

Trusts in Litigation: Special Needs Trusts and §468B Trusts

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I. EXECUTIVE SUMMARY

A. WHEN TO CONSIDER A LITIGATION SNT

1. Client is receiving SSI, ALTCS or other needs-based benefits
2. Client is disabled
3. Existing benefits more valuable, or even necessary to make settlement work
4. Client is under age 65

B. WHEN LITIGATION SNT NOT NECESSARY/APPROPRIATE

1. No means test for SSD (SSDI) or Medicare, AHCCCS based only on earned income
2. Cost of SNT (both set-up and continuing administration) may make it unattractive for smaller net recoveries
3. Payback requirement onerous in some instances
4. Limitations on ALTCS-qualified SNT may make it difficult to meet family expectations

C. HOW TO DO IT

1. Requires Court action (except in rare circumstances of competent adult plaintiff with living and cooperative parent or grandparent)
2. Usually will require continuing Court supervision (e.g.–accountings, bond, etc.)

3. Often (not always) will require professional trustee
4. Home purchase, automobile and some personal effects should be taken care of before establishment of SNT
5. SNT, unlike structured settlement, need not be arranged before receipt of proceeds
6. Important: coordinate with any structured settlement
7. Cost: Expect \$2,000 to \$5,000 in addition to the cost of conservatorship approval

D. ALTERNATIVES

1. Rapid spend down (house, car, old debts, therapy)
2. Pooled trusts
3. Structures (for minors)
4. Court-controlled accounts (for minors)

E. WHY CONSIDER 468B TRUST?

1. To get the defendants out of the structure design process
2. To earn interest on settlement proceeds while resolving questions of structure of settlement and apportionment among plaintiffs
3. To allow time for resolution of AHCCCS, Medicare and other provider liens, while avoiding constructive receipt

II. **SPECIAL NEEDS TRUSTS**

A. ALPHABET SOUP

Before establishing or administering a Special Needs Trust one should have at least a basic understanding of the public benefits programs available to provide assistance to disabled beneficiaries. There are two income programs of importance for most individuals with disabilities, both operated by the Social Security Administration (SSA): Social Security Disability (SSD) and Supplemental Security Income (SSI). SSD is an insurance program based on the recipient's disability coupled with sufficient participation in the program (that is, enough "Quarters of Coverage"—QC—to qualify for the insurance benefit). SSD is not needs-based, so that an SSD recipient can have vast personal wealth and not lose his or her benefits under the program.

SSI, on the other hand, is a welfare program, based on the beneficiary being both disabled and poor. "Poor" by federal standards means (vastly oversimplified here) that the beneficiary must not have more than \$2,000 in "available"

resources (excluding, in most cases, the beneficiary's home, automobile, household goods and a small amount of additional property). The beneficiary must also not have income more than the maximum Federal Benefit Rate (FBR) plus applicable state supplements. Not every state adds supplements to the SSI benefit, but California and a handful of other states do. The FBR for 2007, for example, is \$623 per month (or \$934 for a married couple when both are disabled). Arizona, like a number of other states, provides its own (very modest) supplement program administered separately from SSI.

SSI's treatment of resources and income is important not only for purposes of understanding the program, but also because those eligibility rules are applied, in most cases unaltered, in determining eligibility for Medicaid, to be discussed later. It is also important to understand SSI's rules governing "In-kind Support and Maintenance" (ISM), which is treated as income the recipient even though he or she did not actually receive the income in question. Any payment directly to or for the benefit of an SSI recipient is ISM and treated as available for purposes of calculating eligibility IF the payment is either for necessities (food and shelter) or convertible into food shelter by the recipient. In other words, payments of cash to the SSI beneficiary will usually result in ineligibility because the beneficiary could utilize the cash to provide himself or herself food or shelter—even if the distribution is not in fact used for that purpose.

There are also two medical benefits programs of importance to most disabled individuals (discounting, for the moment, the importance of Veteran's benefits to some recipients). Medicare, an entirely federal program, provides medical benefits to the elderly (those over 65), patients in end-stage renal disease, and the disabled (narrowly defined to include only SSD recipients who have been receiving benefits for 24 months). Like the Social Security eligibility on which it depends, Medicare coverage is not means-tested—even wealthy disabled individuals can qualify for Medicare. Medicare, though its benefits are generous and the quality of care generally excellent, does not provide prescription drug coverage (although that may be changing somewhat with the 2003 adoption of new federal legislation) or long-term nursing or institutional care.

Medicaid (in Arizona, AHCCCS or ALTCS, depending on context) is a federal-state partnership program, in which the federal government provides a majority of the money and regulations but which is actually administered by the states. Like SSI, Medicaid is a welfare program—in fact, eligibility for SSI carries with it automatic eligibility for Medicaid. It is possible to qualify for Medicaid without qualifying for SSI, but the eligibility process for non-SSI recipients can be daunting. As a consequence, continued eligibility for SSI (even though the actual benefits may be small) is often the most important eligibility issue, since a single

dollar of SSI coverage each month will result in full medical coverage as a consequence.

In addition to those centrally important programs there are a wealth of other programs which may provide housing, medical care or cash to the disabled or elderly. QMB, SLMB, Title XIX for the developmentally disabled, Section 8 housing benefits, and TANF (Temporary Assistance for Needy Families—the replacement for the politically assassinated AFDC program) all play an important part in providing care and benefits. Most of the eligibility concerns, however, center around the big two means-tested programs—SSI and Medicaid.

Familiarity with the following abbreviations and shorthand references will help navigate some of the Special Needs Trust confusion:

SNT:	Special needs trust or supplemental needs trust
OBRA 93:	OmniBus Reconciliation Act of 1993
SSI:	Supplemental Security Income
SSD:	Social Security Disability Insurance (sometimes also SSDI)
ISM:	In-kind support and maintenance
AHCCCS:	Arizona Health Care Cost Containment System (Arizona's Medicaid program)
ALTCS:	Arizona Long Term Care System (Arizona's long-term care component of Medicaid and an administrative subdivision of AHCCCS)
(d)(4)(A) trust:	Trust which conforms with 42 U.S.C. §1396p(d)(4)(A)—a self-settled SNT
HCFA:	Health Care Financing Administration (now CMS)
CMS:	Centers for Medicare and Medicaid Services (formerly HCFA), which for some reason drops the duplicate "M" from its acronym
Special Treatment Trust:	Arizona's term for (d)(4)(A) and related trusts

B. FAMILY MEMBER WITH A DISABILITY

When an individual or couple has a disabled child, he/she/they may be faced with a difficult estate planning choice. Should the disabled child be disinherited, since most of his or her needs may be taken care of by the public benefits system? Or should the disabled child receive a disproportionate share of the client's estate, since that child will presumably need more assistance than his or her siblings? Most parents opt for parity (if not exactly equality), and choose to leave a

roughly equal share of their estate to each child, regardless of disability. How then to maximize the benefit to the disabled child, rather than to have any inheritance merely pay for what the government would otherwise provide while producing a negligible, or no, improvement in the child's quality of life? The same calculation, of course, applies to disabled spouses, nieces or nephews, grandchildren or any possible beneficiary of the client's estate.

Sometimes the disabled person acquires wealth of his or her own. This might be by outright inheritance (that is, a gift or bequest not in trust), but is more commonly by settlement of a personal injury action—often for the very injury which caused the disability. In such a case, might it be possible to prevent the loss of public benefits, so that the disabled individual's assets and income can be used to greater benefit for a longer period of time?

C. CIRCUMSTANCES APPROPRIATE FOR SPECIAL NEEDS TRUSTS

“Special Needs Trust” (SNT) is a term commonly used to describe trust funds created to supplement benefits for disabled individuals not provided through government entitlement. Similarly, “supplemental needs,” “supplemental care” or “supplemental benefits” trusts are terms often used to describe trusts created for disabled and elderly persons which are intended to supplement but not replace any public benefits the trust beneficiary receives. Although some commentators attempt to distinguish between “special” and “supplemental” needs or benefits, the differential use is neither widespread nor consistent, and will not be used here.

Ordinarily the lawyer will seek to draft a SNT that will not subject the government benefits recipient to any period of ineligibility nor reduce the benefits that the programs provide. In some circumstances the trust beneficiary's level of government benefits can reasonably be reduced, so long as essential elements of those benefits are not eliminated—as, for instance, when a Supplemental Security Income (SSI) recipient suffers reduced monthly SSI benefits but retains full Medicaid coverage for medical needs. The SNT must conform with appropriate statutory and regulatory requirements to assure the ongoing SSI/Medicaid eligibility of a disabled individual.

These trust funds may be either *inter-vivos* or testamentary trust funds, and may be either self-settled or created by a third party. The type of trust depends upon whose money will fund the trust and the age and circumstances of the disabled individual.

D. THREE TYPES OF SNTs

1. Third Party Created Trust for a Public Benefits Recipient

Although these trusts are probably never useful for personal injury settlement, it is important to realize that there are “Special Needs Trusts” with very different rules and administration. A SNT may be created by a donor who would like to set aside or bequeath assets to another individual without jeopardizing the individual's eligibility for public benefits. The donor's goal is not necessarily to establish public benefits eligibility for the donor, though in some narrow circumstances this may also be one purpose behind establishment of the SNT. Third party SNTs are established most frequently when a parent would like to provide benefits for a disabled child. This may also arise when the spouse of a Medicaid recipient, or potential Medicaid recipient, wishes to leave some or all of their estate in trust for the benefit of the recipient spouse.

2. Self -Settled Trust for Public Benefits Recipient

A SNT may also be established for a disabled individual who seeks to set aside their own funds for their own benefit in a self-settled trust. This occurs most frequently when there is a lawsuit recovery or settlement. Creating and administering this type of trust is extremely challenging due to the heavy correlation between trust requirements and the often inconsistent and unclear rules of the public benefits programs with regard to such trusts. It is only by scrutinizing the rules of each program for which a client may wish to qualify that it is possible to draft a trust that will not jeopardize the public benefits eligibility of the beneficiary.

When creating a SNT the client and the attorney must consider the tax ramifications of the SNT on the beneficiary while alive and upon death (e.g.–estate taxes); gift taxes on transfers to third parties upon the creation of a trust or from the funding of personal injury settlements into a special needs and income taxation; the trusts impact on government benefits; and the impact on existing liens from either public benefits or private insurance. A trustee of a trust of which an SSI recipient is a beneficiary must understand these rules in order to administer the trust most effectively for the SSI recipient beneficiary.

3. “Sole Benefit” Trust

Occasionally an individual will want to make a transfer to a disabled or minor child in order to help the transferor to become eligible for benefits like long-term care through ALTCS. While transfers to a disabled or minor child are permitted without penalty, transfers into a trust for that same child may result in a disqualification period unless the trust is for the “sole benefit” of the child. ALTCS interprets the “sole benefit” requirement to effectively require annuitization of the trust corpus.

E. MORE ON SELF-SETTLED SNTs

1. General Requirements:

42 U.S.C. §1396p(d)(4)(A) excepts from the attribution rule a SNT containing assets of a disabled beneficiary provided that:

a. The beneficiary is under age 65 and disabled when the SNT is funded. **“Disabled” is defined in section 1614(a)(3) of the Social Security Act, 42 U.S.C. Section 1382c(a)(3).** If the individual is already receiving SSI or Medicaid based upon disability, the “disability” determination has already been made and the Department will accept the disability determination made for those programs. Otherwise, there will have to be an independent determination of disability.

b. The SNT is established by the disabled person's parent, grandparent, or legal guardian or a court; thus, the disabled beneficiary may not establish the SNT. The Social Security Administration has taken the position that the individual establishing the trust must have legal authority over the assets contributed to the trust. In other words, the parent of a competent disabled individual may not establish a trust to be funded with personal injury settlement proceeds, since the parent has no control over those assets. In such a case the trust may be established by a court, including the court approving any personal injury settlement or inheritance.

c. The trust instrument requires the SNT to repay Medicaid for the cost of services provided from principal and accumulated income remaining in trust at the disabled beneficiary's death. See HCFA Transmittal No.64 to the State Medicaid Manual issued in

November, 1994 by the Health Care Finance Administration (now CMMS) of the Federal Department of Human Services ("HCFA 64") for required language.

d. The trust must be funded with assets of the individual. "Assets of the individual" include structured settlement payments. Thus structured settlement payments made payable to the trustee of an (d)(4)(A) trust will qualify for the exemption in addition to any lump sum settlement placed in the trust.

2. Benefits of the d(4)(A) [Self-Settled] and d(4)(C) [Pooled] Trust. Although the trustee is required to reimburse the state for past benefits upon the disabled individual's death, the beneficiary's heirs are benefitted by the deferral during his/her lifetime for the following reasons:

a. Despite the fact that the beneficiary may retain other public benefits through the use of the trust, Medicaid for nursing home residents is the only program that requires reimbursement.

b. The states do not charge interest on the deferred payments; thus, the state is offering the equivalent of an interest free loan.

c. The state, as the administrator of the Medicaid program, will likely pay less for the services than the beneficiary would pay privately if forced out of the program.

d. Some Medicaid programs and services that are beneficial to the disabled beneficiary are unavailable to the individuals not receiving Medicaid benefits.

e. If there is nothing left in the trust, Medicaid receives no reimbursement.

f. These statutes eliminate any period of ineligibility for Medicaid caused by the creation of the trust, whether the individual is institutionalized or receiving community-based services. The corpus will not be deemed available to the beneficiary and the income need not be counted for Medicaid eligibility purposes.

g. These trusts enable the disabled individual to have his or her financial needs met during his/her lifetime. Both the principal and income can be used for the benefit of the disabled beneficiary so

long as the items and services provided do not impinge upon eligibility requirements for SSI and Medicaid. Upon the death of the beneficiary, the State now has a statutory right to be reimbursed from remaining trust assets for the lifetime of Medicaid benefits provided.

h. The establishment of a (d)(4)(A) Trust should not affect the beneficiary's SSDI benefits. Additionally, a SNT created under the statutory safe-harbor at §1396p(d)(4)(A) does not apply to persons on Medicare as they are generally 65 or older. Furthermore, a SNT should not have an effect on Veterans Administration benefits.

III. SNT TRUST ADMINISTRATION

For SSI and Medicaid purposes, the trustee should never make distributions of cash directly to the beneficiary. Distributions from the trust should always be paid directly to vendors and, in most circumstances, should be for the purchase of services or the purchase of things other than food, clothing, or shelter.

ALTCS imposes additional limitations on trust distributions, though Arizona's legal authority to do so is subject to challenge. Arizona Revised Statutes §36-2934.01(B) restricts (d)(4) trusts to a specified list of payments¹. If the beneficiary is on ALTCS, the Arizona statute should be reviewed carefully, and the rest of the advice about distributions described here may have to be modified.

A common disbursement request to a trustee of a SNT is for the purchase of a new home and car, particularly after a settlement for a disabled plaintiff. A purchase can only benefit that individual.

A. Under the appropriate circumstances the trustee should have the power to purchase a house to be held as an asset of the trust. The trustee may consider collecting rent from the family. The problem with the house remaining in trust is that it will be subject to the state's Medicaid reimbursement claim—the “payback” provision of the trust—at the beneficiary's death.

B. As an alternative to the trustee's purchase of a new home, the trustee might fund modifications or other improvements to an existing home for the disabled beneficiary's benefit or loan money to other family members to purchase a home.

C. The Trustee may also purchase an automobile to transport the disabled individual to school, doctors' appointments, therapy, etc. Generally, the automobile should not be titled in the name of the trust because of the potential liability issues.

D. Property belonging to the trust can be loaned to the beneficiary and the beneficiary may be able to borrow from the trust.

E. Like guardianship funds, the value of the funds in a (d)(4)(A) SNT at death will be fully included in the deceased beneficiary's estate for estate tax purposes. Other "self-settled" trusts (funded with the beneficiary's own assets by a representative on the beneficiary's behalf) will also be included in the beneficiary's estate. If most of the settlement was structured with guaranteed payments, or as a payment stream over a number of years to family members, there may be insufficient liquidity in the estate to pay death taxes. Death taxes are due within 9 months of the decedent's death and the outstanding tax will begin to accrue interest and penalties thereafter.

F. **PLR 9437034** - Estate Tax Inclusion.

The decedent, a United States citizen, died testate in October 1993. Several months prior to his death, litigation was instituted by the decedent as plaintiff, emanating from an automobile accident in which he had been seriously injured. The case settled and the proceeds compensated the decedent for his personal injuries. The defendants agreed to pay a lump sum amount and a specified amount monthly for the longer of the decedent's life or 10 years. These funds were to be paid to an irrevocable trust established for the support of the decedent.

A special needs trust (the "trust") was created to receive these funds. The decedent's mother was designated as "trustor" and a bank was named as trustee. The trust was to terminate on the death of the decedent at which time the corpus was to be distributed pursuant to the exercise of a testamentary special power of appointment held by the decedent. The decedent could appoint the corpus to any person or persons, other than his estate, his creditors, or the creditors of his estate. Under the terms of a will executed in August 1993, the decedent exercised the special power of appointment by appointing the trust corpus to designated individuals.

Under the aforementioned circumstances, the proceeds from the settlement of the lawsuit were the decedent's property, and, thus, the

decedent was the transferor with respect to the funds placed in the trust, notwithstanding the designation of the decedent's mother as "trustor." Under the terms of the trust, the decedent retained the right to alter the disposition of the trust corpus at his death through exercise of the special testamentary power of appointment. In view of this retained power, the initial transfer of the funds to the trust constituted an incomplete gift under section 25.2511-2(b), and the trust corpus was includible in the decedent's gross estate under section 2038. *Estate of Robinson*, 675, F.2d 774 (5th Cir. 1982), See also, section 2036(a). Accordingly, the corpus of the trust was includible in the decedent's gross estate for federal estate tax purposes under section 2038.

IV. IRC §468B TRUSTS

A. THE PROBLEM

When multiple plaintiffs sue the same defendant or multiple defendants, a constellation of problems face both sides of the litigation when settlement is near or reached. In addition to the difficulty of apportioning the damages among plaintiffs, there are often difficulties determining whether to structure some plaintiffs' or all plaintiffs' settlements. One or more of the plaintiffs may be a minor, or incapacitated. Liens from medical providers, including Medicaid (AHCCCS) and Medicare, may be involved. If one or more plaintiffs are public benefits recipients, one or more Special Needs Trusts may be necessary. There may be delays for some plaintiffs waiting for approval of steps not involving them but critical for other plaintiffs.

B. DSFs AND QSFs

Internal Revenue Code §468B provides an opportunity for quicker resolution of complex litigation settlements and earlier disengagement by the defendant(s). The general rule with tort liability is that economic performance occurs when the tortfeasor (insurance carrier) makes payment to the person having a claim against the tortfeasor, which created the liability. This is the economic performance test. Under the Internal Revenue Code, the taxpayer or insurance carrier cannot deduct the claim until payment is made to the claimant. Payments to a "Designated Settlement Fund" (DSF) or "Qualified Settlement Fund" (QSF) satisfy the economic performance test even if the funds are not paid out for years.

Until the mid-1980s, insurance companies and self-insured defendants were reluctant to participate in settlement trusts. Payments to such trusts would not be

tax deductible like direct lump-sum payments. A payment into such a trust was not deductible until the year in which the trustee decided to distribute payment to the beneficiary. Congress enacted §468B in 1986, which created designated settlement funds (DSFs) in order to address the plaintiffs' and defendants' concerns.

The Treasury Department expanded DSFs via a 1994 regulatory ruling to include Qualified Settlement Funds (QSFs). QSFs expanded the range of claims that could be considered, such as tort, environmental, breach-of-contract, violation-of-law and other claims as designated by the IRS. The court or government entity that creates a QSF must continue oversight of the fund. There is no such requirement for a DSF.

Many master trust agreements for recent high-profile class action lawsuits include QSFs. Such lawsuits include: Exxon Valdez, People v. Philip Morris, Inc., the NASDAQ Market-Makers antitrust case, and the Austrian and German Bank Holocaust litigation.

The §468B trusts are not just for mass tort actions. They can be used to settle cases involving the personal injury victim with a derivatively injured spouse, child or parent. The DSF is restricted to tort claims. The QSF applies to contract claims, violations of law and torts.

C. IRC §468B(d)(2) REQUIREMENTS FOR A DSF:

1. Any fund established pursuant to a Court order and completely extinguishes the tortfeasor's tort liability;
2. No amounts may be transferred other than in the form of qualified payments;
3. The majority of the administrators of the fund are independent of the tortfeasor;
4. The fund is established to satisfy present or future claims against the tortfeasor;
5. The tortfeasor and related parties may not hold any beneficial interest in the income or corpus of the fund.

D. TREASURY REGS. §1.468B-1(C) REQUIREMENTS FOR A QSF:

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 a violation of law;
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.
4. A Qualified Settlement Fund cannot be created for liabilities under a workers compensation act or self-insured health plan. A fund is not considered a Qualified Settlement Fund until the court has approved the trust fund and the assets have been put into it by the tortfeasor (the "Transferor"). This meets the economic performance test.

The first requirement indicates that the fund must be approved by a governmental agency. This occurs when the governmental authority issues its preliminary order to establish the fund even if the order is subject to review or revision. An arbitration award granted by an arbitration panel will suffice as long as the award is judicially enforceable, the award is issued pursuant to a bona fide arbitration proceeding and the fund is subject to the arbitration panel's continuing jurisdiction.

The second requirement of the trust being established to satisfy a claim has been strictly interpreted by a district court. The court in *United States v. Brown* held that funds used to reimburse victims of a stock fraud were not held in a QSF because the fund was created to provide restitution, not to resolve or satisfy a requisite claim. *United States v. Brown*, No. 2:95-CR; 245 B (D. Utah May 23, 2001).

An interesting and potentially valuable option available to the parties is the "relation-back rule." If the fund meets all the statutory requirements with the exception of obtaining governmental approval, then the transferor and fund administrator may treat the fund as being created either when the last two (of the three) statutory requirements are met, or January 1st of the year in which all three statutory requirements are met, whichever occurs later. If a relation-back election is made, the funds are treated as being transferred to the fund on this date. Procedurally, the relation-back election is made by attaching a copy of an

“election statement,” signed by the transferor and the fund administrator, to the income tax return. The requirements of a properly prepared election statement are contained in the statute.

E. TAXATION

In general, both DSFs and QSFs are treated as corporations and liable for taxes on their modified adjusted gross income. Earnings (dividends, interest, capital gains and losses, carryovers, etc.) are subject to being taxed in a manner similar to corporate earnings. A QSF is taxed as a separate entity at the maximum trust tax rate in IRC §1(e). The QSF must apply for an EIN and is subject to the estimated tax provisions for corporations. Treasury Regulations 1.468B-2(k)(4) & (5). DSFs and QSFs are also allowed deductions for administration costs and related expenses, losses sustained in connection with the sale, exchange, or worthlessness of property and net operating losses. Distributions to either the plaintiff or defendant are not deductible and liability cannot be reduced with tax credits. Qualified payments to DSFs and QSFs are not included in the gross income of the funds.

The taxable year for DSFs and QSFs is the calendar year, and the fund must use an accrual method of accounting. Since these funds are treated like corporations for tax reporting purposes, payments and distributions are subject to the Internal Revenue Code’s corporate reporting requirements. The fund administrator is responsible for obtaining an employer identification number from the IRS.

For tax purposes, the fund begins on the date that it becomes treated as a DSF or QSF and ends when it no longer holds assets or no longer meets the statutory requirements under §468B, whichever occurs first.

F. ADVANTAGES OF THE §468B SETTLEMENT FUNDS

Now that we know about this obscure provision in the Internal Revenue Code, what are the advantages to the §468B settlement funds?

First, the §468B funds release the Defendant and counsel from the litigation. Once a petition is filed by either party in a court and the fund administrator is appointed, the settlement can be paid to satisfy the economic performance test. The defendant is out of the picture. Many defense structure settlement annuity brokers dislike the §468B for this very reason—it removes the defendant’s insurance carrier and the defendant’s broker from the opportunity to sell the structured settlement annuity. The plaintiff can use their own structured settlement annuity broker if they wish to implement the strategy of a structured

settlement annuity. The §468B Fund removes the defendant from the allocation of the settlement amounts between the various plaintiffs. Defense counsel need not get involved in the sometimes messy and complicated process of allocating damages and securing appropriate court approvals for some or all plaintiffs.

A second advantage is that the plaintiffs receive the income from the settlement inside the §468B fund. The plaintiffs can take their time selecting among the options of a lump sum payment to the plaintiffs, a structure settlement annuity and the special needs trust pursuant to 42 USC §1396p(d)(4)(a).

Third, the plaintiffs can obtain the settlement while waiting for final figures on Medicare, Medicaid and provider liens. The case has settled and the defendant has made the payment into the §468B fund so that snap decisions do not have to be made. While plaintiffs (or some plaintiffs) wait for the lien amounts and consider allocations between plaintiffs and the method of payout to an annuity or trust, the pressure is off.

In some cases establishment of the QSF or DSF also removes the plaintiffs' attorney from the calculation, at least to a considerable extent. Attorney's fees and costs can be paid immediately while the plaintiffs themselves (sometimes represented by separate counsel or court-appointed counsel) work out the mechanics of allocation, structured settlements and lien payoffs.

The lawyers in a personal injury settlement are anxious to finalize the case and move on. Quick decisions when special needs are involved can let good planning opportunities slip away. §468B trusts can provide additional options to the plaintiffs, defendants and counsel.

1. 36-2934.01. Creation of trusts; eligibility for the system; share of cost

A. The administration has sole authority to qualify any trusts that are created pursuant to section 1917(d)(4)(A), (B) and (C) of the social security act and shall require that the trustee provide the following information and assurances when the trustee submits trust documents to the administration for approval:

1. Specific language that protects the state's beneficiary interest in the trust and that names the administration or the state medicaid agency as the primary beneficiary of the trust if the trust is terminated before or on the death of the member. The trust document shall state that the trustee shall pay on a monthly basis the share of cost amount established by the posteligibility treatment of income determination pursuant to subsection D of this section.

2. A provision that requires the direct deposit of all income assigned to the trust by the grantor, when legally permissible, into an account titled to the trust.

3. A detailed description of how the trust funds will be administered and disbursed. The trustee shall submit the description at the same time that the trustee submits the trust document to the administration for review. The administration shall review the planned disbursements or plan approved by the probate court and render a decision on the appropriateness of the disbursements or plan within the time frames established by federal law for processing applications for medical assistance. The administration may extend this limit to enable a trustee to amend a trust or to provide additional information requested by the administration. The trustee shall report to the administration any new trust funding or modifications to the planned disbursements from the trust no less than forty-five days before the intended action or change by the trustee. Under extenuating circumstances, the trustee may forgo the forty-five day reporting requirement and provide notice to the administration within thirty days from the date of disbursement. If the administration determines that the disbursement was not appropriate, or that any other provisions of the trust or this section have been violated, the administration shall consider the trust in accordance with subsection F of this section. The trustee may appeal this decision, but the provisions described in subsections I and J of this section shall be applied if the administration's action is affirmed. On request of the administration, the trustee shall provide verification of how the funds were administered.

4. A statement signed by the trustee acknowledging that an adverse action may be taken against the member's eligibility for the system if the trustee improperly violates the terms of the trust or the requirements of this section or if the trustee takes any action that limits the administration's beneficiary interest in the trust.

5. Specific language that protects the trust for the benefit of the trust beneficiary. The trust document shall state that disbursements shall not be made for other than those purposes allowed pursuant to this section.

B. For a trust that qualifies pursuant to subsection A of this section, the trustee shall not make any disbursements from the trust other than for the following:

1. Reasonable legal and professional expenses related to the trust including:

(a) Trust taxes.

(b) Trust investment fees.

(c) Reasonable professional expenses, including trustee, accounting and attorney fees related to the administration of the trust.

2. The posteligibility share of cost as computed pursuant to section 36-2932.

3. For trusts created pursuant to section 1917(d)(4)(B) of the social security act, a disbursement to the beneficiary equal to the personal needs allowance as computed pursuant to section 36-2932.

4. Health insurance premiums, medically necessary medical expenses and special medical needs of the beneficiary including:

(a) Expenses required to make the home accessible to the person.

(b) The purchase and maintenance of a specially equipped vehicle titled to the trust or to the beneficiary with a lien against the vehicle held by the trust in an amount equal to the current market value of the vehicle.

(c) Durable medical equipment.

(d) Over-the-counter supplies and medications, including diapers, lotions and cleansing wipes.

(e) Personal care services that are determined to be medically necessary by the program contractor and that are provided by a person who is registered by the administration to provide the services and who is not a financially responsible relative of the beneficiary. For the purposes of this subdivision, "financially responsible relative" means the spouse of the beneficiary or, if the beneficiary is a child under eighteen years of age, the parent of the beneficiary.

5. Maintenance payments for the spouse or family in accordance with 42 United States Code section 1396r-5(d)(1) and (2) and section 36-2932, subsection L.

6. Guardianship and conservatorship fees for the trust beneficiary based on the fair market value of the services provided.

7. The following expenses for the benefit of the beneficiary, excluding gifts to, payments for or loans to other persons, whether these are in cash or in kind:

(a) Entertainment, educational or vocational needs or items that are consistent with the person's ability to use these items.

(b) Other expenses that are individually approved by the director.

(c) Living expenses for food, clothing and shelter. If home property or other real property is purchased by the trust it must be titled to the trust.

(d) Income taxes owed on income from trust investments or on income of the beneficiary that is assigned to the trust when an actual tax liability is established.

(e) Provision for burial expenses that is limited to one of the following methods:

(i) Purchase of a prepaid burial plan funded by an irrevocable life insurance policy, irrevocable burial account, irrevocable trust account or irrevocable escrow account.

(ii) Purchase of life insurance to fund a burial plan for the beneficiary with a face value that does not exceed one thousand five hundred dollars after allowing deductions for burial plot items as defined by the administration.

(iii) Funding a burial fund account in an amount not to exceed one thousand five hundred dollars.

(f) Travel expenses for a companion, other than a beneficiary's financially responsible relative, when a companion is required to enable the beneficiary to travel for nonmedical reasons.

C. For trusts that qualify pursuant to subsection A of this section, the administration shall consider only the person's proportionate share of expenses as for the benefit of the trust beneficiary if these expenses also benefit others.

D. For trusts that are created pursuant to section 1917(d)(4)(A), (B) and (C) of the social security act, the administration shall require that the posteligibility treatment of income that is determined pursuant to section 36-2932 shall include the income assigned to the trust and any other countable income received by the member, excluding interest and dividends earned by the trust corpus and added to the principal. Each month the administration shall count for income eligibility purposes any disbursements made to the beneficiary and any payments made on behalf of the beneficiary for food or shelter. The administration shall count disbursements issued for the personal needs allowance

pursuant to subsection B, paragraph 3 of this section as disbursements for food or shelter.

E. In order for a trust that is created pursuant to section 1917(d)(4)(B) of the social security act to be considered under this section, the sum of the individual's countable nontrust income and the income assigned to the trust, excluding interest and dividends earned by the trust corpus and added to the principal shall be equal to or less than the private pay rate established in the state plan.

F. For revocable or irrevocable trusts that are created pursuant to section 1917(d)(3)(A) or (B) of the social security act, the administration shall include the income that is received by the trust, excluding interest and dividends earned by the trust corpus and added to the principal or that is disbursed from the trust, whichever is greater, for both income eligibility calculations under section 36-2934 and posteligibility of income under section 36-2932. In determining eligibility for the system, the administration shall consider payments from the trust regardless of the purpose for which the payment is made.

G. Notwithstanding this section, a trust that is established before August 11, 1993 shall be evaluated in accordance with the provisions contained in the state plan.

H. If the administration determines that the trustee did not report changes in the amount of trust income or disbursements from the trust to the administration in the time frame and manner specified in subsection A of this section, the administration shall notify the member of the noncompliance and shall prospectively apply the adverse action that would have resulted if the change had been reported in a timely manner. If benefits for the system are continued by the administration pending a decision by the director after a hearing on a proposed adverse action that results from trust income or disbursements and the director upholds the administration, the administration shall apply the adverse action on a prospective basis.

I. The administration shall consider trust disbursements issued in violation of this section as a transfer without fair consideration.

J. If the administration determines that the trustee is in violation of this section or the terms of a new or existing trust, the administration shall consider all trust assets held in the trust and income held in or produced by the trust, available to the beneficiary under 42 United States Code section 1396p(d)(3) until the trustee corrects the violation.

Fleming & Curti, P.L.C.

ROBERT B. FLEMING

THOMAS A. CURTI

LEIGH H. BERNSTEIN

VICTORIA E. BLAIR

Re: Settlement approval

Dear Personal Injury Attorney:

I understand you have reached a settlement in your pending personal injury matter, and that approval of the settlement through the probate court will be required. We appreciate your assistance in familiarizing us with the underlying action by filling out the questionnaire contained in this letter. Most of this information will be required by the court.

Typically, the probate court looks to the personal injury firm to absorb the cost of the settlement approval and not to pass this cost on to the injured party's estate. Unless you instruct us otherwise, we will inform the court that you will be responsible for our fee and costs. We anticipate that our fee will be a flat \$_____ (plus costs) in this case; once we have reviewed the information you provide us more closely, we will set a final fee. We would, of course, be happy to discuss the fee arrangement further.

Please provide us the following information:

All Plaintiffs' names and dates of birth _____ (),
_____ (), _____ (),
_____ (). Do you represent each plaintiff? Y/N (If
the answer is no, what other attorneys are involved?)

If there are multiple plaintiffs, has the issue of allocation of settlement proceeds been addressed? Y/N If yes, how?

Briefly describe each plaintiff's injury.

Have you engaged a life-care planner? Y/N If yes, who? _____
(phone number) _____.

What public benefits are received by which plaintiffs?

_____ (benefit) _____ (plaintiff)

_____ (benefit) _____ (plaintiff)

_____ (benefit) _____ (plaintiff)

Does any plaintiff now have a court-appointed guardian or conservator? If so, please specify: _____

Whom do you anticipate will be nominated as the conservator:
_____, phone number _____

(NOTE: If the Conservator lacks sufficient assets and/or income she/he may not be able to qualify for a bond. In this case either the assets will have to be restricted so that no withdrawals may be made without court approval or another person will have to be appointed to act as Conservator who is able to qualify for a bond. If the Conservator intends to charge for their services they must be certified as a Private Fiduciary through the Arizona Supreme Court.)

All defendants participating in the settlement and their insurance companies:

_____, insured by _____;

_____, insured by _____.

Any Defendants not participating in this settlement: _____
insured by _____.

Gross amount of settlement: \$ _____.

Your fee: \$ _____; Your costs: \$ _____.

Please provide us with a copy of the contingency fee agreement as well as any agreements to split fees with any other counsel (including referral fee agreements). If you expect to reduce your fee, please give us some indication of your current thinking in that regard.

Date by which you will have an affidavit regarding your fees and costs (an hourly/itemized breakdown) ready: _____.

Liens against settlement: _____ (amt) _____ (lien-holder)
_____ (amt) _____ (lien-holder)

Last date on which anyone in your office did a lien check: _____.

How was the settlement reached? Mediation? Judicial settlement conference?
The mediator or settlement judge was: _____.

What are the settlement terms?

May we please have a copy of the settlement agreement?

Is a structured settlement part of the agreement or under consideration? Y/N

Do you anticipate any hold-up on the structure purchase coming from any defendant? Y/N

Did you speak with your client about structures vs. other investment possibilities? Y/N

Have you consulted a structure specialist or plaintiff's broker? Y/N If yes, who?
_____. (ph.) _____ - _____

Please fax us this form as soon as you can. We will send a different questionnaire to the proposed conservator and will be meeting presently with that person. We look forward to working with you on this matter.

Very truly yours,

Leigh H. Bernstein
Attorney