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Structured Settlements

The August, 14, 1995 issue of the National Law Journal has a thoughtful article by Gail Diane Cox on structured settlements - "Life After Victory: How To Insure a Win." Cox points out that with the demise of double digit interest rates and several insurance companies there is a growing concern by plaintiff lawyers about malpractice liability if a structure goes into default. This has led to a switch from defense brokered structures to plaintiff designed packages. As argued by plaintiff brokerage services, letting the defense take the lead in designing the structure is like letting the mice guard the cheese. The fear is inflated annuity costs, use of insurance companies with inferior ratings, use of a structured settlement when a lump sum is more advantageous to the client, and creative valuation tactics similar to the addendum to the sticker price on a new car (e.g., including tax savings as part of direct compensation). Pro-plaintiff structures include provisions for secured creditor status, spreading the annuity among several insurance carriers, and accommodation of lawyer fees on the basis most favorable to the client.

The July 1995 issue of the Oregon State Bar "In Brief" includes this checklist for evaluating a structured settlement by Jack L. Meligan, Certified Structured Settlement Consultant, Settlement Professionals, Inc., 1001 SW Fifth Ave., Suite 1410, Portland, Oregon 97204 (1-800 666-5584):

1. Does the structure meet the present and future needs of the client?

2. What are the names of the annuity company and the assignee company (they should be different)?

3. Do the annuity and assignee company have top ratings from four of the five rating services? (A.M. Best - no less than Class A+; Standard and Poors - one of the top 4 ratings; Moody's Investor Services - one of the top 4 ratings; Duff & Phelps - one of the top 4 ratings; Weiss Research - B or higher rating)

4. If the assignee company does not have assets of its own, what additional protections are available? (Protections might include corporate board guarantees, secured creditor status, or a surety bond.)

5. Is the annuity funded by the United States Government obligations? (An alternative to getting a company which has excellent ratings from four services.)

6. Is the company writing the structure admitted to do business in the state of Oregon [Kentucky]? Will the structure be protected by the Oregon Insurance

Guaranty Association [Kentucky Insurance Guaranty Association]?

7. Is the claimant being "rated-up" for age because of health impairments ? This means that the biological age, rather than the chronological age of the claimant is being used for the purposes of calculating the annuity. This could effect the annuity cost substantially.

Also helpful is KBA Ethics Opinion E - 339 (1990) which gives guidance on the proper way to compute contingent fees in structured settlements. The fee agreement should specify whether the lawyer's fee is to be paid in a lump sum or incrementally. If in a lump sum, it should be based on a percentage of the discounted present value of future periodic payments.

Computation Of Time And Leap Year 1996

What follows is an update of a piece we included in our Winter 1992 Newsletter:

What does the extra day in 1996 mean to Kentucky lawyers when computing time deadlines? At least one state (Oregon) stung a lawyer by using 365 days as the measure of a one year limitation period even though the year in issue was a leap year with 366 days.

KRS 446.010, Construction of Statutes, Definitions, provides that "Year" means calendar year. The two Kentucky cases we located which considered the Leap Year question both reasoned that since "Year" means calendar year it is immaterial that Leap Year includes an extra day. Proceedings were, therefore, not barred because a party got the benefit of an extra day to get to court (Rice v. Blair, 158 Ky. 680, 166 S.W. 180(1914); Geneva Cooperage Co. v. Brown, 124 Ky. 16, 98 S.W. 279 (1906).

What about the situation when the 28th and 29th of February occur during a period to be computed of less than one year? We are unaware of consideration of this question by Kentucky legal authority. One secondary authority provides that when these two days occur in any period of days less than one year they must be computed as two days (Sec. 11. Day, 74 Am Jur 2d. Time).

The key is to be safe, not sorry. Count a year time limitations as 365 days and the 28th and 29th of February 1996 as two days.That way you can't go wrong.

Nonclient Liability: The Beat Goes 0n And On!!!

Item - Dateline Indiana: The lawyer for a lender who made changes in a document that the borrower had approved in draft form owes a duty to the borrower to disclose changes made subsequent to borrowers approval. Wright v. Pennamped, Ind CttApp, No. 49A05-9405-CV-207,11/9/95; p. 373 Current Reports, ABA/BNA Lawyers' Manual on Professional Conduct,

Vol. 11 No. 23, 12/13/95.

Item - Dateline New Mexico: The Supreme Court adopted a multi-factor balancing test for determining liability to the beneficiaries of an estate of a lawyer for the personal representative in a wrongful death action. Leyba v. Whitley, NM SupCt, No. 22,309, 10/11/95; p. 374 Current Reports, ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 11 No. 23, 12/13/95.

Item - Dateline New Jersey: Nonclients who foreseeably relied on information produced by attorneys in offering statements for clients selling condominiums may sue the lawyers for malpractice. Atlantic Paradise Associates Inc. v. Perskie, Nehmad & Zeltner, NJ SuperCt AppDiv, No. A-6840-93T1, 11/2/95; p. 375 Current Reports, ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 11 No. 23, 12/13/95.

Item - Dateline New Hampshire: The New Hampshire Supreme Court endorsed a new tort of 'Malicious Defense." Described as a mirror image of malicious prosecution, a defense lawyer who initiates defensive measures that are or should be known to lack merit or credible basis is liable to the opposing party along with the client. Moreover damages are not limited to attorney's fees. Aranson v. Schroeder, NH SupCt, No. 93-519, 10/31/95; p. 376 Current Reports, ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 11 No. 23, 12/13/95.

10 Commandments of Real Estate Closings

By Wayne Stephenson, Lawyers Mutual Liability Insurance Company of North Carolina

1. Thou shalt not walk into the deed vault nor close a real estate transaction unless thou knowest what thou art doing or thou has a learned brethren or sistren to lend a helping hand. The days when "anyone can close a loan" are gone.

2. Thou art not a title insurance company nor is thy malpractice carrier. Many are those, both owners and lenders, who are using their attorney as their title insurance company.

3. Thou shalt document the substance of every telephone conversation involved in the transaction. Thou shalt cover thine hind parts.

4. Thou shalt have a working knowledge of environmental law. And lo, there shall one day be pestilence upon the entire face of the earth and environmental law will touch every transaction.

5. Verily, verily I say unto you that the closing attorney is as the hub of a wheel and each party to the transaction a spoke. If in the future any of the spokes is broken economically, ye whose name was blessed at closing shall be called "Oh cursed one." Beware of the potential conflict of interest that could be alleged in the future and proceed cautiously.

6. Thou shalt not disburse loan proceeds before updating and recording title. "Tis better to suffer the wrath of an angry realtor or property owner than to bury thy law license in the sand."

7. Thou shalt uncover thine eyes and proofread carefully the work of those thou superviseth. If thy support staff has erred and thou has not reviewed their work, then two errors have occurred. Many is the attorney who has suffered a claim because of a typo the size of a mustard seed.

8. Thou shalt say "Get thee behind me Satan" if thou art pressured to perform a transaction in a way that thou thinks is improper. Do not succumb to the almighty dollar. Tis better to lose a closing fee than to suffer the slings of multiple claims resulting from a system breakdown because one has worshipped at the altar of the "Cash Cow" client.

9. Thou shalt always review each instrument within the title search in its entirety. Beware the deed of trust that encumbers the property in the hidden "Attached Schedule A."

10. Thou shalt never forget this real estate transaction is the biggest transaction of thy client's life. Communicate, communicate, communicate.