

Back to the Basics of Structured Settlements

As you continue to provide the best service and dedication to your clients, it is almost impossible to know everything that could possibly benefit your client's ultimate recovery. But what you do need to know is that you have experts available to you who know how to handle various settlement scenarios. A settlement consultant provides you and your clients with alternative ways to settle your cases as well as protection from legal malpractice. Your valued consultant can become more than just a vendor; she/he can be an extension of your firm.

There are many moving parts to consider when settling a case, from protecting your clients' medical and governmental benefits to considering private and governmental lien and reimbursement rights. Oftentimes, one of the most beneficial and secure options for your client to consider is a structured settlement.

What is a structured settlement?

The first structured settlement appeared in the United States in 1975, and is a financial package custom designed for the Plaintiff that is to be paid by the defendant or the insurer for future periodic payments. The parties agree on the package, the defense then funds its obligation by purchasing an annuity from a life insurance company. The goal of a structured settlement is to protect the injured party and guarantee income to assist in paying the future medical care and life expenses and to prevent spendthrift. The greatest benefit of a personal injury structured settlement is that all the pay-

Traci Kaas, CSSC, is a settlement consultant with Millennium Settlements in Irvine, CA. She holds Life & Health and Series 6 Licenses as well as her designation from the University of Notre Dame as a Certified Structured Settlement Consultant. Traci can be reached at 714.335.4977 or tkaas@msettlements.com.

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TRACI KAAS, CSSC

ments are guaranteed and are 100% federal and state tax-free (see Internal Revenue Code, Sec. 104 (a)). A structured or periodic payment settlement can be simply defined as "any series of payments made other than a single lump sum amount."

A structured settlement is flexible and is based on your client's particular needs. The payments can be paid monthly, quarterly, annually, or in lump sums, with or without cost of living increases, and made payable for any period of time desired.

In addition to personal injury claims, settlements of other types of cases such as employment, divorce, property, or discrimination cases may benefit from a structured settlement. These scenarios are not tax-free, but they still provide the advantage of being tax-deferred until the annuity begins to payout.

As an attorney, the one thing to remember, if you do not recall anything else from this article, is **DO NOT TAKE POSSESSION OF THE SETTLEMENT FUNDS** as that would constitute Constructive Receipt, and will

eliminate the ability for your clients to receive the tax benefits of a structured settlement.

Income, although not actually reduced to a taxpayer's possession, is constructively received by him if you have power over the money or investment and it is available to draw upon it at any time or if you have the authority to request the sum be paid in full or having the funds available upon demand.

You do not have constructive receipt if "the taxpayer's control is subject to substantial limitations or restrictions."

What amount of settlement is necessary for a structured settlement?

There is no magic number to trigger the potential use of a structured settlement. The decision to structure should be based upon the following considerations:

- (1) How well will my client manage their finances? Do we need to consider spendthrift protection, protection from other family members or friends who may have "better investments" for you client?
- (2) Is your client a minor? For example, \$5,000 awarded to a 5-year-old child could be placed in a Blocked Account with minimal interest rates. However, a structured settlement could easily double, if not triple, the investment and is both state and federal tax-free. Additionally, the parents have the opportunity to direct the distribution past the minor's 18th birthday. Orange County Superior Court requires the purchase of an annuity where the net sum distributable to a minor exceeds \$25,000 and the minor is less than 15 years of age.

(3) Does your client have benefits that

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need to be protected? Does your client require a Special Needs Trust or Medicare Set-Aside?

If any of these issues apply to your client, you should consider a structured settlement.

When the defense already has a consultant, should the Plaintiff have his or her own consultant?

Absolutely! If you have a working relationship with a consultant whom you trust, then that consultant will have your client's best interest in mind. She/he will prepare a rate comparison sheet that represents all the annuity companies that offer a structured settlement annuity so that you and your client know you are getting the best rate of return.

Another way to look at a structured settlement transaction is like a real estate transaction. You can sell a house utilizing the expertise of one agent representing the seller and the buyer; however, with whom does the fiduciary responsibility lie? Is it in your client's best interest?

Will having the structured settlement consultant at mediation facilitate settlement?

There are different philosophies on this subject; however, when the parties understand the role of a consultant, having the consultant attend indicates that everyone is serious about getting the case settled and the use of a structure is beneficial to all parties.

Benefit for the Plaintiff: The consultant can show the injured Plaintiff the opportunity of lifetime security without the problem and anxieties of investment risk, money management and financial decisions. She/he can also reiterate the payments are guaranteed and tax-free.

Benefit for the Plaintiff Attorney: The consultant can assist the attorney in demonstrating that the client will receive guaranteed, tax-free income, protecting the client so the funds are not threatened. It is also a protection for the Plaintiff's attorney against legal malpractice. The attorney has the added opportunity to receive tax-deferred fees through a structured settlement.

Benefit for the Defense: It is an alternative approach in negotiating a settlement along with a cost savings for them, and they can close the file sooner, reducing their reserves.

Will a consultant provide protection against potential malpractice claims?

If you feel that it is not your place to bring in a settlement consultant or you believe that it is beyond your responsibilities as an attorney or you assume it will cost you more time, you may want to think twice. In *Grillo v. Pettiette et al*, (Cause No. 96-145090-92, 96th District Court, Tarrant County, TX) an attorney was sued for legal malpractice because he discouraged his clients from taking a structured settlement that was offered for their future medicals for life and settled for a lump sum. Within a few short years the families (and the taxpayers) were left to pay tens of millions of dollars in medical costs. 90% of all settlement dollars, whether in a settlement, lottery or inheritance, is generally gone within 5 years, 25-30% is gone within 5 months! *The Rutter Group*, Flavahan, Rea & Tener, California Practice Guide: Personal Injury (TRG 1992) Chapter 4.

Even if your client declines the structure, it is wise to have a disclosure that states that you offered a structured settlement. Should they decline a proposal, have them write "Declined" with their signature and file it for your protection. Your consultant can easily prepare a proposal with information for you to visually show the client the benefits.

When should an attorney introduce a consultant to the client?

The options that a settlement consultant can offer and an introduction to a structured settlement annuity should be discussed with your client early in the process. It creates skepticism when a consultant is introduced for the first time at the mediation or after the case has been settled. If you have already discussed the settlement amount with your client and have not discussed a structure as an option, their funds are generally already spent in their minds. To avoid the spendthrift syndrome, introduce your structured settlement consultant to your client as soon as possible.

Can I structure my attorney fees even if my client declines structuring their award?

Yes, if the case qualifies under IRC 104(a) (1) or (2), as arising out of a personal physical injury. If you have explored the options of structuring your fees, you will see how tax deferral can assist you in growing your own personal portfolio. You can "stack" structures on top of each other. For example, a \$40,000 attorney fee structured to a lifetime payment on a 40-year-old attorney, starting at age 62 will guarantee \$1,000 per month for the rest of his life. This allots an expected benefit of more than \$265,000 tax-deferred. As cases settle, you could add on until you have accumulated the guaranteed monthly income that you desire. Your attorney fee structure becomes the foundation of your retirement and leaves other taxable funds available to be more aggressive with your investments.

With the market so volatile, how can I know that a structured settlement annuity is safe for my client?

Insurance companies rarely experience financial failure, thanks to strong regulatory safeguards; but in the extreme instance when a failure happens, there are significant safety nets in place to protect con-

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sumers. The last major life insurance company failure was in 1994 when Confederation Life failed, due to the loss in value of its real estate holdings, representing some 71% of its assets. Despite the failure, no structured settlement recipient missed any payments.

If an insurer appears to be in danger of failing, state regulators can assume control over the company. The regulators are charged with supervising the company's turnaround, which can include selling it to another company, putting it into liquidation or into runoff. If a company enters liquidation, the regulators in charge make sure that policyholders are paid first before most other creditors. If the company does not have enough money to pay all of its claims, regulators turn to the state guaranty fund to make up the difference up to the limits specified by that state's guaranty fund.

Is it okay to accept a structure from a property and casualty company that would like to place the annuity with their "sister" life insurance company?

Yes, as long as you have a comparison sheet, which notes the rate of return (ROI) and the annuity company has a rating that you and your client are comfortable with, it is acceptable. Your settlement consultant will be sure that your client receives the best annuity for your client.

NOTE: In the case of a minor's compromise in Orange County, the court requires comparable quotes from other insurance companies if the settling insurance company is offering the annuity.

Is there a refund or "kickback" that goes from the structured settlement consultant back to the insuring property and casualty company?

No. Since *Macomber v. Travelers Property & Casualty Corp.*, (2002) 261 Conn. 620, 653, the industry has been regulated against kickbacks. As a matter of fact, some casualty companies cannot even accept something as small as a promotional item.

How do I choose a qualified settlement consultant?

As with the legal profession, there are consultants who specialize in different areas and have different backgrounds. The National Structured Settlement Trade Association (NSSTA) has a certification through Notre Dame that can be obtained, the CSSC (Certified Structured Settlement Consultant). Verify that your consultant has the CSSC designation to ensure you are working with someone who is accredited and knowledgeable on issues pertaining to a structured settlement.

There are many moving parts to settling your case and taking care of your clients. Your structured settlement consultant can help to alleviate settlement issues and take care of you and your client. 