Structured Settlements – Top 10 Settlement Planning and Negotiating Issues (with Checklist for Plaintiffs' Attorneys)

by Paul J. Lesti, CSSC, RSP, MSSC

A Structured Settlement is when a plaintiff receives income tax-free payments over time to settle a physical personal injury matter. An annuity is normally used and the obligation to make the future payments is typically assigned to a third party which is related to and normally guaranteed by the life insurance company issuing the annuity. Structured Settlements are beneficial for plaintiffs who have the following characteristics or situations: Minors, catastrophically injured victims, those with long-term or special needs which may have been caused by brain damage or paralysis, persons with a reduced earnings capacity, cases involving significant amounts, workers' compensation claims, and those who don't have proper financial education, training or investment experience.

A Structured Settlement should be properly documented which may include the following: Contingent fee agreement, stipulation of settlement, HIPAA documentation, settlement financial plan, annuity company survey, settlement agreement and release, court periodic payment exhibit, financial and trust documentation, assignment agreement, and possibly a financial waiver letter to client.

This article alerts plaintiffs' attorneys to the top 10 salient settlement planning issues that will occur before, during and after a mediation session where a Structured Settlement may be considered. Sample documents referenced in this article are available from the author.

1. Have a properly constructed contingency agreement. A contingency fee agreement should have proper language that anticipates a Structured Settlement, states the basis for the fee—usually the cost of the funding asset—and allows the attorney to be paid on a deferred basis, even if the client takes cash only.

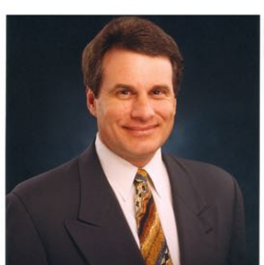
2. Client's financial requirements are explored first, solutions later, and resolve liens. Find out the most important things the client wants to do with the money. This begins a financial needs assessment which should result in a list of the client's important financial needs, and perhaps a settlement plan. Your Structured Settlement professional is trained to handle this as some attorneys may not be comfortable giving a client financial advice. Some future expenses may include repaying debts, everyday lifetime living expenses, college costs, transportation expenses, housing costs such as a down-payment and/or mortgage payments, retirement, retraining, caregiver, direct medical costs and future medical insurance premiums, etc.

In certain more complex cases, a 468B fund, which may accept a lump sum to settle the entire case and which acts in the place of the defendant, may be considered. This vehicle is especially effective when there are multiple plaintiffs and defendants, and when allocation, liens and other issues may otherwise delay the distribution of funds from the defense. A Structured Settlement may still be issued if a 468B fund is used.

Upon death, a lump sum may be paid, representing the present value of the remaining guaranteed payments to pay for funeral expenses, liens, estate taxes, etc. This is called a commutation of benefits. Liens should also be discovered and resolved as soon as possible as they may delay the settlement.

3. Understand and protect the public benefits your client is receiving or may be eligible to receive in the future. Find out if the client is eligible for, has applied for, or is currently on any public benefits, whether needs-based or not. A Structured Settlement may fund an appropriate vehicle such as a Special Needs Trust (SNT) or an Achieving a Better Life Experience (ABLE) account to allow the client to remain eligible for needs-based assistance. Payments must be paid directly to the trust or account and not the client to help retain eligibility.

A proper allocation and/or a full Medicare Set Aside (MSA) agreement may be required to properly protect



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Medicare's interests, otherwise the client could lose Medicare benefits. Note that structuring an MSA, rather than funding it with a lump sum, usually means that more money will be available for the client.

4. Life expectancy, life contingent payments, and guaranteed or certain payments. When in doubt, obtain a rated age. Any injury or medical condition related or unrelated to the incident which may reduce the client's life expectancy should be considered. Your Structured Settlement consultant will submit the appropriate medical records to obtain a rated age, which will increase life contingent benefits for the same annuity cost. When sending medical records to the defense, consider a HIPAA document that prevents the defendant from obtaining a rated age which may be used against your client in negotiations, or at trial if the case does not settle.

Almost all lifetime payments streams normally have a 10-30 year guarantee or certain period if it makes settlement planning and financial sense. It is the exception and not the rule to have all life contingent payments. Having no guaranteed or certain payments creates many risks, and is almost always not advisable.

5. Obtain basic client and lawsuit Information. To issue an annuity the full name, the correct date of birth (and sometimes proof of birth), the address, and the Social Security number of each payee is required. If a payee does not have a Social Security number some annuity companies may accept the case but may not provide lifetime benefits. A copy of the first page of the complaint and a list of all parties to be released is helpful to construct a sample settlement agreement and release. This information should be obtained as early as possible.

6. Tell stakeholders that a Structured Settlement and/or deferring your fee may be possible. The mediator and defense counsel should be told this at the earliest appropriate time. In many cases it is obvious that a Structured Settlement will be considered or required. Also, give your Structured Settlement professional enough lead time before the mediation—the sooner the better.

7. Retain your own Structured Settlement professional and have this financial product explained directly to the plaintiff. It is important to ensure that you have your own consultant to represent your and your client's interests. Make sure your Structured Settlement agent has: 1. No conflict of interest (i.e. restrictions dictated by the liability insurer to the agent may not be in the plaintiff's best interest). 2. Adequate errors and omissions insurance coverage. 3. Access to all Structured Settlement annuity companies. 4. Appropriate education, training, experience, and industry designations. Your consultant will therefore be your trusted advisor on your side and who does not work for the other side.

Some attorneys prefer the Structured Settlement information to be given to them and their client at the same time as the transaction and its nuances may be quickly explained. Be wary of Structured Settlement offers from the other side, as they may be confusing and may not include complete information. Your Structured Settlement professional will provide advice to meet your client's financial needs and integrate the appropriate Structured Settlement terms into the settlement agreement, court order and the assignment agreement. If a Structured Settlement is not selected, your consultant can draft a letter documenting that this information was offered or explained to the client. This may be appropriate to avoid unnecessary financial exposure later on.

8. Sign a settlement stipulation that allows a Structured Settlement, do not sign a cash release, and do not accept funds into your client trust account. A proper settlement stipulation, settles the case for a fixed amount, allows the plaintiff and the plaintiff's attorney the option to receive future payments, and states the settlement is valid even if the plaintiff dies. It can also require that there are no financial provider restrictions and that the agent of record will be the plaintiff's advisor. An all-cash release or accepting funds into your account usually means that a tax-free Structured Settlement is no longer possible and any earnings on the funds will be taxable.

9. Obtain a survey of all annuity companies, find out if there is a restricted list, and lock-in the quote as soon as possible. In this way the Structured Settlement quotes will reflect the entire marketplace. Ask defense counsel if there are any restrictions regarding a Structured Settlement. This may include annuity companies that the insurer prefers not to use or which cannot be used, or if deferring legal fees is allowed. Structured Settlement agents have access to the same figures from each company which provides a level playing field. If different figures from the same firm are obtained, explore the reason for the difference (i.e. a different purchase date, rate series, or rated age). Locking-in the quote will protect the client from adverse interest rate changes. Also, having a proper purchase date to coincide with court approval and when the defendant will deliver the funds, ensures that the annuity rates will be valid, even if the annuity is purchased months in the future.

10. Make sure your Structured Settlement professional provides and reviews appropriate Structured Settlement language for the settlement agreement and release, the court petition and order, and the assignment agreement before submitting to the court and the other side. A Structured Settlement normally includes an assignment so the defendant or its insured does not own the financial asset. Please note, it is essential to have the precise Structured Settlement terms, especially the correct payee, included in appropriate exhibits to the court's petition and order for a minor, particularly if the payments are to be paid to a trust. Critical flexible funding language should also be included in the court's periodic payments exhibit that allows the current court order to be used, even if the annuity funding deadline is missed.

Conclusion

An attorney should explore the use of a structured settlement when it may be in the client's best interest. Structured settlements aren't difficult but do require that certain steps be followed. A proper fee agreement, mediation stipulation, settlement plan, settlement agreement, assignment agreement, court periodic payment exhibits, and related financial and trust documentation will both protect the plaintiff's attorney and the client. A trusted Structured Settlement professional on your side will provide invaluable financial and settlement planning advice and will guide you throughout the entire process.

Structured Settlement Checklist:

1. Have a properly constructed contingency fee agreement.
2. Explore client's financial requirements first and consider solutions later; investigate and resolve liens.
3. Understand and protect your client's eligibility for public benefits such as Medicaid and Medicare.
4. When in doubt obtain a rated age and remember that accepting all life contingent payments is almost always inadvisable.
5. Obtain basic client and lawsuit information early in the process.
6. Let stakeholders know that a Structured Settlement and/or deferring your fee is possible.
7. Retain your own Structured Settlement professional to explain it directly to the plaintiff and yourself at the same time, if preferred.
8. Sign a mediation stipulation that allows a Structured Settlement, do not sign a cash release, and do not accept funds into your client trust account.
9. Obtain a survey of all annuity companies, find out if there is a restricted list, and lock-in the quote as soon as possible.
10. Make sure your Structured Settlement professional provides and reviews appropriate Structured Settlement documentation.

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