

# CPLR 5046: New York Court of Claims Rules that a Woman with AIDS Who Believes Her Concern Over Receiving a Structured Judgment is Accelerating Her Disease does not Meet the Requirements for Acceleration of Her Judgment into a Lump Sum

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## CIVIL PRACTICE LAW AND RULES

*CPLR 5046: New York Court of Claims rules that a woman with AIDS who believes her concern over receiving a structured judgment is accelerating her disease does not meet the requirements for acceleration of her judgment into a lump sum*

In response to the escalating verdicts of the medical malpractice insurance crisis of the 1980s,<sup>1</sup> the New York Legislature enacted CPLR Article 50-A,<sup>2</sup> thereby adopting structured judgment

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<sup>1</sup> See Stephanie L. Argentine, Comment, *From Verdict to Judgment: The Evolution, Confusion and Reformation of CPLR Articles 50-A and 50-B*, 40 BUFF. L. REV. 917, 917-20 (1992). Damage awards have been consistently increasing in value; statistics reveal that “[i]n 1966, only one verdict in the entire United States totaled \$1 million or more; in 1970 there were eleven such verdicts . . .” *Id.* at 923 (footnotes omitted). Currently, judgments and settlements in excess of one million dollars occur almost weekly throughout the country. *Id.*; Charles F. Krause, *Structured Settlements for Tort Victims*, 66 A.B.A. J. 1527 (1980). The increasing personal injury and wrongful death damage awards can be attributed to jury responses to the efforts of plaintiffs’ counsel in presenting more precise and comprehensive demonstrations of pecuniary losses suffered by tort plaintiffs. *Id.* at 1527. In addition, inflation has contributed to higher awards. *Id.*

<sup>2</sup> See CPLR 5031-5039 (McKinney 1992). CPLR Article 50-A was a part of the legislature’s “concessions to several of the medical profession’s demands” during the most recent insurance crisis. CPLR Article 50-A commentary at 711 (McKinney 1992).

Under the present lump-sum system, awards for future damages are discounted to present value, taking into account the time value of money. Argentine, *supra* note 1, at 926. Thus, a claimant is paid an amount of money today, which, if invested at an average rate of interest, will generate income, and will produce the total amount of damages awarded to the claimant. *Id.* at 926-27; see Roger C. Henderson, *Periodic Payment of Bodily Injury Awards*, 66 A.B.A. J. 734, 736 (1980) (stating that in present lump-sum system, awards for future damages are discounted to present value to take into account earning power of money).

In 1985, in response to the liability insurance crisis, the New York State Legislature enacted CPLR Article 50-A as part of the Medical Malpractice Reform Act of 1985. Argentine, *supra* note 1, at 955.

This act had three purposes: 1) to increase the efficiency of the medical malpractice litigation process by encouraging settlement and by expediting such litigation . . . ; 2) to contain the liability of physicians and dentists within limits that maintain a fair and full recovery for the plaintiff . . . ; and 3) to reduce medical malpractice litigation.

*Id.* (footnotes omitted). Article 50-A requires that a structured judgment be entered whenever a plaintiff recovers more than \$250,000 in future damages. *Alisandrelli v. Kenwood*, 724 F. Supp. 235, 238 (S.D.N.Y. 1989); see CPLR 5031(e) (McKinney 1992).

legislation.<sup>3</sup> One year later Article 50-B<sup>4</sup> was enacted as part of the Toxic Tort Legislation, extending these structured judgments to actions for personal injury, property damage, and wrongful death.<sup>5</sup> CPLR 5041, included within Article 50-B, provides that if a judgment greater than \$250,000 is awarded for future damages (including pain and suffering), the court *shall* structure the judgment for periodic payments.<sup>6</sup> These payments cease upon the death of the judgment creditor.<sup>7</sup> The legislature provided an ex-

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<sup>3</sup> See Argentine, *supra* note 1, at 917. "The terms 'structured judgment' and 'periodic payment of a judgment' are often interchanged." *Id.* at 925. But, "[b]oth terms refer to an arrangement for a series of payments, rather than [to] a lump sum payment." *Id.* "Structured settlements have become increasingly popular in the latter part of this century." *Id.* at 917. By the year 1990, New York was one of thirty states to have enacted some form of a periodic payment statute. *Id.* at 954. Fueling this popularity are the growth of "escalating [jury] verdicts and the growing judicial acceptance of evidence concerning rates of wage growth and the effects of inflation on future earnings." Argentine, *supra* note 1, at 917. The legislature's decision to enact structured judgment provisions has been described by some as a "desperate response to the insurance crises of the 1980's." *Id.* Structured settlements gained popularity when the "advantages of periodic payments of settlements became apparent to members of both the plaintiff and defense bars." *Id.* at 922. A defendant benefits from making structured payments because payment in installments allows the insurer, who usually pays the judgment, to retain and invest the balance of an award before the installments are due. See, e.g., *Alisandrelli*, 724 F. Supp. at 238.

<sup>4</sup> CPLR 5041-5049 (McKinney 1992). Article 50-B applies when a plaintiff recovers damages for future injuries exceeding \$250,000. CPLR 5041(e) (McKinney 1992).

<sup>5</sup> CPLR 5041(e); see *Alisandrelli*, 724 F. Supp. at 238. In 1986, when the legislature extended structured judgment to tort actions, "[i]t was expected that the extension would be accomplished merely by amending Article 50-A to change the reference from malpractice actions specifically to tort actions generally." CPLR Article 50-B commentary at 730 (McKinney 1992). Instead, the legislature drafted Article 50-B to coexist with Article 50-A and created the possibility of confusion in interpreting the rules. *Id.* Professor David Siegel asserted that "the two articles should be one and the legislature would do all of us a service . . . by merging the two." *Id.* at 731.

<sup>6</sup> CPLR 5041(e) (McKinney 1992). CPLR 5041 provides, in relevant part:

In order to determine what judgment is to be entered on a verdict in an action to recover damages for personal injury, injury to property or wrongful death under this article . . . the court *shall* proceed as follows:

. . . .

e) With respect to awards of future damages in excess of two hundred fifty thousand dollars in an action to recover damages for personal injury, injury to property or wrongful death . . . the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments.

*Id.* (emphasis added).

<sup>7</sup> CPLR 5045(a) (McKinney 1992). "Unless otherwise agreed between the parties at the time security is posted . . . the liability for payment of any installments for medical . . . or other costs of health care or non-economic loss not yet due at the death of the judgment creditor terminates upon the death of the judgment creditor." *Id.* In

ception to Article 50-B in CPLR 5046, which allows for acceleration of the periodic payments, or a portion thereof, into one lump sum.<sup>8</sup> Under this limited exception, a judge may order an acceleration upon a finding that the judgment of periodic installments will impose a hardship on the judgment creditor.<sup>9</sup>

Recently, in *Doe v. State*,<sup>10</sup> Justice Margolis of the Court of Claims held in a matter of first impression that a nurse who was inflicted with AIDS through the negligence of the defendant, and whose life expectancy had decreased from the original court estimate,<sup>11</sup> did not meet the statutory requirements for acceleration

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*Doe v. State*, the court noted that in New York, "one may recover only for the injuries one is expected to suffer during one's lifetime." *Doe v. State*, 155 Misc. 2d 286, 301, 588 N.Y.S.2d 698, 708 (Ct. Cl. 1992), *modified*, 189 A.D.2d 199, 595 N.Y.S.2d 592 (4th Dep't 1993). The court then stated that "[t]his is well ensconced in New York decisional law in wrongful death cases, where the damages relating to the decedent's earnings are limited to the pecuniary injuries the distributees suffer." *Id.* Furthermore, a cause of action also remains after the decedent's death, which may be maintained by the estate to recover pain and suffering, medical expenses, and lost wages prior to death. *Id.* at 301, 588 N.Y.S.2d at 709. But, common law prohibits recovery for death itself. *Id.* This common law rule is codified in EPTL § 11-3.3(a) (McKinney 1992). "Where an injury causes the death of a person the damages recoverable for such injury are limited to those accruing before death and shall not include damages for or by reason of death . . ." *Id.*

<sup>8</sup> CPLR 5046(a) (McKinney 1992).

<sup>9</sup> *Id.* CPLR 5046(a) provides, in pertinent part:

If, at any time after entry of judgment, a judgment creditor . . . can establish that the continued payment of the judgment in periodic installments will impose a hardship, the court may, in its discretion, order that the remaining payments or a portion thereof shall be made . . . in a lump sum. The court *shall*, before entering such an order, find that: (i) unanticipated and substantial medical . . . or other health needs have arisen . . . ; (ii) ordering such a lump sum payment would not impose an unreasonable financial burden on the judgment debtor. . . ; (iii) ordering such a lump sum payment will accommodate the future medical . . . and other health needs of the judgment creditor; and (iv) ordering such a lump sum payment would further the interests of justice.

*Id.* (emphasis added).

<sup>10</sup> *Doe*, No. 82,265, slip op. at 1 (Ct. Cl. Dec. 6, 1993).

<sup>11</sup> *Doe v. State*, 155 Misc. 2d 286, 588 N.Y.S.2d 698 (Ct. Cl. 1992), *modified*, 189 A.D.2d 199, 595 N.Y.S.2d 592 (4th Dep't 1993). Dr. Saah, the claimant's doctor, testified that Mrs. Doe had been infected with HIV for approximately four years at the time of the trial. *Id.* at 299, 588 N.Y.S.2d at 707. By his estimate, Mrs. Doe would develop AIDS within four or five years. *Id.* He stated that he believed her condition was progressing more rapidly than most cases, and that she would suffer from AIDS related illnesses for approximately fourteen months before dying from the disease. *Id.* The court determined that, as a result of this infection, Mrs. Doe's reasonable life expectancy was five years. *Id.*; *cf. Doe*, No. 82,265, slip op. at 13 (finding plaintiff's life expectancy, as of December 6, 1993, to be 12 months). Dr. Saah testified that the drop in Mrs. Doe's CD-4 cell counts from the time he had testified at trial in March 1992, to

of her periodic pain and suffering payments established in CPLR 5046.<sup>12</sup>

In *Doe v. State*, the claimant alleged that two New York State corrections officers were responsible for Mrs. Doe's infection with the virus.<sup>13</sup> Ronald Potempa and Timothy O'Connor, the corrections officers, were charged with guarding an inmate who was receiving treatment at Faxton Hospital, where the claimant was employed as a registered nurse.<sup>14</sup> On August 21, 1988, during a struggle with the inmate, Mrs. Doe was pricked in the hand by a needle which had become dislodged from an intravenous apparatus, and was contaminated with the inmate's AIDS-infected blood.<sup>15</sup> Throughout this incident, the corrections officers stood idly by, away from the patient's bed, offering no assistance to the nurses.<sup>16</sup>

Jane Doe and her husband, Joseph Doe, commenced a negligence action against the State.<sup>17</sup> Mrs. Doe claimed that the struc-

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her latest count taken in June of 1993, indicated that Mrs. Doe's disease had progressed unexpectedly. *Id.* at 12-13. In 1992, at the time of trial, he estimated that her life expectancy was approximately five to five and one-half years. *Id.* at 12. But, as of August 1993, "in light of the precipitous drop in her CD-4 count between the two trials, . . . Mrs. Doe's present life expectancy was 12 to 18 months . . . 'at best.'" *Id.* at 12-13. Therefore, at that time, Mrs. Doe was expected to live no later than February, 1995. *Id.* Although Mrs. Doe did not have any infection, she has been diagnosed with "wasting syndrome," which is evidenced by losses in weight of up to 80 pounds. *Id.* at 13. The court found Mrs. Doe's life expectancy to be twelve months, in accordance with the conclusion that she is showing clinical signs of AIDS in the form of wasting syndrome. *Id.*

<sup>12</sup> *Doe*, No. 82,265, slip op. at 25. The court concluded that Mrs. Doe did not establish by a preponderance of the evidence that "the stress associated with th[e] judgment has resulted in an unanticipated and substantial medical or other health need; that any health need would be accommodated by ordering a lump sum payment . . . ; nor that the interests of justice would be served by abrogating the periodic payment schedule. *Id.* (citations omitted); see CPLR 5046(a).

<sup>13</sup> *Doe*, 155 Misc. 2d at 287, 588 N.Y.S.2d at 700.

<sup>14</sup> *Id.* at 287-88, 588 N.Y.S.2d at 700.

<sup>15</sup> *Doe v. State*, 189 A.D.2d 199, 201, 595 N.Y.S.2d 592, 593 (4th Dep't 1993). The inmate became agitated. *Id.* When one of the nurses realized the contaminated needle was within the inmate's reach, she let go of his leg while attempting to secure the needle. *Id.* As a third nurse also attempted to retrieve the dislodged needle, the inmate's leg jerked, bumping the nurse's arm and driving the needle into the gloved hand of Mrs. Doe. *Id.*

<sup>16</sup> *Id.* at 201, 595 N.Y.S.2d at 593. The hospital staff requested assistance from the corrections officers, who refused to intervene. *Id.* Immediately following the incident, Mrs. Doe tested negative for HIV; however, when she was retested in February 1989 she tested positive for the virus. *Id.* at 201, 595 N.Y.S.2d at 593-94.

<sup>17</sup> *Doe*, 155 Misc. 2d at 287-88, 588 N.Y.S.2d at 700. Mr. Doe asserted a cause of action in his own right for emotional harm claiming that the defendant's actions put him at a risk of contracting AIDS. *Id.* at 297, 588 N.Y.S.2d at 706. The court held that

tured judgment payments caused her hardship and stress which were responsible for the acceleration of her disease.<sup>18</sup> The Court of Claims found that the State had a duty to provide reasonable security to the hospital staff where the patient was an inmate, and that this duty was breached by the corrections officers when they failed to intervene once the inmate became difficult to control.<sup>19</sup> The court held that the defendant's negligence was the sole proximate cause of the claimant's injury.<sup>20</sup> Since the future damage awards exceeded \$250,000,<sup>21</sup> Article 50-B required the court to structure the judgment for periodic installments.<sup>22</sup> On appeal, the Appellate Division, Fourth Department, modified the Court of Claims' determination, increased the award, and remitted the case back to the trial court for further proceedings.<sup>23</sup> The claim-

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"[s]uch a chain of events was not reasonably to be foreseen . . . . If Mr. Doe will ever suffer a physical injury from Mrs. Doe's contamination, it will be the result of some contact between Mrs. Doe and Mr. Doe, not between the defendant and Mr. Doe . . . ." *Id.* at 296-97, 588 N.Y.S.2d at 706. Mr. Doe also claimed that he would suffer emotional damage from witnessing the deterioration of his wife's health. *Id.* at 297, 588 N.Y.S.2d at 706. Although it was not disputed that Mr. Doe would suffer emotionally, and that the Does will "forever have to change the course of their intimate relations," Mr. Doe was denied recovery for emotional injury. *Id.* at 297 n.5, 588 N.Y.S.2d at 706 n.5. Mr. Doe was not at or near the hospital at the time of the incident; "present law dictates that the claimant must *contemporaneously witness* the injury or death of an immediate family member and fear for his own safety as a result of being in the *zone of danger* created by the defendant's negligence . . . ." *Doe*, 155 Misc. 2d at 297, 588 N.Y.S.2d at 706 (emphasis added) (citing *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984) (setting forth New York's current "zone of danger" rule)); see *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (applying zone of danger analysis). The court concluded that "[i]f [Mr. Doe] becomes contaminated with HIV, it would be neither as a direct nor proximate result of th[e] needle stick." *Doe*, 155 Misc. 2d at 297, 588 N.Y.S.2d at 706.

<sup>18</sup> *Doe*, No. 82,265, slip op. at 3-4. In the original trial, the court found that Mrs. Doe would live until December 31, 1997 (five and one-half years). *Id.* at 3. Accordingly, the court structured payments under CPLR 5041 to be dispersed until that date. *Id.*

<sup>19</sup> *Doe*, 155 Misc. 2d at 294-95, 588 N.Y.S.2d at 704-05.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The court of claims awarded damages for Mrs. Doe in the amount of \$4,354,550, which were allocated as follows: past medical expenses \$1700; future medical expenses \$59,000; pain and suffering to date \$750,000; loss of wages \$43,850; and future pain and suffering \$3,500,000. *Doe*, 189 A.D.2d at 202 n.2, 595 N.Y.S.2d at 594 n.2. Mr. Doe was awarded \$1,016,642 in damages, which were as follows: past loss of consortium \$250,000; future loss of household services \$16,642; and future loss of consortium \$750,000. *Id.*

<sup>22</sup> *Doe*, 189 A.D.2d at 207, 595 N.Y.S.2d at 597.

<sup>23</sup> *Id.* at 207, 595 N.Y.S.2d at 596. Specifically, the court awarded Mrs. Doe \$450,000 for "impairment of earnings and lost wages" and \$275,000 for loss of "services as a homemaker." *Id.* at 211, 595 N.Y.S.2d at 599; cf. *supra* note 21 (discussing trial court award).

ants then approached State Senator William S. Sears (R-Woodgate) and asked him to introduce legislation which would exempt Mrs. Doe from the Article 50-B structured judgment. The Senator's proposed bill, however, did not pass the Senate.<sup>24</sup>

Subsequently, the claimants received the defendant's first payment six days late and moved for an order to accelerate the periodic payments pursuant to CPLR 5044.<sup>25</sup> Again writing for the Court of Claims, Justice Margolis indicated that "Article 50-A and 50-B were created to permit judgment debtors a practical opportunity to pay judgments over the course of time and allow them not to face the 'heavy burden' of a lump sum award."<sup>26</sup> The court also noted that, under the circumstances, it would be inappropriate to accelerate the judgment simply because the first payment was received six days late.<sup>27</sup>

<sup>24</sup> See *infra* notes 41-45 and accompanying text (discussing proposed bills).

<sup>25</sup> *Doe*, 159 Misc. 2d at 83, 602 N.Y.S.2d at 990. CPLR 5044 provides:

If at any time following entry of judgment, a judgment debtor fails for any reason to make a payment *in a timely fashion*[,] . . . the judgment creditor may petition the court which rendered the original judgment for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum.

CPLR 5044 (McKinney 1992) (emphasis added).

The judgment order provided "for gross awards to Mrs. Doe in the amount of \$5,035,700 and to Mr. Doe in the gross amount of \$1,000,000." *Doe*, 159 Misc. 2d at 83, 602 N.Y.S.2d at 991. Metropolitan Life Insurance Company ("MetLife") agreed to assume the State's obligation to pay under the structured judgment, the first payment being due July 1, 1993. *Id.* Unfortunately, when filling out the banking agreements which requested payments to an account in the bank, the zip code for the bank was not included, causing data entry to be delayed. *Id.* Since July 5 was a holiday, MetLife did not issue a check until July 6, and the bank did not receive it until July 7. *Id.*

<sup>26</sup> *Doe*, 159 Misc. 2d at 86, 602 N.Y.S.2d at 993 (citing Governor's Memorandum on Approval of ch. 682, N.Y. Laws, reprinted in [1986] N.Y. LEGIS. ANN. 288-89 [hereinafter Governor's Memorandum]); see *Doe*, 189 A.D.2d at 209, 595 N.Y.S.2d at 598 ("Article 50-B . . . was intended to maintain the moderate cost of liability insurance premiums, while assuring adequate compensation for tort victims throughout the entire period of their loss . . .").

<sup>27</sup> *Doe*, 159 Misc. 2d at 86, 602 N.Y.S.2d at 993. Justice Margolis reasoned: To interpret the phrase "in a timely fashion" in so extreme a way as to accelerate in excess of \$3,000,000 in payments for a delay so clearly de minimis, in relation to the structured award these claimants have already received and are going to receive, would restore the very result that articles 50-A and 50-B were created by the legislature to avoid . . .

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. . . When properly applied, article 50-B provides a "useful mechanism for ameliorating the burden of tort liability for defendants and their insurers without reducing the compensation to which plaintiffs are entitled."

*Id.* at 86, 602 N.Y.S.2d at 993-94 (quoting Governor's Memorandum, *supra* note 26, at 158).

The Court of Claims rejected Mrs. Doe's claim that her stress from structured judgment payments accelerated her disease,<sup>28</sup> and held that she did not meet the requirements of CPLR 5046, which permits remaining payments to be made in a lump sum.<sup>29</sup> Justice Margolis explained that, even if Mrs. Doe were awarded a lump sum of the next twelve months of payments,<sup>30</sup> she would continue to be distressed by her perception of the inequity of the award and by her concerns about her children's future.<sup>31</sup> The court was not convinced that Mrs. Doe's stress would be substantially relieved if her application were granted.<sup>32</sup>

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<sup>28</sup> See *Doe v. State*, No. 82,265, slip op. at 25 (Ct. Cl. Dec. 6, 1993). In light of her most recent medical tests, Mrs. Doe fears that her immune system is deteriorating more rapidly than expected. *Id.* at 7. Pursuant to CPLR 5045, the claimant's periodic payments for her pain and suffering will terminate upon Mrs. Doe's death. *Id.* at 3. Mrs. Doe believes that the stress of knowing that she must survive in order to garner the full judgment has caused her much hardship. *Id.* Therefore, she believes her situation falls under the classification of an "unanticipated and substantial medical . . . or other health need" under CPLR 5046. *Id.*

<sup>29</sup> CPLR 5046(a) (McKinney 1992). For the relevant text of CPLR 5046, see *supra* note 9 and accompanying text. The court of claims held that Mrs. Doe did not establish three of the four requirements of CPLR 5046(a). Specifically, the court found that Mrs. Doe failed to prove that the stress associated with the judgment resulted in "an unanticipated and substantial medical . . . or other health need[ ]" pursuant to CPLR 5046(a)(i); that any health need would be accommodated by ordering a lump sum payment as required in CPLR 5046(a)(iii); or that "the interests of justice" would be served by abrogating the periodic payment schedule set forth in CPLR 5046(a)(iv). *Doe*, No. 82,265, slip op. at 23-25.

<sup>30</sup> *Doe*, No. 82,265, slip op. at 21. The court reestimated Mrs. Doe's life expectancy to be twelve months. *Id.* at 19. If Mrs. Doe received a lump sum payment, she would forfeit approximately \$1.5 million of payments for the last three years of the structured judgment. *Id.* at 18-19. In effect, Mrs. Doe argues that forfeiting the money and receiving payments now will relieve her of stress. *Id.* at 19.

<sup>31</sup> *Doe*, No. 82,265, slip op. at 19. Mrs. Doe's primary interest is to receive a full recovery of the 1992 award granted to her for pain and suffering. *Id.* If granted the lump sum payment requested under CPLR 5046, she could prejudice this interest. *Id.* For example, if she should live two years, rather than the doctor's estimate of one year, she would lose over \$445,000. *Id.* "How this would in any way relieve Mrs. Doe's stress concerning the adequacy of the judgment and her children's resources is beyond us." *Id.*

<sup>32</sup> *Doe*, No. 82,265, slip op. at 21-22. Mrs. Doe had urged that such a ruling would leave her substantially less anxious and would thereby assist her to live a longer life. *Id.* The court noted, however, that it seems equally likely that she would be distressed knowing that if the motion were granted, it would divest her children of \$1000 for each day she lives beyond twelve months. *Id.* at 19. The Appellate Division, Fourth Department, expressed similar concerns, stating that the "abolition of the right of a tort victim to receive an award for future damages in a lump sum does not deprive that victim of a right or interest protected by the Due Process Clause of our State Constitution." *Doe v. State*, 189 A.D.2d 199, 209, 595 N.Y.S.2d 592, 598 (4th Dep't 1993). In response to the claimant's contention that her due process rights were being



This issue was never addressed prior to *Doe v. State*, but will undoubtedly arise again in future tort litigation. It is submitted that since there is a chance that Mrs. Doe could live longer than twelve months, the court was incorrect in its decision not to grant her a lump sum of her full award.

The Court of Claims failed to recognize the potential significance of this precedent. Moreover, the court's denial of the lump sum payment of Jane Doe's judgment allowed the State to benefit from its own negligence.<sup>33</sup> When considering Mrs. Doe's claim under CPLR 5046, the court stated that she did not meet three of the four necessary conditions.<sup>34</sup> However, since Article 50-B allows the court some discretion in reaching its determination, the court could have reasonably determined that Mrs. Doe's concern over the judgment caused significant adverse developments which accelerated her disease.<sup>35</sup> It is submitted that contrary to the court's finding, this determination would be sufficient to meet the

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violated, the court examined the legislative history of Article 50-B. *Id.* at 207-10, 595 N.Y.S.2d at 597-99. The court indicated that "Article 50-B . . . was intended to maintain the moderate cost of liability insurance premiums, while assuring adequate compensation for tort victims throughout the entire period of their loss." *Id.* at 209, 595 N.Y.S.2d at 598 (citing GOVERNOR'S ADVISORY COMMITTEE ON LIABILITY INSURANCE, INSURING OUR FUTURE, Apr. 7, 1986, at 156-58, and Governor's Memorandum, *supra* note 26, at 289).

<sup>33</sup> See generally Joseph Kelner & Robert S. Kelner, *Trends in CPLR Articles 50A and 50B*, N.Y. L.J., Aug. 27, 1991, at 3 (discussing problems inherent in structured judgment rules).

<sup>34</sup> See *supra* notes 9, 29 and accompanying text (discussing requirements of CPLR 5046 and Mrs. Doe's failure to meet those requirements). The New York Legislature, by adopting Article 50-B, has determined that pain and suffering awards should generally be paid as the related injury is experienced—over the course of time. *Doe v. State*, No. 82,265, slip op. at 24 (Ct. Cl. Dec. 6 1993). Pain and suffering awards are intended to compensate tort victims for pain and suffering *actually* incurred. *Id.* If Mrs. Doe were to die sooner than expected, she would not receive payments for pain and suffering since she would no longer be experiencing pain and suffering caused in connection with her battle with AIDS. *Id.* Since the legislature has made clear that it intended for such payments to end when the victim's pain and suffering ends, the "interests of justice" do not permit a court to effectuate a different result. *Id.* at 24.

<sup>35</sup> *Doe*, No. 82,265, slip op. at 9. The medical expert at trial testified that stressful circumstances directly affect a patient's ability to remain healthy. *Doe*, No. 82,265, slip op. at 9. He stated that while it is difficult to develop empirical studies showing the effects of stress on patients with weak immune systems, such as those with AIDS, it is clear that stress adversely affects the ability of such patients to cope with their diseases. *Id.* Dr. Saah testified that Mrs. Doe's anxiety over the financial well-being of her family, coupled with the realization of her death, caused her to suffer clinical depression. *Id.* at 10. Moreover, Dr. Saah testified that Mrs. Doe could be expected to survive, at most, three additional months if the application for lump sum payments was granted. *Id.* at 20. The defendants called their own medical expert, who testified that while Mrs. Doe's perception of her conditional payment schedule causes her

“unanticipated and substantial” needs requirement of CPLR 5046(a)(i).<sup>36</sup> It is unlikely that ordering the lump sum would “impose an unreasonable financial burden” on MetLife, as required by CPLR 5046(a)(ii).<sup>37</sup> Furthermore, ordering the lump sum would accommodate Mrs. Doe’s future medical needs, under CPLR 5046(a)(iii), by helping to alleviate her stress.<sup>38</sup> In addition, ordering the lump sum would clearly “further the interests of justice,” as required in CPLR 5046(a)(iv), by allowing her to collect the judgment awarded to her for this devastating situation.<sup>39</sup> Although the purpose of CPLR Article 50-A and 50-B was to ease the liability of defendants, public policy demands that the courts protect plaintiffs as well.<sup>40</sup>

Although the court chose not to do so, the case at bar provided ample opportunity to avoid the restrictive measures of Article 50-B. During the litigation of this case, two bills were proposed by Senator Sears in an effort to achieve a more equitable outcome.<sup>41</sup> In his first proposal, the Senator attempted to have the CPLR modified to provide that when a jury determines a verdict in an Article 50-B action, the jury must make a specific finding as to whether the injuries or conditions caused by the defendant are

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stress, he could not testify with a reasonable degree of medical certainty that the cessation of that stress would in any way affect Mrs. Doe’s immune system. *Id.* at 17.

<sup>36</sup> CPLR 5046(a) (McKinney 1992); *see supra* note 9 (quoting text of CPLR 5046(a)).

<sup>37</sup> CPLR 5046(a); *see supra* note 9 (quoting text of CPLR 5046(a)).

<sup>38</sup> CPLR 5046(a); *see supra* note 9 (quoting text of CPLR 5046(a)).

<sup>39</sup> *See* CPLR 5046(a)(iv) (McKinney 1992). Mrs. Doe testified:

My understanding is the Judge, when they were looking originally at my lab work, they gave me five and a half years to live and that is how he stretched it out. . . . But the thing is, if I die for any reason at all . . . the money stops.

. . . And, yes, I mean it just—if I die because I got hit by a car or because of this disease, my family shouldn’t suffer, and the State shouldn’t benefit.

*Doe*, No. 82,265, slip op. at 19-20; *see* Introducer’s Memorandum in Support of N.Y.S. 5754-A (May 24, 1993). “Thus, the stark reality is that the state’s negligence could cause Mrs. Doe’s premature death and the statutory law of the state will then allow the negligent party to benefit from the negligence.” *Doe*, No. 82,265, slip op. at 2. If payments cease by reason of unexpectedly early death, the State in effect, would save money due to the untimely demise spawned by a condition the State was found to be liable for causing in the first place. *Id.*

<sup>40</sup> CPLR 5041(f) in fact authorizes a judgment to be entered without regard to the provisions of Article 50-B, but only if the claimant and the judgment creditor consent. *See* CPLR 5041(f) (McKinney 1992).

<sup>41</sup> Senator William R. Sears of the 47th District proposed Senate bills #3740-A and #5754-A during the 1993-94 session. N.Y.S. 3740-A, 5754-A, 216th Sess. (1993).

likely to be fatal.<sup>42</sup> If such injuries were found to be fatal, the payments would continue to be paid to the judgment creditor's heirs instead of terminating upon the judgment creditor's death.<sup>43</sup> The Senator, however, subsequently removed that bill from the Senate floor, amended it, and proposed a second bill.<sup>44</sup> This second proposal specifically called for the complete exemption of Mrs. Doe from the provisions of Article 50-B.<sup>45</sup>

It is submitted that the Senator's first proposal would have served the public by benefitting all plaintiffs in Mrs. Doe's situation. It would have provided for exemption from periodic payments in situations where plaintiffs are tortiously inflicted with terminal diseases, or where they suffer from toxic exposure. Such an exemption would ensure that similarly situated plaintiffs do not lose money which they rightfully deserve. Therefore, it is proposed that Senator Sears' first bill be reinstated and enacted by the New York Legislature.

*Leah P. Sanzari*

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<sup>42</sup> N.Y.S. 3740-A, 216th Sess. (1993). Senate bill #3740-A stated that when an action is brought which would fall under the structured judgment requirement, the jury shall make a specific finding as to whether the injury or condition caused by a defendant's conduct is likely to be fatal. *Id.* If the jury so finds, the bill then called for termination of the judgment creditor's recovery upon his or her death, "unless the death was caused by the culpable conduct of the judgment debtor, as determined pursuant to Rule 4111. In that event, the entire periodic payments [would] be paid to the judgment creditor's heirs." *Id.*

<sup>43</sup> N.Y.S. 3740-A, 216th Sess. (1993).

<sup>44</sup> Telephone Interview with John Smith, Assistant to Sen. Sears (Jan. 1, 1994).

<sup>45</sup> N.Y.S. 5754-A, 216th Sess. (1993). Specifically, this second bill provided that "[u]pon the death of Jane Doe, the comptroller is directed to compute, notwithstanding the provisions of section 5045 of the [CPLR], the balance owed by the state to Jane Doe . . . to be determined as of the date of [her] death . . ." *Id.* This bill was ultimately withdrawn as well. See Eric Durr, *Prison AIDS Victim's \$3.5M Stalled Again*, WATER-TOWN DAILY TIMES, June 22, 1993, at 1. It was withdrawn because not enough senators were present to determine its level of support. *Id.* Some senators present did oppose the bill; Senator Emanuel R. Gold (D-Queens) stated that the bill was "very dangerous and very wrong." *Id.* He went on to reason that "[i]f, God forbid, this woman were to die early, we would be giving a few million dollars to this family that goes beyond the medical, beyond her pain and suffering." *Id.* Senator Richard A. Dolinger (D-Rochester) expressed similar sentiments, stating that "passing one such bill would open the floodgates for others." *Id.*; see Gary Spencer, *Action Seen Likely on Transfer Payment for Appellate Courts*, N.Y. L.J., July 6, 1993, at 1 (noting opposition from insurance companies and political reluctance to relax structuring rules helped to defeat Sears' bills).