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STRUCTURED SETTLEMENTS:

A highly sensitive concept that calls for irreproachable standards

A controversial issue rapidly gaining momentum within the structured settlement industry concerns the extent to which some structured settlement brokers are offering rebates to casualty insurers in an effort to expand their competitive edge.

It is a practice, says Martin Jacobson, vice president and general counsel at Creative Capital, Inc., (CCI) a nationwide domestic structured settlement consulting company, that while it is not a universal practice, it is despite legal and regulatory prohibitions, widespread enough within this sensitive area of business.

"It is unfortunate," he says, "that many structured settlement brokers and insurers are ignoring the law as if it doesn't exist."

Structured settlements represent a small, yet solid niche business, comprising approximately 25-30 structured settlement firms and about 500 agents nationwide. At the peak of structured settlement activities, premiums generated annually can reach as high as \$5-6 billion, although activity in this area has slowed, as interest rates remain low, Jacobson explains.

Jacobson points to the advantages of a structured settlement for plaintiffs and defendants alike. From the plaintiff's perspective, a structured settlement shields both the payments and interest earned from taxation, while also providing such benefits as absence of investment risk, management-free income, flexibility in structuring payments to fit individual needs, and protection of funds against fraud and greed. Likewise, Jacobson observes, there is a significant benefit to the insurer since a structured settlement, while resulting in a larger ultimate benefit to the plaintiff-victim, involves a lesser cost to the insurer than a lump-sum pay-out.

Yet, Jacobson points out that many companies brokering them are gaining an edge in the marketplace by questionable -if not illegal-activities. High on the list is rebating.

"It has been common knowledge that many struc-

tured settlement brokers have been paying part of their commissions to their liability insurer clients for years," Jacobson states. "Such arrangements, although tied to a percentage of commissions earned by the brokers, have been called service fee or administrative fee arrangements. All these brokers have done is change the label. A rebate by any other name is still a rebate."

In fact, according to Jacobson, 49 states have anti-rebating laws on the books, with California the only state that allows rebates to be paid on insurance products. Yet, Jacobson says, enforcement of these statutes, at least as respects structured settlements, is virtually non-existent. Insurance departments, he observes, "seem to be turning a blind eye" to the practice.

Last year, the rebating issue emerged as a potentially significant liability exposure to those who engage in it, in the form of a lawsuit filed in the United States District Court, District of Connecticut. The class action lawsuit- Lisa M. Macomber, vs. Travelers Property Casualty Corp; Travelers Group Inc.; Salomon Smith Barney Holdings Inc.; Ringler Associates, Inc.; Wells and Associates; Travelers Life and Annuity Company; seeks to recover damages associated with alleged "serious misconduct" during the period 1982 to the present time in which the suit was filed. It alleges that the defendants engaged in misconduct relating to "wrongful and illegal transactions and an illegal kickback scheme," and further charges that these actions were conducted "at the expense of the plaintiff and the other members of the Class."

Note: The Macomber case was dismissed because of a defective pleading. However, a Federal RICO class action suit ("Racketeer Influenced and Corrupt Organizations Act") has been filed by the law firm of Milberg Weiss Bershad Hynes & Lerach. This RICO action, entitled Abdullah v. Travelers Property Casualty Corp.; Travelers Group Inc.; Tower Square Securities, Inc.; Salomon Smith Barney Holdings, Inc.; Ringler Associates, Inc.;

Wells and Associates; Travelers Life & Annuity Company; and John Does 1 through 99, seeks to permanently enjoin the defendants from “engaging in the illegal and fraudulent kickback scheme” alleged in the complaint. It also seeks both compensatory and punitive damages plus expenses and attorneys’ fee to be paid by defendants.

While recent lawsuits may serve as a wake-up call to those engaged in questionable structured settlement rebating practices, the rebating controversy is not new.

The National Structured Settlements Trade Association (NSSTA), whose members comprise primarily structured settlement brokers and about a dozen life insurers, more than a decade ago, published an article in its newsletter about rebating, in which the group cautioned (at the time) “all states forbid the practice under one or more sections of their current insurance regulations.”

NSSTA also requested a legal analysis of the issue by the international law firm of LeBoeuf, Lamb, Leiby & MacRae. According to Jacobson, the analysis concluded that under the several hypothetical scenarios posed, it would be illegal for a structured settlement broker to share commissions with a liability company that settled a case with a structured settlement and paid the annuity premium.

Yet Jacobson notes that despite the report, which was widely circulated within the structured settlement industry, “it is well know” that some structured settlement companies have entered into written “exclusive” or “semi-exclusive” arrangements with liability companies to rebate as much as 25 to 50 percent of the commissions earned.

In the wake of mounting frustration and concern over the ongoing and seemingly unstoppable practice of rebating, CCI has taken the matter into its own hands, initiating a “Certificate of Reliability and Assurance” (CORA) affidavit which asserts the integrity of the structured settlement process and the full disclosure of terms. The affidavit, says Jacobson, is tailored to each case, made under oath, and carries all penalties for perjury.

A primary goal of CCI in establishing its CORA affidavit, Jacobson explains, is to assure the clients with whom it does business that it does not engage in rebating or other questionable practices. Likewise, he says the longer-term goal of CORA is to establish a standard that plaintiffs will demand, thereby compelling positive change within the structured settlement industry.

In a “Special Message” memo announcing the company’s CORA certificate, CCI pointed out that while structured settlements can provide the parties with a



“win-win” result, they can “also be tool for abuse.” That memo, sent earlier this year to attorneys, adjusters, insurers, and consumers of structured settlements, outlined in detail some of the alleged abuses within the structured settlement industry and presented a list of representations and warranties set forth in the CORA certificate.

Specifically, it noted that CCI does not pay kickbacks; will disclose the cost of the structure, in writing; will disclose the rated age assigned by the life company issuing the annuity; will not engage in post settlement medical underwriting to secretly reduce the cost of the structured settlement; will only use legitimate, realistic and reasonable assumptions in calculating present value and will disclose those assumptions; will use present value only when actual cost is also disclosed; and will certify that CCI is neither an in house, captive, affiliated or exclusive broker of the carrier paying for the structured settlement.

Jacobson challenges other structured settlement brokers to adopt such standards as part and parcel of the way in which they conduct business, not only to create a level playing field within the industry, but more importantly, to protect the plaintiffs served through structured settlements.