

Why Every Attorney Should Consider Medicaid Planning Issues When Settling Personal Injury Claims

By Steven M. Jankower

A client seeks your assistance with regard to representing him in a personal injury claim. He is 27 and has been disabled as a result of serious injuries sustained in an automobile accident. He is unable to work as a result of his disabilities. He also has no health insurance and is unable to obtain health coverage. He relies exclusively upon benefits he receives from Medicaid to pay for his medical treatment. He receives Medicaid by virtue of the fact that he is eligible for Supplemental Security Income (SSI). His medical treatment requires regular ongoing medical visits and related therapies.

Later, you are able to settle his personal injury claim for \$200,000. Release documents are executed and you disburse settlement proceeds directly to your client; however, months later, your client receives notice from SSI that he now has too much in financial resources because of the funds received in the personal injury settlement, and he is no longer eligible for SSI. Further, since he was receiving Medicaid benefits as a result of his eligibility for SSI, he loses his Medicaid card as well. Medicaid also demands reimbursement of amounts previously paid in benefits to him out of settlement funds that have been received.

Your client now comes back to see you. He realizes he is now required to personally fund his future medical expenses using the settlement proceeds he received and any other available resources he may have. He asks you, as his attorney, why he wasn't told that the settle-



ment could impact his eligibility for Medicaid and SSI. Later, you receive a letter from the Office of Disciplinary Counsel. You are advised that your client has lodged a complaint with the Bar because he wasn't fully advised of the legal impact of his personal injury settlement on his Medicaid and SSI eligibility.

Unfortunately, the scenario described above is more common than might be imagined. Many attorneys and their clients are unaware of the impact of personal injury settlements on the client's eligibility for critically needed Medicaid benefits. In many instances, the problems associated with the impact of a personal injury settlement on Medicaid eligibility can be efficiently and prudently handled through careful planning.

Clients with Disabilities Face Unique Challenges

Individuals with disabilities face huge problems associated with obtaining quality health care. Many of these individuals cannot afford adequate health insurance to pay for their health care needs. Others simply do not have health coverage and cannot obtain health benefits due to their disabilities. Some of these individuals, particularly the elderly, require long-term care and cannot afford it. For these individuals, programs such as Medicaid are lifelines. Unfortunately, these programs place severe income and resource restrictions upon applicants that can cause them to become ineligible for such benefits unless proper steps are taken to plan for unexpected contingencies.

Plaintiffs in personal injury claims are particularly vulnerable to disqualification from programs such as Medicaid. Because many of these personal injury victims lack sufficient income and resources to be able to afford their own health coverage, they may be dependent upon the benefits provided by Medicaid in order to maintain their eligibility. If they are unable to qualify for Medicaid benefits, they may be forced to pay for their future medical needs out of settlement proceeds until the funds are spent down and virtually no funds are left.

Proceeds from a personal injury settlement can suddenly cause these individuals to be ineligible for benefits unless steps are taken to properly handle and protect them.

Medicare and Medicaid Are Not the Same

Medicaid was created in 1965 with the passage of Title XIX of the Social Security Act.¹ It is the nation's major public financing program for health care coverage and long-term care for low-income, elderly and disabled persons. Medicaid is a "mean-tested" program, meaning that in order for individuals to be eligible for it, they must have limited income and resources.

Medicaid and Medicare are entirely different programs. Medicare generally provides health insurance-related benefits to individuals 65 years of age or older; to individuals who are eligible for Social Security disability benefits and have received such benefits in excess of two years; and to individuals suffering from end-stage renal disease. Medicare is entirely funded and administered by the federal government. Furthermore, there are no "means tests" for individuals seeking eligibility for Medicare benefits, *i.e.*, benefits are not tied to an individual's limited income and resources. Medicare recipients may now be eligible for prescription drug benefits under the Medicare Prescription Drug, Improvement and Modernization Act of 2003.² Medicare recipients also may be eligible for some long-term care benefits, but these benefits are capped to a period of time not to exceed 100 days.³

Medicaid is unique in many ways from other federal programs such as Social Security and Medicare. Medicaid is primarily federally funded, but the states also provide a portion of the funding; however, Medicaid is entirely state administered. Whether an individual qualifies for Medicaid benefits depends in large part upon the state in which he or she resides. Each state operates its own "version" of Medicaid under a state plan that must be submitted to the federal

government for approval.

Medicaid is also unique in that it is the only program that provides for the costs of long-term care for eligible recipients beyond the 100 days of skilled nursing care allowed to Medicare recipients. Long-term care services can be delivered in institutional settings, such as nursing homes or group homes, or in community and home-based settings such as family homes, depending upon the particular program for which the recipient is deemed eligible.

Qualifying for Medicaid Can Be Difficult

Persons seeking Medicaid eligibility may qualify through a number of different methods. For example, individuals who are eligible to receive SSI also qualify for Medicaid benefits. Individuals requiring long-term care in an institutional setting, such as a nursing home or long-term care facility, may become eligible for Medicaid benefits to cover the costs of such care.

Other individuals may qualify for Medicaid through "waiver" programs offered by the state. These programs were originally authorized and established in 1981 during President Reagan's term under Section 1915(c) of the Social Security Act.⁴ The 1981 legislation provided a vehicle for states to offer additional services not otherwise available to serve people in their own homes and communities, helping to preserve their independence and ties to family and friends. This is accomplished by waiving certain eligibility requirements to allow individuals with disabilities to receive public benefits and services in the most integrated settings appropriate to their needs, consistent with the Americans with Disabilities Act and as recognized by the United States Supreme Court.⁵

Waiver programs offer valuable benefits to eligible recipients — provided they are willing to wait. The programs have stringent income and resource limitations and other technical eligibility requirements. Because of limited funding,

only a small number of waiver “slots” are available to eligible persons, and the waiting lists for such programs are extremely long — in some cases, in excess of 11 years. Once slots open up, individuals who might be eligible must be re-evaluated to determine their continuing qualification. Waiver programs are also subject to the availability of funding and are severely affected by budgetary restraints.

Individuals seeking to become eligible for Medicaid through the methods described above are often required to pursue their rights through time-consuming administrative appeals. Pending the outcome of such appeals, these individuals may be required to pay medical and long-term care expenses out of their own pockets while waiting to become eligible for benefits.

Medicaid Recipients Must Meet Stringent Means Tests

Individuals seeking eligibility for Medicaid in Louisiana must meet stringent income and asset limitations. They are not allowed to own more than \$2,000 in what is referred to as “countable resources.” If a husband and wife are both in need of institutional care, they are jointly not allowed to own more than \$3,000 in countable resources.⁶ Individuals also are prohibited from having income in excess of \$1,869 per month (2007 cap limit). This income limitation is adjusted for cost of living on an annual basis and is equal to three times the SSI cap limit

of \$623 per month (2007 cap limit).⁷

Medicaid primarily looks at the “availability” of assets and resources to an individual in order to determine whether such resources are countable resources for purposes of determining eligibility. Resources are deemed to be available when the individual has the “legal means to access” the assets.⁸ Generally speaking, the less available that a resource is to an individual, the higher the likelihood that the resource will not be deemed “countable” for Medicaid eligibility purposes.

The general rule in determining whether resources are countable is that all income and resources owned by an individual and his or her spouse are deemed countable unless they are properly spent down or an exception exists under the law. Resources are cash assets or those assets which can be converted to cash to meet basic needs.⁹ Countable resources include liquid assets, real estate and other personal property not otherwise excluded that could be sold to provide for an individual’s basic needs.

However, there are exceptions to the countable resource rules. Included among these exceptions are a claimant’s principal place of residence,¹⁰ wedding and engagement rings,¹¹ one automobile,¹² prepaid irrevocable burial contracts,¹³ and certain types of life insurance¹⁴ that are not deemed to be countable resources under Medicaid rules. Furthermore, assets placed in a properly drafted special needs trust can be deemed non-countable resources.¹⁵

Many individuals attempt to dispose of assets that might be deemed countable to try to achieve eligibility for Medicaid benefits. The result of such efforts can be disastrous for these individuals. The reason for this is that Medicaid applies transfer penalties to transfers of property deemed to be made for “less than fair market value.”¹⁶ Medicaid also has “look back” rules that apply to transfers. Under the Deficit Reduction Act of 2005, signed into law on Feb. 8, 2006, Medicaid is now allowed to look back to transfers made from an applicant to another individual or trust within 60 months of the date the applicant applies for Medicaid benefits.¹⁷ Furthermore, transfer penalties are now applied prospectively from the date that an applicant becomes eligible for benefits, rather than from the date the transfer was originally made.¹⁸ Transfer penalties may result in long periods of ineligibility for individuals who would otherwise be deemed qualified for benefits.

A Properly Drafted Special Needs Trust Can Protect Your Client

What can be done with proceeds of personal injury settlements in order to help individuals eligible for Medicaid to retain eligibility for services and benefits? The answer requires an understanding of federal legislation that impacts Medicaid eligibility. Specifically, the Omnibus Budget Reconciliation Act of 1993 (OBRA '93)¹⁹ and the Foster Care Independence Act of 1999²⁰ place restrictions on an individual’s ability to establish trusts and transfer assets to such trusts in order to achieve eligibility. Prior to 1993, some individuals attempted to divest themselves of their assets in order to achieve Medicaid eligibility by self-settling trusts naming themselves as beneficiaries and transferring their estates to such trusts. These types of trusts are referred to in the Louisiana Medicaid Eligibility Manual as “Medicaid Qualifying Trusts.”²¹ The name is a misnomer, though, because such trusts may actually disqualify a person from eligibility for Medicaid benefits.

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However, the OBRA '93 legislation does contain limited exceptions to the prohibition against "Medicaid Qualifying Trusts." Under 42 U.S.C. §1396(p), if an individual (1) owns or is deemed to own countable resources in excess of \$2,000, (2) meets Social Security disability requirements, *i.e.*, an inability to engage in substantial gainful employment for a period of time in excess of 12 months, and (3) is under the age of 65, then a parent, grandparent, legal guardian or a court may establish a trust for the individual into which that individual's assets may be placed such that the assets will be deemed non-countable for Medicaid eligibility purposes.²² It is important to note that under the legislation, the individual seeking Medicaid eligibility must not be the settlor of the trust. Furthermore, in order for such trust to be deemed a non-countable resource by Medicaid, it must contain provisions requiring the trustee to repay the state for Medicaid

payments made by the state on behalf of the individual during his lifetime.²³

This type of trust is often referred to as an "under age 65 disability trust" or a "(d)(4)(a) trust." A better way to describe the trust, however, is as a "quality of life trust." It provides a source of funds that may be used to improve the quality of life of an individual with disabilities without forcing the individual to fully deplete available funds on medical and personal care needs before being deemed eligible for Medicaid services and benefits.

How is a "(d)(4)(a) trust" created? This type of trust must be created with the approval and authority of the court. If the beneficiary does not have parents or grandparents who are living, and has no legal guardian, the trust can be created by court order. The court order should also specifically direct and authorize the transfer of the beneficiary's assets to the trust.

Selection of the trustee for the trust is perhaps the most important decision to

be made in creating this type of trust. The trustee will be in charge of administering the trust assets for the sole and exclusive benefit of the Medicaid recipient. Generally, the choices for trustee include a trusted and capable family member or friend, a professional trustee such as an attorney or CPA, or an institutional trustee such as the trust department of a bank. There are advantages and disadvantages to using each of these types of trustees. Determining which of these individuals or groups will best meet and serve the needs of the beneficiary depends upon the facts and circumstances of each particular case.

What Steps Should An Attorney Take When Settling a Personal Injury Claim?

What should an attorney handling and settling a personal injury claim do in order to determine whether a client is a candidate for Medicaid planning? First,



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and most importantly, the attorney should make inquiries to determine whether the client is receiving Medicaid and/or SSI-related benefits and/or whether the client will be a candidate for receipt of such benefits in the future. Just a few of the questions that should be posed to the client when the settlement is being considered include:

- ▶ What are the client's current health care needs? Will the client have a need for ongoing continuous medical treatment for the foreseeable future?
- ▶ Is the client in need of long-term care? Does the client currently receive care in the home? Will the client need nursing home care in the foreseeable future?
- ▶ What is the nature of the client's disabilities? Are they developmental disabilities? Are the disabilities expected to continue for the foreseeable future and/or for the rest of the client's life?
- ▶ How old is the client? If the client is over 65, the Medicaid planning options available to the client are significantly limited since the "(d)(4)(a) trust" cannot be used.
- ▶ Is the client currently receiving Medicaid or SSI benefits? If so, how is the client qualifying for the benefits? Are benefits being received as a result of eligibility for SSI, eligibility for a waiver slot, or some other method?
- ▶ Does the client currently own assets that may be deemed countable resources for Medicaid eligibility purposes?
- ▶ Does the client currently have health insurance? If so, is the client covered by individual or group health coverage?
- ▶ Does the client currently have or qualify for long-term care insurance?
- ▶ Does the client stand to receive assets through inheritance that may affect eligibility for Medicaid benefits? If so, the person from whom the client stands to inherit may consider establishing a testamentary special needs

trust for the benefit of the client.

- ▶ How large is the settlement, and are there other options to convert the settlement funds into non-countable resources?

Most importantly for the attorney, whether the client is a candidate for Medicaid planning or not, it is critical that the attorney fully explore Medicaid options with the client and that the client is fully advised of the fact that a personal injury award may affect his eligibility for benefits such as Medicaid and SSI. The client's rights and options should be fully discussed with the client prior to settlement. At a minimum, it is recommended that the attorney advise the client in writing of Medicaid options and the effect the settlement may have on such options. It is also advisable that the attorney have the client sign documents acknowledging that the impact of the settlement on the client's eligibility for programs such as Medicaid and SSI have been fully explained to him.

Finally, it is important to remember that Medicaid planning is very complex and technical, and the rules affecting Medicaid eligibility are in a constant state of flux. Solutions that work today may not work tomorrow, and even the most careful and prudent Medicaid planning cannot insure or guarantee that an individual will retain eligibility for benefits or will become eligible for services and benefits in the future. Medicaid planning should be performed only with the guidance and assistance of an attorney experienced in prudent and effective Medicaid planning techniques applicable in the state of Louisiana.

FOOTNOTES

1. 42 U.S.C. § 1396-1396(v).
2. 108 Pub. L. No. 173, 117 Stat. 2066 (2003).
3. See 42 U.S.C. § 1395d(a)(2)(A).
4. 42 U.S.C. § 1315.
5. See *Olmstead, et al v. L.C.*, 527 U.S. 581 (1999).

6. See La. Dep't of Health and Human Services, Louisiana Medicaid Eligibility Manual, § I-1631 [1992].

7. See Center for Medicare and Medicaid Services, Supplemental Security Income (SSI) Income and Resource Limits, Special Income Level, SSI Break-Even Points, and Spousal Impoverishment [2007].

8. See Louisiana Medicaid Eligibility Manual, *supra*, § I-1633.

9. See *id.* § I-1610.

10. See *id.* § I-1634.28.

11. See *id.*

12. See *id.* § I-1634.40.

13. See *id.* § I-1634.5.

14. See *id.* § I-1634.18.

15. See 42 U.S.C. § 1396p(d)(4)(a); Louisiana Medicaid Eligibility Manual, *supra*, § I-1720; POMS SI 01120.200, *et seq.*

16. See Louisiana Medicaid Eligibility Manual, *supra*, § I-1670, *et seq.*

17. See Deficit Reduction Act of 2005, 42 U.S.C. § 1396p(c)(1)(B)(i).

18. See *id.* § 1396p(c)(1)(D).

19. 42 U.S.C. § 1396p.

20. 42 U.S.C. § 1382b.

21. See Louisiana Medicaid Eligibility Manual, *supra*, § I-1710.

22. See 42 U.S.C. § 1396p(d)(4)(a).

23. See *id.*

ABOUT THE AUTHOR

Steven M. Jankower has practiced law in Lafayette for more than 24 years. He is a graduate of the University of Southwestern Louisiana and Louisiana State University Paul M. Hebert Law Center. He has focused much of his practice on the handling of estate planning issues involving families with disabled and special needs members. He currently serves as president of the Lafayette Association for Retarded Citizens, as chair of the Lafayette City-Parish President's Advisory Committee for Citizens with Disabilities, and is the immediate past president of Families Helping Families of Acadiana. He is a member of the Volunteers of America Advisory Board, the Down Syndrome Association of Acadiana and the Beaver Club of Lafayette. He writes a monthly newsletter on Medicaid planning issues. (P.O. Box 53829, Lafayette, LA 70505-3829)



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