

CITY PART
RULES FOR SETTLEMENT OF CLAIMS
BY INFANTS AND IMPAIRED PERSONS

A. COMPLIANCE WITH RULES AND STATUTES:

These rules are adopted in recognition of the equitable duty of the court to consider infants and impaired persons to be wards of the court and to protect them as such. Thus, in order to zealously safeguard the rights of infants and impaired persons, this court will require strict adherence to its rules and all other applicable laws and rules. Failure to strictly comply will result either in delay and/or denial. Therefore, make certain before you file, that your application fully complies with, and provides all information required by these rules as well as Article 12 of the CPLR; Uniform Court Rule 202.67; and Judiciary Law § 474. If a structured settlement is proposed the application must also comply with General Obligations Law, Article 17, §§ 5-1701 et. seq., as well as with Internal Revenue Code §§ 104 and 130.

These rules also require counsel to complete, and simultaneously file, a Worksheet/Checklist. The worksheet/checklist and all of the court's rules and forms are available on the OCA Website (www.nycourts.gov.courts.)¹

B. A WORKSHEET/CHECKLIST

On the same day that a compromise application is filed with the Clerk in Room 217, a completed worksheet/checklist must also be delivered to the Clerk. A courtesy copy should be delivered to the Court in Chambers (Room 828). If the worksheet/checklist is not provided to the Court in Chambers, the Court will not be

¹ At that site, follow the prompt to, "Trial Courts" then to "New York City", then to "Bronx 12TH JD", then to "Civil Division", then to "City Part."

aware that the application has been filed in Room 217; and it will result in a delay of the delivery of the file to the Court; and it most likely will result in a denial of the application.

All information provided in the worksheet/checklist and in the supporting affirmations, affidavits and other supporting papers must be consistent , especially as it relates to the issues of liability, injuries, present complaints and damages. An explanation set forth in the worksheet, but not set forth in the supporting affirmations, (or visa versa) will result in a denial.

C. AN EX-PARTE APPLICATION

CPLR 1207 provides, among other things, that a settlement application which is made upon behalf of an infant/impaired person , must be made either by motion in a pending action, or if no action is pending, by special proceeding commenced upon a petition. However, in the County of Bronx, it has always been the rule and practice to process an infant/impaired person’s settlement application as an ex-parte proceeding, i.e., the court is presented merely with a proposed order and all supporting documentation, none of which is required to be settled or served upon defendants; and the compromise hearing is conducted in the absence of all other parties. There is, however, one exception to this rule.

Notice of Settlement For Structured Settlements

When a “structured settlement” is being proposed although the ex-parte procedure is still being utilized, a Notice of Settlement of the proposed order is required to be served after the hearing has been conducted. Because of the complexity of such settlements, and the representations and conditions required to be contained in the proposed structured

settlement order, the court requires that the defendants and all insurance carriers involved in the structured settlement transaction be served with a Notice of Settlement so that they will have an opportunity to object to the proposed order, and be heard before they are bound by its terms. Only the Notice of Settlement and Proposed Order (not the supporting petition or other supporting papers) need be served.

D. THE APPLICATION AND SUPPORTING DOCUMENTS

The application will consist of the following documents:

1. The Proposed Order (Use the court's form)
2. Counsel's Affirmation
3. Petitioner's Affidavit
4. Infant's Affidavit (If over 14)
5. Supporting Medical Proof
6. Other Necessary and/or Helpful Exhibits
7. For Structured Settlements, additional documents (See below)

(1) THE PROPOSED ORDER.

Counsel must use one of the following form orders which are available on the above OCA Website, since they contain all of the decretal paragraphs required by the court:

- (i) Standard Compromise Order
- (ii) Simple Order For a Structured Settlement
- (iii) Complex Order For a Structured Settlement

Each proposed order can be adapted to fit the circumstances presented; and each of the form orders for structured settlements are accompanied by a set of instructions which will assist counsel and staff to understand and complete same.

(2) AFFIRMATION OF COUNSEL.

Counsel must provide an affirmation which not only demonstrates full compliance with, and all information required by, CPLR 1208 and UCR 202.67, but also sufficient details concerning the following issues:

- (a) **Retainer Statement Compliance** (See UCR 202.67 (d));
- (b) **Petitioner’s Standing** Petitioner must be a person who is qualified and has standing to bring the application as authorized by CPLR 1207 (See, Petitioner’s “Affidavit”, below);
- (c) **Recent and/or Current Complaints Of Infant/Impaired Person** (See below);
- (d) **Reasons For Recommending the Settlement** (See below);
- (e) **Medical Services and Expenses.** Counsel and petitioner must obtain written proof of the total amount of the charges incurred for each doctor, medical provider and hospital in the treatment and care of the said plaintiff, and the amount remaining unpaid for such treatment and care (See, USCR 202.67 [b]);
- (f) **All Possible Liens.** Counsel and petitioner must provide sufficient proof of either the the absence or existence of liens against plaintiff’s proceeds; obtain an itemized statement for any payments made by a lienor; and provide sufficient details of the efforts made to resolve said liens;
- (g) **Other Related Claims and Possible Conflicts.** (See below);
- (h) **Fees and Disbursements Counsel.** Counsel must set forth all services rendered in support of the request for counsel fees; itemize all disbursements, especially those disbursements, if any, which counsel seeks to have reimbursed.

A Fair and Reasonable Settlement. CPLR 1208 (b) (1) requires counsel to provide the “reasons for recommending the settlement.” The Court requires that counsel provide a **detailed** explanation as to why the proposed settlement is fair and reasonable. Counsel must address the issues of liability and damages and the infant’s current complaints, if any. Note: Conclusory assertions (such as “poor liability”; or “full recovery”; or “best interest of the child”) without specification and supporting facts, will **not** be sufficient.

Recent and/or Current Complaints. The issue of the infant/impaired person's recent or current complaints, if any, must also be fully addressed in petitioner's affidavit, as well as in the current medical proof which is provided to the court in support of the application. If plaintiff does have recent or current complaints, the medical proof must provide a prognosis. Counsel is cautioned to make sufficient inquiry in advance so that the court and counsel are not surprised at the hearing concerning the infant/impaired person's recent, intermittent or current complaints.

All Possible Liens. Note: UCR 202.67 (b) requires the court to make provisions for payment of all medical expenses and liens. The court is concerned that if this issue is not properly addressed, the plaintiff's may be surprised and held accountable post settlement. In any event, a lien may arise by operation of law if public funds were used to pay for the medicals; and the lien must be satisfied from the proceeds of the settlement regardless of the awareness of counsel or petitioner. See, *Gold v. United Health Services Hospitals Inc.*, 95 N.Y. 2d 683 [2001]; *Arkansas Dept. Health and Human Services v. Ahlborn*, 126 S. Ct. 1752, 2006 U.S. . Lexus 3455.

Other Related Claims and Possible Conflicts. A full identification of all claims made by any person, including a parent or other family member, arising out of the same accident must be provided. If any such other claims exist, counsel for petitioner must provide a copy of the Bill of Particulars and all medical records for all other settling parties so that with full disclosure, the court can determine if the proposed apportionment of the settlement proceeds is "fair and reasonable." [See also CPLR 1208 (a) (8)].

(3) THE PETITIONER'S AFFIDAVIT.

At the outset, the application must disclose, whether petitioner is one of the persons authorized by CPLR 1207 to make said application. In addition, petitioner's affidavit must comply with and contain all information required by CPLR 1208 AND UCR 202.67; including details concerning the following issues:

- (a) Qualification and standing of petitioner to bring the application (See below);
- (b) Petitioner's understanding of the proposed settlement (See below);
- (c) Recent and/or current complaints, if any of the infant/impaired person (See below);
- (d) Medical services rendered, expenses incurred; method of payment; and liens, if any (See below).

Qualification of Petitioner. CPLR 1207 provides that the application may be made by one of the following persons: a guardian of the property; or guardian ad litem of an infant; or a parent having legal custody; or another person having legal custody; or if infant is married, by an adult spouse residing with infant; or a committee of property of a judicially declared incompetent; or a conservator of the property of a conservatee. Note: A parent at times may not qualify, such as, for example, when custody has been removed by the Family Court. Also note, that even where a parent has lawful custody a problem can arise, for example, when the lawsuit is commenced by one parent on behalf of the ward and the compromise application is brought not by that parent, but by the other parent, who was not named as the natural guardian in the underlying claim or action. In such a situation, counsel must also provide, among other things, proof of the authority of the non-party parent to settle or discontinue the loss of services claim.

Petitioner's Understanding of the Settlement. In addition to all of the above, a petitioner must acknowledge an awareness and understanding of all of the reasons given by counsel for recommending the settlement; as well as a full understanding of the proposed apportionment of the settlement proceeds.

Recent and/or Current Complaints. Petitioner must also acknowledge familiarity with all injuries, conditions and complaints, if any, made by the infant/impaired person especially recent and/or current complaints, so that they can be fully addressed at the compromise hearing. At the hearing the following questions will be asked of the petitioner and the infant/impaired person. Does the infant/impaired person have any recent or current pain or limitations? When is the last time any pain or limitations were experienced? How often? Has plaintiff's physical or mental ability or range of motion, or ability to engage in any activities been affected?; and if so, what is the prognosis or plan for the future? **Note:** Applications have been denied because, although all the supporting papers, including the current medical report, reflect in a conclusory way that the infant has "fully recovered," at the hearing the court discovers otherwise.

Medical Services, Expenses, Payments and Liens. CPLR 1208 (a) (4) requires that a petitioner provide an itemization of such expenses; and subdivision (a) (7) provides that the affidavit of the petitioner state whether reimbursement for medical expenses has been received from any source. **Note:** UCR 202.67 (b) goes further than the CPLR. It not only requires petitioner to provide an itemization of the medical expenses but it compels the court to make provision for payment thereof. Thus, petitioner and counsel are cautioned not to be vague. The court must not be left with nothing more than mere speculation as to whether there are any

unpaid bills or liens. A medical statement that “all medical expenses have been paid”, will not suffice. In addition, vague statements such as, “I have not been aware of any unpaid liens or bills,” also will not suffice.

(4) INFANT’S AFFIDAVIT AND ATTENDANCE.

Note that, absent extraordinary circumstances, CPLR 1208 (d) mandates that the attorney, the petitioner and the infant/ incompetent attend the hearing. It has been the longstanding practice in the First Department to require an infant over the age of fourteen to provide a supporting affidavit, and attend the hearing; and thus my rules and my forms and worksheets also make it mandatory. At the hearing, I will question the infant/impaired person as to the episode, the injuries sustained and recent or current complaints and limitations, if any; and where appropriate, their understanding of the terms of the settlement. I also view the injured area when it can be accomplished without any embarrassment to the plaintiff and others present.

(5) SUPPORTING MEDICAL PROOF.

CPLR 1208 (c) states that “if the action or claim is for damages for personal injuries to the infant or incompetent, one or more medical or hospital reports, which need not be verified, shall be included in the supporting papers” [emphasis added]. Note that neither the CPLR nor any other statute or rule requires that said reports and records be verified. The Court’s rules and worksheet provide, however, as follows:

“Unless waived by the Court this part of the application must include a recent [not stale] medical record, report or affirmation which provides:

- History obtained;
- Infant’s complaints of pain and/or limitations (past and present);
- Treatment rendered;
- Details of the examination currently rendered upon which current opinion and conclusion is based;

- **Diagnosis;**
- **Prognosis, especially if there are any present complaints of pain or limitations;**
- **Opinion, conclusion and recommendations.”**

While an affirmation is not required, the court does mandate that a recent [not stale]

medical record or report be submitted in support of the application. The said record, report or affirmation should provide all of the above information, especially as it relates to recent or current complaints and/or limitations of the infant/incompetent if any. Note: If the issue of present or recent complaints and/or limitations is not addressed in the medical proof submitted, and the Court discovers same at the hearing, the application will probably be denied. In addition, if there are any recent or current complaints and/or limitations, counsel should make sure that the medical proof provides a prognosis so that the Court and the petitioner can make a meaningful determination as to whether the proposed settlement is fair and reasonable. Sparse and conclusory medical reports or affirmations may not be acceptable.

(6) OTHER NECESSARY AND/OR HELPFUL EXHIBITS.

When necessary, the application should have as exhibits a copy of all documents (relating to liability and damages), which would assist the court in arriving at a determination. When such documents are included they should be appropriately identified in the supporting affidavits and affidavits, as well as separated by Exhibit tabs. Note: Additional documents will be necessary when a structured settlement is proposed (See below)

E. THE HEARING.

CPLR 1208 (d) provides that “at the hearing, the moving party or petitioner, the infant or incompetent, and his attorney, shall attend before the court, unless attendance is excused for good cause” [emphasis added]. If attendance at the hearing would create a hardship for any of said persons, the court will consider waiving the appearance and allowing a telephone

conference, if appropriate assurance can be made as to the identify of the person who appears by telephone.

F. STRUCTURED SETTLEMENTS

1. COMPLIANCE WITH RULES AND STATUTES.

These rules for a proposed structured settlement are supplemental to the above rules for the conventional settlement of claims for infants and impaired persons. Because of the multiple benefits achievable (even for modest settlement amounts), structured settlements are highly favored by this Court provided, however, compliance with all applicable statutes and rules, including the mandates of Sections 104 and 130 of the Internal Revenue Code and the New York State Structured Settlement Protection Act (Gen. Obligations Law, Article 17, § 5-1701, et. seq.).

2. EX-PARTE APPLICATION AND NOTICE OF SETTLEMENT.

As stated above, the general rule, in Bronx County is to process an infant/impaired person's settlement application as an ex-parte application. However, when a structured settlement is being proposed, although the ex-parte procedure is still utilized, a "Notice of Settlement" of the proposed order is required to be served upon defendants as well as upon all insurance carriers involved in the structured settlement transaction, so that they will have an opportunity to be heard and object before being bound by its terms. This Notice is to be served only after a hearing has been conducted and after the court has tentatively approved the proposed structured settlement. Note: Only the Notice and proposed order [not the underlying supporting papers] need be settled and served on the defendants and insurance carriers.

3. THE PROPOSED ORDER FOR A STRUCTURED SETTLEMENT.

Counsel must use one of the two court's form orders for a structured settlement, each of which are available on the OCA Website. The form orders (simple and complex), which can be adapted to fit the circumstances presented, comport with Internal Revenue Code requirements; contain all of the decretal paragraphs required by the court; and each form is accompanied by a set of helpful instructions. Each form includes vital information concerning the financial aspects of the structured settlement, and an identification of all of the documents and necessary parties necessary to implement the transaction, namely:

THE PARTIES

- (a) The Plaintiff/Payee of Annuity**
- (b) The Defendant/Assignor**
- (c) The Assignee/Annuity Owner**
- (d) The Annuity Issuer**
- (e) The Guarantor**

THE IMPLEMENTING DOCUMENTS

- (a) The Settlement Agreement**
- (b) The Assignment Agreement**
- (c) The Annuity Contract**
- (d) The Guaranty Agreement**

THE SETTLEMENT TRANSACTION AND ANNUITY

- (a) The Total Settlement Cost², includes:**

- (I) Up front funds; plus**
- (ii) Cost to fund annuity;**

- (b) Total Future Periodic Payments, with:**

² The total settlement cost (consisting of the up front funds plus annuity cost) is to be distinguished from the total settlement sum, which for Internal Revenue Code [IRC] purposes, consists of the up front cash plus the total of all periodic payments. For example, if the total settlement cost is \$1,000,000 (\$400,000 up front and \$600,000 to fund an annuity) and the annuity will pay a total of \$3,000,000 in future periodic payments, the parties and all implementing documents, including the court's order must, in order to obtain an IRC tax exclusion, state that the case is settled (not for \$1,000,000) but for \$3,400,000.

- (I) Due dates and amount of each periodic (lump sum and/or monthly) payment; and
- (ii) An identification of those periodic payments which are guaranteed to be paid regardless of whether plaintiff survives.

4. SUPPORTING DOCUMENTS AND ADDITIONAL REQUIREMENTS.

In addition to the requirements and documents described above for a traditional compromise application, the application for a structured settlement must also include and be supported by:

- (a) Counsel's Affirmation (additional requirements, see below);
- (b) Petitioner's affidavit (additional acknowledgments, see below);
- (c) Affidavit of the Structured Settlement Broker (see below);
- (d) The Proposed Settlement Agreement (see below);
- (e) The Proposed Assignment Agreement (see below);
- (f) The Proposed Annuity Contract (see below);
- (g) Proposed Guaranty Agreement (see below)

5. COUNSEL'S AFFIRMATION.

In addition to compliance with all other requirements for an ordinary compromise application, counsel for the plaintiff must, in support of a structured settlement:

- (a) Demonstrate "due diligence" in the selection of an annuity and a structured settlement broker (and not just go along with one imposed by the defendants). (See "Due Diligence and Shopping the Best Deal", below);
- (b) Provide plaintiffs, as well as the court, with meaningful legal and investment advice supporting the specific recommended annuity plan;
- (c) Annex all of the above described documents to the application (and provide exhibit tabs) as well as copies of the alternative and/or other competitive structure proposals which were considered. (These exhibits can be annexed as part of the Broker's Affidavit, see below);

6. PETITIONER'S AFFIDAVIT.

Petitioner's affidavit must, among other things acknowledge receipt of a copy of all of the above documents as well as a copy of counsel's affirmation in support of the proposed structured settlement; and petitioner must acknowledge that all of the above was fully explained by counsel and/or by an independent financial advisor. Petitioner must further acknowledge receipt of all of the "initial disclosure" required by General Obligation Law § 5-1702, including a caution "to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences"; and petitioner must acknowledge that he/she is relying upon said independent professional advice, and not upon any advice, provided by defendant or any person recommended by the defendant's legal representative.

7. STRUCTURE BROKER'S AFFIDAVIT.

The structured settlement application must also be accompanied by an affidavit (and exhibits) provided by the structured settlement broker whose proposed structure plan is being recommended by counsel for petitioner. The affidavit must include a full description of all the other annuity plans considered in addition to the one being recommended, and the tax and financial advice provided to petitioner with regard thereto; and must contain all of the warranties, assurances, affirmations and exhibits included in the sample brokers affidavit, which is also available on the above OCA website.

The following proposed documents, which will implement the recommended structured settlement, must be annexed as exhibits to the structure broker's affidavit:

- (a) Proposed Settlement Agreement
- (b) Proposed Assignment Agreement³
- (c) Proposed Annuity Contract
- (d) Proposed Guaranty Agreement⁴
- (e) Rejected and/or Alternative Proposals

8. **DUE DILIGENCE AND SHOPPING FOR THE BEST DEAL.**

Counsel for petitioner should consider the following observations when conducting "due diligence" in the selection of a structure broker and an annuity.

(a) **The Cost of the Annuity**

An annuity is just another investment commodity; and as with any other

³ A standard form assignment agreement called a "Uniform Qualified Assignment and Release Agreement," is generally used to implement the transfer of the obligation to make the future payments. However, if a "Uniform Qualified Assignment, Release and Pledge Agreement" is used, the plaintiff receives a security interest in the annuity policy, and thus becomes a "secured creditor" of the assignment company and receives a priority over other creditors in the event of a default.

⁴ This guaranty is provided by the annuity issuer, a major life insurance company, which is licensed to issue insurance and annuity products in the State of New York. The annuity issuer must be rated by A.M. Best at no less than A++ or A+. This guaranty is in addition to the insurance protection provided by New York State Insurance Law. Under N.Y. Ins. Law Article 77, the Life Insurance Company Guaranty Corporation of New York provides \$500,000 of protection with respect to a structured settlement annuity in the event an annuity issuer becomes insolvent if the annuity issuer is licensed in New York and the plaintiff is a New York resident. See, N.Y.S. Ins. Dept. O.G.C. Opinion 5-1-96 (May 1, 1996), General Counsel Opinion 2-20-2003 (February 20, 2003). In view of this monetary limitation, where the cost of the annuity is more than \$500,000, it is prudent to purchase annuities from more than one issuer to keep the cost of each annuity below \$500,000.

investment commodity it is subject, at its inception, to the vicissitudes of the market place. Although the future payout of an annuity at inception is controlled by, and dependent upon the interest rates prevailing at the time of purchase, a proposed annuity is not arrived at simply by use of mathematical formula. Despite the fact that annuity issuers periodically publish a schedule of rates, which set forth the cost to buy various future periodic payments other variables affect the ultimate quote. First of all, rates between carriers may differ and, in any event the published rates for each carrier are periodically adjusted relative to prevailing interest rates. Secondly, the cost to purchase an annuity may also be affected by the sex and life expectancy of the plaintiff; and finally market place competition, rivalry and circumstances, which affect each annuity issuer, may also play a part in the offer made.

An unknown variable is plaintiff's real life expectancy, for example when payments which terminate at death, are included in the proposed structure, and the plaintiff, due to some injury or condition has a shorter life expectancy than normal (and is thus given a "rated age") the cost of the annuity may be less, because the annuity issuer may gamble on making fewer payments. In such cases, although the offered annuity will probably have a large proposed payout (if plaintiff lives to a full normal life expectancy), the annuity issuer's actuary "calculates" that the actual payout (rather than the projected payment) will be severely truncated by those "payments" which do not survive death. In any event, as with mortgage rates, market forces and competition between issuers play a role

in the proposed cost of the annuity. The court has been informed that it is not uncommon for the costs quoted by different annuity issuers, for the identical proposed annuity, to vary by more than 10%.

(b) The Structure Broker

In the annuity field the bargaining agents are structured settlement specialists, and are usually referred to as structure brokers. Most, if not all, liability insurance companies have their own list of preferred structure brokers and preferred annuity issuers (life insurance companies). In addition, an annuity issuer will generally sell an annuity only through a structure broker that is appointed as an agent for such issuer. However, a structure broker can be, and usually is, an agent for multiple annuity issuers.

Because of the mandates of the Internal Revenue Code, liability insurance carriers have been given the authority to select a broker and to purchase the annuity. Most often these liability carriers have their own preferred list of annuity issuers and structure brokers; and said liability carriers insist (for some commercial reason) that only their listed annuity issuers and brokers be used in the selection of an annuity. Caveat! When you do your due diligence, ask yourself the following questions. Do these brokers owe their loyalty and allegiance to the infant plaintiff or to the insurance carrier? Although these defendant affiliated structure brokers are specialists, and are capable of surveying the market, are they proposing the best annuity available in the market place? In other words, has the defendant selected broker made a survey of the market of annuity providers to

confirm the best value (price/quality), or has said broker confined his search to the list of annuity issuers preferred by the defendant's liability carrier?

It does not appear that a defendant-selected broker has any legal duty or obligation to purchase the annuity from the annuity issuer which is best for plaintiff. Thus, one way for the court to be more certain in this regard, is to make market forces come to play. In most instances defendants insist that a structure plan be provided by a structure broker that is selected by defendant and/or its insurer. The Court requires that plaintiff's counsel retain a structure broker before discussing a structured settlement with the defendants, [See, City Part Rules for Settlement of Claims of Infants and Impaired Persons at pages 16 to 21]. Both brokers can be compensated by a splitting of the annuity commission so there is no cost to the plaintiff or the attorney.⁵ There are many such plaintiffs' structure brokers and some of them are listed in the New York State Trial Lawyers Association [NYSTLA] website.

[<http://www.nystla.org/index.cfm?fuseaction=article&articleID=1551>].

If the plaintiff's attorney has failed to retain a structure broker to represent the plaintiff, and the structure plan submitted to the Court was prepared by the defendant's structure broker, the Court requires that at least one other competitive quote for that structure plan be provided by a structure broker selected by plaintiff. If the plan being proposed has been selected by a plaintiff's structure broker, a competitive quote need not be submitted.

Counsel is cautioned to resist the temptation to accept [without first obtaining an independent brokers' advice], an offer by defendant's structure broker to submit

⁵Some might argue that these brokerage commissions do actually come out of the settlement proceeds because they are taken into consideration by the annuity issuer which proposes a structure plan. It's the market place!

an annuity rate lock-in notice. In any event, counsel should seek court approval before doing so!

Independent (“plaintiff’s”) structure brokers, are abundant and readily available to plaintiff’s counsel. Some of them are listed on trial lawyer’s websites such as the New York State Lawyers Association (NYSTLA) website <http://www.nystla.org/index.cfm?fuseaction=article&articleID=1551>).

Where a competing proposal is necessary, the court rules require that all proposed competing annuity plans and their respective costs are to be submitted to the court for its review, and the rules further provide that the application made by plaintiff to settle the claim or action, must be supported by, among other things, an affidavit provided by the structure broker whose annuity proposal is being recommended by plaintiff’s counsel. Both counsel and the broker must provide all vital required information, and, among other things, explain why the proposed annuity is less costly and is being recommended as the best available. After a hearing and review of all submitted plans, it is the court’s ultimate obligation to make a selection of the annuity which is deemed best for its ward!

(c) Lock-In Quotes and Notices

Counsel must obtain court approval before agreeing to a lock-in quote or notice! The court might consider imposing a penalty or sanction on those who violate this rule.

It should be noted that plaintiff’s counsel sometimes places the court in a “catch 22” by locking in a quote before ever submitting an application for approval. Plaintiff’s counsel often allows a defendant broker to submit an annuity

rate lock-in notice to the annuity issuer, and arranges for the liability carrier to issue a check to purchase the annuity even before the court is aware of a proposed settlement for an infant/impaired person. Thus, if there is a substantial delay between the lock-in and the submission of the application to the court, interest has already accumulated on the “locked in” funds, and no other broker can, at that later date, compete with the proposed annuity suggested by defendant’s broker. This is so because, even though a lower cost may have earlier been available with another annuity issuer, no annuity issuer would offer retroactive interest to be part of the proposal. However, if prevailing interest rates rise dramatically, a new annuity proposal may still be better than the locked-in proposal. Although this “lock-in” procedure may result in some benefit to the infant/impaired person, it might also result in a less than best proposed annuity. Thus, to avoid the conundrum, plaintiff’s attorneys should be advised to consult with a plaintiff’s structure settlement broker before a defendant’s broker has been consulted and caused to lock-in the funds and/or perform substantial services, believing that no other broker is involved.

(d) Qualified Settlement Fund

In the event that defendant or its liability insurance carrier refuses to allow an independent broker to participate in the annuity selection and share in the commission, counsel should consider the creation of a “Qualified “Settlement Fund.”

By use of a “Qualified Settlement Fund” (“QSF”) it may be possible, without loss of the tax benefits provided by the Internal Revenue Code (“IRC”), to have the settlement proceeds placed in an interest bearing account during the pendency

of an application to settle a claim or action on behalf of an infant/impaired person. (IRC § 468B; Treasury Regulation, § 1.468 B-1; see also, Rev. Proc. 93-34, 1993-2 CB 470, 08/10/1993, IRC § (a) 468b; Rev. Rul. 79-313, 1979-2 C.B. #75; Rev. Rul. 79-220, 1979-2 C.B. #74; Rev. Rul. 83-25, 1983-1 C.B. #116).

The IRC and its implementing regulation, allow the judicial establishment of a “qualified settlement fund” to be established to resolve or satisfy “one or more contested or uncontested claims.” Among other requirements, the fund must be established by a court order, which completely extinguishes the taxpayer’s (defendant’s) tort liability; and no amounts may be transferred to the fund other than in the form of a qualified payment. In addition the fund must be administered by persons, a majority of which are independent of the defendant taxpayer.

This QSF procedure is often used to settle class tort actions pending a resolution of an appropriate apportionment of the settlement proceeds. Caveat:

Despite the express authority to create a QSF to resolve “one or more” claims⁶, the issue is still uncertain as to whether such a fund would cause the income portion of each periodic payment to be taxable if a QSF is utilized in an action involving only one plaintiff. There is no precedent or authority either way on this issue. Most attorneys and judges however, will not take the risk of utilizing a qualified settlement fund for actions or claims involving only one claimant until a definite ruling is issued by the Internal Revenue.

⁶ Section 1.468B-1 (c) of the regulations provides, among other things, “that a fund, account, or trust is a qualified settlement fund if: ***** (2) it is established to resolve or satisfy one or more contested claims *****” [emphasis added]. Some feel that this language provides sufficient authority for the use of a qualified settlement fund in a single plaintiff claim.

In any event, the establishment of the fund is initiated by way of a petition to the court for an order allowing its creation. Once the order is signed, the liability insurer pays the settlement amount into the fund which deposits same into an interest bearing account, and the liability insurer and defendant are released from all further responsibility and liability. The attorneys for the plaintiffs then have sufficient time to propose and seek court approval for the appropriate apportionment and use of the settlement funds, and the creation of the appropriate structured settlement. Of course, while the settlement amount is in the “qualified settlement fund” those funds will earn interest that is taxable. However, the future periodic payments will be tax free. When a QSF is utilized, neither the court nor the plaintiff’s attorney, will be at the mercy of defendant’s structure broker.

Obtaining an independent competing broker is not a useless precaution. Unfortunately, there have been instances, where, when using a defendant selected broker only, that abuses have occurred; and plaintiffs did not get the best deal available. (See, for example, Macomber v. Travelers Property And Casualty Corp., 261 Conn. 620, 804 A.2d 180 (Conn. Sup Ct. 2002).

In Macomber, above, Travelers Property and Casualty Corp. entered into an illegal arrangement with certain structure brokers pursuant to which the brokers agreed to rebate a portion of the annuity commission to Travelers. As a result of the arrangement, Travelers did not expend the full amount that it had represented to the plaintiff as the cost of the annuity; and the Connecticut Supreme Court held that the plaintiffs had a cause of action.

See also, Lyons v. Medical Malpractice Insurance Association, 286

A.D.2d

711, 73 N.Y.S.2d 345 (2d Dept. 2001). In Lyons, the liability insurer and its structure broker misrepresented that the value of the annuity was \$940,000, but the actual cost was only \$410,000!

In any event, as stated above, it is not uncommon for costs of an annuity quoted by different annuity issues, for the identical proposed annuity, to differ by more than 10%. When considerable sums are involved, 10% can be a very considerable savings to a plaintiff.