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TANF Section 8 WIC SNAP
Medicare SSI Settlement Proceeds

Considering Eligibility for Public Benefits in Settling a Client's Claim for Damages

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Mark, 20, has been in a car accident. He suffered a head injury and spinal injuries, rendering him permanently disabled. He faces long-term medical needs and will be unable to live independently. He has no income or health insurance. His parents can offer only modest financial support. He expects to receive a substantial settlement from the accident, but it will not be enough to cover his long-term needs. His personal injury attorney asks you, the only legal services lawyer he knows, how the settlement will affect Mark's entitlement to government benefits for his long-term disability. The lawyer wants to know how to structure the settlement or otherwise advise Mark about options to minimize the impact on government benefits he may receive.

Two of your own clients are Jane, a single mother, and Joshua, her disabled 12-year-old son. You represent them in a landlord-tenant case, suing her former landlord for failure to make repairs, a failure that resulted in a minor personal injury to Joshua. You expect to receive a settlement of about $10,000 for rent abatement for Jane and another $10,000 for Joshua's injury. Jane receives Section 8 housing assistance, a Temporary Assistance for Needy Families (TANF) cash welfare check, food assistance from the Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program), and Medicaid. Joshua also receives Supplemental Security Income (SSI) and Medicaid because of his disability. How will the settlement affect their benefits? What can you do about any such effect?

Every attorney who represents low-income persons in cases that can result in a cash award should understand both how a settlement or award will affect the client's eligibility for government benefits and how public benefits can be maximized for the client. Before settling a case, the attorney and client should discuss the government benefits that the client receives or may need and how the settlement may affect those benefits.

Public Benefits to Consider

Your client may receive or need a range of public benefits that may be affected by a settlement, inheritance, or other lump sum, asset, or new stream of income. Here we focus on the most common and important benefits for low-income persons: Medicaid and Medicare (health insurance coverage); social security and SSI (income to the elderly and disabled); SNAP (assistance in purchasing food); TANF (cash assistance and services to poor children and their families); and federal subsidized housing assistance. Not discussed here but also potentially important to consider in settlement planning are veterans' benefits based on need, refundable tax credits such as the earned income tax credit and health insurance subsidies that will begin in January 2014, educational assistance, other nutrition programs such as WIC (the Special Supplemental Nutrition Program for Women, Infants, and Children) and school nutrition programs, and state-specific programs of assistance based on need, such as child care subsidies and general assistance.

Two of the most common public benefit programs, social security and Medicare, are generally not means-tested.[1] Most settlements, whether received as a lump sum or in installment payments, will not affect eligibility for social security or Medicare.[2] However, the Medicare Assistance and Low-Income Subsidy programs, which help pay Medicare Part B and D premiums, are means-tested. Also, any Medicare payment of past and future medical expenses related to the legal claims in the case must be considered in crafting a settlement.[3]

Even if an elderly or disabled client will receive social security and Medicare, the client may also need other means-tested benefits, such as SSI or Medicaid. SSI, a program administered by the Social Security Administration, pays cash benefits of up to $674 per month in 2011 for an individual (more in states with SSI state supplements) to supplement small social security checks and to provide income to aged, blind, or disabled individuals who are not insured for social security.[4] Both income and asset limits must be met to qualify for SSI.[5]

A client with a long-term disability may need public assistance beyond Medicare to pay for medical and personal care needs; Medicare does not cover long-term nursing care or personal care services either in a facility or at home. To pay for nursing care or personal care services, the client may need Medicaid on a long-term basis. Even for services that Medicare does cover, there is a twenty-nine-month waiting period after the onset of disability before Medicare can begin. Medicaid has no waiting period if the client is eligible, files a written application, and does not transfer assets.

In the first example above, Mark probably is not insured for social security disability benefits because he is young with very little work history. He became disabled before age 22, and if both his parents are still alive and working, then he cannot qualify for social security benefits on their earnings records, at least not yet. Because Medicare is generally tied to social security, Mark is unlikely to qualify for Medicare either. Mark will need long-term care and many other health services. Mark may qualify for SSI, Medicaid, and perhaps other programs, but his attorney must consider the income, asset, and

[1]Social security, more formally titled Old Age, Survivors, and Disability Insurance, is a national insurance program of monthly cash payments to retired and disabled wage earners and their dependents or survivors. Payments are based on the earnings record of the wage earner and not on any analysis of financial need. In order to qualify for social security benefits, a wage earner must have worked enough to be considered "insured" and must be at least age 62, disabled, or deceased. To be considered "disabled," a person must have a physical or mental impairment that prevents the person from working for a period of at least twelve months. The survivors and dependents of a deceased, aged, or disabled insured wage earner may receive benefits on the wage earner's record if they meet certain age and relationship tests. Medicare Part A covers inpatient hospital stays and up to one hundred days of skilled nursing care. Medicare Part B covers doctors' services and outpatient care. As of 2007, individuals with incomes over $80,000 and married couples with incomes over $160,000 pay higher premiums for Medicare Part B. Medicare Part D helps pay for prescription drugs, and most people also pay a premium for this program. Medicare recipients with low income and assets qualify for assistance in paying premiums for Part B and Part D.

[2]Workers' compensation settlements are generally the only type of settlement that affects Social Security Disability Insurance benefits. These benefits are subject to an offset, or reduction, when the claimant is also entitled to workers' compensation benefits (see 42 U.S.C. § 424a (2006); 20 C.F.R. § 404.408 (2011)). A discussion of workers' compensation offsets and how to structure those settlements to limit their impact on social security benefits is beyond our scope here.

[3]Medicare and Medicaid are both considered "secondary payers." The issue of Medicare and Medicaid liens against recovery from a personal injury claim, and structuring settlements to limit the amount that must be reimbursed, is beyond our scope here.

[4]The Social Security Administration's website contains the Supplemental Security Income (SSI) maximum benefit amounts for 2011 (www.ssa.gov).

[5]See 20 C.F.R. pt. 416 (2011).

transfer-of-asset rules for these programs in structuring his settlement.

Income Limits

Many public benefit programs have income limits, which, for TANF and, to a lesser extent, SNAP, vary by state.[6] The rules on whose income is counted and how much income is disregarded vary widely by state for TANF but are generally uniform for SNAP.[7]

To qualify for SSI, countable income must be less than $674 per month in 2011 for a disabled or aged individual in states without a state supplement. Countable income includes the income of a spouse or of a minor's parent if that person lives with the SSI applicant, unless the applicant is in a home and community waiver program.[8] Every dollar of income reduces the SSI benefit, although some unearned income and more than half of earned income are disregarded.[9] There are also allowances for other dependents for income that is deemed to the SSI applicant from a spouse or parent.[10]

For Medicaid, the countable income limit varies by state and depends on whether the individual is an adult or child, disabled or elderly, and at home, in an institution, or in a home and community waiver program.[11] Higher income limits generally apply for residents of nursing homes and assisted living facilities. Income disregards for Medicaid for children and their caretakers vary by state but are generally much less liberal than for the elderly and disabled. The effect of being even one dollar over the Medicaid income limit can be disastrous for clients without other health coverage.

Often large settlements are structured to be paid over time, but a stream of monthly income from a settlement can reduce or eliminate eligibility for benefits for as long as the payments last. For a client who has or will need means-tested public benefits, a lump-sum settlement may be the better choice, as explained below. Usually a lump sum is counted as income only in the month received, making the client ineligible for benefits for one month only.[12] SNAP excludes one-time lump sums from income entirely.[13]

Asset Rules and Strategies

Many public benefit programs, such as Medicaid, SSI, TANF, and (in some states) SNAP, have low limits on the amount an individual may own in countable assets (also called "resources"). The asset limit may be as low as $2,000. The assets (and income) of legally responsible persons (spouse or parent of a minor) generally are counted if the responsible persons live with the benefit recipient or if the recipient is in a nursing home. But these programs also exclude certain assets from being counted toward this limit.[14] The most common exclusions from assets are the home and contiguous land, personal effects and household goods,

[6]A growing number of states have elected varying forms of Supplemental Nutrition Assistance Program (SNAP) categorical eligibility, thereby allowing higher gross income limits.

[7]See 7 C.F.R. §§ 273.9–273.11 (2011).

[8]Medicaid home- and community-based waivers offer services in addition to those covered under a state's Medicaid plan (e.g., habilitative services, respite, and home modifications) and waive rules that otherwise would deem the income and assets of spouses and parents to persons with severe disabilities. These waivers are intended to reduce government costs and permit profoundly disabled persons to live in the community when they would otherwise require institutionalization (42 U.S.C. §§ 1396d(a), 1396n (2006)).

[9]See 20 C.F.R. § 416.1112 (2011).

[10]See *id.* §§ 416.1160–416.1169.

[11]Medicaid income limits and countable income for those under 65 and not on Medicare will change substantially in most states in January 2014 under the Patient Protection and Affordable Care Act of 2010.

[12]See, e.g., 20 C.F.R. § 416.1123(a) (2011) for the SSI rule, followed by Medicaid in most states.

[13]7 C.F.R. § 273.9(c)(8) (2011).

[14]See 42 U.S.C. § 1382b(a) (2006) for a list of excluded resources for SSI.

one motor vehicle, and burial assets.[15] Much more is excluded under Medicaid if the recipient is institutionalized and has a spouse at home. Many state Medicaid programs have no asset limit or a liberal asset limit for children and pregnant women.

For individuals such as Jane and Joshua already receiving public benefits, the simplest and most advantageous settlement plan may be small lump-sum payments of under $2,000 for each client. Jane's settlement should be spent quickly to purchase a home or pay down a mortgage; make home repairs or improvements; buy a new car, furniture, appliances, or clothes; pay off valid debts; or buy burial plots and burial plans. Jane and Joshua may even take a vacation to spend down her money. She may not purchase countable assets such as stocks and bonds. Because Joshua is a minor, Joshua's settlement must be spent on his needs. Jane and Joshua should *not* give away any of the money to avoid a transfer-of-assets disqualification period for Joshua's SSI and for some Medicaid services as well.

Because asset eligibility is usually based on assets held on the first day of the month, the settlement should be paid as early as possible in a calendar month to allow the client to spend down the proceeds before the end of that month.[16] If the client's attorney receives the money, and even if the money has not yet been paid to the client, the money is likely to be considered countable to the client on the day the attorney receives it. The client should keep records of when and how the money is spent because the benefits provider may request such information.

Transfer-of-Asset Penalties

SSI, Medicaid, and some states' SNAP programs penalize gifts of assets or income made by the benefit applicant.[17] A period of disqualification for the benefit or certain services may result if something of value has been transferred by the public assistance applicant without fair compensation. In most states a penalized transfer may be relinquishing a right to a personal injury award. Depositing funds by a person in a joint bank account may be considered a transfer to the joint account holder if that person is not a spouse. Purchasing an annuity may be penalized. The "look-back period" in which such transfers are forbidden is up to five years before an application for Medicaid and three years for SSI. Some transfers are exempt. For Medicaid, the disqualification may not even begin until the applicant needs the services—often nursing home care—for which the applicant is disqualified.

(d)(4) Supplemental Needs Trust

For a client like Mark who is younger and permanently disabled with many needs, attorneys should consider another option before settling his case: the (d)(4) Supplemental Needs Trust.[18] This trust can receive either a lump sum or a stream of income from a settlement and will not disqualify Mark for either SSI or Medicaid so long as the rules are followed. The trust funds may be used to pay for a wide variety of Mark's needs that are not fully covered by his public benefits. This trust is available for any disabled person under 65 when the trust is created. The trust must be irrevocable and must be established by a parent, grandparent, le-

[15]Personal effects and household goods include furniture, cooking utensils, appliances, personal computer, and clothing (20 C.F.R. § 416.1216 (2011)). Exempt burial assets include burial spaces, an irrevocable burial (or cremation) agreement of any reasonable value, and a bank account or life insurance cash value of up to $1,500 designated for burial (*id.* § 416.1231 (2011)).

[16]See, e.g., 20 C.F.R. § 416.1207(a) (2011) for the SSI rule, followed by Medicaid in most states.

[17]42 U.S.C. § 1382b(c) (2006) (SSI penalties for disposal of resources for less than fair market value); *id.* § 1396p(c) (Medicaid penalties for certain transfers of assets; these penalties primarily apply to payment for nursing care and home health care); 7 C.F.R. § 273.8(h) (2011) (SNAP penalties for transfer of resources).

[18]So named because Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. § 1396p(d)(4)(A) (2006)) establishes the requirements for supplemental needs trusts; 42 U.S.C. § 1396p(d)(4)(C) (2006) establishes the requirements for pooled trusts, which are an option for individuals with smaller settlement amounts and can be established by the individuals themselves.

gal guardian, or court and not by the trust beneficiary himself. The trust may be established with his funds.

The (d)(4) trust must provide that the state will receive all remaining funds on the death of the disabled individual up to the amount of medical assistance provided by Medicaid. Once a supplemental needs trust is established, the state Medicaid agency may monitor it to make sure that its funds are used only for the benefit of the disabled individual. For example, trust funds have been used inappropriately to pay for housing expenses that benefit other members of the household. Before establishing such a trust, attorneys should satisfy the state's lien on a portion of the settlement proceeds if Medicaid has already paid for medical care for the injury. Attorneys should use caution in establishing (d)(4) trusts, given the rather tight restrictions that attach to them, and must be sure that prospective trustees understand these rules.

Federally Assisted Housing Eligibility

The income and asset limits for federally assisted housing are less restrictive than other need-based programs.[19] Lump-sum additions, such as settlements for personal injury or property loss, are expressly excluded from income in determining a tenant's rent.[20] Periodic payments under a structured settlement may be more problematic; housing providers likely seek to count them as income, as they do with similar periodic payments such as annuities.[21] To avoid such treatment, advocates can argue that these payments should be excluded from countable income because they are compensation solely for personal injury or property losses, not lost wages or other income replacement.[22]

Unlike other need-based programs, there is no asset limit for federally assisted housing, and assets are not counted as income. However, the actual or imputed income from a family's net assets is included in setting its rent.[23] If the assets are valued at less than $5,000, then the actual income generated by the assets is included in the rent calculation. If the household's assets exceed $5,000, then the landlord includes the greater of the actual income from the assets or a percentage of the value of the assets based on the current passbook interest rate, currently set at 2 percent, as determined by the U.S. Department of Housing and Urban Development.[24]

For Jane and Joshua, the proceeds from their lump-sum settlement should not count as income. Otherwise 30 percent of the settlement proceeds would have to be paid toward their Section 8 rent.[25] How-

[19]Federally assisted housing includes public housing authorities, the Section 8 housing choice voucher program, and Section 8 project-based and Rural Housing Service apartment complexes (24 C.F.R. § 5.100 (2011)).

[20]24 C.F.R. § 5.609(c)(3) (2011); HUD [U.S. Department of Housing and Urban Development] Handbook 4350.3 REV-1: Occupancy Requirements of Subsidized Multifamily Housing Programs 5-33 (June 2007) [hereinafter HUD Handbook], http://1.usa.gov/icVb8v. Other excludable lump-sum additions to family assets are inheritances, proceeds from the sale of property, and settlements under accident and health insurance and workers' compensation.

[21]See 24 C.F.R. § 5.609(b)(4), (7) (2011); see also HUD Handbook 4350.3 REV-1, *supra* note 20, at 5–18, 5–33 (treating onetime lottery winnings as an asset but counting lottery winnings paid periodically as income).

[22]See 24 C.F.R. § 5.609(b)(5), (c)(3) (2011). The policy argument is that these payments, regardless of form or frequency, are intended to make the tenant whole by compensating the tenant for injury or loss.

[23]Net family assets include cash held in savings and checking accounts, the principal value of any trust available to the family, equity in real property, individual retirement accounts, and any asset disposed of for less than fair market value within the previous two years. Necessary personal property, such as clothing, furniture, cars, term life insurance, or other assets that are not effectively owned by, or are inaccessible to, the family, are not included as net family assets (24 C.F.R. § 5.603(b) (2011); HUD Handbook 4350.3 REV-1, *supra* note 20, at 5–21).

[24]HUD Handbook 4350.3 REV-1, *supra* note 20, at 5–25; U.S. Department of Housing and Urban Development, Public Housing Occupancy Guidebook 122 n.35 (June 2003), http://1.usa.gov/dLdct8. Although HUD's Guidebook website notes that "the Office of Housing is updating the passbook savings rate," presumably to reflect the nominal rates currently paid by banks on these accounts, to date, it has not done so (http://1.usa.gov/eUXm5q). However, the HUD Seattle Regional Office reduced the HUD passbook rate to 0.2 percent after surveying banks in its four-state region (Seattle Regional Office, U.S. Department of Housing and Urban Development, PHA Circular No. 04-06, Current Passbook Savings Rate Determined by HUD—0.20 Percent (0.002) (Dec. 28, 2004), http://1.usa.gov/e55BkC).

[25]Tenants in federally assisted housing generally pay 30 percent of their adjusted monthly income as rent (24 C.F.R. § 5.628 (2011)).

ever, if they retain the settlement funds in a bank account, then the greater of the actual or imputed income would be included in calculating their future rent.

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Here we examine the mere tip of the iceberg in a complex area of law. The rules for public benefit programs vary by state and change frequently. Other than income and asset tests, these programs have requirements such as citizenship or qualified immigration status and, in some cases, proof of disability or age.

After carefully reviewing your state's rules and discussing the clients' goals and needs, you may be ready to advise Mark, Jane, and Joshua about their options. Mark should apply for SSI and Medicaid and may benefit from having a (d)(4) trust established for him. Jane and Joshua's settlement should be structured as two single lump-sum payments with Jane's portion to be spent down quickly or used to purchase exempt assets and Joshua's to be spent quickly on his needs. The settlement should not affect their Section 8 housing assistance. Mark, Jane, or Joshua should not give away any settlement proceeds. Don't settle for less.

Online Resources for Public Benefit Programs

For more detailed information about the effect of settlements on public benefits, talk to an attorney specializing in public benefits in your state, or visit these websites:

Social Security Administration:
www.ssa.gov

Medicare:
www.medicare.gov

SSI Program Operations Manual:
http://1.usa.gov/eh0al2

Center on Budget and Policy Priorities' links to states' public benefits information:
http://bit.ly/hGu5Pd

Interactive Benefits Finder:
www.benefits.gov/