

New York 50A and 50B Resolution

The Burbank Group

The New York statutes governing Medical Malpractice and General Liability are, perhaps, the most comprehensive and therefore most complex schemes governing personal injury and wrongful death. In addition to 50A and 50B, there are a number of statutes and Court decisions interpreting 50A and 50B and filling voids. They both clarify and complicate the Award and Valuation processes.

It is fair to call this a complex process with the simple objective of producing a full, fair and timely resolution in wrongful death or personal injury actions.

As attorneys are responsible for achieving the objective, they are also responsible for the complexities. That does not mean that the attorneys must know the details of elements and adjustments, but they must ensure that the statutes are properly applied, and that any consent to settlement or resolution is informed.

They don't need to be able to perform the calculations. They should have access to expertise and/or systems that address the complexities and provide documentation to support the Award and Valuation. That documentation should include,

- ◆ Award reports, incorporating taxes (Med/Mal), allocating elements to past damages and including Collateral Source offsets.
- ◆ Verdict Worksheets, including element information together with periodic and discrete payment details.
- ◆ Med/Mal Wrongful Death Award Summaries incorporating taxes, past damages, lump sum treatment for all future damages, and allocation and application of expenses and fees.

Application of Pre-verdict interest, including

- ▶ Discounting of future damages to the date of death.
- ▶ Discounting of past damages to a weighted average payment date.
- ▶ Inclusion/exclusion of past Pain and Suffering.

Application of interest to Judgment or payment.

- ◆ Discounted Award Valuation Summaries incorporating taxes (Med/Mal), past damages, allocation of future damages to lump sums, lump sum treatment for Loss of Services and /or Consortium (Med/Mal), application of Collateral Source offsets, and allocation and application of expenses and fees [including the option to allocate before or after application of Collateral Source offsets].

- ▶ Reconciliation from the Total Future Award to the Net Discounted Award by element, accounting for the all of the allocations and adjustments.
- ▶ Monthly and annual payments and discounted annual payments by year with the annual amounts totaled by element.
- ▶ Application of Pre-verdict interest in bifurcated cases with total damages discounted back to the date of the determination of liability.

Application of pre-judgment and pre-payment interest to the total discounted Award Valuation after adjustment of net future damages for the value of interim payments, and application of interest to interim payments based on a weighted average date.

Judgment Worksheets that detail the Net elements of an Award together with any interest, all in a judgment format.

A systematic approach has the advantage of consistency of treatment, repeatability of results, easy application and documentation of different index rates and variables, internal control of data, and reconciliation of an Award to a Net Discounted Award that address options and adjustments.

Selection and Application of Discount Rates

To this point, there has been no mention of the choice of discount rates to be employed in valuing Awards, or the method of application. While the indexing to 10-Year Treasuries was introduced in Amended 50A, it has also gained application to original 50A and 50B cases. The daily yield on the verdict date has been selected as the rate in effect.

As long as the 10-Year Treasury was relatively stable trading in a range above 4%, the choice of the daily yield was not critical. Over the last few years, the rates have fallen precipitously, rebounded and fallen again. Consider that three years ago the applicable rates and yields were about 4.75% and today they hover around 2.5%.

During these moves, they have also displayed a fair amount of volatility as measured by the occasions when the yield moved more than 9 basis points (9/100 of 1%) in a day. As a reference point, a 10 basis point decrease will produce a 100 basis point (1%) increase in the total Award. That means there is something of 'crap shoot' associated with the timing of verdict awards, and it raises the need for valuations at different rates during settlement or resolution.

A model has been run through Amended 50A, Original 50A and 50B valuation systems at index rates ranging from 4.5% to 2.5%. Valuations were produced for each step, and summary comparisons were generated for the rate range.

Over the range, the total Award increased 15% for Amended 50A, 22% for Original 50A and 24% for New York 50B. Amended 50A awards increased 3 to 4% per 50 basis point downward move, Original NY50A awards increased 4.5 to 6% per 50 basis point downward move, and Original NY50B awards increased 5.2 to 6.9% per 50 basis point downward move.

Amended 50A					
	<u>Discounted Future Award</u>				
	4.50%	4.00%	3.50%	3.00%	2.50%
	<u>Base</u>	<u>Index</u>	<u>Index</u>	<u>Index</u>	<u>Index</u>
Total Future		4.57%	9.53%	14.91%	20.75%
Lump and Past		2.29%	4.77%	7.47%	10.41%
Contingent Fees		2.93%	6.12%	9.58%	13.34%
Total Award		3.28%	6.83%	10.69%	14.89%

[Note that under Amended 50A, Lump Sum increases were due to the method by which all except Pain and Suffering are calculated. 35% of the future Award is discounted to produce the lump sums.]

Original 50A

Original 50A					
	<u>Discounted Future Award</u>				
	4.50%	4.00%	3.50%	3.00%	2.50%
	<u>Base</u>	<u>Index</u>	<u>Index</u>	<u>Index</u>	<u>Index</u>
Total Future		5.91%	12.45%	19.60%	27.48%
Lump and Past		0.13%	0.25%	0.38%	0.51%
Contingent Fees		4.29%	9.02%	14.21%	19.92%
Total Award		4.66%	9.81%	15.45%	21.65%

New York 50B

New York 50B					
	<u>Discounted Future Award</u>				
	4.50%	4.00%	3.50%	3.00%	2.50%
	<u>Base</u>	<u>Index</u>	<u>Index</u>	<u>Index</u>	<u>Index</u>
Total Future		6.18%	13.01%	20.51%	28.77%
Lump and Past		0.07%	0.13%	0.19%	0.26%
Contingent Fees		5.25%	11.05%	17.41%	24.42%
Total Award		5.18%	10.90%	17.18%	24.10%

By way of reference, In situations where 4% statutory inflation is applied an element's Award will increase in value after discounting if the index rate is below 3.625% and the future period is 20 years or less, and below 2.91% and the future period is 31 Years (The application of 2.91% for twenty years and 4.91% for 11 years will yield 3.625%).

Finally at low discount rates, tax advantage and guaranteed payments become marginal and can best be displayed in a Payment Evaluation that compares future payments to net values and imputed annuity costs.

Summary

The parties can seek settlement using the extensive Award and Valuation systems to produce full Awards and Valuations. They can

- ▶ Offer index rates that are above the current range without materially affecting future payments to the plaintiff.
- ▶ Offer settlement for cash for the shorter term future Award elements.
- ▶ Avoid the larger hit of pre-verdict interest when a very low discount rate is employed.
- ▶ Resolve issues related to interim payments
- ▶ Put the other side on written notice of a full settlement offer that requires response.
- ▶ A case can be made that early resolution will save the defense on
 - ▶ Costs through trial,
 - ▶ The impact of an adverse index rate,
 - ▶ Interest expense with low discount rates, and
 - ▶ Interim Cash payments and interim valuations.

In large part, the present financial environment offers an opportunity for full, fair and timely resolution, and requires devices to gain informed consent and convey offers.