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## A Primer on Public Benefits for the Personal Injury Lawyer

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As a personal injury lawyer, you have worked on a multitude of personal injury and medical malpractice claims concerning clients who are indigent and permanently injured. In such cases, the client and his family may be eligible for various public benefit programs that are potentially impacted by a settlement or judgment. What are the tell tale signs that alert you to the foregoing, and how do you go about identifying the various public benefit programs that may be at issue, as well as the options to preserve eligibility for such programs?

The first tell tale sign for the personal injury lawyer that public benefit programs may be at issue are the medical liens and claims in a case. If a potential Medicare claim exists for anyone under the age of 65 (pre-retirement), then the individual is likely disabled and receiving Social Security cash benefits known as Social Security Disability Insurance (SSDI). SSDI benefits are not based on financial need, but are based on the earnings record of the disabled individual, or a retired or deceased parent if the individual was disabled before age 22. Thus, such benefits would not be impacted by a personal injury settlement or judgment.

An individual who has been eligible for and receiving SSDI benefits for twenty-four (24) months is thereafter eligible for Medicare coverage. As is the case with respect to eligibility for SSDI benefits, Medicare eligibility is not based on financial need. Beware as your client may be eligible for and receiving SSDI benefits but

not yet eligible for Medicare. Although Medicare may not have a claim in such instance,<sup>1</sup> the fact that your client is disabled and receiving such cash assistance may indicate that he has medical and long term care needs that may be currently met by other public benefit programs for which eligibility is based on financial need and, thus, potentially impacted by a personal injury settlement or judgment.

If the Arizona Health Care Cost Containment System (AHCCCS) or one of its program contractors has a lien, then your client is eligible for such assistance either based on financial need alone, or both medical and financial need. AHCCCS administers multiple medical assistance programs. For those who are disabled, they may be eligible for AHCCCS medical benefits by virtue of their eligibility for Supplemental Security Income (SSI) cash benefits through the Social Security Administration, and/or they may be eligible for Arizona Long Term Care System (ALTCS) benefits, which provides custodial care for those who cannot independently perform their daily living activities.

A disabled individual who does not qualify for SSDI, or a benefit less than the maximum benefit rate of \$564.00 per month in 2004 (\$579.00 per month in 2005), may qualify for Supplemental Security Income (SSI). SSI is based on financial need and, thus, the individual is limited in what he can have in income and resources. In general, the individual may have no more than \$2,000 in countable resources. The follow-

ing resources are exempt or excluded for financial eligibility purposes: the primary residence, vehicle, household furnishings and personal effects, burial plan, burial plot, limited life insurance. As long as an individual is eligible for at least \$1 of SSI, he will be categorically or automatically eligible for Medicaid or AHCCCS benefits.

As mentioned above, individuals who receive less than \$564 (or \$579 in 2005) in SSDI may be eligible for SSI. In fact, they may be eligible for a combination benefit of SSDI and SSI. It is important to confirm the nature and amount of the Social Security benefit received so as to ensure that a settlement or judgment will not cause the individual to be disqualified for cash benefits and, as a result, Medicaid or AHCCCS benefits.

Individuals who require custodial care to assist with their daily living activities may be eligible for ALTCS benefits to provide for long term care assistance in their home, or, alternatively, in an out-of-home placement such as a skilled nursing facility. For those individuals who are residing in skilled nursing facility and otherwise "indigent," it is likely that they are eligible for ALTCS to provide for what would otherwise run about \$4,000 per month in cost of care.

To be eligible for ALTCS, an individual must meet medical and financial requirements. The financial requirements consist of both income and resource criteria. In general, an individual may have no more than \$1,692.00 per month (or \$1,737.00 in

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2005) in gross income.<sup>2</sup> The resource limit is different for a single and married individual. A single individual is limited to \$2,000 in countable resources just as is the case with respect to SSI financial eligibility. In the case of a married individual, the total countable resources of the couple are considered and the “community spouse” can retain one-half (1/2) of the total countable resources as of the month in which the applicant or recipient spouse was first institutionalized for 30 consecutive days or received care for 30 consecutive days that prevented his institutionalization. The one-half (1/2) or Community Spouse Resource Deduction (CSR) cannot exceed \$92,760 and the minimum CSR is \$18,552. The applicant or recipient spouse can retain an additional \$2,000. As is the case with SSI, a primary residence, vehicle, household goods and personal effects, burial plan, burial plot, and limited life insurance are exempt or excluded for ALTCS financial eligibility purposes.

If an individual is not disabled and an AHCCCS lien exists, then he is likely eligible for one of the medical assistance programs that is based on financial need only. For the most part, these programs consider the income of the individual and/or his household only, and not the resources.<sup>3</sup> In the end, all cash and medical assistance programs take into account income. Thus, the impact of a structured settlement annuity on public benefits eligibility of the individual and his household must be considered.

If an individual is receiving medical assistance through AHCCCS due to “indigence” alone, then it is likely that other members of the household are as well. It may also be the case that they are receiving cash assistance through the Arizona Department of Economic Security, such as Food Stamps or Temporary Assistance for Needy Families (TANF) (formerly Aid to Families with Dependent Children or “AFDC”). In such instances, the impact of a settlement and judgment on the public benefits eligibility of the household should be considered.

Not only should you identify the public benefit programs for which your client is currently eligible, but those public benefit programs for which he may be eligible in the future given the nature of his condition. The life care planner may be able to assist in this regard.<sup>4</sup> Liens will provide the personal injury lawyer with his first clue as to what may be at issue. However, it behooves the personal injury lawyer to conduct a preliminary investigation with his client as to

what public benefits he may be receiving. Do not rely on the word of your client because more often than not he only knows that he receives cash benefits and is covered by Medicare and/or AHCCCS. He will not necessarily know the nature of his cash benefits or for which medical assistance program of AHCCCS he is eligible. Thus, you will want to obtain from the client and his household copies of checks and notices from the relevant public benefit agencies, such as the Social Security Administration, AHCCCS, and the Arizona Department of Economic Security.

In the end, you will want to consult with an attorney who is familiar with the requirements of the various public benefit programs and can provide you and your client with options with respect to a settlement or judgment. If the client is indigent and not disabled, then a structured settlement annuity may be inadvisable as it may cause the client to be over the applicable income limit. If the client is disabled, then resources are at issue and, depending on the circumstances, the client will either need to immediately spend down the settlement or judgment so as to maintain his eligibility for needs-based public benefits, or establish a special treatment trust aka special needs trust.

In general, a settlement or judgment is considered income in the month it is first available, i.e., when the net amount payable to the client is known regardless of whether it remains on deposit in the personal injury lawyer’s trust account. Most public benefit programs require immediate disclosure<sup>5</sup> of the availability of a settlement or judgment. The settlement or judgment is treated as income in the month received and, if retained thereafter, a resource. Thus, the opportunity to spend down or establish a special treatment trust is limited and must be accomplished by the end of the month the settlement or judgment is first available to the individual.<sup>6</sup>

In general, an individual can spend down his settlement or judgment by paying off debts, mortgage balances, purchasing exempt or excluded resources, paying for non-covered medical services, purchasing special equipment, travel expenses, recreation, education, and prepaying services for up to one (1) year. In anticipation of a settlement or judgment, your client should develop a proposed spend down plan and “pre-shop” so as to obtain estimates on the items they wish to purchase and ensure that they will sufficiently spend down. Following receipt of the settlement or judgment, your client must immediately spend down, retain back up

documentation verifying the spend down by way of copies of checks and receipts and/or invoices, and provide such disclosure to the relevant public benefit programs.

For those clients who are disabled and cannot sufficiently spend down or a spend down is impractical, a special treatment trust should be considered. In general, a special treatment trust that is established in accordance with federal<sup>7</sup> and state<sup>8</sup> law will be exempt or excluded for SSI and AHCCCS financial eligibility purposes. The law requires that the trust be established for an individual who is under age 65 and disabled, by a parent, grandparent, guardian, conservator, or court of law, and contain a provision that requires reimbursement to AHCCCS the cost of medical services provided upon the trust’s termination. In many instances, establishment of such a trust will require prior probate court approval and ongoing monitoring by the probate court. Although the corpus of the trust is exempt or excluded for SSI and AHCCCS financial eligibility purposes, distributions from such a trust may impact the financial eligibility of the beneficiary. Thus, it is important for you and your clients to consult with a lawyer knowledgeable and experienced in special needs planning and trusts so as to ensure that such a trust allows for the beneficiary to benefit from a settlement or judgment as intended.

In the end, you, as the personal injury lawyer, are in a position to identify the public benefit programs for which your client is or may be eligible and should do so early on in the case. At that juncture, it behooves you and your client to consult with a lawyer knowledgeable and experienced in public benefits and special needs planning who can further assist in identifying public benefits that may be at risk, discuss the impact of a settlement or judgment on eligibility for such benefits, and explore the various options available in preserving such eligibility. Ideally, you and your client will contemplate these issues prior to the time settlement is reached or a judgment entered so as to ensure that your client’s eligibility for public benefits is not unknowingly or unnecessarily jeopardized.

1 Currently, the Center for Medicare and Medicaid Services (CMS) is taking the position that a set-aside arrangement for future medical expenses is required in some personal injury cases, particularly, mass tort cases. CMS guidelines provide the criteria for when third party payers must consider Medicare’s interest when settling a workers compensation case. This criteria presumably applies in those personal injury cases

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- es where CMS takes the position that it must approve an allocation for future medical expenses. An injured person who is not yet a Medicare beneficiary must consider Medicare's interest only if he has a "reasonable expectation" of Medicare enrollment within 30 months of the settlement date, and the anticipated total settlement for future medical expenses and lost wages is expected to be greater than \$250,000.
- 2 For those individuals who have income that exceeds \$1,692.00 (or \$1,737.00 in 2005) but is less than the average cost of care, which is \$4,188.72 in Maricopa County, an Income Only Trust may be established to receive the income that puts them over the limit, thereby qualifying the individual for ALTCS with respect to income.
  - 3 The exception to this general statement is the Medical Expense Deduction Program which considers not only income, but resources and for which the resource limit is \$100,000, which includes equity in the primary residence and of which no more than \$5,000 can be liquid.
  - 4 A word of caution in using the life care plan expert beyond the calculation of damages: the expert's opinion is discoverable and may serve to minimize damages or reduce the potential for a larger settlement.
  - 5 SSA and ALTCS require disclosure within ten (10) days.
  - 6 For those individuals who are under the age of majority or incapacitated and probate court approval of the settlement or disposition of the judgment is required, the settlement or judgment is not available until such time as an order is entered.
  - 7 42 U.S.C. Section 1396p(d)(4)(A) and (C).
  - 8 A.R.S. Section 36-2934.01.

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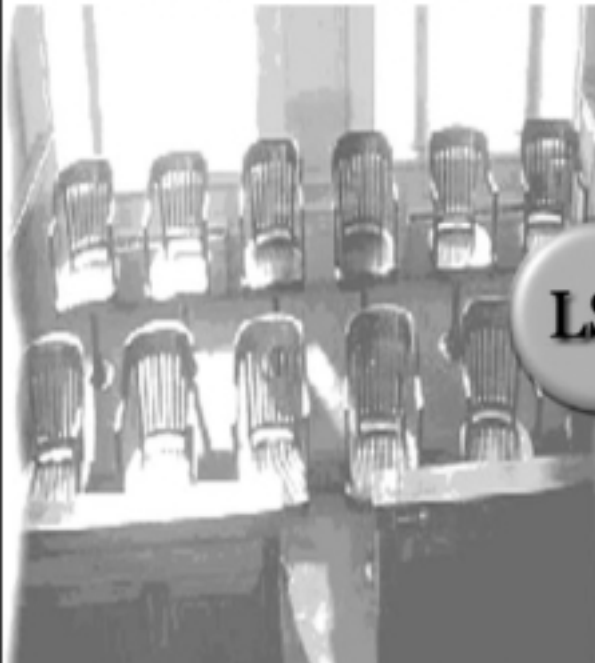
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