note: This Notice of Settlement and the proposed Order are to be served only after a hearing has been conducted and after the court has tentatively approved the proposed structured settlement. Note further: Only the Notice and proposed Order [not the underlying supporting papers] need be settled and served on the defendants and insurance carriers.

When plaintiff seeks to establish a "Qualified Settlement Fund" (as a prelude to an apportionment of the settlement proceeds and the use of all or a portion of said settlement proceeds for a structured settlement), defendants must be provided with Notice and be served with a copy of the entire application so that they will have an opportunity to join in or object to the application. For the procedures and implementing regulations necessary to establish a "QSF", see below: "(10) Qualified Settlement Fund".

(4) THE PROPOSED ORDER FOR A STRUCTURED SETTLEMENT.

Counsel must use one of the court's two form orders for a structured settlement, each of which are available on the OCA Website. The form orders (simple and complex), which can be adapted to fit the circumstances presented, comport with Internal Revenue Code requirements; contain all of the decretal paragraphs required by the court; and each

form is accompanied by a set of helpful instructions. Each form includes vital information concerning the financial aspects of the structured settlement, and an identification of all of the documents and parties necessary to implement the transaction, namely:

THE PARTIES

- (a) The Plaintiff/Payee of Annuity _____
- _____ (b) The Defendant/Assignor _____
- (c) The Assignee/Annuity Owner
- (d) The Annuity Issuer
- (e) The Guarantor

THE IMPLEMENTING DOCUMENTS

- (a) The Settlement Agreement
- (b) The Assignment Agreement
- (c) The Annuity Contract
- (d) The Guaranty Agreement

The proposed “order” for a structured settlement must clearly provide a distinction between the “total settlement cost” and the “total settlement payout.”

For tax code compliance², the form orders clearly provide the following distinction between “total settlement cost” and “total settlement payout”:

- _____ (a) The Total Settlement Cost, consists of:
 - _____ (i) Up front funds; plus
 - (ii) Cost to fund annuity;
- (b) The Total Settlement Payout, consists of:
 - (i) Up front funds, plus

²The “total settlement payout” and the total settlement cost” are different and must be distinguished in order to obtain the tax advantage provided by the Internal Revenue Code. The total settlement cost consists of the up front monies plus the cost to purchase the annuity.

The total settlement payout consists of the up front money plus the total of all future periodic payments.

For example, if the total settlement cost is \$1,000,000 (\$400,000 up front and \$600,000 to fund an annuity) and the annuity will pay a total of \$3,000,000 in future periodic payments, the parties and all implementing documents, including the court’s order must, in order to comply with the tax code, state that the case is settled (not for the settlement cost of \$1,000,000) but for \$3,400,000, the total settlement payout.

(ii) Total of all future periodic payments.

The form orders also require a listing of all annuity payments with an identification of all payments which are guaranteed to be paid regardless of whether plaintiff survives.

(5) SUPPORTING DOCUMENTS AND ADDITIONAL REQUIREMENTS.

In addition to the requirements and documents described above for a traditional compromise application, the application for a structured settlement must also include and be supported by:

- (a) Counsel's Affirmation (additional requirements, see below);
- (b) Petitioner's affidavit (additional acknowledgments, see below);
- (c) Affidavit of the Structured Settlement Broker (see below);
- (d) The Proposed Settlement Agreement (see below);
- (e) The Proposed Assignment Agreement (see below);
- (f) The Proposed Annuity Contract (see below);
- (g) Proposed Guaranty Agreement (see below)

(6) COUNSEL'S AFFIRMATION.

In addition to compliance with all other requirements for an ordinary compromise application, counsel for the plaintiff, in support of a structured settlement must:

- (a) Demonstrate "due diligence" in the selection of an annuity and a structured settlement broker. (See "Due Diligence and Shopping the Best Deal", below);

- (b) Demonstrate that the plaintiff has been provided with the disclosure required by General Obligations Law § 5-1702 and § 5-1701(e)
- (c) Annex as exhibits³ a copy of all of the above described proposed implementing structured settlement documents, as well as copies of the alternative and/or other competitive structure proposals from other annuity providers or from other structured settlement brokers, which were considered and rejected.

(7) **PETITIONER'S AFFIDAVIT.**

Petitioner's affidavit must, among other things, acknowledge receipt of a copy of all of the above documents as well as a copy of counsel's affirmation in support of the proposed structured settlement; and petitioner must acknowledge that all of the above was fully explained by counsel.

Petitioner must further acknowledge receipt of all of the "initial disclosure" required by General Obligations Law § 5-1702, including the advice "to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences." It should be noted that § 5-1701(e) of Title 17 of the General Obligations Law⁴ provides that:

"Independent professional advice" means advice of an attorney, certified

³ One set of numerically or alphabetically identified exhibits will suffice for the entire application and they can be referred to in the supporting affirmations and affidavits. Do not have separate exhibits within each supporting affirmation and/or affidavit.

⁴ Title 17 is the General Obligations Law (entitled the "Structured Settlement Protection Act") was enacted by Chapter 537 of the Laws of 2002, in essence, to protect the rights and interests of injured settling litigants from the overbearing and predatory practices of "factoring" companies which vigorously pursue these individuals and entice them with offers to purchase their annuity payments for a "present value" lump sum cash payment less a steep discount and substantial costs. In the memorandum and other correspondence in support of this legislation it is noted, among other things that, by their practices, these unregulated factoring companies "deprive injury victims and their families of the long term financial security their settlements are designed to provide." Among the reforms enacted in Title 17 is a provision that all such sales and transfers must receive prior authorization of the Court.

public accountant, actuary or other licensed professional adviser:

- (i) who is engaged by a claimant or payee to render advice concerning the legal, tax and financial implications of a structured settlement or a transfer of structured settlement payment rights.**
- (ii) who is not in any manner affiliated with or compensated by the defendant in such settlement or the transferee of such transfer, and**
- (iii) whose compensation for rendering such advice is not affected by whether a settlement or transfer occurs or does not occur” [emphasis added].**

It must be noted that for the purchase of an annuity (as distinguished from a sale or transfer thereof) a structure broker (whether selected by a plaintiff or a defendant) cannot qualify as an “independent professional adviser” under the above definition. Subdivisions (e) (ii) and (e) (iii) disqualify a defendant selected broker; and subdivision (e) (iii) would also disqualify a plaintiff selected broker.

In any event, unless plaintiff receives a prior waiver upon good cause shown, plaintiff is required by this court’s rules to obtain a competing proposal from a structure broker who is selected by the plaintiff and who is independent of the defendant and defendant’s liability insurance carrier. It should be noted that in some states (e.g. Texas and California) the involvement and use of a structure broker selected by plaintiff is the accepted norm.

STRUCTURE BROKER’S AFFIDAVIT.

This court’s rules require that an application for approval of a proposed structured settlement must be supported by an affidavit provided by a structure broker. In addition, that affidavit must conform to, and contain all representations and warranties that are set forth in the form affidavit which has been provided by this court

and published on the OCA website, above.

In the annuity field the bargaining agents are structured settlement specialists, and are usually referred to as structure brokers. Most defendants and/or their liability insurance companies have their own list of preferred structure brokers and preferred annuity issuers (life insurance companies). In addition, an annuity issuer will generally sell an annuity only through a structure broker that is appointed as an agent for such issuer. The vast majority of structure brokers, however, operate independently, and are not affiliated with any liability insurance company or annuity issuer. Furthermore, most structure brokers have agency relationships with multiple annuity issuers.

The court is advised that structure brokers are listed in a variety of places including lists maintained by bar associations, by trial lawyers associations and structured settlement trade associations. See, for example, the website maintained by the National Structured Settlement Trade Association (www.nssta.com) which lists such brokers by state.

The structured settlement application, which is being recommended, must be supported by an affidavit provided by the broker who places the annuity. The affidavit must, among other things, include:

- (a) a representation that the cost to purchase the proposed annuity was arrived at after a survey of the market of annuity providers in order to confirm and obtain the best value (price/quality) for same.
- (b) a full description of all the other annuity plans considered in addition to the one being recommended;
- (c) all other warranties, assurances and affirmations which are set forth in the form sample broker's affidavit, which is published by this court in the above OCA website.

See, Form Affidavit in the Appendix to these Rules.

The following proposed documents, which will implement the recommended structured settlement, must be annexed as exhibits to the application and referred to in the brokers affidavit:

- (a) Proposed Settlement Agreement
- (b) Proposed Assignment Agreement⁵
- (c) Proposed Annuity Contract
- (d) Proposed Guaranty Agreement⁶
- (e) Rejected and/or Alternative Proposals

(9) DUE DILIGENCE AND SHOPPING FOR THE BEST DEAL.

This court's rules require counsel for plaintiff, in his supporting affirmation to set forth and explain the efforts made to provide the plaintiff with the best and least costly annuity. When conducting such "due diligence", counsel for petitioner should consider the following observations:

_____ (a) The Cost of the Annuity

⁵ A standard form assignment agreement called a "Uniform Qualified Assignment and Release Agreement," is generally used to implement the transfer of the obligation to make the future payments. However, if a "Uniform Qualified Assignment, Release and Pledge Agreement" is used, the plaintiff receives a security interest in the annuity policy, and thus becomes a "secured creditor" of the assignment company and receives a priority over other creditors in the event of a default or bankruptcy of the assignee.

⁶ This guaranty is provided by the annuity issuer, a major life insurance company, or by an affiliated insurer of the annuity issuer, which is licensed to issue insurance and annuity products in the State of New York. The annuity issuer must be rated by A.M. Best at no less than A++ or A+. This guaranty is in addition to the insurance protection provided by New York State Insurance Law. Under N.Y. Ins. Law Article 77, the Life Insurance Company Guaranty Corporation of New York provides \$500,000 of protection with respect to a structured settlement annuity in the event an annuity issuer becomes insolvent if the annuity issuer is licensed in New York and the plaintiff is a New York resident. See, N.Y.S. Ins. Dept. O.G.C. Opinion 5-1-96 (May 1,1996), General Counsel Opinion 2-20-2003 (February 20, 2003). In view of this monetary limitation, where the cost of the annuity is more than \$500,000, it may be prudent to purchase annuities from more than one issuer to keep the cost of each annuity below \$500,000.

While a fixed annuity is a contractual obligation rather than a traditional investment product, its future payout, and thus its rate of return, is affected mostly by the interest rates prevailing at the time of purchase. Despite the fact that annuity issuers periodically publish a schedule of rates, which set forth the cost to buy various future periodic payments, other variables affect the ultimate quote. First, rates between carriers may differ and, in any event, the published rates for each carrier are periodically adjusted relative to prevailing interest rates. Second, the cost to purchase an annuity may be affected by the sex and life expectancy of the plaintiff. Third, market place competition, rivalry and circumstances, which effect each annuity issuer, may also play a part in the annuity's return.

When lifetime benefits are part of the proposed annuity, one unknown variable is plaintiff's real life expectancy. For example, when payments which terminate at death are included in the proposed structure, and the plaintiff, due to some injury or condition, has a shorter life expectancy than normal (and is thus given a "rated age"), the cost of the annuity may be less because the annuity issuer may anticipate making fewer payments. In such cases, although the offered annuity may have a large projected payout (if plaintiff lives to a normal life expectancy), the annuity issuer's actuary "calculates" that the actual payout will be truncated by those "payments" which terminate upon death. In any event, as with mortgage rates, market forces and competition between issuers play a role in the proposed cost of the annuity. The court has been informed that it is not uncommon for the costs quoted by different annuity issuers, for the identical proposed annuity benefit to vary by more than 10%.

(b) Independence of The Structure Broker

As noted above, the Internal Revenue Code, in essence, prohibits the direct purchase of an annuity by the plaintiff from the settlement funds. The Code mandates (in order to achieve tax excludability) that the claim be settled in exchange for the defendant's promise to make periodic payments. The defendant then assigns its periodic payment obligation to an affiliate of a major life insurance which then acquires and holds an annuity to make those periodic payments to the claimants.⁷

It may appear therefore, that the Code has indirectly provided the settling defendant or its carrier, with a preference in the selection of a structure broker. It should be noted that, although such a defendant selected broker has no fiduciary relationship with or obligation to the plaintiff, this lack of fiduciary obligation does not mean that such a broker cannot provide the best possible annuity advice and plan. In any event, nothing in the Tax Code precludes a plaintiff, from selecting and receiving advice from a structure broker who can act as a fiduciary for plaintiff and who is independent of the settling defendant and its liability insurance carrier. Indeed the recent experience in structured settlements has been that in serious physical injury cases, most often both parties are receiving advice from their own structured settlement brokers. As stated above, in many states the involvement of a broker selected by plaintiff is the accepted norm.

Unless a waiver is obtained upon good cause shown, the court's rules require, among other things, that the plaintiff obtain annuity advice from a structure broker that is independent of the defendant and its liability insurance carrier. This court's chief goal is to make certain that a settling infant or impaired person is being provided with

⁷ In essence, the Code allows the defendant or its liability insurance carrier to arrange for the purchase of the annuity.

an annuity which is not only personally designed to meet the plaintiff's needs, but also the best value available from a quality and cost evaluation. Although, it is not the purpose of these rules to imply that these goals cannot be achieved by a broker selected by a defendant, plaintiff is required by these rules to obtain advice from an independent plaintiff selected broker if for no other reason but to introduce competition and market forces to the process. Thus, both brokers are required by these rules to survey the annuity market, and the application must provide an explanation why the proposed annuity represents the best value and is most suitable for this claimant.

Obtaining an independent structure broker may not be a useless precaution. Due diligence in the selection of an independent structure broker is required in order to minimize the exposure of the plaintiff to abuses. Although abuses can occur no matter who selects the structure broker⁸, it is hoped by this court, that the fiduciary relationship

⁸Any form of a referral fee, rebate or other form of compensation paid by a structure broker (whether plaintiff or defendant selected) to an attorney or to a party or to an insurance carrier that made the referral, would be considered unethical and illegal. See, for example, Macomber v. Travelers Property And Casualty Corp., 261 Conn. 620, 804 A.2d 180 (Conn. Sup Ct., 2002); and also reported on a subsequent appeal at 277 Conn, 617 (Conn. Sup. Ct. 2006); Lyons v. Medical Malpractice Insurance Association, 286 A.S.2d 711, 73 N.Y. S.2d 345 (2d Dept., 2001). It must be noted that these actions are still pending and at this stage of each case we are only left with unproven allegations of wrongdoing; and they are included herein only as an example of the type of wrongful conduct this court is seeking to prevent.

In Macomber, above (a proposed class action), it was alleged that Travelers Property and Casualty Corp. entered into an illegal arrangement with certain structure brokers pursuant to which the brokers allegedly agreed to rebate a portion of the annuity commission to Travelers. It was alleged further that as a result of the arrangement, Travelers did not expend the full amount that it had represented to each plaintiff as the cost of the annuity. On that first appeal the Connecticut Supreme Court upheld the plaintiffs' right to bring the action by reversing a lower court's dismissal of six of the alleged causes of action which were brought on behalf of the class. However, the Supreme Court directed the lower court to conduct further discovery in order to fully identify the appropriate class. On the second appeal the Supreme Court held, among other things, that by examining only thirty files out of several thousand when it ruled on a motion for class

created by a plaintiff's selection of a broker, and the competition between both brokers, will not only maximize plaintiff's opportunity to get the best annuity, but also minimize, if not eliminate, the plaintiff's exposure to such abuses. Of course, abuses affecting the structured settlement can also take place after an annuity has been purchased. See, for example, footnote No. 4 at page 17 above, dealing with the predatory practices of "factoring" companies that use overbearing tactics to solicit and purchase these annuity payments at a steep discount. Since the sale of a structured settlement may undermine the goal of the court to provide long term financial security to an injured settling party, counsel is advised that when doing due diligence in the selection of a broker, counsel should refrain from engaging the services of any structured settlement broker or company which has an affiliation with any of these factoring companies. This is not meant to imply that, when an annuitant seeks to sell and transfer an annuity, a broker cannot qualify as a "licensed professional adviser", in accordance with § 5-1701(e) of the GOL; nor is it meant to imply that said broker cannot provide good advice on how the annuitant can maximize the purchase price and not fall victim to a predatory

certification, the trial court engaged in a truncated discovery procedure which could not be endorsed. The case was remanded to the trial court for further action and proceedings.

In Lyons, above, it was alleged that the liability insurer and its structure broker misrepresented the value of the annuity as \$940,000, when the alleged cost was only \$410,000! The court denied defendant's motion to dismiss the action stating that "there are questions of fact as to whether the represented present value was a fraudulent, intentional or negligent misrepresentation"

factoring company. However, these services, should be provided at the request of the annuitant. In contrast, it would not seem appropriate for a structured settlement broker to provide the names of its client annuitants to such factoring companies for solicitation purposes; and it would certainly seem unethical, if not illegal, for a structured settlement broker to receive a referral fee or any form of compensation from such a company. It must be noted that the “structure broker’s affidavit” which is required by this court’s rules must contain a representation that said broker does not have any such relationship with a factoring company.

In any event, as stated above, it is not uncommon for costs of an annuity quoted by different annuity issuers, for the identical proposed annuity, to differ by more than 10%. When considerable sums are involved, 10% can be a very considerable savings to a plaintiff; and hopefully the competition between said brokers will result in a benefit for the plaintiff.

(c) Compensation For The Broker:

A structure broker is paid a one time commission of 4% for services rendered in connection with the selection and purchase of an annuity. This commission is paid by the annuity issuer. In theory this commission is not deducted from the settlement proceeds, but this cost is certainly taken into consideration by the annuity issuer when it makes an annuity proposal. But, unlike many other types of investment vehicles there are no ongoing management, advisory, or administrative fees under a structured settlement. This can represent a significant cost savings over the decades of pay-out to a permanently disabled infant or minor plaintiff.

In any event, the issue of compensation and/or commissions for structure brokers must be addressed by counsel in the affirmation supporting the application. When

more than one broker is involved, a dispute may arise as to which broker is entitled to the commission. Usually these disputes are resolved amicably with a commission sharing agreement. There are times when an amicable agreement cannot be achieved. In such instances the issue should be brought to the court's attention.

If the issue can be resolved amicably by an agreement between the competing brokers, the court will most likely accept the proposed resolution thereof. If there is a dispute a hearing must be held so that the court can review all circumstances concerning the efforts made by each broker in the selection of the recommended annuity. At the hearing each said broker will be required, among other things, to provide testimony as to the financial advice provided and as to the efforts made to obtain the annuity that provides the best value for the particular circumstances for this plaintiff.

(d) Guaranteed Payments

Counsel must be aware of, and not confuse the various forms of guarantees which are available and should be provided to a settling plaintiff/annuitant. There are three distinct guarantees. The "guaranteed" payments mentioned in the annuity contract and in the form orders which have been provided by this court, refer to that portion of periodic payments which will not terminate upon the death of infant/impaired person. Upon death, these "guaranteed" payments will be made to the estate of the infant/impaired person, or to the designated beneficiary of said person. These "guaranteed payments" are not to be confused with the guaranty of the annuity

contract which is provided by a “guarantor” company.⁹ This guarantor company will guarantee the obligation of the assignee company to fulfill its obligation to make the future periodic payments in accordance with the annuity contract. Neither of these guarantees should be confused with the additional guaranty provided by the Life Insurance Company Guaranty Corporation under New York Insurance Law, Article 77.

Under N.Y. Insurance Law, Article 77, the Life Insurance Company Guaranty Corporation of New York provides \$500,000 of protection with respect to an annuity in the event an annuity issuer becomes insolvent if the annuity issuer is licensed in New York and the plaintiff is a New York resident. See, N.Y.S. Ins. Dept. O.G.C. Opinion 95-65 (9/24/95); See also N.Y.S. Ins. Dept. O.G.C. Opinion 5-1-96 (May 1, 1996), General Counsel Opinion 2-20-2003 (February 20, 2003). In view of this, where the amount structured is more than \$500,000, it may be prudent, but not required by law, to purchase annuities from more than one annuity issuer in order to keep the cost of each

⁹ The “Assignor, The “Assignee”, The “Annuity Issuer” and the “Guarrantor”

The defendant (or its insurer), is the “assignor”, and they usually assign the obligation to make the periodic payments to an “assignee” company, which is usually a single purpose corporate affiliate of the “annuity issuer”. That “assignee” company will then purchase the annuity contract from the “annuity issuer”. The following is required by this court’s rules:

The “annuity issuer” must be licensed to do business in the State of New York in order for the annuity to be protected by the Life Insurance Company Guaranty Corporation of New York. The annuity issuer must have an A.M. Best Company rating of no less than A++ or A+, which are the two highest ratings. The ratings of the proposed annuity issuer must be described in the broker’s affidavit and must be supported by an appropriate exhibit attached thereto.

The “guarantor” company must guaranty the obligations of the “assignee” company to make the periodic payments. The guarantor is usually the annuity issuer or a substantial affiliated company. If the assignee itself is a substantial company, which is rated A++ or A+ and it otherwise qualifies for insurance under New York Insurance Law, Article 77, a “guarantor company” may not be necessary.

annuity below \$500,000. The court is informed, however, that purchasing more than one annuity generally results in lower payments to the plaintiff. In any event, if the proposed annuity is to cost more than the above \$500,000 maximum guaranteed by Article 77, both counsel and the structure broker must justify any proposed investment in an annuity which does not take full advantage of that added protection.

(e) Lock-In Quotes and Notices

Plaintiff's counsel should avoid placing the court in a "catch 22" by locking in an annuity quote before submitting a structured settlement application for approval. Unless the "lock in quote" acknowledges that it is subject to court approval, counsel must seek court approval before agreeing to a lock-in quote or notice! In any event, the said proposal should be brought to the court's attention expeditiously and before there is any change in prevailing interest rates.

The court might consider imposing a penalty or sanction on those who, by violation of this rule, cause an infant or impaired person to be unable to timely survey the market and obtain the annuity that represents the best value available for the particular plaintiff.

(10) QUALIFIED SETTLEMENT FUND

This court's rules require full compliance with the Tax Code and its implementing regulations if a "Qualified Settlement Fund"(QSF) is being proposed. The IRC and its implementing regulation, allow a QSF to be established to resolve or satisfy "one or more contested or uncontested claims." (See, IRC § 468B; Treasury Regulation, § 1.468 B-1; see also, Rev. Proc. 93-34, 1993-2 CB 470, 08/10/1993, IRC § (a) 468b; Rev. Rul. 79-313, 1979-2 C.B. #75; Rev. Rul. 79-220, 1979-2 C.B. #74; Rev. Rul.

83-25, 1983-1 C.B. #116). Thus, a QSF is often used to settle class tort actions. _____

Caveat: Despite the express authority to create a QSF to resolve “one or more” claims¹⁰, the issue is still uncertain as to whether, in a single plaintiff action, the attempted creation of such a fund would cause the income portion of each periodic annuity payment to be taxable. Most attorneys and judges will not take the risk of utilizing a “qualified settlement fund” for actions or claims involving only one claimant until a definitive ruling is issued by the Internal Revenue Service that such a fund can provide payments that would be fully tax-free damages in the hands of the claimant.

In any event, the establishment of the QSF is initiated by way of a petition to the court for an order allowing its creation. Once the order is signed, the liability insurer pays the settlement amount into the fund, which deposits same into an interest bearing account, and the liability insurer and defendant are released from all further responsibility and liability. Thereafter, attorneys for the plaintiffs have additional time to propose and seek court approval for the appropriate apportionment and use of the settlement funds, and the creation of the appropriate structured settlement. Of course, while the settlement amount is in the “qualified settlement fund”, those funds will earn interest that is taxable. However, when the annuity is ultimately purchased via the monies in the QSF, the future periodic payments will be tax free. The court order establishing the fund must completely extinguish the taxpayer’s (defendant’s) tort liability; and no amounts may be

¹⁰ Section 1.468B-1 (c) of the regulations provides, among other things, “that a fund, account, or trust is a qualified settlement fund if: *****(2) it is established to resolve or satisfy one or more contested claims *****” [emphasis added].

transferred to the fund other than in the form of a qualified payment.

When a QSF is utilized, the structure broker is apparently selected, not by the defendant or its insurance carrier, but by the administrators of the QSF, a majority of whom are independent of the defendant and its liability carrier. However, defendants may have the right to object to the initial establishment of QSF. See, Continental Casualty Co. et al v. United States of America, 2006 U.S. Dist. Lexis 90012, 2006 WL 3455055 (N.D. CAL.; 11/29/06) (Court found that it lacked power establish a QSF over defendant's objection).¹¹ In Continental above, the United

¹¹ In the Continental case the parties agreed to an all-inclusive settlement figure of \$1.75 million with the expectation that the settlement would include a structure that would be subject to approval by the Center for Medicaid Services . However, the government's proposed structured settlement terms, were objected to by plaintiffs, and the government then took the position that the only alternative was an all cash settlement. The plaintiffs then asked the Court to enter an order establishing a qualified settlement trust presumably to bypass the DOJ requirements and privately create a structured settlement plan. The plaintiffs also sought an order imposing restrictions "on all settlements by the Torts Branch of the United States Department of Justice, Civil Division." As justification for this extraordinary request for relief, the plaintiff's challenged the legality of the government's settlement terms, including DOJ "requirements": that the government select an annuity broker; that the annuities "provide reversionary interests to the government; and that the settlement documents "prohibit the future assignment of the structured settlement payments.

The Court denied the plaintiffs' petition, observing that it was "not in the position to make policy decisions regarding DOJ settlement practices and finds no illegality in any of the requirements." The Court decision summarized and rejected two of the plaintiffs' complaints as follows:

First, plaintiffs argued that an annuity agent selected by the government would have a conflict of interest in violation of Model Rules of Professional Conduct 1.7(a). Unless the annuity agent is a lawyer, however, the model rules are not binding for annuity brokers. Rule 1.8 applies only to lawyers with current clients who have conflicting interests. The court noted that plaintiffs are represented by independent counsel.

Second, plaintiffs argued that any condition prohibiting assignment of the annuity payments would eliminate rights granted by 26 U.S.C. §5891. The court noted that section 5891 involves tax exemptions for transfers of structured settlement rights and does not establish a statutory right for such transfers; and that plaintiffs are free to contract away an y right of assignment; and that the government can seek such a provision.

States District Court, for the Northern District of California, held among other things, that it did not possess the power to establish a QSF over the objection of the defendant, despite a tax regulation which allows for the creation such settlement accounts.

STRUCTURE BROKER'S AFFIDAVIT

(NAME OF COURT)

-----X

(CASE CAPTION)

_____ an infant, by his/her Parent and Natural Guardian _____; and _____, individually,

Docket No. _____

Plaintiffs,

-against-

STRUCTURE BROKER'S AFFIDAVIT

_____,

Defendants.

-----X

UNDER THE PENALTIES FOR PERJURY, I [Insert Name of Broker] , of [Insert Name of Company] , acting as structured settlement consultant in the above matter hereby warrant and represent, under oath, having first been duly sworn, the following facts to be true, complete and accurate to the best of my

In response to the plaintiffs' contention that the regulations under IRC § 468B empower courts to establish qualified settlement funds the decision explained: "This court may not create a qualified settlement account merely because a tax regulations allows the creation of such settlement accounts."

knowledge, information and belief:

1. No rebates, service fees, administrative fees, or other financial consideration of any kind or in any amount has been paid, will be paid or had been promised to be paid to any party, insurer, attorney, guardian or any other person, firm or corporation associated with this case by me or by my above stated company either directly or indirectly, by virtue of the structured settlement or otherwise, relating to this matter.

2. The cost to the defendant(s) and/or casualty insurer(s) of the structured settlement portion of the settlement in this case is \$ _____ inclusive of any applicable qualified assignment fee; and this cost to purchase the proposed annuity, was arrived at after a survey of the market of annuity providers in order to confirm and obtain the best value (price/quality) for the periodic payment plan now recommended.

APPENDIX

3. (Insert name of Defendant or Insurer) will make the following future periodic payments to (Name of Annuitant):

[Provide full benefit payment schedule]

4. The obligation of (Name of Defendant or Insurer) to make the above future periodic payments will be assigned to _____, the Assignee. (Assignee) may fund the obligation assumed by the purchase of an annuity from (Insert name of annuity issuer), an A.M. Best Company rated A+ or A++ insurer. A guarantee letter will be issued by (Insert name of guarantor) to guarantee the performance of said assignee.
5. The Annuity Issuer company above named is licensed to issue insurance and annuity products in the State of New York.
6. The standard industry commission that we are receiving in this case is based on 4% of the premium of \$ _____. This commission is paid by (annuity issuer) _____, the life insurer issuing the annuity policy.

[If more than one broker is sharing in the commission, set forth the details supporting same].

7. The annuity being provided in this case is based upon guaranteed non-life contingent payments for the plaintiff, who is presently _____ years of age, having been born on _____. The annuity cost set forth in number two above reflects this non life contingent annuity cost;

Or

The life insurer(s) providing the annuity or annuities in this case has rated the plaintiff, who is presently ____ years of age, having been born on _____, up to age _____ by reason of plaintiff's medical condition. The annuity cost set forth in number two above reflects this rated age with regard to all life contingent annuity benefit payments. Period certain only payments and guaranteed lump sum payments are not affected by rated age;

Or

By reason of said plaintiff's non life impairing medical condition, the annuity being provided in this case is based upon a standard age quote for the plaintiff, who is presently years of age _____ having been born on _____. The annuity cost set forth in number two above reflects this standard age rating. Period certain only payments and guaranteed lump sum payments are not affected by a rated age.

8. Medical underwriting is inapplicable in guaranteed non-life contingent cases;

Or

No medical underwriting has taken place or will take place after the agreement to settle has been reached without full disclosure to both plaintiff and defendant. No post settlement medical underwriting has or will take place to secretly reduce the defendant's cost.

9. No present value calculations were provided in this case. All illustrations provided were based on actual cost only.
10. Neither I nor [company name] is an in-house broker of any party or casualty carrier involved in the settlement; nor am I or said company affiliated with or an "exclusive" broker of any of any party or casualty carrier involved in the settlement.
11. Neither I nor (Insert name of company) will, without the express consent of the plaintiff and the prior written approval of this court:
- (a) provide any information about this settlement to any factoring company for any purpose; or
 - (b) solicit the plaintiff or plaintiff's family on behalf of any factoring company for any purpose, including, but not limited to, the proposed sale of plaintiff's future periodic payments, nor will I or (Insert name of company) participate, assist, promote, or aid in such solicitation by any person, firm, corporation or entity; or
 - (c) seek or accept any consideration, financial or otherwise, directly or indirectly from a factoring company.
12. The following documents have been annexed as exhibits to the application made to the court for approval of the recommended settlement proposal:
- | | | |
|-----------|---|--|
| Exhibit A | - | Proposed Settlement Agreement |
| Exhibit B | - | Proposed Assignment Agreement |
| Exhibit C | - | Proposed Annuity Contract |
| Exhibit D | - | Proposed Guaranty Agreement |
| Exhibit E | - | Rejected Alternative and/or Competing Proposals. |

THIS STRUCTURED SETTLEMENT AFFIDAVIT IS PROVIDED TO THE PARTIES TO THE SETTLEMENT WITHOUT COST AND WITH THE EXPRESS PURPOSE OF INDUCING THE PLAINTIFF(S), THE DEFENDANT(S), AND ALL PARTICIPATING INSURERS TO ENTER INTO AND/OR PARTICIPATE IN FUNDING THE STRUCTURED SETTLEMENT AGREED UPON IN THIS CASE. STATEMENTS SET FORTH HEREIN CONSTITUTE AFFIRMATIVE REPRESENTATIONS AND WARRANTIES BY THE UNDERSIGNED STRUCTURED SETTLEMENT CONSULTANT.

(Insert name of individual) individually
and on behalf of [Insert name of company]

Sworn on before me
this _____ day of _____, 2006

Notary
My Commission Expires: