

# Why Plaintiffs Should Engage Their Own Structured Settlement Broker

## New York State Law – Structured Settlement Protection Act

The General Obligations Law, Section 5-1702(e), requires the defendant to advise the plaintiff to retain his or her own financial expert. The defendant is prohibited from referring any financial expert. The act also deals with the regulation of factoring companies that purchase structured settlement payments at discounted prices.

§5-1702. Initial disclosure of structured settlement terms.

***In negotiating a structured settlement of claims brought by or on behalf of a claimant who is domiciled in this state, the defendant or defendant's legal representative shall disclose in writing to the claimant or the claimant's legal representative all of the following information that is not otherwise specified in the structured settlement agreement:***

- (a) the amounts and due dates of the periodic payments to be made under the structured settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;
- (b) the amount of the premium payable to the annuity issuer;
- (c) the nature and amount of any cost that may be deducted from any of the periodic payments;
- (d) where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law; and
- (e) ***a statement that the claimant is advised to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences and that the defendant or defendant's legal representative may not refer any advisor, attorney or firm for such purpose.***

\* \* \*

[Emphasis added]

## Steering

Some P&C insurance companies have affiliated life companies to which they instruct their structured settlement brokers to “steer” business. This steering allows a company to profit (through its affiliated life company) from the settlement of the claim. This is not necessarily a negative practice, provided the plaintiff is protected by:

- Making sure the life company has acceptable ratings. Most plaintiff attorneys require the life company to have a rating of A+ or better.
- Making sure the plaintiff is getting the best annuity rate from amongst those life companies with acceptable ratings.

## Post Settlement Medical Underwriting

Post settlement medical underwriting is a fraudulent practice whereby the plaintiff is given proposals at a stated cost, but after agreement has been reached on a specific plan, the broker submits medicals to the life company and obtains a “rated age”, thus lowering the defendant's cost without advising the plaintiff. This post medical underwriting abuse can be avoided by insisting on your own broker to either place the case entirely or co-broker the case with the defendant's broker.

## Rebating of Commissions

This abuse is carried out through commission arrangements whereby the broker pays part of its commission back to the P&C or related entity that retained its services. Referring to the class action law suit of *Macomber v.*

*Travelers P&C*, the Supreme Court of Connecticut called these practices “short changing” the plaintiff, a “rebating scheme”, and a practice that resulted in plaintiff attorneys inadvertently “overcharging” their clients on the mistaken belief that the actual cost to the carrier was higher than it really was (after receipt of the rebate).

### **Periodic Judgments under CPLR Articles 50-A and 50-B**

Creative Capital is the recognized expert in crafting judgments under these statutes. When a defendant asks CCI to do this, we get involved on the expectation that we will place the annuity when it comes time to fund the judgment. Because no settlement is involved in this situation, the defendant is in complete control. When a plaintiff firm asks us to perform these services, we realize that when the judgment gets funded the defendant will have the ability to bypass CCI and use its own broker. We nevertheless provide this service, without charge.

### **There are No Panaceas**

Over the years, various “fads” have been promoted to convince attorneys that one approach or another allows them to take a cash settlement and still get a structured settlement without defense cooperation. The current panacea is the concept of agreeing to an all cash settlement and then setting up a 468(B) qualified settlement fund, notwithstanding the fact that the case is a single plaintiff or single plaintiff family case. Such an approach potentially exposes plaintiffs to the risk of disallowance by the IRS should there ever be a tax audit. CCI will not use, promote or offer any approach that exposes a P/I plaintiff to the risk of denial of tax free status and the back taxes, interest and penalties that would result from such a finding. Until there is a ruling by the IRS on this issue, CCI cautions clients to avoid this approach. A structured settlement is, after all, a negotiated "settlement" that requires the cooperation of both sides.

### **Why CCI is the Right Choice**

New York’s statute requires the disclosure of information that Creative Capital already routinely includes in its own Certificate of Reliability and Assurances (CORA) affidavit. Immediately after CCI’s involvement was known in numerous catastrophic injury cases where no medical underwriting was done\*, defense brokers submitted medicals (to the life companies) for rated ages and presented corrected proposals to plaintiff’s counsel, thereby preventing post settlement medical underwriting from occurring. When life companies produce poor rated ages, we request that they improve their rate-ups to be consistent with the market. CCI strives to get the best possible rated ages from the life companies, and in turn, the best annuity return.

CCI’s legal department gets involved. We will either draft or review and revise the various documents necessary to properly conclude a structured settlement case. This includes the Settlement Agreement and Release (“SA&R”), Qualified Assignment agreements, Infant's Compromise Orders, etc. For example, defense brokers often draft an SA&R to meet the specific needs of the carrier, without regard to the possible negative tax consequences to the plaintiff. We see our job as protecting the tax efficacy of the structured settlement. We are proud that in nearly 23 years in this business, no CCI structured settlement has collapsed for failure to comply with the tax laws pertaining to structured settlements.

It is only by engaging your own broker that you will be able to receive proper advice on the many issues involved in achieving a fair structured settlement. As the company that has continually taken the lead in advocating ethical professional standards in the structured settlement industry, CCI guarantees the integrity of the settlement process.

\*Notwithstanding the fact that structured settlement offers were made.

**Insist on your own structured settlement expert:**

