Maximize the Advantages

Understanding the Role of the Structured Settlement Consultant

By Wm. T. Robinson III and Bruce McIntosh

Trying to resolve a claim involving injuries of any seriousness without a structured settlement as part of the negotiation may not be malpractice. But it is certainly not a smart move.

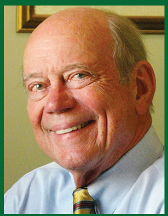
Encouraged by the federal tax code since 1983, a structured settlement is the only option for an accident survivor offering guaranteed income specifically tailored for his or her unique needs and completely exempt from all federal and state income taxes. At the heart of any structured settlement is the settlement consultant, the financial expert who works with settling parties to design the payment stream funded with a life insurance company annuity or U.S. Government obligations.

Even though structured settlements have been a part of the country's litigation process since 1983, and have benefited more than 500,000 annuitants, the role of the structured settlement consultant is surprisingly not always well understood. For example, *National Underwriter* recently published an opinion column suggesting structured settlement consultants should be viewed with the same lens as "advisors who sell retirement investment products."

Statements such as these show a disappointing lack of familiarity with the roles of both the structured settlement and the settlement consultant. First, even though structured settlements are typically funded through a life insurance company annuity, a structured settlement should never be considered an investment. It is a voluntary option for injured people and dependents who need a guaranteed payment stream not subject to reductions due to interest rate or market changes.

State laws strictly regulate the type and quality of investments that a life insurance company is allowed to make. Typically, more than half the resources held by a life insurance company are in investment-grade bonds, with less than five percent in the stock market. *Changes in the stock and bond markets have little effect on a life insurer's ability to make structured settlement annuity payments.*

Second, unlike the inherent uncertainty of a cash stream from most investments (think stock fluctuations, bonds called), the plaintiff and his or her counsel, working with a settlement consultant, have an almost limitless ability to design the specific



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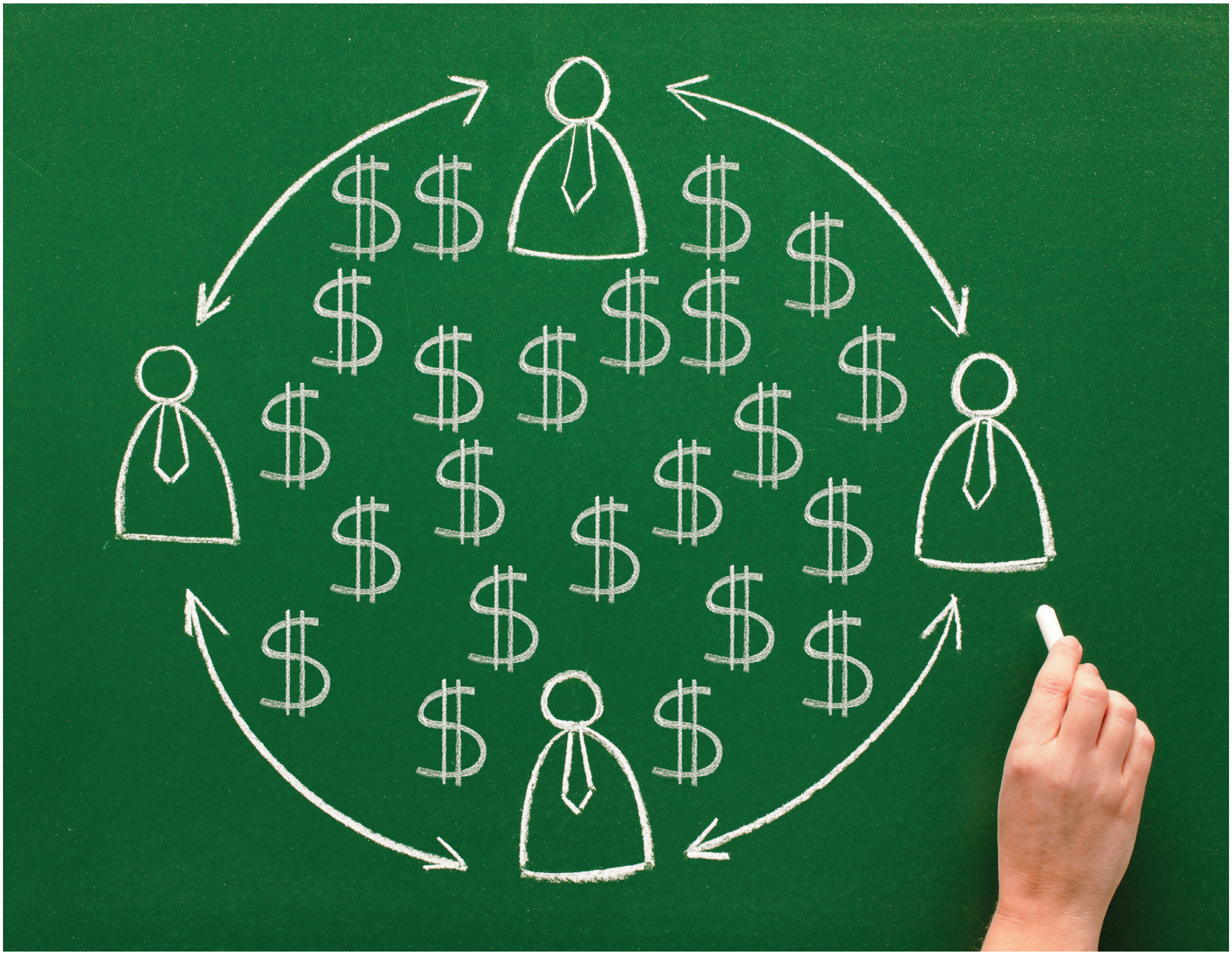

future payment stream to meet the plaintiff's unique needs.

Plaintiff and counsel must agree to this payment schedule *prior to any final settlement*. In effect, this means that the plaintiff knows beforehand the exact amounts and schedule of payments he or she will receive in the future—a significant benefit over "investments" which by their nature involve risk and uncertainty.

Getting to "Yes"

Ascribing a financial level to someone's injury is generally inexact and more than a little distasteful. Moreover, as finance professor Christopher Coyne, a specialist in post-accident financial planning at St. Joseph's University, says "Conventional investing logic doesn't apply for plaintiffs in injury or wrongful death accidents. Guaranteed income is vital and very few certified financial planners have experience creating plans to meet this need."

Usually, the structured settlement consultant for the defense is the first to enter negotiations, often in the evaluation phase. This person's job is to facilitate negotiations by transitioning away from all-cash "high-low" arguments toward specific damage costs. By beginning the negotiation with a combination of cash and future payments, this consultant can help guide the parties toward a mutually acceptable resolution.

The key is to optimize settlement authority. The defense's structure consultant should work with the adjuster to understand the history and future medical costs, lost wages and other issues affecting the claim value. These future costs should be directly addressed through a tailored payment stream, which the consultant can design.

Substandard age ratings often play a key role in maximizing buying/negotiation power, so submitting the most helpful medical reports to life insurer underwriting departments is very important. A substandard age rating occurs when an annuity issuer concludes that the claimant's life expectancy is less than normal and therefore requires a lower annuity premium to fund a lifetime payment stream. Importantly, a substandard rating does not have to stem solely or even partially from the accident. Awareness of pre-existing conditions and even smoking could reduce the cost.

A major part of the value-added nature of any structure consultant involves knowing details that may impact a settlement. For example, many claimants are justifiably concerned about how a settlement could impact eligibility for means-tested federal programs (Supplemental Security Income, Medicaid, private programs whose eligibility is based on Medicaid). These issues are constantly evolving and your structure consultant should be aware of current rules.

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Also important is the decision as to which life insurance company annuity to purchase to fund the future payments. By looking to companies with a large portion of their investment portfolio in fixed income or cash and that are well-diversified with a significant portion of the portfolio rated investment grade, the consultants can recommend the best life insurers to their clients.

This means that the consultant must have strong knowledge of pricing, underwriting guidelines, and investment strength of a life insurer. He or she must also be certain that settlement documents include protection for their clients/insureds, comply with the Internal Revenue Code and adhere to guidelines set forth by the annuity provider(s).

Not to be overlooked is the ability to protect the settlement from anyone, including the plaintiff, who might consider it a windfall instead of the only way to make a severely or even catastrophically injured family whole. Although guardians of a minor or someone with mental incapacity may try to prevent legal invasion of the "corpus" of a cash settlement, the temptation to extract large sums for comfort rather than necessities can be overwhelming. This is where a structured settlement, carefully planned, will provide life-long funding for daily care and protection from undeserving and predatory creditors.

Finally, every plaintiff and defense structure consultant must be licensed in the states in which they practice. That licensing is contingent upon an annual review for compliance regarding continuing education requirements and compliance with state insurance and ethics laws. Additionally, every life insurance company issuing structured annuities within a state must maintain approvals from that state's Department of Insurance. That involves compliance with capital requirements and limitations on permitted investments.

Openness and Transparency

If recent financial history shows anything, it is that regulation of financial professionals is not a dependable way to guarantee quality. The now-defunct Bear Stearns and Lehmann Brothers investment houses were filled with professionals licensed by the Securities and Exchange Commission, yet both spiraled into bankruptcy due to risky and unsound investment practices.

A better and certainly more effective option involves ensuring openness and transparency in a financial transaction so that the plaintiff, his or her attorney and the financial advisor (if there is one) have the facts necessary to make their own determinations about how much of their settlement, if any, should involve a structured settlement. This is especially important for the plaintiffs' attorney, who bears ultimate legal responsibility to negotiate the best possible settlement.

Keeping in mind the voluntary nature of any structured settlement, today's structured settlement process features transparency in every aspect. In addition to having the right to affect the design of the future payment stream, the plaintiff and attorney (again, often working with their own structured settlement consultant) should be fully aware of the cost of the annuity used to fund the future payments and the rating of the life insurance company issuing the annuity.

Regarding compensation, the plaintiff pays no ongoing fees with a structured settlement. Consultant(s) involved with the case are paid a single commission from the life insurance company based on the price of the annuity—a fact that has been public information for years. All life insurance companies pay the same commission rates on structured annuities. This commission model allows plaintiffs to find expertise that they might not otherwise be able to afford if they were paying on an hourly basis.

Additionally, unlike financial advisors, who may recommend multiple different investment options, today's structured settlement consultant is nearly always focused on that single option. As a result, many are able to develop expertise in analyzing the future cost of specialized care—for example, future skin graft surgeries for a burn victim.

This ability to design guaranteed payment streams often raises the issue of whether a structured settlement consultant is a replacement for a financial planner. The answer depends on the severity of the injury and the impact on future earnings. But in general, particularly with more serious injuries and larger settlements, the structured settlement consultant should be seen as an expert who will help fulfill the goals of a financial strategy, not a replacement for this strategy. In fact, it may be beneficial for both the settlement consultant and a financial planner to work together to develop a comprehensive financial plan.

As financial planner Laura Tarbox (one of the country's "Best Financial Advisors," according to *Worth*) says:

> Successful investing requires a clear long-term strategy but today's uncertainties make this especially difficult. So if you're settling a lawsuit, [a structured settlement] can be an important part of your overall financial planning because it combines two valuable qualities: guaranteed security and tax-free income.

Conclusion

The structured settlement offers significant advantages for both plaintiff and defense. Good structure consultants can show their respective clients how to incorporate the structure to maximize these advantages. Beyond creating guaranteed, tailored payments to meet future needs, the structure consultants can design the settlement to maximize other benefits—for example, maintaining the plaintiff's eligibility for means-tested benefits programs. Taken together, this helps create the bridge that leads to a mutually agreeable solution FTD.