

Best's Insurance Law Podcast

[Structured Settlements in Employment Practices Liability Claims - Episode #223](#)

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John Czuba: Welcome to Best's Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Insurance Professional Resources*. We're pleased to have with us today Dan Finn Dan is the founder of [Finn Financial Group, LLC](#) a nationally recognized provider of structured settlements products and services, headquartered in Newport Beach, California.

Dan is the Founder of Finn Financial Group, a nationally recognized provider of structured settlement products and services, headquartered in Newport Beach, California.

Dan is a former claims adjuster, claims training coordinator, and claims manager. He is the past President and Chairman of the Board of Directors for the National Structured Settlements Trade Association in Washington, DC, and a published author of *The CPA Journal*, *Claims Management* and *Plaintiff Magazine*. Dan, we're very pleased to have you with us again today.

Dan Finn: Thank you, John. Great to be here.

John: Today's discussion is structured settlements in employment practices liability claims. Therefore, our first question, structured settlements typically have a long history of being used to successfully resolve personal injury litigation, but their usage seems to be limited to bodily injury and Workers' Compensation claims.

Why don't we hear more about structured settlements within the context of resolving employment practices liability disputes?

Dan: That's a great question, John. I think the best way to answer that is twofold. One, because structured settlements originally came into existence as a method to resolve claims involving personal physical injuries, where the settlements are tax-free, most practitioners operating in the non-physical injury space, such as EPL litigation, haven't made the connection yet that there may be value in using this approach to resolving the types of cases where the damages that are paid out are taxable.

The second reason has to do with case value. Because many employment disputes ultimately resolve within relatively reasonable settlement ranges, a structured settlement isn't likely to have much of an impact on the outcome.

I saw a statistic recently indicating that the average settlement value of a wrongful termination case in California is \$48,800. At these levels and below, structured settlements are going to be less valuable, especially after accounting for attorney's fees.

It's at the higher settlement ranges where structured settlements can and should be seriously considered because they can be such an extremely valuable component of any settlement evaluation and resolution dialogue.

John: Dan, tell us a little bit more about the distinction between physical and non-physical injury claims when assessing EPL claims. Don't employment disputes often include claims for physical injuries such as emotional distress?

Dan: Yes, they do occasionally, but that doesn't necessarily mean these damages are automatically tax-free. Traditional structured settlements for physical injuries track with Internal Revenue Code Section 104(a)(1) for Workers' Compensation and 104(a)(2) for personal injury litigation, which render all payments made, "whether by lump sum or as periodic payments," as tax-free.

No such provision for emotional distress is extended to claims involving only non-physical injuries however, since generally they stem from an underlying event that is considered non-physical in nature. Think wrongful termination, discrimination, etc.

Sometimes, some EPL claims like sexual harassment maybe, have a physical injury component that can be carved out. But by and large, employment disputes involve taxable damages.

Ironically, it's because these types of damages are taxable that using structured settlements during negotiations can be even more valuable than they are on tax-free bodily injury settlement discussions because you can more easily demonstrate measurable tax savings.

I like to say structured settlements are very often a good idea on physical injury claims but should almost always be considered mandatory for non-physical injury settlements of any significant size.

One other thing worth mentioning here, even though private letter rulings can't be cited as precedent, there is one PLR that is specifically on point about the ability to defer recognition of income on an employment settlement into future years when properly structured. That citation, if anybody's interested, is PLR-150850-07.

John: Dan, what surprises me somewhat, especially considering how underutilized this strategy seems to be, is that you feel structured settlements on EPL claims can be even more beneficial to the claims resolution process than they are in BI litigation. Can you elaborate a little bit more on that for us, please?

Dan: Sure. Let's take a look at a hypothetical settlement negotiation and look at things from the plaintiff's perspective for a minute. Let's say you're a claims adjuster and you've made a settlement offer to a single 58-year-old male in California for a discrimination claim.

He's considering whether or not to accept your settlement offer that will net him \$500,000. He no longer works for the company, he's been unable to find suitable employment since the lawsuit began, so he has no income currently.

He goes online, plugs \$500,000 into an online tax calculator only to discover he would owe almost \$192,000 in taxes on this settlement if paid in cash. That means 38 percent of the non-wage payments made to him are going to be paid out in federal and state taxes.

As a result, he feels he has no choice but to hold out for more money. On the other hand, if that same \$500,000 were paid out over five years, let's say, his tax liability is also spread out over the same five years, and he'd only owe a little more than \$100,000 in taxes on the sum he deferred.

Not to mention, he would also earn some additional pretax interest, which would be credited through the structure because of the \$500,000 used to fund the structured settlement.

At no additional cost to the defense, they just enriched this plaintiff to the tune of about \$92,000, increasing the chances of a successful resolution. This method lowers his tax liability from 38 percent to 20 percent.

John: When you present it that way, Dan, it seems pretty obvious why someone would want to go that route, which I guess brings us back full circle to the beginning of our discussion. With this kind of demonstrable value, you would think there'd be more of a demand for structured settlements. What could be done to potentially change this?

Dan: The demand clearly exists, especially on larger cases. We know that. That much is certain. Unfortunately, the demand usually ends up coming from the plaintiff's side of the negotiating table late in the process.

That's a shame because this is a tremendous lost opportunity for the parties to engage in a productive dialogue for better outcomes, when they fail to consider the positive impact structured settlements can have on settlement talks.

About 18 months ago, one life company very active in the non-physical injury structured settlement marketplace, MetLife, released the results of a poll they conducted, which revealed 86 percent of plaintiff attorneys viewed structured settlements as a good negotiating tool.

Think of how beneficial this knowledge can be to the defense when crafting a settlement offer. If you already know there is an 86 percent chance the plaintiff attorney views structured settlement negotiations favorably, creating an offer that includes a structured settlement can help move discussions along in the right direction.

If you think about it, isn't a lump sum settlement for someone with a wrongful termination claim, for instance, the wrong way to approach settlement anyway? If a demand includes a claim for future lost income and enjoyment of life, a single lump sum is inadequate to address those needs. You're doing the plaintiff a disservice.

It's infinitely better to pay the income over time to make up for what the plaintiff alleges was lost.

Not only does this guarantee future income replacement more appropriately meet the need, but the money also goes farther increasing the chances a defendant can settle the dispute within its evaluation and hopefully avoid the uncertainty that comes with a jury verdict.

I think the defense recognizes the power of structured settlement negotiations on EPL claims. If they do, maybe we can see some increased usage.

John: Dan, a large majority of our attorneys are defense-driven. If I'm a claims professional, a risk manager, or a defense attorney evaluating and negotiating a wrongful termination lawsuit, let's say there are other considerations I need to be mindful of. What's the best approach when using structured settlements?

Dan: Since these lawsuits usually involve a breakdown of wages and non-wage settlement dollars, it's important to note that anything attributable to wages can't be structured. Those sums need to be paid out in cash at the time of settlement. Everything else is fair game though.

When the claim resolves with a structured settlement, the defense receives a full release, has no contingent liability for the future periodic payments once assigned and funded, and then the settlement is finalized.

The plaintiff receives a 1099 Miscellaneous directly from the life company providing the structured settlement benefits. The defense is completely done with the transaction at that point and has no ongoing responsibility. They're done with it. They're out of it, just like they would if it were a cash settlement.

To the extent claims professionals view structured settlements as the valuable tools they are, I'd like to think usage will increase. With nuclear verdicts still on the rise, anything one can do to avert trial is going to be universally recognized as a step in the right direction.

I think it's a safe bet that people aren't going to stop filing lawsuits anytime soon. When the opportunity presents itself, why not take advantage of all the tools at one's disposal that can help bring about a more mutually acceptable outcome?

Since structured settlements don't cost the defense anything, there's no reason to keep them on the bench. Negotiating with structured settlements on employment practices liability claims can help save time, money, and avoid the potential of large verdicts. If I'm a claims person, what's not to like about that?

John: Dan, thanks so much for joining us today.

Dan: Thank you, John, appreciate you having me.



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John: You've just listened to Dan Finn of [Finn Financial Group, LLC](#) headquartered in Newport Beach, California. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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