

Key Points To Consider When Implementing A Structured Settlement

Most experienced litigators are well aware of the benefits of structured settlements in personal injury claims. The “win-win” proposition of securing guaranteed, tax-free income for an injured party while saving money for insurers has existed in Canada for well over 25 years. Over those years, the role of the structure broker has expanded significantly. Today, the broker is a terrific (and free) resource for plaintiff and defence lawyers, and casualty claim representatives alike, providing valuable expertise to help “make sense” of the numbers in personal injury claims, whether those claims are ultimately structured or not.

Before negotiations begin, the structure broker can help determine the value of future economic requirements in as simple or detailed a fashion as you require. From developing comprehensive future care cost analyses within a week, to preparing simple “multipliers” in just a few minutes, the broker can be of great assistance to you in determining the value of a claim.

At mediation, the structure broker can provide on-site annuity costs of future financial requirements, or translate offers into meaningful future payment streams. More importantly, during the considerable “down time” experienced at most mediations, the broker can spend valuable time with the injured party explaining the benefits of structured settlements and providing illustrative examples.

This dialogue will not only ensure that the plaintiff understands the structure concept and its benefits, but can demonstrate that a settlement offer will or will not meet the plaintiff's real future needs. The result is that the probability of achieving a settlement is greatly enhanced.

But what do you, as a plaintiff or defence litigator, need to know about structured settlements in order to protect your client, and yourself, when a structure forms part of the ultimate settlement? Negotiations are complex enough, without worrying whether you've missed something important when it comes to the structure component.

Here are some key issues to consider when negotiating and implementing structured settlements.

PRE-NEGOTIATION

1. Should I Consult a Structure Specialist?

If you're asking the question, the answer is probably "yes". Even if you're not sure whether the matter will settle, it's worth your time to contact a structure broker. Are you reluctant because there might not be a structure at the end of the day? Don't be. Whether or not you think a structure may ultimately be implemented, the structure broker is a free resource available to help you put values on your best and worst case scenarios for heads of damage relating to future economic loss.

2. Have I Forwarded Medical Information to the Structure Broker?

Providing medical information in advance of the mediation or settlement meeting allows the structure broker to obtain impairment rating (life expectancy) assessments from the various life insurers in the structure market.

An "**impairment rating**" is a number of years that each life insurer adds to an injured person's actual age, in order to create an artificial age for the purpose of providing structured settlement quotations **based on someone's lifetime**. An impairment rating of +10 years on a 40 year-old male means that he will be treated as 50 years of age, for structured settlement purposes. The result is that the cost to provide a specific monthly payment for his lifetime is reduced. In the reverse, the monthly payment that can be generated based on a set funding amount is increased.

A lifetime structure quotation eliminates the need to argue over life expectancy, since lifetime means just that – payments will be made for as long as the individual remains alive, whether that be for one more month, or for 50 more years. There is no need to dispute life expectancy, because all the mortality calculations are left up to the life insurer that produced the structure quotation, and all the risk lies with that insurer as well.

Let's take the example of a tort future care claim for \$5,000 per month. The ABC Life Insurance Company might assess a +20 year impairment rating on a 50 year old female (thereby treating her as age 70) and might charge, say, \$860,000^u for a lifetime structure. This price might be based on an assumption that ABC will only have to pay this lady for another 16 years (to a statistical age of 86 – the estimated life expectancy of a 70 year-old woman). However, if she subsequently lives for another 30 years, she will be paid every month for every one of those 30 years, and the actuaries at ABC Life Insurance Company may wish they had charged \$1,200,000 instead of \$860,000 for that structure.

Put simply, that is ABC's responsibility, not yours, and not your client's.

Plaintiff's counsel might be inclined to forego the step of providing medical reports and request structure figures based on normal life expectancy. However, if there is any significant injury or pre-existing medical condition, the structure figures really aren't realistic without an impairment rating assessment. If the impairment rating "favours" the

defence by resulting in a lower cost, the same rating will, in turn, “favour” the plaintiff by producing more income once the lifetime structure is actually funded with a specific amount.

Regardless of which side of the table you represent, submitting medical information to the structure broker will allow for the most accurate structure figures to be produced for use during settlement negotiations, and will eliminate any dispute over life expectancy which might otherwise arise.

In any event, more often than not, defence counsel will have submitted medical information, and will attend the mediation or settlement meeting with structure figures that are based on an assessed impairment rating.

Although some impairment ratings can be obtained within 24 hours of receiving medical information, it is best to allow the structure broker one week to obtain assessments from all of the available life insurers.

3. Have I Obtained Preliminary Structure Figures and Introductory Information?

You probably have an idea of the anticipated settlement value range for your case. Regardless, it is helpful to have some illustrative structure figures prepared in advance of the mediation or settlement meeting.

A broker can provide structure proposals containing three or four illustrative options based upon a specific funding amount. These options illustrate roughly what can be generated on a monthly or annual basis, in a variety of different structure forms.

Some counsel prefer to have structure “factors” prepared in advance of a mediation or settlement meeting. This might include determining the cost to provide \$10,000 per year on a monthly basis to a certain age (for future income loss), or for life (for future care requirements). You might also ask for a structure printout showing what \$100,000 funding would generate on a monthly basis.

If you know that it costs \$200,000 to produce \$10,000 a year for the injured person’s lifetime, you can quickly calculate (“pro-rate”) that \$20,000 per year would cost roughly \$400,000 ($\$200,000 \times 2$). Similarly, if \$100,000 structured can produce \$500 in tax-free monthly income, then you know that a \$500,000 structure will produce roughly \$2,500 a month ($\500×5). Such pro-rating produces accurate estimates for most situations, but you should ultimately confirm this with your structure broker.

As long as medical information has already been provided to the structure broker, these factors can be provided within an hour of your request.

At the very least, contact a broker to obtain some general information about structured settlements, so that the injured party can become familiar with the concept before he or she is required to make what might seem like a “last minute” decision about structuring, especially when the plaintiff is faced with having to make a decision regarding acceptance or rejection of a settlement proposal during the mediation.

4. Do I Need More Detailed Structure Valuations?

Structure costs can help you determine your best and worst case scenarios, before you begin negotiations. Providing future care reports and income loss estimates will allow the structure broker to prepare very detailed costings of the future requirements outlined in those reports. These costings can be done from both a tort and an accident benefits perspective.

For SABs claims, Medical & Rehabilitation and Attendant Care payments to date information is required, so that the broker can estimate when the coverage limits might be exhausted.

Although a “rough and ready” costing can be provided on only a day’s notice, detailed future care report assessments generally take up to a week to prepare precisely and accurately.

5. Should I Have a Structure Broker Attend the Mediation/Settlement Meeting?

This is worthwhile in many cases. Having a broker on-site during negotiations means that annuity cost values can be obtained within minutes. This will help translate offers into more meaningful figures. For example, a broker participating in the mediation can quickly advise a defence lawyer that a SABs Medical & Rehabilitation “burn rate” of \$25,000.00 per year will exhaust the remaining limits in 8 years and 4 months, with an annuity cost present value of \$375,000.

Plaintiff’s counsel can learn just as quickly that the last defence offer of \$450,000 can provide the injured client with \$1,438 per month, tax-free, for the rest of her life. And if the client really needs that amount to be \$1,700 per month, the broker can calculate that you need to structure roughly \$532,000 to produce this.

If you do request that a structure broker attend the mediation or settlement meeting, please remember to **let the other parties to the negotiation know that you have done so**. In addition to prompting the mediator to order enough lunch, this lets the other parties know that there will be someone on-site to provide confidential annuity cost values, and avoids the thorny issue of having two structure brokers show up at the same mediation. The professional courtesy of providing this advance notice will be appreciated by all parties.

Odd as it may seem, **each side does not need its own structure broker**. The broker should be as neutral as the mediator, and it is perfectly appropriate for one person to run figures for all parties involved in settlement discussions. Structure brokers will simply run figures as requested, while retaining strict confidentiality for each side. As those who have been involved in such a situation know, the presence of two structure brokers simply adds one more confusing element to what is already a complex settlement process.

^[1] Structure figures outlined in this paper are illustrative only. Please consult a structure broker for actual quotations on individual files.

POST-NEGOTIATION

Armed with illustrative proposals, future care valuations and (possibly) a structure broker on-site to run numbers throughout the day, you've ended a marathon mediation with a settlement your client is pleased with, and part of that settlement will be structured. Your work here is done, right?

Not necessarily.

Like any marathon, as good as the preparation is, the race isn't won without the proper finish. When a structured settlement is to be implemented, some items must be dealt with **at the time of settlement** in order to ensure that the structure component can be effected without any last minute confusion. Here are the key points to remember:

1. Is There a Right to Structure?

The cardinal rule of the structured settlement is that **it requires the consent of the casualty insurer providing the funds.**

Be clear on this. Talk of structuring at the beginning of the day does not necessarily confirm the right to structure at the end of the day. Ideally, the settlement agreement should specifically say that the plaintiff has the right "to structure all or any portion of the settlement funds".

2. Who Will Own the Structured Settlement?

The plaintiff cannot own the structured settlement. In order to maintain the tax-free status of the payments, the structure **must be owned by an insurer.** If the casualty insurer contributing the settlement funds has agreed to own the structured settlement, this must be spelled out in the settlement agreement or Minutes of Settlement.

The fact that a casualty insurer has consented to a structure, does not necessarily mean that the insurer has agreed to own it. This must be clarified at the time of settlement. Some casualty insurers will allow structured settlements, but their corporate policy is to *assign* ownership.

Assignment is the process by which the casualty insurer's obligation to make periodic payments to the plaintiff, is transferred to an independent, third party insurer.

Assignment is not a vehicle by which the plaintiff can unilaterally establish a structure without the consent of the contributing insurer. Consent of the defence is required, even with assignment, since appropriate documentation must be executed by representatives of the plaintiff and the assigning casualty insurer, in order to effect the assignment. This documentation is prepared by the structure broker.

Counsel representing casualty insurers need to be clear on whether their client will own the structure directly, or whether assignment will be required. If assignment is required, it must be clearly stated, since any ambiguity might lead to a protracted resolution of the claim.

Both plaintiff and defence counsel should be aware that the requirement for assignment restricts brokerage options and may result in lower payments based on a specific funding amount, or a higher cost to produce agreed-upon payments.

3. What if There are Multiple Contributors?

If more than one insurer is contributing to the settlement, a number of ownership possibilities arise:

One insurer might own the structured settlement completely

Each insurer might own the structured settlement in direct proportion to its contribution to the total settlement

One insurer might assign the structure on behalf of all contributors

Each insurer might assign ownership in proportion to its contribution

One insurer might own its portion, the other(s) might assign its/their portion

No matter what the agreement is, it needs to be clarified. **The structure broker cannot proceed unless the issue of ownership is addressed.**

4. If Assignment is Required, Who Pays the Fee?

The simple answer is “whoever wins the argument”.

There is a cost to assignment. A fee of \$2,000 is charged by each third party insurer (assignee) stepping in to own the structure on behalf of the contributing casualty insurer. **The assignment fee is not charged by the structure broker.**

Sometimes, the most favourable quotation is obtained by splitting the structure funding between more than one life insurer. When structure funding is split, two (and occasionally, three) third party insurers are required to step in to assume the payment obligation. **The result is a requirement for two assignment fees, totalling \$4,000.**

It is important to appreciate that, depending on how the settlement is constituted, the plaintiff or defence position is ultimately enhanced by virtue of the split brokerage, notwithstanding the requirement for an extra assignment fee (or fees).

The fact that a casualty insurer requires assignment does not necessarily mean that the insurer will pay the costs of assignment. This is often the subject of a great deal of

negotiation, and must be clarified at the time of settlement. Even seven figure settlements have ground to a halt over the payment of a \$2,000 or \$4,000 assignment cost.

For this reason, the settlement agreement should state whether the plaintiff or the casualty insurer will pay the cost of assignment, or whether the cost will be shared between the parties. All parties should be aware that, depending on the structure option chosen, the file might require the payment of more than one fee.

5. Is There a Reversionary Interest?

It must be made clear at the time of settlement whether or not there is to be a reversionary interest. A “*reversion*” is the designation of the casualty insurer – not the injured person’s estate or designated beneficiary - as the recipient of payments in the event the injured person dies within a specified guarantee period. It is very common for casualty insurers to seek reversionary interests in SABs settlements.

In order to secure a reversionary interest for the casualty insurer, a guarantee period must be included in the structured settlement. Without a guarantee, payments will simply stop when the plaintiff dies (whether one payment or one hundred payments have been made), and there will be no money to “revert” to the casualty insurer. In our experience, the insurer generally pays the cost of the guarantee, over and about the agreed upon settlement amount. However, to avoid future dispute, **this too must be clearly outlined at the time of settlement.**

In addition to identifying that the casualty insurer is retaining a reversionary interest, the settlement agreement should also outline whether the reversion is complete (i.e. 100%) or partial (say, 50/50). A 100% reversion means that all guaranteed payments falling due after the injured person’s death revert to the casualty insurer. In the case of a 50% reversion, 50% of the guaranteed payments would go to the casualty insurer and 50% to the claimant’s estate or designated beneficiary. In such a case, the cost of the guarantee could likely also be shared 50/50.

Reversions may also be applied on the basis of time periods. The casualty insurer may take a reversion for, say, the first 15 years after structure payments begin, and the injured party might include a 5-year guarantee (from year 16 to year 20) for the benefit of his or her estate. Presumably, the latter segment of guarantee would be paid for by the claimant.

With any form of reversionary interest, a **minimum amount to be structured** must be identified, and the casualty insurer should **secure the right to approve the final form of structured settlement.** Without a minimum funding amount specified, there is no obligation to fund a structure at all. Without a requirement that the casualty insurer approve the final form of structure, a claimant might (even against his or her counsel’s advice) be inclined to take payments over a very short period of time, during which there

is only a slight probability of death. In that situation, the value of the reversion to the casualty insurer is greatly diminished.

6. What Else Am I Forgetting?

Only a few small items remain, in order to ensure the smooth implementation of the structured settlement.

Ideally, the settlement agreement should identify the **name of the structure firm that will be implementing the structure**. Whether you represent the casualty insurer or the injured party, it is in your client's best interests to ensure that the structure is brokered by experts in the field. In addition, the structure broker will review your draft and final settlement documents in order to ensure that the tax-free status of the structured settlement is preserved and that the interests of all parties are protected.

Finally, it is wise to outline a **time frame for funding the structure**, in order to avoid undue delay in finalizing the settlement of the claim. This is especially important if much needed SABs payments are stopped at the time of settlement.

IN CONCLUSION

Sound daunting? It doesn't need to be. If a structure broker has attended the mediation or settlement meeting, seek his or her input in drafting the provisions of the settlement agreement that deal with the structured settlement.

If a structure broker is not present, call one. It is worth your time to use this valuable (and free) resource in order to protect yourself and your client when it comes to the structure component of your settlement. Five minutes on the phone at the end of a long mediation may well avoid reopening negotiations over a seemingly small but thorny structure question, if the settlement agreement is silent on an important issue. It may even save you from having to submit an E & O claim.