

Why Trial Lawyers Should Consider Using § 468B Settlement Trusts

You know the scenario well!



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Over the years, it has become apparent that a crossover between the personal injury practice of our members and the areas of probate and public benefits exists. Our very own Bridget O'Brien Swartz spearheads this column which highlights issues of relevance and importance in these areas to our members. If you have issues of particular interest you would like addressed, please notify Bridget at boswartz@dbfazlaw.com

By Bridget O'Brien Swartz, Esq.

You have just settled a personal injury claim for a substantial amount for Ann, who is permanently disabled as a result of her injuries. She has a Medicare claim and a Medicaid lien. Ann is eligible for Arizona Long Term Care System ("ALTCS") benefits and will need a special needs trust. You made a derivative claim for a loss of consortium on behalf of Ann's husband, Tom. The defendant has a structured settlement broker who wants to meet with you and Ann's family. How can you quickly tie up the loose ends and get the money?

Ann's family is stunned and confused. They waited four years for their day in court and the case settled on the courthouse steps. The family is anxious and uncertain about the allocation of the settlement between Ann and Tom. They have questions about lump sum payout, the use of a structured settlement annuity, and the special needs trust. Ann is incapacitated, and will need to have a conservator appointed for her by the probate court.

Qualified settlement funds, or § 468B settlement trusts allow for payment of the settlement into a trust. The defendant is released upon payment to the trustee, and the trustee can immediately pay the plaintiff's attorney's fees and litigation costs, assuming they have been approved by the court. This "stops the clock" so that plaintiff's counsel can carefully evaluate settlement options. The plaintiff's attorney can continue to update the lien information and negotiate with lienholders. When the liens and the allocation of the settlement are resolved, the trustee can still use a structured settlement annuity and the special needs trust without adverse tax consequences.

As a trial attorney, you need to know how to use qualified settlement funds!

Qualified settlement funds can be used to settle cases of any value involving multiple

claimants or the personal injury victim with a derivatively injured spouse, child or parent.

They have many advantages:

- Funding the § 468B trust removes the defendant, its counsel, and their structure broker from the litigation. They can pay and walk!
- If claims against multiple defendants exist that will not all resolve at the same time, the § 468B trust allows for the entire case to be resolved before permanent and long term decisions are made as to the overall recovery.
- The § 468B trust removes the defendant from the allocation of the settlement amounts between the various plaintiffs.
- Plaintiffs' attorney's fees and other expenses can be paid immediately from the § 468B trust, assuming court approval has been obtained.
- Plaintiffs receive the income from the settlement held in the § 468B trust.
- Time is no longer a pressing factor for the lien negotiations, allocations, probate proceeding, selection of structured settlement annuity, or establishment of a special needs trust.

What are the requirements of a § 468B?

Treasury regulation § 1.468B-1(C) sets forth the following:

- (1) It must be a trust, account or fund, which is established or approved by order of a court of law (or government agencies) and is subject to continuing jurisdiction of that authority;
- (2) It is established to resolve contested or uncontested claims asserting liability for a tort, breach of contract or violation of law (not worker's compensation or self-insured health plan claims); and

See Settlement Trusts, page 21

Settlement Trusts

Continued from page 7

- (3) It must be a trust under applicable state law, or the assets must be kept separate from the assets of the tortfeasor, insurance carrier or other related parties.

No constructive receipt!

A defendant can pay a settlement into a § 468B trust and deduct the claim even though the payout to or for the benefit of the plaintiffs occurs later. However, the § 468B trust does not constitute constructive receipt to the plaintiffs because of the restrictions placed on the § 468B trust. The plaintiffs' attorney does not have custody of the fund. An independent trustee owns the funds. This arrangement preserves the opportunity to use the structured settlement annuity option, and to do so using one's own brokers rather than those of the defendant.

Tax reporting details

A § 468B trust is treated as a corporation and is liable for taxes on its modified adjusted gross income. Earnings are subject to taxation in a manner similar to corporate earnings at the maximum tax rate in IRC § 1(e). Settlement trusts are also allowed deductions for administration costs and related expenses, losses sustained in connection with the sale or exchange of property, and net operating losses. Trust distributions to the plaintiffs are not deductible and liability cannot be reduced with tax credits. Qualified payments to a § 468B trust are not included in the gross income of the funds.

Beware!

If a § 468B trust is contemplated, bring it to the table sooner rather than later when negotiating with the defendant and be sure to include a provision for such a trust in the settlement agreement and release. Unfortunately, some insurers are reluctant to agree to settle with a § 468B trust due to their lack of knowledge and experience with them in general, or in cases involving a couple or few claimants rather than a large number of claimants such as in a mass tort action or class action. Also, the defendant's structured settlement annuity brokers do not want to be left out of the equation and, as such, it may be helpful to ensure that if such an annuity is utilized, it will be co-brokered between the plaintiff's and defendant's brokers. Some insurance companies will not do structured settlement annuities where a § 468B trust is involved in a case concerning only a handful of plaintiffs.

Conclusion

When cases are ripe for settlement, and yet loose ends remain, do not rush to make the many important decisions that affect your clients for a lifetime. Use the § 468B trust to remove the defendant from the equation, and allow you and your clients time to properly evaluate the options. ■



National Academy of Elder Law Attorneys



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Bridget O'Brien Swartz, CELA, Named Treasurer of 2021-2022 NAELA Board of Directors

Washington, DC — The National Academy of Elder Law Attorneys (NAELA), an association of attorneys dedicated to improving the quality of legal services provided to older adults and people with disabilities, is proud to announce its appointment of Bridget O'Brien Swartz, CELA, of Phoenix, Ariz., as Treasurer of the 2021-2022 Board of Directors. Swartz began serving as NAELA Treasurer on June 1, 2021.

As NAELA Treasurer, she will assist and advise the NAELA Board and Executive Committee with respect to fiscal management and serve as Chair of the NAELA Finance Committee.

"I look forward to continuing to work with NAELA's Executive Committee and Board of Directors to assist our members throughout the country in navigating the practices of elder and special needs law following what have been unprecedented times. As a result of the pandemic, our clients are unimaginably more vulnerable than ever before and their families face newfound challenges in providing for the needs of their loved ones who are aging or have a disability. NAELA's members are a special breed of lawyer who are uniquely positioned to counsel and guide their clients and advocate for their needs and rights."

Bridget has been in practice for 25 years in Phoenix, Arizona, primarily focusing on the area of special needs law. Her work experience also includes serving as a trust officer at a local community bank. Bridget is originally from Duluth, Minnesota, obtained her undergraduate degree from Notre Dame (cum laude), and her law degree as well as a Masters in Public Administration from Arizona State University. Bridget is a Certified Elder Law Attorney certified by the National Elder Law Foundation and a Fellow of the American College of Trust & Estate Counsel. Along with NAELA, she is a proud member of the Special Needs Alliance.

About NAELA

Members of the National Academy of Elder Law Attorneys (NAELA) are attorneys who are experienced and trained in working with the legal problems of aging Americans and individuals of all ages with disabilities. Upon joining, NAELA member attorneys agree to adhere to the NAELA Aspirational Standards. Established in 1987, NAELA is non-profit association that assists lawyers, bar organizations, and others. The mission of the National Academy of Elder Law Attorneys is to educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law. NAELA currently has members across the United States, Canada, Australia, and the United Kingdom. For more information, visit NAELA.org or to locate a NAELA member in your area, visit NAELA.org/findalawyer.

Dyer Bregman & Ferris, PLLC has been providing legal services helping individuals and fiduciaries plan, administer and litigate issues for over fifty years in Arizona. Each of its principals has more than 20 years of experience in their respective area practice. The firm has been recognized by its peers as among the best for its contributions to the legal and social communities.