Defense Structured Settlements: Home of the Whopper

By Richard G. Halpern

Sad but true: some professions exist through lies, and there are businesses to which particularly seductive whoppers are as valuable as patents. The legal profession is one of the very few on the face of the earth that prohibits its members from lying. Attorneys may not engage in fraud, dishonesty, misrepresentation... or even that favorite pastime of our elected officials, deceit. Our system of law is based upon the search for truth, after all. So it is no wonder that plaintiff's counsel have been vulnerable to the maneuvers of the structured settlement industry, an institution built, maintained, and nourished by lies.

Harsh words? In fact, not harsh enough. These lies are more than gentle deceptions, casual exaggerations, or even everyday weasel words: they are carefully considered weapons designed to make the plaintiff's bar accessories as the industry enriches itself to the detriment of injured parties.

Were this column the size of War and Peace, I might be able to discuss thoroughly all of the lies, large and small, that contribute to so much harm and deception. But I must content myself, for now, with five of the most egregious defense whoppers, beginning with:

1. Present Value Sleight of Hand

"Now you see it. Now you don't." You would think the one piece of information plaintiffs and their attorneys would have a right to in the settlement process would be the cost of the settlement modality. And you would be correct, except that the defense doesn't want the plaintiff to know the true cost. The defense wants to use "present value," a number based on the estimates of its annuity broker and subject to manipulations according to which assumptions are used. The defense also wants you and your plaintiff to believe that "present value" is the same as cost, so if that misconception exists, the defense will do nothing to clarify it. This is what your state rules of professional responsibility describe as "deceit," impermissible conduct for an attorney. Deceit is nourishing a misconception without directly misstating the facts. Deceit is also presenting present value to a plaintiff as if it represented the cost of a structured settlement, which it isn't.

Why do they do this?

Power, plain and simple. Since the present value number is the end result of a calculation based on speculative variables, it can be adjusted by the defense to serve its purposes. If the plaintiff hears "cost" when the defense says "present value," then conditions are perfect for a defense slam dunk: the plaintiff is making decisions based on misleading and defense-serving information. Of course, no plaintiff's counsel would ever recommend a course of action in a trial setting based on the other side's expert's analysis. But the defense believes that you as a plaintiff's attorney have no reason to challenge it on this point, and a big reason not to challenge it: your fee. Since defense-provided present values are usually higher than cost, if you base your fee on "present value" you may get more money. You will also be over-charging, because the present value presented by the defense is usually significantly more than the actual settlement. See how insidious this deception is? The defense believes it can pull you into the lie by making you a beneficiary of it. (They have even influenced certain state legislatures to enact statutes allowing contingent attorneys' fees to be based on present value rather than cost.)

Attempt to pierce the subterfuge, however, and you encounter the next whopper.

2. The Constructive Receipt Dodge

"I can't tell you the cost. That would be constructive receipt." This is the defense equivalent of the old spy gag, "I could tell you, but then I would have to kill you." The difference is that while there may have been a kernel of truth behind the spy line, there is none behind this one. It is a naked ploy to avoid

disclosing cost using the false theory that once the plaintiff has the true cost, he or she has taken "control" of the settlement, thus constituting constructive receipt under I.R.C. Section 130. Now if this were true, the periodic payments to the plaintiff would no longer be tax-exempt, which would certainly be a good reason for the defense not to disclose the cost. If it were true.

It isn't. The IRS never said this, implied it or intended it. The defense made it up! Indeed, the IRS has explicitly rejected this fantasy, in Private Letter Ruling 83-33035. That ruling responded to a clarification request on this point "because of... concern that your knowledge of the existence of cost of the annuity might cause you to be in constructive receipt of that annuity." The IRS's answer?

..."[W]e conclude that disclosure by defendant of the existence, cost, or present value of the annuity will not cause you to be in constructive receipt of the present value of the amount invested in the annuity."

You can't be more plain than that... and this ruling, readily accessible, dates from May 16, 1983. The very fact that the defense has repeated the constructive receipt myth to thousands of plaintiffs since then is powerful evidence of the insurance industry's reliance on lies as a primary strategy in settlement.

3. The Imaginary Pay-Out

"Bait and switch:" it's one of the oldest swindles known to human civilization, and it's key to the defense's strategy in pushing your client into a structured settlement. In this common maneuver, you will be shown a pay-out to a normal life expectancy on an injured client with a very high age rating; let's say a three-year-old client whose proper age rating is 82. So even though your client will probably live only a few years, the proposal projects a full life expectancy. The defense is counting on a passive plaintiff's attorney in order for this outrageous tactic to succeed, an attorney who does not determine an accurate age rating. It is trying to turn human nature to its advantage: guardians or parents who want to believe that an injured minor will live a normal life span... an attorney eager to wrap up a case with a big settlement figure. The tactic works all too often. Then once the papers have been signed, the defense buys a much cheaper annuity using the true age-rating, and pockets the difference.

4. The Money Management Shuffle

Remember Christmas clubs? Some banks would sell naive customers on putting money aside at no interest to make sure they had an extra account at the end of the year for Christmas gifts. Mad Magazine, in one of its old "Lighter Side Of..." features, had a perplexed bank patron querying a bank officer on this point, saying, "Your promotion says `Our Christmas Club will make the holidays a little brighter!' I could do just as well putting my money in an old sock. How is your Christmas Club going to make my holidays `brighter?'" The officer's reply: "I don't know about your holidays, but it sure makes our holidays brighter!"

I think of this whenever the defense trumpets to the plaintiff that its structured settlement provides "professional money management." Sure it does... for the annuity carrier's money! The plaintiff receives a fixed income stream based on today's interest rates. There is nothing to manage for the plaintiff. But if the principal is invested so as to bring in more than the amount to the paid to the plaintiff, that benefit of "professional money management" goes to the insurance company. This "professional money management" line is in fact an admission that the defense is going to make excessive money off of the plaintiff's settlement. It is presented in such a way as to intentionally mislead plaintiffs into believing that they are getting something they are not.

Ah, but if that "professional money management" is not so astute? Then the carrier may fail, leading to seizure by the insurance commissioners and the possibility of a reduced benefit stream for the rest of the plaintiff's life.

With defense-controlled structured settlements, the only proper way for plaintiffs to regard the defense's "professional money management" is to fear it. It can only benefit the life insurance company, and the only thing it can bestow on a plaintiff is either the predetermined income stream, or financial hardship.

5."Risk is Safety"

"War is Peace." George Orwell's 1984 totalitarians perfected a chilling system of institutionalized lies in which the population was confused into believing that things were their exact opposites. The defense is practicing the same technique when it tries to sell your plaintiff on an annuity-based structured settlement by explaining that its Section 130 assignment of liability provides enhanced security. The truth is often exactly the opposite! The assignment of liability takes the defendant off the hook, of course: the settlement agreement transfers the obligation to pay to the assignee, and relieves the defense of liability and responsibility forever. But this is the real twist: the plaintiff, by approving the assignment, often has agreed to let the defense replace an insurance company with billions in assets with a shell corporation having a small fraction of those assets. The chances of the liable party going under, thus jeopardizing the plaintiff's future, may be vastly increased.

Orwell didn't use "Risk is Safety." Maybe even his totalitarian truth-twisters couldn't say that one with a straight face.

Does this exhaust the parade of whoppers? Not a chance... and more are being uncovered all the time, like the "customer service pledge" recently being used by Allstate to lure injured plaintiffs into foregoing legal representation [ATLA Advocate, November 1997, Vol. 23, No. 9, "States Outlaw Allstate Pledge."] That's the insurance industry. If they were witnesses, you could impeach them with ease. If they were applying for a job, their credentials wouldn't check out. You'd never buy a car from them, or let them be treasurer of your charitable organization.

It's time to stop trusting them to safeguard your client's future. It's time to stop trusting them, period.

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