STRUCTURED SETTLEMENTS

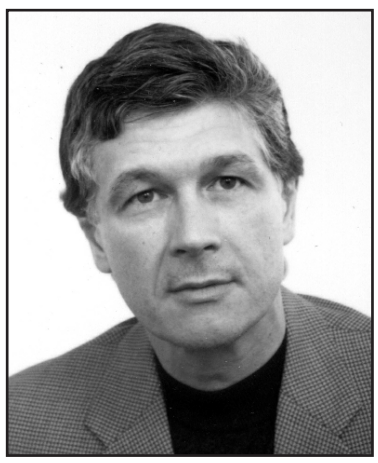
So what is a structured settlement and what are its advantages?

By Bob Nigol

While most seasoned personal injury practitioners have had at least a modicum of exposure to structured settlements, there is nonetheless value, at least for the benefit of those less experienced, in reviewing what structured settlements are and why they represent an attractive investment vehicle.

Structured settlements may be defined a number of ways. A frequently cited definition is the one offered by the Supreme Court of Ontario in *Yepremium v. Scarborough General Hospital*: "Structured settlements are a means whereby all or part of the damages are paid to a claimant by means of periodic payments rather than means of a lump sum."

Quite simply, structured settlements are an alternative to the conventional lump-sum settlement; that is, they replace the



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traditional single payment with a series of periodic or annuity payments.

The origins of structured settlements may be traced to the 1950s. They first appeared in the United States in 1958 in the form of a structured judgment. Since then structures have been used extensively south of the border, the more prominent examples being the thalidomide cases of the 1960s and the Ford Pinto cases of the 1970s.

In fact, structured settlements were first introduced to Canada in 1968 by virtue of the American thalidomide cases. They did not, however, gain widespread popularity in this country until the 1980s, when they were formally accorded tax-free status by the government of Canada.

The most obvious motivation for settling injury claims by way of a structured settlement is found in the income tax treatment of compensatory damages. While lump-sum damages are not subject to taxation, the income derived from investment is. Consequently, so as to create an incentive to invest compensatory damages in something guaranteed and geared to the longer term (thereby minimizing the possibility of premature dissipation and reliance, perhaps, on government support), the government of Canada exempted structured settlement income from taxation, subject to the following conditions:

1. The damages to be invested must be in reference to a claim for personal injury or death;

2. The claimant and the casualty insurer must agree to settle by way of a structure;

3. The casualty insurer must purchase a single premium annuity contract to produce the periodic payments in accordance with the settlement agreement;

4. The casualty insurer must be both the owner and annuitant (beneficiary) of the annuity contract;

5. The annuity contract must be non-assignable, non-commutable and non-transferable;

6. The casualty insurer must irrevocably direct that all payments be made to the claimant;

7. The casualty insurer must remain liable to make the periodic payments required by the settlement agreement.

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Uninsured drunk driver may sue tavern in negligence: Ont. C.A.

By John Jaffey
Toronto

Although Ontario's *Insurance Act* precludes uninsured drivers from recovering damages for injuries arising "from the use or operation of an automobile," the Ontario Court of Appeal has held that an uninsured drunk driver may sue a tavern in negligence for that very purpose.

Upholding a motions court judge's decision, Justice James MacPherson concluded that s. 267.6(1) of the Act "applies only to damages for vehicular negligence." He said that "courts should not rigidly apply past interpretations of a given legislative phrase," but should look first to the nature of the cause of action and next to the purpose of the legislative provision. Only then should the courts determine whether the provision should be applied on the facts.

Here an automobile was clearly the instrument of the plaintiff's injuries, but that fact was incidental to his cause of action, a tavern's alleged negligence for allowing him to drive home.

Next, the purpose of the *Automobile Insurance Rate Stability Act* is to stabilize insurance costs by limiting recovery to those who have paid premiums. The purpose of the *Insurance Act*, s. 267.6(1), is to address the problem of uninsured drivers.

"An interpretation … that precludes recovery of damages for vehicular negligence but permits a cause of action in taverner's negligence promotes both the general and specific purposes of the statute and provision," said Justice MacPherson. "A contrary interpretation leads to the absurd result that taverners have a reduced responsibility toward patrons who happen not to have automobile insurance."

An intoxicated Disraeli Hernandez left Mr. Biggs Sports Bar & Eatery at 2 a.m. on an August morning in 1997. Five minutes after driving off, the uninsured driver collided with a parked car and caromed into a lamppost. His car exploded, causing him serious injuries.

Hernandez sued the tavern, claiming it had been negligent to permit him to leave in his condition after serving him drinks all evening.

Relying on s. 267.6(1), the tavern brought a motion under rule 21.01(1)(a) that Hernandez was precluded from recovering any damages. Superior Court Justice Steven Rogin refused "to extend s. 267(6) beyond the confines of the *Insurance Act* and the *Compulsory Automobile Insurance Act*," reasoning that "Section 267.6(1) does not entitle the defendant to use the defalcations of the plaintiff to absolve itself of responsibility for the damage suffered by him for which it is alleged that it is in part responsible."

Justice MacPherson narrowed the issue on the appeal to determining the precise scope of s. 267.6(1).

The tavern argued that Hernandez should not be entitled to claim damages under *any* cause of action because the section precludes uninsured drivers from recovering any damages in actions arising directly or indirectly from their ownership, use or operation of an automobile.

Hernandez argued that a person has a vested right of action for taverner's negligence, which is not affected by s. 267.6(1).

Justice MacPherson relied on *Heredi v. Fensom* [2002] S.C.C. 50, in which Justice Frank Iacobucci said the legislature could not have intended that all claims in tort, regardless of their true substance, should be governed by a law "merely because of the presence of a motor vehicle somewhere within the chain of causation leading to damage sustained." He adopted a substantive approach, wherein "the nature of the facts and the nature of the action ought to be considered together in order to make a determination as to the fundamental nature of the action." He framed the issue in this way: "Is the action one that could be primarily classified as an action for damages occasioned by a motor vehicle?" In order to answer yes, he wrote, the motor vehicle must be the dominant rather than an ancillary feature of the claim.

Justice MacPherson concluded that the essence of a taverner's negligence action is "the failure on the part of the tavern to take charge of intoxicated patrons, and take reasonable steps to prevent them from hurting themselves…. Clearly, this duty goes far beyond preventing car accidents."

Justices Stephen Goudge and Robert Armstrong agreed.

Alan Rachlin of Toronto's Rachlin & Wolfson LLP and William Chapman of Windsor's Ducharme Fox LLP acted for Hernandez. James Townsend and George Tsakalis of London's Foster, Townsend represented the appellant tavern.

Reasons in *Hernandez v. 1206625 Ontario Inc. (c.o.b. Mr. Biggs Sports Bar & Eatery)*, [2002] O.J. No. 3667, are available from FULL TEXT: **2226-025**, 13 pp.

Interpretation principles provided

BUSINESS EXCLUSION

–continued from page 16–

and pointed out that that reasoning was consistent with the intent of a homeowner's policy that charged premiums of $378 per year.

Though the trial judge stopped there, Justice Feldman also considered Number 3: whether Wilson lived in his parents' house so as to be covered by the Co-Operators policy.

She concluded that he did — he lived at home (in Orillia, Ont.) during the summers and Christmas breaks, visited home at various times during the year and slept in his former bedroom, though it had been converted to a guest room/study.

Number 6 refers to a clause in the Co-Operators policy which says it will cover only the excess, over and above the coverage provided by other applicable policies.

Having decided the case's outcome on the business exclusion clause, Justice Feldman did not decide whether the policy's excess insurance clause applied. She did, however, set out three propositions on which to interpret and apply "other insurance" clauses:

1. If two clauses are irreconcilable and effectively cancel each other out, both insurers are rateably liable;

2. If the two clauses can be read as working together, the policies apply as stated, with one primary and the other either excess or excluded as the case may be;

3. In interpreting the policies, one determines the intent of each insurer by examining the policy's language, not by looking for the subjective intent of the insurers.

Patrick Monaghan represented CURIE. Theodore Rachlin acted for Co-operators.

Reasons in *Canadian Universities Reciprocal Insurance v. Halwell Mutual Insurance Co.*, [2002] O.J. No. 3306, are available from FULL TEXT: **2231-033**, 12 pp.