

Protecting the plaintiff's eligibility for Medicare, Medi-Cal and SSI

Evaluating age or income restrictions in the new era of affordable care

By Patrick C. Farber and William E. Lindahl

Plaintiffs often come to litigation while receiving public benefits such as Medi-Cal and/or Supplemental Security Income (SSI), while others become eligible as a direct result of their injuries. Still others require a Medicare Set-aside (MSA), further complicating the settlement process. Attorneys know, with proper planning, preserving these benefits significantly extends the value and the life of a plaintiff's settlement funds. However, plaintiffs who are eligible for Medi-Cal or SSI and receive settlement funds directly, run the risk of losing these public benefits. Benefits may be lost if monthly resources (income or assets) exceed $2,000 for an individual or $3,000 for a couple.[1] This concern, however, will play a much smaller role in settling cases once the Affordable Care Act[2] (ACA), also known as Obamacare, takes effect on January 1, 2014. In fact, many features of the ACA are already in place and available to plaintiffs now.

The most common way for a plaintiff to continue to receive Medi-Cal and SSI while also receiving settlement funds is to establish a first-party, individual Special Needs Trust (SNT) or enroll in a Pooled Special Needs Trust (Pooled SNT) also known as a Pooled Trust, PSNT or Master Trust. Pooled SNTs are run by charitable organizations who serve as the trustee, rather than by an individual or corporate trustee.[3]

Affordable Care Act impact

Once the ACA takes effect in 2014, those with the economic means will have an "individual mandate" that requires them to buy their health insurance. Currently, anyone who has a pre-existing condition or is determined to be disabled according to the Social Security Association (SSA) is forced to meet eligibility requirements in order to receive Medicare, Medi-Cal and SSI. The ACA allows disabled individuals with a pre-existing condition a choice between public or private health insurance coverage.

Whether or not a state elects to expand its Medicaid program, the ACA forces the insurance industry to open private insurance to all persons regardless of a disability or pre-existing condition. The significance of this provision is that Medicaid, Medi-Cal coverage and the scope of services it provides will be expanded in those states that choose to expand Medicaid. Medi-Cal programs will be required to offer higher standards of care and services to get additional Medicaid funding. Protecting Medi-Cal eligibility for the seriously injured plaintiff may provide a significant cost savings over their lifetime.

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Under the ACA, policies will no longer have lifetime caps. Policies will be prohibited from the use of cost-containment ceilings that are a significant barrier to access for private medical care. Policies cannot have a rescission of policy or non-renewability for any reason. Insurance providers will not be able to charge higher premiums for a pre-existing condition or disability. These changes greatly enhance the ability of a recipient of a modest settlement to secure high quality insurance on their own.

Individual Special Needs Trust [D][4][A]

As a result of the ACA, the use of Individual SNTs will be reduced. There are several reasons why: 1) the cost to establish and administer an Individual SNT over the life of the trust is significant; 2) court congestion delays their creation; and 3) there are barriers to accessing the assets that are held in an SNT. Since there will be no restrictions on settlement proceeds when a plaintiff does not use an SNT, under the ACA, many injured parties might choose to buy their own insurance rather than go through the hassle of establishing an Individual SNT.

From a cost standpoint, it is not uncommon for Individual SNT fees on a $1 million settlement to exceed $15,000 annually. These additional costs accelerate the loss of the plaintiff's settlement funds, and limit the ability to structure the funds for long-term security. Non-structured Individual SNTs are often spent down within just a few years. This can leave the injured party financially vulnerable. Individual SNTs also require that the injured party be under age 65, and require that a parent, grandparent, guardian or the court establish the trust.[4] Court closures and budgetary issues faced by the state judicial system have further delayed attorneys' ability to settle cases and establish Individual SNTs for their clients.

Paying for private insurance gets around these issues. Choosing to purchase private health insurance allows plaintiffs to have direct control over their settlement proceeds because they are not constrained by all the limitations of an Individual SNT. Choosing private healthcare insurance also removes the restrictions associated with sharing the settlement proceeds with spouses, children or family members. In effect, there will be no restrictions on settlement proceeds if a plaintiff chooses to purchase private health insurance. Add to that the elimination of high annual trustee fees, the state payback and sole benefit limitations and there are plenty of reasons to deter injured parties from signing up for the Individual SNT option.

Undoubtedly, there will be some circumstances where an Individual SNT will be applicable. One example would be a plaintiff under the age of 65, who needs to have long-term nursing-home care. The plaintiff would need an SNT to defray the cost to Medi-Cal.

Pooled Special Needs Trust [D][4][C]

While a Pooled SNT also protects Medi-Cal and SSI, it has a number of features that make it more attractive than an individual SNT. The first is its cost. The trust setup costs are between $1,500 and $2,000 with annual trust administration fees as low as $1,000. In addition, most Pooled SNT providers do not have a minimum funding amount requirement. With a Pooled SNT, the plaintiff can establish the trust directly, without a parent, grandparent, guardian or the court.[5] These trusts can be set up in days rather than months, thus avoiding the need to navigate the congested California legal system.

Pooled SNT providers are charitable organizations that act as the trustee rather than an individual or corporate trustee. The federal statute that gives authority for a charitable organization to act as a trustee also provides an exception that allows them to enroll plaintiffs of any age, even those over age 65, whereas a private trustee or corporate trustee cannot establish a Special Needs Trust for a plaintiff over 65.

Pooled SNTs can be a valuable settlement planning strategy under a number of circumstances including those in these examples.

- Plaintiff is incapacitated so a court- supervised Pooled SNT may be required.
- Plaintiff is already receiving Medi-Cal and/or SSI, and the net settlement is insufficient to afford private health insurance premiums.
- Plaintiff has an MSA and is receiving Medi-Cal. The MSA needs to be held and administered within the trust for assets to be considered uncountable to the Social Security Administration.
- Plaintiff is over age 65.
- Plaintiff needs long-term, nursing-home care or an alternative and wants to shift cost to Medi-Cal.
- Plaintiff has elected to use a structured settlement.

Pooled SNTs and structured settlements

If plaintiffs have structured settlement funds distributed to a Pooled SNT, they will maintain eligibility for Medi-Cal for the entire life of the structure. If plaintiffs are unable to pay premiums in the future, they will still be eligible for Medi-Cal. Conversely, if the structured settlement payments are distributed outside a Pooled SNT, they are considered income by the Social Security Administration, making the plaintiff ineligible for Medi-Cal for the life of the structure. One cannot irrevocably assign a structured settlement to a Pooled SNT once it has been established.

As a planning strategy, only the assets in the Pooled SNT are subject to state lien payback. Funding the Pooled SNT with a structured settlement annuity maximizes funds to heirs and extends the life of the trust. In addition, the annual trust administration fees are paid directly from the annuity's life insurance company.

If plaintiffs structure their settlement, they can still be eligible for Medi-Cal. This would negate the need to purchase private health insurance or it can be used in tandem with private

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insurance. This strategy can save the plaintiff thousands of dollars annually and tens of thousands of dollars over the life of the trust. Since the ACA mandates increased standards of care and broadens the scope of services of Medi-Cal, Medi-Cal could be comparable to existing health care plans.

While both Individual SNTs and Pooled SNTs protect Medi-Cal and SSI benefits, using a Pooled SNT maximizes the value and life of settlement funds for plaintiffs eligible for Medi-Cal and SSI benefits. Pooled SNTs also do not have age restrictions or limits on the size of the settlement.

A quick note: when settlement planning, it is not necessary to establish an SNT if the plaintiff is already receiving Social Security checks or Supplemental Security Disability Income (SSDI). Social Security and SSDI government-benefit programs are entitlements, therefore they are not means tested; asset and income limits do not apply; settlement proceeds will not impact eligibility. However, Medi-Cal and SSI *are* means tested; client assets; income and future medical costs *do* impact eligibility.

Evaluating a pooled trust provider

Not all Pooled SNT providers offer the full scope of services that are sometimes required. Of the nine programs available in California, only two accept court-supervised cases. The Pooled SNT is a state approved Master Trust document that an injured party joins via a "Joinder Agreement." The Pooled SNT provider does not generate a new trust document for each new plaintiff/enrollee.

In order for a Pooled SNT provider in California to accept a court-supervised case, it must have a master trust that is probate compliant. Also, court-supervised cases in California require a corporate trustee with the charitable organization as the trust administrator. Avoid Pooled SNT programs that have an individual as the trustee rather than a corporate trustee for court-supervised cases, or the charitable organization as the trustee for court-ordered or self-established trust accounts.

Establishing a Pooled SNT

There are two steps plaintiff attorneys should complete to ensure that establishing a Pooled SNT goes smoothly. First, as with any SNT, the plaintiff attorney should provide counsel and disclosure of the limitation associated with the trust. It is advisable to have the plaintiff sign a disclosure letter as evidence of proper counsel. The second step should be to provide notification to the appropriate state agency via registered mail that funds have been placed in a Pooled SNT making the assets uncountable for Medi-Cal and SSI eligibility. Most Pooled SNT providers should be able to supply the plaintiff attorney with these notification letters.

Individual SNTs and Pooled SNTs are important tools to protect plaintiffs' Medi-Cal and SSI eligibility. There is no doubt the ACA will impact an injured party's use of SNTs. It is up to the plaintiffs' attorneys to make sure their clients understand the financial ramifications when determining which trust is right for them. Careful consideration should be given especially to health insurance premium costs. Whether an Individual SNT or Pooled SNT, these trusts should be established and administered at the time of settlement to prevent accidental loss of public benefits.


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Endnotes

[1] 20 C.F.R. §416.1205(C)(SSI), 22 Cal Code Regs §§50419-50419-50420 Medi-Cal
[2] www.healthcare.gov/law/full/index.html also see www.dol.gov/ebsa/healthreform
[3] 42 U.S.C. §1396p(d)(4)(A)&(C) allowing first party Special Needs Trusts
[4] 42 U.S.C. §1396p(d)(4)(A)
[5] 42 U.S.C. §1396p(d)(4)(C)

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