PERSONAL INJURY

Lawyers can simplify negotiations using structured settlement costs

By Barry Chobotar

Lawyers practising on both sides of the personal injury bar increasingly employ structured settlement costs as a pre-settlement evaluative tool.

Structured settlement costs can be used, at any stage of proceedings, to provide the present value of various future damage scenarios, or, alternatively, they may be used to illustrate payment streams in reference to various potential settlement amounts.

In particular, structure costs may be employed by practitioners prior to settlement in the instance of a first party claim, such as a claim arising out an automobile accident made pursuant to no-fault statutory accident benefits, a third party claim with its basis in tort, or a combination of both types of claims, when appropriate. And it is important to note that reports produced using structure costs are produced on a "no-cost" basis, in contrast to an actuarial calculation and corresponding report that may ultimately cost in the thousands of dollars.

A first party claim, such as a statutory accident benefits claim, is particularly amenable to evaluation by reference to structure costs. A statutory accident benefits claim is a claim in contract, with no legal obligation to settle into the future. The liable casualty insurer will owe the injured party benefits to the present in accordance with the terms and conditions of the automobile policy contract.

For all intents and purposes, a specific statutory accident benefit entitlement, such as an income replacement benefit, is simply a tax-free annuity payable by the insurer, subject to the condition of disentitlement at some future point in time. Consequently, it makes good sense to use a tax-free structured annuity (rather than a mathematical present value calculation) to assess it.

The structured annuity cost or "market valuation" approach is also appealing in this context in that it avoids any adversarial discussions as to the proper discount rate(s) to employ, as a prescribed discount rate is not set out under the *Insurance Act* and its related regulations for the future valuation of first party claims.

A structured annuity cost represents an indisputable present value of future benefits, as it represents the actual cost that a life insurance company would require to assume a no-fault insurer's future obligation to pay benefits to an injured party. Structured settlement costs take into account real rates of return, can be indexed in reference to future inflation and can include a mortality contingency by reference to the "life impairment ratings" provided by the life insurance companies that produce these costs. This is in direct contrast to a mathematical present value calculation of a first party claim that will necessarily involve assumptions made by experts as to future rates of return, inflation rates and, if provided, reduced life expectancy assessments from physicians.

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Evaluation by way of structured settlement costs removes the variables inherent in a mathematical present value calculation and thereby another layer of negotiation. It provides practitioners with a "true cost" of future first party entitlement scenarios, all on a "no-cost" basis.

With respect to the evaluation of third party claims, structured annuity costs, similarly, provide a useful tool for pre-settlement purposes. While the value of future pecuniary third party damages is calculated in Ontario using prescribed discount rates set out by Rule 53.09 of the *Rules of Civil Procedure,* pursuant to provisions contained in s. 6 of *O. Reg.* 461/96, damages awarded for third party claims may be ordered to be paid by way of a structured settlement under the *Insurance Act* and, similarly, under ss. 116 and 116.1 of the *Courts of Justice Act*.

Barry Chobotar

Furthermore, in the context of medical malpractice actions, the recently enacted s. 116.1 of the *Courts of Justice Act* sets out that future care costs awarded in excess of a prescribed amount (currently $250,000) shall be satisfied by way of structured annuity, unless it is proven by the plaintiff to be unjust.

While future damages at trial, if proven, will be calculated using Rule 53.09, at any point in time prior to trial, the amounts of damages and the assumptions contained in Rule 53.09 (i.e. future inflation rates, future rate of return on investments and future life expectancy of the injured party) are open to negotiation.

By making use of structured settlement costs to value a third party claim, practitioners are, once again, able to procure, free-of-charge, costs that employ market-oriented (rather than prescribed) rates in the future damages calculations. And depending on the percentage amount of future inflation protection (or indexation) employed (to be determined by reference to the evidence specific to the head of damage under consideration), structured settlement costs will produce greater or lesser values relative to those produced by a calculation made pursuant to Rule 53.09.

In anticipation of any settlement negotiations, a well-prepared practitioner should have as much information as is available at his or her disposal. By obtaining structured settlement costs (sometimes independent of and sometimes in concert with present value calculations) and illustrations, lawyers are equipping themselves with a quantitative tool that better enables them to determine the feasibility of the various positions taken during negotiations on quantum of damages, all provided on a no-cost basis.

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