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Periodic Payment Awards: The Prescription for the Medical Malpractice Crisis in Ohio

Laurie G. Steiner
Hahn, Loeser, & Parks

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PERIODIC PAYMENT AWARDS: THE PRESCRIPTION
FOR THE MEDICAL MALPRACTICE CRISIS IN OHIO

Laurie G. Steiner*

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* B.A., College of Wooster 1979; J.D., Cleveland-Marshall College of Law, Cleveland State University 1989, Editor-in-Chief, Cleveland State Law Review, Associate, Hahn, Loeser & Parks, Cleveland, Ohio. The author would like to express her thanks to Terry Donner for her comments and help in reviewing draft after draft of this article.

I. INTRODUCTION

The medical malpractice¹ crisis came into the public eye in 1975 with extensive news coverage of striking physicians. Medical malpractice claims were soaring, resulting in multi-million dollar verdicts and settlements.² Increased claims led to higher malpractice insurance premiums,³ and the increased premiums forced physicians to pass the cost on to health care consumers in the form of higher fees.⁴

The etiology of the medical malpractice crisis is complex. Some experts attribute the increase in medical malpractice actions to a deterioration in the doctor-patient relationship.⁵ Additionally, the phenomenon of modern science has created increased patient expectations which "result in a situation where these patients sometimes emerge from hospitals with legal claims against their physicians for less than perfect outcomes."⁶ The general increase in claims may also be attributed to individuals becoming more conscious of their personal rights.⁷

¹ Medical Malpractice has become a catchall phrase for various types of suits arising out of the doctor-patient relationship. See generally Blaut, *The Medical Malpractice Crisis — Its Causes and Future*, 44 INS. COUNS. J. 114 (1977) [hereinafter Blaut].

² Multi-million dollar suits are no longer the exceptional case. MODEL PERIODIC PAYMENT OF JUDGMENTS ACT, Prefatory Note 1 (Discussion Draft 1980) [hereinafter MODEL ACT] [microfiche].

The American Medical Association indicates that the percentage of physicians sued in malpractice claims nearly tripled from 1978 to 1983. In 1983, there were sixteen malpractice suits for every one hundred doctors, which is a twenty percent increase since 1982. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 196 n.2 (1985) (citing A.M.A., SPECIAL TASK FORCE ON PROF. LIAB. & INS. PROF. LIAB. IN THE '80'S, REP. No. 1 at 10 (Oct. 1984)).

³ From 1960 through 1970, surgeons' insurance rates soared 942.2%. Non-surgeons' rates increased 540.8% and hospital rates increased 262.7%. Note, *Ohio's Attempts to Halt the Medical Malpractice Crisis: Effective or Meaningless?*, 9 U. DAYTON L. REV. 361 (1984) [hereinafter Note] (citing U.S. DEP'T OF HEALTH EDUCATION AND WELFARE, MED. MALPRACTICE REP. OF THE SECRETARY'S COMM'N ON MED. MALPRACTICE 13 (1973)).

⁴ Hilliard, *Alternative Recovery Methods: Structured Settlements & Periodic Payments of Judgments*, 34 FED'N INS. COUNS. Q. 237 (1984) [hereinafter Hilliard]. See also Kabel, *Medical Malpractice Damage Awards: The Need for a Dual Approach*, 11 FORDHAM URB. L.J. 973 (1982-83) [hereinafter Kabel].

⁵ In the early 1970's, Senator Abraham Ribicoff headed a subcommittee organized to investigate the increase in medical malpractice litigation. They determined that there is a general breakdown in the patient's trust and respect of the doctor. People perceive physicians as wealthy, golf-playing elitists. Our mobile society prevents the growth of community feelings and the growth of rapport with the family doctor. Doctors overbook and maintain a casual attitude, suggesting lack of empathy. Ribicoff, *Medical Malpractice: The Patient vs. the Physician*, 6 TRIAL 10 (Feb./March 1970).

⁶ Kabel, *supra* note 4, at 977.

⁷ Roth, *The Medical Malpractice Insurance Crisis: Its Causes, the Effects, and Proposed Solutions*, 44 INS. COUNS. J. 469, 472 (1977) [hereinafter Roth].

Some critics claim the crisis was due to the insurance industry's desire to obtain excess profits in an attempt to recover from their stock market losses.⁸ The physicians blame the crisis on the legal profession for becoming ever more litigious.⁹

Regardless of the origin of the crisis, "the perceptions of a panicked public as well as ferocious lobbying by the medical profession and insurance industry generated intense pressure on state legislatures to enact remedial legislation."¹⁰ The alteration of the common law rules surrounding medical malpractice litigation is at the heart of such legislation. The major alteration is a change from the common law lump sum award rule to the alternate recovery method of a periodic payment award.

Periodic payment awards are judgments payable in installments rather than as one lump sum.¹¹ If multi-million dollar judgments can be paid over time, insurance companies can reduce cash reserves thereby reducing malpractice insurance premiums, and ultimately, this will result in lower health care costs for the general public.¹²

Ohio has felt the panic surrounding the medical malpractice crisis.¹³ In response, the Ohio Legislature passed Amended Substitute House Bill 327 in 1987, creating a mandatory periodic payment scheme for medical malpractice judgments.

The focus of this article is the use of periodic payment plans generally as a remedy to the medical malpractice crisis. A complete understanding of the periodic payment judgment, however, is impossible without an exploration of the general common law treatment of personal injury and medical malpractice awards. Once the historical background is established, this article will examine Ohio's new statute in light of the Model Periodic Payment of Judgments Act and the law existing in other jurisdictions. This article will also analyze the advantages of the periodic payment and its viability as a solution for the medical malpractice crisis.

⁸ Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 144-45 (1980) [hereinafter Learner]. See also Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments*, 66 A.B.A.J. 1524 (1980) [hereinafter Corboy].

⁹ See Blaut, *supra* note 1, at 115.

¹⁰ Learner, *supra* note 8, at 144.

¹¹ See *infra* note 26 and accompanying text.

¹² See *infra* notes 153-55 and accompanying text.

¹³ See *infra* notes 72-81 and accompanying text.

II. HISTORICAL BACKGROUND

A. *The Common Law History of Personal Injury Awards - The Lump Sum Award*

The main purpose of the tort law surrounding personal injury awards¹⁴ is to restore the injured party to his prior economic position.¹⁵ More specifically, in a medical malpractice action, the damage award must meet two criteria: (1) the award must adequately compensate the victim for his losses,¹⁶ and (2) the award should deter potential tortfeasors from engaging in similarly negligent actions.¹⁷

Historically, the victim of a tort was compensated by a singular award of money, a doctrine known as the lump sum award. Adopted from English common law, the doctrine requires that "all damages for an injury must be recovered in a single action."¹⁸ That is, the trier-of-fact determines all past and future damages and returns a judgment for a single sum.¹⁹ This lump sum award doctrine, applicable to both personal injury and medical malpractice awards, was paralleled in the United States in *Frankel v.*

¹⁴ "Personal injury . . . denotes an injury to the physical body of a person, including pain and suffering from such injury, injury to a person's health, or to his reputation, as contradistinguished from injury to his property." Hindert, *Periodic Payments of Personal Injury Damages*, 31 FED'N INS. COUNS. Q. 3, 3 n.1 (1980-81)(quoting *Koon v. Atlantic Coast Line R.R.*, 90 Ga. App. 877, 878, 84 S.E.2d 703, 704 (1954)) [hereinafter *Payments*].

¹⁵ See Grossman & Roman, *Model Periodic Payment of Judgments Act - An Economic Analysis*, 18 TRIAL 62 (May 1982) [hereinafter *Analysis*]. "One injured by the tort of another is entitled to recover damages from the other for all harm, past, present and prospective, legally caused by the tort." RESTATEMENT (SECOND) OF TORTS §910 (1979).

¹⁶ There are three criteria for the determination of the appropriate level of compensation for a tort claimant: (1) the compensation method must minimize the cost of the specified standard of living; (2) the post-judgment risk faced by the claimant must be compared with the risks the claimant may have faced had he not been injured; and (3) if the risk level is changed as a result of the injury, the claimant should receive increased compensation if he faces increased risk, and decreased compensation if he faces decreased risk. Rea, *Lump Sum versus Periodic Damage Awards*, 10 J. LEGAL STUD. 131, 133 (1981) [hereinafter *Rea*].

¹⁷ Kabel, *supra* note 4, at 980.

¹⁸ *Fetter v. Beale*, 91 Eng. Rep. 11 (1699), *aff'd*, Eng. Rep. 112 (1702).

¹⁹ OHIO LEGAL CENTER INSTITUTE, REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION — OHIO TORT REFORM 7.0 (1987)[hereinafter *REFERENCE MANUAL*]. See also Henderson, *Periodic Payments of Bodily Injury Awards*, 66 A.B.A.J. 734 (1980) [hereinafter *Henderson*].

The fact trier must also reduce the future damages to present value. The present value of an award is the amount which, if currently invested at the present long term interest rates, will yield the total value of the award in the future. Comment, *Period Payment Plans: Are Annuities Adequately Protecting the Personal Injury Plaintiff from Inflation, Providing Accurate Attorney's Fees and Promoting the Compensatory Goal of Our Tort Law System?*, 12 OHIO N.U.L. REV. 271, 276 (1985)[hereinafter *Comment*]. See also Hilliard, *supra* note 4, at 259 n.97.

United States,²⁰ when the Third Circuit Court of Appeals held in part that no judgment can be "payable in installments."²¹

Despite the fact that lump sum awards have existed since the seventeenth century, there persists an inherent danger of inaccuracy in lump sum jury verdicts.²² The inaccuracy stems from the trier-of-fact's inability to accurately determine at the time of judgment the victim's true life span, predict changes in his or her earning power and forecast the amount of future expenses likely to be incurred.²³ "[I]t will never be known what the victim would have been like had he or she not been injured . . . [The] mere passage of time, however, will reveal what the victim will be like."²⁴ It is this inherent inaccuracy coupled with the increasing size of lump sum awards which has skyrocketed the cost of medical malpractice insurance and resulted in the medical malpractice crisis.²⁵

B. *The History of the Periodic Payment Award*

Conceding that the main goal of our tort system is accurate and adequate compensation of the victim, legislatures have instituted periodic payment awards in an attempt to achieve this goal. A periodic payment award is a judgment that is payable in installments rather than as one lump sum.²⁶ The legislators assert that periodic payment plans are more accurate because they can be adapted to the unique needs of each claimant.²⁷ Since "[d]amages and losses occur periodically, . . . a structured settlement assists the claimant economically and psychologically by providing a natural, periodic-payment scheme."²⁸ Besides being made whole again, the claimant can enjoy tax advantages and can be relieved of investment

²⁰ 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972). *Accord* Kaczkiński v. Bolobasz, 491 Pa. 561, 421 A.2d 1027 (1980).

²¹ 321 F.Supp. at 1340. In *Frankel*, the United States refused to allow a judicially created trust as a settlement tool in a negligence action filed under the Federal Tort Claims Act.

²² Comm. on Uniform State Laws, *Commission Rep.: Model Periodic Payment of Judgments Act*, 39 REC. OF THE A. OF THE B. OF N.Y. 11, 24 (Jan./Feb. 1984) [hereinafter *Comm. Rep.*].

²³ *Id.*

²⁴ MODEL ACT, *supra* note 2, §11 commentary, at 37.

²⁵ *See supra* note 2 and accompanying text.

²⁶ Elligett, *The Periodic Payment of Judgments*, 46 INS. COUNS. J. 130, 131 (1979) [hereinafter Elligett].

²⁷ In most literature, the term structured settlement has become a generic label for alternate recovery settlements before judgment although the Structured Settlements Co. of Los Angeles, California has claimed the term as a proprietary service mark. Comment, *Structured Settlements: Customized Compensation for Personal Injury Plaintiffs*, 13 STETSON L. REV. 309 (1984) [hereinafter *Customized Compensation*].

The term periodic payment plan as used in this article refers exclusively to a judicially approved plan to pay a court's judgment over time.

²⁸ Carestia, *Structured Settlements in Practice*, 46 MONT. L. REV. 25, 36 (1985) [hereinafter Carestia].

decisions,²⁹ and the defendant benefits because periodic payment plans are ultimately cheaper to finance than lump sum awards.³⁰

Although only recently accepted as a viable alternative to a lump sum award, periodic payment schemes have been a part of judicial history for years, especially in cases where the defendant is of limited financial means.³¹ The first use of a periodically paid verdict in a personal injury case in the United States³² was in *M & P Stores, Inc. v. Taylor*.³³ The Oklahoma Supreme Court upheld a jury verdict that was paid out at \$150 per month for twenty years. The court noted:

The verdict should not have been rendered in this form; and should not have been received in this form; however, it was received and neither party objected to it and neither party now contends that the verdict was void, and under those circumstances, this court will not of its own volition, invalidate it.³⁴

In response to the view "that the incorporation of periodic payment plans in judgments involves such a substantial departure from common law practices that it requires statutory authorization,"³⁵ several state legislatures began to enact periodic payment legislation in the area of medical malpractice awards.³⁶ Despite the initial judicial reluctance and continued distaste by the plaintiff's bar, a broader segment of the personal injury bar is realizing the ability of the periodic payment plan to meet the claimant's needs at a more efficient cost to society.³⁷

C. Periodic Payment Plans Generally

In spite of the uncertain start of the early periodic payment plan legislation, more and more states began enacting similar legislation. Certain provisions appeared consistently in these early statutes.³⁸ For ex-

²⁹ See *infra* notes 156-80 and accompanying text. Comment, *supra* note 19, at 285. Critics fear a change in recovery methods. Some critics assert that periodic payments actually threaten a claimant's right to recovery because they are such a drastic departure from tort common law. *Id.* at 281. Additionally, critics fear lack of finality in the judicial system because the claimant's award is subject to continuous review. *Id.* However, most periodic payment plans do not allow for such continuous review.

³⁰ See *infra* notes 181-87 and accompanying text.

³¹ Plant, *Periodic Payment of Damages for Personal Injury*, 44 LA. L. REV. 1327 (1984) [hereinafter Plant].

³² Hilliard, *supra* note 4, at 262.

³³ 326 P.2d 804 (Okla. 1958).

³⁴ *Id.* at 808-09.

³⁵ Plant, *supra* note 31, at 1333.

³⁶ See *infra* notes 106-52 and accompanying text. In 1975, various states began enacting statutes to allow periodic payment of medical malpractice awards. Hilliard, *supra* note 4, at 262.

³⁷ Plant, *supra* note 31, at 1328.

³⁸ See generally REFERENCE MANUAL, *supra* note 19, at 7.02. See also *supra* notes 106-52 and accompanying text.

ample, past damages (past medical bills and lost wages) are typically paid in a lump sum at judgment due to the claimant's need to pay expenses already incurred.³⁹ Only non-accrued future damages will be covered by periodic payment plans. Such damages will normally include "(1) medical expenses, costs of care or custody, and other outlays related to the claimant's physical and mental condition; (2) economic losses such as wages or other income reduced or precluded by the injury; and (3) future non-economic losses including pain and suffering, loss of consortium, and loss of normal bodily functions."⁴⁰ Normally, an expert witness is used to establish the appropriate dollar amounts needed to fund a payment plan to compensate the victim in an amount equal to the verdict.⁴¹

The legislators commonly left the specific terms of the plan up to the discretion of the court. Some of the optional provisions available to the court include: monthly payments to the claimant for life or a term certain, lump sum payments at intervals, medical funds for future medical expenses, rehabilitation funds, college funds for the victim's children, custodial funds for the victim's future care, and a minimum number of payments ordered to guarantee monetary protection of the heirs should the plaintiff die prematurely.⁴²

The legislators also left the funding of the plan up to the discretion of the court. The plan can be financed personally by the defendant or by his liability insurer.⁴³ Such plans are rare due to their lack of security for the claimant.⁴⁴ To decrease the security risk, the defendant or his insurer can make a qualified assignment of the obligation to pay. A qualified assignment is an assignment to an insurance company of the liability to pay personal injury damages.⁴⁵

Alternatively, the court can permit the defendant or his insurer to render payment through a trust. In such a situation, the claimant essentially releases the defendant from liability for the tort judgment and

³⁹ See Hilliard, *supra* note 4, at 239-40.

⁴⁰ Plant, *supra* note 31, at 1329.

⁴¹ Levin, *Effective Opening Statements*, ch. 10, reprinted in *THE FIRST ANNUAL PERIODIC PAYMENT JUDGMENTS* 202 (Law J. Seminar Press ed. 1987) [hereinafter *FIRST ANNUAL*]. See generally Welcher, *Structured Settlement Expert as Defense Economist*, 25 *FOR THE DEF.* 27 (June 1983).

⁴² Crane, *How to Use and Benefit from Structural Settlements in Personal Injury Suits*, 59 *J. TAX'N* 330 (1983).

⁴³ In such a plan, the defendant simply makes an unsecured promise to the claimant to pay future installments. The defendant retains control of the assets used to fund the payments. *FIRST ANNUAL*, *supra* note 41, at 180.

⁴⁴ *Id.* at 181. Five types of security are permissible: (1) a bond executed by a qualified insurer; (2) an annuity contract executed by a qualified insurer; (3) evidence of liability insurance with a qualified insurer; (4) an agreement made by a qualified insurer to guarantee the payment; or (5) any other satisfactory form of security.

⁴⁵ See *infra* notes 163-65 and accompanying text.

maintains rights only as a trust beneficiary. The defendant retains a reversionary interest in the money used to fund the trust if the plaintiff dies before the funds are exhausted.⁴⁶

A trust, however, may not be the ideal choice in every situation. For instance, if the trust is held by a bank, it may require additional deposits or otherwise be unwilling to guarantee a long-term fixed rate of return.⁴⁷ A better idea would be for the court to allow funding of the periodic payment plan with an annuity.⁴⁸ Funded by a single premium, an annuity is a series of equal payments over time at a constant interest rate.⁴⁹ In such an arrangement, while the claimant releases the defendant from tort liability, the defendant maintains his duty to make the payments under the periodic payment judgment. To fulfill the duty, the defendant may purchase an annuity which pays benefits to the claimant.⁵⁰ An annuity is the most widely used form of funding, since it has the advantage of being funded with a single payment by the defendant.⁵¹ Annuities also cost the defendant twenty to thirty percent less than a comparable trust.⁵²

III. EXISTING LEGISLATION

A. *The Model Periodic Payment of Judgments Act*⁵³

The general provisions and funding of the plans outlined above were based on early state periodic payment statutes. This legislation was often vague and created interpretation, application and administration problems.⁵⁴ In an effort to unify the statutes, the National Conference of Commissioners on Uniform State Law met in 1977 to develop model legislation abolishing lump sum judgments.⁵⁵ After eight drafts, the Model

⁴⁶ See REFERENCE MANUAL, *supra* note 19, at 7.16.

⁴⁷ Elligett, *supra* note 26, at 144.

⁴⁸ The types of annuities available include the immediate or deferred annuity, the life insurance annuity, the period certain annuity, the installment refund annuity, the increasing payment annuity and the survivorship annuity as defined in FIRST ANNUAL, *supra* note 43, at 183-85.

⁴⁹ Comment, *supra* note 19, at 275.

⁵⁰ See REFERENCE MANUAL, *supra* note 19, at 7.13.

⁵¹ See generally Halpern, *A Plaintiff's Alternative to Structured Settlements*, 23 TRIAL 83, 84-89 (1987) (recommending the use of a single-premium whole life insurance policy to fund the periodic payout) [hereinafter Halpern]. However, if the claimant is to retain tax advantages, he must not have contractual rights in the annuity. See *infra* notes 156-64 and accompanying text.

⁵² Elligett, *supra* note 26, at 144.

⁵³ 14 U.L.A. 2 (1980 & Supp. 1988).

⁵⁴ See MODEL ACT, *supra* note 2, Prefatory Note, at 1.

⁵⁵ The committee was chaired by Roger C. Henderson, distinguished legal scholar and then Dean of Arizona State University College of Law. See Henderson, *supra* note 19, at 734.

Periodic Payment of Judgments Act [hereinafter Model Act] was passed on August 1, 1980.⁵⁶ The Model Act was meant as a guide for states to use to tailor their own legislation⁵⁷ and was geared to the payment of personal injury, products liability and medical malpractice actions.⁵⁸ This section will examine how a malpractice claim is pursued under the provisions of the Model Act.

Initiating a medical malpractice claim under the Model Act is not mandatory. The parties to a malpractice action may try the case under the Model Act by mutual consent. Absent mutual consent, a periodic payment judgment will issue only where the claimant's future damages exceed \$100,000.⁵⁹ Thus, if the claimant moves to have his claim tried under the Model Act, he must show he has a good faith claim for future damages which exceed \$100,000.⁶⁰ If the defendant so moves, he must show that the claimant claims future damages of more than \$100,000 and that he can provide the specified security.⁶¹ However, objections to trying the case under the Model Act may be raised by either party on the ground that "the purposes of the Act would not be served."⁶²

Assuming no objections are raised, the claim is tried under the Model Act and if the defendant is found liable, the Model Act provides that the jury must include in its verdict specific findings fixing the amount of past and future damages for medical costs, economic loss, and non-economic loss⁶³ without regard to future inflation.⁶⁴ All past damages are then paid in a lump sum. If the claimant requests periodic payments, the court will so order regardless of the amount of the future damages.⁶⁵ Otherwise, if the jury's verdict includes at least \$100,000 of future damages the court

⁵⁶ The Act was not passed as a uniform law because the committee felt the changes were experimental. See P. Carroll, Remarks in the Proceedings in Committee of the Whole on the Model Periodic Payment of Judgments Act of the National Conference of Commissions on Uniform State Laws 1 (July 28, 1980) [hereinafter Committee Proceedings] (available in Cleveland-Marshall Law School Library) (microfiche).

⁵⁷ See MODEL ACT, *supra* note 2, Prefatory Note, at 2. Such a solution was preferable to a federal law with the resultant administration problems. *Id.* at 4. However, no state has yet adopted the act in full. Of the states with periodic payment of medical malpractice judgments statutes, only Illinois has patterned its statute after the Model Act. 1985 Ill. Legis. Serv. §§ 2-1701 to 1719 (West).

⁵⁸ See MODEL ACT, *supra* note 2, Prefatory Note, at 2. Although not specifically dealing with medical malpractice, the commissioner's goal was to allow people with medical claims to receive their actual economic losses. Mr. Downs, Committee Proceedings 7 (July 28, 1980).

⁵⁹ MODEL ACT, *supra* note 2, § 3, at 8.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ MODEL ACT, *supra* note 2, §§ 2, 4(a), at 6, 12.

⁶⁴ *Id.* § 5, at 15.

⁶⁵ *Id.* § 6(2), at 17.

will make certain adjustments to the amount⁶⁶ and if the future damages after adjustment exceed \$50,000, the court shall enter judgment for future damages paid in periodic installments.⁶⁷

When a periodic payment judgment is entered, the defendant must post judicially approved security for the payments within thirty days, and maintain that security for the life of the award.⁶⁸ The defendant has an incentive to post security since the periodic payment plan will be cheaper for him to fund than a lump sum award. If the requisite security is not posted or maintained, the court will enter a lump sum judgment.⁶⁹ If the failure to comply is capricious or in bad faith, the lump sum judgment is entered without discounting the payment to present value.⁷⁰

Upon death of the claimant, the Model Act provides that the award payments for medical and other health care costs and non-economic loss terminate. Other future installments will be paid in conformity with the judgment to the surviving beneficiaries.⁷¹

B. Ohio's Statute: O.R.C. § 2323.57

1. History of Ohio's Statute

When Ohio first addressed the medical malpractice crisis, the legislature did not have the benefit of the Model Act's guidance. "On July 1, 1975, before the enactment of the Model Act, the Ohio State Medical Association informed Ohio's General Assembly that according to its survey, 'within the next several days, the number of physicians unable to continue medical practice in Ohio because of lack of adequate malpractice coverage will reach crisis proportions'."⁷² In an attempt to remedy the crisis, the Ohio Legislature passed Amended Substitute House Bill 682, which was scheduled to take effect July 28, 1975.⁷³ The aim of this original medical malpractice legislation was to guarantee "the availability of medical malpractice insurance."⁷⁴ The legislation in effect changed the statute of

⁶⁶ The amount of attorney's fees are deducted from the future damage award. MODEL ACT, *supra* note 2, § 6(3)(i), at 17. The amount of payments to subrogees entitled to reimbursement (e.g., workers' compensation) are deducted from the future damage award. *Id.* § 6(3)(ii), at 18.

⁶⁷ *Id.* § 6(3)(iv), at 18.

⁶⁸ *Id.* § 9(a), (b), at 29. Satisfactory security includes the five types listed *supra* note 44.

⁶⁹ MODEL ACT, *supra* note 2, § 9(b), at 29.

⁷⁰ *Id.* § 9(c), at 29.

⁷¹ *Id.* § 11, at 35. Special provisions also exist for wrongful death beneficiaries. *Id.*

⁷² Note, *supra* note 3, at 363.

⁷³ Amended Substitute House Bill 682 was adopted by the Legislature July 24, 1975. It was approved by the governor and became effective July 28, 1975. *Id.* (citing the 111th Ohio General Assembly, 1st Reg. Sess., 136 OHIO HOUSE J. 687 (1975)).

⁷⁴ *Id.* (citing *Senate to Focus Its Attention Next Week on Medical Malpractice Bill*, Gongwers News Serv., Inc., Ohio Report, July 11, 1975, at 2).

limitations, established compulsory non-binding arbitration, and set a \$200,000 damage recovery limit with regard to medical malpractice actions.⁷⁵

Lacking the guidance of the Model Act, the 1975 statute failed to provide for periodic payments. The only provision of the early medical malpractice statute which was related to the goal of a periodic payment award was the \$200,000 cap on damages.⁷⁶ This restriction on recovery was meant to reduce the cost of medical malpractice insurance by reducing the amount of the award available to claimants.⁷⁷ However, the statutory change was unsuccessful because: (1) the limits were rarely imposed by the arbitration panels or the courts,⁷⁸ and (2) the statute failed to alleviate the basic causes of medical malpractice litigation.⁷⁹

When Ohio's legislators realized that the early statute was essentially ineffective in lowering medical malpractice insurance rates, a new statutory scheme was implemented.⁸⁰ Amended Substitute House Bill 327 [hereinafter H.B. 327] changed the statute of limitations, eliminated mandatory arbitration, required authentication of claims and directly addressed the medical malpractice crisis by creating a mandatory periodic payment plan for judgments with future damages in excess of \$200,000 in medical malpractice actions.⁸¹ In developing the new statutory scheme for periodic payments, Ohio's legislature could have patterned the statute after any of the earlier state statutes or the Model Act. Instead, the legislature decided to develop a statute considerably more detailed in its coverage and its guidelines for application than any earlier statute.⁸²

2. Specific Provisions of Ohio's Statute

To litigate under these detailed provisions, the claimant must have made a medical, dental, optometric or chiropractic claim with future damages exceeding \$200,000 whereupon either party may move the court to try the case under the statute.⁸³ In cases tried under the statute, the jury must first return a general verdict. When the verdict is in favor of the plaintiff, the jury must then answer interrogatories specifying past

⁷⁵ *Id.* at 363-64.

⁷⁶ OHIO REV. CODE ANN. § 2307.43 (Baldwin 1981).

⁷⁷ Note, *supra* note 3, at 383.

⁷⁸ *Id.* See *supra* notes 5, 6 and accompanying text.

⁷⁹ Note, *supra* note 3, at 387.

⁸⁰ Amended Substitute House Bill 327, effective Oct. 20, 1987 [hereinafter H.B. 327], 1987 Ohio Legis. Serv. 327 (Baldwin).

⁸¹ Each of these sections of the House Bill was published in OHIO REV. CODE ANN. in 1988.

⁸² REFERENCE MANUAL, *supra* note 19, at 7.02. See comparison with other state laws *infra* notes 106-52 and accompanying text.

⁸³ OHIO REV. CODE ANN. § 2323.57(A)(3), (B)(1) (Baldwin 1988).

damages⁸⁴ and future damages⁸⁵ including non-economic loss,⁸⁶ economic loss,⁸⁷ compensatory economic loss,⁸⁸ medical economic losses,⁸⁹ and miscellaneous economic loss.⁹⁰ The jury should also include in their answers to interrogatories: (1) the length of time over which the future damages will continue; (2) the discount rate used to determine the present value of the award; and (3) the growth ratio for the earning power of the dollar that should be used.⁹¹

Should the interrogatories reveal future damages greater than \$200,000, either party may, before the judgment entry, move for an order of the court that the future damages in excess of \$200,000 be paid in periodic payments.⁹² Upon such a request the court shall order that the first \$200,000 in future damages be paid in a lump sum.⁹³ Any future damages greater than \$200,000 shall be used to fund a series of periodic payments in compliance with H.B. 327.⁹⁴ If neither party timely requests periodic payments, or the future damages are less than \$200,000, a lump sum award for the entire verdict will be made.⁹⁵

If either party requests periodic payment, within 20 days after the motion the claimant shall submit a plan for periodic payment.⁹⁶ The defendant can file jointly with the plaintiff, or he may submit his own plan.⁹⁷ Alternatively, the defendant can examine the plaintiff's plan and then within ten days submit his comments to court. The plaintiff may exercise

⁸⁴ § 2323.57(A)(1)(5). Past damages are those damages accrued by the time the determination of liability is rendered in a medical malpractice claim. § 2323.57(A)(6).

⁸⁵ § 2323.57(B)(1)(b). Future damages are those damages that will occur after the determination of liability is rendered in a medical malpractice claim. § 2323.57(A)(2).

⁸⁶ § 2323.57(B)(1)(b)(i). Non-economic loss means non-pecuniary harm resulting from an injury, death, or loss to person or property such as pain and suffering, loss of consortium and any other intangible loss. § 2323.57(A)(4).

⁸⁷ § 2323.57(B)(1)(b)(ii). Economic loss is any of a variety of pecuniary harm. § 2323.57(A)(1).

⁸⁸ § 2323.57(B)(1)(b)(iii). Compensatory economic loss means all wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property. § 2323.57(A)(1)(a).

⁸⁹ § 2323.57(B)(1)(b)(iv). Medical economic loss means all payments for medical care or treatment as a result of an injury, death or loss to persons or property. § 2323.57(A)(1)(b).

⁹⁰ § 2323.57(B)(1)(b)(v). Miscellaneous economic loss means any other expenditures incurred as a result of an injury, death, or loss to person or property other than attorney's fees. § 2323.57(A)(1)(c).

⁹¹ REFERENCE MANUAL, *supra* note 19, at 7.06.

⁹² OHIO REV. CODE ANN. § 2323.57(C).

⁹³ § 2323.57(C)(1). No claimant shall receive less than \$200,000 plus attorney's fees and costs. § 2323.57(E)(2).

⁹⁴ § 2323.57(C)(2).

⁹⁵ § 2323.57(D)(2).

⁹⁶ § 2323.57(D)(1)(a).

⁹⁷ § 2323.57(D)(1)(b).

a similar option should the defendant file a plan.⁹⁸ After all the plans are submitted, the court will accept, reject or alter the plans.⁹⁹

Consistent with the majority of jurisdictions, Ohio provides that if the complainant dies before receiving the entire periodic award, payments of the part determined to be future medical care or non-economic damages will cease.¹⁰⁰ The balance of the future damages (essentially lost wages) shall be paid as scheduled to the heirs of the plaintiff as entered in the payment plan or as determined by the court.¹⁰¹

As to funding, the statute is consistent with the flexible early legislation of other jurisdictions and indirectly suggests¹⁰² that the periodic payment plan be funded by an annuity¹⁰³ or trust.¹⁰⁴ The only restriction is that if an annuity is used, the annuity must be purchased from an approved insurance company.¹⁰⁵

C. Periodic Payment Statutes in Other Jurisdictions

As previously mentioned, the Ohio legislature decided not to pattern its periodic payment of medical malpractice judgment statute after any other jurisdiction. The medical malpractice crisis had prompted sixteen states¹⁰⁶ in the mid-1970's to adopt new rules and procedures to deal with medical malpractice claims, including provisions for periodic payment of

⁹⁸ § 2323.57(D)(1)(c).

⁹⁹ The court's discretion extends only to the terms of the plan, not to whether a periodic payment plan shall issue at all. § 2323.57(D)(1)(d).

¹⁰⁰ § 2323.57(F)(1).

¹⁰¹ § 2323.57(F)(2).

¹⁰² "After a periodic payments plan is approved, the future damages that are to be received in periodic payments shall be paid in accordance with the plan, including, if applicable, payment over to a trust or annuity provided for in the plan." § 2323.57(D)(1)(e).

¹⁰³ See *supra* notes 48-52 and accompanying text.

¹⁰⁴ See *supra* notes 46-47 and accompanying text.

¹⁰⁵ The A.M. Best Company must have rated the Ohio based insurance company A or better and XII or higher as to financial size and strength. OHIO REV. CODE ANN. § 2323.57(E)(1)(a) (Baldwin 1988). The A.M. Best Company is the authority in the analysis of finance and management of life insurance companies. Carestia, *supra* note 28, at 41-42. Over 1,500 life insurance companies are rated annually by classification from A+ (excellent) to C (fair) in management. The ratings indicate the ability of a company to pay policy holder obligations over the long term. *Id.* at 42. The companies are also rated according to financial size based upon policy holder's surplus. The ratings range from Class I (\$250,000 or less) to Class XV (\$1,000,000 or more). *Id.* at 42.

¹⁰⁶ The sixteen states are: Alabama, Alaska, Arkansas, California, Delaware, Florida, Illinois, Kansas, Maryland, Michigan, North Dakota, New Hampshire, New Mexico, Oregon, South Carolina and Wisconsin. Hindert, Dehner & Hindert, *Structured Settlements and Periodic Payment Judgments* ch. 10 (1986) reprinted in FIRST ANNUAL 21, 24 [hereinafter Hindert, *Structured Settlements*].

Of these state statutes, two have been repealed: (1) North Dakota, N.D. CENT. CODE § 26-40, 1-16 (1977 Supp.), repealed by S.L. 1983, ch. 332, § 26 and (2) Oregon, OR. REV. STAT. § 752.070 (1977), repealed by 1987 C. 774 § 154. New Hampshire's

judgments. Many other states added such statutes in the late 1980's.¹⁰⁷ A comparison of the major provisions of Ohio's statute to these other statutes will show the similarities and differences in both approach and reach of the various jurisdictions.

1. Threshold Amount

The first major common provision is the threshold amount of future damages needed for the periodic payment statutes to apply. The majority of state statutes contain a provision that a periodic payment judgment cannot be ordered unless a threshold amount of future damages is reached. The threshold amount for the claimant's future damages can arise in one of three ways: (1) meeting the threshold may *allow* the court to order a periodic payment judgment;¹⁰⁸ (2) meeting the threshold amount may *require* the court to order a periodic payment judgment;¹⁰⁹ and (3) meeting the threshold amount combined with some other factor may influence the court to enter a periodic payment judgment.¹¹⁰

The amount of the threshold varies from state to state, with amounts ranging from \$25,000¹¹¹ to \$250,000¹¹² in future damages. The Model Act takes an intermediate position designating a threshold amount of \$100,000 in future damages.¹¹³ Generally, some minimum threshold amount is advantageous since the cost of administering periodic payments is prohibitive for small awards.¹¹⁴ Despite this advantage however, several state statutes

statute was held unconstitutional: *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

This article is limited to states with periodic payment of medical malpractice judgment statutes only as of December 1987. Therefore, states with periodic payment plan statutes applicable to all personal injury claims or municipal claims are not discussed. These states are: Alaska, Connecticut, Hawaii, Idaho, Iowa, Louisiana, Michigan, New Hampshire, New York, North Dakota, South Dakota and Washington. *FIRST ANNUAL*, *supra* note 41, at 261-62.

¹⁰⁷ Maine added a statute in 1985, Missouri and Utah added a statute in 1986, and Ohio added a statute in 1987.

¹⁰⁸ Elligett, *supra* note 26, at 137. See ALA. CODE § 6-5-486 (1977).

¹⁰⁹ Elligett, *supra* note 26, at 137. See KAN. STAT. ANN. § 60-3407(c)(3)(1986); S.C. CODE ANN. § 38-59-180 (Law. Co-op. 1985).

¹¹⁰ Normally the "other factor" is a request made by either party to: (1) try the case under the statute if the damages sought exceed the threshold amount; or (2) render a periodic payment judgment if the verdict exceeds the threshold amount. See MODEL ACT, *supra* note 2, § 3, at 8; ARK. STAT. ANN. § 34-2619(D)(1985); CAL. CIV. PROC. CODE § 667.7(a)(West 1987); 1985 Ill. Legis. Serv. 84-7 § 2-1705 (b)(West); ME. REV. STAT. ANN. tit. 24, § 2951(2)(1987); MO. ANN. STAT. § 538.220 (2)(Vernon 1987); UTAH CODE ANN. § 78-14-9.5(2)(1987); §§ 2323.57(B)(1) and (C) of 1987 Ohio Legis. Serv. 327 (Baldwin).

¹¹¹ WIS. STAT. ANN. § 655.015 (West 1980 & Supp. 1987).

¹¹² 1985 Ill. Legis. Serv. 84-7 § 2-1705(b)(West); ME. REV. STAT. ANN. tit. 24, § 2951(2)(1987).

¹¹³ MODEL ACT, *supra* note 2, §§ 3(a), 6(3)(iv), at 8, 18.

¹¹⁴ See Elligett, *supra* note 26, at 136.

have no designated minimum threshold amount.¹¹⁵ The rationale offered for such statutes is that these states were unable to calculate the social costs of periodic payment plans. Thus, the amount of future damages which would be awarded in a periodic payment plan is left to the court's discretion.¹¹⁶

In Ohio, the claimant must have a good faith claim of \$200,000 in future damages and an election must be made by either party to try the case under the provisions of the statute.¹¹⁷ Additionally, a verdict of \$200,000 in future damages plus a second election by either party is necessary to enter judgment by periodic payment.¹¹⁸ The rationale behind this higher than average threshold amount was to impart the benefits¹¹⁹ of the periodic payment judgment to the most needy claimant, the seriously injured victim.

2. Court's Discretion

Once the threshold amount is met, the statutes contain provisions directing the amount of discretion the judge possesses to order a periodic payment plan. The majority of states have mandatory provisions for the use of periodic payment judgments above the threshold amount with¹²⁰ or at the request of either party.¹²¹

A small number of state periodic payment statutes entrust the trial judge with the discretion to decide whether or not to use a periodic payment plan.¹²² Unfortunately, none of these discretionary statutes require the judge to use a payment plan or set forth guidelines on how to exercise his or her discretion.¹²³ Another problem with discretionary statutes is that a trial judge may initially be reluctant to fashion a periodic payment plan because of his or her unfamiliarity with the mechanics of such plans.¹²⁴

Despite these problems, critics argue that periodic payment judgments should always be optional by the parties and never be man-

¹¹⁵ These states are Delaware, Maryland and New Mexico. Hindert, *Structured Settlements*, *supra* note 106, at 29.

¹¹⁶ Elligett, *supra* note 26, at 137.

¹¹⁷ See *supra* note 82 and accompanying text.

¹¹⁸ See *supra* note 92 and accompanying text.

¹¹⁹ See *infra* notes 156-80 and accompanying text.

¹²⁰ KAN. STAT. ANN. § 60-3407(c)(3)(1986); WIS. STAT. ANN. § 655.015 (West 1980 & Supp. 1987).

¹²¹ MODEL ACT, *supra* note 2, § 6(3)(iv), at 18; CAL. CIV. PROC. CODE § 667.7 (West 1987); 1985 Ill. Legis. Serv. 84-7 § 2-1708(8)(West); ME. REV. STAT. ANN. tit. 24, § 2951(2)(1987); MO. ANN. STAT. § 538.220(2)(Vernon 1987); UTAH CODE ANN. § 78-14-9.5(2)(1987); OHIO REV. CODE ANN. § 2323.57(C)(Baldwin 1988).

¹²² ALA. CODE § 6-5-486 (1977); ARK. STAT. ANN. § 34-2619(D)(1985); DEL. CODE ANN. tit. 18, § 6864(a)(1986); MD. CTS. & JUD. PROC. CODE ANN. § 11-109(c)(1)(1984).

¹²³ Hindert, *Structured Settlements*, *supra* note 106, at 37.

¹²⁴ *Id.*

datory by the court.¹²⁵ Proponents of mandatory provisions, however, assert that if the lump sum and periodic payment plan awards are allowed to co-exist, the parties may be unable to choose the best form of payment for the claimant's award.¹²⁶ In contrast to other state statutes, Ohio's statute provides for both a mandatory trial of the case under the periodic payment provisions at the request of either party¹²⁷ and a mandatory entry of a periodic payment judgment at the request of either party.¹²⁸ The statute is a clear signal to Ohio's judiciary that the legislature is serious about the use of periodic payment judgments.

3. Damages Allowed in Periodic Payment Awards

The next major statutory provisions, once the judge has determined that a periodic payment plan is to be ordered, are those concerning which future damages can be paid periodically. State statutes differ as to how much and what kind of damages are to be included in a periodic payment plan. The majority of states require the court to enter a lump sum judgment for at least part of the damage award. In such states, only future damages in excess of the threshold amount may be ordered to be paid periodically. Past damages up to the time of the judgment and future damages up to the threshold amount must be paid by lump sum. The majority of states allow all future expenses to be paid periodically by the defendant, his insurer¹²⁹ or the state compensation fund.¹³⁰ A few states limit the periodic payment to future medical expenses,¹³¹ or to future economic losses.¹³²

Like the majority of states, Ohio allows all future damages in excess of the threshold amount to be paid in periodic payments. Ohio does not limit future damages paid by the plan to medical expenses or economic losses because to do so would defeat the purpose behind the periodic payment plan which is to pay all the damages as the losses are incurred.

¹²⁵ See generally Vertlieb, *Mandatory Structured Settlements and the Subtle Assault on the Tort System*, 4 AM. J. TRIAL ADVOC. 657 (1981) [hereinafter Vertlieb].

¹²⁶ Rea, *supra* note 16, at 145-46.

¹²⁷ OHIO REV. CODE ANN. § 2323.57(B)(1) (Baldwin 1988).

¹²⁸ § 2323.57(C).

¹²⁹ MODEL ACT, *supra* note 2, § 2, at 6; ALA. CODE § 6-5-486(1), (2)(1977); ARK. STAT. ANN. § 34-2619(D)(1985); CAL. CIV. PROC. CODE § 667.7(b)(1)(West 1987); DEL. CODE ANN. tit. 18, § 6864(a)(1)(1986); 1985 Ill. Legis. Serv. 84-7 § 2-1709(b)(West); ME. REV. STAT. ANN. tit. 24, § 2951(2)(1987); MO. ANN. STAT. § 538.220 (Vernon 1987); UTAH CODE ANN. § 78-14-9.5(2), (3)(1987); OHIO REV. CODE ANN. § 2323.57(E)(1) (Baldwin 1988).

¹³⁰ IND. CODE ANN. § 16-9.5-2-2.4 (1987); S.C. CODE ANN. § 38-59-180.

¹³¹ N.M. STAT. ANN. § 41-5-7(E)(1986); WIS. STAT. ANN. § 655.015 (West 1980 & Supp. 1987).

¹³² KAN. STAT. ANN. § 60-3407(c)(3)(1986); MD. CTS. & JUD. PROC. CODE ANN. § 11-109(c)(1984).

4. Security for the Claimant

Even though the court orders a periodic payment judgment for the damages designated by the statute, the claimant may be concerned about the security of his right to payment. Therefore, a majority of the state statutes contain security provisions to protect the claimant from the risk of the defendant's non-compliance with the periodic payment judgment.¹³³ Jurisdictions which provide that the court has discretion to require the posting of adequate security if the defendant is inadequately insured do not protect the claimant¹³⁴ if the court fails to clearly define "inadequately insured" and "adequate security." Statutes which provide that the court must require posting of adequate security offer greater protection to the claimant.¹³⁵

The statutory provisions supplying the greatest protection for the claimant and the clearest administrative guidelines for the court are those statutes which incorporate Section 8 of the Model Act.¹³⁶ This section provides that security must be posted in one of five forms: (1) a bond executed by a qualified insurer; (2) an annuity contract executed by a qualified insurer; (3) evidence of applicable and collectible liability insurance with one or more qualified insurers; (4) an agreement by one or more qualified insurers to guarantee payment of the judgment; or (5) any other satisfactory form of security.¹³⁷

Unlike the Model Act, Ohio's statute provides protection to the claimant without explicitly directing the court as to the type of security required. In Ohio, to decree a periodic payment judgment, the court must find there is adequate security¹³⁸ to ensure the plaintiff will receive all payments under the plan.¹³⁹ To accomplish this goal, the statute suggests the use of an annuity.¹⁴⁰

¹³³ The only state which has no provision at all is Delaware. See generally DEL. CODE ANN. tit. 18, § 6864 (1986).

¹³⁴ ARK. STAT. ANN. § 34-2619(D)(1985); MO. ANN. STAT. § 538.220(3)(Vernon 1987).

¹³⁵ ALA. CODE § 6-5-486(4)(1977); CAL. CIV. PROC. CODE § 667.7(a)(West 1987); ME. REV. STAT. ANN. tit. 24, § 2951(2)(1987).

¹³⁶ The range of options allows the security of payment to be structured in such a way as to maintain favorable income tax treatment. See *infra* notes 156-64 and accompanying text.

¹³⁷ MODEL ACT, *supra* note 2, § 8, at 26; 1985 Ill. Legis. Serv. 84-7 § 2-1710 (West); UTAH CODE ANN. § 78-14-9.5 (3) (1987). The security must be in an amount equal to the sum of present value of future and past damages. MODEL ACT, *supra* note 2, § 9 commentary, at 31.

¹³⁸ Adequate security means a sufficient, but not absolutely air-tight, guarantee of future payments. *Reference Manual, supra* note 19, at 7.20.

¹³⁹ OHIO REV. CODE ANN. § 2323.57(E)(1).

¹⁴⁰ See *supra* notes 102-05 and accompanying text.

5. Modification of the Periodic Payment Award

One area in which the state statutes agree is that of the possibility of award modification. The majority of states, including Ohio, make no provisions for adjustment of the periodic payments after judgment.¹⁴¹ The legislators likely agreed with the drafters of the Model Act who had considered and had specifically left out a modification provision.

It was argued [at the committee meeting] that the insurance industry could not cost its product where a liability was opened, court congestion would be worsened, and some injured persons might be motivated to resist rehabilitation and recovery. Difficulty in determining the cause of subsequent medical and other changes in the tort victim were also cited. In short, the [drafters] voted to abandon the suggestion because of the seemingly intractable practical problems involved.¹⁴²

Proponents of award modification, however, assert that if the goal of periodic payments is to make the claimant whole, then it is equitable and necessary to allow adjustments in the award should the claimant's injuries be more or less than expected. Such proponents assert that a typical modification provision should provide that: (1) either side must request the adjustment, (2) the adjustment can be an increase or a decrease, (3) the court must be able to impose sanctions for bad faith or flagrant abuse of the modification provision, and (4) the claimant must submit to a physical examination if requested by the defendant.¹⁴³

6. Beneficial Rights

Although the amount of the periodic payment award may not be modified during the claimant's life, most statutes allow adjustments after his or her death. As to beneficial rights, the statutes are divided over whether and to what extent a claimant's estate inherits the right to the claimant's payments. Upon the death of the claimant, the need for medical care and for non-economic losses (pain and suffering) terminates. Thus, most state statutes provide that this portion of the payments end while damages for future lost earnings continue.¹⁴⁴

However, the states vary in their approach as to payment of the

¹⁴¹ Only the following six states allow any modification of periodic payment plans after the judgment has been entered: ARK. STAT. ANN. § 34-2619(D)(1985); CAL. CIV. PROC. CODE § 667.7(b)(1)(West 1987); DEL. CODE ANN. tit. 18, § 6864(b)(1986); 1985 Ill. Legis. Serv. 84-7 § 2-1709(2)(West); ME. REV. STAT. ANN. tit. 24, § 2951(2)(B)(1987); UTAH CODE ANN. § 7-14-9.5(6)(1987).

¹⁴² MODEL ACT, *supra* note 2, § 11 commentary, at 38.

¹⁴³ Elligett, *supra* note 26, at 139.

¹⁴⁴ Since the need for medical care and pain and suffering terminate upon death, continued payment of these items is a windfall to the recipient. MODEL ACT, *supra* note 2, § 11 commentary, at 39. But if the claimant's family needs the anticipated future earnings, they should be able to recover these damages. Elligett, *supra* note 26, at 141.

remaining damage award. Five of the states pay the remaining installments for loss of future earnings as scheduled to the beneficiaries or heirs of the claimant.¹⁴⁵ Four states make payments to the estate, either as periodically scheduled¹⁴⁶ or after the award is converted to a lump sum.¹⁴⁷ The Model Act and an Illinois statute have complicated provisions¹⁴⁸ which award future damages to the beneficiaries of the claimant based upon the wrongful death statutes. Several states make no provision for the death of the claimant; however, in those states, state law generally provides that any remainder left after the claimant dies passes to the claimant's estate.¹⁴⁹

The Ohio statute follows the majority of states. H.B. 327 terminates the awards for future medical care and non-economic loss and pays the installment as scheduled to the claimant's beneficiaries.¹⁵⁰

7. Reversionary Rights

With regard to reversionary rights, a minority of jurisdictions allow a reversionary payment of the unpaid medical and non-economic losses to the defendant's insurer should the claimant die prematurely.¹⁵¹ Proponents of reversionary rights assert that the reversion eliminates the need for continued court involvement in the administration of the award and prevents a windfall to beneficiaries.¹⁵² However, granting the defendant a rebate if the claimant dies earlier than expected defeats the deterrence goal of tort damages. For this reason, Ohio follows the majority of jurisdictions which do not provide for reversionary rights.

IV. ADVANTAGES AND DISADVANTAGES

A. Advantages

The periodic payment statutes discussed in the previous section offer great advantages to the defendant's insurer, the claimant, and the defendant.

¹⁴⁵ ALA. CODE § 6-5-486(3)(1977); CAL. CIV. PROC. CODE § 667.7(c)(West 1987); MO. ANN. STAT. § 538.220(5)(Vernon 1987); UTAH CODE ANN. § 78-14-9.5(6)(1987); OHIO REV. CODE ANN. § 2323.57(F) (Baldwin 1988).

¹⁴⁶ ARK. STAT. ANN. § 34-2619(D)(1985); ME. REV. STAT. ANN. tit. 24, § 2951(2)(D)(1987); MD. CTS. & JUD. PROC. CODE ANN. § 11-109(d)(1984).

¹⁴⁷ DEL. CODE ANN. tit. 18, § 6864(b)(1986).

¹⁴⁸ MODEL ACT, *supra* note 2, § 11, at 35; 1985 Ill. Legis. Serv. 84-7 § 2-1713 (West).

¹⁴⁹ These states are: Indiana, Kansas, New Mexico and South Carolina. Hindert, *Structured Settlements*, *supra* note 106, at 59.

¹⁵⁰ OHIO REV. CODE ANN. § 2323.57(F)(2).

¹⁵¹ ARK. STAT. ANN. § 34-2619(D)(1985); CAL. CIV. PROC. CODE § 667.7(c)(West 1987); MD. CTS. & JUD. PROC. CODE ANN. § 11-109(d)(1984); WIS. STAT. ANN. § 655.015 (West 1980 & Supp. 1987).

¹⁵² Elligett, *supra* note 26, at 141. Proponents advocate the use of two or more annuities to fund the periodic payment judgment. This type of funding would facilitate a reversion from one annuity with continued payments from the others. Hilliard, *supra* note 4, at 7.

1. Reduction of Medical Malpractice Insurance Costs

The greatest advantage of periodic payment judgments is the benefit malpractice insurers gain from their use. If the liability payments are made over time, insurers need not set aside large cash reserves for lump-sum payments.¹⁵³ Lower cash reserves result in lower malpractice premiums and lower health care costs.¹⁵⁴ The main purpose behind Ohio's medical malpractice statute is to guarantee the availability of affordable medical malpractice insurance.¹⁵⁵ Ohio's periodic payment statute meets this goal by lowering the cost of malpractice insurance thereby making it more available.

2. Taxation

Another major benefit of periodic payment awards is the tax advantage it affords the plaintiff. I.R.C. § 104(a)(2) allows an income tax exclusion for "the amount of any damages received [whether by suit or agreement and whether as lump sums or as periodic payments] on account of personal injuries or sickness."¹⁵⁶ All the income earned on a lump sum award is taxable to the claimant.¹⁵⁷ However, under a periodic payment plan, I.R.C. § 104(a)(2) gives the claimant an income tax exclusion for not only the lump sum, but the interest appreciation as well.¹⁵⁸ The only exceptions¹⁵⁹ to the tax-exempt status of damages under I.R.C. § 104(a)(2)

¹⁵³ See generally Elligett, *supra* note 26, at 146-47.

¹⁵⁴ *Analysis, supra* note 15, at 64. An insurance company can allow a recovery to a claimant of up to 200-300% of the malpractice insurance limit while spending only 95-96% of the limit. Whiting, *Periodic Payment Settlements - Friends Indeed*, 28 RES. GESTAE 75 (Aug. 1984). Periodic payments can save insurers as much as 40-75% over lump-sum judgments resulting in lower costs to consumers. Elligett, *supra* note 26, at 146-47.

¹⁵⁵ See *supra* notes 72-75 and accompanying text.

¹⁵⁶ I.R.C. § 104(a)(2)(West Supp. 1987). To be excludable, damages must arise from a tort action. Treas. Reg. 1.104-1(c)(1970).

¹⁵⁷ Rev. Rul. 65-29, 1965-1 C.B. 59.

¹⁵⁸ Although I.R.C. § 104(a)(2) applies only to federal income tax, the states generally follow the federal code. See Winslow, *Tax & Economic Considerations in Structured Settlements*, 35 FED'N INS. COUNS. Q. 59, 60 (1984). Projecting to 1990 current trends in periodic payment plans, the total tax savings could amount from \$600 billion to \$1 trillion. Halpern, *supra* note 51, at 18. However, the new 1988 tax reforms which reduce tax brackets make the tax savings less important. McNay, *The Other Side of Structured Settlements*, 23 TRIAL 79 (May 1977) [hereinafter McNay]. Additionally, critics argue that comparable tax-savings can be achieved by investment of a lump sum award in tax-exempt state and local government bonds. See, e.g., *Analysis, supra* note 15, at 64. However, the lump sum recipient would receive a lower interest rate on the government bonds than the periodic payment plan recipient would receive with a regular bond or annuity. Hilliard, *supra* note 4, at 12 n.46.

¹⁵⁹ Future earnings have never been deemed income pursuant to I.R.C. § 61(a)(West 1987). Instead, the Internal Revenue Service excludes such earnings because they are merely a measure of the harm from a personal injury. I.R.C.

are medical expenses¹⁶⁰ and punitive damages.¹⁶¹

The defendant can also benefit from the tax treatment of periodic payment plans. First, if the defendant or his insurer finds it inconvenient to continue paying the periodic payments over an extended time period, a qualified assignment of the liability can be made to a major life insurance company under I.R.C. § 130.¹⁶² The qualified assignment must be funded with qualified funding assets such as annuities or United States obligations.¹⁶³ Additionally, I.R.C. § 162(a) may allow a current deduction to the defendant of the amount actually invested to fund the periodic payments.¹⁶⁴

§ 61(a)(West Supp. 1987). See *Roemer v. Comm'r*, 716 F.2d 693 (9th Cir. 1983). See also Rev. Rul. 85-97, 1985-2 C.B.50 (the entire damage amount received, including the claim for lost wages, is excludable). There are six criteria for maintaining tax-exempt status. The claimant must not have constructive receipt of current economic benefits from the award. Rev. Rul. 65-29, 1965-1 C.B. 59; Rev. Rul. 79-220, 1979-2 C.B. 74. The claimant must have no ownership rights in the award. Ownership rights include the right to change beneficiaries. Rev. Rul. 79-220, 1979-2 C.B. 74. The defendant or the defendant's insurer must not set aside assets to secure payment of the plan. Rev. Rul. 79-313, 1979-2 C.B. 75. The claimant cannot possess the ability to borrow against the annuity purchased to fund the plan. Rev. Rul. 65-29, 1965-1 C.B. 59. The claimant cannot possess the right to change the monthly payments. Rev. Rul. 79-313, 1979-2 C.B. 75. Finally, the claimant's rights against the defendant, the defendant's insurer or qualified assignee for payments can be no greater than those of a general creditor. Rev. Rul. 79-313, 1979-2 C.B. 75.

¹⁶⁰ I.R.C. § 213 (West Supp. 1987) allows the taxpayer a deduction for medical expenses paid during the taxable year to the extent the expenses exceed 7.5% of adjusted gross income. See Rev. Rul. 75-220, 1975-1 C.B. 93, Rev. Rul. 75-232, 1975-1 C.B. 94 and Rev. Rul. 79-427, 1979-2 C.B. 120 for restrictions on medical expense deductions.

¹⁶¹ *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955). See also Rev. Rul. 84-108, 1984-2 C.B. 32 (Punitive damages are not an award on account of personal injury. Rather such damages are awarded for the degree of the defendant's fault.). See generally Jaeger, Owens & Fields, *Taxability of Damages*, 18 TAX ADVISOR 432 (July 1987).

¹⁶² I.R.C. § 130 (West Supp. 1987). See *supra* text accompanying note 45. In order to make a valid qualified assignment of one's obligation to make periodic payments due to an adverse personal injury judgment, six criteria must be met: (1) the assignee must elect to make a qualified assignment; (2) the assignee must assume the defendant's liability; (3) the payments must be fixed as to the amount and time of payments; (4) the assignee must not give the claimant rights greater than a general creditor; (5) the assignee's obligation must be equal to that of the defendant; and (6) the payments must be excludable under I.R.C. § 104(a)(2). See McKenney, *Understanding Structured Settlements*, 66 MICH. B.J. 610 (July 1987). See also I.R.C. § 130(c)(West Supp. 1987).

Two life insurance companies currently accept qualified assignments. They are Connecticut General Life and Transamerica Occidental Life. McNay, *supra* note 158, at 80.

¹⁶³ I.R.C. § 130(d)(West Supp. 1987). United States obligations may be more advantageous since the yield to maturity is higher than that available on an annuity. Winslow, *supra* note 158, at 64.

¹⁶⁴ I.R.C. § 162(a)(West Supp. 1987) provides a deduction for ordinary and necessary business expenses.

3. Windfall Avoidance

The third major advantage of a periodic payment plan is that such plans prevent a windfall to the claimant's family.¹⁶⁵ Under a periodic payment plan windfalls are prevented, because in a majority of states, the payments attributable to future medical expenses and future pain and suffering are terminated upon the death of the claimant.¹⁶⁶ Therefore, the the family is not enriched by damage awards for future damages never incurred.¹⁶⁷ With a lump sum award, however, the potential for a windfall always exists because the jury must provide for future inflation and the claimant's estimated life span.¹⁶⁸ If the claimant dies earlier than expected after receiving a lump sum award, his family receives money in payment for future damages which the claimant will never incur.

4. Anti-Spendthrift Provisions

Another important advantage of periodic payment plans is that they are anti-spendthrift in nature. In other words, payments spread over life can prevent the claimant from wasting the award in the first few years after judgment.¹⁶⁹ Most personal injury attorneys indicate an awareness of cases where the claimant did not reap the long-term benefits the lump-sum award was intended to provide because the money was spent for unintended purposes soon after the trial.¹⁷⁰ The problem lies in the fact that claimants prefer lump-sum settlements, but often misallocate the award to present rather than future spending.¹⁷¹ Studies show that 90% of all major windfalls are squandered within five years.¹⁷²

¹⁶⁵ See Elligett, *supra* note 26, at 131.

¹⁶⁶ Plant, *supra* note 31, at 1332.

¹⁶⁷ Elligett, *supra* note 26, at 131.

¹⁶⁸ Roth, *supra* note 7, at 498. See also *Analysis*, *supra* note 15, at 64. California even included prevention of a windfall in the legislative intent of their periodic payment statute. CAL. CIV. PROC. CODE § 667.7(f)(West 1987). But see Rea, *supra* note 16, at 143 (windfall argument is like claiming that unused life insurance policy is a windfall to the insurance company).

¹⁶⁹ Periodic payments prevent the claimant from wasting the award and becoming a ward of the state. Roth, *supra* note 7, at 498.

¹⁷⁰ Carestia, *supra* note 28. See also Krause, *Structured Settlements for Tort Victims*, 66 A.B.A.J. 1527 (1980) [hereinafter Krause].

¹⁷¹ Rea, *supra* note 16, at 142-43.

¹⁷² Hilliard, *supra* note 4, at 249. Critics, however, dispute these statistics. If the recipients ended up on welfare after squandering the money foolishly, then the matter would be one for public concern. See *Comm. Rep.*, *supra* note 22, at 23.

Other critics flatly deny the statistics. Such critics assert that people do not foolishly treat personal injury awards like lottery winnings. Instead, successful claimants utilize trusts and financial managers to help them conserve their awards. See generally, Vertlieb, *supra* note 125.

Studies supporting this proposition have shown that the danger of dissipation of lump sum awards is very real. According to James N. Morgan, Marvin Snider and Marian Sobel of the Economic Behavior Program of the Survey Research Center

Periodic payment plans solve the misallocation problem by paying the claimant for damages as they occur. To prevent waste, the claimant will receive the award in the same manner as he is accustomed to receiving wage income, that is, periodically.¹⁷³

5. Freedom from Investment Concerns

Yet another benefit the claimant enjoys is freedom from investment concerns.¹⁷⁴ The injured claimant who receives a lump-sum award suddenly finds himself having to decide how to invest the money. Many claimants lack the financial knowledge to manage large amounts of money,¹⁷⁵ and this lack of financial expertise is further complicated when the claimant has suffered catastrophic injury which handicaps him physically, mentally or emotionally.¹⁷⁶

The claimant can hire an investment counselor, however, claimants who have suffered catastrophic injuries often do not have the presence of mind to obtain professional financial advice.¹⁷⁷ The claimant is always in danger of exposure to improvident advice and investments.¹⁷⁸ Furthermore, absent professional advice, the claimant's own family members may "intentionally or incompetently mismanage the funds."¹⁷⁹

Periodic payment judgments such as those contemplated by H.B. 327 solve the claimant's investment concerns and prevent him from squandering the award because he is relieved of the investment burden. The defendant or his insurer must decide how to invest what would have been the claimant's lump sum award. The investment burden is thus placed where it belongs, on the shoulders of the liable party.¹⁸⁰

6. Flexibility of Plans Before Implementation

The defendant's investment burden has been lightened by periodic payment plan legislation, in that the defendant has tremendous flexibil-

of the University of Michigan, 40% of lump sum recipients did not conserve the award to use it to replace lost future wages. Instead, the money was spent on payment of bills other than medical bills, payment of mortgages, purchase of furniture, purchase of real estate and stocks, and investment in business. Plant, *supra* note 31, at 1331.

In the 1975 Tenth Annual Report of the Michigan Law Revision Commission, recommendations were made that deferred payment awards in personal injury cases be adopted. The report found that a few years after the judgment, personal injury claimants often found themselves as public charges. *Id.* at 1331-32.

¹⁷³ Elligett, *supra* note 26, at 131-32.

¹⁷⁴ See Comment, *supra* note 19, at 286.

¹⁷⁵ See MODEL ACT, *supra* note 2, Prefatory Note, at 3.

¹⁷⁶ Hilliard, *supra* note 4, at 238.

¹⁷⁷ *Id.* at 250.

¹⁷⁸ See MODEL ACT, *supra* note 2, Prefatory Note, at 3.

¹⁷⁹ Elligett, *supra* note 26, at 132.

¹⁸⁰ See Krause, *supra* note 170.

ity in shaping the plan.¹⁸¹ As was mentioned earlier, one of the most flexible and most used funding tools for such plans is the annuity.¹⁸² In suggesting the use of annuities,¹⁸³ the Ohio statute encourages the bar to use flexibility and imagination in payment plans.

7. Periodic Payment Plans Cost Less

Another benefit defendants receive through the periodic payment structure is the ability to pay huge future damage claims as they accrue.¹⁸⁴ Furthermore, defendants may utilize annuities to help meet future payments. Generally, the defendant pays less for an annuity than he would for a lump sum award.¹⁸⁵

However, some critics fear that the periodic payment judgment provides excessive benefits to the defendant. Since funding a payment plan with an annuity costs less than payment of a lump sum award, the defendant is in effect receiving leniency in his punishment.¹⁸⁶ For this reason, some critics assert that "periodic payments should be inapplicable to suits involving intentional torts or punitive damages, since easing the burden on the judgment debtor would decrease the deterrent effect."¹⁸⁷

B. Disadvantages

Although periodic payment plans are a cavalier solution to the medical malpractice crisis, they are not without problems. The disadvantages that do exist, however, are minimal and are far outweighed by the advantages of such plans. Such disadvantages that exist are described below.

1. Lack of Security for the Claimant

One disadvantage of periodic payment plans involves the security of payments to the claimant. In a properly structured non-taxable plan, the claimant has no greater rights than a general creditor of the liability insurer or assignor.¹⁸⁸ As a result, the claimant is last in line to receive pay-

¹⁸¹ Elligett, *supra* note 26, at 146. Periodic payment plans can be tailored to the unique needs of those involved. Plant, *supra* note 31, at 1328.

¹⁸² See *supra* notes 51-52 and accompanying text.

¹⁸³ See *supra* note 102 and accompanying text.

¹⁸⁴ See generally *Comm. Rep.*, *supra* note 22, at 21-22.

¹⁸⁵ *Customized Compensation*, *supra* note 27, at 316. One expert estimates that a periodic payout providing \$30,000 per year for life, with twenty percent increases in the payments every five years and a potential payout of \$1,950,000 could be purchased for \$380,000. *Comm. Rep.*, *supra* note 22, at 12.

¹⁸⁶ See Corboy, *supra* note 8, at 1526.

¹⁸⁷ Elligett, *supra* note 26, at 132.

¹⁸⁸ See *supra* notes 159, 162.

ment should the insurer or assignor end up in bankruptcy.¹⁸⁹ Thus, the claimant is subject to a security risk since he will be a general creditor of a commercial insurance institution years into the future.¹⁹⁰

A second security risk for the claimant is that of inflation.¹⁹¹ A periodic payment plan forces the claimant to bear all of the risk of inflation since the annuities used in most plans are unresponsive to changes in the economic climate. The claimant is locked into fixed payments and defenseless against unforeseen future expenses.¹⁹²

These security risks are not fatal to periodic payment plans. Partial remedies exist in careful drafting of the annuity contracts used to fund the plans.¹⁹³

2. Inflexibility of Plans after Implementation

One of the greatest disadvantages of periodic payment plans is inflexibility after implementation which may leave the claimant without recourse in meeting unforeseen expenses.¹⁹⁴ Failure to provide for modification of the periodic payment plan after the judgment is ordered can be detrimental to the claimant because: (1) the claimant may outlive the term over which the damages accrue; or (2) the payments could fail to meet actual expenses if the claimant's medical condition worsens or inflation outruns the fixed income.¹⁹⁵ The first type of shortfall can be prevented by the use of a life annuity or other payment for the claimant's lifetime.¹⁹⁶ The second type of shortfall can be avoided by careful construction of the plan.¹⁹⁷

With careful planning, shortfalls will not be a problem under the Ohio statute. H.B. 327 allows the claimant and defendant to voluntarily submit a satisfactory and carefully constructed plan to the court for approval.

¹⁸⁹ Halpern, *supra* note 51, at 83.

¹⁹⁰ Compare Winslow, *The Seven Most Common Questions About Structured Settlements*, 30 TRIAL LAW GUIDE 14, 25 (1986) (in only ten years, 1974 through 1984, almost two hundred casualty insurance companies were placed in conservatorship, liquidation, receivership or bankruptcy) with McNay, *supra* note 158, at 79 (bankruptcies are rare in the insurance business due to the large cash reserves maintained).

¹⁹¹ Inflation reduces the purchasing power of money and dissipates the value of an annuity. Comment, *supra* note 19, at 278.

¹⁹² *Id.*

¹⁹³ The defendant's ownership and alienability rights may be restricted. Hilliard, *supra* note 4, at 15. Should the claimant require even more security, counsel can consider requiring transfer of the annuity into an irrevocable trust. The asset would thereby be protected from creditors of the defendant in case of insolvency and the claimant in case of misapplication of funds. *Id.*

¹⁹⁴ Comment, *supra* note 27, at 311 n.18.

¹⁹⁵ See *Payments*, *supra* note 14, at 13.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

Every contingency can be met and addressed by providing for annual percentage increases, fixed incremental increases, or deferred lump sums.¹⁹⁸ Since the plaintiff assists in drafting the plan, he would hopefully have few complaints about inflexibility in the future.

3. Value of Plan not Related to True Worth of Injury

Another disadvantage critics raise is that the value of the periodic payment plan bears no relation to the true damage of the injury.¹⁹⁹ Jury damage awards are designed so that the claimant is compensated in an amount equal to the seriousness of his injury. Under the common law, the defendant is punished for his negligence by paying the present value of the lump sum jury award. Critics assert that since purchasing an annuity to fund a periodic payment plan is cheaper than paying the lump sum, the defendant is not being punished in an amount equal to the jury's valuation of the injury.²⁰⁰

Ohio's statute helps eliminate this problem by allowing the plaintiff a chance to draft the type of plan desired.²⁰¹ As with problems of inflexibility, the plaintiff should have few complaints if he understood the plan he proposed.

4. Unavailability of Annuities

The recent development of periodic payment statutes raises the disadvantage of there being only a small market of annuities available to fund the payment plans. In the majority of states, annuities are the favored method to fund periodic payment judgments.²⁰² In order to create unique, flexible plans, annuities must provide payments which will take into account fluctuating inflation. Fear was expressed at the Model Act drafting committee meetings that there would be no market for the type of annuity needed to fund a periodic installment judgment adjustable over time. But representatives of the banking industry indicated that a "market will develop."²⁰³

At this time there are already three insurance companies with Best's highest ratings of quality and size which are writing annuities for periodic

¹⁹⁸ McNay, *supra* note 158, at 79.

¹⁹⁹ See generally, Broder, *Structured Settlements: The Argument Against*, 1981 PERS. INJ. ANN. 838 (1981).

²⁰⁰ These critics suggest that the claimant's attorney must demonstrate how much less present value is than the total award. The court could even require an affidavit from the claimant that he understands the figures. *Id.* at 841. However, the same requirements could be used for lump sum awards since they too are reduced to present value.

²⁰¹ OHIO REV. CODE ANN. § 2323.57(D)(1)(a) (Baldwin 1988).

²⁰² See *supra* notes 51, 52 and accompanying text.

²⁰³ MODEL ACT, *supra* note 2, § 7 commentary, at 22.

payment judgments.²⁰⁴ In Ohio, more insurance companies will offer annuities to satisfy the market created by the new periodic payment of judgments act.

5. Constitutional Challenges

Examination of the constitutional aspect of periodic payment awards raises various due process, equal protection and right to jury trial challenges to such plans at both the state and federal levels. The due process challengers argue that use of a periodic payment award reduces the value of the claimant's award without a corresponding *quid pro quo*.²⁰⁵ The equal protection challengers assert that the periodic payment of large judgments unduly imposes the burden of reducing malpractice insurance costs on a class of seriously injured claimants, while unreasonably benefiting the class of medical malpractice defendants.²⁰⁶ Finally, in states where the court, rather than the jury, is given the task of fashioning the terms of the periodic payment plan, the challengers allege that the court is removing from the jury its constitutional obligations to fix damages.²⁰⁷

Despite such challenges, the majority of states have upheld the constitutionality of periodic payment statutes.²⁰⁸ In Ohio, no direct consti-

²⁰⁴ The three insurance companies are: (1) Prudential Insurance Company of America; (2) Metropolitan Life Insurance Company; and (3) Equitable Life Insurance Company. Other companies offer bargain rates by using investments in junk bonds, and should be avoided. Kelner & Kelner, *Tort Reform & Periodic Installment Payouts*, N.Y.L.J., Oct. 8, 1986, at 1, col 1.

²⁰⁵ See *American Bank & Trust Co. v. Community Hosp.*, 36 Cal.3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984), *vacating*, 33 Cal.3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983). A woman hospitalized for brain surgery fell or fainted in a shower stall and suffered severe burns as a result of overheated water. The hospital moved for periodic payment of the \$200,000 verdict under CAL. CIV. PROC. CODE § 667.7 (West 1987). The court denied the motion, concluding that the California statute was violative of due process and equal protection. The California Supreme Court originally agreed, but later reversed the decision, finally holding that the statute was rationally related to a legitimate state interest, the claimant had no vested property rights in the payment style of damages, and the legislature has broad authority to modify the nature of the damages. *Id.*

²⁰⁶ See *Comm. Rep.*, *supra* note 22, at 14. The court in *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) struck down the statutory scheme of periodic payments on the ground that the statute unduly burdened seriously injured claimants with future damages greater than \$200,000 while unreasonably favoring health care defendants. *Id.* at 944, 424 A.2d at 838.

But see *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) which held that the entire medical malpractice act was unconstitutional because key provisions were invalid, but the periodic payment portion itself was valid.

²⁰⁷ *FIRST ANNUAL*, *supra* note 41, at 134.

²⁰⁸ See *Comm. Rep.*, *supra* note 22, at 13-14. *Community Hosp.*, 36 Cal.3d at 359, 683 P.2d at 670, 204 Cal. Rptr. at 671, held there was no equal protection violation because the statute was a reform measure being enacted one step at a time. *Accord* *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *appeal dismissed*, 474 U.S. 892 (1985); *Craven v. Crout*, 163

tutional attack has yet been made due to the fact that the statute has only recently been enacted.

Furthermore, the closest analogy to cases which might attack the periodic payment statutes are those cases addressing the constitutionality of the previous \$200,000 limit on general damages in medical malpractice claims. Although several lower Ohio appellate courts were in the minority of jurisdictions in holding the \$200,000 limitation unconstitutional,²⁰⁹ the Ohio Supreme Court has followed the majority of states in upholding other provisions of the original medical malpractice act,²¹⁰ and it is likely it will follow the majority of states in upholding the periodic payment statute as well.

V. CONCLUSION

In summary, it is apparent that the modern trend in the majority of jurisdictions has been to uphold the periodic payment award as a viable alternative to the traditional lump sum award. Proponents of such plans advocate their use as a solution to the medical malpractice crisis because of the distinct advantages to insurers, claimants and defendants.

Due to the fact that payments are made periodically rather than in a lump sum, insurers can keep less cash on reserve, thereby freeing more capital for investment. The claimant is benefited by periodic receipt of tax exempt payments. Furthermore, the equitable periodic nature of the payments prevents the claimant from spending the award too quickly, and allows the court to terminate portions of the award when the need for those damages ceases.

Benefits accrue to the defendant as well. The flexibility of such plans allow the parties to design a unique plan which will be less costly for the defendant than a lump sum award. Additionally, the defendant may be

Cal. App.3d 779, 209 Cal. Rptr. 649 (1985); *Bernier v. Burris*, 113 Ill.2d 219, 497 N.E.2d 763 (1986); *State ex. rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 261 N.W.2d 434 (1978).

²⁰⁹ The first Ohio case challenging the recovery limit held that the limit conferred an unreasonable benefit on medical malpractice defendants not available to other defendants, and thus, violated equal protection. *Graley v. Satayatham*, 74 Ohio Op.2d 316, 343 N.E.2d 832 (1976). The next case which addressed the issue suggested that the limit on recovery violated due process protections because it removed the common law right to full redress without a *quid pro quo*. *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op.3d 164, 355 N.E.2d 903 (1976). *But cf. Keeton v. Mansfield Obstetrics & Gynecology Assn.*, No. C80-1573A, slip op. at 27 (N.D. Ohio March 5, 1981)(U.S. District Court upheld the constitutionality of the recovery limit and disagreed with *Simon*). The most recent case held that the recovery limit violates both due process and equal protection guarantees. *Duren v. Suburban Community Hosp.*, 24 Ohio Misc.2d 495, 495 N.E.2d 51 (1985).

²¹⁰ The main Ohio Supreme Court case dealing with the constitutionality of the medical malpractice act addressed only the mandatory arbitration provision which it upheld. *Beatty v. Akron City Hosp.*, 67 Ohio St.2d 483, 424 N.E.2d 586 (1981).

able to deduct his cost of funding the plan as a business deduction.

More specifically, in Ohio, H.B. 327 will be embraced by imaginative attorneys attempting to promote the best interests of their client at trial. Although H.B. 327 does not mirror the Model Act, Ohio's legislators have developed a unique plan by combining their innovations with the most significant provisions utilized by the majority of states. After reviewing the current periodic payment legislation enacted by the majority of jurisdictions and the reaction of the bar, economists, and insurers to such legislation, one must conclude that periodic payment awards will become the rule in the area of medical malpractice.

