

Lies, Damned Lies, and Statistics? Structured Settlements, Factoring, and the Federal Government

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INTRODUCTION

When Orion Olson was three years old, a dog assaulted him, causing serious vision and neurological damage and requiring plastic surgery. After Orion sued, the tortfeasor negotiated a settlement of \$75,000 to be distributed over five payments scheduled to begin when Orion turned eighteen. Before receiving the first payment, Orion dropped out of high school and eventually became homeless. His first payment of \$7500 disappeared quickly, and Orion needed cash. He saw an advertisement by J.G. Wentworth, a company offering to buy Orion's rights to the last four payments in exchange for an immediate lump sum payment. Of the \$67,500 still owed to Orion in future payments, J.G. Wentworth took \$51,400 and dispensed a meager \$16,100 to Orion. Within six months, the money was gone, and Orion was living out of his car.¹

Raymond White lost part of his leg to a New York City subway train. He agreed to accept monthly payments of \$1100 with annual 3 percent cost-of-living increases for the rest of his life. Six years after the accident, Raymond began selling his rights to the future monthly payments to J.G. Wentworth so that he could pay medical bills and buy a car. Of the \$198,000 still owed to Raymond in future payments, J.G. Wentworth took \$144,000 and gave Raymond a lump sum payment of \$54,000. Raymond used the money for living expenses, but the money ran out. And Raymond had to rely on public assistance to make ends meet.²

Each year, hundreds of thousands of people like Orion and Raymond are injured and sue for compensation.³ Most claimants choose to settle rather than take their chances at trial.⁴ Due to tax breaks promulgated in 1983, many claimants opt for structured settlements rather than lump sum settlements.⁵ A structured settlement splits the total settlement award into periodic payments affixed to a predetermined schedule, effectively turning the settlement into a right to receive a series of future payments.

* Notes & Comments Editor, *Indiana Law Journal*, Vol. 82; J.D. Candidate, 2007, Indiana University School of Law—Bloomington; B.S., 2003, Indiana University—Bloomington. Many thanks to my family and friends for their invaluable assistance and support. I am notably indebted to Terry Cushing, Ben Schechter, and my father for playing such ostensibly agreeable *advocati diaboli* during the research and writing processes for this and other projects.

1. Margaret Mannix, *Settling for Less*, U.S. NEWS & WORLD REP., Jan. 25, 1999, at 62.

2. *Id.* at 64.

3. See BUREAU OF JUST. STATS., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., FEDERAL TORT TRIALS AND VERDICTS, 2002–03 1 (2005) (reporting that federal courts disposed of 98,786 tort claims during the fiscal year 2003); Bureau of Justice Statistics, Key Facts at a Glance: State Tort Trials, <http://www.ojp.usdoj.gov/bjs/glance/tables/tortstatetab.htm> (last visited Jan. 11, 2006) (reporting that state courts handled 198,377 tort claims during 2003).

4. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1266 (2005) (“One [factor contributing to the long-term decline of trials] is the ascendance of a judicial ideology that commends intensive judicial case management and active promotion of settlements (with settlement seen as a result superior to trial).”).

5. See *infra* Part I.A.

Unsurprisingly, the creation of the structured settlement industry spawned an industry dedicated to purchasing claimants' rights to receive those future payments.⁶ Claimants take a gamble with factoring companies like J.G. Wentworth who purchase rights to future payments at an often dramatically discounted rate. Sometimes that gamble may succeed,⁷ but other times, it may fail, leaving the claimant dependent on outside funding sources to survive. In 2001, Congress attempted to rein in the abuses of the factoring industry by enacting I.R.C. § 5891. As this Note demonstrates, however, rather than thwarting factoring abuses, § 5891 legitimates factoring and has been embraced by the industry. The provision essentially ensures that factoring transactions receive court approval, lending legitimacy to the industry's malevolence toward tort victims.

The deeply troubling aspect of the tax provisions surrounding the structured settlement and factoring industries is the questionable foundation for the provisions' enactments. The sponsors of I.R.C. § 130⁸ proclaimed that tort victims were incapable of responsibly managing large monetary awards in the form of lump sums, requiring Congress to create incentives for tortfeasors to offer—and for tort victims to accept—structured settlements.⁹ When factoring companies began circumventing structured settlements, the sponsors of § 5891 again relied on evidence professing tort victims' inability to make sound financial decisions with their settlement awards in order to pass legislation regulating sales of structured settlements.¹⁰

Research has shown that the evidence hyperbolizing the “squandering plaintiff”¹¹ is unreliable, vitiating Congress's continued subsidization of the structured settlement and factoring industries under the guise of protecting unsophisticated victims. This Note discusses less than benevolent justifications for the tax provisions surrounding structured settlements, including relatively unknown lobbying efforts from the structured settlement industry, and the unique ability of the United States to control the benefits it receives from the tax breaks outlined in § 130 in tort suits against the federal government.

Part I of this Note reviews the creation of the structured settlement and factoring industries. Part II discusses the merits of the laws Congress has enacted to subsidize and subsequently protect those industries. Part III analyzes the tangle of policies that allows the United States to benefit from structured settlements as a defendant in federal tort claims. Part IV argues that the United States has unjustifiably restricted claimants' freedom to contract for settlements at considerable expense to the public fisc, while securing substantial profits for the structured settlement and factoring transaction industries. Without proper validation of the “squandering plaintiff,” Congress should

6. Within the industry, purchases of claimants' rights to receive future payments are called factoring transactions. See Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 898–900 (2002).

7. See Mannix, *supra* note 1, at 63–64 (discussing one fortuitous claimant who used the money from a factoring transaction to prevent foreclosure on her home and another claimant who used a factoring transaction to expand his business).

8. I.R.C. § 130 (2006) (creating tax incentives for defendants to offer structured settlements rather than lump sum settlements to tort victims).

9. See *infra* Part II.A.

10. See *infra* Part II.B.

11. See *supra* note 6, at 869 (using the label “squandering plaintiff” to describe the primarily anecdotal evidence of fiscally irresponsible tort victims).

repeal § 130 and § 5891 to streamline and enhance federal interests while ensuring that claimants' rights receive maximal attention and protection.

I. IN THE BEGINNING

A. *The Structured Settlement Industry*

The concept of structured settlements emerged in our legal dialogue in the mid-1950s and 1960s.¹² Claimants began accepting large settlements, and an alternative market to lump sum settlements evolved. The practice of spreading settlement awards over a series of future payments began to gain legitimacy and power in the 1970s when the Internal Revenue Service (IRS) issued three rulings outlining the federal tax consequences for structured settlements. Tort damages have been unilaterally excluded from the federal income tax since its inception,¹³ and the IRS rulings sought to maintain the tax-exempt nature of a tort settlement in structured form.¹⁴ These rulings were codified in I.R.C. § 104(a) in 1983.¹⁵ Section 104(a)(2) excludes any payments received by a claimant pursuant to a structured settlement for a tort claim from the claimant's taxable income, making structured settlements equal to lump sums in terms of the claimant's tax liability.

In addition to codifying the IRS rulings, Congress created I.R.C. § 130,¹⁶ igniting the explosion of structured settlements. Section 130 creates tax incentives for companies willing to finance periodic payments. In a windfall for the developing structured settlement industry, Congress conditioned § 130's tax benefits on defendants turning over their liability for the settlement awards to third-party insurers and annuity

12. See, e.g., Richard B. Risk, Jr., *A Case for the Urgent Need to Clarify Tax Treatment of a Qualified Settlement Fund Created for a Single Claimant*, 23 VA. TAX REV. 639, 641–42 (2004) (estimating that the structured settlement industry was created in the mid-1960s); Scales, *supra* note 6, at 863 (discussing *M & P Stores, Inc. v. Taylor*, 326 P.2d 804 (Okla. 1958), where the jury structured the plaintiff's damages into periodic payments scheduled over twenty years).

13. See Scales, *supra* note 6 at 865–66 (attributing Congress's disdain for adding “insult to injury” as a prominent reason for the exclusion of tort damages from federal income tax basis). *But see* 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, 870–71 (2001) (finding that Congress exempted personal injury awards because it believed that there was no gain associated with compensation for personal injuries).

14. See Rev. Rul. 79-313, 1979-2 C.B. 75 (holding that payments received by the claimant pursuant to a structured settlement were excludable under the claimant's taxable income because the claimant could not accelerate or increase the payments and thus had no control over the lump sum income); Rev. Rul. 79-220, 1979-2 C.B. 74 (holding that federal income tax exclusion of structured settlement payments applies to the full amount of the payments received rather than the settlement's discounted value when the defendant buys an annuity that fulfills the payments' obligations to the claimant); Rev. Rul. 77-230, 1977-2 C.B. 214 (holding that income earned from a trust held by the United States for the benefit of a federal tort claimant is excluded from the claimant's taxable income because the United States is regarded as the owner of the trust).

15. See *Damages for Personal Injury or Sickness, Tax Treatment of Periodic Payments*, Pub. L. No. 97-473, 96 Stat. 2605 (1983).

16. I.R.C. § 130 (2006).

issuers, who also benefited from § 130's tax structure.¹⁷ Once the parties agreed on a settlement sum, § 130 required the defendant to devise a payment schedule, ranging anywhere in length from a few months to the duration of the claimant's life.¹⁸ The defendant's liability insurer then purchased an annuity, generally from another insurance company. The annuity issuer then assumed the defendant's obligation to make the scheduled payments to the claimant.

This transfer of the payment obligation constituted a "qualified assignment" (qualified because it enabled both the defendant and the annuity issuer to receive the tax benefits of § 130).¹⁹ The annuity issuer was not taxed for the payment it received from the defendant to purchase the annuity.²⁰ The annuity issuer then invested the purchase money and used a portion of the investment income to increase the value of the annuity. Because the annuity issuer invested the defendant's purchase money and the annuity's value increased by absorbing portions of the investment income, the defendant could pay a settlement sum that cost less than the total annuity value the claimant would eventually receive.²¹ This tax treatment of structured settlements allowed defendants to release their liability for a much lower cost using periodic payments transferred to and distributed by a third party than lump sums paid directly by the defendant.²²

The annuity issuer was, however, taxed for the income it received—usually, a standard assignment fee of 4 percent of the annuity cost plus the annuity's investment returns—that exceeded the annuity cost.²³ This tax was offset, however, because the issuer presumably claimed the income as a business-expense deduction,²⁴ thereby opening a minimal-cost and low-risk market for the insurance industry to reap profits from structured settlements.²⁵

With such substantial legislative support from Congress—and the subsequent financial support from the U.S. Treasury, which essentially acts as a co-defendant for tortfeasors,²⁶ the structured settlement industry has boomed into a multibillion-dollar market. By 1991, structured settlement annuity sales totaled \$4 billion.²⁷ By 2005,

17. The tax benefits accrue if the assignment of the defendant's payment obligations meet the requirements of I.R.C. § 130: the annuity issuer assumes the defendant's liability; the amount and payment schedule are fixed and determinable; the annuity contract prohibits acceleration, deferral, increases, and decreases of the periodic payments; the annuity issuer's liability to the claimant does not exceed the defendant's liability to the claimant; and the underlying claim is grounded in tort. *See* I.R.C. § 130(c) (2006).

18. *See* Scales, *supra* note 6, at 868.

19. *See* Robert W. Wood, *Structured Settlements and Nonqualified Assignments*, 36 TAX ADVISER 26, 27 (2005).

20. Scales, *supra* note 6, at 868.

21. *See id.* at 876–79.

22. For a discussion of what Professor Scales terms the "fuzzy math" created by I.R.C. § 130, *see* Scales, *supra* note 6, at 879–87.

23. *See* Scales, *supra* note 6, at 868.

24. *See* W. United Life Assurance Co. v. Hayden, 64 F.3d 833, 842 n.12 (3d Cir. 1995).

25. Tortfeasors' liability insurers often form subsidiaries that sell annuities to the parent insurance company, keeping the profits from annuities within the same corporate structure. *See* Scales, *supra* note 6, at 868.

26. *See id.* at 880 (estimating that the U.S. Treasury "chips in" 10–30 percent of the settlement cost).

27. *See* Risk, *supra* note 12, at 878.

structured settlement annuity sales had climbed to \$6 billion.²⁸ Tort claims were in ample supply, and the government was bending over backwards to streamline the development of the structured settlement market. The structured settlement industry seemed luxuriously positioned for continued prosperity, until outside investors began eyeing claimants' rights to future payments.

B. The Factoring Transaction Industry

A classified advertisement in a Dallas newspaper caught Jim Lokey's attention in 1989.²⁹ A local tort victim wanted to sell his rights to future structured settlement payments in return for an immediate lump sum.³⁰ Lokey quickly capitalized on the idea of buying the rights to secure future payments in return for a smaller lump sum and founded Settlement Capital Corporation (SCC) to process such purchases.³¹ These transactions are termed "factoring transactions" within the industry.³² SCC began buying rights to future settlement payments from claimants, giving claimants the opportunity to exchange the rigid structured settlement—that could not be accelerated or increased—for large sums of instant cash.³³

The idea caught on quickly, and companies eagerly lined up to join Lokey, including J.G. Wentworth, Peachtree Settlement Funding, Singer Asset Finance, Stone Street Capital, and Liberty Life Assurance Company of Boston.³⁴ With claimants looking to gain large sums of money now rather than later and finance companies searching for alienable low-risk assets, the market for factoring had arrived.³⁵ In 2003, J.G. Wentworth's Assistant General Counsel estimated that factoring companies purchased structured settlement payment rights from approximately 4,000 claimants in 2003, totaling \$1 billion in assets.³⁶ Given the existence of a \$6 billion structured settlement industry comfortably subsidized by the public fisc, the factoring transaction industry has ample room for future growth.

Factoring companies advertise aggressively, flooding the Internet and television with hundreds of websites and thousands of commercials touting the benefits to tort victims of selling their structured settlement payment rights.³⁷ When factoring

28. See, e.g., 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). But see Kathy Chu, *Beware of Discounted Lump Sums*, WALL ST. J., Mar. 12, 2003, at B9A (reporting that the structured settlement industry sold \$60 billion in contracts in 2003, a number this author believes is dramatically overstated).

29. See Scales, *supra* note 6, at 898.

30. See *id.*

31. See *id.* at 899–900.

32. See *id.*

33. See *id.* at 900.

34. See *id.*

35. See *id.* at 899–900.

36. See *NAWJ Issues Bench Book to Assist Judges with Structured Settlement Transfers*, PRESENT VALUE (J.G. Wentworth, Bryn Mawr, Pa.), July 2004, at 1, 1, available at http://www.jgwfunding.com/pdf/PV_7_2004.pdf [hereinafter *NAWJ Issues Bench Book*].

37. The factoring industry has a very aggressive history in acquiring clients. See *Tax Treatment of Structured Injury Settlements: Hearing Before the H. Ways & Means Subcomm. on Oversight*, 106th Cong. 12 (1999) (statement of Joseph M. Mikrut, Tax Legislative Counsel,

companies approach structured settlement payment recipients, the companies offer the claimants an immediate lump sum in exchange for the claimant's right to receive future payments. These offers are "discounted" lump sums, often just a fraction of the overall settlement figure. The factoring company takes a "discount rate," a certain percentage of the settlement figure.³⁸ These rates range from around seventeen percent³⁹ to as high as seventy percent.⁴⁰ The rates consist of the factoring company's costs of borrowing money to finance the lump sums paid to claimants, the company's legal-service costs, and the expected profits from the purchase.⁴¹ The rest of the settlement figure is then disbursed to the claimant in a lump sum, which is often paltry in comparison to the original settlement figure, depending on the variable discount rate.⁴²

Nearly twenty-five years after the enactment of § 130, our society is left with two industries, both heavily reliant on the subsidy provided by the U.S. Treasury, vying for an ever-growing portion of the tort-claim market. The thirst for profits, secure assets, and maximized tax treatments obscure Congress's original rationale for emphatically supporting structured settlements: adequate and effective compensation for tort victims. To achieve that goal, Congress has relied on a paternalistic, dubious rationale—the need to protect tort victims from themselves—to justify its continuous subsidization of the structured settlement and factoring industries.

II. THROWING SOME ELBOWS

A. I.R.C. § 130

First, it is important to recognize the public policies underlying I.R.C. § 130 as Congress's first attempt to protect the financial interests of tort victims. In the early 1980s, Congress took up the cause of the "squandering plaintiff." At the behest of Congressman James Corman and Senator Max Baucus,⁴³ I.R.C. § 130 was enacted to provide long-term financial security to tort victims.⁴⁴ Proclaiming vivid stories of

U.S. Department of Treasury) (stating that one large factoring company broadcast more than 90,000 television commercials in less than two years) [hereinafter Mikrut Statement]. To circumvent anti-assignment clauses typically found in structured settlement annuity contracts, factoring companies required claimants to file a change of address with the annuity issuer. The claimant was then instructed to route her payments to a post office box leased by the factoring company, which then endorsed the checks in the claimant's name using a power of attorney and collected the claimant's payments. *See Mannix, supra* note 1, at 64.

38. *See Scales, supra* note 6, at 930.

39. *See id.*

40. *See Hindert & Ulman, supra* note 28, at 20, 28 n.2.

41. *See Scales, supra* note 6, at 930–31.

42. For a discussion on the variability of the settlement figure's present value and potential difficulties in comparing the factoring transaction lump sum with the settlement figure, see *id.* at 879–881.

43. *See* 144 CONG. REC. 23343 (1998) (statement of Sen. Baucus); Press Release, Capitol Hill Press Releases via Federal Document Clearing House, Sens. Grassley, Baucus Honored for Efforts on Behalf of Injury Victims (Nov. 8, 2005), available at 2005 WLNR 18106658 [hereinafter Capitol Hill Press Release].

44. In analyzing his introduction of the 1983 legislation promoting structured settlements, Senator Baucus reported that:

[i]n the past, these awards have typically been paid by defendants to successful plaintiffs in the form of a single payment settlement. This approach has proven

exploitation like those of Orion Olson and Raymond White,⁴⁵ the sponsors generated an incendiary image of a throng of financially unsophisticated tort victims whose injuries left them severely disabled and unemployable. Unable to financially or physically care for themselves, these tort victims were assumed to rely on public assistance once their lump sum settlements were spent. Various statistics were used to support this concept of the squandering plaintiff. The most frequently cited statistic reported that ninety percent of tort victims dissipated their lump sum settlement awards within five years.⁴⁶

These anecdotes and statistics generated a collective sympathy for people whose unfortunate injuries dramatically changed their lives and dreams. With their physical abilities forever altered, outsiders imagined these victims as buying nice cars, televisions, and homes to compensate for their injuries, quickly running through the money that was awarded to secure the victims' futures. These plaintiffs needed to be protected against themselves. They needed a structured settlement that would ensure a longer stream of payments that could not be accelerated or increased. Or so the public imagined.

In his bracingly exhaustive article⁴⁷ on the structured settlement marketplace, Professor Adam Scales uncovered three "insurance industry studies" behind the statistics supporting the idea of the squandering plaintiff. He has analyzed and criticized each study as providing inadequate support for the federal subsidization of the structured settlement industry.⁴⁸ The first two studies examined worker's compensation claimants during the Great Depression and tort victims' widows during the 1970s.⁴⁹ Scales found these studies too removed from our modern socioeconomic landscape to afford useful comparisons to today's tort claimants.⁵⁰ The third, a study of railroad compensation cases in the late 1940s, determined that victims "squandered" their money on living expenses and stocks, rather than other investments that were seen at the time as more secure.⁵¹ Such studies, conducted long before the enactment of § 130, provide only tenuous support for the assertion that modern plaintiffs need any help in wisely investing their settlement awards. Tort victims may well have been dissipating settlement money rapidly without concern for their futures at the time § 130 was enacted; but the evidence used to support this claim—three outdated studies produced by the insurance industry announcing that ninety percent of tort victims irresponsibly spent their settlement awards within five years of dispensation—is highly problematic, raising grave doubts about the accuracy of Congress's proffered justification.

unsatisfactory, however, in 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.

144 CONG. REC. 23343, 23343 (1998) (statement of Sen. Baucus) (quoting 127 CONG. REC. 30462 (1981)).

45. See *supra* Introduction.

46. See Scales, *supra* note 6, at 870.

47. See generally Scales, *supra* note 6 (providing a well regarded and thorough analysis of the creation, history, and current state of the structured settlement industry).

48. *Id.* at 870–73.

49. *Id.* at 870–71.

50. *Id.*

51. *Id.* at 871–72.

Additionally, Richard Risk, an experienced structured settlement broker and certified structured settlement consultant,⁵² has suggested a less-compassionate motive behind Congress's enactment of § 130.⁵³ In the early 1980s, a brokerage company hired a Los Angeles tax attorney to lobby Congress for a tax deduction to allow defendants' settlement obligations to be profitably transferred to a third party. Working with the lobbyist, the Congressional Budget Office reported to the House Committee on Ways and Means "that [such a] bill will have a negligible effect on budget receipts."⁵⁴ The IRS accordingly embedded the industry-requested tax structure in § 130. Certainly not touted by the industry, these lobbying efforts were revealed to Risk only during conversations with an acquaintance, David Higgins—the Los Angeles tax attorney who pushed them through Congress.⁵⁵

Whether the deciding factor behind § 130 was a paternalistic concern for tort victims or a boon for the insurance industry, the result has been that claimants get more compensation by accepting structured settlements rather than lump sums.⁵⁶ Typically described as a "win-win" situation for all involved, defendants can afford to offer a settlement that exceeds the amount to which the plaintiff will agree, but undercuts the defendant's costs; the annuity issuer essentially gets a tax-free market to exploit; and the claimant will receive the annuity's investments without having to report them as taxable income. By enticing defendants and well-heeled annuity issuers to offer structured settlements that are more valuable than lump sum settlements, § 130 sweetens the structured settlement option up front—leaving structured settlement claimants at the mercy of the factoring industry if the need for a lump sum arises. The factoring industry has been fairly generous at doling out its mercy, raking in over \$1 billion in assets in just one year.⁵⁷

B. I.R.C. § 5891

Motivated by its increasing concern for the so-called "squandering plaintiff" (and prompting from the structured settlement industry, which worried that annuity issuers would lose their preferential tax treatment under I.R.C. § 130 if claimants assigned their payment rights to factoring companies),⁵⁸ Congress once again stepped in by enacting the structured settlement-protection provision of the Victims of Terrorism Tax Relief Act of 2001,⁵⁹ codified as I.R.C. § 5891,⁶⁰ in the rush of legislation pushed

52. See Risk, *supra* note 12, at 865 n.1.

53. See *id.* at 874–75.

54. *Id.* at 874 (quoting H.R. REP. NO. 97-832 (1982)) (internal quotation marks omitted).

55. See Risk, *supra* note 12, at 680 n.139.

56. See *supra* Part I.A.

57. See *NAWJ Issues Bench Book*, *supra* note 36, at 1.

58. See Scales, *supra* note 6, at 901 (noting that annuity issuers became aware of the emerging factoring transaction industry when the issuers began receiving change of address forms from claimants, triggering concern over the effect of anti-assignment clauses typically included in annuity contracts and the tax treatment of assigned payment rights); Mannix, *supra* note 1, at 63–64.

59. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 115, 115 Stat. 2427, 2436 (2002).

60. I.R.C. § 5891 (2006).

through after September 11, 2001.⁶¹ Senator Baucus once again helped lead the charge, this time to protect structured settlement payment recipients from the unsavory factoring industry.⁶²

As with the enactment of I.R.C. § 130, Congress relied solely on anecdotal stories, like those of Orion Olson and Raymond White,⁶³ and outdated, unreliable studies⁶⁴ to promote regulating the factoring transaction industry. While anecdotal stories do paint vivid images of squandering plaintiffs,⁶⁵ they were not and are not substantiated by quantitative data that can justify Congress's intent in enacting § 5891. In its analysis, the Treasury Department raised only the possibility that "[d]issipation of an award by an injured person who is unable to earn money because of his or her injury or illness may result in the need for welfare payments or other public assistance."⁶⁶ Regardless of claimants' actual levels of financial sophistication and any resulting impact on welfare funds, the factoring industry certainly did nothing to *increase* the amount of financial support available to claimants. And Congress was very anxious about reports that the industry took as much as seventy percent of claimants' settlement figures in exchange for an up-front, lump sum payment.⁶⁷

Members of the factoring industry were portrayed as vultures swooping in to strip claimants of their carefully planned and managed structured settlements that ensured long-term financial viability.⁶⁸ The advocates for increased structured settlement protection touted judicial approval as the most effective way to protect claimants from

61. See Hindert & Ulman, *supra* note 28, at 20.

62. Senator Baucus (D-Mont.) was joined in this effort by Representatives Clay Shaw (R-Fla.) and Pete Stark (D-Cal.) as well as Senator John Chafee (R-R.I.). See *id.*

63. See *supra* Introduction. The Mannix article, *supra* note 1, was read into the Congressional Record on May 13, 1999. 145 CONG. REC. 9616, 9618–20 (1999) (statement of Sen. Chafee) [hereinafter Chafee Statement].

64. See *supra* notes 43–47 and accompanying discussion.

65. Consider the story of one woman who received \$5 million in donations and legal compensation, including a \$2 million settlement, for the loss of her husband who was killed in the World Trade Center on September 11, 2001. Four years later, the money is almost gone, due to major home renovations, vacations to the Super Bowl and the Bahamas, and half a million dollars spent on shoes and gowns. See National Structured Settlements Trade Association, *Big Jackpots, Bigger Tragedies* (Oct. 14, 2006) (on file with Indiana Law Journal), available at <http://www.nssta.com/Resource.phx/public/real-people-real-tragedy.htm>.

Consider also the story of Robert Falsani, a personal injury lawyer in Minnesota, whose minor client received a personal injury settlement. When the client turned eighteen, he moved in with friends and spent \$90,000 in one year to buy a car and "party down." See Michelle Lore, *Structured Payments Can Help Protect Clients from Themselves*, ST. LOUIS DAILY REC., Jan. 8, 2006, available at 2006 WLNR 546626.

66. See Mikrut Statement, *supra* note 37, at 12.

67. See Hindert & Ulman, *supra* note 28, at 28 n.2.

68. One complaint filed in a class action lawsuit against J.G. Wentworth described the leading factoring company as "'prey[ing] upon the financially vulnerable and unsophisticated, persuading them to accept up-front payments which do not even approximate any commercially accepted concept of the fair present value of their structured settlement sums.'" Julie G. Shoop, *Selling Structured Settlements: Boon or Boondoggle for Injury Victims*, TRIAL, July 1999, at 12–13 (quoting Complaint at X, *Magee v. J.G. Wentworth & Co.*, No. 001552 (Pa. Ct. Com. Pl. Phila. County Civ. Div. 1999), *aff'd*, 761 A.2d 159 (Pa. Super. Ct. 2000)) (bracketed alteration added).

unconscionable factoring. The first proposal, in 1998, would have required a court order finding that the “extraordinary, unanticipated, and imminent needs of the structured settlement recipient . . . [rendered the] transfer appropriate” before a factoring transaction could proceed.⁶⁹ If the court found that the proposed factoring transaction did not meet the “extraordinary, unanticipated, and imminent needs” of the claimant, then a substantial fifty percent excise tax would be imposed on the discount rate taken by the factoring company.⁷⁰

The proposed legislation appealed neither to the structured settlement industry nor to the factoring transaction industry. The structured settlement industry wanted clarification on whether annuity companies would retain their preferential tax treatment under § 130 if claimants transferred payment rights to factoring companies.⁷¹ To maintain the federal subsidy that sustained the industries’ livelihood, the insurance industry and the structured settlement industry⁷² formally allied themselves as the National Structured Settlement Association (NSSTA), primarily a lobbying organization.⁷³

The factoring industry did not welcome the prospect of having to meet such a high burden as the proposed hardship standard in order to obtain judicial approval for factoring transactions. By requiring that proposed factoring transactions meet the “extraordinary, unanticipated, and imminent needs” of claimants, the proposed hardship standard would seriously impede the industry’s ability to acquire assets. Paying the fifty percent excise tax for unsuccessful hardship showings was an even less desirable alternative. Following the NSSTA’s lead, factoring companies allied to form the National Association of Settlement Purchasers (NASP) to lobby Congress for a compromise.⁷⁴

The two organizations collaborated to propose a legislative middle ground that pleased them both: annuity issuers could retain the tax benefits of § 130 if a court order was obtained, finding that the factoring transaction was in the “best interests” of the claimant.⁷⁵ The excise-tax penalty for not obtaining a court order, termed a qualified order, was also lowered to forty percent.⁷⁶ The compromise was accepted and codified as § 5891.⁷⁷ Although the legislation carefully coordinated §§ 5891, 104, and 130 to determine which structured settlements and factoring transactions could qualify, the legislation said remarkably little about the now much weakened and nebulous standard that required the factoring transaction to be in “the best interest of the payee, taking into account the welfare and support of the payee’s dependents.”⁷⁸ While debatable, it

69. 144 CONG. REC. 17332 (1998) (statement of Rep. Shaw) (quoting U.S. Dep’t of the Treasury, *General Explanations of the Administration’s Revenue Proposals* (Feb. 1998)).

70. See Chafee Statement, *supra* note 63, at 9617.

71. See Mannix, *supra* note 1, at 63–64 (discussing the industry’s concern that non-qualified assignments would violate I.R.C. § 130, causing structured settlement companies to lose their preferential tax treatment under § 130 when claimants assigned their settlement rights to factoring companies).

72. See *supra* text accompanying note 26.

73. See Scales, *supra* note 6, at 900–01.

74. See *id.* at 927–31.

75. 146 CONG. REC. 21839 (2000) (statement by Rep. Shaw).

76. *Id.*

77. I.R.C. § 5891 (2006).

78. § 5891(b)(2)(ii).

seems doubtful that the NSSTA and NASP were driven by concerns for the “best interests” of claimants when proposing this compromise.

While § 5891 was being enacted, several state legislatures had independently adopted so-called structured settlement protection acts that similarly enabled the structured settlement and factoring transaction industries to peacefully coexist.⁷⁹ Recognizing the states’ efforts, Congress allocated the responsibility of issuing qualified orders to state courts or to administrative authorities that had exclusive jurisdiction over the underlying actions resolved by structured settlements.⁸⁰ Federal regulation ensured compliance with state structured settlement protection acts and encouraged other states to enact such legislation.⁸¹ By April 2001, nineteen states had enacted structured settlement protection acts⁸² and by the spring of 2005, the total comprised thirty-seven states.⁸³

State courts have split over how to interpret their duties under § 5891. Some courts require a hearing to allow interested parties to testify about the proposed transfer.⁸⁴ Other courts are willing to eliminate hearings and determine the best interests of the claimant as represented solely by the paper record.⁸⁵ Other courts differ on what interests justify qualifying a factoring transaction. New York courts have developed a thorough list of factors to consider when making best interest determinations, including the claimant’s age and mental capacity, the intended use of the funds, and the claimant’s financial acumen.⁸⁶ Most courts have adopted a less stringent definition of what constitutes the claimant’s best interests, “recognizing that ‘[t]he more pressing the need, the more reasonable it may be for a payee to obtain immediate cash at a steep discount rate.’”⁸⁷

Despite the majority of states enacting structured settlement laws and despite courts’ struggles with “best interest” definitions, § 5891 does not seem to have significantly impacted the factoring industry’s growth. Counsel for the industry reported that the industry accumulated \$1 billion in assets in 2003.⁸⁸ In fact, “[s]ettlement purchasers welcome the certainty of court-approved transfer[s] of rights to settlement payments.”⁸⁹

79. See 147 CONG. REC. 5598 (2001) (statement of Rep. Stark).

80. See § 5891(b)(2)(B).

81. See 147 CONG. REC. 5598.

82. *Id.*

83. See Hindert & Ulman, *supra* note 28, at 20.

84. See *id.* at 22.

85. See *id.*

86. See *In re Settlement Funding of N.Y., L.L.C.*, 774 N.Y.S.2d 635, 638-39 (Sup. Ct. 2003). The list of factors includes:

- (1) the Payee’s age, mental capacity, physical capacity, maturity level, independent income, and ability to support dependents;
- (2) purpose of the intended use of the funds;
- (3) potential need for future medical treatment;
- (4) the financial acumen of the Payee;
- (5) whether Payee is in a hardship situation to the extent that he or she is in “dire straits”;
- (6) the ability of the Payee to appreciate financial consequences based on independent legal and financial advice;
- (7) the timing of the application . . . and cases cited therein.

Id.

87. See Hindert & Ulman, *supra* note 28, at 23 (quoting *In re 321 Henderson Receivables Ltd. P’ship*, 769 N.Y.S.2d 859, 861 (Sup. Ct. 2003)) (bracketed alteration in original).

88. See *supra* note 36 and accompanying text.

89. Martha Neil, *Fading Resistance*, A.B.A. J., Sept. 2002, at 26 (quoting Earl Nesbit,

Notwithstanding Senator Baucus's admirable attempts⁹⁰ to prevent claimants from factoring their structured settlement payments, § 5891 enabled the factoring industry to continue to flourish in the face of anti-assignment clauses⁹¹ and "best interest" standards, reaping profits through the ever-present "discount" rate.

III. THE CATCH-22

A. *The Federal Tort Claims Act*

With I.R.C. §§ 130 and 5891 working together to entice defendants to offer more valuable settlements in structured rather than lump sum form, a curious result arises when the underlying claim stems from the Federal Tort Claims Act (FTCA):⁹² as a defendant, the United States is allowed to dispense of its liability for less money by purchasing structured settlements.

Cautiously lifting its traditional shroud of sovereign immunity, the federal government enacted the FTCA in 1946,⁹³ giving claimants a vehicle to seek compensation for a limited number of torts⁹⁴ committed by agents of the federal government. Before 1946, individuals with meritorious tort claims against the United States had to submit private claims bills to Congress.⁹⁵ Congress then had to consider each private bill, pass or defeat each bill, and submit each approved bill to the President for enactment.⁹⁶ In the 1940s, Congress and the President dealt with approximately 2000 of these private bills per year.⁹⁷

To encourage efficient resolution of private tort claims against the government, the United States agreed to waive sovereign immunity, subject to certain conditions. Any settlement agreement reached would be the final and conclusive award given to the claimant.⁹⁸ The settlement would also completely release the United States from any further claims arising from the accident.⁹⁹

NASP counsel).

90. The NSSTA recently awarded Senator Baucus with the James Corman Award for having pushed §§ 130 and 5891 through Congress. Senator Baucus stated that he "helped write the law establishing the rights of victims to choose to accept long-term settlement payments, instead of lump sums. For more than 20 years, these structured settlements have helped victims live productive lives." Capitol Hill Press Release, *supra* note 43, at 1.

91. For a discussion on the effect of state structured settlement protection acts and anti-assignment clauses, see Scales, *supra* note 6, at 929.

92. 28 U.S.C.A. §§ 2671-80 (2006).

93. Originally enacted as Title IV of the Federal Tort Claims Act within the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812, 842-47 (codified as amended at §§ 2671-80).

94. For an in-depth discussion of which tort claims may be brought under the FTCA, see Memorandum from Colonel John H. Nolan III, Judge Advocate, to Claims Judge Advocates/Claims Attorneys 76-102 (Nov. 1, 1999), available at <https://134.11.61.26/Archive/Pub/Publications/JA/CS/CS%20FTCA%20Handbook%2019991101.pdf> [hereinafter Nolan Memorandum].

95. See H.R. REP. NO. 77-2245, at 6 (1942).

96. *Id.*

97. *Id.* at 6-7.

98. *Id.* at 2.

99. *Id.*

Since the inception of the FTCA, the number of claims filed has grown considerably,¹⁰⁰ causing the policies and law surrounding the FTCA to evolve accordingly. Before a claimant can bring suit directly against the United States, the claimant must first exhaust her administrative remedies.¹⁰¹ Once a claim cycles through the administrative process, the claimant can file a complaint against the United States in federal district court.¹⁰² The Justice Department's Torts Branch of the Civil Division and the United States Attorneys are responsible for defending the United States against federal tort claims.¹⁰³

B. Settlements and the FTCA

The government faces the same resource cost pressures as the private sector, generally preferring to settle over going to trial. An analysis of settlements and the FTCA begins with recognizing the conflicting duties of federal attorneys: a duty to limit settlement payouts to protect the public fisc and a duty to provide adequate and effective compensation to tort victims as constituents of the United States. To accomplish these two antagonistic goals, the FTCA gives wide discretion to various government agents to settle FTCA claims.¹⁰⁴

Before 1956, payment of all judgments against the United States required Congress to approve individual appropriations bills (similar to the private bill process for federal tort claims before 1946).¹⁰⁵ Then Congress enacted 31 U.S.C. § 1304,¹⁰⁶ creating the Judgment Fund.¹⁰⁷ The Judgment Fund is not actually a fund per se, but rather a permanent, indefinite appropriation used to fund all final judgments, awards, settlements, and costs against the United States.¹⁰⁸ Because the Judgment Fund is a general appropriation, individual agencies do not necessarily have the budget incentive to deter claims that require disbursements from the fund.¹⁰⁹ To ensure adequate protection, the U.S. Attorney General has been designated as the guardian of the

100. The Department of Justice reported that United States Attorneys handled 3091 FTCA claims in 2004. See Michael A. Battle, *United States Attorneys' Annual Statistical Report: Fiscal Year 2004*, at 82 tbl.5 (Dep't of Just. 2004), available at http://www.usdoj.gov/usao/reading_room/reports/asr2004/asr2004.pdf.

101. 28 U.S.C. § 2675(a) (2000).

102. The federal district courts have exclusive subject matter jurisdiction to hear FTCA claims. 28 U.S.C. § 1346(b) (2000).

103. See 28 U.S.C. § 2672 (2000) (permitting the United States Attorney General to delegate settlement authority to other executive agencies); Jeffrey Axelrad, *Resolving Federal Tort Claims Expeditiously*, ATLA ANNUAL CONVENTION REFERENCE MATERIALS (2003), available at Westlaw, 1 Ann.2003 ATLA-CLE 571 [hereinafter *Resolving Federal Tort Claims*].

104. See § 2672.

105. See Jeffrey Axelrad, *What is the Judgment Fund*, ATLA ANNUAL CONVENTION REFERENCE MATERIALS (2004), available at Westlaw, 1 Ann.2004 ATLA-CLE 435 [hereinafter *Judgment Fund*].

106. 31 U.S.C. § 1304 (2000).

107. See *Judgment Fund*, *supra* note 105.

108. See *id.*

109. See *id.*

Judgment Fund and must exercise “[e]ternal vigilance and reasoned, careful analysis” in doling out payments from the fund.¹¹⁰

The FTCA asserts a strong preference for administrative resolution of claims.¹¹¹ Each federal agency can authorize settlements of up to \$25,000 during the administrative resolution process.¹¹² The Department of Transportation can authorize settlements of up to \$100,000.¹¹³ The Department of the Army, Department of the Navy, Department of the Air Force, Department of Veterans Affairs, and Postal Service can authorize settlements of up to \$200,000.¹¹⁴ Any settlement exceeding an agency’s maximum settlement authority requires approval from the Department of Justice.¹¹⁵

The Justice Department’s Civil Division attorneys and the United States Attorneys are jointly responsible for representing the United States in FTCA claims that have survived the administrative claims process.¹¹⁶ The United States Attorneys have authority to settle claims up to \$1 million.¹¹⁷ The Assistant Attorney General for the Civil Division may settle claims up to \$2 million.¹¹⁸ To ensure that settlements most damaging to public funds are justified, the Deputy Attorney General or the Associate Attorney General must approve any settlements exceeding \$2 million.¹¹⁹

C. Back to Square One

The question then is, what form do settlements take? While government representatives are not expressly instructed to resolve federal tort claims using structured settlements rather than lump sums, the use of structured settlements is strongly encouraged.¹²⁰ Seeming discrepancies exist in federal reports as to the number of agreements that result in structured settlements. In a February 2000 report to Senator James Inhofe, the General Accounting Office stated that the Justice Department’s Civil Division estimated that only one to two percent of all litigated federal tort claims are resolved via structured settlement.¹²¹ During 2002, however, the Judgment Fund reportedly paid \$396 million in federal tort claims,¹²² with a median award of \$201,000

110. *Id.*

111. *See* 28 U.S.C. § 2672 (2000); *Resolving Federal Tort Claims*, *supra* note 103.

112. § 2672.

113. *Resolving Federal Tort Claims*, *supra* note 103.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Nolan Memorandum, *supra* note 94, at 350–56.

121. *See* U.S. GEN. ACCT. OFF., STRUCTURED SETTLEMENTS: THE DEPARTMENT OF JUSTICE’S SELECTION AND USE OF ANNUITY BROKERS 3 (Feb. 16, 2000), *available at* www.gao.gov/archive/2000/gg00045.pdf [hereinafter GAO REPORT].

122. *See* *Resolving Federal Tort Claims*, *supra* note 103. Presumably, this number includes judgments against the United States, which totaled more than \$20 million in fiscal years 2002–03. *See* Thomas H. Cohen, *Federal Tort Trials and Verdicts, 2002–03*, 2005 BUREAU OF JUST. STATS. BULL. 9 (Dep’t of Just.), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ftv03.pdf>. Litigated FTCA cases are generally decided via bench trial, implying that federally appointed

during fiscal years 2002 and 2003.¹²³ Over \$236 million was spent on structured settlement agreements between May 1, 1997 and May 1, 1999 (an average of \$118 million per year),¹²⁴ indicating that structured settlements account for just under thirty percent of monies annually paid out to resolve federal tort claims. Because the data is expressed in terms of median awards, it is difficult to determine precisely how many settlements are covered by that thirty percent; but structured settlements clearly account for a substantial portion of FTCA claim resolutions, and there is no evidence to indicate that their popularity will diminish in the future.

The larger issue then becomes why the federal government regularly uses structured settlements at all. The two most popular reasons seem to correspond with the legislative justifications for promoting the growth of structured settlements: providing long-term financial security to tort victims and protecting the public fisc.

The first reason, supporting claimants' future financial stability, requires us to once again return to the idea of the squandering plaintiff. Though claimants' settlements are trivially funded by their own tax contributions, there is no significant reason to believe that FTCA claimants react any differently than private tort claimants to lump sum settlements. Hence, the image of an unsophisticated financial manager placed in charge of an incomprehensible amount of money arises, accounting for the paternalistic belief that what the claimant really needs is a periodic allowance for living and medical expenses.

That image of heedless dissipation may be correct, but once again, no reliable information justifies the belief.¹²⁵ Claimants may in fact be able to smoothly navigate through the investment realm and allocate funds for personal needs as those needs arise. With the enactment of I.R.C. § 130, claimants' annuity earnings are entirely tax free, while any income earned by directly investing a lump sum would be taxable.¹²⁶ By enacting legislation that coaxes defendants to make higher offers for structured rather than lump sum settlements and presumes third parties to be more adept financial investors than claimants, Congress forces claimants to choose between being able to individually manage lump sums on the one hand and obtaining greater compensation from the defendant through structured settlements on the other. While federal regulation is generally a system of justice versus efficiency, it seems wrong to regulate justice based on unjustified assumptions of a claimant's inexperienced investment abilities.

The second popular reason for the federal government to favor structured settlements—exercising “eternal vigilance” over public monies—relies on the conclusion of the squandering plaintiff story. Once the claimant has frittered away his lump sum, he must look elsewhere for sustenance; and what better and more controversial source than welfare funds? If an FTCA settlement recipient turns to welfare after spending his lump sum, the U.S. Treasury will arguably be paying twice for one accident—once for the initial settlement and again for public assistance.

judges will be more conscious of the effect of large settlements on the public fisc than juries. *See id.*

123. Cohen, *supra* note 121, at 1.

124. *See* GAO REPORT, *supra* note 120, at 2.

125. *See supra* Part II.A.

126. *See* Scales, *supra* note 6, at 878–79.

This conclusion relies on two potentially faulty assumptions: one being that lump sums will dissipate quickly,¹²⁷ and the other being that claimants are unable to support themselves post injury.¹²⁸ Anecdotal stories such as those of Orion Olson and Raymond White make it easy to imagine all tort victims as severely disabled and disfigured from tragic accidents and thus prevented from working because of their disabilities,¹²⁹ but evidence indicates that only twenty-one percent of structured settlements involve catastrophically injured victims.¹³⁰ The majority of structured settlement recipients may not, in fact, be prohibitively injured. Without quantitative data indicating otherwise, it seems reasonable to assume that these recipients may be able to financially support themselves without having to rely on public assistance, even after dissipating their lump sum awards.

It is possible that the proffered policy reasons for supporting structured settlements, while misguided and unsupported by quantitative data, genuinely represent a compromise of federal attorneys' duties to both protecting the public fisc and supporting injured constituents. But a third and less admirable reason may underlie the preference for structured settlements.

While the legislative history arguably indicates that I.R.C. § 130 was enacted to protect tort victims or to stimulate the economic growth of the structured settlement industry, the United States curiously benefits from the provision's tax ramifications. The government is not required to pay any taxes associated with structured settlements, but the United States is put in the same position as defendants in structured settlement agreements.

Because § 130 minimizes market costs for annuity issuers, a large supply of annuity issuers emerged, ready and eager to take settlement obligations from the hands of defendants, including the United States, and to invest the purchase amount, augmenting the initial value of the annuity. Section 130 allows the United States to buy annuities to fund settlement obligations for less than the actual settlement figure.¹³¹ It seems a little too convenient that a policy based on faulty assumptions that limits victims' abilities to determine what is best for them also allows the government to undercut what it would be liable for in lump sum form. Does the resulting efficiency warrant the loss of claimants' contractual freedom?

IV. ON THE ROPES

I believe the answer is no. The interplay of § 104 and § 130 forces claimants to choose between being able to individually manage lump sums or obtaining greater compensation from the defendant through structured settlements. Section 104 excludes tort settlements in any form, lump or structured, from the victim's tax liability. Section 130, through the Treasury's seemingly unending coffers, allows tortfeasors to sell their

127. *See supra* Part II.A.

128. *See generally* GAO REPORT, *supra* note 120, at 4.

129. *See supra* notes 1–2 and accompanying text; National Structured Settlements Trade Association, *What Independent Voices Say*, <http://www.nssta.com/Resource.phx/content/independent-praise.htx> (last visited Oct. 13, 2006) (describing the care of a daughter who suffered severe brain damage as a child due to medical malpractice and was then later injured in a wheelchair accident).

130. *See Scales, supra* note 6, at 922–23.

131. *See supra* Part I.A.

liability to a third-party annuity issuer for less than the amount the victim will ultimately receive, so long as the settlement is structured. Savvy tortfeasors can then manipulate possible settlements to create an offer that will produce more income for the claimant than a lump sum but will cost the tortfeasors less than a lump sum.¹³² It is no surprise then to find that tortfeasors come to the negotiating table well armed and highly motivated to broker a structured settlement resolution.

Recently injured and facing unexpected future medical costs and indeterminate income loss, victims are forced to decide between relinquishing investment authority by agreeing to structured payments or accepting a lesser settlement figure. While no empirical research has yet been done on this point, I suspect that very few victims (with no immediate substantial costs) would opt to reduce the amount of their settlement in order to preserve their right to manage their award as they please. Then, § 5891 steps in to give victims its blessing over factoring transactions, which deftly usurp substantial percentages of the settlement through the “discount rate.”¹³³

These forced choices might be justified if tort victims do indeed need structured protection from their own spending habits, but, as we have seen, the evidence supporting the image of the squandering plaintiff is anecdotal at best.¹³⁴ In reality, Congress initially enacted a provision that allowed a \$6 billion industry to escape tax liability by cornering tort victims into waiving individual management rights. Congress then enacted a provision that placed a substantial “excise tax”¹³⁵ on tort victims wishing to buy back those rights.

This reality hardly seems to mirror the great concern for tort victims that Congress professed when enacting § 130 and § 5891. And while the United States does benefit as a defendant from the creation of the structured settlement industry, the advantage of efficiency can be considered only marginal when compared to the tax revenue the U.S. Treasury loses each year on the \$6 billion structured settlement industry. Clearly, it is time for Congress to reevaluate its support of § 103 and § 5891.

CONCLUSION

Congress must first confront the idea of the squandering plaintiff. The current supporting evidence is outdated and tangential. New studies should be conducted to determine how modern tort victims spend their lump sum awards. If claimants are indeed frittering away their awards, the government may want to continue supporting the paternalism inherent in structured settlements. If claimants are not frittering away their awards, however, Congress would be hard-pressed to rationalize continued subsidization of structured settlements using the current justifications.

Congress must confront the importance of its relationship to the structured settlement and factoring industries with its dedication to tort victims. With the structured settlement industry boasting \$6 billion in sales and the factoring industry

132. See Scales, *supra* note 6, at 876–81; *supra* Part I.A.

133. See *supra* note 40 and accompanying text.

134. See *supra* Part II.A.

135. Under § 5891, factoring companies are required to pay an excise tax if they do not obtain judicial approval prior to the transaction. See I.R.C. § 5891(a) (2006). In reality, most transactions receive court approval with little difficulty, placing the burden on the settlement recipient via the discount rate. See *supra* notes 88–91 and accompanying text.

constantly striving to usurp larger portions of the structured settlement market, both markets have a significant impact on the national economy. Congress must determine whether that impact justifies burdening tort victims with waivers of investment freedoms and discount rates. I suspect that most elected officials will have a difficult time earning voter support by coming out in favor of a mammoth, impersonal industry over an individual, sympathetic plaintiff.

If the concept of the squandering plaintiff proves to be unjustified, Congress should abolish § 103 and § 5891 and allow claimants to determine the most adequate and appropriate settlement for themselves as the circumstances dictate. Simply put, Congress can no longer rely on “lies, damned lies, and statistics”¹³⁶ to quietly place tort victims at the mercy of the structured settlement and factoring industries. Society needs and tort victims deserve to know the truth about structured settlements, factoring, and the federal government.

136. This quotation is generally attributed to Benjamin Disraeli as noted in 1 MARK TWAIN, *AUTOBIOGRAPHY* 246 (1924).