Structured Settlements:

Before and After the Settlement –
What You Must Know

The Basics or, More Importantly:

Malpractice Pitfalls in Settling Cases

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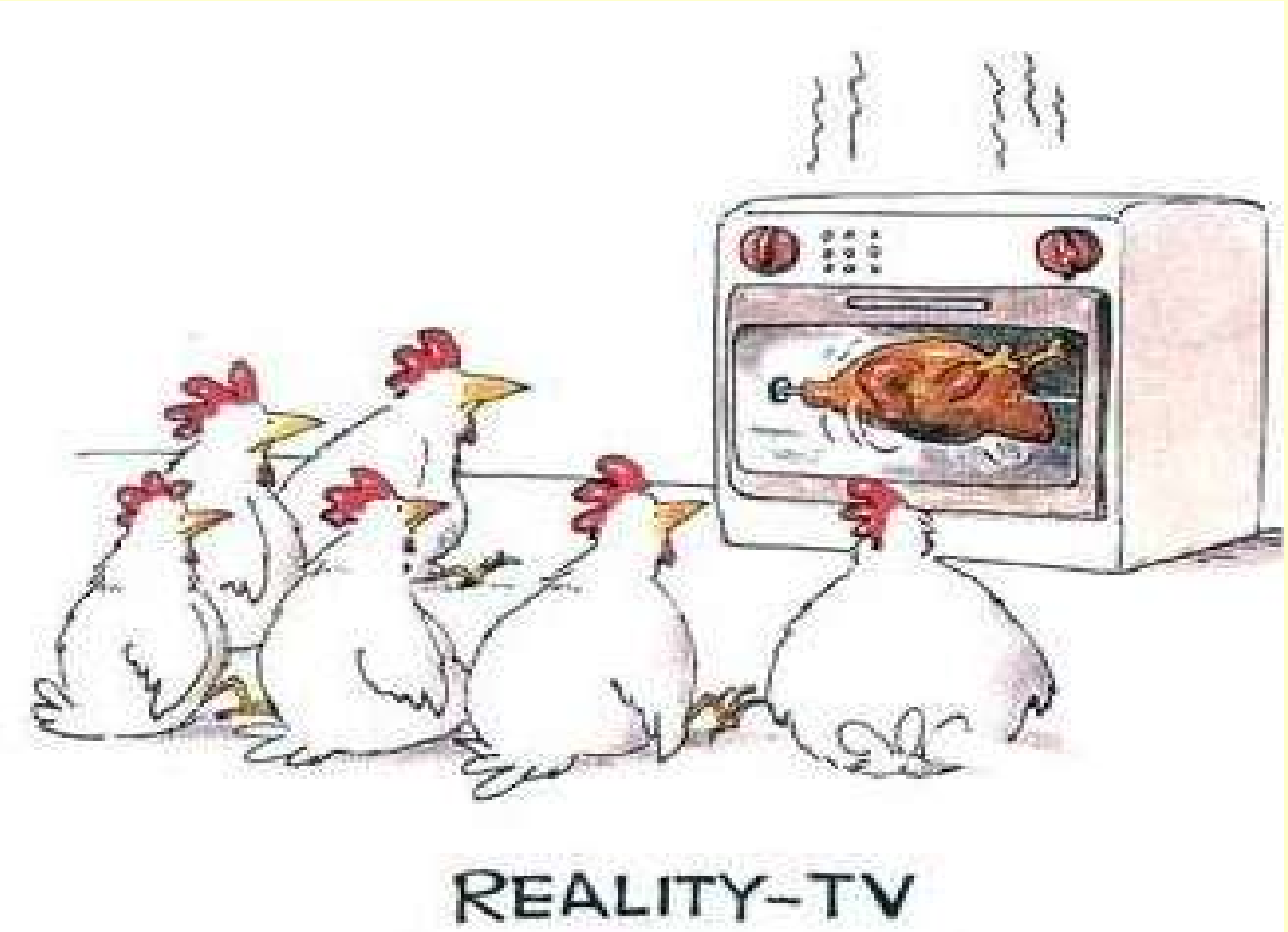
Today's Entertainment



Evolution of Structured Settlements

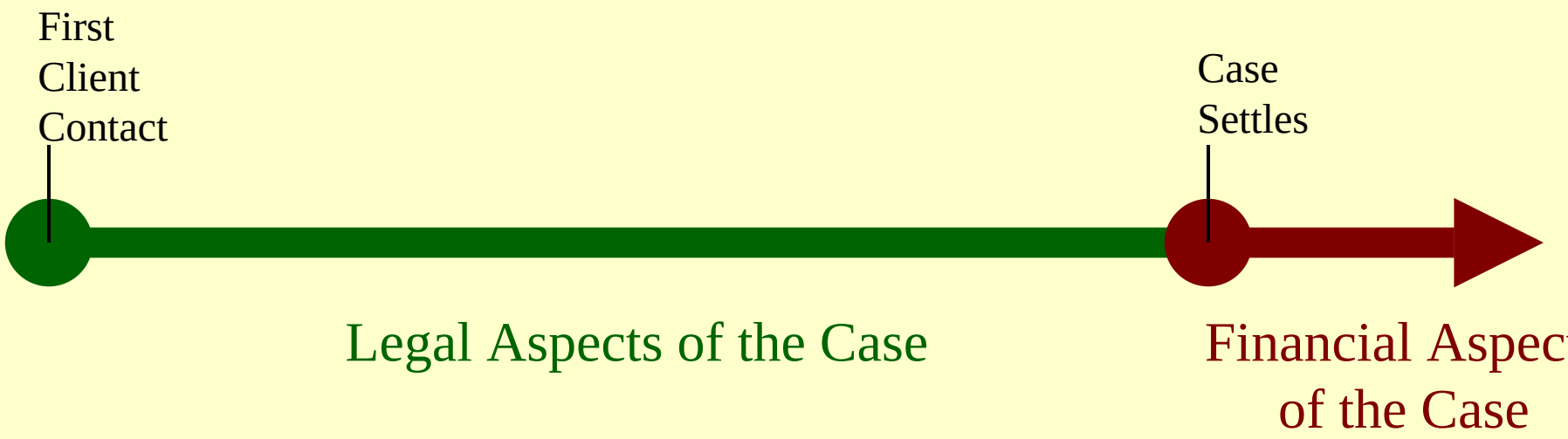
- Started out as plaintiff driven
- Defense took over
  - Use as tool to shortchange plaintiffs
  - Force annuity to life affiliate
  - “Share” commissions (undisclosed rebates)
- Plaintiffs have been fighting back
  - Society of Settlement Planners
  - Protective legislation

Avoiding Malpractice Pitfalls

Premise:

Plaintiff attorneys expose themselves to unnecessary liability by leaving clients in hands of defense regarding financial aspects of clients' settlements

Case Timeline

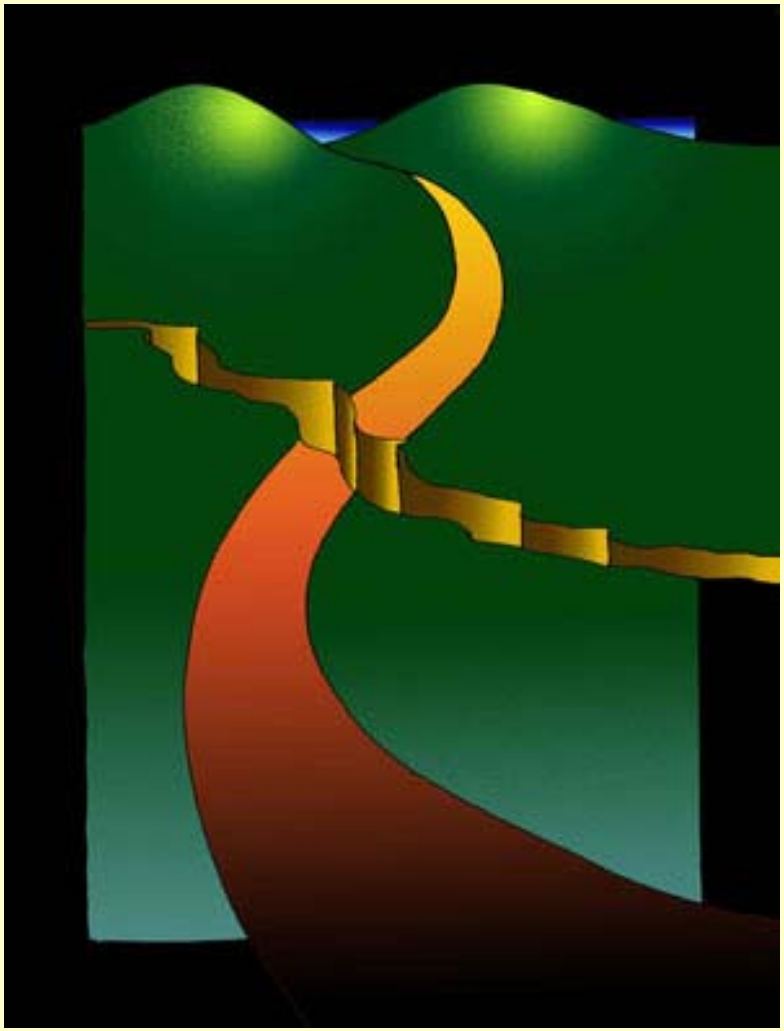


In general, Plaintiff attorneys zealously represent their clients' rights during the first 85% of the timeline, but often relinquish control of the financial aspects of the case once a settlement has been reached.

Pitfall One

Using Defense Provided Financial Expert

What's Wrong With Letting the Defense Handle It?



Lyons Case[1]

- Defendant offered $265,000 cash plus $3,000 per month for life, with 20 years guaranteed, to settle a medical malpractice claim.
- Defendant claimed that the cost for the $3,000 per month was $675,180, bringing the total cost of the settlement to $940,180
- The plaintiff's attorney accepted this at face value and calculated his fee based upon this represented value.

[1] Lyons v. Medical Malpractice Insurance Association, 730 N.Y.S.2d 345, 286 A.D.2d 711 (N.Y. App. Div. 2001)

Lyons Case

- Defendants conducted medical underwriting and obtained a rated age, which lowered the actual cost of the structured annuity to $409,544.50
- **TOTAL Settlement Value is really $674,544.50, not $940,180.00**
- The Attorney Fee is overestimated
- Attorney and the original defendant insurer are sued

Lyons Case

- Trial Court dismissed the suit, stating **"plaintiffs were not entitled to rely on the represented present value of the package because they could have and should have independently determined the value for themselves."** (286 A.D.2d at 712)
- New York Appeals Court reversed and remanded for trial

Macomber Case[2]

- Two plaintiffs with similar cases (Lisa Macomber for our purposes)
- Defendant's insurer was Travelers Casualty
- Macomber settled an auto case for $70,000 cash plus an annuity that Traveler's claimed cost $15,000

[2] Macomber v. Travelers Property and Casualty Corporation, 260 Conn. 620, 804 A.2d 180 (Sept. 3, 2002)

Macomber Case

- Travelers made a deal that Macomber did not know about: they agreed to provide certain brokers all of their structured business if the brokers would "rebate" part of their fee for placing the annuities back to Travelers.
- Connecticut Supreme Court labeled this **"the rebating scheme."** (Id. at 625)
- Because Travelers received this "rebate," Macomber alleges that what Travelers paid for the structure was actually less than the represented $15,000.

Macomber Case

- Macomber also alleges that Travelers routinely spends less on structures than they represent, even without taking the "rebating scheme" into account.
- Connecticut Supreme Court labeled this the **"the short-changing scheme"** (Id. at 625).

Macomber Case

Two Problems:

- Macomber got ripped off; her annuity cost less than the represented $15,000
- Macomber's attorney based his contingency fee on a settlement value of $85,000; the actual value of the settlement was less than that, thus, the attorney overcharged his client

Macomber Case

Interesting Tid-bits from the Case:

- Trial court dismissed Macomber's ten-count complaint because Macomber "received the exact amounts which they agreed to and expected to receive under the structured settlement agreements." (Id. at 628).
- Macomber's attorney based his contingency fee on a settlement value of $85,000; the actual value of the settlement was less than that, thus, the attorney overcharged his client

Macomber Case

- The Connecticut Supreme Court upheld the dismissal of the breach of fiduciary duty count, stating:

> " . . . one cannot overlook the salient fact that the defendants were also acting primarily for their own benefit and that of their insured's . . **the defendants did not owe the plaintiffs a single duty of loyalty characteristic of the relationship that exists between a principal and his agent**." (Id. at 640 fn.12.)

Macomber Case

- "Indeed, had the plaintiffs been invested with the type of control inherent in the traditional principal-agent relationship . . . they would have been better equipped to **safeguard their interests against the rebating and short-changing schemes alleged in the present complaint**." (Id. at 640 fn.12)

DON'T GET HOSED

The Defense uses various methods to save their client (liability insurer) money:

1. Post settlement underwriting and re-underwriting
2. Jumbo case discounts/Daily rates
3. Rebating 25% of commission
4. Life insurance affiliate

Pitfall Two

Failing to Retain Your Own Financial Expert

Grillo Case[3]

- Christina Grillo was catastrophically injured at birth.
- Plaintiff Counsel and the Guardian ad Litem **ignored a structure offer** and advised Josephine Grillo (mother) to set up a simple Section 142 trust and purchase taxable annuities to feed the trust.
- Money quickly dissipates
  - •Failure to establish special needs trust
  - •Failure to transfer mortality risk through annuity
- Mom sues attorney and guardian ad litem

[3] Grillo v. Henry, 96th Dist. Ct, Tarrant Co. (Tex.) and Grillo v. Pettiette, et al., 96th Dist. Ct. Tarrant Co.]

Grillo Case

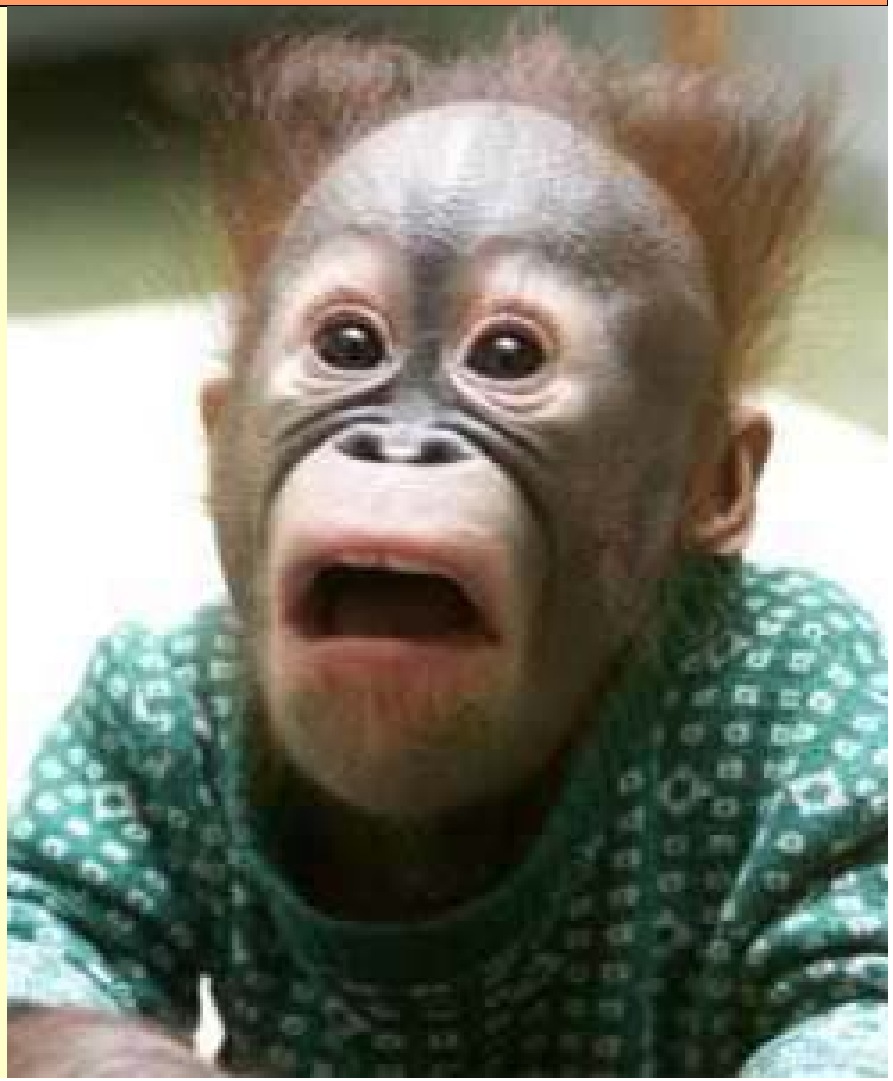
- Claim Settles for $4,100,000
  - •Attorney pays $1,600,000
  - •Guardian ad Litem pays $2,500,000
- Claimant does structure a large portion of this settlement

Grillo Case

We still meet attorneys who say, “We don’t give any advice about structures. We just tell them that we do not give any tax or investment advice.”

Why Have Plaintiff Attorneys Allowed These Things to Happen?

Because for years these things have simply been the status quo, and various myths about structured settlements have come to be accepted as truths



Structured Settlement Myths

"Client knowledge of the present value cost of a structured settlement triggers constructive receipt"

Myth Number One

Structured Settlement Myths

Priv. Rul. 83-33035

"Disclosure by defendant of the existence, cost, or present value of the annuity will not cause constructive receipt of of the present value of the amount invested in annuity"

Priv. Rul. 90-17011

"Knowledge of the existence, cost, and present value of the annuity contract used to fund the settlement offer…will not cause constructive receipt of the amount payable under the annuity contract or the amount invested in the annuity contract."

FALSE!

Structured Settlement Myths

"Any structured settlement has to come through a broker provided by the defense, or constructive receipt is triggered."

Myth Number Two

Structured Settlement Myths

The only requirement is that the check to fund the future payments be paid directly to the annuity issuer, and not to attorney or client.

FALSE!

Structured Settlement Myths

"The client can structure only from the defendant casualty company's life insurance affiliate, or from a company 'approved' by the defense."

Myth Number Three

Structured Settlement Myths

- Plaintiffs have the right to choose any annuity company that offers structured settlements.
- Denying the Plaintiff the right to choose annuity companies often results in increased prices, and forces Plaintiffs to structure with a company with poor financial ratings.

FALSE!

Overcoming Pitfalls One and Two

Avoiding Pitfalls One and Two

Make sure that your settlement planner:

1. Is loyal **ONLY** to Plaintiffs
2. Does not have special arrangements with any annuity company that could affect his objectivity
    a. Rebating
    b. "Approved" broker
3. Has his own E&O coverage for financial advice

Retain Your Own Settlement Planning Expert

Avoiding Pitfalls One and Two

Your Settlement Planner should:

1. Educate your client on the pros and cons of all available settlement options:
   a. Cash
   b. Structured Settlements
   c. Trust products
   d. Other investment vehicles

Retain Your Own Settlement Planning Expert

Avoiding Pitfalls One and Two

Your Settlement Planner should:

2. Prepare you for mediation negotiations:
   a. Cost per $1,000 market survey
   b. Medical Underwriting
   c. Analyze/Annuitize Life Care Plan
   d. Negotiation tactics of defense liability insurers

Retain Your Own Settlement Planning Expert

Avoiding Pitfalls One and Two

<u>Example of need for market survey:</u>

Defense offers your 6 year-old client a structure that provides a $1,000 level lifetime monthly payment, with the first 15 years guaranteed. The represented cost is $188,836.

How do you know if this structure is competitive?

Obtain a Market Survey

Market Survey

ANNUITY ISSUER	AGE UPRATE	COST FOR A LEVEL $1,000/MO LIFETIME PAYMENT
American General	74	$129,538
Liberty Life	72	$131,959
Allstate	73	$131,982
Pacific Life	70	$140,594
MassMutual	67	$141,171
First Colony	64	$146,177
General Electric	64	$146,688
Hartford	62	$150,094
Safeco	56	$153,643
New York Life	53	$160,391
John Hancock	N/A	$176,978
Prudential	N/A	$186,222
Aviva	18	$186,891
MetLife	N/A	$188,836

Annuity Issuer Ratings

Life Company	A.M. Best Co.	Fitch	Moody's	S & P	Weiss
Allstate Life	A+ 15 (2)	NR	Aa2 (3)	AA (3)	B+ (4)
American General Life	A++ 15 (1)	AA+ (2)	Aa1 (2)	AAA (1)	B+ (4)
Aviva	A 8 (3)	A+ (5)	NR	A (6)	B (5)
First Colony Life	A+ 15 (2)	AA- (4)	Aa3 (4)	AA(3)	B (5)
G.E. Capital Assurance	A+ 15 (2)	AA- (4)	Aa3 (4)	AA (3)	C+ (7)
Hartford	A+15 (2)	AA (3)	Aa3 (4)	AA- (4)	B+ (4)
John Hancock	A++ 15 (1)	AA (3)	Aa3 (4)	AA (3)	A- (3)
Liberty Life Assurance	A- 8 (4)	NR	A1 (5)	A (6)	B- (6)
Massachusetts Mutual Life	A++ 15 (1)	AAA (1)	Aa1 (2)	AAA (1)	A (2)
Metropolitan Life	A+ 15 (2)	AA (3)	Aa2 (3)	AA (3)	B+ (4)
New York Life	A++ 15 (1)	AAA (1)	Aa1 (2)	AA+ (2)	A (2)
Pacific Life & Annuity	A++ 15 (1)	AA+ (2)	Aa3 (4)	AA+ (2)	B (5)
Prudential	A+ 15 (2)	AA- (4)	A1 (5)	A+ (5)	B- (6)
Safeco	A 10 (3)	AA- (4)	A1 (5)	A+ (5)	B (5)

Avoiding Pitfalls One and Two

Market Survey:

MetLife costs $59,298 more than American General, or, in other words, MetLife is nearly **46%** more expensive than American General, **for the exact same benefit stream.**

Obtain a Market Survey

Avoiding Pitfalls One and Two

Your Settlement Planner should:

3. Review/Draft proper structured settlement documents

4. Memorialize settlement plan recommendations in formal letter to client and attorney

Retain Your Own Settlement Planning Expert

Pitfall Three

Unaware of Tax Treatment on Taxable Damages

Unaware of Tax Treatment on Taxable Damage Cases

TAXABLE DAMAGES?

I thought personal injury settlements were tax free?

Unaware of Tax Treatment on Taxable Damage Cases

Punitive Damages
Negligent Infliction of Emotional Distress
Abuse of Legal Process
Insurance Bad Faith
False Imprisonment, etc.
Defamation: Slander and Libel
Invasion of Privacy
Contractual Relations Litigation

American Jobs Creation Act of 2004 (P.L. 108-357), Oct. 22, 2004, makes Discrimination and Wrongful Termination, etc., fees deductible under IRC § 62

Taxable Damage Cases

Unaware of Tax Treatment on Taxable Damage Cases

- The IRS has recently expanded its audit guidelines for "Lawsuit Awards and Settlements" under its Market Segment and Specialization Program (MSSP)
- 32 page publication sent to IRS field agents that targets damages from lawsuit settlements that "otherwise fall through the gap of unreported income."

Punitive Damages: Handle with Care

Unaware of Tax Treatment on Taxable Damage Cases

- IRS has traditionally given most weight to the complaint

- If punitive damages were alleged in the complaint, and the SA is silent on punitives, the IRS can presumptively assign an allocation of punitive damages to the settlement amount (including each future periodic payment). *Barnes v. Commissioner*, T.C. Memo 1997-25.

- Burden is on taxpayer to prove otherwise

Punitive Damages: Handle with Care

Unaware of Tax Treatment on Taxable Damage Cases

SAMPLE LANGUAGE FOR SETTLEMENT AGREEMENT

"No payment or part of any payment is for punitive damages. While punitive damages may have been alleged in pleadings or mentioned during negotiations, they were not proven and would have required a specific finding by a court of competent jurisdiction. Further, it is in the mutual best interest of the opposing parties that these settlement terms do not include punitive damages."

Punitive Damages: Handle with Care

Pitfall Four

Improper Language in Settlement Documents

Improper Language in Settlement Documents

1. Settlement Agreement and Release
2. Qualified Assignment
3. Court Order approving settlement

Improper Language in Settlement Documents

1. **SA Should never have language stating that Plaintiff will be purchasing the annuity.**

   - such language violates constructive receipt
   - defendant or liability insurer purchases annuity directly from annuity company

Improper Language in Settlement Documents

2. **When discussing compensation to client, the Settlement Agreement should not state that "receipt and sufficiency is hereby acknowledged"**

   -SA can acknowledge sufficiency of compensation, but not receipt (since future payments have not yet been received)

Improper Language in Settlement Documents

3. **Settlement Agreement should never contain language that puts injury in doubt.**

   Incorrect: "Plaintiff *claims* that he sustained personal physical injuries, all as a result of the incidents…"

   Correct: "Plaintiff *sustained* personal physical injuries, that he claims are all as a result of…"

   -If necessary, the proximate cause can be in doubt, but make sure that the *injuries are certain*, and stipulated to in the agreement.

Settlement Agreement and Release

Improper Language in Settlement Documents

4. **SA should not state that the cost of the annuity is the consideration being paid to Plaintiff.**

- Consideration to Plaintiff is the cash lump sum, if any, and the obligation to make future periodic payments on the dates specified.
- The annuity cost is really the consideration being paid by the defendant to the third party assignee (annuity company) for assuming the future payment obligation.

Settlement Agreement and Release

Improper Language in Settlement Documents

5. **SA should contain "5891" clause**:

   "…none of the periodic payments may be accelerated, deferred, increased or decreased, anticipated, sold, pledged or encumbered by the Claimant, ***except as pursuant to a qualified order under IRC Sec. 5891, and as amended."***

Improper Language in Settlement Documents

New IRC Sec. 5891, which became effective January 23, 2002, allows for certain future payments to be "factored" to a lump sum with court approval.

-court will consider "best interest" of plaintiff

-unapproved factoring transactions are subject to a 40% federal tax

Settlement Agreement and Release

Improper Language in Settlement Documents

The Qualified Assignment document memorializes the transaction that assigns the obligation to make the future payments from the defense or liability insurer to the annuity company

Qualified Assignment Documents

Commutation Riders

- Potential estate tax problem whenever guarantee period added
- When potential problem exists, choose company that provides commutation rider
- Avoids need for factoring and court approval

Improper Language in Settlement Documents

Lack of ‘Secured Creditor’ Status

- Section 130 of the IRC allows the claimant to receive a "pledge" or security interest from the annuity provider.

  -Designed to put the claimant ahead of general creditors in case of bankruptcy of the assignee/obligor.

  -No cost to add provision

Qualified Assignment Documents

Improper Language in Settlement Documents

In cases where court approval of the settlement is necessary (Estates, Minors and Incompetent Adults), if a structured settlement will be a part of the settlement, the language in the petition and order for court approval must contain “structure language” (to create the periodic payment obligation).

Petition and Order for Court Approval of Settlement

Improper Language in Settlement Documents

- The Settlement Agreement should be attached as an exhibit (or submitted for *in camera* review), which contains the full settlement including the necessary structure language

- At a minimum, the Petition and Order must mention that the claimant will receive cash ***and*** future periodic payments

Petition and Order for Court Approval of Settlement

Pitfall Five

Problems in Mediation Negotiations

Common Problems in Mediation Negotiations

BE PREPARED:

Retain own Settlement Planner prior to mediation

- -Cost per $1,000 annuity market survey
- -Medical Underwriting
- -Gain insight into defendant's structured settlement policies and negotiation tactics
- -"Annuitize" Life care plan

Prepare and educate your client regarding various settlement options

- -Cash
- -Structured Settlement
- -Structured Settlement Trust products
- -Combination of all of the above

Common Problems in Mediation Negotiations

NEGOTIATE BASED ON "CASH COST"

<u>Do not get drawn into a "structure duel"</u>

- unnecessarily complicates negotiations
- negotiate for highest present value dollar amount possible, and reserve the right to structure

Common Problems in Mediation Negotiations

Upon final offer from defense, accept the offer contingent upon the defense agreeing to:

1. Fund a structured settlement, if any, that is designed by Plaintiff and Plaintiff's Settlement Planner;
2. Use annuity companies of Plaintiff's choosing;

Common Problems in Mediation Negotiations

3. Place annuities through Settlement Planner of Plaintiff's choosing; and,
4. Cooperate by executing the necessary documents (Qualified Assignment)
5. "Each party bears own costs."

   WARNING: Defense attorneys often are forced to renege by liability insurers, when they learn that they will not control the structure transaction.

Common Problems in Mediation Negotiations

Be prepared for Defense to bring up “Myths”

1. “corporate policy,”
2. “approved broker,” etc.

Common Problems in Mediation Negotiations

Example language when accepting final offer from defense:

"The parties agree to settle for consideration of cash and future periodic payments, if any, the details of which to follow within the next 14 days, all of which will cost the defendant $X. Defendant agrees to. . .

Common Problems in Mediation Negotiations

1. Fund a structured settlement, if any, that is designed by Plaintiff and Plaintiff's Settlement Planner;
2. Use annuity companies of Plaintiff's choosing;
3. Place annuities through Settlement Planner of Plaintiff's choosing;
4. Cooperate by executing the necessary documents (Qualified Assignment); and,
5. Bear its own costs

Pitfall Six

Neglecting Medicare Set Aside (MSA) Accounts

Medicare Set Asides (MSA) Accounts

MEDICARE?! I'm getting sick…

Neglecting Medicare Set Aside (MSA) Accounts

1. Medicare has begun a comprehensive effort to collect past paid Medicare benefits that should have been paid by another primary payor (Workers' Comp, Liability Carrier).

2. In an attempt to prevent this in the future, Medicare is now requiring that in applicable cases, a specific portion of the settlement be allocated and set aside in a separate account or trust, to be used exclusively for future injury-related medical expenses that would otherwise be paid by Medicare. (42 CFR 411.46)

Neglecting Medicare Set Aside (MSA) Accounts

3. The Centers for Medicare and Medicaid Services (CMS) has outlined when and how Medicare's interests should be protected:
    A. If a primary payor is settling future medical benefits for a qualified" individual, an allocation must be made to cover future injury-related Medicare-allowable expenses in order to prevent the shifting of the burden to Medicare.
    B. This arrangement is generally referred to as a Medicare Set-Aside (MSA) Account.
    C. MSA Account must be approved by CMS.

Neglecting Medicare Set Aside (MSA) Accounts

4. An individual in considered “qualified” if:
   A. The individual is a Medicare recipient at the time of settlement,

      OR

   B. The individual is not yet receiving Medicare benefits, but the total amount of settlement is over $250,000,

      AND

   It is reasonably expected that the individual will become a Medicare recipient within 30 months of settlement.

Neglecting Medicare Set Aside (MSA) Accounts

"Reasonable expectation" exists in the following situations:

1. The individual is receiving Social Security Disability (SSD) benefits at the time of settlement;

2. The individual has been denied SSD benefits but plans to appeal that decision;

3. The individual has End Stage Renal Disease (ESRD) but has not yet qualified for Medicare; and,

4. The individual is age 62.5 or older at the time of settlement.

Neglecting Medicare Set Aside (MSA) Accounts

The MSA arrangement consists of three components:

1. The allocation amount to be placed into the MSA account at the time of settlement must be determined
    A. Determined by review of medical records, medical payment history, etc. Amount is calculated using Worker's Comp fee schedule, or customary charges, depending on jurisdiction.
2. A mechanism must be established to fund the MSA account
    B. Can either be a lump sum or an annuity
3. Must be a mechanism to administer the account after settlement
    C. Can be professionally or self-administered

Neglecting Medicare Set Aside (MSA) Accounts

- The penalty to the liability carrier or self-insured can be double the damages incurred by Medicare. (42 CFR 411.46)
- The injured party could lose their future Medicare benefits. (42 CFR 411.46)

Potential Penalties for Neglecting Medicare Set Asides

Neglecting Medicare Set Aside (MSA) Accounts

- CMS has a right of action to recover its payments from any entity, including a **beneficiary**, provider, supplier, physician, **attorney,** State agency or private insurer that has received a third party payment.(42 CFR 411.24)

Potential Penalties for Neglecting Medicare Set Asides

Pitfall Seven

Neglecting to Preserve Medicaid Benefits

Neglecting to Preserve Medicaid Benefits

- If the injury victim currently receives Medicaid benefits, or expects to apply in the future, the receipt of settlement proceeds can cause loss of eligibility
- It is possible to preserve Medicaid and Supplemental Security Income (SSI) eligibility by creating a special needs trust under 42 USC § 1396p(d)(4)(A) to remove the settlement proceeds from a “means test”

Neglecting to Preserve Medicaid Benefits

- Medicaid is a federal program administered by the states, with rules that vary widely among the states
- SSI is a federal Social Security program, with independent criteria
- Eligibility for SSI usually means eligibility for Medicaid, while the reverse is not true
- Beneficiary must be under age 65 and disabled
- State usually requires notice of settlement
- Medicaid lien for services prior to settlement must be satisfied

Neglecting to Preserve Medicaid Benefits

- The state must be the secondary beneficiary of any special needs trust, with right to recover from the trust assets up to the sum of benefits provided
- It is possible to preserve guaranteed payments from a structure, after the death of the trust beneficiary, if the allocation is made at the time of settlement (annuity is not a trust asset)
- Key is to submit the trust agreement to the state for review prior to execution; obtain written okay

Neglecting to Preserve Medicaid Benefits

- Social Security, in insolated instances, has denied SSI on the basis that a structure (periodic payments) is considered instant access because it can be factored
- Precautions:
  - Do not include section 5891 language (right to factor)
  - Do not use “pledge” form of the qualified assignment, which gives a security interest to the payee

Neglecting to Preserve Medicaid Benefits

- Preservation of Medicaid eligibility is critical, if damage recovery will not by itself provide lifetime care for the beneficiary:
  - Settlement proceeds will be spent down to provide medical care
  - Medicaid gets a huge discount on its cost of services, which your client loses

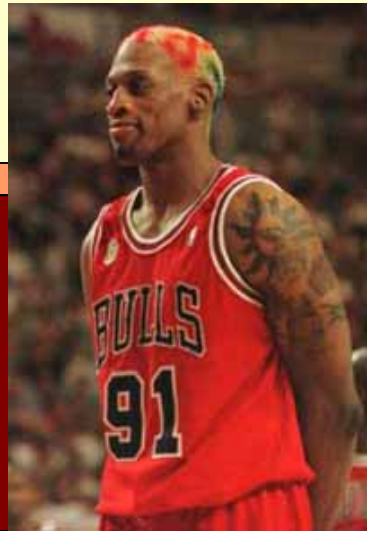
Pitfall Eight

Confidentiality Clause: A Potential Tax Trap

Confidentiality Clause: A Potential Tax Trap!

Facts: 'The Worm' kicked a cameraman in the groin after falling out of bounds during a game.

- Dispute settled for $200,000
- Settlement Agreement contained confidentiality clause

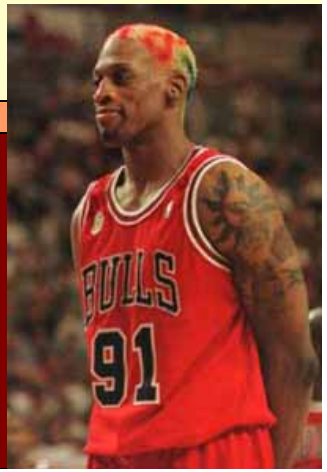


Rodman Case

Confidentiality Clause: A Potential Tax Trap!

- Photographer treated all $200,000 as compensation for personal injury damages under IRC Sec. 104(a)(2).
- Photographer's tax return was audited, IRS sought to treat entire payment (except $1) as taxable compensation based upon the provisions in the Settlement Agreement.
- Matter ultimately decided in U.S. Tax Court, and reported in a memorandum. *Amos v. Commissioner*, T.C. Memo 2003-329 (December 1, 2003).

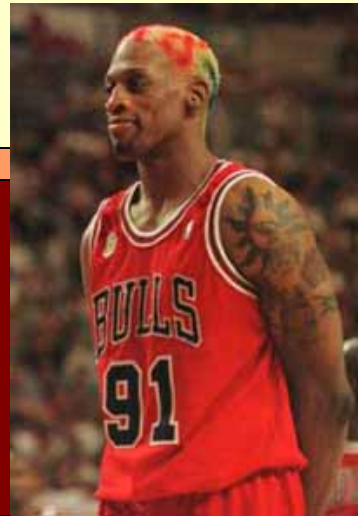
Rodman Case



Confidentiality Clause: A Potential Tax Trap!

- In the memorandum, the judge stated that the taxpayer has the burden of proving that damages were on account of personal physical injuries or sickness, under IRC Sec. 104(a)(2). Citing *Commissioner v. Schleir*, 515 U.S. 323, 328(1995), and *United States v. Burke*, 504 U.S. 229, 248 (1992).

Rodman Case

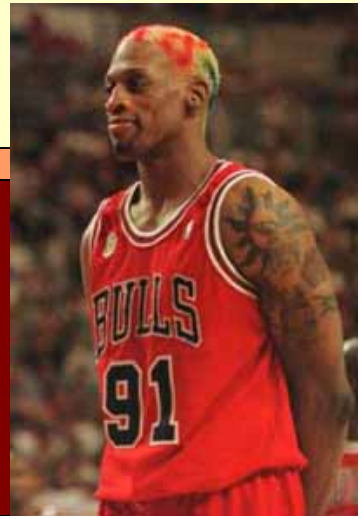


Confidentiality Clause: A Potential Tax Trap!

•Judge noted that "the nature of the claim that was the basis for the settlement controls whether such damages are excludable under IRC Sec. 104(a)(2)." *Burke*, *supra*, 504 U.S. at 237.

•The "intent of the payor is critical" and "the character of the settlement payment hinges ultimately on the dominant reason of the payor in making the payment" *Knuckles v. Commissioner*, 349 F.2d 610, 613, (10th Cir. 1995).

Rodman Case

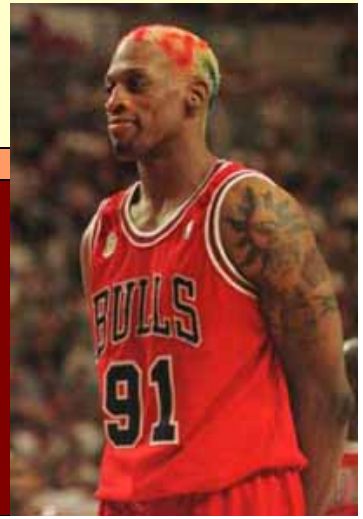


Confidentiality Clause: A Potential Tax Trap!

•On that basis, the court treated 60% of the damages as compensation for the photographer's physical injuries, **and 40% of the damages as payment for the confidentiality and related provisions of the settlement agreement.**

•Thus, 40% of the damages were taxable

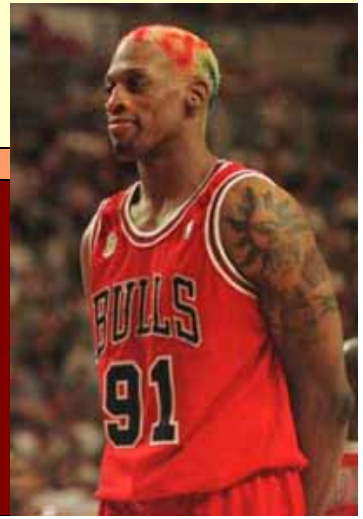
Rodman Case



Confidentiality Clause: A Potential Tax Trap!

- Even though "Mr. Rodman's dominant reason in paying the petitioner the settlement amount was to compensate him for his claimed physical injuries," (*Amos v. Commissioner*) the court still held that a portion of the award represented taxable damages.

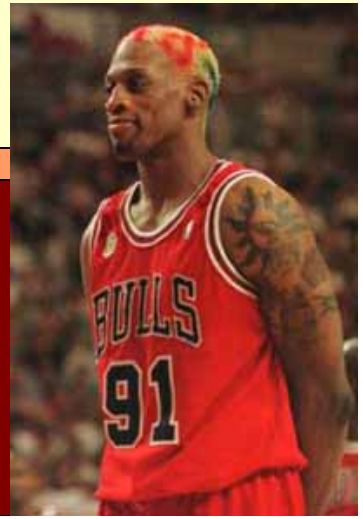
Rodman Case



Confidentiality Clause: A Potential Tax Trap!

- The holding in *Amos* provides justification for the IRS to treat all personal injury damage awards as part taxable and part non-taxable if the Settlement Agreement contains confidentiality provisions

Rodman Case



Confidentiality Clause: A Potential Tax Trap!

•Plaintiff attorneys must insist on striking confidentiality provisions from personal physical injury cases that fall within IRC Sec 104(a)(2).

•If the defense insists on a confidentiality clause, the plaintiff must demand that the confidentiality clause state that confidentiality is mutually beneficial to both parties, and that the defendant is paying the settlement amount for 104(a)(2) damages, and not for confidentiality purposes.

What Can Be Done?

Pitfall Nine

Not Using HIPAA to Your Advantage

Use HIPAA to Your Advantage

- Medical Information is private and protected
- By filing a lawsuit, your client may have to give up some of that privacy, but not all
- Privacy good for its own sake, but may also be to your strategic advantage

Use HIPAA to Your Advantage

A Few Tips:

The defense, especially in medical malpractice cases may be routinely violating HIPAA

- When a doctor gives medical information to a "business associate" (which should include their defense attorneys), they have to meet HIPAA requirements.

- If they don't, they can be subject to civil and criminal sanctions—or at least deserve to be roundly embarrassed on the witness stand.

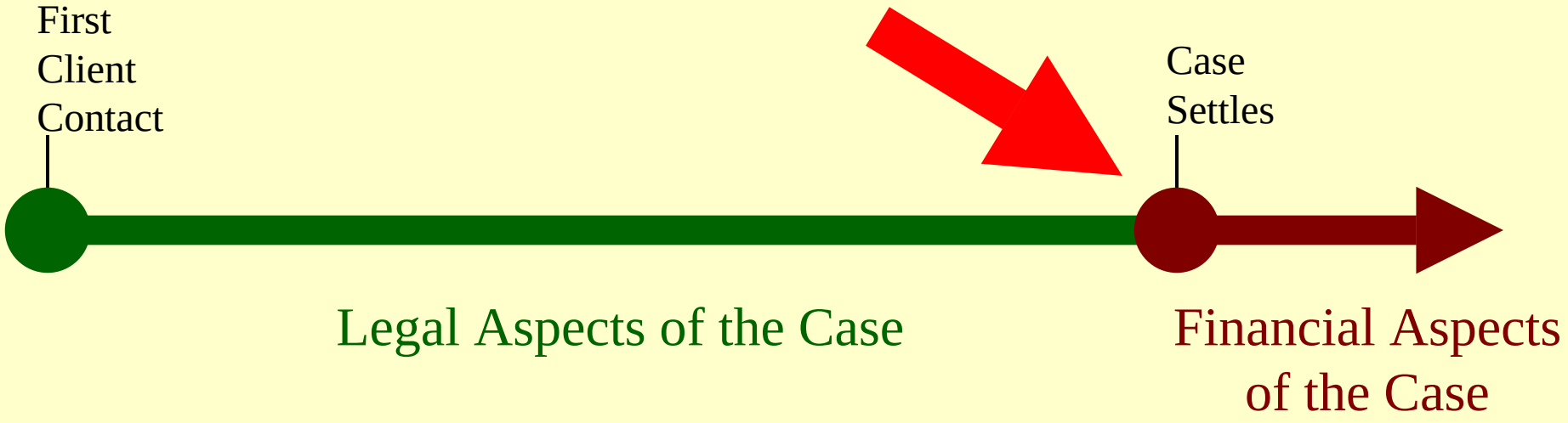
Use HIPAA to Your Advantage

What to do:

- When your client signs the necessary medical releases, narrow the releases as much as possible.

- Require that the released information not be shared without your client's further permission

Case Timeline



Case Timeline

The final offer and acceptance is the most critical time to take control of the settlement planning process!

You should involve your expert prior to this point.

Step by Step Guide to Avoiding Malpractice Pitfalls

1. 30-60 days prior to mediation, get settlement planner involved

2. Send clients ‘Form of Settlement’ letter (attached)

3. If clients take settlement in cash, make sure they sign “Grillo” acknowledgment. (attached)

What if the Defense Will Not Cooperate?

IF THE DEFENSE WILL NOT AGREE TO:

1. Fund a structured settlement, if any, that is designed by Plaintiff and Plaintiff's Settlement Planner;
2. Use annuity companies of Plaintiff's choosing;
3. Place annuities through Settlement Planner of Plaintiff's choosing;
4. Cooperate by executing the necessary documents (Qualified Assignment); and,
5. Bear its own costs

The Ultimate Weapon: The Qualified Settlement Fund

- Contrary to defense's representation, a structure does not require the cooperation of the defendant or its insurer
- The QSF is a substitute defendant (by novation), which assumes the tort liability from the original defendant in exchange for receipt of a cash lump sum
- The settlement terms call for a cash payment *for the benefit of* (not *to*) the plaintiffs, payable to the QSF
- Defendant or insurer (the transferor) gets deduction under IRC § 461(h)
- Recommend use of "stealth" approach to avoid recalcitrant insurers from reneging on cash settlement agreement

The Ultimate Weapon: The Qualified Settlement Fund

- QSFs are authorized pursuant to Treasury Regulations § 1.468B
- QSFs stand in the shoes of the original defendant when making a "qualified assignment" by becoming a party to the suit or agreement under IRC § 130, per Rev. Proc. 93-34
- Self-insured defendants and insurers are disparaging the use of the QSF because they will lose control of the structure transaction (as well as the ability to profit at the expense of the injury victim)
- QSFs are administered under court oversight
- QSFs are a short-term proposition; they terminate once the funds are distributed (periodic payment obligations are transferred to third parties)

The Ultimate Weapon: The Qualified Settlement Fund

HOW TO PROCEED:

•Engage a settlement planner (the structured settlement producer) early, who should, in turn, help you contact the services of an attorney who specializes in QSFs

•Use the “stealth” approach by avoiding the use of terms such as “QSF” and “468B Trust” in favor of a less descriptive term

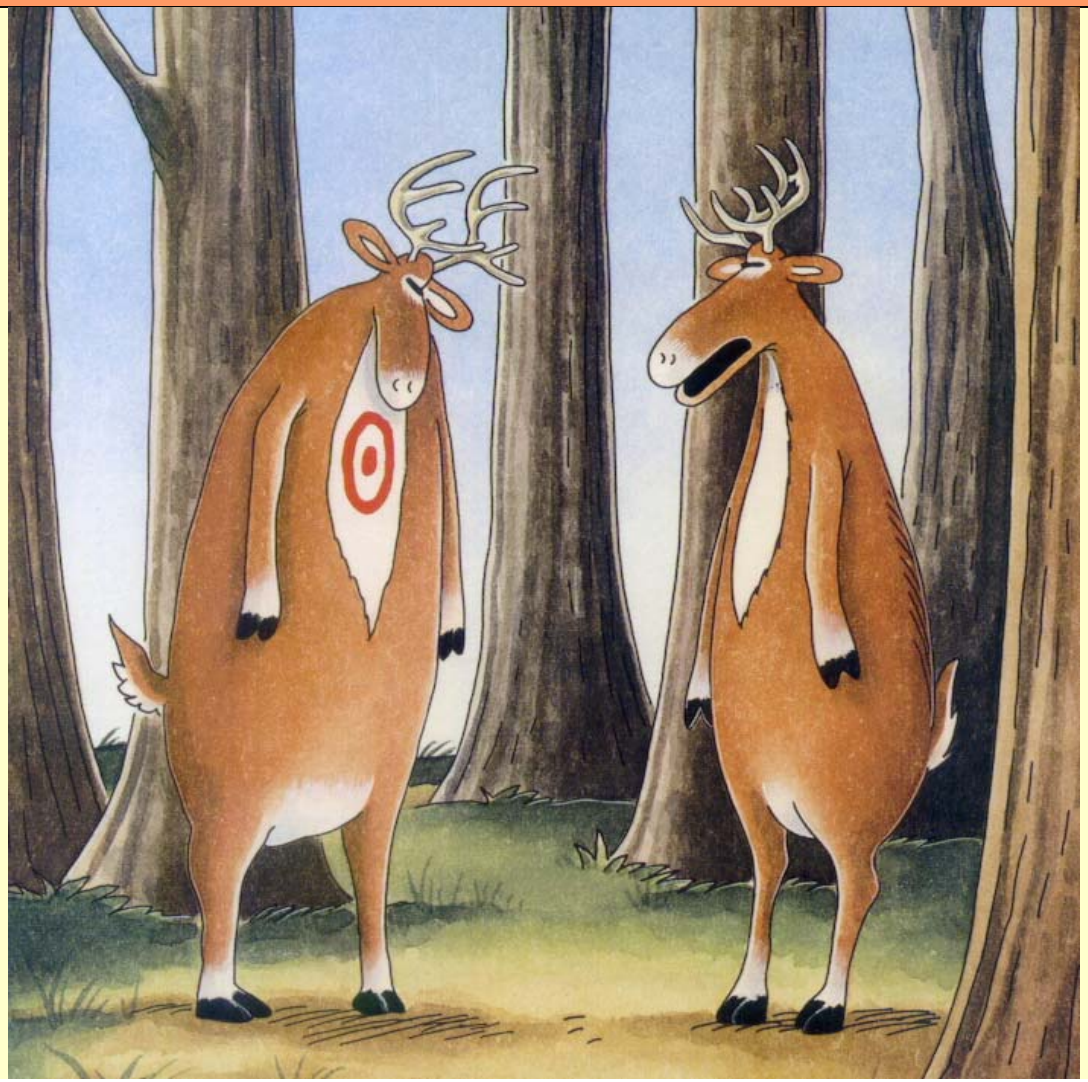
•Specialist attorney can advise as to what to communicate to defense

•Specialist attorney will draft all settlement documents for trial attorney, coordinating structure aspects with settlement planner

The Ultimate Weapon: The Qualified Settlement Fund

- Interest earned on funds in QSF, while it exists, can be applied toward attorney fees for specialist, which are legitimate expenses of the QSF; often, the structured settlement producer will agree to pay the remaining costs of the QSF
- All funds paid by defendant into the QSF are available for the benefit of the plaintiffs
- No funds from the QSF go toward defense costs (including commissions to defense structured settlement producers)
- Defendants and insurers are not allowed to profit at the expense of the injury victims

Benefits of Avoiding Pitfalls



Benefits of Avoiding Pitfalls

TO CLIENT:

- Peace of mind
- Avoid being victimized again
- Best possible financial outcome

TO ATTORNEY:

- Happy clients and referrals
- Liability firewall
- Peace of mind

How Much Does it Cost?

$0.00

Questions? **Please.**