

# Resolution Options for Product Liability, Toxic Tort Cases

STRUCTURED SETTLEMENTS CAN BENEFIT INDIVIDUAL PLAINTIFFS AND COMPANIES

By JOHN DARER

Structured settlements funded by product manufacturers or their insurers have been providing stable guaranteed income to individuals alleged to be injured or killed by those products for more than 30 years. Structured settlements have been widely endorsed by legislators on both the state and federal level, disability advocates such as the American Association of Persons with Disabilities (AAPD), judges and trial lawyers of any persuasion.

The words of product liability claimant William Wayne Jeske of Corinth, New York, to one of the people who represented him after his 2001 accident illustrate what a structured settlement means in a practical sense:

"Now that the dust has somewhat settled from a long legal battle, I feel very good about the decision I made to invest in a structured settlement

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annuity package," he said. "I will admit that I was skeptical at first, but the more I considered the 'structured settlement,' the more it made good sense. Especially, being aware that I was under much mental, physical, emotional and financial pressure, I knew that I was very vulnerable."

Jeske continued: "In this very complicated world, it is very easy to fall prey to poor or crooked financial advisers, stockbrokers, hidden laws, fluctuations in all types of financial markets, corporate manipulation and corruption [such as Enron, for example], not to mention the effects of terrorism. I finally reached a point where I just imagined monthly, tax-free payments simply sent to me for the rest of my life, guaranteed. At that point I realized all at once that I didn't have to become an overnight business and financial expert with one chance to get it right with little or no experience. I also realized at that point that I could secure and guarantee the payments for my loved ones or family in the event something happened to me." (Source: National Structured Settlements Trade Association.)

A 2013 American General structured settlement survey found that without being informed about the differences between lump sums and structured settlements, 65 percent of those surveyed selected a lump sum. In contrast, with more education, 73 percent said they would select a structured settlement.

It's critical for attorneys to prepare clients to make important, sometimes complex, financial decision before engaging in settlement discussions. As I discussed in "Trial Lawyers' Clients Need Help Planning Life Transitions" (Connecticut Law Tribune, June 9, 2014), a settlement may seem like a windfall, but plaintiffs often receive settlement money during stressful periods. Who is helping to manage the stress and prepare them to make a financial decision?

## Environmental Cases

Use of structured settlements in the resolution of toxic tort or environmental cases provide a risk-management solution to Connecticut companies

or companies doing business in Connecticut and elsewhere, and bankruptcy trustees who have or oversee environmental exposures. Environmental structured settlement and cleanup funding arrangements enable all parties to cease litigation and provide the necessary funds to begin the important task of cleaning up the site without contingent liability to the parties involved.

One example is where there is a need for guaranteed cash flow to fund the long-term stewardship of a cleanup project. Environmental structured settlements are an ideal solution for the larger cleanup projects such as large industrial sites, landfills and mines where there are stable stewardship obligations. Environmental structured settlements enable a responsible party to advance the present value of the remediation of a cleanup project and guarantee fixed and determinable costs for cleanup obligations and long-term monitoring.

## Bankruptcy Impact

Payments can be guaranteed for as long as 50 years or beyond, depending on the underwriter, which extends beyond the duration limits of most pollution liability insurance policies. And there is



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the possibility of recapture available. The companies that underwrite environmental structured settlements are large, well-capitalized insurers such as Berkshire Hathaway and Metropolitan Life Insurance Co. A 1995 paper by then-Environmental Protection Agency Director of Site Remediation Enforcement Bruce Diamond expressly recognized that "annuities, sold and administered by large, regulated, conservative financial institutions with substantial assets, their promise to pay may be more reliable than a business lacking the same resources or stability."

## Funding Environmental Settlements

There are a variety of environmental cleanup funding strategies. The agreements generally involve a promise to pay future periodic payments to a trust or untaxed government entity, funding as set forth in the settlement agreement. Where there is no measuring life, a funding agreement is used. Funding agreements are a high-quality funding vehicle offering attractive returns, simplicity and preservation of principal. Funding agreements can also be used for the funding of settlement proceeds before their distribution to plaintiffs. A funding agreement is effectively an annuity between businesses, but without the restrictions of individual annuities. A nonqualified assignment/nonqualified structured settlement is a solution where there is no requirement that the regulator or government entity own the funding instrument. There are also two- and three-party reinsurance solutions where the responsible party is insured. ■

*John Darer is president of 4structures.com, a Stamford-based provider of structured settlements.*

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