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SPECIAL REPORT:
Qualified Settlement Funds

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Imagine this situation: you are in the middle of trial preparation when the defense attorney presents an offer that your client is willing to accept. The offer is contingent on the quick settlement of the case, but all you can think of are the myriad of issues left to resolve – Does my client have any special needs that should be taken into consideration? Is a Medicare Set-Aside necessary? What structured settlement options are available? Qualified Settlement Funds ("QSFs"), also called 468B funds or 468B trusts, are entities designed to address these issues by allowing litigation to be resolved quickly.

What is a Qualified Settlement Fund?

Generally speaking, QSFs act as an intermediary party to a lawsuit. These funds allow defendants and their insurers to make payments to a court-created trust fund. The fund is subject to the court's continued oversight. The defendant's payment to the fund is tax-deductible to the defendant at the time payment is made, no matter when the plaintiff actually receives payment from the fund. In addition, the defendant is released from liability at the time it makes the payment to the fund. The fund administrator then works to make proper allocations among the plaintiffs and claims. The administrator has the flexibility to arrange payments in a number of ways including cash payments, periodic payments, or through a special needs trust.

These QSFs or 468B funds get their name from the Internal Revenue Code section under which they are created. In the 1980s, Congress passed Section 468B of the Internal Revenue Code, thereby creating Designated Settlement Funds. These funds were limited in the way they could be used. In 1994, however, the Treasury Department added regulations under Section 468B that expanded the use of these funds and created a new type of fund entitled "Qualified Settlement Funds." The added regulations expanded the range of claims in which the funds can be used, and now these funds are available in personal injury, breach-of-contract, and environmental claims. These 468B funds are not available for liabilities under the workers' compensation act.

Advantages of Using a Qualified Settlement Fund

Using QSFs in personal injury cases has many advantages. Both plaintiffs and defendants can benefit from the use of a QSF. In addition, there are numerous advantages for the attorneys representing plaintiffs. The use of a QSF can give the plaintiffs time to resolve any remaining issues. The defendants have the advantage of walking away from the claim/litigation while those issues are resolved. Plaintiffs' attorneys have the benefit of a professional QSF administrator to handle issues such as the creation of special needs trusts and Medicare set-aside trusts, and the payment of any Medicare or Medicaid liens.

A. Advantages to Defendants

Although QSFs provide many advantages to plaintiffs and their attorneys, QSFs are not without advantages to defendants. Establishing a QSF allows a defendant to disengage from litigation. After a QSF is created, the plaintiff executes a release of liability, and economic performance takes place immediately upon the defendant's payment into the fund. Defendants can walk away without being bothered by allocation issues or waiting on the Medicare or Medicaid liens to be settled. For this reason, defendants often agree to the establishment of a QSF.

B. Advantages to Plaintiffs

Using a QSF has great advantages to plaintiffs and to their attorneys. The first advantage is breathing space. Many times, settlements occur so quickly that there is not enough time to evaluate the advantages and disadvantages of alternative forms of distribution, such as structured settlements. Using a QSF allows the settlement to move forward while preserving all distribution options for each claimant. This allows each claimant time to decide on the form of distribution that best suits each claimant's needs.

In some instances, using a QSF also allows for easier apportionment of shares. Often times, individuals within a group of claimants cannot agree on how to apportion the proceeds of a settlement among themselves. Using a QSF may help solve that problem because the fund administrator is able to negotiate with individual claimants or their attorneys to resolve these issues.

Establishing a QSF also helps eliminate the risk of insolvency by the defendant or its insurer. If the plaintiff is aware that the defendant's financial status is unstable, establishing a QSF allows for the quick transfer of funds to protect the plaintiff's interest while the remaining issues are being settled. This can be a great protection for the plaintiff in any case where the defendant's financial situation is unstable.

The last, and possibly greatest, advantage to a plaintiff's use of a QSF is that the plaintiff earns all the interest on the funds while the money is in the QSF. Rather than the defendant earning interest on the funds while allocation and other issues are being resolved, the defendant places the funds into a QSF while those issues are resolved. The plaintiff receives all interest earned while the money remains in the fund. In the case of a settlement for millions of dollars, daily interest payments can mean thousands of dollars in additional money in the plaintiff's pocket.

C. Advantages to Plaintiffs' Attorneys

Subject to the approval of the court, a QSF may pay attorney's fees as soon as proceeds have been delivered to the QSF. This can mean that the plaintiff's attorney is able to receive payment prior to the resolution of many issues. The plaintiff's attorney also has the advantage of time. Just as a claimant needs some breathing room after deciding to settle and before deciding upon the form of distribution, so does the plaintiff's attorney. This space allows the plaintiff's attorney to evaluate and make recommendations as to the form of distribution. The plaintiff's attorney may decide to structure his or her fees, obtain tax deferral, or take a lump-sum cash payment.

A QSF can also help the plaintiff's attorney to resolve issues between claimants. In any case with multiple claimants whose interests are adverse, the plaintiff's attorney faces difficulty in resolving apportionment issues. This is often the case when a claim involves a minor child whose parents are divorced. The QSF fund administrator can act as an independent person who negotiates apportionment of shares. The administrator fills this role as a fiduciary and is subject to the court's oversight.

Just as a QSF administrator can assist in allocation issues, the administrator can offer much more to the plaintiff's attorney. Few attorneys have the necessary knowledge, skills, or resources to help clients with special needs trusts or Medicare set-aside trusts. These trusts, however, are necessary in many cases to preserve the plaintiff's eligibility for government benefit programs. A fund administrator should have professional experience in the area of special needs trusts and Medicare set-asides and should be able to address these issues for the plaintiff's attorney. The fund administrator can also oversee any Medicare or Medicaid lien resolutions that are necessary.

Is a QSF Appropriate for Your Case?

If you think that a QSF may help with the resolution of your case, then contact one of the elder law attorneys of Hook Law Center. Hook Law Center also suggests that the personal injury attorney consult with an elder law attorney early in the case in order for the personal injury attorney to learn about the impact of the settlement or award on the eligibility of the injured person to receive government benefits. This will free up the personal injury attorney to better focus on proving the case, and to help comfort and support the injured person. The elder law attorneys at Hook Law Center are experienced in assisting personal injury attorneys and their clients with the coordination of the settlement or award with the client's eligibility for government benefit programs.

About This Document

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