



Willson & Pechacek, P.L.C. Newsletter



Insurance Defense Issue

January 2002

Structured Settlements: The Most Socially Responsible Method of Indemnification

by Philip Willson

It is believed that 90% of cash settlements are gone within five years. Tragically, such money is intended to replace lost income for a disability or provide future medical care.

Malpractice concerns have caused many plaintiff's lawyers to conclude that they have an obligation to initiate and present the alternative of a structured settlement to their clients. A case was recently tried in Omaha, Nebraska, in which a workers' compensation claimant

contended malpractice on the part of his lawyer for failing to be persuasive enough in preventing him from converting his weekly workers' compensation payments into a lump sum - which he had dissipated. Failing to use a structured settlement in an appropriate case may cause loss of Medicaid and Medicare benefits.

The payments made under a structured settlement for workers' compensation or physical injury tort claims

(other than punitive damages) are exempt from current year income taxation. Payments can be scheduled for the lifetime of the injured person. If the injuries result in a shortened life expectancy, the insurers of the annuity will take this into account and make larger payments than they would for a person with a normal life expectancy. Plaintiff's attorneys can defer their fees and the income taxes on the fees until they are actually received - thereby allowing

(Continued on page 2)

Independent Contractors Lack Cause of Action For Claimed "Retaliatory Discharge"

by Michael J. Davenport

In Iowa, an at-will employee may bring a cause of action in tort for "wrongful termination of employment" when discharged by an employer in violation of public policy. This cause of action is a recognized exception to the at-will employment doctrine, which would otherwise serve to deprive a wrongfully discharged employee of a remedy. In first adopting this public policy exception, the Iowa Supreme Court in Springer

v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988) determined the cause of action was necessary to prevent employees from facing the dilemma of giving in to improper threats by employers or being subject to discharge without a remedy.

Recently, the Iowa Supreme Court addressed whether this doctrine extended to independent contractors in Harvey v. Care Initiatives, Inc., 634 N.W.2d 681 (Iowa 2001). After an in-depth comparison to the reasons for allowing employees to

pursue "wrongful termination" causes of action, the Iowa Supreme Court declined to extend this doctrine to independent contractors.

The Court reasoned that independent contractors possess greater control and flexibility in their work and in the hiring process, and that the hiring party assumes fewer responsibilities toward independent contractors than at-will employees (e.g., employer contributions to social

(Continued on page 3)

Uninsured Vehicles Are Not Also Underinsured Vehicles

by Bruce B. Green

Most insurance policies prohibit a plaintiff from stacking the limits of uninsured motorist coverage contained in multiple policies. Can a plaintiff sidestep these anti-stacking provisions by claiming a vehicle is both uninsured and underinsured, thereby collecting under both coverages? The Iowa Supreme Court recently said "no".

Steven Pudil was a passenger in a truck driven by Andre Chalupsky. Pudil and Chalupsky's employer owned the truck. Pudil was injured when Chalupsky lost control of the truck in a single-vehicle accident.

At the time of the accident,

Chalupsky had no liability insurance. However, both Pudil and his employer had policies of insurance that included underinsured and uninsured motorist coverages. Pudil brought suit against Chalupsky, his employer, and his own insurance company, State Farm.

Prior to trial, Pudil settled his claims against Chalupsky and his employer. In the release and settlement agreement, Pudil acknowledged that the settlement proceeds were being paid solely from the uninsured motorist provisions of his employer's policy.

Pudil nonetheless proceeded to trial against his own insurer. Pudil claimed that he had not been fully compensated by the

prior settlement agreement, thereby rendering his employer's truck an underinsured motor vehicle (in addition to being an uninsured motor vehicle).

The trial court and the Iowa Supreme Court disagreed with Pudil. State Farm's policy clearly stated that an underinsured motor vehicle did not include a motor vehicle defined as an uninsured motor vehicle. The two were mutually exclusive. The policy definition comported with Iowa's uninsured/underinsured motorist statutes. Since Pudil stipulated in the settlement agreement that the truck driven by Chalupsky was uninsured, it could not also have been underinsured.

Settlement . . . (Continued from page 1)

attorneys to set up personal-retirement plans without the restrictions and other drawbacks of qualified plans.

A structured settlement usually consists of a cash lump sum covering unpaid bills and attorney fees that is paid when the documents are signed, and an agreement to pay the remainder in a series of periodic payments, future lump sums or a combination. The obligation to make future payments is normally assigned to an affiliate of a highly rated life insurance company, then guaranteed by the life insurance company or

another financially strong and stable entity. Therefore, a structured settlement is one of the most secure arrangements available anywhere.

Pursuant to an Iowa law (Senate File 337), passed in 2001, the beneficiaries of a structured settlement cannot convert the future payments to a lump sum by selling them to a third party without obtaining court approval. Similar legislation (Structured Settlement Protection Act of 2001) is pending in Congress.

The following are the primary advantages of structured settlements:

- ♦ All payments are free of federal and state income tax.
- ♦ Settlement proceeds cannot be dissipated.
- ♦ Benefits can be tailored to meet the claimant's individual needs.
- ♦ Payments can be increased to keep pace with inflation.
- ♦ Fixed-size payments are guaranteed by one of our economy's strongest sectors.
- ♦ No investment worries.
- ♦ Claimants will never outlive income when lifetime periodic payments are selected.
- ♦ May survive bankruptcy.

Internet Private Investigations

by Robert B. Lundholm

In most cases you cannot collect a debt or obtain a judgment against someone until you can locate that individual. The Internet may be a less expensive alternative than hiring a private investigator to locate that individual.

The Internet is a valuable resource for retrieving information about individuals and corporations. Most browsers offer "people finders" to obtain addresses and phone numbers for individuals, and "ultimate yellow pages" for corporations. Most states' websites offer information about corporations free of charge. That information includes corporate status, street address, telephone number and the name and address of the registered agent. Langenberg.com allows free searches of white pages and yellow pages, including a reverse search if you have a telephone number but need a name and address.

There are many Internet services offering more detailed searches for less than \$100.00. Other services offer criminal records, credit history, motor vehicle records and employment information.

Some fee-for-service companies offer information that only private investigators could obtain in the past. For example, "Tracerservices.com" offers a wide variety of search reports. If you know the name and address of an individual, you can obtain his or her social security number for a \$50.00 fee. For \$25.00 to \$150.00, you can obtain criminal records, driving records, bankruptcy filings and employment information.

Unlisted and mobile phone numbers can be obtained at "phonesearch.com" and "Americana.com". "Americandatalink.net" offers criminal records and background searches. "A1-trace.com" offers criminal

record searches by county and state, as well as foreign countries. "Informationexpertsinc.com" provides background checks and tenant screening reports from information gleaned from public records.

Corporate information is also available from the fee-for-service companies. For example, "lawservice.com" offers corporation filings, document retrieval, and public record searches. "corpdirect.com" and "incspot.com" offer public records research, document retrieval and filing services.

In addition, some services offer land, mortgage and title search information. The British site, "<http://www.lpr.org.uk/>", specializes in tracing and locating heirs.

As when dealing with other kinds of services on the Internet, you should proceed with caution when using the Internet to locate individuals. You never know where information about you might be listed.

Discharge . . . (Continued from page 1)

security, unemployment benefits and workers' compensation coverage). Moreover, existing principles of contract law provide independent contractors with remedies not generally available to employees. Thus, an independent contractor can not only negotiate the circumstances governing the termination of a contract, but has contract remedies to enforce all

of the express or implied terms of a contract, which diminish the need for Court-based remedies such as a cause of action for wrongful termination.

While independent contractors cannot bring an action for "wrongful termination", it should be noted that the determination of whether a particular person is an "independent contractor" or an "employee" is a fact-based

inquiry based upon the nature of the working relationship and many other circumstances, not necessarily on any label used to identify the parties in the contract. Thus, it is still possible for individuals labeled as "independent contractors" to establish that they are, in fact, "employees" and to pursue a "wrongful termination" action based upon their "employee" status.

Recovery for the Lost Value of a Damaged Car

by M. Brett Ryan

It is a common situation: a car is damaged in an accident, the insurance company pays for all of the repairs. However, the insured maintains that the car no longer has the same value after the accident. Iowa cases state that when repairs do not return the car to its pre-accident market value, then the insured must be paid for the loss in the market value of the car due to the damage.

This measure of damages for cars not totally destroyed is consistent with the rule that allows the owner of a vehicle, which is completely destroyed, to recover the pre-accident

market value. If the owner of a vehicle which is not totally destroyed is not compensated for the lost market value after repairs, in addition to being compensated for the costs of the repairs, then there would be an inconsistency in the law (i.e., there would be a different measure of recovery depending upon whether the vehicle was partially or completely destroyed, and an owner would only be fully compensated if the vehicle was completely destroyed).

Courts in other states have taken this legal principle and stated that an insured is entitled to compensation for the lost market value even though re-

pairs return the car to its pre-accident condition. The Georgia Supreme Court recently ruled that value, not condition, is the proper measure of damages, and that a car loses value when damaged and repaired, even if the repairs return the car to its pre-accident condition. The Georgia court cited a 1910 Iowa case concerning whiskey that was lost in a fire, stating that the measure of the owner's loss is neither the cost of the raw material from which a like product may be made, nor the cost of the labor to provide it. Instead, the owner's loss is the cost of immediately replacing the damaged item, by purchase or otherwise.

Willson & Pechacek, P.L.C.

Newsletter

Willson & Pechacek, P.L.C.

421 West Broadway, Suite 200

P.O. Box 2029

Council Bluffs, Iowa 51502

(712) 322-6000

Website: www.willsonpechacek.com

Email: info@willsonpechacek.com

State of Iowa Legal Disclosure: The determination of the need for legal services and the choice of a lawyer are extremely important decision and should not be based solely upon advertisements or self-proclaimed expertise. A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law or practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.