

# Settlement Strategies in the Days of Mega and Nuclear Verdicts

Rachel D. Grant, CSSC     Arcadia Settlements Group

*Insurance claims professionals and their attorneys face many challenges throughout the course of a claim, especially as nuclear and mega verdicts loom so large, making it critical that industry leaders consider Structured Settlements in early resolutions.*

Historically, U.S. law has recognized that personal injury damages should be excluded from taxable income since the Revenue Act of 1918. Section 104(a)(2) of the Internal Revenue Code codified the law, guaranteeing that lump sum monies received for the damages “on account of” physical injury are excluded from gross income. There was, however, no exclusion for interest and investment earnings. In 1983, Public Law 97-473 amended Section 104(a)(2) to allow that the full amount of the future periodic payments from a structured settlement, which consists of both principal and interest, constitute damages and are, therefore, exempt from federal tax liability. In 1997, amendments to the federal tax law expanded the use of structured settlements to include workers’ compensation claims [Section 104(a)(1)].

## A VALUABLE PIECE IN YOUR CLAIMS TOOLKIT

Structured settlements are often misunderstood - or simply forgotten about - during the claims resolution process. While not every matter may resolve with a structured settlement component, they are useful to consider to avoid nuclear verdicts, evaluate settlement value, and calculate future financial and/or medical needs of claimants and their families. While the list below is not exhaustive, the following are instances when consideration of a structured settlement might make sense.

### Claims for which a structured settlement are most useful:

- Wrongful death
- Minor or mentally incompetent person
- Disability and catastrophic injuries
- Plaintiffs with limited investment or financial expertise
- Offer and demand are too far apart
- Workers’ compensation claims and Medicare Set-Aside Arrangements (MSA)
- Attorney fees can be structured

**LIFE CARE PLANS** Structured funds can address the future value of life care plans that will satisfy the plaintiff’s or claimant’s medical needs while potentially saving the defendants and insurers hundreds of thousands, if not millions, of dollars. Purchasing future benefits is the most affordable way to close the gaps between available settlement dollars and proposed life care plans and mega pre-suit demands.

**CLAIMANTS ON GOVERNMENT ASSISTANCE** Claimants who receive gov-

ernment assistance can benefit from a structured settlement to preserve their ability to qualify. Settlement funds accepted as cash might destroy their eligibility, but when settlement dollars are placed in a structured settlement annuity and strategically paired with a Special Needs Trust, claimants’ eligibility for needs-based assistance is often protected.

**MINORS AND OTHER PROTECTED INDIVIDUALS** When the claimant is a minor or a protected individual, the Courts necessarily review the settlement to ensure that settlement funds are wisely invested for the benefit of the claimant. Structured settlements are overwhelmingly approved by the Courts for their protection of an injured party’s best interests. They are especially desirable for guaranteed tax-exempt growth between the time of the settlement and first payments after the age of majority. A structured settlement is an excellent solution when compared to more common investment alternatives that incur trustee fees and taxable growth.

### WORKERS’ COMPENSATION CLAIMS

In workers’ compensation claims, the traditional structured settlement is a tried-and-true method to fund Medicare Set-Aside Arrangements (MSAs). After the initial “seed” cash payment, a structured settlement can be established to annually fund the MSA to pay for medical expenses at-

tributed to the work-related illness or injury. This protects the MSA account from premature consumption and is, therefore, viewed favorably by CMS.

### NEEDS-BASED SETTLEMENT DISCUSSIONS

While a lump sum settlement is one-dimensional, structured settlements allow claims professionals to foster a dialogue on the actual past, present, and future needs of the plaintiff that extends beyond a simple discussion of settlement dollars. In developing a settlement strategy, a structured settlement offers claims professionals and their attorneys an alternative to cash-only negotiation, allowing claims organizations to legitimately stretch their claims dollars while negotiating in good faith.

This focus on needs can identify and address both immediate and future needs for medical treatments, lost earnings, education, scholarship funds, and to provide for ongoing income to a plaintiff's surviving beneficiaries.

Personal injury plaintiffs and beneficiaries of wrongful death actions generally have very low or no investment risk tolerance due to ongoing financial needs. Structured settlements offer spendthrift protection for plaintiffs to ensure adequate funds are available as needs arise and should be coordinated with current and anticipated income sources of the injured party.

### THE ROLE OF STRUCTURED SETTLEMENT CONSULTANTS

In 2014, the National Structured Settlements Trade Association (NSSTA) joined forces with CLM Advisors to survey 100+ claims professionals about how they use structured settlements in their claims practice.

### THE STUDY FOUND THAT CLAIMS PROFESSIONALS ESTIMATED THAT:

- 40% of the structured settlement proposals they have requested from consultants are used.
- 25% of the study's participants said that they believe that using structured settlement proposals helps to speed up the resolution of the claim.
- Almost 50% felt that utilizing a structured settlement makes a case more likely to settle.
- Interestingly, 75% of those surveyed stated that they themselves would take advantage of a structured settlement if they were an injured party.

The NSSTA/CLM study showed that the claims professionals surveyed agreed that claims are more likely to settle when a creative approach is taken during settlement negotiations. A full 96% ranked their structured settlement consultants' experience, knowledge and level of expertise as "valuable" to "very valuable" to their claims

### ADVANTAGES FOR THE DEFENDANT/INSURER AND DEFENSE COUNSEL

- Reduces administrative and legal expenses
- Reduces expense of trial and appeal
- Eliminates the potential for nuclear verdicts
- Bridges gap between offer and demand
- Eliminates potential bad faith claim
- Settles case without risk of adverse trial results
- Can break a negotiation impasse
- Services provided at no additional cost to the parties.

### ADVANTAGES FOR PLAINTIFFS AND PLAINTIFF'S COUNSEL

- Tailored income stream to meet specific financial needs
- Guaranteed money for plaintiff and family
- Investment advantages
- Competitive "taxable equivalent" return
- Payments are income tax-exempt
- Can integrate the structured settlement program with asset management solutions and/or trust
- Avoids hazards of litigation, expenses of discovery and trial
- Services provided at no additional cost to the parties.

process. Further, 67% of those surveyed stated that the participation of their structured settlement consultants at mediations and settlement conferences was "valuable" to "very valuable."

### A NO-COST SERVICE

There is no downside or out-of-pocket costs to any of the parties for considering a structured settlement. During the early recognition and early resolution stages, an independent structured settlement consultant can bring an advantage to the defense during the settlement process. An independent structured settlement consultant is empathetic to both the needs of the defendants (committed to avoiding high-risk exposures) and the injured party (fairly compensating for sustained injuries and protecting the financial security of the claimant).

Collaboration is essential to achieving a good resolution. Your structured settlement consultant will help identify the benefits of a structured settlement to all parties and assist the plaintiff in understanding the advantages and tax-exempt benefits, as well as coordinating the settlement with other legal vehicles so that eligibility for public benefits is preserved. Further, your consultant will assist in the preparation of the necessary settlement documents to ensure that the proper corporate entities are included and protected and that the IRS requirements are met so that the tax advantages are preserved.

### CONCLUSION

With a structured settlement, the settlement team is able to negotiate benefits, not just bottom-line costs. All settlements involve compromise, and, while you may not meet all the plaintiff's needs, utilizing structured settlement options in your claims negotiations demonstrates a willingness to creatively address the plaintiff's unique needs.

The economic uncertainty of current market conditions has caused a surge in interest for structured settlements: plaintiffs and their attorneys are increasingly using structured settlements to ensure that guaranteed tax-exempt payments act to ensure good financial management and avoid volatility in the financial markets.



*Rachel D. Grant, CSSC is a certified structured settlement consultant with Arcadia Settlements Group, USLAW NETWORK's exclusive structured settlements corporate partner. Rachel is based in the metro-Detroit area but provides services to her clients nationwide.*