



Lawrence Lallande —
LALLANDE LAW, PLC



Karina Lallande —
LALLANDE LAW, PLC



Traci Kaas —
KAAS SETTLEMENT CONSULTING



Avoiding problems with structured settlements

HOW TO PRESERVE A STRUCTURED SETTLEMENT AS AN OPTION FOR YOUR CLIENT

After years of litigation and contentious back-and-forth negotiations, you've finally resolved your client's case. Everyone is happy, hugs all around, and there may even be some tears of joy. Fast forward a month, as you bang your head against your desk, and your client's tears of joy have become your tears of frustration.

Once the case has resolved, the hard work is over and all that remains is to sign a few papers, deposit the checks, and distribute the money, right? While it is true that a lump-sum settlement or judgment is generally straightforward, you may have to deal with some thorny issues relating to liens and allocations

among multiple plaintiffs, but for the most part, the process for distributing a lump-sum amount from a settlement or judgment is uncomplicated.

Structured settlements, however, can be complex and give rise to several pitfalls if not handled correctly. In many cases it is important to document your file that you have presented the structure option to your client. Some courts have made their preference for structured settlements clear. It is necessary to preserve the option to incorporate a structured settlement during the final settlement negotiations. If you fail to do so, not only can you find yourself frustrated trying to remedy it, but not

handling a structured settlement properly can open you up to malpractice claims for failure to effectuate a structured settlement.

What is a structured settlement?

A structured or periodic payment settlement can be simply defined as "any series of payments made other than a single lump sum amount." It is a financial package designed for the plaintiff, or plaintiff's attorney, and is agreed to be paid by the defendant, the insurer or a Qualified Settlement Fund (QSF). It is limited only by the ingenuity of those involved. In its most fundamental form, a *Lallande, Lallande & Kaas, Nxt Pg*

defendant, insurer or QSF agrees to make future periodic payments to the plaintiff or plaintiff attorney by purchasing an annuity from a life insurance company.

The problem

Over the last year some insurers and defense counsel have made it more difficult to effectuate a structured settlement. It is not clear to the authors as to what is prompting this trend, but one thing is clear – some carriers and defense counsel will fight efforts to structure unless the documentation reserving the right to structure is clear at the time that the amount of the settlement is finally agreed upon. If it is not clear at the time a settlement is reached that the defendant agrees to future periodic payments through a structured settlement, then defendants are on solid ground in denying plaintiff or plaintiff's attorney the option of structuring the settlement.

Real-world examples

1. In a recent case we included brief language in the mediator's settlement memoranda preserving the option to structure all or part of the settlement. The defendant signed the Uniform Qualified Assignment but flatly refused to include the periodic payment and assignment language in the Settlement and Release Agreement. The insurer issuing the structured settlement annuity policy insisted that the Settlement and Release Agreement also include the required language. The lead defense attorney is a highly intelligent and sophisticated attorney who is the head of civil litigation in one of California's largest cities; however, she simply refused to include the assignment language in the release. No logical reason was given. After some great work by our mediator (and a threat of seeking judicial enforcement – a risk we did not want to run), the defense finally agreed to sign an Addendum to the Release that included the necessary language.

2. You do not want to be that attorney who successfully negotiated a settlement at the mediation session and then missed the details necessary to

preserve the structured-settlement option. In a recent case, the defendant brought a form release that did not contain any structured-settlement language, and which was unfortunately signed at a mediation session. The plaintiff's attorney didn't know that signing the release at the mediation was a problem. When the plaintiff's attorney attempted to obtain a new release with structured-settlement language, the insurance carrier, who often settles cases which include structured settlements, refused to change the settlement and include a structure. In support of their position, the defense attorney made derogatory comments about the plaintiff and claimed that the plaintiff was lucky to obtain the settlement that was agreed to. The defense attorney refused to talk to his carrier further.

3. In a case involving an insurer, who typically agrees to work with structured-settlement annuities, the insurer refused to implement a structured settlement. This was a tragic wrongful-death case involving a defendant who had been driving drunk. There were two mediation sessions. The defense attorney and carrier knew that the plaintiff's attorney had brought their structured-settlement planner and the defense knew that the family wanted to have future periodic payments. No objection to a structured settlement was ever raised by the defense attorneys or the defendant's carrier. The second mediation session ended with a demand of \$6,000,000.00 and a \$4,000,000.00 offer. Three days later, the parties agreed to settle for \$5,000,000.00. Although the parties had agreed to a settlement amount, the plaintiff's attorney did not include a structure as a condition of settlement.

After the plaintiff's attorney and plaintiff's settlement planner did the necessary work to put the structured-settlement plans in place, the structured-settlement plans were presented to the defendant's insurer. The defendant's insurance carrier, without any justification, rejected the structure component. The adjuster said, "If they

wanted an annuity, they should have settled the day of mediation." The refusal to structure was a hard no. The adjuster had zero reason other than claiming to be upset for paying too much.

How to protect your client's options

Often, plaintiffs' attorneys are fortunate to work with adjusters and defense attorneys who will cooperate with them to effectuate the structured settlement. However, given recent experiences, care should be taken to ensure that the option to structure the settlement is preserved.

Be prepared at the mediation session

Mediation is a process that sometimes involves discussions before, during, and often after the convened mediation session. When the case resolves at the convened mediation session, it is important to be prepared to preserve your client's rights for a structured settlement. There are alternative approaches. One approach is to be clear from the beginning that any settlement will involve a structure. A downside to this approach is that the defense will focus on the settlement guaranteed payout and not the present value of the settlement. In effect, the defense will seek a discount. Another approach is to first arrive at a gross settlement amount, and only after the settlement amount is agreed upon is the term of a structured settlement introduced. When using this second approach, have the mediator introduce the issue and explain that you are insisting on a structured settlement with a broker of plaintiff's choice. (If the defense brings a structured settlement broker to the mediation, then they will be prepared for the settlement documents to include the required structured settlement language. Never agree to a sole defense structured settlement broker.)

If the case resolves at the mediation session, insist that language reserving the plaintiff's ability to structure be included in the memorandum of settlement that

Lallande, Lallande & Kaas, Nxt Pg

is commonly used by most mediators. You can bring an “Attachment A” or “Addendum,” which can be incorporated into the mediator’s settlement memorandum or term sheet. The following is offered by way of example:

“The parties agree to settle this case for the present value amount of \$_____, a portion of which may be placed in one or more structured settlements. Defendant agrees to work with plaintiff attorney and plaintiff structured settlement planner to ensure proper language will be included in the settlement agreement and release and to ensure the structured amount is properly assigned. Defendant acknowledges that a separate check(s) will need to be written for the structured settlement to avoid constructive receipt.”

“The parties acknowledge that settlement documents may require the execution of either a qualified or non-qualified assignment.”

“The parties acknowledge, and the Settlement and Release or an addendum thereto will require language describing the structured settlement and assignment.”

“Defendants will fully cooperate with the execution of all documents necessary to complete the structured settlement.”

Settlement outside the mediation process

Similarly, if the case resolves during informal negotiations, an email or letter confirming the settlement should include language that the settlement is contingent on the option to structure the settlement.

Engage a consultant

It cannot be overstated how important it is to retain a qualified structured settlement expert early in the settlement process. Regardless of your success as a trial attorney or the number of cases you have resolved that involved structured settlements, settlement planning and structured settlements involve and require a different type of expertise.

- Introduce the idea of settlement planning or a structured settlement in advance of mediation, so the client is introduced to the concept.

- If you anticipate that the client will want the option of a structured settlement, call a settlement planner in advance of the mediation to find out how to preserve structured settlement as an option.

- If you haven’t spoken to a settlement planner prior to the mediation and the issue comes up during mediation, call a settlement planner during the mediation so that the planner can help you with the necessary language to preserve the option of a structured settlement or help with customizing language to later allow for an addendum to a settlement agreement.

- Do not advise the client that they should do a structured settlement or not. Attorneys are not financial advisors and do not fully understand suitability and risk tolerance.

- There are no fees or costs to the attorney or client for the settlement planning advice, and the planner/broker carries E&O coverage.

Get the necessary language in the settlement agreement and release

The Settlement Agreement and Release is the document that memorializes the consideration being paid for the resolution of the claim, and it must include the future periodic payments to qualify as being exempt from gross income under Internal Revenue Code section 104(a)(2) (physical injury).

- Do not sign a long form release prior to allowing the plaintiff to talk to a settlement planner and obtain proper advice.

- Annuity companies have internal rules up front on structured settlements. Some are stricter with language than others, but in all cases certain rules must be followed for both the annuity companies and the IRS.

- Plaintiff or plaintiff’s attorney cannot have “constructive receipt” of the funds in order to do a structured settlement. The manner in which this is accomplished is by the defense making the future periodic payments. They can “assign” their responsibility to make the

payments to an annuity company by way of an assignment agreement and the funding of the annuity. Defendant will sign a qualified (in physical injury cases) or a non-qualified (non-physical injury cases) assignment for the structured settlement to be able to occur.

- If there is a qualified structured settlement, then the release must specify the periodic payments that are owed. Then it can be transferred away via Internal Revenue Code section 130 to a third-party entity – the annuity company.

How to fix it if it wasn’t done right

Work it out with defense counsel

What if you didn’t make the settlement contingent on being able to do a structured settlement? Well, hopefully, you have established a relationship of respect with defense counsel during the case, because having defense counsel cooperate and insert the necessary structured settlement language into the release will save you from a headache down the road.

Addendum to the release

What if the client signed a release that failed to include the specific required language about the defendant assigning the future payment obligation? First, stop and breathe. Immediately contact your structured settlement planner, and they will be able to review the release and potentially work it out with all the parties. If the release reads as if it’s a cash release and makes no reference to future periodic payments, that is constructive receipt, which voids the entire transaction and the annuity company will not issue the policy. If you are able to utilize an addendum to the release, but not able to get the defendant to sign the addendum or the annuity company to accept the release with the language currently in it, the result could be that the structure is unwound.

Motion to enforce the settlement

If there was language in the release about the structured settlement, but the issue of the periodic payments

Lallande, Lallande & Kaas, Nxt Pg

wasn't explicitly stated and the defendant now refuses to sign an addendum, then you should consider bringing a motion to enforce the settlement on the basis that the defendant is essentially refusing to sign a document to implement the structured settlement, which is set forth in the release.

Mr. Lallande is the founding partner at Lallande Law, PLC. He is member of ABOTA; and sits on the Boards of Governors for CAALA and CAOC.

Karina Lallande is a partner at Lallande Law, PLC, where her practice focuses on litigating personal injury and wrongful-death cases throughout California. She is a member of the CAALA Board of Governors.

Traci Kaas is a Certified Financial Transitionist®, Certified Structured Settlement Consultant, Certified Medicare Secondary Payer Professional & Financial Planner. Traci is also the author of What You Can Expect When Expecting a Settlement. She can be reached at traci@tracikaas.com.