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Is Plaintiff's Lawyer Liable for Not Offering Structured Settlement?

By Amy Johnson Conner

Plaintiffs' lawyers who won a \$2.5 million medical malpractice settlement for a client have been sued by the client for, among other things, failing to propose a structured settlement rather than accepting a lump sum payment.

The lawyers settled the legal malpractice claim for \$1.6 million – raising questions among the plaintiffs' bar about whether there is ever a duty to offer a structure.

Plaintiff Josephine Grillo claimed the lawyers: (1) failed to inform her about a structured settlement that had been offered by the defense, and (2) failed to make a structured settlement proposal of their own.

While failure to communicate a settlement offer would constitute a traditional case of legal malpractice, it was heavily contested by defense lawyers who claimed to have the plaintiff's signature rejecting the offer. Grillo's attorney, Kevin Isern, says the second part of the claim – that Grillo's original lawyer was negligent in not developing a structured settlement offer of his own – carried equal weight in reaching the \$1.6 million settlement.

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"When you start out with the premise that they didn't inform them of the settlement, that obviously looks bad. But when you go onto the next step – that they settled the case for \$2.5 million and after they took their attorneys' fees they still had enough money to do a structure and didn't do it – that is the more important aspect of it," says Isern. "Failing to do the structure lost all the Medicaid and Medicare benefits until [Grillo's daughter] turned 18."

Isern says he's had several similar cases presented to him since settling the Grillo case, but he hasn't yet decided whether to accept those cases.

"I don't think this is a unique situation," says Isern, partner in a four-lawyer firm in Amarillo, Texas.

Although the settlement means there will be no definitive ruling on whether a lawyer ever has a duty to propose a structure, some in the structured settlement industry think there may be such a duty.

"It was only a matter of time before someone sued their own lawyer for malpractice for failing to offer

a structured settlement," says Richard Risk of Structured Settlement Services in Tulsa, Oklahoma, who has been in the business for more than 15 years.

There is "a little more potential liability" for the plaintiffs' lawyers, says Terry Taylor, president-elect of the National Structured Settlement Trade Association and owner of Plaintiff Structures in Austin, Texas.

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The Underlying Case

Josephine Grillo's daughter, Christina, was born with cerebral palsy, cortical blindness and a host of other medical problems – allegedly because of negligent medical care. The medical malpractice case settled for \$2.5 million.

"During the [medical] malpractice case, the defendant insurance company offered a structured settlement to the child and our allegation was that it was never relayed to the parents and, in fact, never relayed to the court," says Isern.

"That structured settlement proposal...would have provided over \$240 million for the child" over her projected lifetime of 68 to 70 years, Isern says. But the final settlement, after attorneys' fees were deducted, left the child with only \$1.5 million.

While that was clearly the strongest allegation in the plaintiff's case, it was also contested by the defense, which produced a copy of the settlement offer with the plaintiff's signature indicated that she had rejected it. Isern contends that the signature was not the plaintiff's, but concedes that it made this aspect of the case less certain if the suit went before a jury.

What wasn't contested, however, was that Grillo's original lawyers never developed a structured settlement proposal of their own, even though that arrangement would have provided their client with tax benefits, guaranteed lifetime care, and protection from poor financial moves that would compromise her future care.

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"At that point, the lawyers didn't offer a structured settlement to the child," says Isern. "They had the money deposited into the registry of the court...and she lost Medicaid" because she had more financial assets than the eligibility guidelines allowed.

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Placing the money in the registry also caused the interest on that money to be taxed. "In a structured settlement, that does not occur," Isern says.

The lawyers also failed to set up a "special needs trust" for the child, Isern says. Any money in such a trust is not considered under Medicaid eligibility guidelines and therefore can be used to supplement government benefits.

"You have a child who has all these needs, requires 24-hour care and has no government assistance to help pay for it. She got taxed on all the money she gained," Isern says.

The case settled for a confidential amount, but Risk says that because of a filing error on the court's part, the amount is now a matter of public record. The suit against the lawyer settled for \$1.6 million; a parallel suit against the child's guardian ad litem settled for \$2.5 million.

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What It Means

One lesson of the case is that lawyers should convey all settlement offers in writing.

"You need to make sure you have something in your file to show that you discussed the offer with your clients" says Taylor.

"Any settlement communication has to be in writing to the client and the client's response in writing also," says Gary Fox, a partner in a six-lawyer Miami firm who specializes in professional negligence cases. "Unless you do it in writing...the lawyer is very much at risk and flat foolish. It doesn't take a lot of time and it doesn't take a lot of effort."

The second lesson is to strongly consider whether a structured settlement offer is appropriate.

"For lawyers not to recommend such a settlement I think is questionable, especially in circumstances where the plaintiff is unsophisticated and likely not able to manage the settlement proceeds," says Fox.

This is especially true since structures can not only help with Medicaid issues and avoid dissipation of assets, but have tax advantages as well.

Any type of settlement that provides compensation for personal injury is not taxable, but interest gained on a lump sum is. However, under a structured settlement, any interest earned on the money is tax-free.

The federal government made this clear in the Tax Code in 1999 to encourage structured settlements, which it reasoned would keep injury victims from becoming wards of society after wasting their award, Risk says.

There may also be tax benefits for attorneys, who can structure their fees into the settlement.

"When you get into higher income brackets, a larger percent of income is taxed. By spreading it out over several years, you can avoid those peak-earning years and save money on taxes," Risk explains.

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