

Use Structured Settlement Adviser for Consultation in Mediation or Settlement Conference

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hat can we, as attorneys, expect to find when we arrive for the much anticipated settlement conference or mediation of our seriously or catastrophically injured client's case? Time and again, whether announced or not, the defense will bring a structured settlement adviser to this event. It should be no surprise to counsel that these representatives are not independent. But what will the client or client representative think? To adequately prepare ourselves and our client for such an event, we will most certainly benefit from having an independent structured settlement adviser/broker present, or at least readily available for consultation and analysis of defense proposals.

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Expert Editor

When the defense has an opportunity to directly address the client or client representative, it will likely portray itself as sincere and desirous of "doing the right thing" for the injured person. This will likely be qualified, of course, by the defense's explanation of its self-diagnosed "limited" risk of exposure in the case. In explaining its benevolent and protective motivation, the defense will then perhaps extol its altruism for the injured person through an introduction of its structured settlement representative. This conservatively dressed individual's priority will purportedly be to secure an investment vehicle for the injured person that will protect his or her interests into the future. This may, arguably, insinuate that lump sum monies, primarily payable against attorney fees and case expenses, are recovered contrary to the best interests of the injured person. Ah, the games people play.

In any event, then comes the offer—maybe several thousand dollars each month, payable for the injured person's lifetime or beyond. The client's eyes widen, and his or her heart pounds from the prospect of some much needed relief. What happens next may depend on our preparation for this particular moment in this representation.

Preparing for the Mediation or Settlement Conference

To protect the client's interests, we will need to prepare ourselves, and our client, to confront the myriad of issues involved in the settlement of a serious or catastrophic injury case. Plaintiff's counsel should be able to evaluate specific settlement proposals in an informed manner, either

with the help of plaintiff's own structured settlement adviser or broker, or through study of the realities of the structured settlement market. The client should be advised of the many opportunities presented by structured settlements, as well as the risks inherent within these opportunities.

In preparation for the mediation or settlement conference, counsel will need to assess whether the client or client representative truly understands the future needs of the injuries in issue—and the attendant costs. Given the realities of ever rising costs of medical care and the static payments ordinarily proposed by the defense, such numbers are unlikely to sufficiently provide for the injured person's needs. The client or representative will need a true grasp of the Life Care Plan at issue in the case, as well as financing and attendant taxation/risk considerations involved with the structured settlement. Independent analysis is a must for the conservative practitioner.

Analyzing the Defense's Structured Settlement Proposal

Opposing counsel, his or her adjuster, and their structured settlement adviser, will arrive with pre-packaged proposals carefully providing a minimal amount of useful information to the client. When the hard questions are ultimately answered, we will often find that the annuity funding the defense's structured settlement proposal is inferior to that which we could independently obtain. This is true unless specific terms are obtained in negotiation from the defense's annuity representative—not only haggling over the actual cost of the annuity, but within the composition of the particular annuity selected itself. Not surprisingly, we will also likely find that the proposal is based upon an annuity rendered by an insurer that is a sister/related company of the carrier purchasing the settlement investment.

In light of our well-prepared opposition, following are a few pertinent questions for consideration when evaluating a defense proposal or any structured settlement contract.

What is the actual cost of this investment to the defense? Ask and obtain in writing what the investment costs the defense (with disclosure of

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any discount of the cost provided to the defendant upon sale of the annuity to an affiliated entity).

What is the actual rate of return paid on this investment vehicle? This should help you to compare what the defense's investment is really buying as opposed to what you can get from your adviser or broker for the same amount. As with mortgages and other investments, different companies, with different attendant risks, pay different rates of return.

Should the annuity be contingent upon the life of the plaintiff? If such is the case, we need to know the age rating provided of the plaintiff to calculate the actual cost of the annuity to the defendant, and consequently the true amount for the fee to which we are entitled.

Is a "variable" return annuity a viable settlement structure? Some companies are now offering variable rates of return on investment in an annuity contract. These buy into the stock market but have additional attendant risks. If your client is interested in diversification of assets, the risk of additional growth versus loss may lead him or her to place all or part of the settlement into such an account.

What is the payment structure that truly fits the anticipated needs of the injured person? When writing the structured settlement, the client can include benefit increases, periodic lump payments to cover anticipated life needs such as funding future medical procedures, purchase of a home, or increases simply to offset inflation.

Can the risk be split between two insurers or investment companies? Given the realities of today's market, consideration should be given to splitting the risk of loss on this investment. As we have experienced recently in Kentucky, insurers can, and with surprising frequency, do fail. While portions of certain

annuity contracts can be funded by government pools in the event of failure of an insurer, insurance against such failures has its limits. If the settlement involves a significant amount of money, it may be feasible, and is advisable, to split the risk of failure of an insurer by investing in two or more different annuity contracts.

What is the financial rating of the insurer issuing the annuity contract? There are a number of entities that rate the viability of annuity insurers. These include Standard & Poor's, A.M. Best, FITCH (previously Duff & Phelps) & Moody's. Each uses a different system of ratings, and it is recommended that you compare the ratings of at least two of these entities before choosing the insurer(s) that will issue the investment contract in your settlement. Utilizing your own broker will help to insure performance of due diligence in the selection of the insurer.

Can the annuity investment contract be deemed as a secured obligation? In the event of the failure of an insurer and bankruptcy, if you are able to obtain "secured status" for the client's investment contract, he or she will be better insulated from loss. This may be available from some insurers without additional cost in the purchase of the contract.

What are the tax ramifications of the proposal? Compensation received because of personal injury or physical sickness is not taxable as gross income under IRC Section 104(a)(2). This is true whether it is received in a lump sum or as periodic payments. However, if the claimant invests the settlement dollars, the interest earned will be subject to tax. When the plaintiff has no control over the assets that fund a periodic payment stream, the interest earnings on the investment will be excludable from income under IRC Section 104, per

Revenue Ruling 79-220, 1972-2 C.B. 74. There is an important caveat, however. *If the annuity payments extend beyond the death of the plaintiff, his or her estate may face a significant tax burden on his or her death.* Often this tax burden may force the sale of the asset, with losses up to and including the remaining benefits under the settlement annuity contract. The client should be advised of the potential for this tax problem. You may also be able to negotiate a "Commutation Benefit Rider" to provide a cash payment for satisfaction of estate taxes, in the event of the death of the plaintiff.

In conclusion, as always in your selection of the appropriate expert, be advised to seek references from fellow KATA members or other counsel having previously employed the person under consideration. Request references and background information on any structured settlement adviser with whom you are interested in working. One credential to look for is a membership or affiliation with the National Structured Settlements Trade Association, though it does not appear to be difficult to obtain a membership with this association. If you simply desire information and do not anticipate placing the investment with another insurer, confirm the adviser's schedule of fees and document pertinent terms concerning payment and billing before engagement. Conduct as significant a background check as your resources permit. Lastly, consider requiring a confidentiality agreement from the expert. Remember, your experts can make or break your case—in the structured settlement adviser's case, they can make or break your client's financial future. Choose wisely.

