The Future of Structured Settlements

By Robert Nigol, B.A., M.A.

For decades, structured settlements have proven to be the most reliable way of guaranteeing the investment security of compensatory damages received for personal injury or death in Canada. Unlike anything else, structured settlements produce investment income on a tax-free and guaranteed basis, are non-assignable, non-commutable and non-transferable and are, by design, available only for the investment of compensatory damages.

Still, for some there exists a perception that interest rates have nowhere to go but up and that gross rates of return should be the primary consideration when investing compensatory damages for people injured in accidents. While structured settlements are clearly the only reasonable financial alternative for those made vulnerable by injury, the concern over interest rates has prompted some in this population that can ill afford to take chances to consider other, riskier investment alternatives.

In response to this, the producers of structured settlements have continued to deliver the entirely valid arguments that:

1. structured settlements remain, far and away, the best means by which to provide financial security to those with impaired worklife and life expectancies; and
2. structured settlements significantly beat comparable investment options, particularly when their tax-free status is accounted for.

That said, structured settlement producers, particularly in the United States, are venturing beyond the traditional arguments in an attempt to meet the challenge of the "new normal." In particular, two products intended to combat the arguments against fixed income investment in a time of low interest rates and another intended to offer an incentive to expand the market for structured settlements have either been introduced or are in development.

Variable Structured Settlements

The first of these two variable products may be characterized as a Market Indexed ("MI") structured settlement. This product currently exists in the United States (available through Pacific Life Insurance Company).

A MI structured settlement plan is similar to any structure plan indexed for inflation, the difference being that the indexation takes place by reference to market performance (i.e., the S&P 500 in the case of the Pacific Life product), as opposed to a fixed rate of indexation (e.g., 2%) or a rate geared to the Consumer Price Index. A MI structured settlement has the certainty of a floor (i.e., the income produced never drops below the amount reset annually by reference to market performance) and the upside benefit of increased income based on market performance (with an annual ceiling of 5% in the case of the Pacific Life product). In short, by virtue of these product features, structured settlement payments increase annually with each market increase and there is no loss if the market declines.

Another variable structured settlement product, presently in the development stage, is a convertible lump sum ("CLS"). This is not an entirely new product in the context of structured settlements; it is merely a twist on structure plans that call for the payment of a lump sum at some point in the future.

In simple terms, a CLS would allow the injured recipient to receive a specified lump-sum payment on a specific date in the future and reinvest that in another, predetermined structured settlement plan (at potentially superior interest rates).

Lawyers' Fees Structured Settlements

In the United States, plaintiffs' lawyers have had the option to receive their fees from their clients through a structured settlement for many years. This practice was solidified in 1994, when the Tax Court issued its opinion in *Childs vs. Commissioner.*

While not tax-free, the opportunity to accept contingent fees in the form of a periodic payment stream allows, among other things, plaintiffs' lawyers to realize tax savings while keeping their income on a more even keel. This, in conjunction with a structured settlement for the injured client, serves the public policy imperative to deliver more structured settlements to the financially vulnerable, thereby better insuring against the premature dissipation of settlement funds and a reliance on the public purse for support.

While it is not the intention of this piece to go through how those practising through a professional corporation might structure their fees, suffice it to say that, in the United States, structured fees are not the preserve of solo practitioners; that is, shareholders in professional corporations structure their fees regularly and there exists a clear decision support process by which this is done.

In light of this, the future of structured settlements would seem entirely friendly. The traditional arguments in support of structured settlements are now augmented by new products that both respond to the "new normal" and offer more reasons to structure.

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