

**STRUCTURED SETTLEMENTS FROM THE PLAINTIFF'S
PERSPECTIVE**

**STEVEN C. LAIRD
1824 8th Avenue
Fort Worth, Texas 76110**

State Bar of Texas
**EVALUATING, NEGOTIATING, PROVING, AND
COLLECTING DAMAGES AND ATTORNEYS' FEES**
February 19-20, 2009
Dallas

The author wishes to acknowledge input from Richard Halpern¹, Todd Morrow², and Dirk Weeks³ for their information in preparation of this paper. Each of their companies work with plaintiffs' counsel in tort cases. Additionally, the companion paper authored by defense attorney John Scully for this seminar relating to structured settlements from a defense perspective is also recommended reading.

This paper will attempt to provide an overview for structured settlements. Attorneys are encouraged to consult with plaintiff structured settlement brokers, CPAs, family law attorneys, probate and tax attorneys concerning this and related subjects before resolving any issues involving structured settlements, self interests and trusts. These areas of law are complex and may involve tax and entitlement issues that are beyond the scope of most trial attorneys specializing in personal injury and medical malpractice.

I. DEFINITION AND PURPOSE

In Black's Law Dictionary (6th Ed. 1990) structured settlements are defined as:

“Type of damages settlement whereby Defendant agrees to make periodic payments to injured Plaintiff over his or her life. Commonly such settlement consists of an initial lump-sum payment with future periodic payments funded with an annuity.”

Probably the biggest reason plaintiffs choose structured settlements are that there are tax benefits to a structure that are not available with a lump-sum payment. So long as there is no actual or constructive receipt by the plaintiff of the periodic payments, the plaintiff (or the estate) can claim that the payments are excluded from gross income under the I.R.C. Section 104(a)(2) (West 2002) and Revenue Ruling 79-220.

In a structured settlement the interest earned for the life time payout are currently tax-free. Many plaintiffs choose structured settlements because it forces the plaintiff to obtain the money over a period of time, where there is less likelihood of the plaintiff going on a spending spree and dissipating their award.

In order to avoid taxable consequences on the personal injury recovery involving a structured settlement, the plaintiff must agree that the payment stream may not be altered.

¹ Richard G. Halpern, The Halpern Group, 505 Morris Avenue, Springfield, New Jersey 07081 (1-800-524-1631 or 973-379-6723), www.halperngroup.com.

² Todd Morrow, The James Street Group, 1220 Colorado, Suite 400, Austin, Texas 78701, (512) 469-7400 or 800-765-1660, www.tjsg.com.

³ Dirk Weeks, Structured Annuities, Inc., 4330 West Vickery Boulevard, Fort Worth, Texas 76107-6399 (817) 763-8100, www.structuredannuities.com.

II. PLAINTIFF'S COUNSEL'S DUTY REGARDING STRUCTURED SETTLEMENTS

If you have any question as to whether a structured settlement should be considered, you have probably already triggered your duty to obtain structured settlement information and proposals. If a minor is the one benefiting from a recovery, then plaintiff's counsel should anticipate that a guardian ad litem and court will want to see at least one legitimate proposal. The more proposals presented, the less questions can be raised about the plaintiff's attorney fulfilling his or her duties to the client regarding the presentation of this information. Probably the only exception to this is when the amount is so small that depositing the funds into the court's registry is the preferred alternative.

One of the most important aspects of fulfilling any duty relating to structured settlements is to have documented evidence in the file showing that an explanation and proposals have been offered to the plaintiff. Even if the defense tenders various proposals during mediation, plaintiff's counsel can simply have the client write "explained and rejected" with the appropriate date to have documentation in the file.

Another alternative is to have a structured settlement representative attend the mediation. Yet another alternative is to simply obtain structured settlement proposals either during or immediately following settlement negotiations. Plaintiff's counsel is only limited by his or her imagination as to how to explain and present structured settlement proposals to the client. The important issue is that such information is conveyed.

In 1992, an attorney in Tarrant County, Texas, was sued by the plaintiff after most of the recovery for a minor child had been spent. Although the attorney stated that the plaintiff had been informed about structured settlements, the plaintiff disputed this. The case eventually settled; however, the point is that a plaintiff's attorney always needs to make sure that accurate documentation is in the file substantiating that such explanation has been given.

III. CONSIDER LIFE EXPECTANCY AND/OR NEEDS

How Plaintiffs Often Evaluate Life Expectancy:

The government's mortality tables⁴ are often used by plaintiff's experts on life expectancy. These government tables are provided by the U.S. government and encompass all people in the United States.⁵ These government tables look at a person's overall life expectancy based upon their age and race, and incorporate persons with multiple health conditions.

⁴ Anderson, RN: United States life tables, 1998. National vital statistics reports; vol. 48 no18. Hyattsville, Maryland: National Center for Health Statistics: 2001.

⁵ The National Vital Statistics Report can be obtained from the U.S. Department of Health & Human Services at the Centers for Disease Control & Prevention, National Center for Health Statistics, 6625 Belcrest Road, Hyattsville, Maryland, 20782-2003 and is DHHS Publication No. (PHS) 2001-1120 1-0093 (2/01). The document is certified as an official Federal document and is fully admissible in Federal court under Federal Rule of Evidence 902.

How Defendants Often Evaluate Life Expectancy:

The defense life expectancy expert will often use studies, other than the U.S. government tables, that sub-categorize specific health conditions and give generalities about persons with those health conditions, i.e. cerebral palsy, traumatic brain injury, permanent vegetative state, etc. For example, the defendants may lump people with spinal cord injuries together and not give any consideration to age, gender, type of care provided or look at any other individual factors that may apply to your case.

Life Expectancy for the Plaintiff:

As a plaintiff's attorney it is important to fully develop the damages in your case, especially for a catastrophically injured client. It needs to be shown what medical needs and losses had been incurred, as well as to completely analyze future losses and medical needs.

The following life expectancy issues may present challenges that will need to be overcome for a jury to award significant damages: an elderly client; not having a projected normal life expectancy; chronic health problems; and/or severe neurological impairments.

Always start from the presumption of a full life expectancy.

Life Expectancy and Texas Caselaw:

Life expectancy issues are not widely addressed in current published Texas caselaw opinions or Texas law review or bar articles. "Issues such as life expectancy, medical advances and the future costs of products and services, are, by their very nature, uncertain, and therefore, appellate courts are particularly reluctant to disturb a jury's award of these damages." *Brownsville Pediatric Association v. Reyes*, 68 S.W.3d 184, 191 (Tex. App. – Corpus Christi, 2002 n.w.h.). See also, *Volkswagen of America, Inc. v. Ramirez*, 79 S.W.3d 113, 127 (Tex. App. – Corpus Christi, 2002), *rev'd on other grounds*, 159 S.W. 3d 897 (Tex. 2004).

Texas courts usually give the fact finder "considerable latitude" in awarding personal injury and wrongful death damages because those damages cannot be proven with great certainty. See, *Harris County Hosp. Dist. v. Estrada*, 872 S.W.2d 759, 763-764 (Tex. App. – Houston [1st Dist.] 1993, *writ denied*). *Isern v. Watson*, 942 S.W.2d 186, 196-197, (Tex. App. – Beaumont, 1997, *pet. denied*).

Life expectancy is akin to future loss of earning capacity. "Loss of earning capacity that a party will suffer in the future is always uncertain and left largely to the jury's sound judgment and discretion," *Wal-Mart Stores, Inc. v. Ard*, 991 S.W.2d 518, 522-523 (Tex. App. -- Beaumont, 1999) quoting *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 524 (Tex. App. -- Corpus Christi 1993, *writ dismiss'd by agr.*). "Proof of life expectancy is not required to recover lost future earnings, because the jury may reach its own conclusion as to life expectancy based upon evidence of the injured party's age,

health and physical condition prior to the injury and the permanence of the injury.” *Walmart Stores, Inc.*, *supra* at 523.

Life expectancy is also akin to damages for physical impairment. “No mathematical standard exists for the determination of the money damages a jury may award for physical impairment, and the jury may assess those damages in its discretion.” *Roberts v. Williamson*, 52 S.W.3d 343, 351 (Tex. App. – Texarkana, 2001), *aff’d*, 111 S.W.3d 113 (Tex. 2003).

Needs and Spending:

What are the needs of the plaintiff? If a minor is involved, will he or she be able to continue in school, and possibly college? Has there been a life care plan prepared? Are there any other special needs? All of this information needs to be given to a structured settlement specialist so that a considered proposal may be prepared for the plaintiff, an ad litem, and the court.

If the plaintiff is an adult, a structured settlement proposal may be no less necessary. It has been known for well over 2 decades that 90% of plaintiffs will have squandered their lump sum recovery in less than 5 years. Current national economic conditions create even more of a need for asset management to be in place. If sophisticated investors can lose incredible amounts of money, there is significant justification for the presentation and use of structured settlements. This is true even if the plaintiff is not individually injured and recovers on a derivative or similar legal theory.

None of the above statements presuppose that an adult plaintiff can be forced to accept a structured settlement. The issue relates more to the duty of the attorney to obtain and present the information. The ultimate choice of an adult plaintiff to accept or reject a structured settlement will always be made by the client.

IV. TAX CODE ON PERSONAL INJURY AWARDS

I.R.C., Section 104(a)(2) (West 2002) relates to Compensation for Injuries or Sickness. The I.R.C. rule states in Sections 104(a)(1)(2) & (3) (West 2002) in pertinent part:

- (a) In general.
Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include –
 - (1) amounts received under workmen’s compensation acts as compensation for physical injuries or sickness;
 - (2) **the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;**

- (3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee or (B) are paid by the employer).
(emphasis added)

What Is and Is Not Taxed?

Generally, payments for physical injuries are not taxed and payments for punitive damages are taxed. Your client should be given the opportunity to consult with a CPA or tax attorney of their choice prior to settlement of a case and after a verdict to fully explore tax consequences of a verdict or settlement.

V. SPECIAL NEEDS TRUSTS/SUPPLEMENTAL CARE TRUSTS

Special needs trusts allow severely disabled persons to have a trust and remain on governmental entitlement benefits, e.g., Medicaid.

In Texas, [Tex. Prop. Code § 142.005](#) (g)(West 2002) allows for the creation of special needs trusts.

Special needs trusts are authorized by 42 U.S.C.A. Section 1396p (d)(4)(A) (2002) and allow for a disabled person under the age of sixty-five (65) to have a trust established by the disabled person's parent, grandparent, legal guardian or a court IF the State will receive all amounts remaining in the trust upon the death of the disabled person up to an amount equal to the total medical assistance paid by the State plan on behalf of the individual.

EXAMPLE: If your disabled client was on Medicaid and had a special needs trust set up, and had \$250,000.00 worth of medical expenses that the State's Medicaid program paid, then on the death of your disabled client, the estate of the disabled client must repay the State \$250,000.00 for the medical expenses previously paid under Medicaid. Thereby, the special needs trust delays the payment to the state of the Medicaid expenditures until the death of the disabled person.

So-called Medicaid Set Aside Trusts are being required with alarming frequency if the plaintiff is in need of continuing governmental benefits and obtains a recovery. Check with the Texas Health and Human Services Commission's Medicaid Office to determine how any such trust requirement in the future may affect a recovery that involves a potential structured settlement. Names of a few individuals who are very familiar with all of these issues are included at the end of this paper.

Other Information You Need to Know:

A special needs trust must have a trustee that is a trust company or a state/national bank that has trust powers in Texas. Tex. Prop. Code Section 142.005(a) (West 2002). Individuals cannot serve as the trustee.

What to Look for in Selecting an Annuity Company:

When selecting an annuity company, factors you may want to look at include:

- a. price of the annuity;
- b. cash refund option at the death of the measuring life;
- c. the guaranteed period of time that the payments will continue, regardless of plaintiff's life span;
- d. high rated age;
- e. the rating and history of the company (especially in this economic environment);
- f. who the ultimate assignee company may be (once again, look at rating and history);
- g. who ultimately is backing the recovery, and with what assets; and
- h. have a serious and candid discussion with the broker regarding the history and solvency of the carrier and ultimate assignee, as well as how the structured settlement can be protected and guaranteed.

Structured settlements may be useful in cases involving death, guardianship cases, reduced or lost retirement benefits, catastrophic injuries, inadequate policy limits or where there is questionable liability.

You can devise structured settlements that pour over into special needs trusts. Discuss this with a trust attorney who has knowledge of special needs trusts.

Factoring Companies:

It is commonplace to see advertising by companies who are in the business of "buying" structured settlements from plaintiffs. These entities are known as factoring companies. Sections 141.004 through 141.007 of the Texas Civil Practice & Remedies Code (2001) do require court approval for any transfer of structured settlement payment rights. Factoring companies may file documentation in a different court than the one in which the original lawsuit was filed.

Whether factoring companies serve a legitimate purpose when "buying" (transferring) structured settlement payment rights from the plaintiff, or whether they are considered predatory to a vulnerable individual who may need immediate funds, is a debate not addressed in this paper. Additional protection for the plaintiff may be a simple provision in the structured settlement documentation that requires the original court to be the only court which can approve such a transfer.

Commutation Riders:

Another thing to remember is that a commutation rider may be beneficial in larger structured settlements. Given the fact that structured settlement payments cannot be

altered by amounts or payment times, the beneficiaries of the plaintiff's estate may be saddled with significant estate taxes should the plaintiff die during the guaranteed payout period. In other words, the IRS may place a significant value on the remainder of the structured settlement payments for estate tax purposes. The problem, however, may be that the IRS may require the entire amount of taxes be paid by the next applicable tax deadline. This may place a significant, if not impossible, burden on the beneficiaries since the structured settlement continues to pay on a periodic basis. A commutation rider allows a percentage of the structured settlement payments (even 100%) to be converted to a lump sum upon the plaintiff's death in order to meet such a potential tax burden. Talk to the plaintiff's structured settlement broker about the amount of the structure and the period for the guaranteed payouts. A larger and longer payout may justify consulting a tax attorney in relation to a commutation rider.

Three-Step Process for Structured Settlement:

1. The parties to the settlement agreement agree that the Defendant will pay Plaintiff periodic payments as part of the negotiated settlement.
2. The Defendant transfers the obligation to make the periodic payments to a third party Assignee by means of a qualified assignment.
3. The Assignee purchases and owns a qualified funding asset (annuity) to fund the stream of future periodic payments.

Pitfalls to Avoid in the Drafting of Structured Settlement Documents:

1. It should not be stated that the plaintiff is purchasing the annuity. The defendant, its liability carrier or its assignee is purchasing the annuity.
2. The cost of the annuity is not consideration being paid to the plaintiff (releasor) and should not be mentioned as such in the structured settlement documents.
3. Punitive damages should not be part of the document. Allocate that the amount being paid is for compensatory damages only.
4. Watch out for conflicting language in the terms of the structured settlement and the Settlement Agreement and Release.

Structuring Attorney's Fees:

An attorney can structure earned fees by a structured settlement and purchasing an annuity for the attorney's fees. In doing this, the income is taxed as the periodic payments are received by the attorney, and not on the entire lump sum at one time. This may be helpful to the attorney to spread the income over several years, and to defer the income taxes for a later time. This may be especially beneficial if the attorney suspects he or she may eventually be in a lower tax bracket.

VI. SECTION 468B QUALIFIED SETTLEMENT FUND

It is not uncommon for the defendant's insurance carrier to insist on a structured settlement through one of its "approved companies." The plaintiff's attorney needs to fully understand that such an approved company may not have competitive rates. The attorney may feel like he or she is caught in a dilemma: the client needs the money, the amount offered is acceptable, but the rates quoted by the company can easily be beaten

by competitors. The plaintiff's counsel may have already brought in his or her own structured settlement specialist into negotiations, and the rates quoted by the plaintiff's specialists are clearly more advantageous, resulting in a better payout for the client. Yet the defendant's carrier states that only its approved company will be permitted to structure the settlement. What should plaintiff's counsel consider?

As set out below, a 468B qualified settlement fund ("QSF") avoids constructive receipt, which could trigger significant taxable consequences for the plaintiff. Plaintiff's counsel must file a motion to have a 468B QSF created. Once created, the settlement funds are placed into the QSF directly from the defendant's carrier. Do not make the mistake of receiving such settlement funds and placing them in your trust account while you are in the process of creating a QSF.

The benefit of a QSF is to allow the plaintiff (with the court's permission) to choose the type of annuity and carrier, if applicable, that would be most beneficial relating to payout. The downside of a QSF is the costs associated with the creation (counsel should retain a specialist with knowledge about the procedure), as well as the fact that the court will have to approve every penny paid out of the QSF. This includes attorney's fees, expenses, any lump sum to the plaintiff, etc. QSFs are not frequently used, but they are an alternative to the defense carrier's insistence on using a non-competitive company.

Section 468B of the Internal Revenue Code of 1986 and the underlying Treasury Regulations are the laws governing the qualified settlement fund ("QSF").

26 U.S.C.A. Section 468b (West 2002) provides:

- (a) In general. For purposes of section 461(h), economic performance shall be deemed to occur as qualified payments are made by the taxpayer to a designated settlement fund.
- (b) Taxation of designated settlement fund.
 - (1) In general. There is imposed on the gross income of any designated settlement fund for any taxable year a tax at a rate equal to the maximum rate in effect for such taxable year under section 1(e).
 - (2) Certain expenses allowed. For purposes of paragraph (1), gross income for any taxable year shall be reduced by the amount of any administrative costs (including State and local taxes) and other incidental expenses of the designated settlement fund (including legal, accounting, and actuarial expenses):
 - (A) which are incurred in connection with the operation of the fund, and
 - (B) which would be deductible under this chapter for purposes of determining the taxable income of a corporation. No other deduction shall be allowed to the fund.
 - (3) Transfers to the fund. In the case of any qualified payment made to the fund:

- (A) the amount of such payment shall not be treated as income of the designated settlement fund,
 - (B) the basis of the fund in any property which constitutes a qualified payment shall be equal to the fair market value of such property at the time of payment, and
 - (C) the fund shall be treated as the owner of the property in the fund (and any earnings thereon).
- (4) Tax in lieu of other taxation. The tax imposed by paragraph (1) shall be in lieu of any other taxation under this subtitle of income from assets in the designated settlement fund.
- (5) Coordination with subtitle F. For purposes of subtitle F:
- (A) a designated settlement fund shall be treated as a corporation, and
 - (B) any tax imposed by this subsection shall be treated as a tax imposed by Section 11.
 - (C) Deductions not allowed for transfer of insurance amounts. No deduction shall be allowable for any qualified payment by the taxpayer of any amounts received from the settlement of any insurance claim to the extent such amounts are excluded from the gross income of the taxpayer.
 - (D) Definitions. For purposes of this section:
 - (1) Qualified payment. The term "qualified payment" means any money or property which is transferred to any designated settlement fund pursuant to a court order, other than:
 - (a) any amount which may be transferred from the fund to the taxpayer (or any related person), or
 - (b) the transfer of any stock or indebtedness of the taxpayer (or any related person).
 - (2) Designated settlement fund. The term "designated settlement fund" means any fund:
 - (a) which is established pursuant to a court order and which extinguishes completely the taxpayer's tort liability with respect to claims described in subparagraph (D),
 - (b) with respect to which no amounts may be transferred other than in the form of qualified payments,
 - (c) which is administered by persons a majority of whom are independent of the taxpayer,
 - (d) which is established for the principal purpose of resolving and satisfying present and future claims against the taxpayer (or any related person or formerly related

- person) arising out of personal injury, death, or property damage,
- (e) under the terms of which the taxpayer (or any related person) may not hold any beneficial interest in the income or corpus of the fund, and
 - (f) with respect to which an election is made under this section by the taxpayer. An election under this section shall be made at such time and in such manner as the Secretary shall by regulation prescribe. Such an election, once made, may be revoked only with the consent of the Secretary.
- (3) Related person. The term "related person" means a person related to the taxpayer within the meaning of section 267(b).
- (a) Nonapplicability of section. This section (other than subsection (g)) shall not apply with respect to any liability of the taxpayer arising under any workers' compensation Act or any contested liability of the taxpayer within the meaning of section 461(f).
 - (b) Other funds. Except as provided in regulations, any payment in respect of a liability described in subsection (d)(2)(D) (and not described in subsection (e)) to a trust fund or escrow fund which is not a designated settlement fund shall not be treated as constituting economic performance.
 - (c) Clarification of taxation of certain funds. Nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current income tax. The Secretary shall prescribe regulations providing for the taxation of any such account or fund whether as a grantor trust or otherwise.

Other Information on OSFs:

OSFs are utilized when deciding where to put the settlement money and the defendant is ready to pay. An escrow account or fund is set up and the defendant is then released from liability and the plaintiff is not considered to be in “constructive receipt” of the settlement funds. Under section 130, a physical injury tort claim is the only cause of action where damage payments may be assigned. A fund administrator, on behalf of the

qualified settlement fund, settles claims against the defendant and the defendant pays the agreed upon settlement amount into the fund, which then extinguishes any alleged liability of the defendant. When the settlement funds are paid out to plaintiffs, lien holders, the attorneys, or to a third party assignee, then the trust closes and the administrator files a final tax return. Usually the qualified settlement fund exists for only a short duration.

VII. SELF DEALING BY INSURANCE COMPANIES HAS BEEN KNOWN TO HAPPEN

As stated above, in some cases you will see the defendant insurance company try to broker the settlement and then try to use only their affiliated annuity company or “approved” companies for funding any structured part of the settlement. What this does is allow the insurance company to recoup some of the settlement money through their affiliated company or “approved” company. It may be a type of shell game. They may make your client believe they are offering a certain amount to settle the case and then the defendant’s insurance company says you have to use one of their affiliated annuity companies or “approved list” companies. Why do the insurance companies do this? To save money. The defendant’s carrier may get a considerable present discount using future periodic payments. “Present value” from the defense is often based on an estimated number from their annuity broker and is subject to manipulations depending upon what assumptions are used. Beware that sometimes the “approved” companies and brokers may give or receive kickbacks to the insurance carriers for using them, and other times the defendant’s carrier is sending your money in fees back to themselves in a subsidiary that does structured settlements. This is not to imply that such conduct goes on with every insurance carrier and with every structured settlement proposal. As illustrated below, however, it has been known to happen, and plaintiff’s counsel should simply be aware of the possibility.

The case of *Macomber v. Travelers Property and Cas. Corp.*, 261 Conn. 620; 804 A.2d 180 (Conn. 2002), *rev’d as to class certification*, 277 Conn. 617; 894 A.2d 240 (Conn. 2006) addresses the self dealing and rebating issues. In *Macomber*, Travelers Casualty provided a structured settlement annuity to the plaintiffs in which Travelers Casualty used insurance brokers that had an affiliation or other special relationship with them whereby Travelers Casualty got 25-75% of the commission back. The Connecticut court found that the payment plan that the plaintiffs had agreed to was “induced by a representation as to its cost, and that the cost was not accurately reported to the plaintiffs in good faith.” The court stated, “ The key to the plaintiff’s argument, is that, once Travelers Casualty made a representation as to how much the annuity would cost for it to purchase, Travelers Casualty had a duty to disclose any rebates or other schemes that would reduce the final cost of the annuity to Travelers Casualty.”

Make sure that the financial ratings of the insurance company used are strong, and have your broker check several different insurance companies’ proposals to insure that your client is receiving the most competitive rates available on the market. Often times the defense insurer’s approved companies have unfavorable rated age for the plaintiff

when compared with other companies. This is especially true if lifetime benefits are sought.

Further, the defense carrier may release themselves and the selected structure from all future liability, including liability for them picking a flawed structured settlement vehicle.

In a situation in which you have serious questions about the adequacy of the defendant's structured settlement proposal, you have some choices:

- a. Allow the defendant's insurance company to pick the structured settlement company. (In some cases, the defendant's structured settlement companies may have the best rates available with well-rated annuity companies that you would want your clients to use. You still need to independently confirm this with a plaintiff's broker also checking for competitive structured settlement rates.
- b. Have a co-broker arrangement for the plaintiff to work with the defendant's insurance company broker, but be aware that often the plaintiff's co-broker is going to share fees with the defendant's broker/insurance company. The standard fee in the industry is 4%. Such a co-brokering arrangement will generally result in 2% for the plaintiff's broker, and 2% for the defendant's insurance broker. (Such co-brokering has become commonplace over the years, with most plaintiff's brokers simply accepting this arrangement as an easy way to avoid conflict, even though the plaintiff's broker usually ends up doing all of the work and documentation while giving up 50% of his or her fee.)
- c. **Have a 468b qualified settlement fund established by filing motions with the court and then having the settlement money held in escrow until the court determines the proper distribution.** (This option will probably cost somewhere in the neighborhood of \$2,000.00, but could be well worth it for your client when the insurance company is dragging their feet or trying to strong arm your client into working ONLY with their brokers/approved list companies.)
- d. Try the case and not use the defendant's structured settlement company.
- e. Also consider looking at Treasury Bond settlements as another option. The Halpern Group referred in Footnote 1 deals with this type of structured settlement and does not cooperate with defense brokers.

Choose your course of action, and enlist knowledgeable specialists when you have questions.

VIII. WORDS OF CAUTION

A prudent plaintiff's attorney will have the input of structured settlement specialists and probate/trust attorneys, as these are outside the common knowledge of most plaintiff's attorneys. The rules and regulations surrounding tax consequences can

change, and the client should be advised to consult with a certified public accountant/tax attorney to answer any questions they might have concerning tax implications of their settlement proceeds prior to the plaintiff selecting their best option. Independent tax advice should be sought from a tax professional by your client. This cannot be overemphasized.

By way of example only, the following few names are persons known to be knowledgeable in some of the pertinent areas that the plaintiff's attorney may need to retain specialized counsel for the client's benefit, as well his or her own:

Attorneys with experience in Family Law:

Becky Beaver – Austin, Texas
Law Offices of Becky Beaver
816 Congress Avenue, Suite 1600
Austin, Texas 78701
512-474-5791

Gary Nickelson– Fort Worth, Texas
5201 West Freeway, Suite 100
Fort Worth, Texas 76107
817-735-4000

*Family law attorneys may be of assistance in making sure the structured settlement, verdict, and/or trusts and comply with any family law matter, including child support and/or spousal support.

Attorneys with experience in 468B and 142 Special Needs Trusts, tax issues, probate and creative side trusts include:

Phil McCrury – Fort Worth, Texas
Shannon, Gracey, Ratliff & Miller, L.L.P.
777 Main Street, #3800
Fort Worth, Texas 76102
817- 336-9333 Main number

Ron Cresswell – Dallas, Texas
Locke, Liddell & Sapp, L.L.P.
2001 Ross Avenue, Suite 3000
Dallas, Texas 75201
214-849-5500 – Main Number

Attorney with experience with in governmental entitlements, continued protection of governmental entitlements, special needs trusts and probate:

Deborah Green – Austin, Texas
Green & McCullar
7200 N. Mopac, Suite 250

Austin, Texas 78731
Phone: 512-342-9933

IX. CONCLUSION

In this time of economic uncertainty, the prudent plaintiff's lawyer will need to go an extra step in advising the client regarding structured settlements. If the lawyer has to ask himself or herself whether a certain step should be taken, the first self-response should be, "I probably should." The second self-response should be, "Now who can I call to help me with this?" Question the defense lawyer, the adjuster, the defense broker, your own broker, and research the life insurance entities involved, including the ultimate assignee who is going to be responsible for payments at the end of the day. As a well-known actor once said, "Trust, but verify."

X. RELEVANT STATUTES

The Structured Settlement Statutes are found in the Tex. Civ. Prac. & Rem. Code, Chapters 139, 141, and 142 (West 2002).

CHAPTER 139:

Section 139.101 Written Offer Required

An offer of structured settlement made after a suit to which this chapter applies has been filed must be:

- (1) made in writing; and
- (2) presented to the attorney for the claimant.

Section 139.102 Presentation to Claimant

- (a) As soon as practicable after receiving the offer under Section 139.101, but not later than any expiration date that may accompany the quotation that outlines the terms of the structured settlement offered, the attorney receiving the offer shall present the offer to the claimant or the claimant's personal representative.
- (b) To the extent reasonably necessary to permit the claimant or the claimant's personal representative to make an informed decision regarding the acceptance or rejection of a proposed structured settlement, the attorney shall advise the claimant or the claimant's personal representative with respect to:
 - (1) the terms, conditions, and other attributes of the proposed structured settlement; and
 - (2) the appropriateness of the structured settlement under the circumstances.

CHAPTER 141:

Section 141.001 Short Title

This chapter may be cited as the Structured Settlement Protection Act.

Section 141.002 Definitions

In this chapter:

- (1) “Annuity Issuer” means an insurer that has issued a contract to fund periodic payments under a structured settlement.
- (2) “Court” means:
 - (A) the court of original jurisdiction that authorized or approved a structured settlement; or
 - (B) if the court that authorized or approved the structured settlement no longer has jurisdiction to approve a transfer of payment rights under the structured settlement under this chapter, a statutory county court or a district court located in the county in which the payee resides.
- (3) “Dependents” includes a payee’s spouse, minor children, and all other persons for whom the payee is legally obligated to provide support, including alimony.
- (4) “Discounted present value” means the present value of future payments determined by discounting the payments to the present using the most recently published Applicable Federal Rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.
- (5) “Gross advance amount” means the sum payable to the payee or for the payee’s account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from the consideration.
- (6) “Independent professional advice” means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser.
- (7) “Interested party” means, with respect to any structured settlement:
 - (A) the payee;
 - (B) any beneficiary irrevocably designated under the annuity contract to receive payments following the payee’s death;
 - (C) the annuity issuer;
 - (D) the structured settlement obligor; and
 - (E) any other party that has continuing rights or obligations under the structured settlement.
- (8) “Net advance amount” means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under Section 141.003(5).
- (9) “Payee” means an individual who is receiving tax-free payments under a structured settlement and proposes to transfer payment rights under the structured settlement.
- (10) “Periodic payments” includes both recurring payments and scheduled future lump-sum payments.
- (11) “Qualified assignment agreement: means an agreement providing for a qualified assignment within the meaning of Section 130, Internal Revenue Code of 1986 (26 U.S.C. 130), as amended.

- (12) “Settled claim” means the original tort claim or workers’ compensation claim resolved by a structured settlement.
- (13) “Structured settlement” means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim or for periodic payments in settlement of a workers’ compensation claim.
- (14) “Structured settlement agreement” means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement.
- (15) “Structured settlement obligor” means, with respect to any structured settlement, the party that has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.
- (16) “Structured settlement payment rights” means rights to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, if:
 - (A) the payee is domiciled in or the domicile of principal place of business of the structured settlement obligor or the annuity issuer is located in this state;
 - (B) the structured settlement agreement was authorized or approved by a court located in this state; or
 - (C) the structured settlement agreement is expressly governed by the laws of this state.
- (17) “Terms of the structured settlement” include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement, and any order or other approval of the court.
- (18) “Transfer” means any sale, assignment, pledge, hypothecation, or other alienation or encumbrance of structured settlement payment rights made by a payee for consideration, except that the term does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to the insured depository institution, or is agent or successor in interest, or to enforce the blanket security interest against the structured settlement payment rights.
- (19) “Transfer agreement” means the agreement providing for a transfer of structured settlement payment rights
- (20) “Transfer expenses” means all the expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including court filing fees, attorney’s fees, escrow fees, lien recording fees, judgment and lien search fees, finders’ fees, commissions, and other payments to a broker or other intermediary, except that the term does not include preexisting obligations of the payee payable for the payee’s account from the proceeds of a transfer.
- (21) “Transferee” means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

Section 141.004 Approval of Transfers of Structured Settlement Payment Rights

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order based on express findings by the court that:

- (1) the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents;
- (2) the payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received the advice or knowingly waived the advice in writing; and
- (3) the transfer does not contravene any applicable statute or an order of any court or other governmental authority.

Section 141.005, Effects of Transfer of Structured Settlement Payment Rights

Following a transfer of structured settlement payment rights under this chapter:

- (2) the structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments;
- (3) the transferee shall be liable to the structured settlement obligor and the annuity issuer:
 - (A) if the transfer contravenes the terms of the structured settlement, for any taxes incurred by the parties as a consequence of the transfer; and
 - (B) for any other liabilities or costs, including reasonable attorney's fees, arising from compliance by the parties with the order of the court or arising as a consequence of the transferee's failure to comply with this chapter;
- (4) the transferee shall be liable to the payee:
 - (A) If the transfer contravenes the terms of the structured settlement, for any taxes incurred by the payee as a consequence of the transfer; and
 - (B) For any other liabilities or costs, including reasonable attorney's fees, arising as a consequence of the transferee's failure to comply with this chapter;
- (5) neither the structured settlement obligor nor the annuity issuer may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees; and
- (6) any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this chapter.

Section 141.006, Procedure for Approval of Transfers

- (a) An application under this chapter for approval of a transfer of structured settlement payment rights shall be made by the transferee and shall be brought in the court.
- (b) At least 20 days before the date of the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under Section 141.004, the transferee shall file with the court and serve on all interested parties a notice of the proposed transfer and the application for authorization, including with the notice:
 - (1) a copy of the transferee's application;
 - (2) a copy of the transfer agreement;
 - (3) a copy of the disclosure statement required under Section 141.003;
 - (4) a listing of each of the payee's dependents, together with each dependent's age;
 - (5) notice that any interested party is entitled to support, oppose, or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing; and
 - (6) notice of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed to be considered by the court.
- (c) Written responses to the application under Subsection (b)(6) must be filed on or after the 15th day after the date the transferee's notice is served.

Section 141.007 General Provisions: Construction

- (a) The provisions of this chapter may not be waived by any payee.
- (b) Any transfer agreement entered into by a payee who resides in this state must provide that disputes under the transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of this state. The transfer agreement may not authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.
- (c) Transfer of structured settlement payment rights may not extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and agreed to maintain procedures reasonably satisfactory to the structured settlement obligor and the annuity issuer for
 - (1) periodically confirming the payee's survival; and
 - (2) giving the structured settlement obligor and the annuity issuer prompt written notice in the event of the payee's death.
- (d) A payee who proposes to make a transfer of structured settlement payment rights may not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on any failure of the transfer to satisfy the conditions in this chapter.

- (e) Nothing contained in this chapter may be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into before the effective date of this chapter is valid or invalid.
- (f) Compliance with the requirements in Section 141.003 and fulfillment of the conditions in Section 141.004 are solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor not and annuity issuer bear any responsibility for, or any liability arising from, noncompliance with the requirements of failure to fulfill the conditions.

Chapter 142, Management of Property Recovered In Suit by A Next Friend or Guardian Ad Litem

Section 142.008 Structured Settlement

- (a) In a suit in which a minor or incapacitated person who has no legal guardian is represented by a next friend or an appointed guardian ad litem, the court, on a motion from the parties, may provide for a structured settlement that:
 - (1) provides for periodic payments; and
 - (2) is funded by:
 - (A) an obligation guaranteed by the United States governmental or
 - (B) an annuity contract that meets the requirements of Section 142.009.
- (b) The person obligated to fund a structured settlement shall provide to the court:
 - (1) a copy of the instrument that provides funding for the structured settlement; or
 - (2) an affidavit from an independent financial consultant that specifies the present value of the structured settlement and the method by which the value is calculated.
- (c) A structured settlement provided for under this section is solely for the benefit of the beneficiary of the structured settlement and is not subject to the interest payment calculations contained in Section 117.054, Local Government Code.

Section 142.009 Annuity Contract Requirements for Structured Settlement

- (a) An insurance company providing an annuity contract for a structured settlement as provided by Section 142.008 must:
 - (2) be licensed to write annuity contracts in this state;
 - (3) have a minimum of \$1 million capital and surplus; and
 - (4) be approved by the court and comply with any requirements imposed by the court to ensure funding to satisfy periodic settlement payments.
- (b) In approving an insurance company under Subsection (a)(3), the court may consider whether the company;

- (1) holds an industry rating equivalent to at least two of the following rating organizations:
 - (A) A.M. Best Company: A++ or A+;
 - (B) Duff & Phelps Credit Rating Company Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA;
 - (C) Moody's Investors Service Claims Paying Ability Rating: Aa3, Aa2, Aa1, or aaa; or
 - (D) Standard & Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
- (2) is an affiliate, as that term is defined by Article 21.49-1, Insurance Code, of a liability insurance carrier involved in the suit for which the structured settlement is created; or
- (3) is connected in any way to a person obligated to fund the structured settlement.