

How To Sell Structured Settlements

by Joseph Hadus

It seems the pages of legal publications (including this one) are these days full of articles on marketing. Likewise, structured settlements, particularly in light of recent years' developments, must be marketed -- sold.

However, when referring to the "selling" of structures, we are here referring more to dealing with objections -- both as a general reluctance to consider structured settlements and as objections that arise during the course of negotiating the structured settlement. If not dealt with in a timely manner, these objections can derail an otherwise good settlement.

Members of the bar, while generally acknowledging the substantial advantages of structure settlements in the right circumstances, increasingly complain of a reluctance of the parties to enter into such agreements. Yet an analysis of the complaints indicates the problem to be more of perception than reality, and that the probable remedy is communicating the true facts. It is in this context that the role of the structured settlement specialist in the "selling" of the structure becomes most prominent.

As a structured settlement specialist practicing in Michigan and throughout the country for the past 15 years, I hear arguments almost daily having to do with depressed interest rates, safety of the annuity company, constructive receipt, tax consequences and a variety of other issues.

To set the record straight, consider the following:

1) Depressed Interest Rates. In 1980, the typical structured settlement plan yielded 9.16 percent and inflation was at 12.7 percent. The real rate of return then was a minus 3.54 percent. In 1993, the typical structured settlement yields 6.38 percent and inflation is 3 percent. This produces a plus 3.38 percent real rate of return.

Obviously, what really matters is the yield over the inflation rate.

The argument that rates are "too low" begs another question, "Compared to what?" When considering we are in an era where savings accounts are paying about 3 percent and that when the tax-free aspects of the structured settlement are factored in, the yield is considerably more than 6.38 percent (depending on one's tax bracket). With the additional factor of a retroactive federal income tax increase, a tax-free structured settlement looks better all the time.

Additionally, the benefit of reduced annuity costs in medical age rate up cases due to impaired life expectancy and the fact that annuity policies are the only funding vehicle which even takes into account the injury makes structures even more attractive.

2) Safety of the Annuity Carrier. Of the approximate 2,000 life insurance companies in the United States, only a dozen or so offer structured settlement annuities. As a result of

increased public scrutiny, standards of all the rating services have been tightened. In the past, the A.M. Best Company often was the sole source relied upon. Even though Best has substantially tightened its standards, Moody's, Standard and Poors and Duff and Phelps should also be checked for their ratings. Additionally, if desired, a guarantee of the annuity payments can be provided through a company totally unrelated to the annuity issuer.

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Another option is for the plaintiff to have secured creditor status, rather than the traditional general creditor. This was made possible by enactment of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA) and I.R.C. 130(c). Lastly, the companies active as annuity carriers in the structure settlement market welcome close scrutiny of their financial records and are happy to provide whatever additional detailed information is requested.

3) Constructive Receipt. There seems to be an ongoing debate among certain members in the legal community over this issue, although the IRS seems to have ruled in a de-

finitive manner. If one can have access to the funds if so desired, even though there isn't immediate possession, then this is constructive receipt. However, mere knowledge of the cost of the annuity policy is not constructive receipt by any means, and plaintiff attorneys have a legitimate argument that they need to know the cost of the annuity (present value) in order to calculate their fee.

In many instances, the defendant insurance company or self-insurer chooses not to disclose the cost, but there are services available throughout the country that the plaintiff attorney can use in order to determine the cost figure.

4) Tax Consequences. PL 97-473 (H.R. 5470) January 14, 1983, commonly known as the "Periodic Payments Act" effectively codified Revenue Ruling 79-220. Section 104(a)(2) of the Code was amended by inserting "whether as lump sum or as periodic payments" into the exclusion from gross income for personal injury recovery. In addition, the Act added Section 130(c) dealing with personal injury liability assignments and provided that if a defendant and/or insurance carrier assigned its liability to own an annuity policy and guarantee the payments to a third-party assignee, the amount received by the assignee is not taxable as long as it does not exceed the cost of the qualified funding asset. It should be

noted that Section 130(c) was subsequently amended (the Tax Reform Act of 1986) to stipulate that if there was a qualified assignment, the damages had to be on account of "physical injury and/or physical sickness."

That the Congress intended to exclude physical injury and physical sickness cases from gross income cannot be disputed.

The above noted areas of concern are but a small part of the myriad of problems/objections which can develop both prior to and during the course of attempting to negotiate a structured settlement. It seems in personal injury litigation, until the checks are finally issued, the parties are on a roller coaster ride with the outcome always in doubt. The role that a competent structured settlement specialist can play during these negotiations should not be discounted and perhaps none is more important than helping to "sell" the structured settlement.

It is my observation that attorneys don't make nearly the use of structured settlement specialists that they could; and if they look upon them as someone who simply arranges for the purchase of the annuity policy, then they are missing out on a variety of services that can help in the settlement process. This entails dealing with objections that if not handled timely and properly, can

derail the settlement.

A structured settlement specialist who deals with these concerns on a daily basis can help by easing plaintiff's concerns about the safety of the annuity company, interest rates, making the settlement tax free, providing for the structured settlement in the closing documents, the question of structuring attorney fees, alternate modes of investments and a variety of other questions and concerns.

Certainly trial attorneys on both plaintiff and defendant side cannot be expected to be well versed in all aspects of structured settlements. A court settlement annuity broker is highly recommended and can go a long way towards smoothing the settlement process. Typically, the placing of the annuity policy is controlled by whatever entity pays for the settlement and this would be either the casualty insurance company or self-insured corporation. Ideally, they would have their structured settlement specialist involved early on to deal with problems and the "selling" of the structure.

It is not an overstatement that in many instances the difference between an equitable settlement and the uncertainty of trial is the expertise of the structured settlement specialist.



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