Given the continuing problem of escalating trial verdicts, defense attorneys and their clients may be more inclined, as never before, to avoid trial in personal injury lawsuits. This is particularly true in mass tort litigation and in cases involving a highly sympathetic claimant—a brain damaged child, for example.
So settlement is often more appealing than trial. But how can the defense attorney achieve the best settlement possible for the client? There’s no one answer, no pat solution that fits every case. However, after well over 20 years in defense work, I am convinced that a crucial part of the solution is the more frequent and more strategic use of structured settlements.

In recent years, structured settlements have become an increasingly effective way to settle difficult physical injury claims. They are now utilized by attorneys representing all sorts of clients, including such prominent plaintiffs’ attorneys as Philip H. Corboy in Chicago and Joseph Jamail in Houston. Structured settlements have also won praise from such diverse groups as insurance associations, advocates for the disabled, consumer groups, and the U.S. Treasury Department.

Yet some defense attorneys inexplicably remain hesitant to use structured settlements. Many do not fully realize what makes them attractive to the plaintiff. Others may not understand the financial implications. Regardless, defense attorneys will benefit their clients (and hence their own practices) by aggressively incorporating the structured settlement option into their negotiating strategy.

Background

The first structured settlements appeared in the early 1970s, as a means of resolving birth defect cases involving thalidomide. They did not attract widespread use until 1983, when President Reagan and a bipartisan coalition in Congress agreed on legislation (P.L. 97-473) to formalize structured settlements. By federal law, that annuity must be held by the defendant or a third-party assignee, advocates for the disabled, consumer groups, and the U.S. Treasury Department.

At its core, the structured settlement benefits the plaintiff, who receives both a guaranteed income stream and tax-free payments—advantages not available if he or she takes a lump sum cash payment. The plaintiff does not “own” the annuity that funds the payments. By federal law, that annuity must be held by the defendant or a third-party assignee. In that way, the plaintiff (or those who would otherwise take advantage of the plaintiff’s settlement proceeds) will not be able to dissipate the settlement prematurely.

Indeed, federal law is quite explicit that, once a plaintiff agrees to a settlement, he or she may not “increase, decrease, accelerate or defer” the payments. IRC §136(c)(2)(B).

Though the law focuses on the benefits to the plaintiff, there’s an often overlooked implication for the defense, says Joe Costello, a longtime settlement broker at EPS Settlements, and President of the National Structured Settlements Trade Association (www.NSSTA.com). “Congress in effect codified a proven way for the defense and plaintiff to agree on a settlement without a jury trial and without a cash settlement,” says Costello. “Jury trials are inherently risky for both sides. Structures reduce that risk and increase certainty.”

For the defense bar, there is another important consideration. Offering a structured settlement helps focus both sides on future payments for the plaintiff’s basic living needs, medical needs, and lost wages. This often helps inch both sides toward a mutually acceptable closure. As Costello notes, “Negotiations are usually not creative. If I’m at $300,000 and you’re at $500,000, we might compromise at $400,000. But is that sufficient for the plaintiff’s needs? Once you bring in a structured settlement, you’ll do things based on needs.”

The tremendous tax advantages to the plaintiff that Congress created to advance the use of structures—tax advantages not available if the plaintiff takes a lump sum settlement—can help resolve difficult cases. Structures can create a “win-win” situation for both sides.

Using Structures: A Primer

Some defense attorneys may shy away from structured settlements, because they are either unfamiliar with the process, or suspicious about bringing another party, such as a settlement broker, to the negotiating table. Carefully selecting a highly qualified professional structured settlement consultant should allay these concerns.

The process for bringing structures into pre-trial negotiations is challenging. Claims representatives will identify open cases in which a structure seems appropriate, and then bring in an approved structured settlement broker. From there, the focus should be on the plaintiff. How to make him or her whole? How to replicate lost earnings? Future medical and living needs?

Information is crucial. “It’s very important for the structured settlement broker to gather as much information as possible about needs and objectives of claimants prior to preparing an offer,” advises Chuck Harlan, President of Structured Settlements Financial Associates in Baltimore. “Where possible, the broker should really meet with the claimant.” continued on page 43
The nature of the settlement talks should also change. "In most cases, it's counterproductive to make cash-only settlement offers concurrent with structured settlement offers," says Len Blonder of EPS Settlements in Los Angeles. "That's because you're trying to translate needs of an injured party into a settlement that replicates his or her future income."

In cases involving a minor, the tax advantage of a structure can be particularly apparent. The federal tax code provides that for children under age 14, income on investment is taxed at the parents' (or guardian's) rate. Income to minors may also reduce the exemption permitted to parents or guardians. Under a structured settlement, no matter what the child's age or parents' income, the periodic payments are free of federal taxes and the exemption is unaffected.

The defense team, working together and taking advantage of federal tax benefits available to the plaintiff, can design a solution that's financially attractive to the plaintiff and his or her lawyer.

The structured settlement solution should always address any special needs the plaintiff may have. This is important because, as any defense attorney knows, negotiations can sometimes flounder on what may appear to be incredibly extraneous issues. Chuck Harlan recalls a case involving a Maryland man who sustained significant personal injuries in an accident. The major impediment to settlement was the plaintiff's desire for enough money to buy a dairy farm. The defense would not agree to a lump sum payment large enough to purchase the dairy farm, so the dispute continued.

That's when the defense lawyer in the case brought Harlan in. In a few days, he had put together a payment plan for the claimant that took advantage of the tax-free payment stream enjoyed by structured settlements, plus the interest deduction from the mortgage on the dairy farm. Taking advantage of the dual tax benefits, the claimant agreed to settle and the case was immediately resolved. (An interesting side note: Shortly after the claimant purchased his dairy farm, prices for dairy products dropped considerably. The claimant wound up losing his farm, but still had his structured payments on which to fall back. Though it's obviously speculation, one must wonder if he would have been similarly "fluid" had he taken his entire settlement in a lump sum.)

Some defense lawyers, accustomed to negotiating one-on-one with plaintiff's counsel, may initially find it cumbersome to create a settlement "team" that includes a claims professional and a structure broker. And, of course, there is no requirement that these professionals be involved. Still, good results speak for themselves. Having a qualified structured settlement broker in the room, listening to the negotiations, can provide you with a wealth of helpful information. A good broker can discuss the plaintiff's needs, analyze numbers within the carrier's cost limitations, and suggest ways to resolve differences. The bottom line is that the structure broker's job is to listen and, if he does his job well, he will recognize information that helps settle the case.

Kyle Hording, a structured settlements broker in Pasadena, recalls, "Once I was at a meeting which was going nowhere. We all took a break. The plaintiffs talked among themselves about Social Security and whether it would even be
Structures and Case Size

44

been advertised in great detail to the opponent.

the testimony that the friendly witness will

the testimony of other witnesses. Furthermore,

longer be refreshed or molded to conform with

once captured in a deposition transcript, can no

avoided. The testimony of that friendly witness,

are likely to be available at trial, they should be

taken of, for instance, friendly witnesses who

were being presented in the courtroom.

As a result, aged, departing, or ill wit-
tnesses should be carefully interviewed and

trial. As a result, aged, departing, or ill wit-
tnesses should be carefully interviewed and

tried to motions and discovery disputes that one ini-
tiates and to motions and discovery issues

brought forward by the other side. Why not

ignore the one or two counts that might be re-

moved from the case by summary judgment?

Why not allow a particular question to be an-
swered or category of documents to be pro-
duced, rather than relying on the case to stand
while these issues are resolved by the court?

Negotiations and Experts

The deepest hole into which the defense advo-
cate should share with plaintiff’s counsel the
cost of the structure. In the early years of struc-
tured settlements, there was some concern among
outside defense attorneys have embraced this
shift. They tend to settle more cases, which

perspective of the plaintiff’s attorney. There is an increas-
ing interest in the plaintiffs’ bar in the use of
structures, “says Rominger. A leading structured
settlement brokerage company, shows statistics
indicating that 52 percent of its 1999 cases
settled for less than $50,000. The company is
known for handling a large volume of workers’
compensation cases, which should increase
as a result of the 1997 change in the law men-
tioned above.

The Plaintiff’s Counsel’s
Perspective

Final no discussion of personal injury settle-
ments would be complete without a mention of
the plaintiff’s attorney. There is an increas-
ning interest in the plaintiffs’ bar in the use of
structured settlements as a means of ensur-
ing their clients’ financial security. “Since the
mid-1990s, there has been a surge in interest
among plaintiffs’ lawyers in structures,” says
Rominger. “Injury Robinson IV, President of Struc-
tage Settlements in Kentucky. “More and more
outside defense attorneys have embraced this
shift. They tend to settle more cases, which

Settlement is a By-Product

In all but a few cases, the only witnesses
who should be deposed are those whose posi-
tion is hostile or adverse to the inquirer. Such
depositions should be limited to gauging the
effectiveness of the witness and learning just
how the opposition witness will describe the
key events, the key meetings, the key docu-
mments, and other key pieces of evidence that
will be central features of the trial. Armed with
this knowledge, the advocate can prepare his
or her own case, recognizing that it is unsafe
to base one’s case on points scored through
cross-examination of the opponent’s witnesses.
On the contrary, one’s own witnesses, by tell-
ing their own version of events, must meet
and neutralize the adverse evidence the other
side will present.

The defense advocate dedicated to true trial
preparation avoids motion practice and dis-
coverys disputing the greatest extent possible.
Indeed, every potential motion and every po-
tential discovery scuffle should be analyzed
by asking, “Will this really matter at trial?”
This analysis can be useful applied both to
motions and discovery disputes that one initi-
tiates and to motions and discovery issues
brought forward by the other side. Why not
ignore the one or two counts that might be re-
moved from the case by summary judgment?

Settlement is a By-Product, from page 17

is not truly a part of discovery. Rather, testi-
momy of this type is being taken, at least poten-
tially, for use in lieu of live testimony at trial.
As a result, aged, departing, or ill wit-
tnesses should be carefully interviewed and

for preparing for their depositions, just as if they
were being presented in the courtroom.

To the extent that depositions need not be
taken of, for instance, friendly witnesses who
are likely to be available at trial, they should be
avoided. The testimony of that friendly witness,
once captured in a deposition transcript, can no
longer be refreshed or molded to conform with
the testimony of other witnesses. Furthermore,
the testimony that the friendly witness will
provide for the advocate’s case at trial has now
been advertised in great detail to the opponent.

In all but a few cases, the only witnesses
who should be deposed are those whose posi-
tion is hostile or adverse to the inquirer. Such
depositions should be limited to gauging the
effectiveness of the witness and learning just
how the opposition witness will describe the
key events, the key meetings, the key docu-
mments, and other key pieces of evidence that
will be central features of the trial. Armed with
this knowledge, the advocate can prepare his
or her own case, recognizing that it is unsafe
to base one’s case on points scored through
cross-examination of the opponent’s witnesses.
On the contrary, one’s own witnesses, by tell-
ing their own version of events, must meet
and neutralize the adverse evidence the other
side will present.

The defense advocate dedicated to true trial
preparation avoids motion practice and dis-
coverys disputing the greatest extent possible.
Indeed, every potential motion and every po-
tential discovery scuffle should be analyzed
by asking, “Will this really matter at trial?”
This analysis can be useful applied both to
motions and discovery disputes that one initi-
tiates and to motions and discovery issues
brought forward by the other side. Why not
ignore the one or two counts that might be re-
moved from the case by summary judgment?

Settlement is a By-Product, from page 17

is not truly a part of discovery. Rather, testi-
momy of this type is being taken, at least poten-
tially, for use in lieu of live testimony at trial.
As a result, aged, departing, or ill wit-
tnesses should be carefully interviewed and

for preparing for their depositions, just as if they
were being presented in the courtroom.

To the extent that depositions need not be
taken of, for instance, friendly witnesses who
are likely to be available at trial, they should be
avoided. The testimony of that friendly witness,
once captured in a deposition transcript, can no
longer be refreshed or molded to conform with
the testimony of other witnesses. Furthermore,
the testimony that the friendly witness will
provide for the advocate’s case at trial has now
been advertised in great detail to the opponent.