

WHAT EVERY PRACTITIONER NEEDS TO KNOW ABOUT STRUCTURED SETTLEMENTS

by Robert Nigol, Barry Chobotar, and Geraldine Straus

Structured settlements are, in Ontario, a staple of personal injury settlements involving, certainly, parties under disability. And while most practitioners know, conceptually, what structured settlements are and how they may be of benefit to clientele, there is a good deal about the manner in which structured settlements are negotiated and contracted that may not be understood. And these more nuanced issues often have a significant, material impact on the level of income producible by a structured settlement.

The most common oversight in the process of setting up a structured settlement relates to the fact that, short of a court order, structured settlements require the consent of the casualty insurer. A structured settlement must be purchased by a casualty insurer for the benefit of the injured party and therefore the consent to do so must be obtained *a priori*. In other words, the injured party cannot purchase a structured settlement (and derive its benefits) unilaterally after the fact.

Another issue that often goes unnoticed relates to the fact that some casualty insurers restrict the life companies that they permit to be used. The net effect of this may be a diminution in the structured settlement income producible (which would require an


increase in the capital investment to achieve the best income producible, given the imposition of a restriction on the life market).

Yet another issue of material consequence has to do with the ownership of structured settlements. In particular, if the ownership of a structured settlement is to be assigned, there is not only the imposition of a direct cost, measured in terms of assignment fees (which, with three assignment markets, each charging \$2,000, could amount to as much as \$6,000), but also an indirect cost in that only three of five life companies presently offer an assignment market. In effect, should the life companies without an assignment market produce the best structured settlement income, and should the casualty insurer insist on an assignment of ownership, the income producible would be reduced (and only offset by a greater capital investment in the structured settlement).

Who has the right to name the secondary payee (i.e. beneficiary) is also a factor in setting up a structured settlement that is, at times, neglected and has material consequence. This is something that needs to be determined in advance of going to market. The cost for this benefit is, usually and rightfully, borne by the party naming the secondary

payee and thereby reserving a derivative benefit. However, again, this all needs to be negotiated and set out clearly in settlement minutes.

The point in drawing attention to the complexities of contracting structured settlements is certainly not to deter. If it is incumbent upon all practitioners to raise the prospect of a structured settlement with their clients, then it is, likewise, incumbent on practitioners to recognize and understand the complexities, so that the consent to structure can be negotiated on an informed basis.

For a checklist of important considerations in setting up a structure, please refer to the following appendix entitled *Structured Settlement Decision Support Checklist*. 

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Structured Settlement Decision Support Checklist

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1. Is there any restriction on the amount of the total settlement to be structured?
 - the claimant may structure any or all of the settlement
 - the claimant may structure an amount of no more/no less than \$ _____ / _____ % of the settlement

2. Is there any restriction on the structured settlement company to be used?
 - any or all of the settlement may be structured with the company of the claimant's choice
 - any or all of the settlement must be structured with _____ [name of the company]
 - other (e.g., split) _____ [describe]

3. Is there any restriction with respect to the life insurance companies permissible?
 - no, the structured settlement may be placed with any of the life companies presently in the structured settlement market
 - yes, the structured settlement may be placed only with _____ [name of life company(s) permissible]

4. Is there any restriction with respect to the ownership of the structured settlement?
 - no, the structured settlement will be owned by _____ [name of casualty insurer(s)]
 - yes, the ownership of the structured settlement will be assigned by _____ [name of casualty insurer(s)], with:
 - any or all fees borne by _____ [name of casualty insurer(s) and/or claimant]; or
 - a maximum of \$ _____ in fees borne by _____ [name of casualty insurer(s) and/or claimant]

5. Is there any time restriction with respect to the conveyance of funds for the structured settlement?
 - no
 - yes, funds for the structured settlement will be conveyed within _____ business days

6. Who has the right to name the beneficiary/secondary payee (or right to a reversionary interest)?
 - the claimant (at his/her own cost)
 - the casualty insurer (at its own cost)
 - other (e.g., some form of split) _____ [describe]

7. Does the casualty insurer reserve the right to approve the final structured settlement plan?
 - no
 - yes

8. Is there an agreement to continue to pay benefits until the structured settlement commences payments?
 - no, _____ [name of casualty insurer(s)] agrees to pay all outstanding benefits to the date of settlement
 - yes, _____ [name of casualty insurer(s)] agrees to pay benefits as incurred up to _____ [date of the first structured settlement payment]