

JUSTIFYING THE STRUCTURED SETTLEMENT TAX  
 SUBSIDY: THE USE OF LUMP SUM  
 SETTLEMENT MONIES

JEREMY BABENER\*

*Structured settlements have been subsidized by federal, state, and local taxes for nearly three decades. The subsidy, which comes in the form of a tax exclusion that encourages personal injury claimants to forgo a lump sum settlement in favor of long-term periodic payments, is premised upon the belief that claimants prematurely dissipate lump sum settlements. This belief has long been held within the structured settlement industry, and is frequently cited as a proven fact. Anecdotal evidence from industry practitioners, representing a broad cross-section of interests, certainly suggests the belief to be true. However, this Note examines the available empirical data. It concludes that the danger of the dissipating claimant has yet to be proven, and that citations relied upon as evidence lack applicability, and sometimes substance. Therefore, this Note calls for a modern American study to ground the structured settlement subsidy in empirical and substantiated data.*

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\* J.D. Candidate, 2010, New York University School of Law; B.A. Political Science, Haverford College. The author would like to thank those in the structured settlement industry and settlement-planning field for making themselves available, sharing conventional wisdom and their practical knowledge. Specifically, Patrick J. Hindert provided advice in the development of this piece. Thanks also to Gail K. Johnson of the Department of Justice’s Federal Tort Claims Act Section for her limitless mentorship, and New York University School of Law Professor Lily Batchelder for her guidance and support.

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## I.

## INTRODUCTION

Structured settlements have been subsidized at the federal, state, and local levels for nearly three decades.<sup>1</sup> Lauded by politicians,<sup>2</sup> economists,<sup>3</sup> and disability advocates as a “model benefit,”<sup>4</sup> they are regularly implemented by injury victims to secure permanent and continuous streams of future income.<sup>5</sup>

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1. *E.g.* CAL. REV. & TAX. CODE § 17071 (West 2009). *See* I.R.C. §§ 104(a)(2), 130 (West 2009). The exclusion affects state and local income taxes as well as federal. Government entities often use the federal definition of taxable income for their taxable base.

2. *E.g.*, *Tax Treatment of Structured Settlements: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 5 (1999) (statement of Rep. Stark) (arguing that the structured settlement subsidy “made great good sense then, and I think it makes great good sense now”); National Structured Settlements Trade Association, <http://www.nsstta.com> (last visited July 21, 2009) (“In the long run, [structured settlements are] good for this great country of ours.”) (quoting Congressman Charles Rangel).

3. Anthony Riccardi & Thomas Ireland, *A Primer on Annuity Contracts, Structured Settlements, and Periodic-Payment Judgments*, 12 J. LEGAL ECON. 1, 35 (2002-2003) (“[L]ife annuities can be used to increase the well-being of plaintiffs while reducing costs confronting defendants. . . . This is a case in which ‘too good to be true’ happens to be true.”).

4. *E.g.*, National Structured Settlements Trade Association, *Independent Voices*, <http://www.nsstta.com/i4a/pages/index.cfm?pageid=3291> (last visited Jul. 18, 2009) (quoting Andrew J. Imparato, President, American Association of People with Disabilities).

5. Congress has defined a structured settlement as an arrangement established by “(i) suit or agreement for the periodic payment of damages excludable from the gross income of the recipient under section 104(a)(2), or (ii) [an] agreement for the periodic payment of compensation under any workers’ compensation law excludable from the gross income of the recipient under section 104(a)(1) . . . [where periodic payments are] (i) of the character described in subparagraphs (A) and (B) of section 130(c)(2), and (ii) payable by a person who is a party to the suit or agreement or to the workers’ compensation claim or by a person who has assumed the liability for such periodic payments under a qualified assignment in accordance with section 130.” I.R.C. § 5891 (West 2009) (defining the term for purposes of section 5891). The referenced section 130(c)(2), provides in the specified paragraphs, “(A) such periodic payments are fixed and determinable as to amount and time of payment, (B) such periodic payments cannot be accel-

The use and subsidy of structured settlements is justified by the frequency with which personal injury victims dissipate lump sum settlements.<sup>6</sup> There is a clear consensus of opinion among knowledgeable industry professionals, of traditionally competing interests, that many or most claimants prematurely dissipate lump sum settlements.<sup>7</sup> In addition, literature published by those within the structured settlement industry cites to statistical data as proof of such frequent premature dissipation.<sup>8</sup>

However, this Note finds that though widely cited to justify the tax favored treatment of structured settlements, the statistical data relied upon is an oft-repeated urban myth of unsubstantiated origin. The statistical data does not, in fact, exist. The absence of documented empirical evidence to support favorable tax treatment of structured settlements does not negate the validity of the consensus of professional opinion. However, from a policy standpoint, the fundamental importance of this subsidy demands more than anecdotal evidence. A policy that impacts millions of taxpayers and subsidy recipients is deserving of a substantiated empirical foundation. Therefore, this Note recommends the undertaking of a modern American study as a mission of rational policy decision-making. As noted author Malcolm Gladwell has said,

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erated, deferred, increased, or decreased by the recipient of such payments.” I.R.C. § 130(c)(2)(A)-(B) (West 2009).

6. *Infra* at 5.

7. *E.g.*, E-mail from Peter Arnold, NSSTA Consultant, to author (Apr. 8, 2009, 11:42:57 EST) (on file with author) [hereinafter Arnold E-mail] (indicating a wealth of circumstantial evidence); Email from Craig H. Ulman, Counsel to NSSTA, to author (Feb. 16, 2009, 4:06:14 EST) (on file with author) (suggesting that the frequent occurrence of factoring transactions confirm the premise that cash settlements tend to be dissipated quickly, even in cases of severe or long-term injuries); *see* Telephone Interview with Randy Dyer, Former Executive Vice President, NSSTA (Feb. 18, 2009) [hereinafter Dyer Interview]; Telephone Interview with Jack L. Meligan, Plaintiff Loyal Settlement Planner, Settlement Professionals Inc. (Feb. 5, 2009) [hereinafter Meligan Interview]; E-mail from Gail K. Johnson, Senior Trial Counsel, Federal Tort Claims Act Section, Department of Justice, to author (Feb. 20, 2009, 13:06:41 EST) (on file with author). *But see* Telephone Interview with Matt Bracy, General Counsel, Settlement Capital Corp. (Mar. 12, 2009) (noting that he believes much of the dissipating claimant argument to be imagined).

8. *See generally* Section II.

“Truly successful decision making relies on a balance between deliberate and instinctive thinking.”<sup>9</sup>

In 1982, Congress legislated<sup>10</sup> a tax exclusion for a particular type of income, that from a “structured settlement.” Since the early twentieth century, personal injury claimants have received lump sum settlements and awards tax-free.<sup>11</sup> The exclusion of structured settlement income allows claimants to receive damages and settlement monies over time, rather than in a single lump sum, without any additional tax liability. Defendants will often transfer a principal to a structured settlement company,<sup>12</sup> which will purchase an annuity. That structured settlement company will direct a life insurance company to make annuity payments directly to the claimant. Because the insurer can invest the principal over time, it can afford to make annuity payments in excess of the principal. Thus, the claimant benefits from the investment of the original settle-

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9. MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 141 (2005).

10. See Periodic Payment Settlement Tax Act of 1982, Pub. L. No. 97-473, § 101(a), 96 Stat. 2605 (1982). The legislation codified, see H.R. REP. NO. 97-832, at 4 (1982); S. REP. NO. 97-646, at 4 (1982), and expanded previous revenue rulings; see also *Miscellaneous Tax Legislation: Hearings Before the Subcomm. on Select Revenue Measures of the Comm. on Ways & Means*, 97th Cong. 7 (1982) (statement of John E. Chapoton, Assistant Secretary for Tax Policy, Treasury Dep’t).

11. T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918) (“It is held. . . that an amount received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident is not income taxable”); Revenue Act of 1918, Pub. L. No. 65-254, § 213(b)(6), 40 Stat. 1057, 1065-66 (1919). Limitations on the exclusion have been enacted, most recently in 1996. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838 (1996) (allowing the exclusion for injury and sickness damages that are “physical,” and eliminating the exclusion as applied to punitive damages). See generally Margarita R. Karpov, *To Tax or Not to Tax – That is the Question in the Midst of Murphy v. I.R.S.*, 23 AKRON TAX. J. 143, 150 (2008).

12. Defendants can deduct the transfer as a business expense. See Joseph W. Blackburn, *Taxation of Personal Injury Damages: Recommendations for Reform*, 56 TENN. L. REV. 661, 687 (1989) (citing I.R.C. § 165(a) (1986); I.R.C. § 162 (West 2009)); see also *Ford Motor Co. v. Comm’r of Internal Revenue*, 102 T.C. 87, 102, 104 (1994) (allowing a deduction of an annuity’s present, not future nominal value). Since the 1982 legislation, structured settlement companies pay no tax on defendant’s transfer, except for the fee or profit portion. See I.R.C. § 130 (2009). Thus, the defendant can make an immediately deductible transfer, clearing its books. Without that deduction, significantly fewer structured settlements would occur.

ment monies transferred without paying any additional taxes.<sup>13</sup> The resulting benefit has been called a “subsidy” by structured settlement industry commentators<sup>14</sup> and the Joint Committee on Taxation.<sup>15</sup> That subsidy likely provides between \$360 and \$840 million per year in tax benefits,<sup>16</sup> and

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13. For an excellent resource on structured settlements, see DANIEL W. HINDERT ET AL., *STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGMENTS* (perm. ed., rev. vol. 2009). NSSTA can produce countless supporters of structured settlements, Independent Voices, <http://www.nssta.com/i4a/pages/index.cfm?pageid=3291> (last visited Feb. 2, 2009). Many articles have been written that list their advantages. *E.g.*, Dirk Yandell, *Advantages and Disadvantages of Structured Settlements*, 5 J. LEGAL ECON. 71 (Fall, 1995).

14. Richard B. Risk, Jr., *Structured Settlements: The Ongoing Evolution From a Liability Insurer's Ploy to an Injury Victim's Boon*, 36 TULSA L.J. 865, 869 (2001).

15. JOINT COMM. ON TAXATION, 106th CONG., *TAX TREATMENT OF STRUCTURED SETTLEMENT ARRANGEMENTS* (Comm. Print 1999).

16. This back-of-the-envelope range was generated based on authors and practitioners in the industry. It has been estimated that the tax subsidy adds 20% to a given structured settlement. Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 882 (2002) (estimating between 20% to 25%); E-mail from William L. Neff, Partner, Hogan & Hartson LLP (Feb. 23, 2009, 16:29:04 EST) (on file with author) (discussing a “rule of thumb” estimate). Assuming that structured settlements continue to be made at their present value of \$6 billion, the Treasury’s tax loss would be \$1.2 billion. However, because many structured settlement recipients will be at low-income levels, or have high medical expense deductions, they will not benefit from the tax exclusion. Thus, some practitioners estimate that only 30% of structured settlement recipients actually receive a significant reduction in their future income taxes. E-mail from Joseph Tombs, Partner, Amicus Financial Advisors LLP, to author (June 10, 2009, 8:57:37 EST) (on file with author). Others believe that the majority of structured settlement claimants are net taxpayers. E-mail from William L. Neff, Partner, Hogan & Hartson LLP, to author (Feb. 23, 2009, 16:29:04 EST) (on file with author). For purposes of estimation, we shall use the range of 30% to 70% as the likely percentage of structured settlement recipients receiving the tax benefit. Assuming that the average tax benefit to a structured settlement is 20%, we arrive at a back-of-the-envelope estimate of the subsidy’s value: between \$360 and \$840 million annually. Of course, that value also constitutes lost revenue to the Treasury. The cost of the subsidy to Treasury in lost revenue has been almost entirely ignored in structured settlement literature. *See Scales, supra* note 16, at 881. Numbers from the Joint Committee on Taxation are not particularly specific, estimating that section 104(a)(2), which excludes personal physical injuries or sickness, resulted in \$1.5 billion in 2008. JOINT COMM. ON TAXATION, 110th CONG., *ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008-2012*, 57, available at <http://www.house.gov/jct/s-2-08.pdf>. The Committee estimates that section 104(a)(1), which excludes workmen’s compensation payments for personal injuries or sickness, resulted in \$2.7 billion in 2008. *Id.* These figures do not

has spawned an industry<sup>17</sup> that annually produces over six billion dollars of annuity premiums.<sup>18</sup>

In legislating the subsidy, Congress meant to encourage the use of periodic, rather than lump sum payments, thereby discouraging claimants' premature dissipation of settlement

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target the value of the structured settlement subsidy. Of course, the government is not necessarily left with a loss of \$360 to \$840 million. Arguably, there are government savings that accompany the tax loss. First, because the subsidy makes it possible for plaintiff to receive more while defendant pays less, more disputes are settled outside of court, saving court costs. *See Scales, supra at 880; Blackburn, supra note 12, at 689-90; cf. Barbara D. Goldberg & Kenneth Mauro, Utilizing Structured Settlements, in EVALUATING & SETTLING A PERSONAL INJURY CASE: Plaintiffs' and Defendants' Perspectives 31, 44-45 (2001).* However, some argue that today's general scarcity of trials may have negative consequences. Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 837, 839, 848-77 (1990) (discussing inflated claims and reduced quality of legal representation and bargaining credibility). A second government saving that could result from increased structured settlements is a reduction in the number of future public benefit dependents. A British report refers to two Australian studies that reportedly predict net government savings with increased use of structured settlements. *Structured Settlement Working Party at 19 (2000), available at [http://www.actuaries.org.uk/\\_data/assets/pdf\\_file/0003/26598/stuct\\_sets\\_wp.pdf](http://www.actuaries.org.uk/_data/assets/pdf_file/0003/26598/stuct_sets_wp.pdf)*. It is unclear if these studies account for the lost tax revenue from excluded earnings. One of the studies was uncited. *Id.* The other, entitled "Report on the Taxation of Compensation Payments," performed by Price Waterhouse Coopers, could not be found.

17. Scales, *supra* note 16, at 895 (citing *Structuring Settlements, A Roundtable*, 19 TRIAL, Jan. 1983, at 70, 72 (comments of Charles Krause). *See Tax Treatment of Structured Settlements: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 24-25 (1999) (statement of Timothy J. Trankina, Chief Executive Officer, Peachtree Settlement Funding)).

18. HINDERT, *supra* note 13, § 1.03[1]. Some estimate that more than \$100 billion of previous structured settlements currently exist. Daniel W. Hindert & Craig H. Ulman, *Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts*, 44 JUDGES J. 19, 19 (2005). Over \$400 billion of structured settlement payouts have already been made to 500,000 structured settlement recipients. HINDERT, *supra* note 13, § 1.03[1] (citing Report of National Structured Settlements Trade Association President Mal Deener to NSSTA Annual Meeting (May 1, 2004)). It should also be noted that NSSTA lobbying expenses were once as high as \$480,000 in 2001, and measured \$55,000 in 2008. OpenSecrets.org, Nat'l Structured Settlements Trade Assn, <http://www.opensecrets.org> (go to "Industries", then "Insurance", and then "Nat'l Structured Settlements Trade Ass'n" (lasted visited Oct. 21, 2009)). Of course, NSSTA has spent much more in other years, such as \$480,000 in 2001, and \$320,000 in 1999. *Id.*

monies and their resulting dependence on the state.<sup>19</sup> Though the legislative purpose as of 1982 was revealed only through individuals' statements,<sup>20</sup> the goal of counteracting the 'squandering plaintiff'<sup>21</sup> concern was officially adopted nearly two decades later.<sup>22</sup>

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19. IBAR Inc., which lobbied for the 1982 legislation, reports that the concern of premature lump sum exhaustion was important in the bill's passage. E-mail from Stan Schultz, Chief Executive Officer and Majority Shareholder, IBAR Settlement Co., Inc., to author (May. 23, 2009, 18:05:50 EST) (on file with author).

20. 127 CONG. REC. 30462 (1981) (statement of Sen. Baucus, introducing the Periodic Payment Settlement Act of 1981) ("[I]n many cases because it assumes that injured parties will wisely manage large sums of money so as to provide for their lifetime needs. In fact, many of these successful litigants, particularly minors, have dissipated their awards in a few years and are then without means of support."); *Miscellaneous Tax Legislation: Hearings Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 97th Cong. 7, 82, 84 (1982) (statement of Patrick J. Hindert, President Benefit Designs, Inc., a consulting firm for personal injury case parties) (testifying that lump sum plaintiffs "are frequently back on the public dole" due to the dissipation of their award, and that lump sum recipients are "frequently ill-equipped psychologically, physically or educationally to assume the investment and mortality risks associated with managing money to satisfy anticipated future financial requirements"). See *id.* at 87 (written statement of David M. Higgins, Esq., Overton, Lyman, & Prince).

21. Scales, *supra* note 16, at 869 (discussing this oft-cited argument). The language of "squander," as opposed to "dissipate" has been frequently used. *E.g.* *Tax Treatment of Structured Settlements: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 5 (1999) (statement of Rep. Stark); 144 CONG. REC. S11,499-01 (1998) (statement of Sen. Baucus).

22. JOINT COMM. ON TAXATION, *supra* note 15 ("If a recipient chooses a lump sum settlement, there is a chance that the individual may, by design or poor luck, mismanage his or her funds so that future medical expenses are not met. If the recipient exhausts his or her funds, the individual may be in a position to receive medical care under Medicaid or in later years under Medicare. . . . Such a 'moral hazard' potential may justify a subsidy to encourage the use of a structured settlement arrangement in lieu of a lump sum payment to the recipient, to reduce the probability that such individuals need to make future claims on these government programs."). Congressmen involved in the 1982 legislation have affirmed the justification as well. *Tax Treatment of Structured Settlements: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 6 (1999) (statement of Rep. Shaw) ("Congress was concerned that injured victims would prematurely spend a lump-sum recovery and eventually resort to the social safety net."); *id.* (statement of Rep. Stark) ("The stories of people who received large lump-sum settlements and squandered them were equally heart rending, some ended up back on welfare if they were in fact disabled. It made great good sense then, and I think it makes great good sense now."); 144 CONG. REC. S11,499-

Since the stated legislation's purpose is to neutralize an identified problem, claimants' dissipating received lump sum settlements, it is important to verify that the problem actually exists. Academic<sup>23</sup> and non-academic articles,<sup>24</sup> books,<sup>25</sup> and treatises<sup>26</sup> have long accepted the factual assertion that personal injury recipients of lump sum payments rapidly dissipate their settlements. Practitioners advertise structured settlements to claimants based on the same contention.<sup>27</sup> As will be shown, the statistical evidence on the subject is hardly compelling. Two articles, written by Ellen S. Pryor<sup>28</sup> and Adam F.

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01 (1998) (statement of Sen. Baucus) ("our focus in enacting these tax rules in sections 104(a)(2) and 130 of the Internal Revenue Code was to encourage and govern the use of structured settlements in order to provide long-term financial security to seriously-injured victims and their families and to insulate them from pressures to squander their awards."). The Treasury has as well. I.R.S., General Explanations of the Administration's Revenue Proposals, 192 (Feb. 1999) ("Congress enacted favorable tax rules intended to encourage the use of structured settlements. . .because recipients of structured settlements are less likely than recipients of lump sum awards to consume their awards too quickly and require public assistance.").

23. See Leo Andrada, note, *Structured Settlements: The Assignability Problem*, 9 S. CAL. INTERDIS. L.J. 465, 465 (2000); Phillip L. Kennerly, *Structured Settlements: A Useful Tool for the Claims Judge Advocate*, 1986 ARMY LAW. 12, 12-13 (1986). But see Scales, *supra* note 16, at 869-74; Ellen S. Pryor, Symposium, *Liability for Inchoate and Future Loss*, 88 VA. L. REV. 1757, 1777-80 (2002).

24. E.g., Tacker LeCarpentier, Commentary, *Sound, Diversified Settlement Planning – It's Not an Either-Or Proposition*, N.C. LAW WKLY., Feb. 16, 2009, at 14 (reference to statistic deleted in re-print); Richard Halpern, *Protecting Plaintiffs From the Squandered Settlement*, N.C. LAW WKLY., Dec. 1, 2008, at 13; Christopher R. Gullen, *What Attorneys Need to Learn from Grillo v Pettiette*, 82 MICH. B. J. 27, 28 (2003).

25. See Goldberg & Mauro, *supra* note 16.

26. See PAUL J. LESTI, *STRUCTURED SETTLEMENTS* § 3:6 (2d ed. 2008); MATT GARRETSON & GUY KORNBLUM, *NEGOTIATING AND SETTLING TORT CASES* § 18:7 (2009).

27. E.g., Casualty Claim Consultants, Benefits of Using Structured Settlements, <http://www.casualtyclaim.com/why.htm> (last visited May 21, 2009).

28. Pryor, *supra* note 23, at n.69. Pryor, a professor at Southern Methodist University School of Law, located an England Law Commission report, studying the use of lump sum payments by compensated accident victims. LAW COMMISSION, *PERSONAL INJURY COMPENSATION: HOW MUCH IS ENOUGH? A STUDY OF THE COMPENSATION EXPERIENCES OF VICTIMS OF PERSONAL INJURY*, LAW COM. No. 225 (1994) [hereinafter *HOW MUCH IS ENOUGH?*]. Her piece also analyzed a 1959 University of Michigan study, investigating the use of lump sum payments by workmen's compensation recipients. JAMES N. MORGAN ET AL., *LUMP SUM REDEMPTION SETTLEMENTS AND REHABILITATION: A STUDY OF WORKMEN'S COMPENSATION IN MICHIGAN* (1959).



Scales<sup>29</sup> in 2002, tracked down six studies on the subject. Based on their research both authors conclude that personal injury claimant irresponsibility has not been proven.<sup>30</sup> This Note incorporates their findings, and delves further in search of actual empirical evidence of the dissipating claimant. Studies were found within government reports from Canada,<sup>31</sup> the United Kingdom,<sup>32</sup> and Ireland,<sup>33</sup> and others by unearthing long-shelved boxes of dated articles reduced to microfilm. In

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29. Scales, *supra* note 16, at 870-74. Scales, a professor at Washington and Lee University School of Law, cites to a study of widows' use of life insurance payments, *id.* at 871 nn.38-39 (citing THE WIDOWS STUDY, LIFE UNDERWRITER TRAINING COUNCIL AND LIFE INS. AGENCY MANAGEMENT ASSOCIATION [hereinafter The WIDOWS STUDY], vol. 2 (1971)), one that a structured settlement treatise points to as the source of a commonly cited statistic in the insurance field. LESTI, *supra* note 26, § 3:6 (citing The WIDOWS STUDY, *supra*, vol. 1-2). Scales then reviews a 1947 government study surveying the use of lump sums paid to American railroad workers in compensation cases, U.S. RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY: 1938 - 40 (1947) [hereinafter U.S. RAILROAD RETIREMENT BOARD], a 1984 study of tort claimants in the United Kingdom, DONALD HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984), a 1936 New York study tracking the use of worker compensation awards, Scales, *supra* note 16, at 871 (citing Carl NORCROSS, *Vocational Rehabilitation and Workmen's Compensation*, 10 SOC. SERV. REV. 17, 17 (1936)), and a 1987 Manitoba Law Commission report from Canada surveying available studies. Scales, *supra* note 16, at 873 (citing MANITOBA LAW COMM'N, REPORT ON PERIODIC PAYMENT OF DAMAGE FOR PERSONAL INJURY AND DEATH 55-60 (1987) [hereinafter MANITOBA LAW COMMISSION]).

30. Pryor, *supra* note 23, at 1779 ("The empirical evidence is limited and does not point to any firm conclusion."); Scales, *supra* note 16, at 870, 873 ("The available evidence does not sustain [the oft-cited statistics], at least as they are conventionally understood. . . . There appears to be no evidence that personal injury claimants wind up on welfare more than do nonclaimants.") A more recent piece concludes, "Research has shown that the evidence hyperbolizing the 'squandering plaintiff' is unreliable, vitiating Congress's [sic] continued subsidization of the structured settlement and factoring industries under the guise of protecting unsophisticated victims." Laura J. Koenig, *Lies, Damned Lies, and Statistics? Structured Settlements, Factoring, and the Federal Government*, 82 IND. L. J. 809, 810 (2008) (citing Scales, *supra* note 16, at 869).

31. ALAN CAMERON, REVIEW OF THE INCOME TAX EXEMPTION FOR STRUCTURED SETTLEMENTS (2007), [http://www.treasury.gov.au/documents/1355/PDF/Division\\_54\\_Review\\_Final\\_Report.pdf](http://www.treasury.gov.au/documents/1355/PDF/Division_54_Review_Final_Report.pdf).

32. STRUCTURED SETTLEMENTS WORKING PARTY (2000), [http://www.actuaries.org.uk/\\_data/assets/pdf\\_file/0003/26598/stuct\\_sets\\_wp.pdf](http://www.actuaries.org.uk/_data/assets/pdf_file/0003/26598/stuct_sets_wp.pdf).

33. REPORT ON PERSONAL INJURIES: PERIODIC PAYMENTS AND STRUCTURED SETTLEMENTS, LAW REFORM COMMISSION OF IRELAND, 121 (1996), <http://>

all, this Note relies on twelve studies and two law commission reports concerning lump sum dissipation, elaborated upon individually in the appendices.

In examining the available evidence, this Note seeks to blaze a directed path. Section I begins by unsuccessfully attempting to locate the source of the most commonly cited<sup>34</sup> and widely believed statistic<sup>35</sup>—that 90% of lump sum settlement recipients spend their entire payment within 5 years of receipt. Section II looks to other studies casting light on personal injury claimants' responsibility, both positive and negative.<sup>36</sup> Section III considers the conclusions of preceding commentators and commissions, discussing why the unproven assertion endures. Lastly, section IV addresses the rhetoric of the enduring assertion, calling for a modern American study to answer the question long thought answered.

## II.

### AN EMPTY STATISTIC? – “90% OF CLAIMANTS SPEND ALL THE MONEY IN FIVE YEARS”

As early as 1978, proponents of structured settlements pointed to “[s]tudies made by the insurance industry,”<sup>37</sup> that show,

[A]ccident victims receiving large, lump-sum payments frequently have nothing left in a very short period of time. . . . Within two months of settlement, 2.5 out of 10 have nothing left; within one year, half have nothing left; with[in] two years, 70 percent have

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www.lawreform.ie/publications/data/lrc92/lrc\_92.pdf [hereinafter LAW REFORM COMMISSION OF IRELAND REPORT].

34. LESTI, *supra* note 26, § 3:6.

35. Dyer Interview, *supra* note 7.

36. Each study located is discussed in further detail in the appendices. See *infra* Appendices A-C.

37. *Periodic Payments Prove Aid to Accident Victims*, J. COMM., Mar. 20, 1978, at 8 (quoting T.V. Mangelsdorf, a life insurance underwriter); see also Le-Carpentier, *supra* note 24, at 14 (reprint deleted a discussion of “some researchers” finding similar statistics); Andrada, *supra* note 23, at 465 (noting “statistics show[ing]” the 90%-5-year statistic) (citing WILLIAM FLAHAVAN ET AL., CALIFORNIA PRACTICE GUIDE: PERSONAL INJURY § 4:140.1 (1998)).

nothing left; and within five years, 90 percent have nothing left.<sup>38</sup>

Unfortunately, the article provides no citation to these studies or their titles.<sup>39</sup> This 1978 article and other uncited assertions<sup>40</sup> were then relied upon by credible magazines,<sup>41</sup> journals,<sup>42</sup> and government reports.<sup>43</sup> For example, one legal article reports, “studies have concluded that ninety percent of injured plaintiffs who receive substantial sums from settlements or other sources ‘will have squandered the *entire* sum within *five* years, leaving them a public charge, dependent upon welfare, health care assistance, and the like.’”<sup>44</sup> However, the legal article’s only source is a magazine article by Vasilios B. Choulos,<sup>45</sup> whose only source is the 1978 piece discussed in the beginning of this paragraph. A similarly empty, though oft-cited source for the 90%-5-year statistic<sup>46</sup> is the Rutter Group’s

38. *Periodic Payments Prove Aid to Accident Victims*, *supra* note 37 at 8 (quoting T.V. Mangelsdorf, a life insurance underwriter).

39. *Id.*; see also Robert Somers, *The ‘Structured Settlement’ – A Better Way*, J. INS., Mar.-Apr. 1979, at 10 (citing to the same statistics without attribution). Robert Somers was Senior Vice-President of the Home Insurance Company. *Id.*

40. Kenneth K. Keene & Robert J. Ross, *Structured Settlements*, BUS. INS., Apr. 28, 1980, at 25; Derek A. Cave, *Structured Settlements: An Alternate Resolution of Claims Involving Death or Substantial Personal Injury*, 37 ADVOC. 331, 333 (1979) (referring to “one sobering insurance industry survey” without citation, which allegedly found 25% of injured parties or plaintiffs to have exhausted settlement moneys in 2 months, 50% in 1 year, 75% in 2 years, and 90% in 5 years.).

41. See Vasilios B. Choulos, *Structured Settlements: Cure or Curse?*, 16 TRIAL, 73, 74 (Nov. 1980).

42. See Marcus L. Plant, *Ruminations on Tort Law: A Symposium in Honor of Wex Malone: Periodic Payment of Damages for Personal Injury*, 44 LA. L. REV. 1327, 1332 (1984) (quoting Choulos, *supra* note 41, at 74).

43. E.g., MANITOBA LAW COMMISSION, *supra* note 30, at 54 (citing to Somers, *supra* note 39); LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 121 (citing Keene & Ross, *supra* note 40).

44. Plant, *supra* note 42, at 1332 (quoting Choulos, *supra* note 41, at 74). Plant’s article was recently cited by a court for the proposition that “various studies have indicated that a significant percentage of injured claimants who receive lump sum settlements or awards dissipate those funds in a relatively short period of time and often become dependent upon public assistance for support.” *In re Fee*, No. 06 CV 1423, 2006 WL 3478944, at \*3 (Pa. C.P. June 30, 2006).

45. Plant, *supra* note 42, at 1332 n.16.

46. E.g., Halpern, *supra* note 24, at 13; Gullen, *supra* note 24, at 28; Andrada, *supra* note 23, at 465 n.1. There has been some recent controversy

1992 California Practice Guide: Personal Injury.<sup>47</sup> In fact, the guide merely notes the 90%-5-year finding, which “[i]nsurance industry statistics *reportedly show*.”<sup>48</sup> Moreover, the statistics have since been deleted from the guide.<sup>49</sup>

It is unclear where the 90%-5-year statistic originated.<sup>50</sup> In part, this is the fault of structured settlement proponents, who “almost never provide citation for this statistic.”<sup>51</sup> Instead, supporters of structured settlements often rely on vague references to “insurance industry studies,”<sup>52</sup> “statistics,”<sup>53</sup> and “fed-

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over this. Patrick Hindert’s website Beyond Structured Settlements, published that Halpern “announce[d] that he has located the study confirming [the 90% statistic].” *Structured Settlement Credo – 3*, BEYOND STRUCTURED SETTLEMENTS (Jan. 18, 2009), [http://s2kmblog.typepad.com/rethinking\\_structured\\_set/2009/01/structured-settlement-credo-3.html](http://s2kmblog.typepad.com/rethinking_structured_set/2009/01/structured-settlement-credo-3.html). However, Halpern has later noted that the practice guide had been cited for many years, even by the National Structured Settlements Trade Association. Letter from Richard Halpern, President, The Halpern Group, to John Darer, Registered Settlement Planner, 4structures.com, LLC, *Go and Boil Your Bottom, You Son of a Silly Person!* (Feb. 1, 2009), available at [http://structuredsettlements.typepad.com/structured\\_settlements\\_4r/2009/02/go-and-boil-your-bottom-you-son-of-a-silly-person.html](http://structuredsettlements.typepad.com/structured_settlements_4r/2009/02/go-and-boil-your-bottom-you-son-of-a-silly-person.html) (“I always believed that there was a likelihood that the statistic was approximately correct but had never seen any documentation thereof. That didn’t stop me from continuing to look for valid, published information. I personally never found any until I found the 1992 publication of the law book that we have been citing. To date we still have not cited as study we have merely cited a publication.”).

47. FLAHAVAN ET AL., *supra* note 37 § 4:213.

48. *Id.* (emphasis added)

49. ZERNE P. HANING, WILLIAM F. FLAHAVAN, & DANIEL J. KELLY, CALIFORNIA PRACTICE GUIDE: PERSONAL INJURY § 4:213 (2008) (noting, “a substantial number of accident victims completely dissipate their recoveries soon after receipt.”). The reference to statistics was in the guide from its first edition in 1984, until 2000. E-mail from Courtney V. Jackson, Contact at Thomson Reuters, to author (Feb. 27, 2009, 18:26:32 EST) (on file with author).

50. Scales, *supra* note 16, at 871 n.37 (“My reading of [the Widows Study] does not sustain Lesti’s suggestion that it is the source of the ‘90%’ statistic. . . . [T]here is a dissipation estimate of 90% given in a 1936 study of workers’ compensation claims.”).

51. *Id.* at 870-71.

52. *Id.* at 870; see also *Structuring Settlements: A Roundtable*, 19 TRIAL 70, 70 (Jan. 1983) (comments of Roger Warin) (citing “a number of studies” without specificity).

53. Andrada, *supra* note 23, at 465 (citing simply that “statistics show”) (citing FLAHAVAN ET AL., *supra* note 37, § 4:140.1); see also LeCarpentier, *supra* note 24, at 14 (discussion of “some researchers” was deleted in the reprint).

eral studies,”<sup>54</sup> making analysis of their evidence extremely difficult. Articles citing to such statistics are lauded as “perceptive.”<sup>55</sup> However, blame may also rest in the hands of impartial analysts,<sup>56</sup> including authors of treatises,<sup>57</sup> and judges,<sup>58</sup> who repeat the claims without looking to their foundations. For example, in the 2006 case *In re Fee*, the court cites to articles with and without valid sources alike to ground its assertion that statistics prove the dissipating plaintiff theory.<sup>59</sup> Among the articles cited, the Court relies on one merely providing that “[it] is widely stated within the structured settlement industry that some evidence suggests many claimants who receive lump sum awards dissipate them fairly quickly.”<sup>60</sup> Though also noting Scales’ article challenging the statistics, the Court nevertheless accepts them as true.<sup>61</sup>

A 1988 edition of a treatise on tort damages provides a telling commentary on this subject:

We often hear or have seen written in articles, the apparent statistic that 95% or [sic] the plaintiffs who receive sizable settlements have no money within five years. I have asked the authors of these articles the

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54. Scales, *supra* note 16, at 870 n.35 (quoting Bob Rayner, *It's Much Ado About Something: Financiers, Insurance Companies Battle Over Monetary Settlements*, RICHMOND TIMES-DISPATCH, Feb. 25, 1999, at B6).

55. Nat'l Structured Settlements Trade Ass'n, *The Importance of Structured Settlement Planning*, Mar. 20, 2009, <http://www.nssta.com/i4a/headlines/headlinedetails.cfm?id=103> (last visited Mar. 29, 2009).

56. Such as those just discussed. See Plant, *supra* note 42, at 1332 (citing Choulos, *supra* note 41, at 74).

57. GARRETSON & KORNBLUM, *supra* note 26, § 18:3 (repeating the 90%-5-year statistic without citation).

58. See *In re Fee*, No. 06 CV 1423, 2006 WL 3478944, at \*3 (Pa. C.P. June 30, 2006) (citing Risk, Jr., *supra* note 14, at 867; Plant, *supra* note 42, at 1331-1332).

59. *In re Fee*, No. 06 CV 1423, 2006 WL 3478944, at \*3 (Pa. Com. Pl. June 30, 2006) (citing Risk, Jr., *supra* note 14, at 867; Plant, *supra* note 42, at 1331-1332). The court also acknowledges, though apparently does not agree, with Scales’ article criticizing some of the studies. *In re Fee*, No. 06 CV 1423, 2006 WL 3478944, at \*3 (Pa. C.P. June 30, 2006) (citing Scales, *supra* note 16, at 869-872).

60. Risk, Jr., *supra* note 14, at 867 (citing Nat'l. Structured Settlement Trade Ass'n, *What is a Structured Settlement? . . . And Other Questions About Structured Settlement Industry*, (May 1997) (distributed at Nat'l. Structured Settlement Trade Ass'n's annual meeting)).

61. *In re Fee*, No. 06 CV 1423, 2006 WL 3478944, at \*3 (Pa. C.P. June 30, 2006) (citing Scales, *supra* note 16, at 869-872).

source for this statistic. Two have pointed me to a particular broker whom they quoted. I have asked that broker for his source of the statistic and he has promised to provide me with the study. This was over a year ago. In the meantime, we have paid for searches of the available literature and have been able to turn up nothing on the subject. I doubt that 90% of [sic] 95% of the plaintiffs who receive large awards completely squander their money in 5 or 10 years, and I am almost sure that no study exists to indicate such a contention.<sup>62</sup>

The note about the request for information remains unaltered to this day.<sup>63</sup>

This Note provides summaries and analyses of the two studies cited for the 90%-5-year statistic in Appendix A: a 1971 study of widows<sup>64</sup> and a 1936 study of workers' compensation.<sup>65</sup> Neither can plausibly be the source of the statistic, nor are their findings analogous to modern American personal injury lump sum recipients. Appendix A also cites to an article from a British newspaper reporting a Canadian study apparently finding that 90% of personal injury lump sum awards were dissipated in 5 years.<sup>66</sup> That study may very well be the origin of the oft-cited statistic. However, the author was unable to find the study.<sup>67</sup> Even if it does exist, reliance upon its purported findings would seem irresponsible until it has been located and found analogous. This Note has also eliminated other less frequently cited sources as the possible origins.<sup>68</sup>

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62. ROBERT L. CONASON ET. AL., 7 DAMAGES IN TORT ACTIONS § 82.72 (Matthew Bender & Co., 1988) (noting practical risks such as bad investing and relatives requesting money).

63. DAMAGES IN TORT ACTIONS § 82.08 (Matthew Bender & Co., 2007).

64. THE WIDOWS STUDY, *supra* note 29.

65. NORCROSS, *supra* note 29.

66. Dennis Hulls, *Structuring Personal Injury Awards*, L. SOCIETY'S GAZETTE, Mar. 21, 1990, at 27.

67. The author contacted the Insurance Bureau of Canada, which represents Canadian casualty and property insurers. The organization was unable to locate the study cited by Hulls. E-mail from Amra Porobic, Librarian, Insurance Bureau of Canada, to author (May, 25, 2009, 1:32:41 EST) (on file with author).

68. In 1929, a participant at an International Association of Industrial Accident Boards and Commissions meeting said that among 112 investigated lump sum settlements, "in over 90 per cent of these cases the money did the

And yet, the 90%-5-year statistic is “commonly quoted throughout the structured settlement literature,”<sup>69</sup> and is, perhaps, “the most consistently repeated ‘fact’ in this area of the law.”<sup>70</sup> To this day, articles,<sup>71</sup> treatises,<sup>72</sup> and practitioners<sup>73</sup> continue to cite the statistic as proven.

### III.

#### OTHER EVIDENCE OF LUMP SUM USE

Appendix B details and analyzes four studies that have been cited as indicating irresponsible use of money among lump sum recipients. These are a 1959 worker compensation study,<sup>74</sup> a 1947 railroad compensation study,<sup>75</sup> a 1983 Australian accident victim compensation study,<sup>76</sup> and a 1978 British personal injury study.<sup>77</sup> However, as Appendix B explains,

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claimants absolutely not good. They lost it. . . . [W]e find that in over 90 per cent of those cases the money has not accomplished the purpose which we expected it would accomplish.” U.S. DEPARTMENT OF LABOR: BUREAU OF LABOR STATISTICS, BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, 511 PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETING OF THE INTERNATIONAL ASSOCIATION OF INDUSTRIAL ACCIDENT BOARDS AND COMMISSIONS 195 (Oct. 8-11, 1929) (comments of Lawrence E. Worstell). Also, in 1981, one consulting company reported performing studies on awards in excess of \$500,000, finding that recipients often exhaust all the monies within 3 1/2 years. Howard Rudnitsky & Jeff Blyskal, *Something for Everyone*, FORBES, Jan. 19, 1981, at 29 (quoting IBAR President Robert Schultz). However, these studies were informal, and likely based on anecdotal information collected and passed on by attorneys. E-mail from Stan Schultz, CEO and Majority Shareholder, IBAR Settlement Co., Inc. (Apr. 6, 2009, 16:58:23 EST) (on file with author).

69. LESTI, *supra* note 26, § 3:6.

70. Scales, *supra* note 16, at 870 (citation omitted).

71. Halpern, *supra* note 24, at 13.

72. GARRETSON & KORNBLUM, *supra* note 26, § 18:7 (“Studies prove that most people who receive cash settlements spend 95% of their money within five years.”).

73. *E.g.*, Casualty Claim Consultants, Benefits of Using Structured Settlements, <http://www.casualtyclaim.com/why.htm> (last visited May 21, 2009).

74. MORGAN, *supra* note 28.

75. U.S. RAILROAD RETIREMENT BOARD, *supra* note 29.

76. ACCIDENT COMPENSATION: TRAFFIC ACCIDENT CASE STUDIES, NEW SOUTH WALES LAW REFORM COMMISSION 15 (1984) [hereinafter NEW SOUTH WALES LAW REFORM COMMISSION] (citing LUMP SUM ACCIDENT COMPENSATION, COLIN BASS HUMAN RESOURCES vol. 1, 10-12 (C.P. 1, N.S.W. Govt Printer 1983) [hereinafter BASS HUMAN RESOURCES]).

77. ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY (1978) [hereinafter ROYAL COMMISSION].

none of the four studies provide strong evidence that modern American lump sum recipients would dissipate their money, often for a list of reasons such as inapplicable assumptions or ambiguity of the findings.<sup>78</sup>

Appendix C details and analyzes several international studies and two reports indicating that lump sum recipients do not spend their money unwisely. These include a 1994 British study of personal injury compensation,<sup>79</sup> a 1993 Scottish study of personal injury compensation,<sup>80</sup> a 1992 Australian automobile accident study,<sup>81</sup> a 1984 British study of personal injury,<sup>82</sup> a 1984 Australian traffic accident compensation study,<sup>83</sup> and a 1983 Canadian automobile accident compensation study.<sup>84</sup> The reports are by the Law Reform Commission of Ireland in 1996,<sup>85</sup> and the Canadian Manitoba Law Commission in 1987.<sup>86</sup> While the evidence of responsible lump sum use comes from foreign sources, their modernity may render them more analogous to today's American lump sum recipients than the American studies currently available.<sup>87</sup>

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78. A possible source is an AIG study on structured settlements, which found that 57% of lump sum recipients had depleted the money they had received. American General Life Companies, *Structured Settlements: Survey Report*, (2008), [http://www.americangeneral.com/lifeinternet2000/structured.nsf/Lookup/StructuredSettlementSurveyReport/\\$file/StructuredSettlementSurveyReport.pdf](http://www.americangeneral.com/lifeinternet2000/structured.nsf/Lookup/StructuredSettlementSurveyReport/$file/StructuredSettlementSurveyReport.pdf). However, no information is given regarding the amounts involved, or the time it took for such depletion to occur.

79. REPORT ON STRUCTURED SETTLEMENTS AND INTERIM AND PROVISIONAL DAMAGES, ENGLISH LAW COMMISSION, No. 224 (1994) [hereinafter ENGLISH LAW COMMISSION].

80. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 123-24, (citing PAUL CORNES, *Coping With a Catastrophic Injury: A Follow-Up Survey of Personal Injury Claimants Who Received Awards of £150,000 or More in 1987 and 1988* (1993)). At least two other law commission reports have cited to this study. See HOW MUCH IS ENOUGH?, *supra* note 28, at 161; ENGLISH LAW COMMISSION, *supra* note 79, ¶ 1.10.

81. Marcia Neave & Louise Howell, *The Adequacy of Common Law Damages*, ADELAIDE L. REV. RES. PAPER No. 5, 85 (1992).

82. HARRIS, *supra* note 29, at 120-22.

83. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 76.

84. REPORT BY THE AUTOMOBILE ACCIDENT COMPENSATION COMMITTEE: BRITISH COLUMBIA, 105 (1983).

85. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 123.

86. MANITOBA LAW COMMISSION, *supra* note 29.

87. See generally MORGAN, *supra* note 28; U.S. RAILROAD RETIREMENT BOARD, *supra* note 29.



Analyses of how personal injury claimants use lump sums have also analogized the claimants to lottery winners.<sup>88</sup> These comparisons typically recount extraordinary purchases and the avoidance of any financial advice.<sup>89</sup> Thereafter, one author provides this short caveat, "It may be that a disabled person would be more cautious than a lottery winner, but unfortunately there are very few methods upon which the casualty insurance industry can retrieve information regarding the expe-

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88. JOSEPH W. HUVER, *STRUCTURED SETTLEMENTS: AN ALTERNATIVE APPROACH TO THE SETTLING OF CLAIMS* 82-83 (1992); see also LESTI, *supra* note 26, § 3:6 ("lottery winners are a close comparable group to personal injury claimants"). One chapter of the book "Lottery Winners" is entitled, "Where the Money Goes: Spending, Saving, and Squandering." H. ROY KAPLAN, *LOTTERY WINNERS: HOW THEY WON AND HOW WINNING CHANGED THEIR LIVES* 154 (Harper & Row 1978). Kaplan's book uses interviews of one third of American million-dollar lottery winners, some receiving lump sum and some receiving installments. See *id.* at 5. Kaplan found that "[n]early eighty percent moved after winning. . . ." *Id.* at 160. In many instances, Kaplan reports that the expenses on homes "reveal[ed] lack of foresight. New homes were often obviously too large. . . ." *Id.* at 161. Relevant to this article's discussion is Kaplan's note that "some wander aimlessly through life, squandering their annual installments." *Id.* at 9. This could suggest that if squandering is common among lottery winners, that truth speaks more to the source of the income than to its form.

89. HUVER, *supra* note 88, at 82-83. A study on Florida lottery winners found, "while the lump-sum payments reduce the probability of bankruptcy in the first two years after winning in an economically and statistically significant way, this reduction is followed by statistically significant increases of similar magnitude three to five years after winning." Scott Hankins et al., *The Ticket to Easy Street? The Financial Consequences of Winning the Lottery* 22-23, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1324845](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324845) (Vanderbilt Law and Econ., Working Research Paper No. 09-01, 2009). Attention has also been paid to the troubles encountered when one obtains "sudden money." Susan Bradley, *SUDDEN MONEY: MANAGING A FINANCIAL WINDFALL* (2000). In fact, some have written about "sudden wealth syndrome," a term coined during the 1990s tech boom. Katie Hafner, *The Perils of Being Suddenly Rich*, N.Y. TIMES, Apr. 21, 2007, at C1; Abby Ellin, *Preludes; Money, Money, Money. Guilt. Guilt. Guilt.*, N.Y. TIMES, Mar. 19, 2000, at BU14 (noting that it is also called "affluenza"). It originated as a "malady . . . that comes from making too many millions too fast," Maureen Dowd, *Liberties; Slouching Toward '92*, N.Y. TIMES, Mar. 29, 2000, at A25, and is meant to describe the psychological issues and symptoms "associated with sudden stress of success or wealth." MONEY, MEANING, & CHOICES INSTITUTE, *SUDDEN WEALTH SYNDROME*, <http://www.mmcinstitute.com/sws.html> (last visited July 4, 2009); *Signs of Sudden Wealth Syndrome*, WebMD, Apr. 17, 2000, <http://www.webmd.com/balance/features/sudden-wealth-syndrome>.

rience of the use of funds by those people that received lump sum benefits without a guaranteed income stream."<sup>90</sup>

The caveat may underestimate the differences between a disabled person and a lottery winner. Personal injury awards compensate for both injury and lost income, and are thus not truly 'found money,' except where they include punitive damages. By definition, other damages are merely 'compensatory.' Lottery winnings are exactly the opposite, being entirely 'found money.' Because lottery winnings are unanticipated, recipients may assign them a lower subjective value.<sup>91</sup> One psychology article compared participants' spending of *unanticipated* monetary gains with spending of *anticipated* monetary gains.<sup>92</sup> The Note, grounded in the results of five different experiments, found the unanticipated gains to be spent "more readily."<sup>93</sup> On a very basic level, it could also be argued that lottery winners are inherently less conservative with money. To be a lottery winner, one must first be a lottery player. It is thus unlikely that the spending of personal injury awards or settlements, and lottery winnings, are analogous.

#### IV.

##### THE INFORMED CONCLUSIONS OF OTHERS

As shown, there are many studies testing how lump sum person injury claimants spend their monies. Unfortunately, none is directly analogous to modern American lump sum settlement recipients, either being outdated or foreign. Several recent commentators have found the evidence of the dissipat-

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90. HUVER, *supra* note 88, at 83; *see also* LESTI, *supra* note 26, § 3:6 ("Lottery winners are not personal injury claimants and have no perceived need to make a settlement 'last' since they can return to work. However, in the current literature, lottery winners are a close comparable group to personal injury claimants.").

91. Hal R. Arkes et al., *The Psychology of Windfall Gains*, 59 *ORG. BEHAV. & HUM. DECISION PROCESSES* 331, 333 (1994); *see* REPORT BY THE AUTOMOBILE ACCIDENT COMPENSATION COMMITTEE: BRITISH COLUMBIA, 1983, 75 (1983) ("Squandering by people who win lottery prizes, for example, is not uncommon. A compensation award, though, is not like a lottery prize since it is not an unexpected boon but a critically important fund meant to provide for a person's future livelihood.").

92. Arkes, *supra* note 91, at 342 (comparing windfall gains against non-windfall gains, distinguished by their "unanticipated status").

93. *Id.*

ing claimant to be lacking.<sup>94</sup> Likewise, an ambitious survey of available studies by the Law Reform Commission of Ireland found that, “Studies recently conducted by the Law Commission<sup>95</sup> and the Disability Management Research Group at the University of Edinburgh<sup>96</sup> have shown that the risk of dissipation is less than was widely believed and that those awarded very high damages are least likely to fritter away their compensation.”<sup>97</sup> The studies in the appendices provide a basis for such conclusions to be drawn. In the end, the evidence is, as one commentator simply put it, “thin.”<sup>98</sup>

Thus, one wonders why there has not been any modern American study?<sup>99</sup> This Note is not the first published piece to call for one.<sup>99</sup> It could be because the industry does not perceive the tax exemption to be in danger. However, what better advertising tool to structured settlement consumers could there be than an assurance that, without the product of a structured settlement, claimants will end up on welfare?<sup>100</sup>

At least one insurance company considered conducting a modern study around 2005. Adam F. Scales, the author of an article questioning the dissipating claimant assertion,<sup>101</sup> was approached by an insurance company representative.<sup>102</sup> That insurance representative noted that his company had previously attempted to begin a study with the National Structured

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94. See Koenig, *supra* note 30, at 810; Pryor, *supra* note 23, at 1779; Scales, *supra* note 16, at 870-74.

95. HOW MUCH IS ENOUGH?, *supra* note 28, at 177, 180.

96. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 123-24 (citing CORNES, *supra* note 80).

97. *Id.* at 122-23.

98. Henry E. Smith, *Structured Settlements as Structures of Rights*, 88 Va. L. Rev. 1953, 1954 (2002).

99. Koenig, *supra* note 30, at 825.

100. Of course, one might raise an entirely opposing question: Why has the structured settlement purchasing community not done a study either? However, disproving the assertion of lump sum dissipating would likely help factoring companies less than insurance companies. While consumers of structured settlements can demand lump sum settlements, users of factoring companies often sell their future stream of income as a “last resort.” Andrada, *supra* note 23, at 473.

101. Scales, *supra* note 16, at 870, 873.

102. E-mail from Adam F. Scales, Associate Professor, Washington and Lee University School of Law, to author (Feb. 11, 2009, 13:24:30 EST) (on file with author) [hereinafter Scales E-mail].

Settlements Trade Association (NSSTA).<sup>103</sup> When asked about the 90%-5-year statistic, a former executive vice president of NSSTA said, "I spent years looking for that study and I honestly believe it doesn't exist."<sup>104</sup> Though NSSTA has begun calling authors who rely on the 5-years-90%-statistic to discourage them from using it,<sup>105</sup> the organization is not planning to perform such a study.<sup>106</sup>

Debating the relevance of old studies and foreign statistics could go on forever. At the very least, it would seem that the justification and rationale of the structured settlement tax subsidy is legitimately in question.<sup>107</sup> However, this is not to state that the conclusion of the dissipating claimant is false. As mentioned, the author of this Note spoke with many practitioners who believe the dissipating claimant assertion to be true based on personal experience.<sup>108</sup> In fact those claimants who forgo the option of a structured settlement are said to often exhaust their lump sum within the commonly cited five-year period.<sup>109</sup>

On the other hand, it is likely that those who would have settled for a lump sum but for the tax exemption are necessa-

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103. *Id.* Others confirm that NSSTA at one time considered performing such a study. Dyer Interview, *supra* note 7 (noting that such a study was considered in the mid-1990s, but would be very difficult to perform).

104. *Id.* Dyer believes that if a study were performed, the statistic would be confirmed. *Id.* When asked about proving that recipients of lump sums frequently dissipate the money too quickly, one NSSTA consultant said, "we have been trying to wrap our hands around that for some time." Arnold E-mail, *supra* note 7. The consultant said that though the industry has "tried to quantify it, it is substantially impossible to prove." *Id.* With good reason, he noted the difficulty to define exactly what constitutes dissipation, be it a plaintiff exhausting an award meant to last six years within four, or an award meant to last fifty years within five. *Id.*

105. Following the publication of an article citing the 90%-5-year statistic in 2009, LeCarpentier, *supra* note 24, at 14, Tacker LeCarpentier was contacted by organizations and individuals, including NSSTA. E-mail from Edward "Tacker" C. LeCarpentier, Director, Annuities and Structured Products, to author (June 10, 2009, 6:26:14 EST) (on file with author). He was told that the statistic was not grounded in any known study. "NSSTA in particular was discouraging [the statistics'] use." *Id.* In re-print, LeCarpentier deleted the statistic from the article.

106. Arnold E-mail, *supra* note 7.

107. Some believe much of the dissipating claimant argument to be imagined. See Telephone Interview with Matt Bracy, General Counsel, Settlement Capital Corp. (Mar. 12, 2009).

108. See *supra* note 7.

109. Meligan Interview, *supra* note 7.

rily more risk-averse and budget-conscious than those claimants who the author has learned of anecdotally. Anecdotal evidence is just that, inherently flawed due to the human practice of assigning such evidence too much weight, increasing its subjective probability.<sup>110</sup> This is likely to be particularly common when the events in question, here the exhaustion of large lump sums by former personal injury claimants, are “dramatic and salient.”<sup>111</sup> Such psychology research suggests that the available anecdotal evidence of lump sum settlement dissipation may be biased toward memories of financial ruin, as opposed to those of financial responsibility. Therefore, this Note puts forth simply that the information available in 1982, 1999, and currently, is simply insufficient to conclude that personal injury claimants irresponsibly spend lump sum payments.<sup>112</sup>

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110. See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207 (1973).

111. See *id.* at 228. For example, a doctor will likely remember depressed patients who attempted suicide better than a depressed patient who did not. *Id.* at 227-31 (referring to this phenomenon as the “availability heuristic” because they predict one’s judgment of an event’s frequency to be based on the ease with which one recalls similar instances). Because the doctor will recall the memorable patients with greater ease, he may overestimate the frequency with which depressed patients commit suicide. *Id.* at 228-29. This increase in “subjective probability” is a common experience. See *id.* at 230 (noting that many experience some form of increased subjective probability after witnessing a distinct or traumatic event). For example, one might be more concerned about a car accident just after witnessing another. *Id.* at 230. Equally, once the alleged lump sum statistics anchored expectations, anecdotal evidence through recalled observations may have become less trustworthy. See Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 *J. OF PERSONALITY & SOC. PSYCHOL.* 437 (1997) (reviewing literature on the “anchoring effect”); Daniel Cervone & Barton W. Palmer, *Anchoring Biases and the Perseverance of Self-Efficacy Beliefs*, 14 *COGN. THERAPY & RES.* 401 (1990).

112. This is not to say that structured settlements’ ability to schedule receipt of moneys is a problem. In fact, in cases of uncertain future life expectancy and continuing medical expenses, the use of an annuity is invaluable. Pryor, *supra* note 23, at 1783. The structure that annuities provide can be invaluable in other situations as well, especially where it is unlikely that moneys will be effectively administered. Andrada, *supra* note 23, at 469.

V.  
RHETORIC OF THE DISSIPATING CLAIMANT

Structured settlement proponents who use what Adam F. Scales calls the “Image of the Squandering Plaintiff”<sup>113</sup> belie the speculative nature of the assertion. Scales argues that the image carries “intuitive appeal,”<sup>114</sup> largely because most high-value lawsuits derive from work-related accidents.<sup>115</sup> Such claimants typically lack any experience investing large sums of money.<sup>116</sup>

One might argue that the language used to describe claimants, who after all are typically the victims of others’ negligence, has been palpably demeaning.<sup>117</sup> For example, one author writes, “It is human nature that large sums of money are tempting to spend. . . . A structured settlement with an up front cash payment followed by lifetime benefits may allow the plaintiff to indulge his dream of a new red Ferrari, but it also assures that a plaintiff who has extraordinary financial needs will continue to have funds available into the future as needed.”<sup>118</sup> In fact, the very word used to describe claimants’ dissipation of lump sum settlement monies—“squander”<sup>119</sup>—carries a particularly derogatory tone.

Scales sharply criticizes the proponents of structured settlements. In 2002, he wrote, “What is objectionable in the rhetoric of structured settlement enthusiasts is the unsubtle attribution to tort claimants of characteristics, values, and habits that are generally held in contempt in American political discourse: a lack of self-control, and the concomitant propensity to wind up on welfare.”<sup>120</sup> He continues, “An essential element of the discussion has been the assumption that successful tort

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113. Scales, *supra* note 16, at 869.

114. *Id.*

115. *Id.* (citing INSURANCE SERVICES OFFICE, CLOSED CLAIM SURVEY FOR COMMERCIAL GENERAL LIABILITY: 1995 SURVEY RESULTS, 8 (1996)).

116. *See* Scales, *supra* note 16, at 869.

117. The belief can be analogized to what President George W. Bush, in discussing education policy, called the “soft bigotry of low expectations.” Sam Dillon, *Democrats Make Bush School Act an Election Issue*, N.Y. TIMES, Dec. 23, 2007, at 1 (quoting Pres. George W. Bush).

118. Goldberg & Mauro, *supra* note 16, at 44.

119. *See supra* note 21 and accompanying text (discussing use of the word “squander” instead of “dissipate”).

120. Scales, *supra* note 16, at 873.

claimants simply cannot be trusted with large sums of money. There has been surprising unanimity on this point, particularly among commentators who are allied with the defense bar and insurance industry.”<sup>121</sup>

However, the rhetoric may be changing. The NSSTA web site cites the risk of lump sum dissipation, but does so without any discussion of irresponsibility.<sup>122</sup> And, as noted, NSSTA representatives have begun calling authors who rely on the 90%-5-year statistic to discourage its use.<sup>123</sup> Unfortunately, commentators and proponents of structured settlements continue to cite the high frequency of dissipation as a proven fact.

It is appropriate to hypothesize and speculate, or to cite anecdotal evidence, in arguing that structured settlements will promote the financial security of personal injury claimants. However, generalizations from anecdotal evidence lack sufficient credibility. For such claims to be made, and for the tax exclusion to be truly justified, a modern American study is needed.

## VI.

### CONCLUSION

The tax exclusion for structured settlements was founded upon, and meant to counteract, the occurrence of personal injury claimants dissipating single lump sum settlements. However, in legislating this subsidy, Congress failed to establish the frequency of such dissipation.

There is consensus in the structured settlement industry, among a broad cross-section of interests, that claimants often prematurely exhaust lump sum settlements. However, as Malcolm Gladwell says, instinct should be matched with deliberation.<sup>124</sup> A modern American study is needed to ground the structured settlement subsidy in empirical and substantiated data.

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121. *Id.* at 869.

122. National Structured Settlements Trade Ass’n, *Learn More*, <http://www.nssta.com/i4a/pages/index.cfm?pageid=3290> (last visited May 22, 2009).

123. *See supra* note 105.

124. *See* MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 141 (2005).

## APPENDICES (THE SURVEYS)

A. *The Lack of Evidence for the 90%-Five-Year Statistic:  
Three Non-Sources*

Appendix A reviews three sources that have been or might be cited for the most commonly cited statistic in structured settlement literature<sup>125</sup>—that 90% of personal injury lump sum recipients prematurely dissipate their monies. These sources are a 1959 worker compensation study,<sup>126</sup> a 1947 railroad compensation study,<sup>127</sup> a 1983 Australian accident victim compensation study,<sup>128</sup> and a 1978 British personal injury study.<sup>129</sup> As will be shown, they do not bear out the statistic.

One treatise on structured settlements, by Paul Lesti, suggests that the 90% statistic is “usually attributed”<sup>130</sup> to a 1971 study investigating how widows used death benefits.<sup>131</sup> The study surveyed the use of funds by widows two years after they received an average of \$9,950.<sup>132</sup> Lesti explains that the study found that participants spent “much of the money from the death benefits within 18 months.”<sup>133</sup> 24% of widows exhausted their life insurance proceeds in the immediate period upon their spouses’ deaths.<sup>134</sup> It is unclear how this would lead to the 90% dissipation statistic, which does not appear to be in the study.<sup>135</sup> Incidentally, the study interviewed widows two years after receiving their benefits, not five.<sup>136</sup>

Lesti and others citing the widows’ study and subsequent articles have noted substantial differences between the participants and personal injury plaintiffs, such as award size, age,

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125. LESTI, *supra* note 26, § 3:6.

126. MORGAN, *supra* note 28.

127. U.S. RAILROAD RETIREMENT BOARD, *supra* note 29.

128. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 76, at 15 (citing COLIN BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 10-12).

129. ROYAL COMMISSION, *supra* note 77.

130. LESTI, *supra* note 26, § 3:6.

131. *Id.* (citing THE WIDOWS STUDY, *supra* note 29, vol. 2 (1971)). At least one commentator has since disagreed with Lesti. See Scales, *supra* note 16, at 871 n.37 (“My reading of this study does not sustain Lesti’s suggestion that [the Widow Study] is the source of the ‘90%’ statistic.”).

132. THE WIDOWS STUDY, *supra* note 29, vol. 2, at 70.

133. LESTI, *supra* note 26, § 3:6.

134. THE WIDOWS STUDY, *supra* note 29, vol. 2, at 70.

135. See *id.*, vol. 1-2.

136. *Id.*



and “need to make a settlement ‘last.’”<sup>137</sup> Commentators have since criticized the studies’ application to possible structured settlement plaintiffs for similar reasons.<sup>138</sup> For example, more than half the survey population received less than \$5,000.<sup>139</sup> Of those in that group, 60% exhausted the proceeds simply by paying final bills and immediate expenses.<sup>140</sup> In fact, a different study on the use of worker compensation lump sums simply ignored a similar widows’ survey on the use of death benefits because “the two groups [of worker compensation claimants and widowed life benefit claimants] were so different that a comparison would be of no value.”<sup>141</sup> Moreover, those in the industry who so frequently cite the widows’ study ignore one of its most important findings: unwise spending of money was found to be “very much the exception.”<sup>142</sup> Once 24% of the total insurance proceeds were spent on the immediate post-death period, a full 54% of the original proceeds were placed into liquid savings or investments.<sup>143</sup> In fact, less than 5% of the widows spent any of the money on vacation, purchasing appliances, providing assistance to relatives, or to purchase a home,<sup>144</sup> “the very tableau of the assertedly ill-considered dispositions of the squandering recipient.”<sup>145</sup>

Scales suggests that the source of the 90% statistic might derive from a 1936 study<sup>146</sup> surveying the use of workers’ compensation awards.<sup>147</sup> The study surveyed 322 former claimants receiving an average lump sum of \$3,751.<sup>148</sup> Much like the widows study, it is unclear why this study would be cited for the

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137. LESTI, *supra* note 26, § 3:6.

138. See Scales, *supra* note 16, at 871.

139. THE WIDOWS STUDY, *supra* note 29, vol. 2, at 67.

140. *Id.* at 68. Where there was more than \$5,000 of life insurance, over 90% of widows had some proceeds left after the post-death period. *Id.*

141. Norcross, *supra* note 29, at 32 (also noting a higher average payment of \$13,000).

142. THE WIDOWS STUDY, *supra* note 29, vol. 2, at 76.

143. *Id.* at 70.

144. *Id.* at 77. The less than 1 in 20 figure applies to those with savings or investments. *Id.* Thus, the proportion of those who used their money on such items would be far less than even 1 in 20.

145. Scales, *supra* note 16, at 871 n.39.

146. See generally Norcross, *supra* note 29.

147. Scales, *supra* note 16, at 870-71.

148. Norcross, *supra* note 29, at 17. At the time of interview, 45% of participants were employed. *Id.* at 27.

90% statistic.<sup>149</sup> Having closed their cases between 1930 and 1933,<sup>150</sup> by their final interview for the 1936 study, only 30% of participants had any of the remaining lump sum left; only 20% of participants had more than 20% of the money left; only 10% of participants had more than 40% left; and only 5% of participants had more than 60% left.<sup>151</sup> Scales rightly argues that the study's historical context of the Great Depression renders it less analogous to the modern day.<sup>152</sup> However, much like the overlooked statement in the widows study finding unwise expenditures to be rare,<sup>153</sup> the 1936 Study estimated that a total of, "\$60,000 to \$70,000 [of participants' lump sums] was spent unwisely."<sup>154</sup> With 322 participants receiving an average of \$3,751,<sup>155</sup> for a total of \$1,207,822, the study estimates unwise spending of only 5% to 6%. Such a statistic can hardly be used as proof of problematic irresponsibility.<sup>156</sup>

A third, and last possible source of the 90% statistic is an ambiguous Canadian study cited to in the *Law Society's Gazette*.<sup>157</sup> The study, conducted by the Canadian insurance industry, surveyed the dissipation of large personal injury awards.<sup>158</sup> Apparently, the study found that 50% of claimants had exhausted their payment in one year; 70% had done the same in two; and 90% had done the same in five.<sup>159</sup> Of course,

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149. When contacted, Scales was unsure why he cited the study for that statistic. E-mail from Adam F. Scales, Associate Professor, Washington and Lee University School of Law (Feb. 3, 2009, 16:59:34 EST) (on file with author). Of course, he had written his article back in 2002.

150. Norcross, *supra* note 29, at 11.

151. *Id.* at 33.

152. Scales, *supra* note 16, 871.

153. THE WIDOWS STUDY, *supra* note 29, vol. 2, at 76.

154. Norcross, *supra* note 29, at 41.

155. *Id.* at 17.

156. Some will contest this point, as the study noted, "Living expenses represented the largest single purpose for which money was spent. This is to be expected." *Id.* at 34. It must be remembered that compensation payments make up for one's salary, among other things, which is typically used for living expenses. It is also important to note that the study concluded, "In the great majority of cases the money would have lasted longer and served a better purpose if paid in installments." *Id.* at 41. These two quotes are placed in a footnote because, as the study stated, the money was not spent unwisely the vast majority of the time.

157. Hulls, *supra* note 66, at 27.

158. *Id.*

159. *Id.*

with no citation it is impossible to determine the size of these "large cash awards,"<sup>160</sup> nor to independently review the conclusions drawn. Of course, this does not mean that the article has not been cited as evidence of the 90% statistic.<sup>161</sup>

This Note found no empirical data to support the 90%-5-year statistic.

### B. *Other Evidence of Lump Sum Dissipation*

Three studies might suggest that claimants accepting lump sums are spendthrifts.<sup>162</sup> However, these also have inherent deficiencies or lack applicability. The first of these is a 1959 University of Michigan study surveying 485 recipients of injured workers' compensation,<sup>163</sup> later cited by Ellen S. Pryor,<sup>164</sup> and relied upon by the "oft-cited,"<sup>165</sup> *Periodic Payment of Damages for Personal Injury*,<sup>166</sup> by Marcus L. Plant. Plant cited the University of Michigan study and a Michigan Law Revision Commission report,<sup>167</sup> before declaring that "other studies"<sup>168</sup> have found the 90%-5-year statistic, without discussing them. He concludes that the studies reveal an important benefit of periodic payments, "the avoidance of the danger of dissipation of the award [by plaintiffs] for purposes other than the maintenance and rehabilitation of the injured person."<sup>169</sup> In addition, this section will review a 1947 U.S. Railroad Retirement Board Study surveying 1,700 compensation cases,<sup>170</sup> cited by

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160. *Id.*

161. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 123.

162. The author was unable to track down the source of an uncited statistic; "Regarding the risks of receiving monies in lump-sum, Dorothy Dix reported that 80 percent of the money paid out in life insurance proceeds, regardless of the amount, was used up within five or six years!" HUVER, *supra* note 88, at 82. Dorothy Dix, was the most highly paid female journalist of her time. Austin Peay State University Library, Dorothy Dix, <http://library.apsu.edu/Dix/dix.htm> (last visited Feb. 4, 2009).

163. MORGAN, *supra* note 28, at 12.

164. Pryor, *supra* note 23, at 1780.

165. *Id.* (citing Plant, *supra* note 42).

166. Plant, *supra* note 42, at 1331.

167. *Id.* MICHIGAN LAW REVISION COMM'N, TENTH ANNUAL REPORT (1975).

168. Plant, *supra* note 42, at 1332 (citing Choulos, *supra* note 41, at 74).

169. *Id.* at 1331 (citing MORGAN *supra* note 28).

170. U.S. RAILROAD RETIREMENT BOARD, *supra* note 29, vol. 1, at 167.

Adam F. Scales,<sup>171</sup> and a 1983 study by the Law Reform Commission of New South Wales in Australia, surveying 263 accident victims.<sup>172</sup>

The 1959 University of Michigan study surveyed 485 injured workers who received compensation.<sup>173</sup> 341 of those interviewed had received lump sum payments, while 144 received weekly payments.<sup>174</sup> Though the study does not appear to have tracked the amounts spent, it did track the purchases lump sum recipients made with their award.<sup>175</sup> Plant focused on this part of the study, noting:

[A]bout forty percent of the recipients did not conserve the lump sum with a view towards using it to replace lost wages. Instead, they spent all or part of the award for such matters as payment of installment debt other than medical bills, payment of the home mortgage, purchases of furniture and household appliances, investments in the recipient's own business, and investments in other business ventures, such as real estate and stocks.<sup>176</sup>

The study did find that 68% of recipients spent lump sum money on expenses such as bills, rent, and food; 18% spent or saved money for medical bills; 17% spent money on debts other than medical bills; 12% spent money to pay off their home mortgage; 10% spent money to purchase durable goods such as furniture and appliances; 9% spent or saved money for retirement type expenses; 6% spent money to start a business; 5% placed money in a savings account; and 3% invested money in real estate or stocks.<sup>177</sup> However, the study did not ask, or at least did not report on the percentage of participants' budgets that were used on such items.<sup>178</sup> Thus, any conclusion that the lump sum payments were not spent wisely lacks comparable context.

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171. Scales, *supra* note 16, at 871 (citing U.S. RAILROAD RETIREMENT BOARD, *supra* note 29, at 166-76).

172. NEW SOUTH WALES LAW COMMISSION, *supra* note 76, at 15 (citing BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 10-12).

173. MORGAN, *supra* note 28, at 12.

174. *Id.*

175. *Id.* at 100.

176. Plant, *supra* note 42, at 1331 (citing MORGAN, *supra* note 28, at 101).

177. MORGAN, *supra* note 28, at 101 tbl. VI-9.

178. *See id.* at 96.

Equally interesting is the study's emphasis on the money used for employment rehabilitation purposes. For example, the section entitled "Uses of the Settlement Money,"<sup>179</sup> begins with the assumption "that these settlements are made to allow the man to rehabilitate himself, start a business or get special training."<sup>180</sup> While such an assumption may be logical where the goal of the Workmen's Compensation Law, the studied policy, is on returning the worker to employment,<sup>181</sup> such an assumption may not be appropriate for analyzing whether personal injury lump sums will be used effectively. In addition, Ellen S. Pryor makes the argument that the use of compensation for purposes not intended or related to the injury is not necessarily a problem:

It might be that allocating the money to another need will actually end up minimizing the losses for which the plaintiff was compensated. For instance, if this mother is able to fund the necessary schooling and therapy for her child, her diminished stress and fatigue might enable her to achieve psychological recovery and strength more quickly. This possibility increases when one considers that recovery and rehabilitation are deeply linked to psychological and emotional factors, and that our psychological and emotional selves are connected to familial and interpersonal webs. . . . [L]oss-minimization is not a necessary casualty just because the plaintiff allocates the settlement funds to other needs.<sup>182</sup>

Thus, the University of Michigan finding that lump sums were most often used for living expenses such as bills, rent, and food, may not be particularly problematic.

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179. *Id.* at 100.

180. *Id.*

181. *See id.* at 12 (implying that the goal is to return workers to employment as quickly as possible).

182. Pryor, *supra* note 23, at 1782 (citing ENABLING AMERICA: ASSESSING THE ROLE OF REHABILITATION SCIENCE AND ENGINEERING 165 (Edward N. Brandt, Jr. & Andrew M. Pope eds., 1997); *cf.*, HOME HEALTH AND REHABILITATION: CONCEPTS OF CARE 262, 279 (Bella J. May ed., 2d ed. 1999) (noting that factors external to the injury, such as the stress involved with providing general financial support for the costs of living, can weigh heavily on the emotional wellbeing of injured parties and their caregivers)).

Lastly, even if the study does not speak of the lump sum recipients' use of money positively,<sup>183</sup> the study may not be applicable to today's lump sum recipients. First of all, the median settlement in the study amounted to between \$2,000 and \$2,500,<sup>184</sup> 67% of the settlements falling under \$3,000.<sup>185</sup> Second, the participants' injuries were not particularly grave. In fact, 55% of those who settled were back at work less than two years after settling.<sup>186</sup> 31% were back at work before settling.<sup>187</sup> It is probably also worth noting that while 37% of weekly payment recipients returned to work within six months, only 15% of lump sum recipients did.<sup>188</sup> Conversely, while 15% percent of weekly payment recipients failed to return to work for more than six months, 36% of lump sum recipients did.<sup>189</sup> This suggests that lump sum recipients were, on average, worse off after their injury. Thus, any comparing may be inherently problematic.

Marcus L. Plant's article also relies<sup>190</sup> on a report issued 16 years later.<sup>191</sup> In 1975, the Michigan Law Revision Commission published a report recommending a statute mandating

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183. The study did find that "[t]hose who took lump sum settlement . . . were more dissatisfied with their financial adjustment," MORGAN, *supra* note 28, at 104, that while 12% of weekly payment recipients believed their medical care was not satisfactory, 25% of lump sum recipients did, *id.* at 12, and that "from the injured workers' point of view, the primary objectives of the Workmen's Compensation Law (minimum maintenance of the worker and his return to productive work) are not being adequately fulfilled in practice, particularly with respect to lump sum settlements. Nor are these settlements being used for the productive rehabilitative uses for which they were intended." *Id.*

184. *Id.* at 96.

185. *Id.* at 12.

186. *Id.* at 13.

187. *Id.*

188. *See id.* at 20. This calculation does not account for those not back to work for non-injury reasons.

189. *See id.* This calculation does not account for those not back to work for non-injury reasons, or those "[n]ot ascertained." *Id.* While the study's multiple regression analysis does not find a statistically significant effect between return to work and type of settlement, *id.* at 128-35, the variable "[b]ack at work", *id.* at 128, accounts for a worker's return to part-time or full-time work, rather than their speed of return to either after their injury. *Id.* at 128-29.

190. Plant, *supra* note 42, at 1331 (citing MICHIGAN LAW REVISION COMM'N, *supra* note 167, at 129-30).

191. MICHIGAN LAW REVISION COMM'N, *supra* note 167.

deferred damage payment awards in personal injury award cases worth over \$100,000, where a court finds a party likely to become dependant on the state if they exhaust a lump sum award.<sup>192</sup> Preceding its recommendation, the Commission wrote, “the damage award is paid to the plaintiff who very frequently has little capacity for exercising sound judgment as to the making of investments with his new found riches. Often too, the plaintiff lacks the discipline to conserve those assets to meet his lifetime needs, particularly where as a result of those injuries he is unable to support himself by normal employment.”<sup>193</sup> Moreover, it stated that such plaintiffs “often find themselves a few years later without adequate means for their support after having expended or dissipated the sums which they recovered. Such persons frequently become public charges requiring the expenditure of public funds for their future needs for medical expenses, support and maintenance.”<sup>194</sup> However, the Law Revision Commission makes these statements without citing to evidence of such irresponsible lump sum dissipation.<sup>195</sup>

Thus, Plant’s article relies on only one study’s statistic, that of the 1959 University of Michigan study.<sup>196</sup> Nevertheless, the article is cited by courts for the proposition that “various studies have indicated that a significant percentage of injured claimants who receive lump sum settlements or awards dissipate those funds in a relatively short period of time and often become dependent upon public assistance for support.”<sup>197</sup>

A less cited 1947 study,<sup>198</sup> used in the Scales article,<sup>199</sup> surveyed approximately 1,700 railroad compensation cases.<sup>200</sup> The study categorized the participants by level of injury and compensation received, not including legal fees, court costs,

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192. *Id.* at 129-31.

193. Plant, *supra* note 42, at 1331-32 (quoting MICHIGAN LAW REVISION COMM’N, *supra* note 167, at 129).

194. MICHIGAN LAW REVISION COMM’N, *supra* note 167, at 129-30.

195. Plant, *supra* note 42, at 1332 (citing MICHIGAN LAW REVISION COMM’N, *supra* note 167, at 129).

196. MORGAN, *supra* note 28, at 12.

197. *In re Fee*, No. 06 CV 1423, 2006 WL 3478944, at \*3 (Pa. Com. Pl. June 30, 2006).

198. *See Scales*, *supra* note 16, at 871.

199. *Id.* at 871 (citing U.S. RAILROAD RETIREMENT BOARD, *supra* note 29, vol. 1, at 167).

200. U.S. RAILROAD RETIREMENT BOARD, *supra* note 29, vol. 1, at 167.

medical costs, and so forth.<sup>201</sup> Thus, there are three injury groups: fatal, permanent total, and permanent partial.<sup>202</sup> There were also three compensation groups: Group 1 received less than \$1,000; Group 2 received between \$1,000 and \$4,999; and Group 3 received over \$5,000.<sup>203</sup>

Within the fatal group, about \$2.2 million was paid out for 443 cases, averaging \$5,000 per case.<sup>204</sup> Of that, \$1.6 million had been used. Approximately 66% of the \$1.6 million was invested, the majority of it in securities.<sup>205</sup> The study noted with concern that more than 20% of the money had been spent on living expenses.<sup>206</sup>

Within the permanent total disabilities group, \$1.5 million was paid out for 190 cases, averaging \$8,150.<sup>207</sup> Of that, \$1.2 million had been used.<sup>208</sup> Almost 66% of the \$1.2 was invested.<sup>209</sup> Again, over 20% of the money had been spent on living expenses.<sup>210</sup>

Within the permanent partial disabilities group, \$1.9 million was paid out for 529 cases, averaging \$3,600.<sup>211</sup> Of that, about \$1.6 million had been used.<sup>212</sup> 54% of the \$1.6 million was invested.<sup>213</sup> 29% of the money had been spent on living expenses.<sup>214</sup>

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201. *See id.*

202. *Id.* at 169, tbl.45.

203. *Id.* at 171, tbl.46.

204. *See id.* at 168.

205. *See id.*

206. *See id.* at 170.

207. *Id.*

208. *See id.*

209. *See id.*

210. *Id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*



	Fatal	Permanent Disability	Permanent Partial Disability
Average Case Value	\$5,000	\$8,150	\$3,600
% Spent by Type	100%	100%	100%
Investments	67%	64%	54%
Living Expenses	21%	23%	29%
Debt Repayment	8%	13%	17%
Gifts/Loans to Relatives	4%	0%	1%

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Though each group invested more than half the received compensation, the study argued,

[W]hile the total proportion of funds invested may seem impressive, when measured against the needs those investments have to fill they seem to involve only a fraction of the cases, and only a fraction of the investments show any real measure of adequacy. . . . [D]isposition is not generally such as to offer assurance of a stable substitute for the loss of wages incurred in the severe and fatal injuries.<sup>216</sup>

The study communicated a clear concern with the substantial use of settlement monies for living expenses.<sup>217</sup> However, as Scales notes, the “noninvestment expenditures constituted the very items wage earners might be expected to purchase – ordinary living expenses and repayment of debts.”<sup>218</sup> In addition, the study notes the general inadequacy of the compensation provided.<sup>219</sup> Thus, the survey is hardly a finding of lump sum recipient irresponsibility.

An Ireland Commission cited<sup>220</sup> to a 1983 New South Wales Law Reform Commission study from Australia.<sup>221</sup> Surveying 263 accident victims in New South Wales, the study in-

215. *See id.* at 171, tbl.46.

216. *Id.* at 174, 176.

217. *See id.*

218. Scales, *supra* note 16, at 872.

219. *See* U.S. RAILROAD RETIREMENT BOARD, *supra* note 29, at 176.

220. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 123-24 (citing BASS HUMAN RESOURCES, *supra* note 76).

221. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 76, at 15, 16 (citing BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 10-12).

terviewed 70% of traffic accident victims who received in excess of \$100,000, and a representative sample of traffic accident victims who received between \$20,000 and \$35,000.<sup>222</sup> After six years, the study found that 34% of the smaller range recipients, and 50% of the \$100,000-plus recipients were in a “financially vulnerable position.”<sup>223</sup> At that time, 30% of the smaller range recipients and 19% of the \$100,000-plus recipients received social security benefits.<sup>224</sup> While 48% of the smaller range recipients were initially satisfied with their compensation, the figure had fallen to 22% six years later.<sup>225</sup> While 70% of the \$100,000-plus recipients were initially satisfied with their compensation, the figure had fallen to 15% six years later.<sup>226</sup> Of course, without surveys on the percentage of structured settlement recipients satisfied with their compensation, these numbers are not particularly helpful.<sup>227</sup>

While 50% of \$100,000-plus recipients were in a “financially vulnerable position” six years after settlement, it is unclear if that is a result of irresponsible expenses. It could have resulted from inadequately sized settlements, for example.<sup>228</sup>

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222. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 76, at 15, n.3 (citing BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 10-12).

223. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 76, at 16, n.4 (citing BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 10-12). “Vulnerability” was defined as being in receipt of income-tested social security benefits or having a weekly income of less than \$150. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 76, at 16, n.4 (citing BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 72-73).

224. NEW SOUTH WALES LAW COMMISSION, *supra* note 76, at 16, n.5 (citing BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 76-77).

225. NEW SOUTH WALES LAW COMMISSION, *supra* note 76, at 16, n.8 (citing BASS HUMAN RESOURCES, *supra* note 76, vol. 1, at 55, 57).

226. *Id.*

227. A report prepared by the England Law Commission attempted to make comparisons, though with a sample of only nine participants. HOW MUCH IS ENOUGH?, *supra* note 28, at 231. Those surveyed received structured settlements worth between £95,000 and £1,000,000. *Id.* The report concluded, “In common with those who receive lump sum payments, initial satisfaction with the amount of money received at the time of the settlement can often turn to dismay later when, with the benefit of hindsight, compensated accident victims recognise the real costs of physical impairment, the true extent of their losses, and the imprecision of assessments of future needs and expenses at the time of the settlement.” *Id.* at 234.

228. HINDERT, *supra* note 13, § 1.03[3], at 1-21 (citing Barbara B. Kolbach, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 Iowa L. Rev. 138, 142-44 (1978)) (“Studies indicate that generally lump sum

Without a comparable sample of periodic payment recipients, it is impossible to assess whether the lump sum was factored into recipients' "vulnerable position."

Another British study providing statistics on the use of personal injury compensation was produced in a large 1978 review on British personal tort law.<sup>229</sup> The Royal Commission on Civil Liability and Compensation for Personal Injury survey, unfortunately, is not entirely clear. It lists the percentages of the lump sums that were used on different types of expenditures by those surveyed after sustaining injuries between 1966 and 1972, and separately, of those who sustained injuries in 1973.<sup>230</sup> The conclusions' significance is limited because it is unclear how many participants' answers are represented in the percentages given.<sup>231</sup> For both time periods, only those "who had already spent or decided how to spend their money"<sup>232</sup> are included, and the study does not state how many participants this includes. It appears that 215 claimants received compensation in the 1973 group, though it is unclear how many received compensation in the 1966 to 1972 group.<sup>233</sup> Even worse, the study does not state how much was spent on the different types of expenditures. The payments reported by those injured in 1973 were also fairly small, averaging £249.<sup>234</sup>

	1973 Injuries	1966-1972 Injuries
Replacement of Damaged Property	13.9%	6.5%
Payment of Debts/General Living Expenses	51.5%	37.3%
Luxuries/Having a Holiday	32.7%	39.0%
Investing Some/All	5.0%	9.3%
Banking Some/All	11.9%	13.1%
Paying Off Mortgage	5.0%	4.0%
Remainder		6.8%

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awards and settlements have been inadequate to compensate victims for their actual losses and future needs."); *see also* Scales, *supra* note 16, at 898.

229. ROYAL COMMISSION, *supra* note 77.

230. *Id.*, vol. 2, at 125.

231. *See id.*

232. *Id.*

233. *Id.* at 123.

234. *Id.* at 125.

235. *Id.*

Of the 1966 to 1972 group, 22% invested or placed lump sum monies into savings, while 39% spent lump sum monies on luxuries or holidays.<sup>236</sup> Of the 1973 group, 17% invested or placed lump sum monies into savings, while 33% spent lump sum monies on luxuries or holidays.<sup>237</sup>

Though the high percentage of lump sum recipients that spent money on luxuries or holidays appears to suggest that irresponsible spending is common at first glance, it is inconclusive for two reasons. First, it is entirely unclear how much those recipients spent on luxuries and holidays. Each of the 33% and 39% of recipients may have only spent 1% of their lump sum on such things. Secondly, it is inconclusive what can be drawn from this study, simply because it is unclear how many of the survey participants answered each question.

Thus, Appendix B concludes by noting that the available evidence that some might point to for the proposition of the dissipating plaintiff is inconclusive at best.

### C. *Evidence of Responsible Lump Sum Usage*

There are also several more recent studies<sup>238</sup> suggesting that personal injury claimants are, in fact, responsible. In addition, there are reports,<sup>239</sup> much like the Michigan Law Revision Commission report discussed above,<sup>240</sup> finding that the evidence does not prove the dissipating claimant hypothesis. This section will first introduce an Irish report,<sup>241</sup> which led the author to several new studies, and also makes conclusions subsequent to its survey of studies. After reviewing the report's several citations, the section will review an Australian study from the University of Adelaide<sup>242</sup> and a Canadian report's conclusions.<sup>243</sup> As the reader will note, all of the studies are

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236. *Id.*

237. *Id.*

238. See Neave & Howell, *supra* note 81, at 85; ENGLISH LAW COMMISSION, *supra* note 79; LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 123-24 (citing CORNES, *supra* note 80).

239. See LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 121-22 (implying that the dissipating plaintiff theory is exaggerated).

240. Plant, *supra* note 42, at 1331-32 (citing MICHIGAN LAW REVISION COMM'N, *supra* note 167, at 129).

241. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 121.

242. Neave & Howell, *supra* note 81, at 85.

243. MANITOBA LAW COMMISSION, *supra* note 29.

foreign. Thus, they are subject to some of the same criticisms as the previously cited studies. While their modernity does make them more analogous, Americans have an especially long history of consuming through debt.<sup>244</sup> Though other countries have begun moving in the American direction,<sup>245</sup> this Note concedes that the international comparisons are not perfectly analogous.<sup>246</sup> The important takeaway is that there are substantial criticisms to those studies cited in the previous sections, and international evidence suggesting that recipients of lump sums can, and often do, act responsibly.

We begin with the Law Reform Commission of Ireland report, referenced earlier for its citation to the New South Wales's report.<sup>247</sup> The report is not without fault. As "evidence on the issue,"<sup>248</sup> it cites two less-than-worthy sources.<sup>249</sup> First, it cites an article noting,<sup>250</sup> without specific reference, "A recent study shows that 90% of all major windfalls – be they in the form of sweepstakes, lotteries or court settlements – has been squandered within five years."<sup>251</sup> Second, it cites another article referencing an untitled and uncited study mentioned earlier.<sup>252</sup>

However, subsequent to these citations, the Irish report surveys an array of valid sources.<sup>253</sup> It is therefore appropriate to provide the reader with the report's introductory comments, no doubt generated after reviewing the report's many sources. Having noted that the lump sum dissipation problem

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244. See generally JOHN W. WHYBROW, *AMERICAN MANIA: WHEN MORE IS NOT ENOUGH* 40 (2005) ("The promotion of personal debt as an engine of economic growth has a long history in America. Indeed, buying dreams on credit is an American invention.")

245. See *id.* at 207.

246. One could also argue that the countries cited in these studies provide greater benefits to their citizens. The lack of dissipation could result from the lack of control over much of the medical expenses. Thus, the data are not necessarily applicable to American lump sum recipients.

247. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 122-23 (citing LUMP SUM ACCIDENT COMPENSATION, LAW REFORM COMMISSION OF IRELAND (1983)).

248. *Id.* at 122.

249. *Id.*

250. *Id.* at 122 (citing Keene & Ross, *supra* note 40, at 25).

251. Keene & Ross, *supra* note 40, at 25.

252. See Hulls, *supra* note 66, at 27.

253. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 122-24.

has been “identified”<sup>254</sup> in the United Kingdom and the United States, the report reads, “It would be wrong to exaggerate this problem.”<sup>255</sup> The report continues, “Studies recently conducted by the Law Commission<sup>256</sup> and the Disability Management Research Group at the University of Edinburgh<sup>257</sup> have shown that the risk of dissipation is less than was widely believed and that those awarded very high damages are least likely to fritter away their compensation.”<sup>258</sup>

The report first cites to the 1994 English Law Commission Report that surveyed 761 claimants who had received personal injury damages awards two to ten years prior,<sup>259</sup> a reproduction of which would later be cited by Ellen S. Pryor, in *After the Judgment*.<sup>260</sup> The English report categorized the participants into four groups of different lump sum amounts: £500 - £19,999 (Group 1), £20,000 - £49,999 (Group 2), £50,000 - £99,999 (Group 3), and those in excess of £100,000 (Group 4).<sup>261</sup> At the time of the survey, 24% of Group 1, 35% of Group 2, 53% of Group 3, and 51% of Group 4, had preserved about half or more of the original lump sum payment.<sup>262</sup> 10% of those in Group 4 had fully exhausted their award.<sup>263</sup>

The English study also assessed how quickly these groups spent the award over time, finding that those receiving less money exhausted their award more quickly. For those surveyed within three years of receipt, 71% of Group 1, and approximately 33% of Group 4, had spent over half the award.<sup>264</sup> For those surveyed more than four years after receipt, 56% of

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254. *Id.* at 121.

255. *Id.*

256. HOW MUCH IS ENOUGH?, *supra* note 28.

257. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 123-24 (citing CORNES, *supra* note 80).

258. *Id.* at 122-23.

259. ENGLISH LAW COMMISSION, *supra* note 79, ¶ 1.7 (aiming to “explore what levels and what sorts of damages people receive for personal injuries, how people use their compensation payments and why they used the funds in the way reported”).

260. Pryor, *supra* note 23, at 1779 (citing HOW MUCH IS ENOUGH?, *supra* note 28). There are some very slight differences between the No. 224 and No. 225.

261. ENGLISH LAW COMMISSION, *supra* note 79, ¶ 1.7.

262. *Id.* ¶ 2.29.

263. *Id.*

264. *Id.*

Group 2, and 45% of Group 4, had spent over half the award.<sup>265</sup> The study concludes, “these figures show that those with serious injuries, who receive larger awards, are most concerned to preserve their funds for the future, and this would naturally make them risk-averse.”<sup>266</sup> Supporting this conclusion was the finding that while 10% of Group 1 invested in stocks or securities, 60% of those in Group 4 did.<sup>267</sup> Similarly, while 26% of Group 1 obtained investment advice, 84% of Group 4 did.<sup>268</sup>

In remarking that the “risk of dissipation is less than was widely believed,”<sup>269</sup> the Ireland report also cites to a smaller 1993 study from Edinburgh surveying 83 participants of settlements in excess of £150,000.<sup>270</sup> The Scottish study found, “as far as could be determined, the (often substantial) residue of awards had been placed in savings and/or investments to cover future contingencies. . . . There were no examples of fiscal improvidence or profligacy. Rather, there were many indications of prudent, future-oriented financial planning.”<sup>271</sup> The report equally found that other than purchases of property,<sup>272</sup> “awards were usually conserved in anticipation of future contingencies.”<sup>273</sup>

The author also located a 1992 study conducted by the University of Adelaide, in Australia, surveying 227 road accident victims paid in excess of \$25,000 as a result of settlements or verdicts in 1980.<sup>274</sup> The primary purpose of the study was to investigate “the extent to which compensation was sufficient to provide restitution for economic loss.”<sup>275</sup> The study found that approximately 70% invested the majority of their payment in a

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265. *Id.*

266. *Id.*

267. *Id.* ¶ 2.30.

268. *Id.*

269. LAW REFORM COMMISSION OF IRELAND REPORT, *supra* note 33, at 122-23.

270. *Id.* at 124 (citing CORNES, *supra* note 80). At least two other law commission reports have cited to this study. See HOW MUCH IS ENOUGH?, *supra* note 28, at 161; ENGLISH LAW COMMISSION, *supra* note 79, ¶ 1.10.

271. HOW MUCH IS ENOUGH?, *supra* note 28, at 161 (citing CORNES, *supra* note 80).

272. *Id.* at 3.

273. *Id.* (citing CORNES, *supra* note 80, at 57-58).

274. Neave & Howell, *supra* note 81, at 85.

275. *Id.* at 39.

family home, business, or income producing investments.<sup>276</sup> Though the study does not track the speed of dissipation, it speaks to the use of lump sums.

Adam F. Scales also cited<sup>277</sup> a 1984 British survey of 152 tort claimants.<sup>278</sup> The study found that, "The majority used some or all of the money in a way which sought to preserve the benefit for a considerable period."<sup>279</sup> However, it also concluded, "The money is often used in the same ways as might be expected in the case of any unexpected lump-sum windfall, such as a win on the pools."<sup>280</sup> 18% of recipients spent some of the money on household goods, 13% on cars or motorcycles, 10% on presents or loans to relatives, and 7% on a holiday.<sup>281</sup> Of course, as with several of the other surveys, the participants are not necessarily analogous to possible structured settlement claimants. Out of the 152 surveyed, only 14 received more than £2,000, and only 2 received more than £10,000.<sup>282</sup> Also, as noted by Scales,<sup>283</sup> most recipients had returned to work by the time they received the damages.<sup>284</sup> Thus, it seems unlikely that these participants had sustained serious injuries.

The New South Wales Law Reform Commission provides another study performed in 1984.<sup>285</sup> This Traffic Accident Study consisted of 86 case studies based on in-depth interviews with recipients of lump sum compensation.<sup>286</sup> The majority of participants had received their lump sums more than 5 years prior to the study,<sup>287</sup> the majority of which consisted of sums between \$100,000 and \$500,000.<sup>288</sup> The study found that more than 50% of lump sums paid at least five years prior "have proved inadequate,"<sup>289</sup> while another 13% of participants were

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276. *Id.* at 58.

277. Scales, *supra* note 16, at 872 (citing HARRIS, *supra* note 29, at 120-22).

278. HARRIS, *supra* note 29, at 120-22.

279. *Id.* at 122.

280. *Id.*

281. *Id.*

282. *Id.* at 121.

283. Scales, *supra* note 16, at 872.

284. HARRIS *supra* note 29, at 120-22.

285. NEW SOUTH WALES LAW COMMISSION, *supra* note 76.

286. *Id.* at 18.

287. *Id.* at 22.

288. *Id.* at 23 (providing numbers adjusted to 1981 money values).

289. *Id.* at 26-27 (defining "inadequate" as, among other elements, an income of less than \$150 (gross) per week).



in a “financially vulnerable position.”<sup>290</sup> The study identified three factors for the unfortunate positions of these participants: inadequacy of the original compensation, mismanagement or dissipation, and failed business investments.<sup>291</sup> Of the 86 participants, the study identified only 7 who mismanaged their lump sum.<sup>292</sup> Of those, some received but ignored financial advice.<sup>293</sup> Two of the cases of mismanagement can be attributed to the brain damage resulting from the original accident.<sup>294</sup> The study identified 10 participants who were “double dipping,”<sup>295</sup> arranging investments so as to remain or become eligible for social security benefits.<sup>296</sup>

A 1983 Canadian study of automobile accident victims performed 17 in-depth interviews with claimants who received lump sum payments in excess of \$100,000.<sup>297</sup> The study found no evidence of irresponsible spending.<sup>298</sup>

In 1987, the Canadian Manitoba Law Commission issued a report recommending the adoption of a periodic payment system.<sup>299</sup> The report, citing to several studies to be discussed below, wrote, “Often, a plaintiff does not invest the award wisely, or at all, and the income earned on the lump sum together with the capital amount is inadequate to maintain him-

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290. *Id.* at 27. A financially vulnerable position was defined as having “adequate incomes and financial resources at the time of the Study, but their financial positions were precarious. In some cases it was anticipated by respondents that an event might occur, such as loss of employment or further deterioration in health, which would significantly reduce income or increase costs. In other cases, adequacy of income and financial resources was dependent on the continued provisions of free nursing and attendant care by family members.” *Id.* at 31.

291. *Id.* at 29.

292. *Id.* at 50.

293. *Id.*

294. *Id.*

295. *Id.* at 51.

296. *Id.*

297. REPORT BY THE AUTOMOBILE ACCIDENT COMPENSATION COMMITTEE: BRITISH COLUMBIA, 1983, 105 (1983).

298. *Id.* at 107. There were some committee members who disagreed with the conclusion that irresponsible dissipating is uncommon. *Id.* at 77. The committee also concluded that “misallocation of the compensation award may be fairly common. *Id.* at 76.

299. MANITOBA LAW COMMISSION, *supra* note 30.

self.<sup>300</sup> However, subsequently, the report states that the evidence is not conclusive:

[S]ome injury victims or fatal accident beneficiaries may simply squander their award; we do not, however, know the extent of this problem. . . . While the Commission accepts that some damage awards are dissipated by the recipients, we are not convinced that it is a problem meriting special attention. The prevention of dissipation alone does not justify the implementation of a system of periodic payments; it does, however, add weight to the other advantages of the system.<sup>301</sup>

Still, the report does make an important prediction—if periodic payments were made available and an option for damages, “the danger of mismanagement and dissipation of awards would be reduced.”

Thus, Appendix C concludes by noting that much international evidence supports the contention that personal injury lump sum recipients often spend their monies responsibly. While some will distinguish the cited studies as lacking applicability to American personal injury claimants, their modernity, relative to the studies standing in opposition, may render them the most applicable studies available.

Based on the three appendices’ review of available lump sum settlement dissipation studies, this Note concludes that generalizable data does not exist. A modern American study is needed to ground the structured settlement tax subsidy in statistically valid findings.

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300. *Id.* at 54 (citation omitted).

301. *Id.* at 55, 60.