IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

* *		
TSUYOSHI and MARIE MIYAKE, as legal representatives of their minor daughter, AGATA MIYAKE,	*	No. 06-459
	*	Special Master Christian J. Moran
Petitioners,	*	
	*	Filed: March 19, 2009
v.	*	
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Annuity expert
	*	
Respondent.	*	
* *		

David L. Terzian, Rawls & McNelis, P.C., Richmond, VA., for petitioners;
Glenn MacLeod, United States Dep't of Justice, Washington, D.C., for respondent.

PUBLISHED RULING ON PETITIONERS' MOTION
REGARDING ANNUITY EXPERT[*]

Tsuyoshi and Mari Miyake request permission to retain an expert knowledgeable about annuities to assist them and their attorney in resolving their claim for compensation. The Miyakes' request is largely granted because they have demonstrated that they will benefit and the undersigned special master will benefit from information presented by someone retained by them. The Miyakes' request, however, is denied to the extent that they have proposed a method

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[*] Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

of compensating this person that is not the traditional method of calculating a reasonable hourly rate multiplied by the reasonable number of hours.

I. Procedural History

The Miyakes filed a petition seeking compensation on June 13, 2006. They claimed that the diphtheria-tetanus-pertussis vaccine caused their daughter, Agata, to suffer "an encephalopathy." On September 8, 2006, the respondent conceded that compensation was appropriate.

The vaccine severely injured Agata. She is likely to require assistance in living for the rest of her life. Exhibit 28 at 28.

On September 21, 2006, an order to guide the parties in litigating the amount of compensation was issued. The September 21, 2006 damages order is a routine order, similar to a damages order issued by all special masters. Among other provisions, the September 21, 2006 damages order directed the Miyakes to obtain a life care plan for Agata.

On October 4, 2007, the Miyakes filed a motion to supplement the September 21, 2006 damages order. This motion is the motion addressed by this ruling. The parties have filed many briefs to address the issues generated by the Miyakes' motion.

While the parties were litigating the issues about the annuity broker, they continued to develop other aspects of the case relating to Agata's damages. The Miyakes filed a life care plan (exhibit 28) on November 28, 2007. On February 8, 2008, respondent filed a life care plan in response. Exhibit A. The Miyakes filed additional information regarding the life care plan. Exhibits 37-41. An amended life care plan was filed by respondent on August 22, 2008. Exhibit C. The parties have stated that additional negotiations regarding differences in their life care plans may follow after the resolution of the annuity broker issue.

When an injured person requires assistance that may continue for decades, some portion of the compensation often takes the form of a structured settlement. In a structured settlement, the special master orders the respondent to purchase an annuity from a third-party, usually an insurance company. The party that issues the annuity is obligated to pay the petitioners certain amounts of money at specified times. The system, which has been used in the Vaccine Program for many years, offers advantages to petitioners, respondent, and to the special masters adjudicating these difficult cases.

The Miyakes have expressed an interest in receiving some portion of the compensation for Agata in the form of an annuity. However, the Miyakes, assisted by their attorney Mr. Terzian, have challenged the process by which the structured settlement is achieved. According to the Miyakes, the heretofore unchallenged process is antiquated, does not match what happens in traditional litigation involving personal injuries, and fails to protect the interest of petitioners

adequately. To reform this process, the Miyakes filed a motion on October 4, 2007. Although the title of this motion, Petitioners' Motion to Supplement September 21, 2006 Damages Order, appears relatively innocuous, the relief the Miyakes suggest would change the way annuities have been placed for many years through the Vaccine Program.

Respondent generally opposes the Miyakes' request. Respondent observes, correctly, that the existing system has worked well for as many years as it has been in place.

The parties have presented their positions in a series of briefs, reflecting the relative complexity of this topic. The parties' presentation is the foundation for the following summary about annuities. A basic understanding is helpful in analyzing the Miyakes' proposed changes.

II. Background for Structured Settlements and Annuities

This section begins with a basic explanation of terms, including annuities. The second section explains how annuities have been treated in the Vaccine Program. Historically, most of the events relating to how the Vaccine Program has used annuities occurred between 1989 and 1992. After 1992, there have been relatively few changes. This stasis permits a summary of the current practices.

A. Terminology

1. Structured Settlement

Black's Law Dictionary defines a "structured settlement" as "A settlement in which the defendant agrees to pay periodic sums to the plaintiff for a specified time." Black's at 1405 (settlement). Due to the Anti-Deficiency Act, the respondent will not agree to pay compensation in the future.[1] Resp't Sur-Reply, filed Feb. 22, 2008, at 8-10.

However, to compensate people injured by a vaccine, respondent may purchase an annuity. 42 U.S.C. § 300aa–15(f)(4). Respondent maintains – and the Miyakes do not dispute – that after respondent purchases any annuity ordered by a special master, respondent has satisfied the judgment and no longer has any obligation to a petitioner. Pet'r Memorandum, filed Oct. 4, 2007, at 11; Resp't Sur-Reply, filed Feb. 22, 2008, at 8.

Respondent's purchase of an annuity from a third-party benefits petitioners. When petitioners receive payments from an annuity that the respondent purchased to resolve a lawsuit, the proceeds of the annuity are not taxed. Internal Revenue Code § 130. This favorable tax

[1] The Miyakes challenge respondent's reliance on the Anti-Deficiency Act. Pet'r Sur-rebuttal, filed June 13, 2008, at 12-13. Because the Miyakes have not requested that respondent be ordered to make payments in the future, resolving whether the Anti-Deficiency Act prevents awards of future payments from the Vaccine Injury Trust Fund is not necessary.

treatment is a primary reason why petitioners want respondent to purchase an annuity as part of a structured settlement.

2. Annuity

At the most basic level, an annuity is "1. An obligation to pay a stated sum, usu[ally] monthly or annually, to a stated recipient . . . 3. A right, often acquired under a life-insurance contract, to receive fixed payments periodically for a specified duration." Black's Law Dictionary (8th Ed. 2004) at 99; accord MD Code, Insurance, § 1-101(c). The conditions for receiving payment can vary. For example, payments may continue only as long as a certain person is alive.

As alluded to earlier, an annuity can be useful in compensating a person who requires long-term care. Agata's case presents a concrete example. The Miyakes' life care planner recommends that Agata live in a community-based apartment with a full-time care giver. The cost of a full-time care giver is approximately $20.00 per hour for 18 hours a day, five days a week, beginning at age 22. Exhibit 28 at 28. The simple math is that providing living arrangements for Agata will cost $102,960 per year (before any offsets).

At least four options are available to provide compensation to address Agata's future needs. The primary option, the one most commonly used, is for respondent to purchase an annuity from a single company. A second choice is for the special master to award the Miyakes a lump sum and to order the Miyakes to purchase an annuity. A third is to award the Miyakes a lump sum representing the net present value of the various needs set forth in the parties' life care plans. The fourth option, which is really a variation on the first option, is for the respondent to purchase more than one annuity from more than one annuity company.

At the undersigned's request, the Miyakes presented estimates quantifying the cost of the different options. These costs are not the costs for Agata. Rather, the hypothetical assumptions are: (a) the person was born on January 1, 2002, (b) the rated age[2] is 15, (c) the person is male, (d) the person lives in Virginia, (e) the payment stream is $25,000 annually (after payment of any taxes) for 40 years, assuming that the person remains alive, (f) the annuity was funded on January 1, 2009, and (g) the payments begin one year after funding.

[2] The rated age affects the expected duration of payments, and, therefore, the expected amount of payments. For example, if a person has a chronological age of 5 but has such a dehabilitating disease that he (or she) is not expected to live more than ten years, the rated age might be 60. If the annuity company promises to pay a certain amount per year as long as the person is living, then the annuity company wants some information about how long the person is expected to live.

Comparison of Different Costs for Same Stream of Payments		
Option #	Form	Cost
1.	One annuity purchased by respondent	$372,950.00
2.	One annuity purchased by the Miyakes	$445,861.63
3.	Lump sum payment	$572,305.00
4.	Two annuities purchased by respondent	$387,147.25

Comparing the cost of option 1 (an annuity purchased by respondent) with the cost of option 2 (an annuity purchased by the Miyakes) reveals one of the primary advantages of a structured settlement. Annuities purchased by respondent are less expensive than the same annuity purchased by petitioners because of different treatment in tax laws. If the Miyakes were determined to have "constructive receipt" of the funds, they would lose the tax advantage. Internal Revenue Code § 104; Rev. Rul. 79-220, 1979-2 C.B. 74. Thus, all other things being equal, there is an advantage if respondent purchases the annuity.

Annuities, regardless of whether they are purchased by the respondent, offer other benefits. One benefit is that the annuity company guarantees payment. (The Miyakes point out that this "guarantee" is only as worthwhile as the company issuing it.) With an annuity, the corpus of the award cannot be mismanaged or wasted by a parent or guardian. A related way that an annuity is preferable to a lump sum is that disputes (and decisions) about the life expectancy of the injured person are obviated. Life expectancy is removed from litigation because the annuity company evaluates the person's medical condition, assigns a rated-age, calculates the costs of benefits based upon its rated-age calculation, and, finally, assumes the risk that the injured person will live longer than expected. Anghel v. Sec'y of Health & Human Servs., No. 90-210V, 1991 WL 211867 * 4-5 (Cl. Ct. Spec. Mstr. Oct. 3, 1991).

This summary about annuities omits any discussion about the complexities of annuities. Annuities can vary in many ways, such as the duration of payment and whether payments are guaranteed or contingent. An example of how different annuities will provide for different returns is found in Exhibit 2 to Pet'r Rebuttal, filed Nov. 30, 2007.

The cost of an annuity will also vary depending on a number of features. One item that affects the cost of an annuity is whether the purchaser of the annuity retains a premium guarantee. See Resp't Sur-reply, filed Feb. 22, 2008, at 4-5. (Respondent's right to purchase a premium guarantee is the basis for his argument regarding the entities authorized to determine terms of any annuity. See section III.A.1.b below.) The price of an annuity also varies by company, that is, different life insurance companies will offer different prices for what appears to be the same amount of benefits. The difference in price reflects, among other things, estimates about future rates of inflation and future rates of return on investments. These estimates vary

from company to company, much like banks may offer different interest rates to the same borrower to purchase the same house.

For the Miyakes, the details about any annuity will be a consequence of the amount of compensation to which they are entitled. Eventually, the compensation to which Agata is entitled will be determined – either because the parties reach an agreement or because the special master decides the issue. At that point, the form of the award, such as a structured settlement, can be considered. But, the cost of the annuity will have little, if any, effect on the amount of compensation to which Agata is entitled.[3] Even in this situation, the Miyakes have requested the right to consult with an annuity expert to determine whether they agree to the use of an annuity. See Pet'r Rebuttal, filed Nov. 30, 2007, at 28-29.[4]

B. History of Annuities in the Vaccine Act

As relevant to explaining how annuities have been used in the Vaccine Program, Congress has enacted legislation three times. The evolution is described in the following sections, beginning with the original enactment.

1. Initial Method of Compensation

When the Vaccine Act was enacted, compensation could be awarded in four annual payments. 42 U.S.C. § 300aa–15(f)(4)(B) (1988). Petitioners were sometimes ordered to purchase an annuity with these funds. Hanagan v. Sec'y of Health & Human Servs., 19 Cl. Ct. 7,

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[3] By way of contrast, petitioners who are attempting to resolve their cases based upon the costs and risks of continued litigation are more concerned about the cost of an annuity. These petitioners are not like the Miyakes because they have not established that they are entitled to compensation. In these situations, respondent may agree to settle the case by, among other things, purchasing an annuity for $200,000. These petitioners are justified in wanting to understand what the $200,000 purchases because any particular life insurance company may offer more (or less) return for the same $200,000.

The Miyakes' attorney, Mr. Terzian, states that in the context of settlement discussions, when petitioners have requested details about the cost of annuities, respondent has threatened to end discussions about settlement. Pet'r Memorandum, filed Oct. 4, 2007, at 17. Information from respondent tends to corroborate Mr. Terzian's statement. Resp't Sur-Reply, filed Feb. 22, 2008, at 24.

Like all aspects of settlement negotiations, special masters cannot order respondent to do anything. Both parties are expected to negotiate resolutions in good faith. If respondent fails to reach an agreement, regardless of the reason, respondent may be worse off at the conclusion of litigation.

[4] The parties dispute whether the Miyakes' consent is a condition for an award of an annuity. This issue is discussed in section III.B, below.

17 (1989); Garlington v. Sec'y of Health & Human Servs., No. 88-13V, 1989 WL 250129 *2 (Cl. Ct. Spec. Mstr. Sept. 25, 1989).

2. December 1989

In December 1989, Congress enacted various amendments to the National Vaccine Injury Compensation Program. One of these provisions introduced the possibility of an award having the form of an annuity. It stated: "[P]ayment of compensation under the Program . . . shall be paid . . . in a lump sum of which all or a portion may be used as ordered by the special master to purchase an annuity or otherwise be used, with the consent of the petitioner, in a manner determined by the special master to be in the best interests of the petitioner." Pub. L. No. 101-239 § 6601(*l*)(3)(C), 103 Stat. 2285 (1989), codified at 42 U.S.C. § 300aa–15(f)(4)(A).

The House report associated with this section explained: "Paragraph (3) clarifies that in any awards the special master may order the purchase of an annuity or use awarded compensation in a manner determined to be in the best interests of the petitioner." H. R. Rep. No. 101-386, at 517 (1989), as reprinted in 1989 U.S.C.C.A.N. 3018, 3120.

After this provision was enacted, the special masters obtained information from the parties about the form of the annuities. Respondent proposed that annuities should be purchased only from companies that satisfy criteria set forth in Uniform Periodic Payment of Judgments Act.

Decisions issued in the early 1990's indicate that special masters were much more involved in the process of defining the terms of the annuity than they are now.[5] See Edgar v. Sec'y of Health & Human Servs., 989 F.2d 473, 475 (Fed. Cir. 1993) (noting the evidentiary submissions before the special master); Chatigny v. Sec'y of Health & Human Servs., No. 91-425V, 1992 WL 24023 *1 (Cl. Ct. Spec. Mstr. Jan. 27, 1992)(stating that during a hearing on damages, petitioners presented "Dr. Mark Walstrom, an annuity specialist; . . . and Ms. Helen Woodard, a rehabilitation specialist and life care planner. Respondent offered the testimony of Charles Siegel, an associate insurance commissioner for the State of Maryland; and Ms. Linda Thornton-Cruz, a rehabilitation expert and life care planner."); Anghel, 1991 WL 211867 *4

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[5] Today, special masters are called upon to resolve disputes about damages infrequently. For the vast majority of cases, the parties agree to the amount of damages. The special master reviews the parties' agreement and, if approved, adopts the agreement in the decision.

Several factors have contributed to the trend in which settlement of damages is the norm. One factor is that decisions have established what types of items are compensable. Another is that the special masters have encouraged the parties to retain life care planners simultaneously. The simultaneous development of life care plans minimizes disputes about damages because the two life care planners obtain the same information.

The efforts by attorneys representing both sides to resolve damages issues without the need for a special master's decision are commendable.

(noting that after special master had determined the amounts of compensation, the special master requested evidence and held a hearing to determine the form of the award).

The special masters issued decisions that incorporated the criteria proposed by respondent. E.g. Chatigny, 1992 WL 24023 *8 (noting, at footnote 39, that the criteria came from the December 1991 draft of the Uniform Periodic Payment of Judgments Act); Anghel 1991 WL 211867 *6 & n. 27 (Cl. Ct. Spec. Mstr. Oct. 3, 1991) (stating "strict criteria have been set forth . . . by myself and other special masters to ensure that only the most reliable of insurers are utilized.")

Between December 1989 and November 1991, special masters ordered respondent to purchase an annuity in numerous (probably more than 100) cases. E.g. Thomas v. Sec'y of Health & Human Servs., No. 90-2022V, 1991 WL 263730 *10 (Cl. Ct. Spec. Mstr. Nov. 22, 1991)Walker v. Sec'y of Health & Human Servs., No. 90-856V, 1991 WL 234246 *5 (Cl. Ct. Spec. Mstr. Oct. 25, 1991).

Although these decisions by special masters demonstrate their authority to order respondent to purchase an annuity, decisions by judges of the United States Claims Court (as the Court of Federal Claims was then known) show how these decisions were received by an appellate tribunal. In Neher v. Sec'y of Health & Human Servs., 23 Cl. Ct. 508 (1991), the judge held that the chief special master erred when he awarded both an annuity and a lump sum. The judge held that the chief special master only should have ordered the respondent to purchase an annuity because it was "a duplicative amount over-and-above what [the chief special master] included in his annual compensation award." After eliminating the lump sum, the judge noted that "Neither party has contested the portion of the chief special master's award which allows compensation in the form of an annuity." Id. at 516.

The analysis in Leung v. Sec'y of Health & Human Servs., 23 Cl. Ct. 217 (1991), was similar to the reasoning in Neher. The special master ordered compensation in the form of an annuity to be purchased by respondent and a one-time lump sum. Both parties appealed. Petitioner contended that the special master acted arbitrarily and capriciously in ordering an annuity over the petitioner's objection. In rejecting this argument, the judge stated that "Petitioner does not question the special master's authority to award compensation by way of annuity." Id. at 220. Instead, the question was whether the special master abused her discretion in ordering the annuity over petitioner's objection.

A more sweeping affirmation of the special master's authority to award compensation in the form of an annuity is found in Stotts v. Sec'y of Health & Human Servs., 23 Cl. Ct. 353 (1991). In Stotts, the special master's award of compensation included different components, including approximately $200,000 in a lump sum for lost wages. Respondent argued that the special master should have ordered this compensation in the form of an annuity. Id. at 362. The judge held that the special master did not abuse her discretion in awarding the lost wages in a lump sum, rather than an annuity. In doing so, the judge stated: "Under [section 15(f)(4)(A)], all

compensation awards must initially be paid out of the Program trust fund in one lump sum. Thereafter, the special master has two basic options in controlling the use of these 'proceeds.' He or she may (I) order either party to use all or a portion of those 'proceeds' to purchase an annuity or annuities, if that course of action is determined to be in the best interest of the injured individual, with or without the consent of the petitioners." Id. at 365 (emphasis removed).

During this era, respondent was not permitted to use Program funds to purchase a guarantee for the annuity. First Commercial Bank v. Sec'y of Health & Human Servs., No. 89-107V, 1990 WL 293432 *4-5 (Cl. Ct. Spec. Mstr. Dec. 21, 1990).

3. November 1991

Congress enacted another change to how annuities can be used in the Vaccine Program in November 1991, as part of the Health Information, Health Promotion, and Vaccine Injury Compensation Amendments of 1991. In pertinent part, this Act adds: "In purchasing an annuity under subparagraph (A) or (B), the Secretary may purchase a guarantee for the annuity, may enter into agreements regarding the purchase price for and rate of return of the annuity, and may take such other actions as may be necessary to safeguard the financial interests of the United States regarding the annuity." Pub. L. No. 102-168, § 201(f), 105 Stat. 1102, 1103-04, codified at 42 U.S.C. § 300aa–15(f)(4)(C).

The statements accompanying the introduction of the bill into both houses of Congress were identical. They provided: "Under current law, an annuity may be purchased to provide all or part of compensation received under the program. Subsection (f) allows the Secretary to take such additional actions as may be necessary to safeguard the interest of the program in these annuities, such as the purchase of a guarantee–under which, if an annuitant dies, all or part of the value of the annuity is repaid to the program–or the lock-in of rates or purchase prices for the annuity." 137 Cong. Rec. 30218 (Rep. Waxman), 137 Cong. Rec. 31503 (Sen. Kennedy).

After 1991, disputes about annuities decreased. See Watkins v. Sec'y of Health & Human Servs., No. 95-154V, 1999 WL 199057 *3 n. 11 (Fed. Cl. Spec. Mstr. Mar. 12, 1999) (noting that evidentiary hearing about net discount rate could have been avoided if parties had obtained an annuity for lost wages).

In addition, special masters continued the practice of ordering respondent to purchase an annuity according to terms set forth in the Uniform Periodic Payment of Judgments Act. E.g., Wilkerson v. Sec'y of Health & Human Servs., No. 90-822V, 1998 WL 106132 *23 (Fed. Cl. Spec. Mstr. Feb. 24, 1998); Carterman v. Sec'y of Health & Human Servs., No. 90-3708V, 1996 WL 741418 *5 (Fed. Cl. Spec. Mstr. Dec. 13, 1996); Kono v. Sec'y of Health & Human Servs., No. 93-123V, 1995 WL 774598 *17 (Fed. Cl. Spec. Mstr. Dec. 21, 1995). After 1992, no decision from either a judge of the Court of Federal Claims or the Court of Appeals for the Federal Circuit appears to have addressed the special master's ability to make these orders.

4. Respondent's Method of Purchasing an Annuity

The Miyakes believe that the current system unfairly excludes petitioners from the process. Therefore, the current system is described.

At some point during the litigation, the trial attorney from the United States Department of Justice determines that an annuity broker may be helpful. The trial attorney selects an annuity broker. A broker is an independent consultant and is not employed directly by respondent. Typically, the trial attorney picks an annuity broker with whom he or she has worked previously. The trial attorney's selection of an annuity broker is not supervised. See General Accounting Office, STRUCTURED SETTLEMENTS: The Department of Justice's Selection and Use of Annuity Brokers, GAO/GGD 00-45 (Feb. 2000) at 1, 3.[6] The trial attorney does not promise that the United States Department of Justice will pay the annuity broker. See Resp't Sur-Reply, filed Feb. 22, 2008, at 21. As discussed below, no part of the United States government compensates the annuity broker. Because the United States Department of Justice does not compensate the annuity broker, trial attorneys appear to possess the authority necessary to consult, informally, with the annuity broker.

The annuity broker gathers information, both medical and financial. (For a more elaborate description of this process, see Pet'r Memo., filed Oct. 4, 2007, at 4-6.) The medical information is used to set the "rated age" for the injured party.

Financial information concerns how much money will be paid for future items. For example, at one level of injury, a petitioner might be expected to require $10,000 worth of medical care per year. A more severely injured petitioner might be expected to require $50,000 worth of medical care per year. Obviously, the annuity to fund the latter example will cost more, everything else being equal. See Resp't Sur-Reply, filed Feb. 22, 2008, at 22-23.

With information about the injured person, the annuity broker can seek prices from various companies offering annuities. Only certain companies qualify to provide annuities in the Vaccine Program. The annuity companies will probably offer different prices, depending upon certain variables such as how the particular annuity company rates the injured person's age and an estimate about long-term interest rates. Like mortgage rates, sometimes particular prices can be locked in for a period of time.

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[6] The report is reproduced as exhibit D to Resp't Sur-Reply, filed Feb. 22, 2008. This report is also available at www.gao.gov/new.items/gg00045.pdf.

At some point in the litigation, respondent is ordered to purchase an annuity.[7] The respondent is the Secretary of the Department of Health and Human Services (HHS). To comply with the judgment, personnel within the Department of Health and Human Services contact an annuity broker to purchase the annuity. Although HHS is not required to use the same annuity broker, selected by the Department of Justice attorney, it often (perhaps even always) does because that broker is familiar with the case. The Miyakes supplied information indicating that in approximately 75 percent of cases in the Vaccine Program, HHS used two structured settlement brokers. Exhibit 4 to Pet'r Rebuttal, filed Nov. 30, 2007; Resp't Sur-Reply, filed Feb. 22, 2008, at 40 (confirming authenticity of exhibit 4). This relatively small variation in brokers matches what the GAO found in 2000. General Accounting Office, STRUCTURED SETTLEMENTS: The Department of Justice's Selection and Use of Annuity Brokers, GAO/GGD 00-45(Feb. 2000) at 2 .

The annuity broker recommends a life insurance company to HHS. HHS then selects a company.

The annuity broker places the order for the annuity with the life insurance company. Pet'r Rebuttal, filed Nov. 30, 2007, at 3 & n.1. Importantly, the life insurance company pays a commission to the annuity broker. The standard commission is four percent. The price for any particular annuity includes compensation for the annuity broker. HHS does not compensate an annuity broker directly. Resp't Resp., filed Oct. 29, 2007, at 7.

The annuity broker also serves as an intermediary between HHS and the life insurance company. The annuity broker receives payment from HHS and transmits the payment to the life insurance company. The annuity broker also reviews the accuracy of paperwork provided by the life insurance company. See Resp't Resp., filed Oct. 29, 2007, at 6 n.8 (describing functions of annuity broker).

The parties agree that after respondent purchases the annuity as ordered in the judgment, respondent has satisfied that aspect of the judgment. Respondent does not carry any obligations to a petitioner into the future. Pet'r Rebuttal, filed Nov. 30, 2007, at 5; Resp't Sur-Reply, filed Feb. 22, 2008, at 8; Pet'r Sur-rebuttal, filed June 13, 2008, at 5.

III. Petitioner's Requests and Resolution

The previous two sections are the setting for the Miyakes' motion to modify the court's damages order. The Miyakes want permission to obtain guidance from an annuity expert. The

[7] In most cases involving an annuity, the parties agree to the terms of a settlement including the purchase of an annuity. The parties present this settlement to the special master in the form of a stipulation. The special master issues a decision adopting the stipulation. This decision is the basis for a judgment that orders respondent, among other things, to purchase an annuity.

Miyakes believe that a person whom they retain will provide better guidance than someone beholden to the government. For his part, the Secretary believes that the guidance sought by the Miyakes is redundant in the sense that respondent's broker can provide the same information and unnecessary in the sense that personnel within HHS, ultimately, determine the terms of the annuity.

However, respondent does not challenge the Miyakes' right to receive some reasonable assistance regarding an annuity. Respondent recognizes that most attorneys do not have the expertise to guide petitioners about annuities. Thus, respondent agrees that the Miyakes may retain someone in addition to their attorney, but this person should not duplicate services provided by respondent's broker. The Miyakes do not want to be limited to a person selected by the respondent.

The Miyakes' concern about be limited to an annuity expert selected by respondent is well grounded. As discussed in section II.B.4 above, respondent chooses one or two annuity brokers repeatedly. This repetition raises questions about whether these annuity brokers act in a way that is likely to benefit petitioners or in a way that is likely to earn them repeat business. See Snyder v. Sec'y of Health & Human Servs., No. 01-162V, 2009 WL 332044 *12 (Fed. Cl. Spec. Mstr. Feb. 12, 2009) (noting concerns about an expert who has appeared many times for petitioners); cf. Ferring B.V. v. Barr Laboratories, Inc., 437 F.3d 1181, 1188-90 (Fed. Cir. 2006) (finding, in the context of a challenge to the validity of a patent, that affiants should have disclosed their past relationship with the applicant to the Patent and Trademark Office). Respondent, unsurprisingly, defends the annuity brokers he has selected repeatedly. Resp't Sur-Reply, filed Feb. 22, 2008, at 41-42. Yet, the question lingers because an annuity broker, retained by a tortfeasor, neither has a contractual relationship with the injured person nor owes the injured person a fiduciary duty. Macomber v. Travelers Property & Cas. Corp., 804 A.2d 180, 193-95 (Conn. 2002). Through Mr. Terzian, an attorney with more than 10 years of experience in the Vaccine Program, the Miyakes are presumably aware that the Department of Justice attorneys bring annuity brokers to settlement conference and consult with them during negotiations. The appearance of such a close relationship between members of the Executive Branch and the annuity brokers does little to promote the idea that annuity brokers, selected by either attorneys from the Department of Justice or selected by personnel from the Department of Health and Human Services, are concerned about the best interest of petitioners.

Because the Miyakes have concerns (if not outright mistrust) about relying upon an annuity broker selected by respondent, the Miyakes look to the special master to protect their interest. Respondent believes that Congress has given the responsibility for purchasing the annuity to the Executive branch alone. In citing Ruben v. Sec'y of Health & Human Servs., 22 Cl. Ct. 264 (1991), Huber v. Sec'y of Health & Human Servs., 22 Cl. Ct. 255 (1991), and McGaughey v. Sec'y of Health & Human Servs., No. 90-602V, 1991 WL 97558 (Cl. Ct. Spec. Mstr. May 23, 1991), respondent argues that the special master may order an annuity without consent of a petitioner. Respondent, therefore, seems to suggest that the petitioners do not need much assistance because their role is minimal. Resp't Resp., filed Oct. 29, 2007, at 4 n.5. The

different orientations of the parties originate in their different perspectives of the special master's role in any "dispute" about annuities.

The scope of the special master's authority largely determines the outcome of the parties' dispute. Therefore, this issue is resolved first.

A. Authority of Special Master

Respondent's argument that he – and not the special master – possesses the authority to determine the terms of the annuity as those terms affect the petitioner is significantly flawed. Ultimately, special masters award compensation. They do so by making a decision that, absent an appeal, becomes a judgment. 42 U.S.C. § 300aa–12(d)(3)(A) ("A special master to whom a petition has been assigned shall issue a decision with respect to . . . the amount of such compensation."). The special master's authority to define the compensation extends to a determination about the terms of an annuity, insofar as those terms affect the petitioner.

1. Statutory Provisions

a. Section 15(f)(4)(A) Authorizes the Special Master

"[P]ayment of compensation under the Program . . . shall be paid . . . in a lump sum of which all or a portion may be used as ordered by the special master to purchase an annuity or otherwise be used, with the consent of the petitioner, in a manner determined by the special master to be in the best interests of the petitioner." 42 U.S.C. § 300aa–15(f)(4)(A); see Edgar v. Sec'y of Health & Human Servs., 989 F.2d 473, 477 (Fed. Cir. 1993) (stating that section 15(f)(A) "permits the special master to order the purchase of an annuity").

As discussed in section III.B.2 above, after special masters were authorized to award annuities, special masters conducted evidentiary hearings to determine the terms of any annuity. As part of this process, special masters eventually adopted the criteria for selecting the insurance company from which respondent would purchase an annuity.

Over the years, these criteria have been referred to as the "Court's criteria". Respondent's first brief uses this same terminology. It states: "any concern about the fiscal viability of the annuity carrier selected by respondent to fund the case is adequately addressed by the court-imposed selection criteria." Resp't Resp., filed Oct. 29, 2007, at 4 n.6 (emphasis added).

Logically, if the special masters impose criteria, then the special masters possess the authority to modify the criteria. At an extreme, the special masters conceivably could set the criteria in such a way that only a single company qualified, removing any discretion in the selection of annuity company from the Executive branch.

To avoid this result, respondent maintains that special masters lack the authority to impose criteria. Resp't Supp. Brief, filed Oct. 3, 2008, at 5-6 (stating that "special masters lack the legal authority to order the respondent to purchase annuities from a specific life insurance company."). According to respondent, although decisions in the past may have referred to the criteria, these decisions are not accurate. Respondent argues he has merely acquiesced in these decisions because respondent proposed the criteria adopted by the special master. Resp't Sur-Reply, filed Feb. 22, 2008, at 29-30.

This logic, too, is erroneous. If respondent's argument were correct, then whenever a party proposes an order, the party may disregard that same order. For example, parties may request that a court enter a protective order limiting the disclosure of confidential information and often the parties may propose the terms of the protective order in a draft order. The court typically grants the motion and adopts the proposed order. But, according to respondent's rationale, the party may disregard the protective order because the party could have proposed different criteria initially. Such a result makes no sense.

Respondent's conduct immediately following Congress's decision to grant special masters the authority to award compensation is at odds with his position in this litigation. Between the two, respondent's actions are more probative than his words. If respondent had believed that special masters lacked the authority to dictate the terms of the annuity in the early 1990s, respondent would have challenged the special masters' authority then. Respondent's failure to assert the arguments he makes now weakens those arguments. "A contemporaneous construction, by the officers upon whom was imposed the duty of executing those statutes, is entitled to great weight; and since it is not clear that the construction was erroneous, it ought not now to be overturned." United States v. Philbrick, 120 U.S. 52, 59 (1887) cited in United States v. Hill, 120 U.S. 169, 183 (1887); accord Santa Fe Pacific R. Co. v. United States, 294 F.3d 1336, 1343 (Fed. Cir. 2002).

Respondent argues that allowing special masters to establish the criteria could create a chaotic situation in which each special master adopted different criteria. Resp't Sur-Reply, filed Feb. 22, 2008, at 30. This argument is not tenable. Generally, special masters have tried to establish uniform procedures whenever possible. In specific reference to the criteria for annuity companies, special masters did impose the same criteria in a series of independent decisions. Anghel, 1991 WL 211867 *15 n.27. There is little evidence to suggest that the special masters would establish such an unpredictable system.

Ultimately, someone must possess the authority to determine, with finality, the form of compensation to an injured person. There are three possible choices: the petitioners, the respondent, and the special master. Petitioners were not preferred because there was a concern that parents may deplete large lump sums quickly, leaving too little money for the remainder of the life of their injured child. Selecting respondent would seem to be problematic in that respondent would seem to face a conflict between doing what is best for a particular individual (which may be spending much money) and doing what is best for the Vaccine Injury Trust Fund

as whole (which may be spending less money). The remaining and natural choice to resolve disputes is the special master, subject, of course, to appropriate appellate review. As the neutral party, the special master is the best position to consider what is in the best interest of the injured person. Section 15(f)(4)(C) says as much: "payment of compensation . . . shall be paid . . . in a lump sum of which all or a portion may be used as ordered by the special master to purchase an annuity."

For these reasons, as a matter or law, section 15(f)(4)(C) authorizes the special master to determine the terms of an annuity, insofar as those terms concern the petitioner.

b. Section 15(f)(4)(C) Does Not Diminish the Special Master's Authority

Rather than focus on section 15(f)(4)(A), which authorizes a special master to order compensation in the form of an annuity, respondent looks to section 15(f)(4)(C). Resp't Resp., filed Oct. 29, 2007, at 3; Resp't Sur-Reply, filed Feb. 22, 2008, at 12, 15-16, 29-32.

This provision, in pertinent part, provides: "In purchasing an annuity under subparagraph (A) or (B), the Secretary may purchase a guarantee for the annuity, may enter into agreements regarding the purchase price for and rate of return of the annuity, and may take such other actions as may be necessary to safeguard the financial interests of the United States regarding the annuity." 42 U.S.C. § 300aa–15(f)(4)(C).

The "guarantee" to which the statute refers is also known as a "premium guarantee" or "installment refund" annuity. This provision allows the party purchasing the annuity (the respondent) to receive any funds remaining payable if the annuitant (the injured person) dies during the guarantee period. Resp't Sur-reply, filed Feb. 22, 2008, at 4-5. The Miyakes do not challenge respondent's interpretation. See Pet'r Sur-rebuttal, filed June 13, 2008, at 1-2.

Respondent argues that this section authorizes him to determine the terms of an annuity. "[I]n Section 15(f)(4)(C), Congress expressed no desire to give petitioners any role in the 'purchasing' of annuities under the Program." Resp't Sur-reply, filed Feb. 22, 2008, at 11. Respondent further argues that because section 15(f)(4)(C) authorizes the secretary to "take such other actions as may be necessary to safeguard the financial interests of the United States regarding the annuity," he, and not the special master, possesses the authority to determine the criteria to purchase the annuity. Id. at 31-32.

The answer to this argument is simple. After the special master orders the respondent to purchase the annuity, respondent "may purchase a guarantee for the annuity." The steps are sequential in the sense that the special master first determines the terms of the annuity, including, if necessary, the company from which respondent will purchase the annuity. After that step is done, the respondent determines whether a guarantee is in the best interest of the United States.

Although the two decisions are made in sequence, the purchase of an annuity and, if the Secretary desires, the guarantee occurs in one transaction.

Respondent has not explained how his right given in section 15(f)(4)(C) conflicts with the authority given to the special master in section 15(f)(4)(A). The two exist side by side. There is no indication that section 15(f)(4)(C) removes any authority from the special master.

The language of the two sections is clear. Section 15(f)(4)(A) authorizes the special master to act in setting terms of the annuity that benefit the petitioner, such as the amount of the annuity. Section 15(f)(4)(C) authorizes the Secretary to purchase an additional feature that potentially benefits the respondent.

The legislative history supports this interpretation of the two paragraphs. The chronology by itself shows that Congress enacted section 15(f)(4)(A), which concerns special masters, in December 1989. Pub. L. No. 101-239 § 6601(*l*)(3)(C), 103 Stat. 2106, 2291. Congress enacted section 15(f)(4)(C), which concerns the Secretary, on November 26, 1991. Pub. L. No. 102-168, § 201(f), 105 Stat. 1102, 1103-04. Thus, for approximately two years special masters could order an annuity and there was no statutory authorization for respondent to do anything with regard to the annuity. First Commercial Bank, 1990 WL 293432 *4-5

Neher, Leung, and Stotts are informative because they recognize the authority of the special master to order compensation in the form of an annuity. These three cases were decided before Congress enacted section 15(f)(4)(C), on November 26, 1991. Pub. L. No. 102-168, § 201(f), 105 Stat. 1102, 1103-04. Because special masters were awarding annuities before section 15(f)(4)(C) was enacted, the source of the authority to award annuities cannot be that section. Instead, the source of the authority, as noted by Stotts, is section 15(f)(4)(A).

It is conceivable that the enactment of section 15(f)(4)(C) divested special masters of the authority granted by 15(f)(4)(A), although respondent does not make this argument. Such an argument, if proffered, would not be tenable. Section 15(f)(4)(C) does not address the (lack of) authority of special masters to award compensation in the form of an annuity in any respect. If Congress believed that the special masters should not determine the terms of the compensation, including the terms of the annuity, Congress could have addressed the authority of special masters directly. For example, Congress could have stricken section 15(f)(4)(A). The lack of an express statement against special masters setting the terms of an annuity strongly suggests that Congress was satisfied with how special masters were acting. See Canadian Lumber Trade Alliance v. United States, 517 F.3d 1319, 1343 (Fed. Cir. 2008), citing United States v. United Cont'l Tuna, 425 U.S. 164, 168 (1976) (holding that "[f]or a later statute to be held implicitly to supercede an apparently inconsistent earlier enactment, the intent of Congress must be apparent in the circumstances."); Cathedral Candle Co. v. United States Intern. Trade Comm'n, 400 F.3d 1352, 1365 (Fed. Cir. 2008), citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) ("where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.")

For these reasons, Congress has given the authority to determine the terms of the annuity, as those terms relate to petitioners, to the special masters. Special masters are charged with determining what form of compensation is in the best interest of the petitioner. Respondent's arguments to the contrary are not in accord with the statute and are not in accord with decisions made in the Program's early history.

2. Additional Argument Regarding Authority

Besides arguments based upon section 15(f)(4)(C), respondent makes one other argument for why special masters do not have the authority to determine the terms of the annuity. Respondent contends that the participation of the petitioners (and perhaps even the special master) interferes with the Executive Branch's right to contract. See Resp't Resp., filed Oct. 29, 2007, at 6.

This argument, which appears only in respondent's first brief, confuses what is happening. The special master orders respondent to act. The action might be to pay an amount in a lump sum or the action might be to purchase an annuity. In either event, the respondent is carrying out a judgment of the court. The Executive Branch's freedom to contract is curtailed by its obligation to the Judicial Branch.

B. Consequences of Determining that Special Masters Possess the Authority to Determine the Terms of the Annuity

The holding that special masters possess the authority to order respondent to purchase an annuity according to terms set by the special master means that special masters must receive information on which to base their judgment. In a case in which the parties have not agreed to the form of an award, if special masters receive any information about the structure of annuity, both parties must have the opportunity to present evidence. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (stating that a fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."); see also Eastern Paralyzed Veterans Ass'n, Inc. v. Secretary of Veterans Affairs, 257 F.3d 1352, 1364 (Fed. Cir. 2001)(upholding a veteran's due process right to present evidence and require a medical examination); Campbell v. Sec'y of Health & Human Servs., 69 Fed. Cl. 775, 778 (2006)(consistent with due process, the Vaccine Act requires fundamental fairness and an effective opportunity to be heard in a meaningful manner.)

When the parties debate the details of an annuity, the parties must be afforded some opportunity to present their case to the special master. Actually, the petitioner's right to consult with an expert on annuities attaches before the parties' disagreement reaches the special master's attention. The petitioner's consultation with an annuity expert may educate the petitioner and the petitioner's attorney about certain potentially objectionable terms of respondent's plan.

With eloquence, the Miyakes summarize how their retention of an annuity expert fits into the litigation:

> As indeed the special master alone has the capacity and duty to decide what is in petitioners' best interests and has both the authority and capacity to order annuities, how can the special master know what is in petitioners' best interests without input from petitioners and petitioners' experts? If petitioners are denied the opportunity to have their own expert, then the special master is effectively endowing respondent's expert with the sole authority to make financial decisions for petitioners.

Pet'r Sur-rebuttal, filed June 13, 2008, at 27-28.

Respondent does not address this issue directly. Respondent comes closest to addressing the special master's need for information when he argues that because the special master is authorized to order an annuity without consent of the petitioners, the petitioners cannot participate in the process. Resp't Sur-reply, filed Feb. 22, 2008, at 10-11. Again, respondent's argument makes little sense.

Respondent starts from a relatively settled proposition that special masters possess the authority to order an annuity without consent of the petitioners. See Ruben, Huber, and McGaughey. The views of the petitioner as to whether compensation should be in the form of a lump sum or annuity do not bind the special master. It is especially important for special masters to have the discretion to determine the form of an award because the "petitioner" is often the parent or guardian of an injured child. In some cases, the special master is especially concerned about providing compensation in a lump sum, which could be dissipated without adequate protection for the child's remaining years. See Brewer v. Sec'y of Health & Human Servs., No. 93-0092V, 1996 WL 147722 *26-27 (Fed. Cl. Spec. Mstr. Mar. 18, 1996) (special master declined to award compensation to a trustee, as proposed by petitioner, and, instead, awarded compensation in the form of an annuity).

But, from this starting point, respondent takes an illogical next step. Respondent argues, essentially, that because petitioner's views are not binding, they should not be permitted to present any view. According to respondent, "petitioners are given no statutory right to participate in [the process of purchasing an annuity]. Petitioners have no legal right to select the annuity company or be consulted in matters pertaining to the purchase of the government-owned annuity." Resp't Resp., filed Oct. 29, 2007, at 5 (emphasis added).

By attempting to shut petitioners out of the process by which special masters determine the terms of the annuity that affect the petitioners, respondent would create a process in which only one side presents information. Even if potential constitutional concerns could be set aside, a special master is likely to make better decisions if information is received from both sides.

From the conclusion that the special master must be able to receive information from each side, it also follows that the parties must disclose information to each other. The Miyakes' motion requested that information be shared between the annuity experts. Pet'r Mot. at 2. This portion of the Miyakes' motion is GRANTED. Ultimately, if there is a hearing involving the form of an award, both sides will be required to disclose the basis for their experts' opinions.

C. Petitioners' Need for Guidance from Their Own Annuity Expert

Respondent maintains that petitioners are not required to retain a "'bond fide broker.'"[8] Resp't Sur-Reply, filed Feb. 22, 2008, at 32. Respondent argues that "respondent's broker's services leading up to the placement of the annuity provide benefits to all parties to the underlying case, benefits that petitioners are free to avail themselves of." Id. at 33. Respondent believes that "[p]etitioners are not purchasing an annuity here or considering an annuity as an alternative to cash." Id.

Here, the Miyakes have established that the services of an annuity expert are reasonable. The Miyakes argue:

> It is impossible for petitioners to consent to the funding of an annuity without the advice of their own expert to explain, guide and plan a structured settlement. The Vaccine Program does not require petitioners to rely on respondent's experts for any other purpose. It would be similarly ill advised, when making the most important decisions of their lives, for [petitioners] to be forced to rely on the structured settlement expert retained by respondent - a person employed to protect respondent's interests. Petitioner[s] should retain [their] own independent representation, consultation, and advice with regard to these matters."

Pet'r Memorandum, filed Oct. 4, 2007, at 7; see also Pet'r Sur-rebuttal, filed June 13, 2008, at 11-12 (discussing special master's need for information from two sides).

Although respondent attempts to limit the Miyakes to "a financial planner/advisor," Resp't Resp., filed Oct. 29, 2007, at 8 n. 10; this limitation minimizes, unfairly, the number of subjects on which the Miyakes could benefit. Respondent's position appears to amount to "trust us." See Pet'r Rebuttal, filed Nov. 30, 2007, at 12-13 ("In essence, respondent takes the paternalistic view that petitioners should just leave their financial fates in the hands of respondent's broker to determine what is best for petitioners."); Pet'r Sur-rebuttal, filed June 13,

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[8] Although both parties use the term "bona fide broker," neither party defined this term explicitly. The Miyakes indicate that life insurance companies appoints agents to sell their annuities. Pet'r Sur-rebuttal, filed June 13, 2008, at 29 n. 13. So, a bona fide broker may be someone authorized to sell annuities.

2008, at 19-21. The Miyakes should not be limited to information from one side. And, it almost goes without saying, special masters should not be restricted to information from one side.

Contrary to respondent's argument, the Miyakes, are considering an annuity as an alternative to cash. Special masters may award compensation in the form of a lump sum alone. 42 U.S.C. § 300aa–15(f)(4)(A). The Miyakes have a right to be heard on the issue of what form the award should take. Although special masters have generally found that, for an award expected to last for several years, an annuity is better than a lump sum, this decision appears to have been made after evaluating the circumstances of each case individually. The Miyakes may persuade the undersigned that Agata's case is different from these other cases because a lump sum award is in Agata's best interest. To present their assessment, the Miyakes are entitled to someone reasonably knowledgeable about annuities.

Of course, any person retained by the Miyakes should perform only those tasks that are reasonably necessary. If a task is being done (or has already been done) by a broker retained by respondent, then a repeat of this task could be unreasonably redundant. But, repetition may not always be redundant. For example, it might be reasonable for a broker retained by petitioner to check the accuracy of work performed by respondent's broker. Although such a check could be tantamount to redoing the work, there may be no other way to confirm the accuracy of the work.

The process of adjudicating requests for compensation for brokers retained by petitioners will allow special masters to address the reasonableness of certain tasks in terms of concrete examples. A series of decisions will establish some guidelines for compensating petitioner's annuity expert.[9]

D. Method of Compensating Petitioners' Annuity Expert

In addition to requesting the right to consult with an annuity expert, the Miyakes also request some assurance that their annuity experts will be compensated at a level equal to the compensation they would receive if they had worked for a petitioner outside of the Vaccine Program. According to the Miyakes, two annuity brokers commonly agree to split any commission paid by the life insurance company. Pet'r Memorandum, filed Oct. 4, 2007, at 7-8; Pet'r Rebuttal, filed Nov. 30, 2007, at 19 & Exhibit 3 (letter from Mark Wahlstrom). The Miyakes contend that annuity brokers, whom the United States has used in the past, have agreed to split commissions with other annuity brokers in cases outside of the Vaccine Program. Respondent has not challenged the accuracy of these statements.

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[9] For example, respondent maintains that petitioners do not need to retain a "'bona fide broker' simply to 'design' an annuity plan." Resp't Sur-reply, filed Feb. 22, 2008, at 25. Respondent reasons that in a case in which petitioners are entitled to compensation, respondent's broker "provide[s] benefits to all parties." Id. at 33.

There is no reason to resolve this question now. The reasonableness of the broker's activities depends upon all the circumstances.

In some respects, the question of payment to the brokers lies at the heart of the dispute. The Miyakes, initially, proposed that the special master should order respondent to "encourage the structured settlement experts to agree to an equitable sharing of commissions, in accordance with industry standards." Pet'r Mot. at 2. For example, if the annuity policy cost $100,000, then the standard (four percent) commission would be split and each annuity broker would receive $2,000.

Respondent opposed this argument for several reasons. Resp't Resp., filed Oct. 29, 2007, at 6-7; Resp't Sur-Reply, filed Feb. 22, 2008, at 17. One persuasive reason was that it is somewhat a misnomer to label one annuity broker as "respondent's annuity broker." Respondent cannot control what the annuity broker does in the sense that the annuity broker actually is paid by the insurance company.[10] A special master probably lacks the authority to order a broker, who is not a party to this action, to share a commission. Similarly, a special master probably lacks the authority to order a life insurance company, who also is not a party to this action, to divide payment between two brokers. See Resp't Resp., filed Oct. 29, 2007, at 7.[11]

Respondent also maintains that "[f]orcing respondent's broker to pay these costs on behalf of respondent, as suggested by petitioners, could be construed as 'rebating' of a portion of the annuity cost back to respondent." Resp't Sur-Reply, filed Feb. 22, 2008, at 17. Respondent argues that this arrangement "could be construed as illegal under Maryland law." Id. at 18, citing

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[10] Whether respondent could (or should) exercise any bargaining strength to persuade particular annuity brokers to agree voluntarily to split commissions is a determination for the Executive branch. The Miyakes may bring their arguments (perhaps with less rhetoric) on this point; see Pet'r Memorandum, filed Oct. 4, 2007, at 9-11 & 17-18; Pet'r Sur-rebuttal, filed June 13, 2008, at 34-35, to the elected branches of government.

[11] Respondent also presents an unpersuasive argument. Respondent maintains that Public Law 107-273 § 11015(b), 116 Stat. 1824 (2002), codified at 28 U.S.C. § 519 (note) "imposes [a] requirement on government officials (the United States Attorney or designee in this case) in exercising their authority to select the broker." Resp't Resp., filed Oct. 29, 2007, at 7.

This argument is not persuasive because the statute directs only the actions of United States Attorneys. This section begins "In any structured settlement that is not negotiated exclusively through the Civil Division of the Department of Justice." This limitation is confirmed by an order of the Attorney General implementing this statute. "Section 11015 on its face does not require Department of Justice components other than the United States Attorneys' offices to select brokers from the list." 71 Fed. Reg. 11158, 11159 ¶ 9 (Mar. 6, 2006) "Minimum Qualifications for Annuity Brokers in Connection with Structured Settlements Entered Into by the United States."

Cases in the Vaccine Programs are staffed by attorneys in the Civil Division of the Department of Justice. Thus, Public Law 107-273 does not restrict the activities of the DOJ attorneys in this case.

MD. Code Ann., Ins. § 10-130(a) (West 2008). The Miyakes challenge this argument. Pet'r Sur-rebuttal, filed June 13, 2008, at 15-16.

Resolving whether an agreement between brokers in the context of the Vaccine Act is not necessary because the Miyakes are not seeking an order requiring respondent's broker to share any commission. Under this circumstance, attempting to interpret Maryland laws regarding insurance would be imprudent.

In light of respondent's objections, the Miyakes have refined their request regarding payment. The Miyakes now request that the special master assure them that their annuity brokers will receive the amount as if the commission were split. Pet'r Rebuttal, filed Nov. 30, 2007, at 21; see also Pet'r Memorandum, filed October 3, 2007, at 16. To continue the example from an earlier paragraph, for an annuity costing $100,000, the Miyakes' annuity broker would receive $2,000. (Respondent's broker would still receive $4,000.)

The Miyakes argue that without some assurance from the special master about the amount of compensation, annuities brokers are unwilling to assist them. Pet'r Memorandum, filed Oct. 3, 2007, at 16; see also Pet'r Sur-rebuttal, filed June 13, 2008, at 14-18. Respondent counters that experts should be paid only on an hourly basis.

The Miyakes' assertion is difficult to accept for three reasons. Simply as a matter of logic, the Miyakes could never prove that all annuity brokers would participate if and only if the annuity brokers were guaranteed a payment equaling one-half share of the commission. If the Miyakes produced affidavits from 100 annuity brokers, this information would not prove anything about the 101st annuity broker. To provide a counter-example, respondent identifies people willing to provide information about annuities on an hourly basis. Resp't Sur-reply, filed Feb. 22, 2008, exhibit C (Mr. Isleib) & exhibit E (JMW Settlements, Inc.).[12]

For their part, the Miyakes challenge the accuracy of the information presented by respondent. They argue that Mr. Isleib is not qualified to assist them. Pet'r Sur-rebuttal, filed June 13, 2008, at 32. They also contend that respondent has selected incorrect pricing information regarding JMW Settlements. Pet'r Sur-rebuttal, filed June 13, 2008, at 33 & Sur-Rebuttal Exhibit 5.

Determining whether Ms. Isleib or JMW Settlements could, theoretically, provide assistance to the Miyakes is not necessary. If the Miyakes believe that these entities are not likely to help them, then the Miyakes will not retain them.

Second, it seems that if the annuity broker were offered the right incentive, the annuity broker would agree to work for an hourly amount. To take an extreme example – one to which respondent would almost certainly object – if the special master guaranteed payment to the

[12] Exhibit E was filed as a separate document on February 29, 2008.

annuity broker at a rate of $1,000 per hour, it seems likely that at least one qualified annuity broker would agree to work at that rate. There appears to be no legal impediment to the annuity broker's decision to work for an hourly amount.

The third reason to reject the Miyakes' assertion is that there are examples in which annuity brokers have been paid by the hour in the Vaccine Program. In Paul v. Sec'y of Health & Human Servs., No. 05-886V, 2007 WL 4577394 *6 (Fed. Cl. Spec. Mstr. Dec. 13, 2007), the special master paid David C. Brackett at an hourly rate of $200 per hour for some (but not all) activities that he performed for petitioners.[13] Respondent also describes that he did not object to work performed by Mr. Isleib for, among other things, evaluating respondent's offer in conjunction with a life care plan, in the case of Ankeney v. Sec'y of Health & Human Servs., No. 05-1003V. Resp't Sur-Reply, filed Feb. 22, 2008, at 39. Admittedly, this number of examples is very small. However, this existence of any examples that prove that some people who are knowledgeable about annuities are willing to work at an hourly rate contradicts the Miyakes' sweeping argument.

Even if it were true that most annuity brokers would not work for an hourly amount, the Miyakes still face a legal obstacle. Traditionally, experts in the Vaccine Program have been paid by using the same lodestar formula that is used to set the reasonable amount of compensation for attorneys – the reasonable number of hours times the reasonable hourly rate. E.g. Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4426040 *28 (Fed. Cl. Spec. Mstr. Sept. 23, 2008) (citing cases), motion for review denied in part and granted in part, 2009 WL 539880 (Fed. Cl., Mar. 2, 2009); Jeffries v. Sec'y of Health & Human Servs., No. 99-670V, 2006 WL 3903710 *11 (Fed. Cl. Spec. Mstr. Dec. 15, 2006).

This method has been used outside of the Vaccine Program as well. Notably, the United States Supreme Court has adopted its use for setting the reasonable compensation for attorneys. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564 (1986) (discussing Hensley v. Eckerhart, 461 U.S. 424 (1983) and Blum v. Stenson, 465 U.S. 886 (1984)). Several other courts have used this method for setting the reasonable compensation for experts. Haarhuis v. Kunnan Enterprises, Ltd., 177 F.3d 1007, 1016 (D.C. Cir. 1999) (time spent at deposition); Mannarino v. United States, 218 F.R.D. 372, 375 (E.D.N.Y. 2003) (rejecting flat fee rate for deposition and noting "some reasonable relationship between the services rendered and the renumeration to which an expert is entitled").

Against this background, the Miyakes propose a different method of compensation. The Miyakes contend that their annuity experts should be guaranteed an amount that is tantamount to a commission. The Miyakes provide no examples in their briefs of cases (inside or outside the

[13] The Miyakes explain that Mr. Brackett submitted an invoice billing for his services on an hourly basis only after respondent's broker refused to split the commission. Pet'r Sur-rebuttal, filed June 13, 2008, at 19 & Sur-Reb Exhibit 4 (affidavit of Mr. Brackett).

Vaccine Program) in which an expert was compensated on a commission basis. The undersigned's research has not identified any such cases.[14]

The lack of precedent supporting paying an expert on a commission basis certainly cautions against approving that approach. Even if special masters possessed the authority to compensate an expert on a commission basis, the decision to exercise that authority in a particular case would be discretionary. Here, several factors favor not approving compensation based on commission.

First, at this stage in the history of the Vaccine Program, there seems to be some possibility that people knowledgeable about annuities will assist petitioners at an hourly rate. Early in the program, petitioners retained people to testify about annuities. E.g. First Commercial Bank v. Sec'y of Health & Human Servs., 19 Cl. Ct. 226, 233 n.8 (1989) (petitioner's expert witness, an insurance underwriter, determined the amount to purchase an annuity to finance the injured person's health care plan); Chatigny, 1992 WL 24023 *1 (stating that during a hearing on damages, petitioners presented "Dr. Mark Walstrom, an annuity specialist"); Anghel,1991 WL 211867 *4 (noting that after special master determined the amounts of compensation, the special master requested evidence and held a hearing to determine the form of the award). Presumably, the people retained by petitioners were paid at an hourly rate.[15] For example, when economists were necessary, special masters compensated them at a reasonable hourly rate. Estrada v. Sec'y of Health & Human Servs., 29 Fed. Cl. 78, 80 (1993) (affirming special master's reduction in the number of hours). After the early 1990's, petitioners did not seek to retain their expert about annuities for at least ten years. As a group, petitioners appear not to have been interested in this issue and seem not to have recruited annuity experts to work with them. Given that the Miyakes are pursuing this issue now, the increased attention may prompt annuity experts to consider working for petitioners in the Vaccine Program.

Second, the method of compensation may not affect the amount of compensation. For example, if the annuity expert retained by petitioners spent 10 hours creating an annuity worth $100,000, the amount of compensation could be similar. If the annuity expert were paid one-half of the standard four percent commission, then the annuity expert would receive $2,000. If the annuity expert received $200 per hour for 10 hours of work, then the annuity expert would also receive $2,000. Of course, this example is purely hypothetical. No information was submitted as to whether 10 hours of work is a reasonable amount of time and whether $200 per hour is a

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[14] Respondent also challenges the legal authority of special masters to award compensation, on the basis of a commission, to annuity experts retained by petitioners. Respondent argues that if petitioners' proposal were accepted, then petitioners have not "incurred" an expense. Resp't Sur-Reply, filed Feb. 22, 2008, at 35-38.

[15] In one of these early cases, petitioners retained Mark Wahlstrom. Chatigny, 1992 WL 24023 *1. Mr. Wahlstrom was apparently still working in November 2007. Pet'r Rebuttal, filed Nov. 30, 2007, Exhibit 3.

reasonable rate. Special masters can resolve these issues just as special masters have determined the reasonable amount of time and reasonable hourly rate for other professionals, such as attorneys, doctors, and life care planners.

Relatedly, in some cases, paying at an hourly rate could actually benefit the annuity broker. If the annuity broker were paid on a split commission basis, the annuity expert's fee would be contingent upon an annuity being placed. If there were no annuity, the expert would not receive any money. But, if the annuity expert were paid on an hourly basis, the annuity expert would receive reasonable compensation for activities even if the annuity was not ordered.

A third factor supporting the decision not to pay an annuity expert on the basis of a commission is the experience with other professionals. As mentioned, special masters determine the reasonable amount of compensation for attorneys and for doctors who testify as experts. In some early cases, attorneys were accustomed to being compensated using a contingency fee arrangement in which the attorney received a percentage of the amount. However, attorneys were required to keep time records created contemporaneously and special masters compensated attorneys on an hourly basis. Greene v. Sec'y of Health & Human Servs., 19 Cl. Ct. 57, 67 (1989).

Similarly, doctors prepare invoices that list the activity and the amount of time spent on the activity. See Sabella, 2008 WL 4426060 *35. This method of billing differs from how doctors usually bill when treating patients, which is a certain amount for each procedure. See 42 C.F.R. § 410.10 et seq. (Medicaid Program).

The examples of attorneys and doctors demonstrate that professionals could, if they wish, use an hourly billing system. The Miyakes have not presented any persuasive reason why people in the annuity field should be different. Therefore, although the Miyakes may retain an annuity expert, the compensation for that person will be determined on an hourly basis.

IV. Request for a Hearing

In conjunction with their motion the Miyakes have requested a hearing. Pet'r Sur-rebuttal, filed June 13, 2008, at 35. This request is DENIED.

If the Miyakes, after consulting with an expert, and the respondent, after consulting with a separate expert, cannot agree upon the terms of any annuity, the need for a hearing will be reconsidered. It would be difficult to determine, for example, whether it is reasonable for the respondent to purchase an annuity from more than one company (and thereby, diversify some of the Miyakes' risk that one particular company will fail) abstractly. A decision, if necessary, can be made using proposals about Agata Miyake specifically.

V. Conclusion

The immediate result of this ruling is to grant in part and to deny in part, the Miyakes' motion to supplement the damages order. The Miyakes' motion is granted to the extent that it seeks authorization to retain an expert about annuities. The Miyakes are ordered to instruct any person whom they retain as an expert on this topic to record his (or her) time contemporaneously with the activity being performed. To the extent that the Miyakes have sought assurances that their expert will be compensated in an amount equal to a split commission, the motion is denied.

Whether this ruling will affect other cases is not clear. Petitioners, including the Miyakes, may suggest that the form of an award should not be an annuity purchased by the government. Rather, the Miyakes or other petitioners may contend that they would prefer to receive compensation in a lump sum and purchase an annuity on their own. See Pet'r Memorandum, filed Oct. 3, 2007, at 18. This approach would sacrifice the tax advantages of a government-purchased annuity, and, therefore, could increase the compensation to petitioners as the lump sum would probably need to reflect the effect of taxes. See table on page 5. Whether special masters would agree to award compensation in a lump sum is not clear because cases have differed as to whether the special master should consider the cost to the Program in awarding compensation. Compare Stotts, 23 Cl. Ct. at 367 (stating that section 15(f)(4)(A) "does not instruct the special master to consider what benefits, if any, an annuity award might have for the Program trust fund, nor is there any suggestion in the legislative history"); with Anghel, 1991 WL 211867 *6 n. 27 (special master considered the cost to the Vaccine Injury Trust Fund as well as benefits to the petitioner in determining the form of the award).

As noted at the beginning of this ruling, issues about annuities have not risen in the Vaccine Program for approximately 15 years. Respondent observes, correctly, that the annuity companies selected by respondent in accord with the criteria from the Uniform Periodic Payment of Judgments Act have not failed. Some petitioners may feel comfortable with the existing system and prefer the more expeditious resolution offered by using only respondent's broker. This choice appears reasonable.

But, the Miyakes' choice, too, is reasonable. The Miyakes believe that Agata's interests are better served by consulting with an annuity expert. For the reasons explained in this opinion, the Miyakes possess this right as a derivative of their right to present their case to the special master – the person with the authority to set the terms of the annuity as those terms relate to Agata.

Extended litigation about the form of the award is not in the interest of anyone. The Miyakes have raised valid concerns. Although respondent has correctly opposed a request for the special master to order a splitting of commission, respondent has also taken positions that may increase litigation. For example, respondent has not agreed to provide information obtained by his annuity broker about the injured party's rated age. Respondent has not justified this refusal to disclose by claiming any privilege. When respondent fails to disclose information, the

petitioners are forced to seek relief from the special master. In addition to avoiding a particular battle, a greater amount of transparency about the annuity process would promote respondent's more general argument – that a particular broker, although selected by respondent, can provide services to both parties.

This ruling is not intended to open a new topic for litigation. It is hoped that cooperation between experts on annuities will minimize any disputes over the form of an annuity in much the way that cooperation between life care planners has minimized disputes over the amount of care necessary. It is hoped that this spirit of cooperation will extend to the resolution of Agata Miyake's case. A status conference will be scheduled shortly.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master