

Confessions of a Trust Officer

By Dick Moore

Your case is nearing settlement. As you and your client work your way through the alternatives — whether to structure or take cash, and what to do with the cash if you do — you will probably consider the option of a trust administered by a corporate trustee.

And why not? The trust department of a bank, when staffed by caring, competent professionals, can provide extraordinarily valuable service to many clients, including tort victims. A bank-managed living trust, with its attributes of professional investment management, privacy, and financial guardianship, would seem to be the perfect vehicle to meet the needs of tort victims. And it can be, but only if the trust officers are fully familiar with the special circumstances, needs, and concerns of injured plaintiffs.

My 20 years experience as a trust officer have left me with tremendous respect for the professionalism of my colleagues. But those 20 years have also taught me this: the typical trust officer, like the typical financial planner or broker, is unlikely to be familiar with the world of the tort victim. Nor is that the only problem: trust officers are often controlled by institutional biases that can work against the interests of these most fragile of clients.

Unless a trust officer acquires an understanding of the tort victim's world and steps back from his traditional approach, he will have the same effect as a broker or financial planner: operating on a set of flawed assumptions based on the healthy, un-victimized investor, he may injure rather than help your client. This understanding is not something that can be mastered over night, for the differences are profound.

Rich Client, Poor Client

The typical trust client may not be rich, but most are at least comfortable, receiving enough income from investments, or having sufficient outside resources that they are unlikely to have to make sudden, significant demands on the principal of the trust. Frequently, the trust supplements still effective earning power, and the client can endure the ups and downs of a volatile market to achieve later growth in principal. Even an older beneficiary who may be more dependent on trust income has reached a point in life where expenses are relatively low and predictable. A bank's minimum account size requirements ensure that its typical trust clients do not dwell in the low end of the income spectrum.

There are no similarities between this client and the plaintiff in a personal injury law suit. The plaintiff's settlement isn't a supplement to anything. It represents all that a plaintiff has to compensate for a loss of earning power, to provide a source of funds to live, and to provide liquid assets for large future medical expenses. Its size is determined as much by a policy limit as it is by the needs of the plaintiff. If any of it is lost, there is no earning power to rebuild it. One only has to look at an analysis of a life planner in a tort case to see that even the largest settlements do not allow for much leeway or luxuries.

Once a Victim

While a large percentage of typical trust clients are relatively sophisticated about investments and understand the movements of the market, most tort victims are not. Any downward shift in the value of the portfolio causes these clients serious anxiety. They need and deserve constant reassurances that their funds are safe. An even greater threat to the funds are the demands of family members and "friends." The trustee must be prepared to help the victim-client guard their settlement funds against dissipation by generosity.

Maximize at All Costs

Trust officers are usually suspicious of structures. They do not understand them, nor do they understand the reasons a guaranteed stream of payments is valuable for a tort victim. They are likely to argue against them. More importantly, they do not realize that the step from a structure to a managed portfolio should only be a very small one, taken by the client not to gain an investment bonanza, but only to add a little flexibility to an otherwise rigid schedule of payments. If a plaintiff chooses a trust over a structure, he is motivated by concerns over the safety of annuities or by the desire to add flexibility when interest rates are low. It is a decision based on conservatism, not the desire to seek maximum return at a higher risk.

Trust officers associate large accounts with the opportunity to invest in stocks, foreign securities and the like. But for tort victims, the size of their account has nothing whatsoever to do with the ability to take risk. The size of the funds is the direct result of the extent and long term consequences of the injury they have suffered. The larger the funds, the less margin for error the victim-client is likely to have for investment purposes. What the trust officer must understand is that the tolerance for risk of a tort victim with a million dollars in assets is likely to be less than that of a typical customer with only a tenth of that amount.

The Future is Soon

Trust officers, both by preference and by the rules under which they work, favor investment in common stocks. The terms of many trusts go so far as to dictate that the trustee's primary responsibility is to make the trust grow for its inheritors, not to preserve principal and generate income for its current beneficiary. This philosophy dictates common stock investments. I know of one trust department that insisted that all trusts under its supervision have an equity position of at least 25%. This approach is antithetical to the interests of tort victims. The fund at hand is there to provide for the tort victim and his family in the present and immediate future. It is not a fund of money to be passed on to the next generation until the tort victim's needs are met.

Bears are not Allowed

Trust officers, brokers and financial planners stress the importance of having equities included in a portfolio, emphasizing that stocks are the best way to achieve growth in the face of inflation and citing the positive long term returns that equities historically have provided. The same message is trumpeted by the media almost daily as more and more money flows into equity mutual funds. A trust officer will point out to clients the fact that the stock market has averaged a 10.5% annual return since 1926, and can show a persuasive list of one, two, and five year periods in which equities have shown substantial gain. But key to equity investing for the tort victim isn't the long term positive gain that may be achieved. Far more important are these facts: stocks as an investment vehicle fell 48% from January of 1973 to October of 1974, and hidden in the 69-year positive history of the stock market is a 15-year period when stocks produced an average annual return of only 0.6%. This return included dividends earned, so the value of the dollar invested in the stock market actually fell during this period.

For the tort victim, a similar 15-year downturn or an 18-month free-fall can be disastrous. Steady, predictable, continuous growth is essential.

Fortunately, there are trust officers who have accumulated the requisite knowledge and understanding of injured victims (indeed, becoming one of them was how I came to know The Halpern Group). In the hands of such a trust officer, a bank-managed living trust can be a God-send, the perfect way to ensure flexibility, sufficient fund growth, and security. Obviously, The Halpern Group takes great pains to ensure that its trusts are managed only by those with the proper orientation and experience, with whom we consult on an ongoing basis.

But if you are choosing a trust department on your own, beware. Satisfy yourself that the department has officers with significant expertise in managing the assets of tort victims, meaning that they have managed more than just a dozen or so cases. Ask them to describe their investment strategies, and how

they differ from their approach to the assets of uninjured clients. If this question produces a shrug, a puzzled expression, or a response involving fixed asset allocation models, you will know why.

And you will know to go elsewhere to find a trustee.