

Approved February 23, 1987  
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at  
Chairperson

10:00 a.m./~~p.m.~~ on February 20, 1987 in room 514-S of the Capitol.

All members were present except: Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Parrish, Steineger, Talkington and Winter.

Committee staff present:

Mike Heim, Legislative Research Department  
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association

Senate Bill 258 - Periodic payment of judgments act.

Ron Smith, Kansas Bar Association, presented a briefing on Kansas periodic payment of judgments act. He explained the bill is designed to deal with the larger verdict. The reason for the bill is there are more and more larger verdicts, and that impacts insurance. He said it also speaks to very real problems in the litigation area. The thrust of the bill is to create statutory framework for a jury to make a rational decision based on the gross award, then time will take care of what happens. The bill does help on the income tax of the claimant. The bill is not mandatory. A copy of the handout is attached (See Attachment I). Mr. Smith explained the attachment lists the sections of the bill with the comments by the Uniform Laws Commission. He explained the bill section by section.

The chairman announced there will be a hearing on the bill, and the committee will hear testimony from people who support the bill and from people who want to make some changes.

The meeting adjourned.

A copy of the guest list is attached (See Attachment II).



SENATE BILL No. 258

By Committee on Judiciary

2-16

0017 AN ACT enacting the Kansas periodic payment of judgments act.

0018 *Be it enacted by the Legislature of the State of Kansas:*

0019 Section 1. The purposes of this act are to:

0020 (a) Alleviate some of the practical problems incident to un-  
0021 predictability of large future losses;

0022 (b) effectuate more precise awards of damages for actual  
0023 losses;

0024 (c) pay damages as the trier of fact finds the losses will  
0025 accrue; and

0026 (d) assure that payments of damages more nearly serve the  
0027 purposes for which they are awarded.

The problems giving rise to the need for the legislation embodied in the Model Periodic Payment of Judgments Act are detailed in the Prefatory Note to the Act. The purposes of the Act are also discussed there. Since the Notes and Comments are not enacted as part of the legislation when adopted by a state, it was felt that the purposes should be stated at the outset in the Act. The purposes section is to be used by the courts in interpreting the provisions of the Act in general, and is specifically to be used as criteria for preventing abuses in the invocation of the Act.

Any party to an action for bodily injury may elect that the case be tried under the provisions of this Act. If a party objects to the invocation of this Act, that party has the opportunity, but also the burden, to show that the purposes of this Act would not be served by conducting the trial of the claim affecting that party under the Act. In this case, the court must base its decision in resolving the issue on the criteria enumerated in this Section. See Section 3(d). In addition, there are other grounds for objecting to the invocation of the Act. See Section 3(c) (3) (i) and (ii).

Attach. I  
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0028 Sec. 2. In this act:

0029 (a) "Bodily injury" means bodily harm, sickness, disease or  
0030 death.

0031 (b) "Economic loss" means pecuniary harm for which dam-  
0032 ages are recoverable.

0033 (c) "Future damages" means damages arising from bodily  
0034 injury which the trier of fact finds will accrue after the damages  
0035 findings are made.

0036 (d) "Noneconomic loss" means nonpecuniary harm for which  
0037 damages are recoverable, but the term does not include punitive  
0038 or exemplary damages.

0039 (e) "Past damages" means damages that have accrued when  
0040 the damages findings are made, including any punitive or ex-  
0041 emplary damages allowed by law.

0042 (f) "Qualified insurer" means an insurer, self-insurer, plan or  
0043 arrangement approved pursuant to section 17.

Payment of damages on a periodic-  
instalment basis applies only to losses  
accruing in the future. It is customary  
to speak of past and future damages  
and the term "future damages" is used  
to mean those accruing after the dam-  
age findings are made by the trier of  
fact. These are to be distinguished  
from "past damages," which are all  
other damages except future damages,  
including any punitive or exemplary  
damages. Past damages will continue  
to be paid in a lump sum as under the  
present system.

In adopting a system of paying future  
damages over the period which they  
will accrue, a new risk is introduced  
that the obligor will not be solvent or  
able to respond at some point in the  
future. Thus, it becomes important to  
use reasonable means to secure a judg-  
ment containing periodic instalments  
payable in the future. One of the tech-  
niques in the Act for providing this as-  
surance is to require that only certain  
insurers will be eligible to secure such  
a judgment. The responsibility for de-  
termining who is so qualified is placed  
on the insurance regulator in the adopt-  
ing state. See Section 17. The term  
"qualified insurer" is used to designate  
those who are approved under this sys-  
tem.

This Section contains definitions of  
words and phrases employed elsewhere  
in the Act.

The Act applies only to bodily injury  
cases as opposed to cases involving  
property damage. The definition of  
"bodily injury" is taken from tort lia-  
bility insurance policy forms and is one  
that is commonly used to distinguish  
personal injury from harm to property.  
See Section 3(a) for the operative sec-  
tion employing this term.

The Act makes a distinction between  
"economic loss" and "noneconomic  
loss." The trier of fact is asked to  
make specific findings as to the losses  
in each category. This is not only nec-  
essary for the purpose of fashioning a  
periodic-instalment judgment, but is nec-  
essary because the Act provides for the  
lapse of awards for noneconomic loss  
and certain economic loss which never  
accrue because of the unpredicted inter-  
vention of death. The distinction be-  
tween the two types of losses is based  
on whether the harm results in pe-  
cuniary losses. Although not a precise  
line of demarcation, this is the common  
understanding in the bar and judiciary.  
The Act does not attempt to change the  
measure of damages. It is left to the  
adopting jurisdiction, based on existing  
law, to determine into which category  
particular elements of damages fall.

0044 Sec. 3. (a) In order to invoke this act, a party to an action for  
0045 bodily injury must make an effective election in accordance with  
0046 this section.

0047 (b) The election must be made by motion directed to the  
0048 court with notice to all parties not less than 60 days before  
0049 commencement of a trial involving issues of future damages  
0050 unless leave of court is obtained. Any objection to the election  
0051 must be made by motion directed to the court with notice to all  
0052 parties not less than 30 days after notice of the election.

0053 (c) An election is effective if:

- 0054 (1) All parties have consented;  
0055 (2) no timely objection is filed by any party; or  
0056 (3) a timely objection is filed but:

0057 (A) The electing party is a claimant and shows there is a good  
0058 ~~faith claim~~ that future damages will exceed \$100,000; or

0059 (B) the electing party is a party responding to a claim for  
0060 future damages in excess of \$100,000 and shows that security in  
0061 the amount of the claim for past and future damages or \$500,000,  
0062 whichever is less, can be provided under this act.

0063 (d) If an objecting party shows that the purposes of this act  
0064 would not be served by conducting the trial of the claim affecting  
0065 such party under this act, the court may determine not to try the  
0066 claim under this act even though the conditions of (A) or (B) of  
0067 subsection (c)(3) are satisfied. Such determination must be made  
0068 by the court at least 30 days prior to trial.

0069 (e) If an effective election is on file at the commencement of  
0070 trial, all actions, including third-party claims, counterclaims and  
0071 actions consolidated for trial, must be tried under this act unless  
0072 the court finds that the purposes of this act would not be served  
0073 by doing so or in the interest of justice a separate trial or  
0074 proceeding should be held on some or all the claims that are not  
0075 the subject of the election.

0076 (f) An effective election can be withdrawn only by consent of  
0077 all parties to the claim to which the election relates.

The policy underlying this Section is to permit any party to an action for bodily injury to elect that the case be tried under the procedures set out in this Act. If all parties consent or there is no objection filed by any party, the court will proceed to secure the necessary fact findings (Section 4) and determine the type of judgment to be entered (Section 6).

If a party objects to the invocation of the Act, further proceedings must be held by the court. Whenever an objection is lodged, the court should first determine whether the electing party is a claimant or a party responding to a claim. If the electing party is a claimant, the burden is on that party to show that a good faith claim for future damages exceeding the suggested figure of \$100,000 exists. The Act contemplates that only serious cases involving substantial damages which will accrue after the time of trial should be subject to the Act unless all parties agree. An adopting state is free to choose a threshold figure of more or less than the bracketed figure of \$100,000. The size and prevalence of serious injury cases in a particular jurisdiction should be considered in setting this figure. It should also be kept in mind that the dollar figure in this Section is merely a trigger for trying the case under the procedures of the Act and is not dispositive on the question of whether a periodic-installment judgment will actually be entered. Section 6 determines the type of judgment that will be entered.

If the electing party is a party responding to a claim for future damages in excess of the suggested figure of \$100,000, that party has the burden of showing that adequate security can be posted. This will help prevent respondents from abusing the Act. There also is a sanction where a responding party makes the necessary showing as to the ability to post security and later fails to post security without good cause. See Section 9(c).

The suggested figure in brackets in subparagraph (i) and the first figure in subparagraph (ii) should be the same regardless of the amount finally adopted. There appears to be no justification for using a different triggering threshold depending upon whether the electing party is a claimant or a respondent.

Questions with regard to the type of evidence that is admissible, the burden of adducing evidence, and the burden of persuasion under subsection (c) are left to prevailing rules that govern similar pre-trial matters in the adopting state.

In any event, an objecting party has the opportunity to show under subsection (d) that the purposes of the Act will not be served by conducting the trial of the claim affecting that party under the Act. The court must refer back to the criteria stated in Section 1 in resolving this issue. For example, the objecting party may show that, even though the claimant's damages are in excess of the triggering threshold figure, the claim against him is so different in nature from other claims in the case that it should be tried separately, at least as to the damages issue. This could occur where future damages consist mainly of medical bills and pain and suffering that will accrue in less than one year from the date the judgment is entered.

Subsection (e) deals with multiple claim cases. The court will want to take into consideration the question of whether the trial of the objecting party's claim will somehow interfere with the trial of claims which clearly should be subject to the provisions of this Act. In a case in which there are multiple claimants who were injured in one accident, it may not be advisable to try in the same proceedings claims under the procedures of this Act with claims that are not being tried under the procedures of this Act. The Act prohibits expert testimony on future changes in the purchasing power of the dollar whereas such testimony might be admissible on a claim not subject to the procedures of this Act. See Section 5. Thus, instructions to the jury could differ as to the various claimants with regard to inflation. This same disparity would occur with regard to instructions on discounting to present value and on life expectancy. *Id.*

The confusion engendered by trying the claims with different jury instructions in the same proceeding would be a basis for the court to decide that there should be separate trials. The court could sever the damages issues and dispose of them in separate proceedings or try all the claims or none of them under the Act. It is a matter for the court to determine so that the purposes of the Act are served and no injustice is done to either the electing or objecting party after taking all interests into account. Assuming the interests are equal, however, the electing party prevails.

The bracketed language in subsections (h) and (d), dealing with the time periods within which an election or objection must be filed and when the court must rule, respectively, anticipates the problem in some states as to whether the legislature has the power to prescribe such rules or whether this is solely within the jurisdiction of the supreme court of the state. The adopting state should choose the appropriate language. Also, if the time period suggested is not appropriate, the adopting state should feel free to tailor the provision to its own situation. It should be kept in mind that the trial of a case under the procedures of this Act might entail different methods of preparation and should not give an undue advantage to, or work a hardship on, any party. Time periods should be determined accordingly.

The election to try the case under the procedures of this Act may be made for the first time after a mistrial is declared, a motion for new trial is granted, or a case is remanded on appeal for a new trial. A court may even permit an election to be filed after a severance. Leave of court may be granted at any time to file an election absent an abuse of discretion.

An election or attempted election is not to be taken as evidence that the claim is worth more or less than the figure that is finally adopted in subsection (c) (3), nor should any argument to the jury referring to such be allowed.

If an effective election is filed and the case is tried under this Act but the respondent is unable or refuses to post security under Section 9, the claimant has the option to have a periodic or a lump-sum judgment entered. Thus, the claimant can force the respondent to pay the judgment in periodic installments regardless of whether security is posted. In many cases, the respondent will be covered by liability insurance and the insurance regulator is empowered under Section 17 to take appropriate action against any liability insurer that refuses to post security if it is capable of doing so. There are additional sanctions under Section 9(c).

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0078 Sec. 4. (a) If liability is found in a trial under this act, the trier  
0079 of fact, in addition to other appropriate findings, shall make  
0080 separate findings for each claimant specifying the amount of:  
0081 (1) Any past damages; and  
0082 (2) any future damages and the periods over which they will  
0083 accrue, on an annual basis, for each of the following types:  
0084 (A) Medical and other costs of health care;  
0085 (B) other economic loss; and  
0086 (C) noneconomic loss.  
0087 (b) the calculation of future damages for types (A) and (B)  
0088 described in subsection (a)(2) must be based on the costs and  
0089 losses during the period of time the claimant will sustain those  
0090 costs and losses and the calculation for type (C) must be based on  
0091 the losses during the period of time the claimant would have  
0092 lived but for the injury upon which the claim is based.

If an effective election is made under Section 3, Section 4 requires that certain types of findings be made by the trier of fact with regard to damages. The purpose is to obtain the necessary fact findings so that a periodic-installment judgment can be fashioned. Both past and future damages are defined in Section 2. Past damages include any punitive or exemplary damages permitted and a court can require separate findings with regard to the latter. Only future damages are subject to payment in periodic installments so they must be separated from past damages. The findings with regard to future damages must be further delineated between those for medical and other health care costs, other economic loss, and noneconomic loss. The period over which these three categories of future damages will accrue and the amounts of each during these periods must be specified by the trier of fact. Special interrogatories to the jury will provide the needed findings.

Subsection (b) brings into focus an issue regarding damages that has not been given thorough attention by the common law. It is commonly said that, in contrast with the English rule, the United States jurisdictions have denied any damages for the reduced life expectancy of an accident victim. To bring the issue into sharper focus, the question is one of whether the trier of fact should use the pre-injury or post-injury life expectancy of the victim in calculating future damages. There is, however, American authority for the proposition that the pre-injury life expectancy is to be used in determining pecuniary losses such as loss of earnings. See Dobbs, *Remedies*, 549 (1973). The Act recognizes this authority and provides that, in determining loss of earnings, the trier of fact shall calculate future damages on the working life expectancy that the claimant would have had but for the injury upon which the claim is based. Any other economic loss except medical type costs is also governed by the pre-injury life expectancy.

There does not seem to be any American authority for the proposition that medical bills or other health care costs should be calculated on the basis of pre-injury life expectancy. In fact, these damages are nonexistent because death will prevent their accrual. This same argument can be made for non-economic loss. The clearest case of non-accrual, though, is with regard to medical and other health care costs because the de-

pendents of the victim, whose life has been shortened, would never receive any benefits from the awarding of these damages. Had the victim lived, the money would have been spent for the medical services.

The fact situation contemplated is anomalous only because the common law development with regard to wrongful death claims was truncated. Had there been a cause of action for wrongful death recognized at common law, perhaps the courts would have gone forward and recognized a claim for reduced life expectancy, at least for earnings loss. After all, by definition, the injury has reduced the life expectancy of the victim, and it would be a logical extension to permit the survivors to bring a cause of action which would cover the loss of earnings less the amount that would have been spent on the victim or persons other than the wrongful death claimants.

The common law probably would never have recognized the cause of action for any medical expenses beyond death since these will never accrue. The answer as to whether the common law would recognize a cause of action for pain and suffering after the victim has departed this veil of tears would probably have been in the negative too. One can look to the survival statutes and the wrongful death statutes for support for these conclusions. Under the orthodox survival acts, the deceased's cause of action ends upon death except to the extent that the statute permits the bringing of an action for those damages incurred prior to death. (Even then, in some jurisdictions, damages for such noneconomic loss as pain and suffering do not survive death.) The wrongful death statutes create a cause of action in the dependent survivors for their own losses. Weaving the two statutes together, it is clear that there is no cause of action for medical expenses or pain and suffering of the deceased beyond death. The Model Periodic Payment of Judgments Act follows this scheme and dictates that post-injury life expectancy be used in calculating damages for health care and related expenses and noneconomic loss.

The trial court, where necessary, may require more detailed findings separating different types of damages and may require findings relative to apportionment or application among the parties. For example, additional findings may be needed to allocate damages among defendants because of rules with regard to contribution, indemnity or comparative fault. Allocation of damages awards among wrongful death claimants or beneficiaries may be required. Also, more detailed findings with regard to the periods of losses and the amounts incurred during those periods could be required because there may be periods of maximum loss, periods of stabilized loss, requirements for one-time medical procedures or separate medical procedures at different points in the future. Whatever findings are necessary to fashion a periodic-installment judgment, the court is empowered to obtain.

0093 Sec. 5. (a) In all trials under this act, evidence of future  
0094 damages must be expressed in current values and those damages  
0095 must be calculated by the trier of fact without regard to future  
0096 changes in the earning power or purchasing power of the dollar.

0097 (b) In all jury trials in which special damages findings are  
0098 required under this act, the jury must be informed that with  
0099 respect to future damages:

0100 (1) The law provides for adjustments to be made later to take  
0101 account of future changes in the purchasing power of the dollar;

0102 (2) the law takes into account the fact that those payments  
0103 may be made in the future rather than in one lump-sum now; and

0104 (3) the jury will make their findings on the assumption that  
0105 appropriate adjustments for future changes in the purchasing  
0106 power of the dollar will be made later.

One of the main purposes of the Act is to avoid as much speculation as possible with regard to the calculation of future damages and to more accurately tailor awards to actual losses. The thrust of this Section is to require the trier of fact to calculate future damages on the basis of present dollar value or purchasing power. This eliminates the need for expert testimony with regard to general economic fluctuations in the future. It does not eliminate the need for expert testimony with regard to the particular victim's future earning capacity which would take into account the attributes of the victim and any increases or decreases in productivity that might result from technology or other changes in a particular industry or trade. However, any statistical data relied on by an expert as the basis for this type of testimony must be adjusted to eliminate factors that reflect predictions as to fluctuations in the purchasing power of the dollar in the future.

Where future damages are paid in periodic instalments, a cost-of-living adjustment is required under Section 7.

The Section also contemplates elimination of speculation as to the earning power of money in the future, and this is accomplished by paying damages as the losses accrue. Thus, there is no occasion for the trier of fact to consider the earning power of money and thereby reduce to present value awards for losses accruing in the future. When future damages are paid in advance of the period to which they apply, they will be discounted in accordance with Section 10.

No reference is made to income tax consequences. This is left to prevailing rules in the adopting state.

The material dealing with instructions to the jury is bracketed, and an adopting state may include or exclude it. The choice may depend upon the respective jurisdictions of the court of last resort and the legislature as to who has the power to decide such matters. Nevertheless, there is concern that, if the jury is not so instructed, because of their familiarity with the lump-sum system or for some other reason, the jury might take the purchasing power of money and the earning power of money into account in their calculations of future damages. Thus, the jury should be instructed on these matters.

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0107 Sec. 6. In order to determine what judgment is to be entered  
0108 on a verdict requiring findings of special damages under this act,  
0109 the court shall proceed as follows:

0110 (a) The court shall apply to the findings of past and future  
0111 damages any applicable rules of law, including setoffs, credits,  
0112 comparative negligence, additurs and remittiturs, in calculating  
0113 the respective amounts of past and future damages each claimant  
0114 is entitled to recover and each party is obligated to pay.

0115 (b) If the total amount of future damages recoverable by a  
0116 claimant in an action for bodily injury or by all of the benefi-  
0117 ciaries in an action for wrongful death is less than \$100,000, the  
0118 court, unless the claimant or beneficiaries elect to receive a  
0119 judgment for periodic installments, shall reduce the amounts  
0120 payable for future damages in accordance with section 10 to  
0121 determine the equivalent lump-sum value and enter judgment  
0122 for that amount plus the amounts found for past damages.

0123 (c) If the total amount of future damages recoverable by a  
0124 claimant in an action for bodily injury or by all of the benefi-  
0125 ciaries in an action for wrongful death is \$100,000 or more, or the  
0126 claimant or beneficiaries so elect, the court shall enter judgment  
0127 as follows:

0128 (1) If a judgment for periodic installments is entered, it must  
0129 specify payment of attorney fees and litigation expenses in a  
0130 manner separate from the periodic installments payable to the  
0131 claimant, either in lump sum or by periodic installments, pursu-  
0132 ant to any agreement entered into between the claimant or  
0133 beneficiary and such claimant's or beneficiary's attorney. If any  
0134 portion of future damages is payable in advance of the period to  
0135 which it applies in satisfaction of the agreement, the amount of  
0136 the damages is subject to discount in accordance with section 10.

0137 (2) Upon election of a subrogee, including an employer or  
0138 insurer who provides workers' compensation, filed within 10  
0139 days after verdict, any part of future damages allocable to reim-  
0140 bursement of payments previously made by the subrogee is  
0141 payable in lump sum to the subrogee and the appropriate re-  
0142 duction of future damages must be calculated in accordance with  
0143 section 10.

0144 (3) The court shall enter judgment in lump sum for past  
0145 damages and for any damages payable in lump sum or otherwise  
0146 under (1) and (2). Any lump-sum payments for future damages  
0147 reduce proportionately all periodic installments for future dam-  
0148 ages.

0149 (4) After making any adjustments prescribed by the preced-  
0150 ing subparagraphs, the court shall reduce the remaining amounts  
0151 for future damages to present value in accordance with section  
0152 10 to determine the equivalent lump-sum value. If the equiva-  
0153 lent lump-sum value is more than \$50,000 or the claimant or  
0154 beneficiaries elect to receive a judgment for periodic install-  
0155 ments, the court shall enter a judgment for the payment of the  
0156 remaining amounts of future damages, without reduction, in  
0157 periodic installments in accordance with section 7; otherwise,  
0158 the court shall enter a judgment for the equivalent lump-sum  
0159 value.

0160 (5) In an action for wrongful death, the calculation of the  
0161 equivalent lump-sum value under subparagraph (4) of the re-  
0162 maining amounts for future damages must be based on the total  
0163 recovery for all beneficiaries of the action. If the lump-sum  
0164 equivalent of the total is more than \$50,000, each beneficiary  
0165 must be paid in periodic installments in accordance with section  
0166 7.

0167 (d) Upon petition of a party before entry of judgment and a  
0168 finding of incapacity to post the required security, the court, at  
0169 the election of the claimant or beneficiaries in an action for  
0170 wrongful death, shall:

0171 (1) Enter a judgment in accordance with subsection (c); or  
0172 (2) reduce the amounts payable for future damages in ac-  
0173 cordance with section 10, unless subsection (c)(1) of section 9  
0174 applies, to determine the equivalent lump-sum value and enter  
0175 judgment for that amount plus the amounts found for past dam-  
0176 ages.

Even though an effective election to try the case under the provisions of this Act has been made, it may be that a judgment for periodic-installment payments is not warranted. A policy decision has been made that, if the future damages recoverable by a claimant, after applying any setoffs, credits, comparative fault rules, additurs, and remittiturs, are less than the suggested figure of \$100,000, the court shall enter a lump-sum judgment for future damages unless a claimant or the beneficiaries of a wrongful death action nevertheless prefer to take a periodic-installment judgment. In other words, the defendant cannot force a claimant to take a periodic-installment judgment even if the damages award for future losses is relatively small. Although the bracketed figure of \$100,000 is a suggested figure, an adopting state should probably not use a lower figure, in view of the fact that the Section provides for some portions of the award for future damages to be paid in a lump sum. The Act has its greatest utility in the serious injury cases, and anything less than \$100,000 as a threshold would probably result in marginal benefits to the parties and to the public. If the total amount of future damages recoverable does not meet the suggested figure and the claimant or wrongful death beneficiaries do not elect otherwise, the court is to discount the future damages to present value in accordance with Section 10 and enter a lump-sum judgment for all damages recoverable in the action. This includes past and future damages and any other

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awards such as punitive damages and costs.

If the total amount of future damages recoverable meets or exceeds the suggested figure or the claimant or wrongful death beneficiaries so elect, the court is directed to enter a judgment for that portion of the damages award representing attorneys' fees and litigation expenses as set out in subparagraph (i) of paragraph (3). The Act, however, does not dictate how the attorney is to be paid. This is left, as it is today, to contractual agreement between the attorney and client and the attorney may be paid in a lump sum or in periodic instalments.

It would serve no purpose not to permit a subrogee to enforce a subrogation claim in lump sum, and the Act gives a subrogee that election in subparagraph (ii) of paragraph (3).

A lump-sum judgment is required for past damages and any other awards so determined under subparagraphs (i) and (ii) of paragraph (3). If punitive damages are awarded, they should also be entered in a lump sum.

Any amounts of future damages which are paid in advance of the period in which they will accrue must be discounted. See Section 10 and the comment thereto. This applies to any future damages that are used to pay attorney fees, litigation expenses, or a subrogee in lump sum. The remaining future damages that are to be paid periodically must be reduced, and the Act requires that this be done on a proportionate basis. For example, assume that an attorney and client agree to a lump-sum contingent fee contract that, in part, results in a \$30,000 attorney fee when the percentage figure in the contract is applied to the future damages findings. Assuming further that the future damages findings consist of \$10,000 per year for thirty years, the \$30,000 fee would be applied at the rate of \$1,000 per year to the instalments of future damages. Thus, the judgment should specify that the attorney receive an amount which represents \$30,000 discounted to present value in accordance with Section 10 and that the tort victim receive \$0,000 per year for thirty years. It should be noted that the full amount of the attorney's fee is offset against future damages even though the attorney would receive less than \$30,000 once this figure is reduced to present value.

If the attorney had contracted for a dollar fee of \$30,000 rather than a contingent fee, it would take more than \$30,000 of future damages to produce that amount because of the discount factor.

After the adjustments discussed above are made, the court shall reduce the remaining amounts for future damages to present value in accordance with Section 10 to determine the lump-sum value of these damages. If this lump-sum figure is equal to or less than the suggested figure of \$50,000, the utility of paying the award in periodic instalments as the losses accrue is marginal as far as serving the purposes of the Act. However, the claimant or beneficiaries of a wrongful death action are given the benefit of the doubt and are permitted to elect a periodic instalment judgment even if the threshold figure is not met. Otherwise, the Act requires that a lump-sum judgment be entered. If the lump-sum value exceeds the suggested figure, the court is directed to enter a periodic instalment judgment for future damages.

There should be but one judgment entered, and it should contain the lump-sum amounts entered under subparagraphs (i) through (iii) and the periodic instalments entered under subparagraph (iv), all of paragraph (3). The judgment should also contain any costs, pre-judgment interest and other items awarded in the case and must conform to the requirements of Section 7.

Whenever future damages are to be paid in periodic instalments as the losses accrue, it becomes imperative that these payments be assured insofar as possible. The form of security is set out in Section 8, and the requirement for posting and maintaining security is covered in Section 9. If the required security cannot be posted, there is no point in delaying the entry of a lump-sum judgment if that is what a claimant desires. Paragraph (4) permits a party to show an incapacity to post security so that a lump-sum judgment may be entered immediately. However, a claimant may want to have an instalment judgment entered even though there is an incapacity to post security and has that right. If this is the case, a claimant may have the instalment judgment reduced to a lump-sum judgment at a later date under the provisions of Section 9(b).

0177 Sec. 7. (a) A judgment for periodic installments must set out:  
0178 (1) The findings of the future damages for each calendar year;  
0179 and

0180 (2) a schedule of the base figure for each calendar year to be  
0181 used in calculating future payments. The base figure is deter-  
0182 mined by discounting the findings for each calendar year in  
0183 accordance with section 10.

0184 (b) As of the first day of each calendar year after a judgment  
0185 for periodic installments is entered, the schedule of all install-  
0186 ments not previously due must be adjusted by adding to the base  
0187 figure for each installment, in the most recently modified  
0188 schedule, a sum determined by multiplying the base figure by  
0189 the index factor defined in subsection (c).

0190 (c) If a judgment for periodic installments has been in effect  
0191 for:

0192 (1) One year or more at the time of adjustment, the index  
0193 factor is the rate of discount per annum for the last issue of  
0194 52-week United States treasury bills in the year before the year  
0195 immediately preceding the year of adjustment;

0196 (2) less than one year but more than six months at the time of  
0197 adjustment, the index factor is  $\frac{1}{2}$  of the index factor as provided  
0198 in paragraph (1); and

0199 (3) less than six months but more than three months at the  
0200 time of adjustment, the index factor is  $\frac{1}{4}$  of the index factor as  
0201 provided in paragraph (1).

0202 The secretary of state shall publish notice of such index factor  
0203 provided by this section not later than the second issue of the  
0204 Kansas register published in July of each year.

0205 (d) In all other cases, no adjustment may be made.

0206 (e) Unless the court directs otherwise or the parties other-  
0207 wise agree, payments must be scheduled at one-month intervals.  
0208 Payments for damages accruing during the scheduled intervals  
0209 are due at the beginning of the intervals.

Whenever a periodic-installment judgment for future damages is entered, there must be some method of adjusting the payments that do not become due until a date certain in the future to take into account fluctuations in the purchasing power of the dollar. This Section deals with that subject.

After considerable experimentation with various indexes and formulas and consultation with people knowledgeable about these matters, the present approach was developed.

The index factor utilized for adjusting for fluctuations in the purchasing power of the dollar is based on the rate of discount for the 52-week treasury bills issued by the United States Government. Any judgment debtor or other person required to secure a periodic installment judgment, such as a casualty insurance company or corporation, can invest the funds necessary in the treasury bill specified to produce the income to make the required yearly adjustments. The treasury bills chosen provide the maximum accommodation between security and liquidity.

The Section does not require, however, that the judgment be secured by investing in such instruments. It merely requires that the periodic installments be adjusted on the basis of the specified per annum rate of discount. If the judgment debtor chooses to secure the judgment through investments in other instruments, this may be accomplished if the provisions of Section 8 dealing with the form of security are met.

At present, there does not appear to be a market for the type of annuity that would best secure the periodic-installment judgment contemplated in this Act. It is probable, however, that a market will develop to meet the needs of the casualty insurers and corporations required to secure periodic-installment judgments.

Institutional investors, such as large corporations and insurance companies, are able to make investments providing a greater return than the treasury bills specified and will, in all likelihood, do so. This should provide the profit incentive for the life insurance industry to market an annuity that will allow for the first time on January 1, 1983 or January 1, 1984? The adopting state can choose the appropriate language to implement whatever decision is reached on this question.

The Section requires the court to include certain findings in the judgment so that the exact amount due, either in lump sum or periodic instalments, can be easily ascertained. The court is required to include the findings for future damages for each calendar year that losses will accrue. It is also required to include a schedule of the base figures for each calendar year for calculating future payments. The base figures are determined by applying to the findings of future damages for each calendar year the discount factor in Section 10. It is necessary to adjust the findings for future damages in accordance with Section 7 before the index factor in Section 7 is applied. This is so because the index factor in Section 7 is based on the discount rate for 52-week United States treasury bills. The discount factor on the treasury bills represents two predictions by investors about the future: (1) the purchasing power of money and (2) the earning power of money. (The risk of nonpayment is nil for all practical purposes. See Comment to Section 10.) The two together constitute the amount of the discount bid by investors on the treasury bills. An adjustment for fluctuations in the purchasing power of money is all that is required because the damages will be paid as losses accrue, rather than in advance of the period they accrue. Thus, that portion of the discount rate that represents the earning power of

money must be eliminated. Otherwise the judgment creditor will be overpaid just as would be the case of a lump-sum judgment were not discounted to present value.

It would be possible to adjust the discount rate on the United States treasury bills so that one could simply multiply the adjusted discount rate times the unpaid instalments at the beginning of every year. However, the illustration below will show that it will be more advantageous to discount the installment payments in accordance with Section 10 first and then multiply by an unadjusted index factor based on the treasury bills. By doing this, the schedule, as illustrated below, will always show the amount of money due at any one time on a periodic-installment judgment the judgment debtor to secure the judgment as required under the Act. In the meantime, a judgment debtor is not left to the mercy of the insurance industry in providing a market and can secure the judgment and the adjustments required under this Section by investing in the treasury bill specified.

At least one large commercial bank has expressed an interest in the Act and indicated that the investment of the sums needed to produce the installment payments and adjustments could be handled through a trust. Thus, it is felt that the fluctuating index factor employed in this Section is not only the most accurate and, therefore, the fairest approach for all concerned, but that it is a feasible system. On the other hand, it is recognized that a fluctuating index factor is of great concern to some insurers and that some experimentation may need to take place in the settlement arena before such a scheme is mandated by statute.

A state could adopt a fixed index factor initially by simply substituting the following language for that contained in paragraph [(1)] of subsection (c): "[ (1) ] one year or more at the time of adjustment, the index factor is 8 percent." This suggested substitute language employs a figure of 8 percent which is a realistic, if not low, figure for the present economic conditions. This points up the difficulty in reaching a decision on what figure should be used and the unfairness involved if the figure is not an accurate prediction of future fluctuations or, at least, the average of the fluctuations over time. This is why preference is given in the Act to a fluctuating index factor that is based on actual economic conditions. If the above language utilizing a fixed index factor is substituted, paragraph (3) of Section 17 is no longer needed and should be deleted.

Adjustments for fluctuations in the purchasing power of the dollar are to be made on the first day of each calendar year after a periodic-installment judgment is entered. The Section provides alternative language in subsection (c) to give the adopting state a choice as to whether it will adjust only after a judgment has been in effect for a full year or whether it will adjust for initial partial year periods. This is a matter that will arise only on the occasion of the first adjustment. For example, if a periodic-installment judgment is entered on May 1, 1982, should it be adjusted amounts due can be easily determined. The first step is to divide the findings for future damages by the discount factor to obtain the base figures. Assuming the discount factor is 3% and adjustments are to be made only where the judgment has been in effect one year or more, the amount of \$10,000 to be paid in 1983 is divided by 1.03, the amount of \$10,000 to be paid in 1984 is divided by  $(1.03)^2$ , etc. The second step is to apply the inflation or index factor.

Adjusted for 1983 (Factor 10%) 1/1/84	Adjusted for 1984 (Factor 8%) 1/1/85	Adjusted for 1985 (Factor 7%) 1/1/86
\$11,301		
10,973	\$11,851	
<u>10,654</u>	<u>11,506</u>	<u>\$12,311</u>
\$32,928	\$23,357	\$12,311

probable that people would want to pay more than the face value of a United States treasury bill. To do so would mean that one must believe that the earning power of a dollar will be more when the treasury bill comes due than at the date of purchase. One would be better advised to merely retain the money and not invest it at all under these circumstances. Thus, the discount rate for treasury bills will be zero.

However, the instalments for future damages will continue to be paid as losses accrue. These instalments have been discounted in accordance with Section 10 to arrive at the base figures under subsection (a)(2). Since the index factor will be zero in periods of deflation, there will be no adjustment under subsection (b). Thus, there has been a downward adjustment in the periodic instalments because the instalments were discounted under Section 10 and will not be adjusted upwards during periods of deflation.

on a lump-sum basis, as well as on a periodic-installment basis.

#### Illustration

Assume a jury verdict is returned and judgment is entered on January 1, 1982, awarding future damages of \$20,000 in 1982 and \$10,000 in each year for the years 1983 through 1986. Assume that the index factor defined in subsection (b) of Section 7 and the discount rate of Section 10 are as indicated. As time passes, and adjustments are made, the

	Base Figure Schedule (3% discount) 1/1/82	Adjusted for 1982 (Factor 9%) 1/1/83
1982	\$20,000	
1983	9,709	\$10,583
1984	9,426	10,274
1985	9,151	9,975
1986	<u>8,885</u>	<u>9,685</u>
Lump Sum	\$57,171	\$40,517

By examining the illustration, it can be seen that, if security is not posted on January 1, 1982, the judgment creditor can move the court to enter a lump-sum judgment and that amount is \$57,171. If security is posted but, by the end of 1983, the security should fail and the judgment debtor moves to have a lump-sum judgment entered, it can be easily determined that the amount is \$32,928. On the other hand, the schedule also shows the amount that is due each year once the adjustment is made on the basis of the periodic-installment scheme. Thus, the utility of using this type of schedule that employs a schedule of base figures calculated in accordance with Section 10 and then adjusting on the basis of the index factor in Section 7(b) is demonstrated.

Even though subsection (b) speaks in terms of "adding to the base figure", this does not mean that there will not be any adjustments downward if we experience a period of deflation in the future in the economy. It is highly im-

0210 Sec. 8. (a) Security authorized or required for payment of a  
0211 judgment for periodic installments entered in accordance with  
0212 this act must be in one or more of the following forms and  
0213 approved by the court:  
0214 (1) Bond executed by a qualified insurer;  
0215 (2) annuity contract executed by a qualified insurer;  
0216 (3) evidence of applicable and collectible liability insurance  
0217 with one or more qualified insurers;  
0218 (4) an agreement by one or more qualified insurers to guar-  
0219 antee payment of the judgment; or  
0220 (5) any other satisfactory form of security.  
0221 (b) Security complying with this section serves also as a  
0222 required supersedeas bond.

In any system where obligations are to be discharged over a period of time, it becomes important to use reasonable devices to assure that the means for discharging the obligation continues to exist during the time in question. Under a system of paying future damages over the period the losses will accrue, particularly if the judgment debtor is empowered to make this election, it is crucial to the system that the judgment obligation be secured. Section 9 requires that a periodic-installment judgment be secured by each party liable for all or a portion of the judgment. Section 8 details the form of the security.

A variety of ways are available to a judgment debtor to secure a periodic-installment judgment, but it should be noted that the court must approve the form of security. The judgment debtor does not have an unfettered choice in the matter. Four different types of security are explicitly mentioned and will suffice as long as the obligor on the security is a qualified insurer and the court approval is obtained. The insurer regulator in the adopting state is required to establish rules and procedures for determining which insurers, self-insurers, plans or arrangements are financially qualified to provide the four types of security mentioned in this Section. See Section 17. Subsection (5) (a) gives some discretion to the trial court to approve other forms of security so long as they are satisfactory in the judgment of the court to provide the requisite financial stability.

A bank might provide the requisite security through a trust. For example, the Act contemplates that U. S. treasury bills can be used to secure a periodic-installment judgment both as to the lump-sum equivalent of the installments and as to the amounts needed to make adjustments for future inflation. A judgment debtor could establish a trust with a bank whereby the bank would invest the lump-sum equivalent in U. S. treasury bills thereby providing the security and the installment payments. As pointed out in Section 7 and the com-

ment thereto, other types of investments can be utilized to produce the income necessary to make the cost-of-living adjustments required by the Act. Thus, the trust might invest in other high quality instruments. As long as the court is satisfied that the security is adequate, it could approve such an arrangement.

It should be kept in mind, however, that the security must meet the conditions set out in Rev. Rul. 79-220, 1979-2 C.B. 74 in order for the judgment creditor to receive the installment payments on a tax-free basis. The ruling dealt with a situation where an insurance company purchased and retained exclusive ownership in a single premium annuity contract to fund monthly payments stipulated in settlement of a damage suit. It was held that the exclusion from gross income by Section 104(a)(2) of the Internal Revenue Code of 1954 applies to the full amount of the monthly payments received by the victim in settlement of the damage suit because the victim had a right to receive only the monthly payments and did not have the actual or constructive receipt or the economic benefit of the lump-sum amount that was invested to yield that monthly payment. If the victim were to die before the end of the period over which the payments were to be made, the payments made to the victim's estate under the settlement agreement would also be excludable from income under Section 104. See also Rev. Rul. 79-313, 1979-2 C.B. 75.

Subsection (b) simply provides that any security complying with this Section serves also as a required supersedeas bond since it would be wasteful to require both security and a supersedeas bond if the case is on appeal. If the judgment debtor chooses not to secure the periodic-installment judgment pending an appeal in a method that qualifies under this Section, the regular rules with regard to supersedeas bonds in the adopting jurisdiction will still apply.

0223 Sec. 9. (a) If the court enters a judgment for periodic install-  
0224 ments, each party liable for all or a portion of the judgment,  
0225 unless found to be incapable of doing so under subsection (d) of  
0226 section 6, shall separately or jointly with one or more others post  
0227 security in an amount equal to the present lump-sum equivalent  
0228 of the unpaid judgment, including past damages, in a form  
0229 prescribed in section 8, within 30 days after the date the judg-  
0230 ment is subject to execution. A liability insurer having a con-  
0231 tractual obligation and any other person adjudged to have an  
0232 obligation to pay all or part of a judgment for periodic install-  
0233 ments on behalf of a judgment debtor is obligated to post security  
0234 to the extent of its contractual or adjudged obligation if the  
0235 judgment debtor has not done so.

0236 (b) A judgment creditor or successor in interest and any party  
0237 having rights under subsection (e) may move that the court find  
0238 that security has not been posted and maintained with regard to a  
0239 judgment obligation owing to the moving party. Upon so finding,  
0240 the court shall order that security complying with this act be  
0241 posted within 30 days. If security is not posted within that time  
0242 and subsection (c) does not apply, the court shall calculate the  
0243 lump-sum equivalent of the obligation under section 10 and  
0244 enter a judgment for that amount in favor of the moving party.

0245 (c) Upon motion by the claimant, or the beneficiaries in an  
0246 action for wrongful death, the court, in the absence of a showing  
0247 of good cause, shall enter a lump-sum judgment without apply-  
0248 ing the discount factor in section 10 if:

0249 (1) A responding party elects to have this act apply and makes  
0250 the required showing as to security under subsection (c)(3)(B) of  
0251 section 3, but thereafter fails to post security; or

0252 (2) a party fails to maintain security.

0253 (d) If a judgment debtor who is the only person liable for a  
0254 portion of a judgment for periodic installments fails to post and  
0255 maintain security, the right to lump-sum payment described in  
0256 subsection (b) applies only against that judgment debtor and the  
0257 portion of the judgment so owed.

0258 (e) If more than one party is liable for all or a portion of a  
0259 judgment requiring security under this act and the required  
0260 security is posted by one or more but fewer than all of the parties  
0261 liable, the security requirements are satisfied and those posting  
0262 security may proceed under subsection (b) to enforce rights for  
0263 security or lump-sum payment to satisfy or protect rights of  
0264 reimbursement from a party not posting security.

If large awards of future damages are to be paid periodically in the future rather than in lump sum, it is important that the judgment be secured to assure the payments. This Section requires that a periodic-installment judgment be secured. Section 8 prescribes the form of security that will suffice under this Act.

Each party liable for all or any part of a periodic-installment judgment is required to post security within 30 days after the date the judgment is subject to execution. A party may post security even though an appeal is contemplated and have the security suffice as a supersedeas bond. See Section 8(b). In this event, the security must be posted in the time required in the adopting state for a supersedeas bond. Otherwise, this Section merely requires that the security be posted within 30 days after the date the judgment is subject to execution. This will give the parties sufficient time to arrange for security after the judgment becomes final.

If a defendant is incapable of posting security, either the claimant or defendant may petition the court before entry of judgment for a finding of incapacity to post security required in this Section. See Section 6(4). If the court finds that the defendant is incapable, the court may, at the election of the claimant, enter a lump-sum judgment without regard to any waiting period in Section 9. Unless a party can show incapacity to post security, the judgment debtor is given 30 days to post the security.

The security required must meet the form requirements in Section 8 and must be in an amount equal to the present lump-sum equivalent of the unpaid judgment, including past damages. The latter requirement contemplates that the outstanding judgment obligation must always be secured even though diminishing over a period of time. Section 7(a)(2) requires that a periodic-installment judgment set out a schedule of the base figures for calculating future payments. The base figures are deter-

mined by applying the discount factor in Section 10. The base figures are adjusted periodically and, when totalled for a particular year, equal the present lump-sum equivalent of the unpaid judgment. Thus, by requiring the base figures to be set out in the judgment, the total amount of the lump-sum equivalent of the unpaid judgment is readily identifiable at any particular time. Even though the individual installments may increase over time due to the adjustment required in Section 7, the total amount of unpaid installments will decrease. (See the illustration in the Comment to Section 7.) It is the total of the unpaid base figures, including any adjustments, that must be secured to satisfy this Section.

The last line in subsection (a) requires a liability insurer or anyone else who has been adjudged liable to pay all or part of the judgment on behalf of a judgment debtor to post security if the judgment debtor does not. This covers the situation, in addition to that of a liability insurer, in which a manufacturer, or someone else in the marketing chain, enters into an agreement to indemnify or otherwise discharge all or part of the obligation of a party adjudged liable, but limits it to situations in which there has been a court determination of liability.

Subsection (b) deals with the situation in which security is not posted during the 30-day period set out in subsection (a) and the situation in which, regardless of when security is posted, the security proves inadequate. The security may prove inadequate because it is not in the requisite amount or, although in the requisite amount, the obligation on the security is no longer qualified to provide security. There may be other situations in addition to these. In the event security is not posted and maintained, the court is required to order that it be posted within 30 days. If security is not posted within that time, a lump-sum judgment shall be entered if the judgment creditor so moves. There may be circumstances, however, in which the judgment creditor prefers

to retain the periodic-installment judgment even though unsecured. Appeals from any rulings with regard to adequacy of security are left to prevailing rules in the adopting jurisdiction.

Subsection (c) provides for a penalty in some of the situations in which there is a capricious failure to post or maintain security. For example, where a defendant elects to try the case under Section 3(c)(3)(ii) and prevails over the claimant's objection by showing that adequate security can be posted but later refuses to post security without good cause, the claimant can elect to receive a lump-sum judgment without having the discount factor in Section 10 applied. Using the illustration in the comment to Section 7 as a hypothetical case, the claimant would be entitled to a lump-sum judgment of \$60,000. Thus, a penalty of \$2,829 would be imposed. Where the election to try the case under the Act is made by the claimant and there is a subsequent capricious failure to post security, no penalty is imposed. However, the claimant can still insist on a periodic-installment judgment and, if the refusal is by an insurance company, the insurance regulator has power to take action against the company. See Section 17(2). The penalty in subsection (c) applies to all failures to maintain security where there is not good cause for the failure.

The penalty in subsection (c) only applies where there is an absence of good cause. It could happen that the failure to post security in the example given in the preceding paragraph occurred when the verdict exceeded the amount specified for an adequate showing under Section 3(c)(3)(ii) and the defendant was financially unable to post the security required for the jury award under Section 9. This would constitute good cause. Other examples can be posited but in the final analysis the burden is on the defendant or judgment debtor to convince the court that good cause exists.

The last two subsections deal with situations in which there are multiple obligors under a periodic-installment judgment. Subsection (d) deals with the situations in which one of the obligors is solely liable for a portion of a judgment. In this case, the right to a lump-sum judgment for failure to post and maintain security by this obligor is limited to the amount owed by the obligor. The balance of the judgment which is owed by one or more other judgment debtors is unaffected.

Subsection (e) deals with a variety of situations involving multiple obligors under a periodic-installment judgment when one or more of the obligors fails to post and maintain security in accordance with this Section. Situations contemplated include those of joint and several liability in which contribution or indemnity is owed; where there is no joint and several liability, but a right of indemnity is owed as in the case in which a manufacturer owes indemnity to a retailer who has sold a defective product originating with the manufacturer; or in which an employer is vicariously responsible for the acts of an employee, and the employee, as a third party defendant, owes indemnity to the employer. This subsection provides that any party who is obligated to pay part or all of the judgment, whether primarily or secondarily liable, may post security to satisfy the requirements of

this Section. Once having posted security, the posting party is entitled to protect any rights that party has against a defaulting party by requesting that security be posted under subsection (b). If the defaulting party persists in failing to post or maintain security, the posting party can obtain a lump-sum judgment. This provides the maximum accommodation in that the judgment creditor is not deprived of the benefits of a periodic-installment judgment merely because one among several judgment debtors fails to post or maintain security. At the same time, it provides protection to those judgment debtors who do post and maintain security. It prevents one judgment debtor from depriving the other parties to the judgment, be they creditors or debtors, of the benefits of this Act.

0265 Sec. 10. If (a) future damages are determined in accordance  
0266 with section 5 but are ordered to be paid in advance of the period  
0267 to which they apply or (b) base figures are required under  
0268 section 7, the court shall apply a discount factor of 3%, com-  
0269 pounded annually.

Under the common law system, damages for bodily injury are awarded in a lump sum. In most jurisdictions, the trier of fact is required to reduce future damages to present value. A claimant would be overcompensated if the earning power of money were not taken into account.

Whenever an effective election is made to try a case under this Act, the trier of fact is told to disregard the earning power of money because the Act contemplates paying future damages as the losses accrue, rather than in advance of the period when the losses accrue. However, in some cases, awards for future damages so determined may not be paid in periodic instalments in the future for a variety of reasons. After taking into account any set-offs, credits, comparative fault rules, additurs or remitturs, or other portions of future damages that are to be paid in lump sum, such as litigation costs and attorneys' fees and amounts to which others may be subrogated the final amount of future damages subject to payment in periodic instalments may not meet the threshold monetary figures prescribed in Section 6. Moreover, even though the thresholds are met, security may not be posted or maintained and a lump-sum judgment may be entered. Whenever the award for future damage is calculated without regard to the earning power of money and is subsequently required to be paid in a lump sum, it is subject to discount under this Section.

As explained in the Comment to Section 9, the discount factor is also used in arriving at the base figures required to be set out in a periodic-installment judgment.

The discount factor suggested in this Section represents the real rate of interest. Market interest rates reflect two basic components. One component is based upon predictions about increases or decreases in the purchasing power of money over the period the interest rate will be in effect. The second element reflects what the loaning party demands in return for the use of the money and the risk that it will not be returned. The following explanation by Frederick C. Kirby, appearing at pages 449-50 in the August 1978 issue of the *Insurance Law Journal*, is instructive:

It has long been observed that interest rates tend to be "high" when prices are rising and "low" when prices are falling, and that interest rate move-

ments lag behind price level changes. Economic reasoning recognizes inflation as a cost of lending money. Similarly, the borrower recognizes inflation as a gain in borrowing money through repayment of less valuable dollars. The dollars of principal received by the lender upon maturity of a loan will purchase less than the same number of dollars would have purchased at the time of the loan. This purchasing power difference must be compensated for in the price (interest rate) charged for lending money. Thus, inflation is a cost of lending that is included in the price of lending (market rate of interest) according to anticipation of its rate.

Measures of past rates of inflation and relating this to current market rates of interest explains 70 to over 90 percent of the variation in the market rates of interest.

However, the well-known inflationary element of the market rate of interest does not account for the whole market rate of interest nor does the variation in the inflationary element account for the entire change in the market rate of interest. The economically rational person prefers present cash or liquidity to future cash. A borrower must pay a lender a rate of interest, absent inflation, sufficient to induce the lender to part with present cash (liquidity). Additionally, all borrowers (except perhaps the U. S. Government) have some probability of not being able to repay the loan when due. The probability of default is the risk element of the market rate of interest and, absent inflation, a borrower must pay a lender a rate of interest sufficient to induce the lender to accept the risk of default. The time preference element plus the risk element is what economists refer to as the real rate of interest or that rate of interest which would prevail if investors' inflationary expectations were zero. To assume the market rate of interest is offset by the rate of depreciation of real value caused by inflation is to assume, incorrectly, that the real rate of interest (time preference and risk elements) is zero.

Dr. Kirby estimates that the real rate of interest (which includes the time preference element plus the risk element of the market rate of interest) has been approximately 2.50% over the seven years preceding the publication of his article. His estimate is based on a formula that uses the market rates of interest for corporate and U. S. treasury bonds and adjusts them to arrive at a figure for the real rate of interest.

In a study for the Special Committee drafting this Act, Dr. William B. Fairley concluded that the real rate of interest, on the average, has been 1% over the period from 1950 to 1978. Dr. Fairley used one-year government bonds and 52-week treasury bills as the basis for his study. The difference between the two studies can be attributed in the main to three factors: (1) the different time periods involved in the two studies, (2) the fact that corporate bonds have maturity dates far in excess of one year and (3) the fact that corporate bonds have a greater risk of nonpayment.

The suggested figure of 3% in the Act is probably the highest figure that should be adopted, and there is substantial evidence that it should be lower.



0271 damages are payable in periodic installments, the liability for  
0272 payment of any installments for medical or other costs of health  
0273 care or noneconomic loss not yet due at the death of a person  
0274 entitled to receive these benefits terminates upon the death of  
0275 that person. The liability for payment of any other installments or  
0276 portions thereof not yet due at the death of the person entitled to  
0277 receive them likewise terminates except as provided in subsec-  
0278 tions (b) and (c).

0279 (b) If, in an action for wrongful death, a judgment for periodic  
0280 installments provides payments to more than one person entitled  
0281 to receive benefits for losses that do not terminate under sub-  
0282 section (a) and one or more but fewer than all of them die, the  
0283 surviving beneficiaries succeed to the shares of the deceased  
0284 beneficiaries. The surviving beneficiaries are entitled to shares  
0285 proportionate to their shares in the periodic installments not yet  
0286 paid, but they are not entitled to receive payments beyond the  
0287 respective periods specified for them in the judgment.

0288 (c) If, in an action other than one for wrongful death, a  
0289 judgment for periodic installments is entered and a person en-  
0290 titled to receive benefits for losses that do not terminate under  
0291 subsection (a) under the judgment dies and is survived by one or  
0292 more qualifying survivors, any periodic installments not yet due  
0293 at the death must be shared equitably by those survivors.  
0294 Amounts due each survivor may not exceed the survivor's eco-  
0295 nomic loss resulting from the death.

0296 (d) "Qualifying survivor" means a person who, had the death  
0297 been caused under circumstances giving rise to a cause of action  
0298 for wrongful death, would have qualified as a beneficiary at the  
0299 time of the death according to the law that would be applied in  
0300 an action for wrongful death by the jurisdiction under which the  
0301 issue of liability was resolved in entering the judgment for  
0302 periodic installments.

In ascertaining damages under the common law lump-sum system, the trier of fact is ill-informed as to two matters. One of these matters can be ascertained with the passage of time and the other will never be known. In permanent injury cases, it will never be known what the victim would have been like had he or she not been injured. Mere passage of time, however, will reveal what the victim will be like. The Act does not attempt to modify the damages award based on revelations with the passage of time, with one exception.

A policy decision was made to terminate any installments not yet due upon death which represent medical or other health care costs and noneconomic loss such as pain and suffering. Even though the trier of fact is instructed to use the post-injury life expectancy of the victim for these items of damage (see Section 4(b)), death may result prematurely from causes having no relation to the original injury. Since death precludes the accrual of losses for such items of damage, it was felt that these items would be a windfall to the recipient. Thus, subsection (a) provides that any installments representing these items not yet due at death terminate.

Attorney's fees do not terminate, even though based on a contingent fee contract and paid periodically. Those fees are to be set out separately in the installment judgment under Section 6(3) (i) and do not represent amounts owed to the tort victim. This recognizes the common understanding that the attorney is entitled to the fee when the judgment is obtained. Because the fee is owed to the attorney and does not represent damages owed to the tort victim, it does not fall within the operative provisions of this section.

As to economic loss, the trier of fact is to use the pre-injury life expectancy of the victim (see Section 4(b)). The Section provides that installments rep-

resenting these aspects of damages shall continue to be paid to certain beneficiaries with certain limitations. Subsection (b) deals with the wrongful death case. If a periodic-installment judgment provides payments to more than one beneficiary of a wrongful death claim and one or more, but fewer than all, of the beneficiaries die, the surviving beneficiaries succeed to the shares of the deceased beneficiaries. The surviving beneficiaries are to divide the deceased beneficiaries' shares proportionately. However, the surviving beneficiaries are not entitled to receive the deceased's shares for any period longer than they are entitled to receive benefits in their own right.

Subsection (c) deals with cases other than wrongful death in which a person receives a periodic-installment judgment, but the person subsequently dies. If there are qualifying survivors, any periodic installments representing economic loss not yet due at the death must be shared equitably between the survivors. The survivors are not entitled to receive benefits in excess of their losses which result from the death of the judgment creditor.

The term "qualified survivors" is used to designate the recipients of these benefits under subsection (c). The wrongful death act or law of the jurisdiction whose law is dispositive of the liability issue in the action giving rise to the periodic-installment judgment is employed to define the recipients. Thus, if the action giving rise to the periodic-installment judgment is filed in State X, but the law of State Y governs the disposition of the liability issue, the wrongful death act or law of State Y also determines who is a "qualified survivor." This technique avoids the necessity of each state having to define the eligible recipients and adopts what would more than likely be the outcome in most states in any event under conflict of law

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principles. If litigation arises over eligibility to receive benefits or the amounts of benefits to be received, rights will be enforced as they otherwise would be in a wrongful death action.

The survivors described in subsection (c) also may have a cause of action under a wrongful death act or law separate and apart from the rights given to them by this Act. See *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). In this case, the Supreme Court held that the fact that the decedent had previously recovered damages for loss of wages, pain and suffering and medical expenses would not interfere with the independent cause of action for wrongful death in the survivors resulting from the same injury. The wrongful death action was not precluded by the prior recovery under the doctrine of *res judicata*. The potential for double liability coming from the awards to the decedent for loss of future wages and to the survivors for loss of support was held to be controlled by the law of collateral estoppel. The Act does not attempt to deal with this matter, but leaves it to be resolved under the law of the adopting state regarding *res judicata* and collateral estoppel.

Serious consideration was given to including provisions for modifying an instalment judgment when it is learned after the verdict that the tort victim's damages are greater or worse than found at the trial. A suggested section in an early draft would have permitted a court to hold a limited number of additional hearings after a trial and to modify a judgment for future damages based upon later events affecting the judgment creditor's damages. This proposed section was eliminated from the Fifth Tentative Draft by a vote of the Committee of the Whole at the annual meeting of the Conference in 1978. It was argued there that the insurance industry could not cost its product if liability was open-ended, court congestion would be worsened, and some injured persons might be motivated to resist rehabilitation and recovery. Difficulty in determining the cause of subsequent medical and other changes in the tort victim were also cited. In short, the Conference voted to abandon the suggestion because of the seemingly intractable practical problems involved.

Under the present system, the trier of fact predicts the dollar value of all future damages, reduces them to present value, and awards a verdict in a lump sum. If the victim's injuries prove to be different than as predicted, there is no remedy for either the tort victim or the judgment debtor. The undercompensated victim may have a partial remedy through resort to social programs provided for the needy which are paid for by taxpayers. On the other hand, damages paid for losses that are never suffered are clearly a windfall to someone. The cost of this windfall is generally spread among those who pay insurance premiums. In products liability cases, this cost is usually passed on to consumers. The Drafting Committee has concluded that the elimination of this windfall, which has the potential for reducing liability insurance premiums, is not unjust even though a viable solution to the problems of the undercompensated victim cannot be woven into this Act. It must not be overlooked in Section 11 that only liability for unsuffered noneconomic damages and unincurred medical and other health care costs is totally eliminated upon the premature death of a judgment creditor. Survivors may still recover portions of the unpaid future instalments to which they have a rightful claim. Moreover, the tort victim is advantaged by tax savings, inflationary adjustments, and other features of the Act. It is believed that the Act is balanced and that it fairly addresses those problems that are subject to solution without completely reforming the method by which tort victims are compensated. See *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 Iowa Law Review 138 (1978).

If a state decides to eliminate Section 11 on the basis that neither problem should be resolved unless solutions are offered to the undercompensated victim as well as those who pay damages that are never suffered, then it would appear that all unpaid future damages should be lump-summed and paid to survivors upon the death of each judgment creditor. To continue paying the decedent's unincurred medical expenses and noneconomic damages to survivors in instalments merely underscores the windfall nature of the payments and carries out no desirable policy.

0303 Sec. 12. (a) In determining whether or to what extent a  
 0304 judgment for periodic installments exceeds limits under a liabil-  
 0305 ity insurance policy, the total of the base figures calculated in  
 0306 accordance with subsection (a)(2) of section 7 must be added to  
 0307 the lump-sum damages in the judgment. The sum so calculated  
 0308 must be compared to applicable limits under the policy.

0309 (b) If the sum calculated under subsection (a) does not ex-  
 0310 ceed applicable policy limits when the judgment is entered,  
 0311 amounts due by reason of the adjustments required under sec-  
 0312 tion 7 are entirely within those limits.

0313 (c) If the sum calculated under subsection (a) exceeds appli-  
 0314 cable policy limits when the judgment is entered, the adjust-  
 0315 ments required under section 7 must be allocated proportion-  
 0316 ately to amounts within and amounts in excess of those limits.

This Section determines how adjustments in periodic-installment payments under Section 7 are to be applied towards liability insurance limits. It was thought best to spell this out in the Act, rather than leaving it to the insurance industry to draft policy language which may not be in the best interest of the insured or the victim, or to leave it to litigation under present policy language.

Under subsection (a), the total amount of the judgment is reduced to a lump-sum basis. This is done by taking the total of the base figures as calculated in Section 7 (a) (2) and adding this figure to the amount of lump-sum damages in the judgment. The base figures are determined by discounting the installment payments in accordance with Section 10. The sum of the discounted installment payments or base figures and the lump sum damages is then compared with the policy limits. If the sum does not exceed the policy limits when the judgment is entered, subsection (b) states that all the adjustments required under Section 7 are contained within the limits. If the sum exceeds the policy limits at the time the judgment is entered, subsection (c) states that the adjustments are allocated proportionately to amounts within and amounts in excess of the limits.

0317 Sec. 13. An assignment of or an agreement to assign any right  
 0318 to periodic installments for future damages contained in a judg-  
 0319 ment entered under this act is enforceable only as to amounts:  
 0320 (a) To secure payment of alimony, maintenance or child  
 0321 support;  
 0322 (b) for the costs of products, services or accommodations  
 0323 provided or to be provided by the assignee for medical or other  
 0324 health care; or  
 0325 (c) for attorney fees and other expenses of litigation incurred  
 0326 in securing the judgment.

One of the purposes of the Act is to pay out losses periodically in the future to assure that the awards serve the purposes for which they are made. In furtherance of this purpose, this Section places limitations on the assignability of periodic installments. Two versions are presented, both bracketed to indicate that the jurisdiction should consider adopting one or neither of the versions.

Alternative A is the most restrictive and, under it, assignments may be made only to secure familial obligations of support; to secure needed medical and related services; and to obtain legal services and pay for litigation expenses in securing the periodic-installment judgment in question. Alternative B freely permits assignments with one exception — periodic payments for future medical expenses may not be assigned unless the assignment is for the purpose of securing medical and related services. The medical services do not have to relate to the injury, however, which produced the periodic-installment judgment.

This Section is not meant to affect a workers' compensation insurer's right of subrogation or other similar subrogation rights whether created by a statute, contract or under the common law.

0327 Sec. 14. Periodic installments for future damages contained  
0328 in a judgment entered under this act for loss of earnings are  
0329 exempt from garnishment, attachment, execution and any other  
0330 process or claim to the extent that wages or earnings are exempt  
0331 under any applicable law. Except to the extent that they may be  
0332 assigned under section 13, periodic installments for all other  
0333 future damages are exempt from garnishment, attachment, exe-  
0334 cution and any other process or claim.

This Section complements Section 13 and is based on the same policy grounds. Periodic installments representing loss of earnings are treated as earnings are otherwise treated in the adopting state.

If Alternative A of Section 13 is adopted, periodic installments for medical and other health care costs and non-economic losses are exempt except to the extent that they may be assigned under Section 13.

If Alternative B of Section 13 is adopted, the last sentence of Section 14 should be changed to read: "Periodic installments for medical and other costs of health care are exempt from garnishment, attachment, execution, and any other process or claim except to the extent that they may be assigned under Section 13."

If no limitation is placed on the ability to assign periodic installments for future damages, the last sentence of Section 14 should be deleted.

0335 Sec. 15. (a) Parties to an action on a claim for bodily injury  
0336- may file with the clerk of the court in which the action is pending  
0337 or, if none is pending, with the clerk of a court of competent  
0338 jurisdiction over the claim, a settlement agreement for future  
0339 damages payable in periodic installments. The settlement  
0340 agreement may provide that one or more sections of this act  
0341 apply to such agreement.

0342 (b) Upon petition of the parties, a court of competent juris-  
0343 diction may enter a consent judgment adopting one or more of  
0344 the sections of this act.

This Section merely makes clear that the provisions of the Act are available to parties in fashioning settlement agreements and consent judgments. Such agreements and judgments may incorporate the provisions of this Act or adopt them by reference.

0345 Sec. 16. If security is posted in accordance with section 9  
0346 and approved under a final judgment entered under this act, the  
0347 judgment is satisfied and the judgment debtor on whose behalf  
0348 the security is posted is discharged.

In many states, a judgment when entered creates a lien on the judgment debtor's property. The Act, however, requires that security be posted under Section 9 for all the damages, past and future, due under the judgment. The security serves the same purpose as the lien and is a more suitable method of assuring payment of this type of judgment. Accordingly, this Section provides that the judgment is satisfied where the requisite security is posted. Since the judgment is satisfied, there is no lien created under the laws of the adopting state.



0349 Sec. 17. The commissioner of insurance shall establish rules  
 0350 and regulations and procedures:  
 0351 (a) For determining which insurers, self-insurers, plans or  
 0352 arrangements are financially qualified to provide the security  
 0353 required under this act and to be designated as qualified in-  
 0354 surers; and  
 0355 (b) to require insurers to post security under section 9 if  
 0356 found by the court to be obligated and capable of posting secur-  
 0357 ity.

This Section establishes certain obligations on behalf of the insurance regulator in the adopting state. Since securing a periodic-installment judgment is crucial under this Act, the insurance regulator in the adopting jurisdiction is required to establish rules and procedures to facilitate the provision of such security and to make sure the entities providing the security are financially responsible. The insurance regulator in the adopting state is the most logical person to discharge this responsibility.

It is also the obligation of the insurance regulator to establish rules and procedures to assure that liability insurers admitted to do business in the state post security on behalf of their insureds when they are capable of doing so. It should not be within the power of the liability insurer to defeat the purpose of the Act and thwart the benefit under the periodic-installment judgment system flowing to the judgment creditor and judgment debtor. The insurance regulator is in the best position to adopt rules and procedures to prevent abuses by liability insurers.

Finally, the insurance regulator is responsible for publishing the index factor to be used in Section 7 in making cost-of-living adjustments on unpaid installment obligations. This will facilitate the making of the adjustments by those who are obligated to do so. If a fixed cost-of-living adjustment factor were to be adopted as explained in the Comment to Section 7, there would be no need for paragraph (3) and, in such event, it should be deleted.

0358 Sec. 18. If any provision of this act or its application to any  
0359 person or circumstance is held invalid, the invalidity does not  
0360 affect other provisions or applications of this act which can be  
0361 given effect without the invalid provision or application, and to  
0362 this end the provisions of this act are severable.

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0363 Sec. 19. (a) This act applies to actions commenced on or after  
0364 January 1, 1988.

0365 (b) The provisions of this act may apply to medical malprac-  
0366 tice liability actions, as defined by K.S.A. 1986 Supp. 60-3401  
0367 and amendments thereto.

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0368 Sec. 20. This act shall be known and may be cited as the  
0369 Kansas periodic payment of judgments act.

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0370 Sec. 21. This act shall take effect and be in force from and  
0371 after January 1, 1988, and its publication in the statute book.

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