Do Some Structured Legal Fees Fly Too Close to the Sun?

By Robert W. Wood

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Since *Childs v. Commissioner*, structured attorney fees have been popular and are increasingly less likely to raise IRS scrutiny. In this article, Wood addresses features of increasingly flexible offerings that may be outside the comfort zone established by *Childs*.

Plaintiffs' lawyers who are paid contingent legal fees are unique in being able to defer or "structure" their legal fees over time. Most lawyers, other professionals, and business people cannot do that, at least not without surmounting hurdles and enduring special rules, including the Rubik's Cube of section 409A. Amazingly, the structured legal fees of plaintiffs' attorneys are exempt from section 409A, a fact that cannot be overemphasized.[1]

Plaintiffs' counsel may structure contingent legal fees as part of their practice management, cash flow, tax, and estate planning. Most lawyers who start regularly structuring some of their fees do not regret it. Many wonder why they did not do it before.

Structured fees were popularized by *Childs v. Commissioner*,[2] but many lawyers now look beyond the life insurance annuities approved in that case. Recently, I noted that I see nothing magical about life insurance annuities to make them the only way to structure.[3] Indeed, the *Childs* principles apply whether the money goes into life insurance annuities or other investments.

There is clearly nothing wrong with alternative investments as long as *Childs* is followed. However, that "as long as" is an important qualifier.

Key Principles

Contingent fee lawyers contract for a percentage fee payable at the conclusion of a case. Before settlement documents are executed, the lawyer signs structure documents. Of course, lawyers must pay tax as they receive the fees over time, but in the meantime, the funds earn income on a tax-deferred basis.

As in *Childs*, the lawyer must have no interest in the assets, and he must not be able to accelerate, pledge, defer, or otherwise change what he is promised to receive over time. The lawyer contracts for a series of installment payments before the case settles and before he formally earns his fee. That is the fundamental tax reason he can do this. He just cannot change it thereafter.

The structuring attorney must have contract rights, a mere promise to pay. The attorney may be empowered to pick investments or managers *before* signing, but not thereafter. Yet some plaintiffs' lawyers are forging new ground beyond *Childs* to make fee structures even less rigid. Some are dropping some of the elements *Childs* said were important.

In a quest to gain more flexibility, are these lawyers jeopardizing the IRS's tolerance for structured fees? Are some flying too close to the sun? Which features should plaintiffs' lawyers question?

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[1] Section 409A generally does not apply when the service provider is engaged in a trade or business of providing services and provides those services to at least two service recipients. *See* reg. section 1.409A-1(f)(2). Enacted in 2004, section 409A drastically changed the landscape for deferred compensation. In the structured settlement industry, section 409A triggered concern about attorney fee structures. However, not long thereafter, the IRS issued Notice 2005-1, 2005-1 C.B. 274. The notice provides that section 409A does not apply to arrangements between a service provider and a service recipient if the service provider is actively engaged in the trade or business of providing substantial services (other than as an employee or corporate director) and if the service provider provides those services to two or more unrelated service recipients.

[2] 103 T.C. 634 (1994), *aff'd*, 89 F.3d 856 (11th Cir. 1996).

[3] Robert W. Wood, "Structuring Legal Fees Without Annuities: Offspring of *Childs*," *Tax Notes*, July 20, 2015, p. 341.

Investments

Often, a third party holds and invests the money for its account. The lawyer is merely a general creditor with no right to accelerate, defer, assign, and so on. This sounds parallel to *Childs*, so its protections should apply. That there is a formulaic investment return should not create problems.

Indeed, in LTR 199943002, the IRS suggested that the particular investment assets should not matter. The IRS ruled that periodic payments determinable by reference to the S&P 500 stock index or a portfolio to achieve long-term growth and moderate current income qualified under section 130(c).[4] Of course, any investment selections must be made before the case settles.

But that is the key element, not the particular assets being used. Some companies allow attorneys to make periodic nonbinding investment requests. These are generally selected from a menu of investments set before the agreements are executed. That, too, should not spell trouble.

Plainly, attorney fee structures must not provide security or any rights to the underlying assets. The agreement must not create an escrow account, trust fund, or other form of asset segregation. The benefits cannot be subject to anticipation, alienation, sale, transfer, assignment pledge, or encumbrance.[5] There is some illustrative case law.

For example, in *United States v. Fort*,[6] the Eleventh Circuit held that a taxpayer had sufficient control over stock placed in escrow to result in constructive receipt. The shares were held in escrow in the taxpayer's name and for his benefit. He even had dividend and voting rights, so the stock effectively functioned as security.

New Opportunities or New Risks?

Sensibly, most companies stick close to the *Childs* model used by the U.S. life insurance companies that write structured legal fees. Key elements include:

- the attorney cannot accelerate, defer, increase, or decrease the periodic payments;
- the attorney cannot sell, anticipate, assign, pledge, hypothecate, or encumber the periodic payments;
- the attorney does not own the assets or have anything set aside in his name; and
- the attorney is simply a general creditor with a contract right for a stream of payments.

With these generally accepted principles, I examine three ''rights'' being offered in the marketplace that deserve discussion:

- What if the attorney can roll over periodic payments that become payable? Is a redeferral right — as distinguished from a right to accelerate — a no-no?
- What about the attorney having other control-like rights? Suppose the attorney can import his own investment manager? How about dividend rights on any reference securities being purchased as part of the portfolio?
- Finally, what if the attorney can borrow money? Does that right spoil the structure?

Cash Equivalency, Constructive Receipt

There are many nonstatutory tax concepts relevant to structured attorney fees. To some extent they overlap, but they are at least technically distinct. Under the cash equivalency doctrine, if a promise to pay a benefit to an individual is unconditional and exchangeable for cash, the promise is currently taxable.[7]

Thus, attorney fee structures should state that rights under the contract cannot be assigned, transferred, pledged, or encumbered. That should make it unlikely that the cash equivalency doctrine could be applied.[8] Constructive receipt authorities are tougher, particularly because the attorney fee seems *almost* earned when agreements in principle are reached.

Constructive receipt is the universal notion in tax law that there are tax consequences to turning down money you are entitled to receive. You might have to pay tax when you were entitled to receive payment even if you actually refused to accept it until the next year. The key reason the constructive receipt doctrine does not apply to a properly documented structured attorney fee is that the structure is put in place before the case settles.

Technically, the fee is not actually earned until settlement documents are signed. Tax authorities about deferred compensation help to fill in the gaps, because the only structured legal fee case — an important point to remember — is *Childs*. Some nonqualified deferred compensation arrangements are taxed under section 409A. However, section 409A does not apply to structured attorney fees.[9]

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[4]*See* Rev. Rul. 2008-31, 2008-1 C.B. 1180 (investors were not owners of U.S. real estate when they invested in a broad-based index that sought to measure appreciation and depreciation of residential or commercial real estate in large geographic areas).

[5]Rev. Rul. 72-25, 1972-1 C.B. 127.

[6]638 F.3d 1334 (11th Cir. 2011).

[7]*Cowden v. Commissioner*, 289 F.2d 20 (5th Cir. 1961), *rev'g and remanding*, 32 T.C. 853 (1959), *opinion on remand*, T.C. Memo. 1961-229.

[8]*See Reed v. Commissioner*, 723 F.2d 138 (1st Cir. 1983); *Johnston v. Commissioner*, 14 T.C. 560 (1950).

[9]*See* reg. section 1.409A-1(f)(2) and further discussion *supra* note 1.

This is where the interaction with deferred compensation authorities gets interesting. Indeed, although historical non-attorney cases are helpful, there is a danger in viewing the deferred compensation authorities as more important than *Childs*. In an effort to have one's cake and eat it too, one should not forget what *Childs* says.

For example, the structured legal fee industry is justifiably happy that section 409A does not apply. But with that important exemption, can the industry still borrow *some* of the section 409A authorities? In *Childs*, the attorneys had no right to assign, transfer, sell, accelerate, or defer the future payments.

The assignment company in *Childs* purchased the annuities, but the policies were subject to claims by the assignment company's general creditors. The Tax Court approved the structure in *Childs*, and the Eleventh Circuit affirmed. Since then, the IRS has cited *Childs* with approval.[10]

As the years have elapsed, the importance of sticking with the *Childs* fact pattern, even if one strays from life insurance annuities, seems clear. Nevertheless, there is an understandable tendency to build a better mousetrap and to stand on *Childs*' shoulders.

Redeferrals and Section 409A

What if the attorney is allowed to make additional deferrals? This is not accelerating income, but the reverse. If scheduled periodic payments call for a payment in 2016, can the lawyer defer it to 2017 without triggering tax in 2016?

Plainly, the IRS is comfortable that a plaintiffs' lawyer can elect to defer fees into the future as *Childs* allows. But do we have to be limited by *Childs*? *Childs* said that one cannot accelerate or defer fees after the structure is in place. Even so, is it OK to keep rolling the income forward and redeferring it as long as there is no acceleration?

Some plans provide that a redeferral election must be made at least 12 months in advance and must defer the income for at least an additional five years. Supposedly, this is done to comply with the rules of section 409A — even though it does not apply. But it is a fair question to ask whether a right to redefer payments is an exercise of dominion and control.

It is also worth asking whether borrowing one of the more liberal rules from the maze of section 409A — a maze that does not apply to structured legal fees — might be asking for trouble. The IRS could argue that redeferral rights impart control. Historically, such a right could be viewed as an economic benefit over the funds subject to that right.

How viable an argument the IRS would have would presumably depend on whether the attorney actually exercises the right. Constructive receipt, after all, is based on rights, not on what actually happens. The same is true with economic benefit analysis.

For example, in *Veit v. Commissioner* (*Veit I*),[11] the Tax Court considered the deferral of compensation earned but not yet due. Howard Veit and his employer entered into an agreement in 1939 to pay Veit a portion of 1940 profits in 1941. On multiple occasions, they amended their agreement, including in late 1940, when Veit's share of the 1940 profits had yet to be determined.

The amendments said installments due in 1941 would be deferred until 1942. The IRS argued that Veit constructively received the compensation in 1941 even though it was paid in 1942, but the Tax Court disagreed. Two years later, in *Veit II*,[12] the Tax Court addressed Veit's deferrals from 1942 to 1943.

The IRS argued that Veit should be taxed in 1942, but the Tax Court held that the payments were never subject to Veit's demand. Veit amended his agreement before the money was payable, so future payments were not taxable.[13] There was a similar one-year notice in *Martin v. Commissioner*.[14]

In that case, a deferred compensation plan allowed taxpayers to elect a lump sum or 10 annual installments. Plan participants could change their election with one year's notice, so the IRS argued that the taxpayers had constructive receipt. The Tax Court declined to apply constructive receipt, noting that the election had to be made *before* the amounts became due.

So with this background, is a redeferral of structured legal fee payments allowed? Should it be? Many successful plaintiffs' attorneys may find a right to redefer hard to resist. After all, one of the hallmarks of structured attorney fees a là *Childs* is that the fees are not taxed now and will be taxed later only when they come in on schedule.

Wouldn't it be intoxicating if the plaintiffs' lawyer could keep rolling the fees he didn't need into the future, delaying the taxman, perhaps forever? One can argue that any redeferral violates *Childs* and could spell disaster. Of course, one can argue that some redeferrals might be OK if done before a

[10]*See* FSA 200151003; LTR 200836019.

[11]8 T.C. 809 (1947), *acq.*, 1947-2 C.B. 4 (1947).

[12]*Veit v. Commissioner*, 8 T.C.M. 919 (1949).

[13]Notably, in contrast to *Veit I*, the IRS never acquiesced in *Veit II*.

[14]96 T.C. 814 (1991).

periodic payment comes due. Section 409A authority does help if it is relevant. If one can borrow only the good from section 409A, it would allow taxpayers to defer payment by at least five years if the election is made at least 12 months before payment is due (the 12-months/five-year rule).[15]

If a redeferral is permitted under section 409A, perhaps it should also be permitted here without triggering constructive receipt. One can certainly argue the point. However, section 409A does not apply to lawyers' structuring fees.[16] And that fact should send an eerie feeling down one's spine, perhaps akin to pushing the speed limit just a little bit further.

Ultimately, whether the IRS would be bothered by redeferrals is unclear. It may not appear to be an egregious exercise of control, but it is outside the *Childs* fact pattern. Some cherry-picking may be allowed, but when cherry-picking results in a taxpayer having his cake and eating it too, the IRS may say enough is enough.

Childs shares many similarities with section 130 qualified assignments. They include the prohibition against redeferral.[17] The prohibition of redeferral rights in section 130 suggests that the government could see redeferral as material to the result in *Childs.*

But perhaps redeferral rights will not prove to be the straw that breaks the camel's back. The issue could be more worrisome if one adds other potentially bad optics like importing of the attorney's own investment manager, dividend or voting rights on securities, etc. Do these matter, and how much is too much?

Other Indicators of Control

As attorneys negotiate for more rights over ''their money,'' they should be careful what they wish for. Plaintiffs' lawyers are famous for being aggressive. Very successful ones who earn big fees and want to defer them might logically be assumed to be even more aggressive. It is only natural that they may push for as many extra bells and whistles on rights to their fees as they can.

To accommodate them, fee structure companies may be inclined to tweak their fee structure vehicles or to build in features that elite and aggressive plaintiffs' lawyers will like. What about importing the attorney's own investment manager? Those companies may say, ''Forget the menu of investments; if the attorney wants us to send the money to his manager, we will.''

[15]Section 409A(a)(4)(C).

[16]*See* reg. section 1.409A-1(f)(2).

[17]Section 130(c)(2)(B).

Why not add dividend or voting rights on any securities that the company happens to hold, despite the smoke and mirrors, essentially for the lawyer's account? As more companies attempt to add to the smorgasbord that attorney fee structures seem to allow, these rights are increasingly in play. From my viewpoint, caution is clearly in order.

I would suggest several successive levels of caution. One is the technical mechanics. For example, with a little work, one could probably set up the architecture so that a lawyer's own investment manager could have a role in managing an array of reference securities. These securities could not be set aside for the lawyer and could not be available to the lawyer in any way.

But even if this can be shoehorned into the *Childs* fact pattern, consider the overall optics. From a tax viewpoint, having the lawyer's own personal and historic investment manager at the helm may look unsavory. Is this enough control or attribution to spell constructive receipt? Perhaps not, but it may be hard — and expensive — to defend.

Exactly how those additional bells and whistles will be viewed by the IRS is still unclear. Yet it is hard to argue that they (particularly in combination) would pass the IRS unnoticed. In *Goldsmith v. United States*,[18] the IRS argued that the taxpayer was in constructive receipt of deferred compensation when he chose the annuity company to receive a monthly premium deducted from his salary.

Nonetheless, the court held that the mere ability to choose the annuity company did not spell constructive receipt. The optics matter, as do the additional bells and whistles one might add that were not present in *Childs*. The IRS can scrutinize each right or incident of ownership or control.

In Rev. Rul. 77-85, 1977-1 C.B. 12, a policyholder entered into a contract with an insurance company. The custodian bought and sold securities and reinvested earnings based on policyholder instructions. The policyholder could direct the custodian in voting the securities.

Ruling that the policyholder was the beneficial owner, the IRS noted that the owner retained significant incidents of ownership. The owner continued to hold the power to direct purchases, sales, and voting. These extensive rights made the policyholder the owner of the assets.[19]

[18]218 Ct. Cl. 387, 399 (1978).

[19]*Cf.* Rev. Rul. 80-274, 1980-2 C.B. 27 (annuity policyholder treated as owner of savings and loan accounts when the insurance company that issued the annuity acted as ''little more than a conduit'' between the policyholder and the savings and loan association).

Similarly, in *Christofferson v. United States*,[20] the court treated the taxpayer as the owner of invested assets for tax purposes. Rev. Rul. 2003-91, 2003-2 C.B. 347, suggests that policyholders can avoid ownership by avoiding specific investment directives. In contrast, Rev. Rul. 2003-92, 2003-2 C.B. 350, considered variable annuity contracts under which the policyholder could invest in publicly available investment funds and was therefore their owner for tax purposes. Only in limited circumstances with nonpublic funds could the policyholder sidestep ownership.

This is not unique to attorney fee structures. The IRS has considered dominion and control in nonqualified deferred compensation plans. In one general counsel memorandum, the IRS discussed nonqualified deferred compensation arrangements allowing employee elections to have pay withheld and invested.[21] The IRS argued that the employees should be taxable because they exercised dominion and control over the investment of the funds.[22]

Once again, some thought should be given to the golden rules of *Childs*. It is one thing to move beyond life insurance annuities, because the funding asset itself really should not matter. But one should still adhere to all the rules the *Childs* court said were important. They include no rights beyond contract rights, no acceleration, no redeferral, and no pledging.

One should be careful about chipping away at those rights and adding wholly new elements, such as injecting the attorney's own investment manager. With any ''new and improved'' mousetrap, consider the technical rules. And even if one can make the mousetrap work technically, consider the optics.

For example, under section 409A, some limited investment changes are allowed without being considered a material modification to a deferred compensation plan.[23] However, one should feel uneasy relying on section 409A when it isn't supposed to apply to attorney fee structures. *Childs* requires that periodic payments not be increased or decreased by the attorney. Thus, notional investment requests made after the agreements are signed should be viewed with caution. If allowed at all, they should be nonbinding and made based on a predetermined menu of available investments.

Borrowing and Attorney Fee Structures

I want to address borrowing because it is in some ways the elephant in the room. Attorneys should not be scared of this elephant, as long as they are careful. The reality is that attorney fee structures are increasingly likely to permit borrowing or to recognize that a borrowing facility may be allowed, subject to conditions.

Usually, there is a time, entity, and procedural distancing between the structure and any loans. The fee structure company and the lending company may be entirely unrelated. The companies may be related but may each have their own protocols to make them independent and valid.

The mechanics of the fee structure and loan may be staggered. Due dates and payment details may be scrutinized in a conscious effort to avoid bad optics. Without safeguards, it might appear that the money from a fee structure seems to go roundtrip into the lawyer's hands, not as income but as a loan. Entities must be kept straight, borrowing ratios must be observed, and rates and protocols must be in place.

These details may seem unimportant to the plaintiffs' lawyer who can perhaps be forgiven for thinking in shorthand. The lawyer shorthand might be: ''I'll structure fees to provide regular annual cash flow and to defer taxes. And I can always borrow my own money when needed.''

The reality should be much more nuanced. So the lawyer can be allowed to think in these terms, the professionals involved must be diligent in dotting the i's and crossing the t's. This applies to the structure documents and to any loan documents, too.

Loan Basics

In general, the proceeds of a loan are not income if the taxpayer is obligated to repay the loan.[24] Of course, a sale or disposition of collateral or a pledged asset triggers income,[25] yet there does not appear to be any authority directly addressing a loan regarding an attorney's structured fee.

In other contexts, the IRS has shown an interest in transparency and matching. Thus, in *Heyn v. Commissioner*,[26] a plaintiff settled an employment

[20]749 F.2d 513 (8th Cir. 1984).

[21]GCM 36998 (Feb. 9, 1977).

[22]However, in 1978, Congress passed the Revenue Act of 1978 expressing disagreement with the restriction on those deferred compensation arrangements. In the Revenue Act of 1978, Congress added section 457, providing rules for the taxation of deferred compensation plans of state and local government.

[23]Reg. section 1.409A-6(a)(4)(iv).

[24]*Commissioner v. Indianapolis Power & Light Co.*, 493 U.S. 203, 207-208 (1990) (''It is settled that receipt of a loan is not income to the borrower.''); *Commissioner v. Tufts*, 461 U.S. 300, 307 (1983) (''When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer.'').

[25]*See Calloway v. Commissioner*, 691 F.3d 1315 (11th Cir. 2012) (treating a nonrecourse loan at 90 percent of the value of securities pledged as a sale of the securities rather than a mere pledge).

[26]39 T.C. 719 (1963).

dispute in exchange for five annual payments of $9,100. At the same time, the employer ''lent'' the employee $41,835 (the present value of the five annual payments).

The employee issued five promissory notes to exactly offset the annual payments. The Tax Court in *Heyn* held that the $41,835 was income, not a loan. The taxpayer's obligation to repay exactly matched the future payments, so neither party had any obligation to actually pay.

The details, terms, and circumstances matter in determining whether an advance will be respected. Among the requirements for an advance ruling that a nonqualified deferred compensation plan does not result in constructive receipt, the service provider must not be permitted to pledge, encumber, assign, transfer, or alienate the stream of future payments.[27]

In one ruling, the IRS concluded that a combined note, pledge agreement, and bonus agreement constituted compensation for future services, not a bona fide loan.[28] The employee received an upfront loan, signing a promissory note. He pledged his future bonus payments to secure the note.

The employer agreed to pay annual bonuses exactly equal to the note amounts. The IRS acknowledged that the transaction took the form of a loan, but the employee had no unconditional and personal liability. The note would be repaid with guaranteed bonuses exactly matching the note payments, so it was current compensation.

However, in *Dennis v. Commissioner*,[29] an insurance agent received advances secured by future commissions. Although the balance of his advances was reduced by commissions, he had an unconditional obligation to repay. The Tax Court therefore respected the advances as loans.[30]

In contrast, when an employee's obligation to repay is only conditional, it is generally current compensation.[31] In fact, the IRS has stated that an advance qualifies as a loan if: (1) the advance takes the form of a loan and interest is charged; (2) the employee is personally and unconditionally liable; and (3) the employer actually or in practice demands repayment if the future commission income is insufficient for repayment.[32] For a loan to be respected, the attorney must have an unconditional, personal obligation to repay principal and interest.[33]

Loan payments should not match periodic payments, and the attorney should remain entitled to the periodic payments, even on a default under the loan.[34] If they are truly independent, the loan and the stream of periodic payments should be independent obligations, as they were in *In Re Mastroeni*.[35] There, the bank was a lender to the taxpayer and was the custodian of the taxpayer's IRA account. The bank had no right to offset the IRA account.

Thus, even on a loan default, the structure company should be required to pay the attorney's periodic payments on schedule. The structure company should be a general creditor of the attorney but could have a security interest in the other assets of the attorney. With appropriate documentation and distance, it should be possible to have a bona fide legal fee deferral and a bona fide loan and not have them collapsed. But the devil is very clearly in the details.

Perhaps the best fact pattern would be to have truly independent and independently owned structure companies and loan funding entities. The parties should all behave in a commercially reasonable manner. The lending entity should require a loan application, credit report, etc. The more independent and arm's length the relationship, the better.

Conclusion

Structured legal fees have come to be an essential tool for contingent fee attorneys. This is as it should be. Contingent fee lawyers have a unique ability to regularize their income and to achieve surprising tax benefits. They can even do so outside the chafing confines of section 409A. Most other fee earners and most other lawyers cannot.

Fee structures today are moving beyond traditional life insurance to portfolio investments. This, too, is as it should be. Regardless of the mechanics — and mechanics are important — the documents should adhere to the restrictions of *Childs*. The

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[27]Rev. Proc. 92-64, 1992-2 C.B. 422, section 5 (model trust provisions).

[28]TAM 200040004.

[29]T.C. Memo. 1997-275, AOD CC-1999-011.

[30]*See also Gales v. Commissioner*, T.C. Memo. 1999-27, AOD CC-1999-011.

[31]*Winter v. Commissioner*, T.C. Memo. 2010-287 (an advance was treated as compensation when the employee did not have an unconditional obligation to repay the bonus).

[32]*Dennis*, T.C. Memo. 1997-275; *Gales,* T.C. Memo. 1999-27.

[33]*See Mathers v. Commissioner*, 57 T.C. 666, 675 (1972) (noting that the transfer of the installment obligations did not take the form of a loan agreement); *Heyn v. Commissioner*, 39 T.C. 719 (1963) (holding that promissory notes were to be disregarded in part because the taxpayer did not expect to ever pay any amount on the notes).

[34]*See Town and Country Food Co. Inc. v. Commissioner*, 51 T.C. 1049, 1057 (1969), *acq*. 1969-2 C.B. xxv (explaining that the pledge of installment obligations would be respected as a mere pledge in part because the repayment of the loan ''was not geared to the [taxpayer's] collections upon its installment obligations'').

[35]57 B.R. 191 (Bankr. S.D.N.Y. 1986).

principles of constructive receipt, economic benefit, and cash equivalency serve as the lines that one must stay within.

In that sense, redeferrals are worrisome because they go beyond *Childs*. Further, voting and dividend rights inuring to the lawyer should be avoided, along with other miscellaneous rights that may make the lawyer look more like an investor. The more the lawyer pushes investment buttons — even precatory buttons that are not legally binding — the more the lawyer steps deeper into potential trouble.

Borrowing facilities should have independent significance. Ideally, there should be different parties, different timing, and different payment protocols, with no security or pledging. The industry will have to get used to this. So will plaintiffs' lawyers, who must be disabused of the notion that they are "just borrowing their own money."

There is no question that the IRS is comfortable with properly and timely documented attorney fee structures. That deserves underscoring. Even so, there could be some fallout with aggressive attorneys who push the envelope. And as many a structure company and adviser can attest, successful plaintiffs' lawyers do know how to push that envelope.