

# Public Benefits Planning: Timing is Everything!



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*Over the years, it has become apparent that a crossover between the personal injury practice of our members and the areas of probate and public benefits exists. Our very own Bridget O'Brien Swartz spearheads this column which highlights issues of relevance and importance in these areas to our members. If you have issues of particular interest you would like addressed, please notify Bridget at [boswartz@dbfazlaw.com](mailto:boswartz@dbfazlaw.com)*

Your client is indigent and/or disabled and has made you aware that he or she is eligible for governmental assistance. Now that you have settled your client's personal injury matter, the focus has turned to ensuring that your client continues to receive the needs-based public benefits for which he or she wishes to remain eligible. In more cases than not, the primary benefits of concern for individuals who are indigent and/or have a disability are Supplemental Security Income (SSI), Arizona Health Care Cost Containment System (AHCCCS) medical assistance, and Arizona Long Term Care System (ALTCS) benefits, all of which are based on financial need.

An oft-overlooked factor in preserving eligibility for governmental assistance is timing. When it comes to timing in relation to a personal injury recovery and how it may impact eligibility for public benefits, the threshold question is when the client must report the "change" in financial circumstances. In many public benefit programs, the "change" must be reported within a certain number of days of the change occurring. For instance, the Supplemental Security Income program requires that the "change" must be reported within ten (10) days of the date it occurs.<sup>1</sup> However, in the case of AHCCCS, the "change" must be reported as soon as the future event becomes known; however, if the payment is "unanticipated", the "change" must be reported to AHCCCS within ten (10) days of the date it occurs.<sup>2</sup>

Let's take AHCCCS first and its requirement for notice when "the future event becomes known". What does it mean for a "change" to "become known" or "anticipated" in the case of a personal injury recovery? A change has arguably "become known" when a settlement agreement is entered into. Does the fact that a party to the settlement agreement is a minor or incapacitated adult affect the status of such a change "becoming known?" If there is a question or any doubt regarding the

probate court approving the settlement when it concerns a minor or incapacitated adult, is the "become known" threshold applicable? Do unresolved liens affect the "become known" requirement? In conclusion, the point at which a settlement or recovery "becomes known" and thus triggers the AHCCCS notice requirement is case specific.

What are the implications of reporting to AHCCCS a future change in finances which have become "known"? Possibly, AHCCCS issuing a notice of discontinuance based on the date the change will become effective.

Now let's turn to the more common situation where the relevant government benefits agency requires only that the change in financial circumstances be reported within a certain period of time of the change occurring, such as ten days. The key question then becomes when does the recovery first become available to meet the individual's needs?<sup>3</sup>

Often the availability question come into play when the recovery is in the possession or control of plaintiff's counsel. If the settlement check has cleared the personal injury attorney's account and no legal obstacles to issuing a check to the client exist, the funds are available insofar as the client's eligibility for certain needs-based public benefits are concerned and must be reported. But if legal obstacles to issuing funds to the client exist, the question of "availability" may be unclear. Legal obstacles include a minor or incapacitated adult who is unable to give instruction and manage his or her financial affairs and for whom a fiduciary such as an attorney-in-fact named in a valid financial power of attorney does not exist.<sup>4</sup> In the foregoing instance, a fiduciary will need to be appointed by the probate court. The existence of a medical lien that has yet to be compromised and for which the amount exceeds the amount of funds that could otherwise be disbursed from the attorney trust account to

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the client also constitutes a legal obstacle. Competing claims against the personal injury recovery amongst multiple claimants presents a legal obstacle as well.<sup>5</sup>

Once all legal obstacles are eliminated, the proverbial clock starts ticking. Generally, your client has a limited time within which he or she must report a change in his or her financial circumstances to the pertinent governmental agencies<sup>6</sup>. The obligation to report is not dependent on a check being made payable to the client but whether such a check can be drafted. So, it is best to plan ahead and for your client to be prepared to act quickly when the recovery first becomes “available” to him or her.

Most public benefit programs treat a recovery when it first becomes available as “income” in that calendar month and a “resource” thereafter if retained in the subsequent calendar month. Why does this distinction matter? Because “income” and “resources” are treated distinctly, different limits apply, and some programs are income-sensitive only whereas others have requirements for both. You can safely predict that a recovery of any amount will put your client over the applicable income limit of the public benefit programs for which he or she is eligible in the month the recovery first becomes available. For SSI purposes, it will result in an overpayment of such cash benefits in that month that the SSA will be entitled to recover from your client<sup>7</sup>. For AHCCCS and ALTCS purposes, if over the applicable income limit for a single month only, it is unlikely to result in a disqualification from benefits or the program seeking to recoup the cost of services it has provided to the client in that month.

Most AHCCCS medical assistance programs are income-sensitive only. Concern beyond the month in which a recovery first becomes available may not exist unless any of the following circumstances exist: (1) The recovery is so substantial it generates earnings that put the client over the applicable income limit; (2) the recovery is invested in a structured settlement annuity that the particular medical AHCCCS assistance program treats as income; or (3) the recovery is funded to a trust that presents an income eligibility problem. Both SSI and ALTCS, however, have income AND resource limits. With regard to these particular benefit programs, a plan regarding disposition of the net recovery must be made well in advance of the clock starting to tick!

The “plan” must not only consider the timing but also what and how. What will the client do with his or her net recovery? Will he or she “spend down” the funds, that is, spend all the monies by the end of the calendar month in which they first become available? If so, plan for the funds to first become available at the first of the month to allow the better part of the remainder of the month to accomplish the “spend down.” Will the recovery be funded to a self-settled or first party special needs trust? Surprisingly, the latter may be the easier of the options from a timing perspective. Will it be a combination of the two- partial “spend down” and rest to the special needs trust? If a court order is required, that may provide some cushion and prescribe what is to be done- a road map, so to speak.

As for how, one question is whether you, as the plaintiff’s attorney, will disburse the funds directly to the client, particularly when a professional fiduciary is not involved, relying upon him or her to do as planned and necessary within the calendar month,

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or disburse the funds directly to third parties, such as the car dealership from which your client intends to purchase a vehicle. It is of the utmost importance in either case that a paper trail be kept verifying disposition of the settlement proceeds to the pertinent public benefit programs. What constitutes the paper trail? Copies of checks, financial statements containing beginning and ending balances of the client's bank account where settlement monies may have been deposited and all transactions in between, copies of receipts and invoices, agreements and contracts pertaining to more substantial purchases such as a vehicle, etc. As for funding a special needs trust, a copy of the trust agreement and proof of its initial funding are part of the paper trail. If a court order has been entered pertaining to settlement approval and its disposition, that should be included in the required reporting to the public benefit program. Note, the initial disclosure to the public benefit programs regarding a change in financial circumstances or "availability" of funds may precede reporting of disposition of the funds.

Whew! When this author thought to discuss the issue of "timing" in public benefits planning, she did not imagine more than a thousand words being written. It demonstrates the importance of being mindful of the many nuances in planning for a client's continued eligibility of needs-based governmental assistance, assistance a client may not be able to do without in spite of a meaningful recovery. A gentle reminder to we lawyers to consider our competence in handling issues that spill over into areas of practice outside of our own and enlist the assistance of colleagues knowledgeable in this area.<sup>8</sup> ■

## Endnotes

1 Generally, for SSI eligibility purposes, a report of a change in income and/or resources must be made within ten (10) calendar days after the month in which the change occurred. A report by mail is timely when the postmark date is within the same 10-day period. Social Security Program Operations Manual System (POMS) SI 02301.005.B.2-3.

2 See AHCCCS Medical Assistance Eligibility Policy Manual Section 1500.O (Changes in Income) and 1500.X (Changes in Resources).

3 See *id.* at Section 703.A (Availability of Resource) but see Section 605 re: Verifying Income if the individual reports being over income for the applicable medical assistance program, no further verification is needed!

4 Note, a minor is not legally capable of executing a financial power of attorney by virtue of his or her age alone and a natural parent has very limited authority to act on behalf of a minor child with regards to his or her financial affairs.

5 *Id.*

6 Both the SSI and AHCCCS programs require that a change in financial circumstances be reported within ten (10) days.

7 If funds are not available to repay the overpayment of SSI benefits to the SSA, then the SSA is permitted to recoup the overpayment by withholding no more than ten percent (10%) from future benefits.

8 See Ariz. Rule of Prof'l Conduct 1.1.