

How to Give Plaintiffs Control of Their Destiny

By Richard G. Halpern

"Ignorance is bliss," said the poet. Where legal malpractice is concerned, however, ignorance can be disastrous. The precaution I am about to describe will be the standard of practice in time, and thus malpractice if ignored. On the other hand, the readers of this column are dedicated to providing excellent practice, not just the standard. Ignorance may be bliss to poets, but poets don't have injured clients. An important transformation occurs in the completion of a structured settlement, a transformation that few plaintiff's attorneys and fewer plaintiffs accord proper attention. The essence of this transformation is that the defendant's liability carrier assigns its obligations to pay damages to a third party, usually an assignment company. Once this has been done, the defendant, the liability carrier, and the defendant's attorneys are out of the loop completely. If the annuity carrier is seized, there is usually no way for the plaintiff to come back to the defendant and its carrier to recover the lost funds.

This being the case, it would seem to be obligatory for plaintiff's counsel to exercise great care in the process of determining what broker and settlement product will be used in a structured settlement. Defendants like to dictate both the broker and the product; not surprising, since this is usually the continuation of a lucrative long term business relationship with each. The broker so chosen has no loyalty to the plaintiff (whose future is in his hands), only to the defendant's liability carrier, on whom he depends for future business.

The strategy I'm about to describe developed out of musings on some ironic features of this process.

Irony 1: Given that the defendant liability carrier demands to be absolved of all liability and responsibility once the settlement is finalized, how do they have the gall to insist on naming the broker and settlement product that will be only critical to the plaintiff's future welfare, when the plaintiff will be carrying all the risk, and the defendant's carrier none?

Irony 2: The defendant's insurance company has opposed the plaintiff's interests to the last. Why would any plaintiff meekly trust that same company to choose the settlement vehicle and broker? Whose interest is likely to be reflected by that choice?

Irony 3: In the wake of unprecedented failures by annuity carriers, how could any plaintiff, or plaintiff's attorney, permit the defense to choose an annuity vehicle for the settlement without attempting to find a safer alternative?

The root of all these ironies is tradition... the defense traditionally has chosen the broker and settlement vehicle. But like single-earner households, the 21-year old voting age, and shiverees, this tradition must change with the times. The plaintiff must choose the broker and vehicle. Of course. It's the plaintiff's future at stake.

This is how it's done.

STEP ONE

In your initial demand letter, spell out the broker and settlement product you and your client have agreed is in your client's best interest. Include language like the following:

"We are aware that the defendant traditionally dictates the settlement product and broker. However, since your assignment of liability in the final settlement agreement will relieve you of any future legal responsibility should your choices of product and broker prove unwise, I believe my client must be permitted to make the ultimate selection. Therefore, the final settlement agreement must contain language designating _____ as the broker and _____ as the settlement product. The plaintiff assumes all responsibility, risk, and liability for future loss. To this end, the following clause should be included in the settlement agreement:

"The parties to this settlement agreement acknowledge and affirm that the choice of structured settlement broker and vehicle were conditions of settlement imposed by the plaintiff during negotiations, and thus the plaintiff shall bear full responsibility for the consequences of these choices."

STEP TWO

When the defense says "No," (if they say yes, then you don't need Step Two), and insists on their choice of broker and product, your response is direct. "All right, but fair is fair. Please include this language in the final settlement document:

"The parties to this settlement agreement acknowledge and affirm that the choice of structured settlement broker and vehicle were conditions of settlement imposed by the defendant during negotiations, and thus the defendant shall bear full responsibility for the consequences of these choices."

After all, you may point out, you can hardly permit your client's adversary to dictate product and broker and then leave your client naked without recourse if they have chosen badly. If the defendant agrees to this language, you have preserved legal recourse for your client, and performed due diligence. But the defendant is very unlikely to accede to this tradition-busting language without a fight.

STEP THREE

Suppose the defense says, "Neither of these alternatives are acceptable, so if you insist on one or the other, perhaps we should eschew a structure and settle with cash."

Fine. Then you raise your demand by 10 percent to compensate for the lost opportunity to structure.

STEP FOUR

The defense decides to try "hard ball" and says they will not increase their cash offer. They have just demonstrated bad faith by putting their own interests (that is, the insurance company's interests) above the insured, their true client.

Ethical attorney that you are, you should call their attention to this. And the Court's:

"Dear _____:

This letter memorializes our discussions regarding settlement of the above-referenced case, in which we represent the plaintiff, _____.

We want to make the following clear and beyond dispute:

1. We presented an opportunity to settle this case within [the defendant carrier s] policy limits, with fair terms and with no risk to your client.
2. This offer was rejected for reasons unrelated to this case, solely because you insisted on your choice of broker and settlement vehicle.
3. We also agreed to this requirement, insisting only that your choice of broker and settlement product be documented as such in the settlement agreement. You also refused to meet this reasonable requirement.
4. Subsequently, you refused to accept our increased demand, made necessary by your opposition to a fair structured settlement agreement.
5. As the last settlement package discussed was acceptable to both sides regarding its cost to the defendant carrier and its benefits to the plaintiff, the only issue now in dispute involves the choice of structured settlement product and broker.

This issue, unlike other terms of the settlement package, is of no import or significance to the insured, and does not affect the insured s rights, interests, or welfare. Its only importance lies in its effect on [the defendant carrier' s] own business interests.

You have demonstrated bad faith by placing [the defendant carrier s] own business interests above the interests of the insured defendant, your client. Because this conflict of interest makes it impossible for you to render effective representation, we request that you inform your client immediately that he should retain private counsel.

Please supply us with a copy of your letter so notifying the defendant, as well as the name and phone number of defendant' s private counsel. We will, in due course, notify you of our communications with this attorney.

Sincerely,

_____ "

Checkmate.

It should be obvious that the safest course for the defense is to accept your choice of broker and product. That's what the defense will do, once this strategy becomes commonplace.

By that time, lots of injured plaintiffs will be protected.

And by that time, not allowing your plaintiffs to avoid the defense' s self-serving choice and take control of their own destiny may well be malpractice.