

Guest Commentary

# Where A Settlement Meets Life — Or A Lawsuit

Plaintiff attorneys' 'duty to advise' may be more extensive than they think

By MICHAEL D. RAYMOND and  
STEVEN J. ERRANTE

Letting a successful personal injury plaintiff out the door, without careful advice in areas including special needs trusts and public benefits compliance, financial needs analysis, estate planning, and tax knowledge, can lead to the failure of what the settlement was meant to do — the ability of your clients to live with dignity.

However, financial and tax planning are subjects in which most plaintiff attorneys are not qualified by license or training to act on their own. So, many simply ignore them. This oversight will continue to lead to further malpractice risk.

In 1998, a young teenager named Yannis Adrian was randomly shot in the parking lot of the Montehiedra Mall in San Juan, Puerto Rico. Adrian was seriously injured, and as a result, she will live the rest of her life as a paraplegic. This case provides a strong endorsement for the view that a personal injury victim should have a plaintiff-loyal settlement planner to assist them, with what is usually the single largest financial matter of their life.

In August 2003, Adrian brought civil action, *Adrian v. Montehiedra Mall*, alleging the mall's owner was "negligent in implementing managerial or operational strategies, actions, and decisions relating [to] mall security." Thus began prolonged and frustrating settlement negotia-

More time passed as both sides debated the tax issue and withholding. A huge misunderstanding then occurred between opposing sides. It became clear to Adrian and her lawyers that the settlement broker would provide an indemnity letter stating that all or part of the payment was exempt from withholding. In fact, Adrian and her attorney were not going to proceed until they received the necessary assurances that an indemnity letter was forthcoming. Then the settlement broker, late in the process, dropped the bombshell: "The life companies aren't issuing an indemnity letter."

As a result, Adrian sued the defense loyal settlement broker and her company for negligence, negligent misrepresentation, and fraudulent inducement. Adrian's suit centered on the claim that this broker "failed to keep a promise in a manner that breached a duty of care that [she] owed Adrian." In other words, the broker, it was alleged, "broke [her] promise" to acquire an indemnity letter. Adrian held the false belief that the broker was "someone occupying a superior position as to the tax matters at issue" as well. The defendants argued a plaintiff has a "duty to use reasonable prudence and diligence in identifying the truth with respect to representations made to him" on their own. The court agreed.

On July 9, 2009, the U.S. District Court for Puerto Rico granted the defendants' motion for summary judgment and dismissed the case with prejudice. In the court's ruling, it stated, "Adrian

in advance of the recovery, was an actual financial plan discussed and developed with the client, offering multiple options for long-term protection, financial dignity, and an independent lifestyle? Some settlements are large enough to create an estate tax issue as well. For plaintiffs unable to purchase life insurance, has an estate planning commutation rider been offered, which, as an alternative to life insurance, can help pay death and estate taxes later? Is the plaintiff attorney qualified by years of training and experience to render such financial services advice?

A good number of tort victims are generally unsophisticated investors, and they are generally thought to be a high-risk group for spending down their recoveries in short order. In February 2011, the Financial Industry Regulatory Authority (FINRA) heightened their regulatory compliance for so-called "vulnerable customers" or affinity groups. Since a number of plaintiffs are "unsophisticated" investors, this added FINRA oversight could be a recipe for later trouble — for everyone involved.

The claimant may lack the financial skills necessary to manage a large settlement. They may be susceptible also to poor advice. In some cases, financially needy friends and family members may exacerbate the risk. Under the right circumstances, the settlement structure may relieve, in part, the financial pressures of ongoing medical expenses and basic living needs on a long-term basis, tax free for a lifetime. However, who should be guiding the client here — the defense settlement broker?

In *Lyons v. Medical Malpractice Insurance Association* (2001), MMIA was charged with deceptive settlement practices. MMIA represented the present value of a settlement to be \$940,000. In fact, the plaintiff later discovered the actual present value was \$410,000. In their defense, MMIA stated the plaintiffs were not entitled to rely on the "represented value," because, they claimed, there was "no privity" between the parties, and [the plaintiff] could have and should have independently determined the value for themselves."

Although the Appellate Division of the Supreme Court of the State of New York reversed the summary judgment ruling on behalf of the defendants, the plaintiff attorneys were sued by the Lyons family for legal malpractice in their "failure to retain their own structured settlement consultant who could have informed them of the true cost of the structured settlement." This suit was settled out of court for an undisclosed amount.

In some cases, claimants are over-structured, and they may be left with little or no liquidity in the short term. As a consequence, some plaintiff's sell, at a loss, their structure in a so-called factoring transaction later. However, if the plaintiff attorney does not present the option of a structured settlement at all, at least for part of the recovery, the firm may face legal malpractice liability later. So what does the plaintiff legal team do? If they cannot trust completely the defendant's insurance carrier and their defense-loyal structured settlement broker, can they simply fail to inform their client about settlement planning options? The *Grillo v Pettit* case (2001) might give one pause.

The *Grillo* suit successfully charged that the



Michael D. Raymond



Steven J. Errante

plaintiff's attorneys "failed to employ or co-competent... experts in taxation, trusts, or structured annuities... to secure competent reaction and guidance on how to best maximize the value of [a] minor plaintiff's settlement plain language, the plaintiff legal team fail advise their client on all of her options, including, of course, the option of a structure. The firm settled out of court for \$1.6 million.

## More Aggressive Compliance

These cases highlight the necessity plaintiff attorneys to counsel their client regarding all of their financial options, or consult competent plaintiff-loyal experts in *N* care, taxation, trusts, living-benefit annuity wealth management, life and disability insurance, and structured settlements — well in advance of the settlement or trial date. A def loyal single product annuity broker is sufficient. We have entered into a new aggressive era of compliance by the Center Medicare and Medicaid Services. The goal is to prevent shifting of financial responsibility to Medicare.

A "certified" Medicare Set Aside consultant, loyal to the plaintiff, can help determine if the individual is a "qualified individual Medicare. Under the Medicare Secondary Payer Act (MSP) and the Medicare, Medicaid & SCHIP Extension Act of 2007 (MMS) the Center for Medicare and Medicaid Services (CMS) has the right to disregard a settlement and seek reimbursement for medical expenses paid by Medicare [42 U.S.C. 1395y(b)(1)(ii)(iii)]. A proposed rule by CMS coming next year on new standardized options to meet Medicare's interest with respect to MSP claims involving automobile and liability insurance (including self-insurance), no-insurance, and worker's compensation, a future medical care is claimed or has the effect of releasing claims for future medical care qualified planner reduces risk to the attorney in these areas.

Plaintiffs should have a well-designed comprehensive financial plan, which improve odds that they will survive and thrive in personal "life after settlement" Emotional security, long term protection, and the ability to develop an independent lifestyle to the greatest extent possible must be coordinated holistic plan that will empower clients to every day with dignity. The best hope for accomplishing this goal is for plaintiff attorneys to find their own trusted plaintiff-loyal settlement planner. At a minimum, this may be a law firm's potential liability, and include the odds, through extended monitoring the client by the same planner over time, the plaintiff will live a dignified lifestyle at the highest level possible.

**These cases highlight the necessity for plaintiff attorneys to counsel their clients regarding all of their financial options, or consult competent plaintiff-loyal experts well in advance of the settlement or trial date.**

tions. On August 26, 2005, the Fireman's Fund Insurance Company, one of the insurance carriers for the mall, contacted a defense loyal settlement consultant. Soon after, the counsel for the defendant made multiple offers that included all or a portion in a structured settlement.

Early on, the plaintiff made it clear that she was "not interested in negotiating the vagaries of a structured settlement." However, the defendant's counsel continued to persist. Complicating matters, on July 4, 2006, Puerto Rico passed a new tax reform law (Act No 117) that categorized payments for mental anguish as income. Thus, from that date forward, all payments for mental anguish required tax withholding. Adrian's attorney, Paul Hulsey, later testified that defendant's counsel "would only offer a structured settlement, not cash, in order to avoid dealing with the tax withholding issue, and that the defendants indicated that structuring the settlement was the only way to avoid the tax issue."

Most importantly, Hulsey's co-counsel, Cherie Durand, recalled that the settlement broker was bonding with Adrian, telling her that she "operated separately from the defense and had Adrian's best interests in mind." This happened in spite of the fact that the Fireman's Fund was the settlement broker's client, and she "took direct orders from [the] Fireman's Fund."

Three weeks into the trial, Adrian accepted an offer of \$5 million from the defendants.

Michael D. Raymond, Ph.D., is president of Connecticut Investment Planning in North Haven. Steven J. Errante is a partner in the law firm of Lynch, Traub, Keefe & Errante, P.C. where he practices primarily in the areas of medical malpractice and personal injury law.

had no right to rely on [the broker's] statements regarding [Puerto Rico] tax requirements because there was no confidential or fiduciary duty by [the defendants] to Adrian." The court ruled further that the business relationship was not between the defense-hired broker and Adrian, but with the Fireman's Fund. Even though Adrian began to trust the judgment of this broker, she failed to come to terms with the fact that the broker, according to the court, "took direction ultimately from Fireman's Fund. She was not beholden to Adrian."

The broker's only obligation, as someone who had a pecuniary interest in reaching a settlement agreement, the court added, was to "exercise reasonable care in her interactions with the settlement negotiations." The lesson we learn here is simple: plaintiffs and their legal counsel should not rely solely upon the advice and judgment of defense experts. Plaintiffs should have their own settlement planning experts on their side of the table.

## Unsophisticated Advisors

Many personal injury attorneys still believe that informing their client of the statutory provision §104(a)(2) of the Internal Revenue Code, which excludes from gross income personal physical injury recoveries, through the advice of a defense loyal settlement broker, is sufficient to satisfy the "duty to advise" (ABA Model Rules 1.4). But does it really? Has the attorney factored in "life after settlement planning"? Well