



PROPER PLANNING MAY CREATE PEACE OF MIND



November 2007 CONSTRUCTIVE RECEIPT OF SETTLEMENT PROCEEDS

Have you ever considered whether the argument could be made that the trial attorney's 'constructive receipt' of settlement proceeds on behalf of a plaintiff could jeopardize the plaintiff's government benefits?

'Constructive receipt' is the theory that an agent's acceptance of funds is deemed receipt by the principal under agency and partnership law. This theory turns on the 'availability' of the funds to the agent. If the funds are available to the agent they are available to the principal. Therefore, it may not be essential that the plaintiff take actual possession of proceeds to which s/he is entitled or, access the proceeds in order for a constructive receipt argument to apply.

Is the plaintiff deemed to be in actual receipt of the proceeds if defense counsel issues a check payable jointly to the plaintiff and the law firm, is it endorsed and deposited into the firm's trust account? In my experience, this argument has not yet been advanced by the Social Security Administration (SSA) or, the Department of Children & Families (DCAF). Is it possible that the agencies may raise this argument in the future? Certainly. Here are some suggestions to implement to by-

pass the constructive receipt argument:

- (a) Request the defense counsel issue a check payable to the firm representing the firm's legal fees and reimbursable expenses per the Closing Settlement Statement that has been approved by the client and/or the Court;
- (b) Request the defense counsel issue a separate check to satisfy any liens;
- (c) Request the defense counsel issue a separate check payable to the special needs trust or, pooled trust that has been established for the client in order to preserve entitlement to government benefits.

Some might say this only works in an "ideal world." That may be true.

However, if it is explained to the parties and their counsel that it is important to not jeopardize government benefits, it can be accomplished. Advance legal planning should go hand-in-hand with this request so that the plaintiff has sufficient time to explore their options to preserve government benefits which may include Medicaid, Food Stamps, SSI, and HUD housing.

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