

CTLA NETWORK

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PRACTICAL ASPECTS PERTAINING TO STRUCTURED SETTLEMENTS

Stephen C. Kaufman

In settling a personal injury case on a structured basis several factors must be considered by plaintiff's counsel in negotiating the settlement, advising the client and reviewing settlement documents. There are advantages and disadvantages to a structured settlement and in most instances your client will not be familiar

need to be satisfied before my client will consider a structured settlement offer:

Should you decide to make any offer to settle this case on a structured basis, please be advised that my clients have not determined whether they would be interested in a structured settlement. No such offer will be considered unless the following is complied with:

1. The cost of any structured offer would have to be disclosed to Plaintiffs at the time the offer is made. This would not constitute a constructive receipt based on IRS private letter ruling 8333035, and whether it is, or is not, is not a concern of the Defendants in any event.
2. My clients would have to have a secured creditor interest in any annuity purchased to fund the settlement.

the lives of my clients, with a guarantee for a certain number of years which we will leave open for negotiation.

6. None of the Defendants' insurers, or the qualified assignee would have a reversionary interest in the annuity. The estates of my clients will be the beneficiaries.
7. The annuity would have to be purchased from a company where the provisions of a state guarantee fund would apply.
8. My clients would have to be able to obtain a tax opinion letter stating that the structured settlements would be tax free.

With respect to provision numbers 2 and 4, it would not be necessary for your client to have a secured creditor interest in the annuity and it would be acceptable for the qualified assignee to be a shell, provided that in both instances the appropriate guarantees from an A+ 8 or better company can be obtained. As for provision number 8, it would be at your client's option whether to spend in excess of \$1,000.00 to obtain a tax opinion letter confirming the tax free aspect of the structure's annuity payments.

In simple terms the advantages to a structured settlement are two-fold. First, the investment income realized on the annuity is tax free. Second, the fact that the client does not own the annuity and the terms of the structured settlement cannot be changed prevents the client from spending all or a large part of the settlement proceeds in a short period of time. There are disadvantages as well. An annuity purchased as part of a structured settlement is no different from any other investment and if the companies involved fail your client may be left with little or no protection. Also, the fact that your client is locked into the deal once it is made would be detrimental should interest rates go up considerably since your client would not be able to sell the annuity in order to transfer the proceeds into higher paying investments. With this in mind, should your client decide to settle on a structured basis, it is important that the client be fully advised and completely understand the ramifications associated with such a settlement.

There are advantages and disadvantages to a structured settlement and, in most instances, your client will not be familiar with the concept of a structure.

with the concept of a structure. As such, it is not necessary prior to opening settlement negotiations to have your client decide whether to settle on a cash or structured basis. Instead, the plaintiff can make an opening offer on a cash basis, while listing the terms that will be required should the defendant wish to have your client consider a structured counter-offer.

In opening settlement negotiations where the size of the case warrants, I have employed the following language and set forth the following conditions that will

3. Any annuity would have to be purchased from an A+ 8 or better company and the company issuing the annuity would have to be approved by the Plaintiffs.
4. The qualified assignee would have to be an A+ 8 or better company and would have to be approved by the Plaintiffs. No shell company will be approved.
5. The annuity would have to be for

To this end, after so advising my clients, I have them sign what I call an "Affidavit of Client Understanding." Included within this document is the following:

1. The terms of the settlement, including the amount of up-front cash, the timing of annuity payments and the amounts thereof and a statement as to whether the payments are for life and as to whether the payments are guaranteed for a certain number of years.
2. The amount of attorneys fees and costs, together with a statement that these items are not being deferred and will be taken out of the up-front cash portion of the settlement.
3. The identities of the companies from which the annuity will be purchased, that will own the annuity as the qualified assignee, and that will be making any guarantees.
4. The client will have no ownership interest or right of control in the annuity.
5. The annuity payments are fixed in amounts and time of payment and cannot be changed.
6. The client will no longer have any rights against the defendants, even if there is a default on the annuity payments.
7. In the event of insolvency or bankruptcy of the companies involved with the annuity, that the client will have no greater rights than a general creditor (or a secured creditor depending upon which status was negotiated), except to the extent that the client can enforce any company's guarantee.
8. The terms of the payment guarantee, explaining that if the client dies before the number of years guaranteed the payments will go to his beneficiary; if the client dies after the guaranteed period, all payments will stop.
9. An affirmation from the client that

the client is familiar with structured settlements and the companies involved; that the client has had an opportunity to review the documentation; that the client has been provided with documentation from Best, Moodys and Standard and Poor; and that the client has been advised that I am not a financial expert and that the client has the right to obtain independent advice from anyone of the client's own choosing with respect to the stability of the companies involved and elected not to do so.

10. The client will not be able to sell, mortgage or otherwise encumber the right to receive the annuity payments
11. The client had the opportunity to settle on a 100% cash basis or on structured terms different from those agreed upon and that although several other options were presented to the client, it was the client's own decision to settle on the terms that were finally agreed upon.
12. The client is satisfied with the services rendered by me and the percentage of the settlement to go to the attorney. The client feels that the fee is fair and reasonable. The client has been able to ask me all the questions the client has, and I have answered all questions to the client's satisfaction.

Once the structured settlement has been agreed upon it is necessary for the attorney to review the settlement agreement, the uniform qualified assignment and release and any guarantees to ensure that they do indeed reflect the terms of the settlement. Insofar as the qualified assignment is concerned, there may be language to the effect that if it turns out the annuity payments are not tax free, then the annuity is assigned back to the insurer that purchased it. If so, be sure to include language stating that the insurer will then be obligated to make the annuity payments to your client, otherwise there may be nothing to prevent the insurer from interpreting the agreement so as to allow it to keep the annuity funds for itself. Also, the attorney may wish to incorporate

any guarantees into either the qualified assignment or the settlement agreement. With respect to the guarantees, look closely at the language to ensure that they are not illusory and that your client will actually have the right to enforce them. If there is any question, obtain a letter from the guaranteeing company clarifying the matter and giving your client enforcement rights.

As can be seen from the foregoing, structured settlements are not a simple matter. It is essential that when an offer is made to settle on a structured basis that the plaintiff's attorney completely understand what is involved and that the attorney so advise the client.

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