

# Using plaintiff structured settlement specialists

*Structured settlements are an important planning tool to consider when managing the proceeds from a personal injury lawsuit.*

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**Most people would never consider entering a real estate** purchase transaction relying only on the seller's attorney or broker for advice. By the same measure, you would never suggest that your clients rely solely on the advice of the defendant's experts when deciding how best to settle a personal injury claim.

Then why allow your client to rely on the defense expert when it comes to the issue of structuring a settlement?

Structured settlements are an important financial planning tool to consider when managing the proceeds from a personal injury lawsuit. In recent years, an increasing number of plaintiff counsel have retained plaintiff-loyal settlement specialists. In my opinion, this development will soon become the norm, rather than the exception. Of the 430 or so structured settlement specialists nationwide, I estimate that there are least 20 to 30 who work exclusively for plaintiffs.

During the course of most personal injury cases, the defense and the plaintiff routinely gather the most competent teams of experts to support their respective claims. It is a strategic imperative to counter the other side's experts with your own. This same strategy should be used when counseling clients considering a structure for the proceeds from a case settlement or jury award.

Advising the defendant early on that your client intends to employ the services of a plaintiff-loyal settlement specialist can set a foundation for establishing this balance. If the defendant and your client both have specialists they trust to provide expert

advice and direction, then, perhaps, the two specialists can share the responsibilities – and the fees – for recommending the best option for your client's settlement dollars. But be aware, this should be approached on a case-by-case basis, as it may not be fair or equitable to your client or your expert.

Often, the financial proceeds from a case may provide the only form of solace available to your client, especially if the client has suffered a serious injury. The best advice in this situation may not come from your adversary's expert.

After all, many structures are more complex than just designing an annuity package. Who is better positioned to help navigate the financial decisions that must be made before, during, and after settlement than an expert whose duty is solely to your client?

There are a number of practical considerations for plaintiff counsel to consider when recommending the services of a structured settlement specialist.

## **Liability exposure**

Consider the following three scenarios:

**Scenario 1.** A client for whom you successfully negotiated a settlement returns to your office 18 months after the final execution of the settlement agreement. The client is broke, distraught and desperate. The client's proceeds from the settlement have been lost to taxes, ill-advised investments, unchecked spending, and requests from family members.

During the course of settlement negotiations, defendants offered the services of their settlement specialist to structure the proceeds. However, your client wanted nothing to do with any defense expert. Without a settlement specialist to consult,

the client was left to manage his or her own affairs – in this case, with tragic results.

**Scenario 2.** A former client walks into your office 10 years after you negotiated a settlement on his or her behalf. In this case, a substantial percentage of the settlement proceeds were structured, using the services of the defendant's approved settlement specialist. The client has subsequently learned that the structure he or she settled for was less than competitive and that, in fact, higher-yielding structure vehicles were available at the time of settlement, unbeknownst to you or your client.

**Scenario 3.** The heirs to a former client who was seriously injured in an auto collision return to your office shortly after the former client passes away. You successfully negotiated a settlement for the client at that time, and a substantial part of the settlement proceeds were structured with the assistance of the defense-appointed specialist. The heirs have discovered, however, that there is not enough liquidity in the structure for them to pay the required estate taxes.

What would you say to these people? Professional liability exposure is a serious possibility in each of these scenarios, and they illustrate a primary reason why you and your clients should consider using a settlement specialist.

## **Balance the power**

During the negotiation of a settlement, plaintiff counsel may believe that a defendant's settlement broker is working in a shared-interest capacity. But no broker can serve the interests of both sides. As a professional on the defense team, that specialist must foster a sense of coopera-

tion. It is also that expert's professional duty to devise strategies that produce substantial savings to the defendants and their insurer. These are savings that could fall to — or at least be shared with — your client, and you may not be aware of their potential.

Remember that the strategies used by the defense are countered by the plaintiff's retention of a structured settlement specialist. By retaining a specialist, your client can be assured of receiving full value for all the hard-earned settlement dollars. You will also be assured of having a skilled advocate who is an accountable party to you and your client.

On final issue to consider: In the event that something should go wrong with a structured settlement — due to an error or omission by the defendants or their agents — your client has no recourse. The defendants' broker is released from liability once the settlement agreement is executed, as are the defendants and their insurers, attorneys, other agents, and experts.

By retaining a structured settlement specialist, your client should be able to recover against his or her specialist's liability insurance. Be sure to ask your specialist to provide assurance of this coverage.

#### Client referrals

Suggesting that your clients retain a settlement specialist provides another valuable element to your services, especially if you recommend a specialist with credentials and experience in a broad range of financial planning matters. Your clients have an opportunity to receive a settlement package that is tailored to meet their needs. They will feel a sense of security knowing an expert is on their side.

Left on their own to navigate the waters of financial management, many clients encounter problems in protecting the proceeds intended to provide a lifetime of financial security. Many plaintiffs disburse all or part of their settlement proceeds in a short time following settlement. Afterward, they are left pondering their fate.

Naturally, they may compare the financial positions they find themselves in with the position of the legal adviser who settled the case. I have heard more than one practitioner refer to this as "fee envy."

A plaintiff caught in this circumstance can grow resentful of the fees rightfully earned by counsel and can become your firm's worst public relations nightmare.

When you suggest that your clients retain a professional to handle all the detail work on financial arrangements, you add to your competitive arsenal. You also avoid having to deal with ugly scenarios like the three that are mentioned above.

You can find and recommend plaintiff-loyal professionals with the qualifications needed to bring your clients financial peace of mind — whether that means setting up a steady stream of adequate income or planning for estate, tax, liability insurance, or any of the myriad other future financial issues.

There are also advantages for defendants who allow plaintiffs to select a settlement specialist — and who allow that specialist to select the funding mechanism for disbursing the settlement proceeds.

The greatest advantage may be that the defendant avoids the specter of potential long-term liability because of the implied due diligence of their approved broker and approved annuity carrier lists.

In the early 1980s, before Internal Revenue Code §130, defendants and/or their insurers owned structured settlement annuities that only discharged their obligations *pro tanto*. Naturally, the control of the structured settlement process belonged to the defendant — the party at risk in the annuities.

In the years since §130 became law, things have changed. Defendants — and their insurers — may assign their liability for the payments they have promised your clients to a third-party company, one usually affiliated with the annuity carrier.

Since the defendants and their advisers are trying to be released from all liability and responsibility once the settlement has been finalized, how can they also insist on naming the sole broker and the funding method that will be critical to your client's lifetime welfare? Your client is shouldering all the risk, while the defendants and/or their insurer are shouldering none.

Defendants should not preclude your clients from seeking advice and professional counsel in this area, and compensation should not have to be paid twice by your client for these services. Your client should be able to choose a specialist who will offer advice on the right funding method for his or her situation. After all, it is the client's lifetime welfare at stake.

The constructive receipt doctrine is often the focus of discussion between plaintiff and defense counsel. If applicable, the doctrine would obligate the plaintiff to pay

taxes on the investment earnings in the annuity used to fund the settlement. However, the doctrine seldom applies in litigation.

In a personal interview I conducted in December 1998 with David Higgins, founder of the Settlement Law Group in Los Angeles and a certified specialist in taxation issues that arise in personal injury settlements, Higgins said, "The doctrine bars structured settlements only when the settlement is finalized and enforceable or when a judgment has been entered that is no longer subject to appeal."

The IRS ruled privately in Letter Ruling 8333035 (May 16, 1983) and in Letter Ruling 9017011 (January 24, 1990) that neither a defendant's disclosure nor plaintiff's knowledge of the cost or present value of the annuity triggers the constructive receipt doctrine. For this reason, bargaining can and should involve full discussion of the amount the defendant is expected to spend to purchase the annuity. This bargaining will not create tax problems for the plaintiff.

Occasionally, defendants argue that the doctrine may be triggered if the plaintiff's specialist participates in the settlement discussion or its implementation. But again, according to Higgins, there is "no legal basis for such an argument under the governing Treasury regulations [Treas. Reg. 1.451-2]."

Higgins should know. He drafted the relevant structured settlement provisions of §130(c) of the Internal Revenue Code in 1982.

Having represented plaintiffs for over 12 years, I have found that the structured settlement process is evolving, shifting away from some of its earlier trends. This evolution has opened a door of opportunity to plaintiffs.

They can now recapture the original spirit of structured settlements, and plaintiff counsel can give their clients added leverage during settlement strategy sessions, while shielding themselves from potential malpractice traps.

The plaintiff-loyal specialists in this industry are bringing a depth and breadth of education and professional experience in financial planning and are specializing in needs analysis, tax planning, and estate, liability, and other insurance issues. This level of experience will complement your efforts as you work to protect your clients' legal rights. □