

"Make or Break: Using Structured Settlements in Mediation"

Daily Journal Extra
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Twin girls needed a heart procedure soon after their premature births, but when the nurse inserted a tube into one of the infants to take an X-ray, the nurse went too far and pierced the child's heart.

"Technically, the heart was flooded, and the baby suffocated," Los Angeles mediator Lee Jay Berman says. "Literally, the baby drowned to death."

Berman mediated the subsequent medical-malpractice case brought by the mother against the hospital.

The hospital's insurance company brought structured-settlement brokers to the mediation session, who suggested various upfront cash payments to resolve the case.

But the mother wasn't interested. "The lump-sum numbers just weren't moving her," Berman says. "She was more interested in planning for her child's future."

In particular, the mother wanted the proceeds from the case to fund the other child's education.

"She kept saying, 'I want her [dead] sister to provide her college education for her,'" Berman says.

The two sides settled for slightly less than \$200,000, which after attorney fees amounted to net proceeds of \$135,000 funded through the purchase of an annuity from an insurance company, which provides a guaranteed income stream based on investing the money in highly reliable bonds.

According to the annuity's payment schedule, the child would receive \$40,000 each year from the time she turned 18 until she reached 21.

At 25, she'd receive \$100,000. At 30, she'd get \$135,000. From 35 through the rest of her life, \$1,100 a month was coming to her.

The total amount would come close \$700,000 based on a \$200,000 settlement, Berman says.

"The plaintiff and her attorney accepted it solely because of the structure," he says.

Some plaintiffs' counsel are not aware of the advantages - and risks - involved in structuring settlements, according to Los Angeles attorney William L. Winslow.

For clients severely injured in accidents, their case may involve the biggest financial planning of their lives, Winslow says.

"That means there's a lot to think about," Winslow, a partner at Farmer & Ridley, says.

He is hired by either side in a personal-injury case to advise on how to configure a settlement.

Winslow's counseled lawyers on structured settlements since 1988, including structures as high as \$27 million and \$46 million. Before that, he worked as general counsel at Merrill Lynch Settlement Services Inc.

Plaintiffs' litigators concentrate on the battle, Winslow says.

"They're great with cutlass, pistol and rapier," he says.

But Winslow claims they're not as knowledgeable about what to do when the defense says there's enough "gold in my pocket" to settle.

That's when a structured-settlement broker whom a lawyer likes and trusts would be a great benefit, he says.

Thinking about the best way to structure a settlement should not be an afterthought.

"It's not a p.s.," Winslow says.

With the popularity of mediation skyrocketing in recent years, there is increased interest about what role, if any, structured-settlement advisers should play in the process.

That's the topic of a panel discussion today in Palm Springs at the annual meeting of the National Structured Settlements Trade Association, a 600-member organization that provides continuing legal education for brokers and lobbies state and federal governments on policies affecting the industry.

Structured settlements date to the 1960s. But they gained popularity in the 1980s, after Congress approved tax rules to encourage their use. In many cases, periodic payments from structured settlements are tax-free and protected from creditors. In personal-injury cases, lump-sum proceeds are also tax-free, but the income from investing those proceeds may be taxed.

"Structured-settlement proposals are often the difference between cases successfully settling or not at a mediation," says panel member Geoffrey B. White, founder of Newton Massachusetts' Legal Options Inc., an alternative dispute resolution company.

But experts in the legal industry disagree about whether a broker should become involved in mediation. Critics say these specialists sometimes can interfere with a case by injecting themselves too early into the negotiations.

There's also debate about the wisdom of each side having its own expert come to the session, as opposed to the typical situation in which only the defense brings one.

These brokers often are used in workers' compensation and personal-injury cases, ranging from a car accident to dog bites, medical malpractice to product liability. They also advise on employment cases such as wrongful termination and sexual harassment. Business litigation involving partnerships and sole proprietorships also can benefit from their expertise.

Brokers advise lawyers and their clients on how to structure settlements by combining present and future lump-sum payments with a regular stream of periodic payments, usually funded through the purchase of an annuity from a life insurance company.

There are myriad reasons for choosing a structured settlement, but in many cases the injured party is a minor who isn't old enough to manage money or an adult who requires long-term medical care or is not fiscally responsible.

"They're a boozier, [or] they're a gambler," plaintiffs' counsel Ned Good of Pasadena's Good West & Schuetze says. "You know they're gonna blow [a lump-sum upfront cash settlement] in a year."

"It's protection against mismanagement and incompetency," Good adds. "It's a chastity belt."

Attorneys feel obligated to care for their clients, he says. Through a structured settlement, lawyers can ensure that their clients rehabilitate themselves in the "best and wisest" way possible, Good says.

A "clear majority" of cases worth \$1 million or more have some structure component, Winslow says.

But minors may benefit from structuring even less than \$100,000, he says.

Getting the best deal for a plaintiff means bargaining with the defense on the proper mix of upfront cash and deferred annuity payments. The defense benefits by paying less while arguing that the invested money grows over time to more closely match the amount of the plaintiff's damage claim.

"It's all about planning," Winslow says. "Yeah, I think there's some do's and don'ts, for sure."

He recommends obtaining quotes from a broker at least one week before the mediation, if an attorney knows that at least part of the potential settlement will be structured.

Brokers are known through word of mouth as well as advertising in legal journals and on the Web.

"You don't want to start thinking about what the budget might fit at the mediation," Winslow says.

If a deal is reached without a structured component, then adding one later may run afoul of the tax rules regarding "constructive receipt," experts say.

The Internal Revenue Service determines whether an individual has received income based on this theory of "constructive receipt," which maintains that, if an individual has control of the money to be received, then that's considered income and will be taxed.

By giving up control through a structured settlement, a person is not considered in constructive receipt, and taxes may be deferred or avoided.

"Once the case settles and the check is issued, it's too late," structured-settlement specialist Teddy Snyder of Newport Beach's Ringler Associates says.

Both Winslow and Snyder advise that a broker attend the mediation.

"We can do the most good if we're actually attending the mediation and listening to the parties' concerns," Snyder says. "Sometimes, people don't think of it. Sometimes, we're called after the fact."

A case may involve an injured parent with children who may benefit from an annuity structured into a college fund, she says.

"[But] nobody thinks about it because it has nothing to do with liability or damages," Snyder says.

Berman is prepared even if the lawyers are not.

"I keep a list of a handful that I have found to be extra-qualified," he says of structured-settlement experts.

If a plaintiff during mediation expresses a wish that triggers in Berman's mind a need for a structured settlement, then he is ready to offer the names of specialists.

Structured settlements can relieve the financial pressures of long-term medical expenses, home mortgage payments or supporting other family members, according to the National Structured Settlements Trade Association Web site.

Berman says he prefers having a structured-settlement broker in mediation.

"Structured settlements aren't the magic bullet, but, given the particular needs of a plaintiff, they can work wonders in helping us craft a truly custom-tailored settlement," Berman says.

But Good, a veteran litigator, says he doesn't use brokers in mediation.

"To me, it's of no value," he says. "I know what the return of money is [on annuities]. I don't need anybody to tell me what the math is."

Once Good agrees on a settlement figure that includes a structured component, he says he takes the next two or three weeks to check with a broker he trusts to see what are the best terms he can get.

Usually, the defense side brings a broker, partly because insurance carriers benefit by deferring some of the settlement payments. But that's increasingly changing with the plaintiff's counsel bringing his or her own expert.

"It's not always that way, but it's more common" that the plaintiff's side hires an adviser, broker John Vaclavik Jr. of the James Street Group says.

Vaclavik's company, based in Austin, Texas, works exclusively on behalf of plaintiffs' counsel.

He says he's noticed the trend within the last five years "to levelize the playing field so both sides have experts."

Ringler Associates is hired mostly by the defense.

"[But] we're working hard to develop our plaintiff business," Snyder says.

Ringler has reached out to consumer attorneys in Los Angeles through advertising and makes private presentations to law firms and puts on education programs for bar associations, Snyder says.

Winslow is in favor of each side having an adviser.

"Yeah, think real estate [transactions]," Winslow says. "It's complicated enough that you need your own partisan."

But others question whether that's a good policy.

"[At Ringler Associates], we say we're the only broker you need," Snyder says.

She says she can look out for both sides' interests.

"A good broker is going to be there churning out numbers," Snyder says. "The numbers are the numbers. I'm happy to give information. In general, the information is out there for all brokers."

San Diego mediator Scott S. Markus says that trust is an issue and that plaintiffs may see a broker brought in by the defense as aligned with that side.

That's more than a perception problem, Good says.

The defense uses structured settlements to make small amounts of money look deceptively bigger because the annuities earn interest and the payments are spread over time, he says.

Winslow shares that concern.

"What counts is present value, not total payout," he says.

Inflation makes the same amount of money worth less over time.

"There is such a potential for distortion," Winslow says.

He recalls a case that settled in 2002 involving a brain-damaged 3-year-old girl.

The structure paid lump sums of hundreds of thousand of dollars but years into the future.

Meanwhile, the structure provides only \$500 a month until the child is 18, so she doesn't benefit from the settlement during her critical formative period, when her family needs to pay for experts to help her develop cognitive and speech skills, Winslow says.

"They're middle-class parents, so it's not quite the disaster it would be if they were poor parents," he says.

Brokers for the defense know the questionable value of some types of structured settlements, Good says. And the commission they get for selling an annuity may cloud their judgment, he says.

"They're not hired to look out for what's best for the victim," Good says. "Their client is the insurance company that's paying them. There's a potential conflict of interest."

He claims that some brokers kick back money to claim managers of insurance carriers in order to gain more business.

Snyder doesn't buy the allegations of a conflict between the goals of brokers and plaintiffs.

"Actually, there's a conflict of interest between us and the defense," she says. "The bigger the settlement, the more we are likely to make. If anything, we are incentivized to increase the amount being structured, not to keep it low."

Besides, a good plaintiffs' lawyer knows the value of a structured settlement and can shop around with other brokers for alternatives, defense counsel Keith G. Bremer says.

"You either like the option or you don't," Bremer of Newport Beach's Bremer Whyte Brown & O'Meara says. "I don't think we're pulling the wool over anybody's eyes."

Berman says it's generally enough to have one broker at the table. He's concerned about possible friction.

"It would be a bit like having two stockbrokers at the table at the same time, each competing for the investment of the plaintiff's funds," Berman says.

Disputes among brokers sometimes do break out over the split of the commission, which is usually 2 percent to 4 percent, Snyder says.

If each side has its own broker, attorneys need to make their advisers agree to a reasonable split, which is usually 50-50 unless one side does much more, Winslow says.

"Don't let brokers fight with each other or anybody else," he says. "It's unacceptable."

Markus of Markus Kruis Mediation says most of the time advisers are "professional" and "passive." But sometimes, they've become involved too early on in the process when the two sides are very far apart, he says.

They try to structure interim positions in negotiations, he says. He's seen that in a handful of cases.

"They really want to push the structure early in the mediation," Markus says. "I don't see why that person needs to be in the mediation for the first five hours."

He gives an example of a mediation in which the defendant's settlement offer is \$150,000 and the plaintiff's side is seeking upper six figures or more.

"What's the point of structuring a \$150,000 offer?" Markus says. "I won't say it's counterproductive, but it's probably a waste of time and distracting, I'd say."

Three or four years ago, a defense broker wanted to offer a structure, but Markus said no because the two sides were too far apart. The broker tried to present the offer, anyway.

"That's an extreme situation, and, obviously, I won't name names," he says.

The solution is to make clear that that kind of behavior won't be tolerated, Bremer says.

"A good mediator and good lawyers can control that environment," he says.

Structuring early can be useful, Snyder says.

"In the mediation itself, I don't see it as a problem as long as it's a good-faith offer," she says. "It gets everybody thinking about the numbers in the form of a structure."

And a structure can make all the difference.

"A good structured specialist can help us settle a case that wouldn't settle without their skills," Berman says.

This article was published in the Daily Journal Extra, April 18, 2005 issue.