

SPECIAL REPORT: Wrapping Up the Personal Injury Settlement

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Once a personal injury settlement has been achieved or a judgment obtained, the plaintiff begins a new life. There are many considerations that should be addressed prior to or at the time of settlement. These include the following:

Medical Insurance

Does the client have the best medical insurance available? The fact that a client receives Medicare, for example, does not mean that coverage is adequate. According to government studies, Medicare pays only about 50% of a Medicare beneficiary's actual medical bills. In cases involving a catastrophically injured plaintiff requiring considerable home health assistance, that percentage is sharply lower. Medicare Supplements, Medicare Advantage Programs, Medicaid, private insurance from high risk pools, COBRA coverage, Veterans Benefits and continuing Worker's Comp coverage should all be considered.

Medicaid Waiver Programs

Most medical insurance including Medicare and private insurance are designed to pay for acute care. They do not provide coverage for chronic care. There are many Medicaid Waiver Programs that are designed for chronic care including significant home and community-based services that may be required by personal injury victims.

Non-Medical Public Benefits

In many cases, injured plaintiffs are entitled to SSI, SSDI, Section 8 Housing, Group Homes, Veterans Benefits and other public benefits, but have not considered them or applied for them.

Estate Taxes

Where there is a significant recovery, federal and state estate and inheritance taxes should be considered. Currently the exemption from federal estate tax is \$10 million adjusted for inflation (\$11.4 million in 2019).

In many cases, even with severely injured persons, life insurance is available to pay all or part of the tax. The availability of this insurance should be explored and discussed with the client.

Estate Planning Documents

Many injured parties have no Will, Living Trust, Living Will, Power of Attorney or other estate planning documents. Some of those plaintiffs do have documents but are outdated, perhaps even because of the personal injury settlement. These documents should be reviewed and modified or replaced, if needed.

Estate Planning Documents - Parents

If the plaintiff is a minor child who is likely to be receiving public benefits, it is important that the parents' estate planning documents not leave any assets to the child with disabilities, but rather to a third party special needs trust.

Guardianship/Conservatorship

If the plaintiff is unable to properly manage his or her personal affairs, it is important to select the appointment of a guardian and conservator to provide litigation, and manage personal and financial affairs.

Structured Settlements

It is often advantageous to purchase a structured settlement for a portion of the settlement or award. A structured settlement offers a number of advantages to the injured party including creditor protection, tax benefits and often makes it more difficult for the injured party to squander the settlement.

There are also disadvantages to structured settlements. If a structured settlement is to be used, an analysis should be made as to how much should be structured and how much should be retained as a lump sum to pay for immediate cash needs, repayment of debt, emergency funds, and cash for investment in the appropriate equity portion of the injured party's portfolio. COLAs and commutation riders should be considered.

Investment Advice

The client should be introduced to an investment advisor to assist in investing the settlement proceeds. In some instances, the investment manager can be a professional trustee, if a trust is appropriate.

Special Needs Trust

An analysis should be made as to whether a special needs trust is required. The trust may be established by an individual with a disability, if competent to do so, or a parent, grandparent, legal guardian, or court. The trust may be a stand-alone trust or a pooled trust. The long-term success of a special needs trust often depends on the skill and experience of the trustee. Care should be taken in the selection of an appropriate trustee.

Support or Settlement Preservation Trust

Is a support or settlement preservation trust appropriate for a minor or incapacitated beneficiary? The support trust usually results in better money management of the settlement. In the case of a minor, the support trust can be designed to retain the award past age 18. Absent a support trust, a minor can usually access the settlement funds at age 18 when most individuals do not have sufficient maturity to handle significant financial assets.

Medicare Set-Aside Arrangement

An analysis should be made as to whether or not a Medicare Set-Aside Arrangement (MSA) is required. If an MSA is required, a further analysis needs to be made as to whether the MSA can be self-administered, a custodial arrangement, a special needs trust or a pooled trust. Arrangements must be made for an MSA calculation and submission of the calculation to CMS for approval.

Mediation

An elder and disability lawyer is often useful as a participant in mediation. The lawyer is familiar with public benefits, which often are useful in bridging the gap between the plaintiff's demand and the defendant's offer.

Qualified Settlement Fund

In many cases, a Qualified Settlement Fund (QSF) is useful. The defendant can "pay and go." The plaintiff has time to sort out issues such as allocation between the parties, resolution of Medicare, Medicaid, ERISA and other liens, purchase of structured settlements, and other issues that may take time. The defendant gets an immediate tax deduction upon funding the QSF.

Lien Reduction

An elder and disability lawyer can be of assistance in reducing Medicaid and Medicare liens.

ABOUT THIS HANDOUT

This guide is provided as a courtesy to help you recognize potential estate planning issues. It is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent elder law attorney. While every precaution has been taken to make this explanation accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this explanation.

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Hook Law Center focuses its practice on estate and tax planning, planning for long-term care and aging, retirement and investment advice, trust and estate administration and probate, guardianships for those unable to make sound decisions, and the unique situations associated with special needs.

Learn more about the Hook Law Center at www.HookLawCenter.com.

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