# Special Needs Settlement Planning

## Preserving Public Benefits and Enhancing the Injured Party's Quality of Life

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Special needs settlement planning combines traditional government benefits planning with settlement-related issues as varied as identifying government benefits programs; determining and compromising Medicare, Medicaid and other liens; advising the personal injury attorney and the client regarding settlement vehicles in the context of disability planning; preparing and administering special needs trusts (SNTs); and creating Medicare set-aside arrangements (MSAs).

The special needs attorney plays a distinctive and important role in personal injury settlement planning. While the personal injury attorney focuses on the litigation issues that will obtain the best settlement for the plaintiff, the special needs attorney focuses on issues unique to individuals with disabilities. As a result, the earlier the special needs attorney enters a case, the greater the benefit to the plaintiff. The personal injury attorney benefits from early intervention by the special needs attorney, since the services provided by the special needs attorney allow the personal injury attorney to concentrate on the litigation and settlement issues without the distraction of disability issues that are typically not his or her area of expertise.

The failure of a personal injury attorney to involve the special needs attorney early in the case may cost the injured party a valuable planning opportunity. For example, the personal injury attorney may not appreciate the fact that a special needs trust cannot be established for individuals over the age of 65, or that New Jersey does not allow people over the age of 65 to place assets in a pooled trust. The earlier a special needs attorney becomes involved, the more likely the injured party will receive the best possible advice.

### Ascertain the Needs of the Plaintiff with Disabilities

An injured person is in immediate need of medical care. The person may lose his or her job, and subsequently group health insurance. A special needs attorney can assist in determining what government benefits programs are available to assist the person until the matter is ultimately settled, and thereafter. There are a number of government benefits programs to consider for a person with disabilities. While an in-depth examination of these programs is beyond the scope of this article, the plaintiff's eligibility for Supplemental Security Income (SSI), Medicaid, Social Security Disability (SSD), Medicare and federally assisted housing should be considered. Preparing a special needs trust may enable the injured party to qualify for means-tested government benefits during the pendency of the lawsuit.

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A life care plan is designed to assess the individual's current

and future needs, and the associated costs. Life care plans recommend appropriate medical equipment, services and treatment; project costs for the recommendations; and consider the current support system of the individual and alternatives in the event the current support system becomes unavailable.

## Public Assistance Programs

The special needs attorney assists the personal injury attorney in determining the public benefits programs for which the injured party is or may become eligible, and the issues presented by those programs, such as:

**SSI.** A means-tested, federal welfare program providing the recipient with a cash benefit for food and shelter. SSI benefits are reduced dollar-for-dollar for "countable income." SSI recipients may not have more than $2,000 of countable resources, including assets of any trust funded with the property of an SSI recipient, unless the trust was created pursuant to 42 U.S.C.A. § 1396p(d)(4)(A).[1] A special needs trust for a tort victim should be structured to avoid payment of trust assets directly to the recipient, so SSI benefits are not reduced or lost, and so trust assets in excess of $2,000 remain 'unavailable' to the recipient.

**Medicaid.** A means-tested federal and state program covering a broad spectrum of medical services without deductibles, co-payments or coverage limits.[2] Medicaid has stringent financial eligibility requirements, including income and resource limitations, as well as penalties for the transfer of assets. New Jersey is an SSI state, meaning all SSI recipients are automatically eligible for Medicaid.

**SSD.** A federal cash benefit program for the benefit of a person with disabilities (as defined under the Social Security Act)[3] administered by the Social Security Administration. SSD is an insurance program based on the Social Security earning records of the SSD recipient that is not means-tested. If a child becomes disabled prior to attaining the age of 22, eligibility is based on the earnings record of a retired or deceased parent.

**Medicare.** A federal medical insurance program established under the Social Security Act and 42 U.S.C.A. §1395 that is not means-tested. To be eligible for Medicare, a person must be: 1) age 65 or older and either eligible for Social Security or Railroad Retirement benefits or the spouse or surviving spouse of a person who is eligible for Social Security or Railroad Retirement benefits; 2) age 65 or older and divorced from a person who is eligible for Social Security or Railroad Retirement benefits, where the marriage lasted at least 10 years and the person did not remarry; 3) under age 65 and, with few exceptions, receiving Social Security Disability benefits for 25 months.[4]

**Federally Assisted Housing.** These are programs that provide subsidized housing, including Section 8 rental assistance for low-income families.[5]

## Determine and Compromise Claims and Liens

Settling a personal injury case can take years from the time the injury occurs. During that time, if the injured party accesses benefits such as Medicaid, Medicare, or Employee Retirement Income Security Act (ERISA)[6] medical insurance, there are liens that must be settled prior to settlement of the personal injury case.

### *The Medicare Lien*

The Medicare Secondary Payer Program (MSP)[7] provides that Medicare is a secondary payer for any medical services for which payments have been made, or can reasonably be expected to be made

under worker's compensation or other insurance, including automobile, health or liability policies. MSP creates a statutory lien for payments made under the Medicare Secondary Payer Act.[8] The Medicare Prescription Drug, Improvement and Modernization Act of 2003[9] expanded Medicare's recovery authority, allowing the government double damages from parties who settle cases without satisfying the Medicare lien. This provision places a great responsibility on attorneys to assure they are compliant. Medicare Part D and Medicare Advantage have a separate right of recovery.[10]

To the extent Medicare makes a payment in a third-party liability case, the payment is conditional and must be repaid when the matter is settled. Medicare's right of recovery has priority over any subrogated right, and also has priority over Medicaid. Medicare is not bound by a settlement made between the beneficiary and the responsible party. Medicare may pursue its own claim against the liability insurer. If the liability insurer does not properly pay Medicare, Medicare has the right to take legal action against the insurer and to collect double damages.[11]

Determining the correct amount of the Medicare claim is an important part of the attorney's role. Centers for Medicare and Medicaid Services (CMS) can provide a conditional payment summary on request. Medicare considers all monies recovered to be related to medical expenses, regardless of how they are characterized. Medicare will recognize allocation of liability payments for non-medical loss only when payment is based upon a court order that specifically designates amounts that are not related to medical expenses, such as amounts for pain and suffering.

Medicare recognizes a proportionate share of the necessary procurement costs (*i.e.*, court costs and attorney fees incurred in obtaining a settlement) as a reduction to Medicare's repayment.[12]

Plaintiff's counsel must notify Medicare of any possible settlement prior to final settlement or adjudication of the case on its merits. Medicare will then stipulate to its claim, preventing additional subsequent charges. A Medicare claim may be asserted even against the estate of a deceased plaintiff.

The amount of the Medicare lien may be appealed in writing. The three levels of appeal are waiver, partial waiver and compromise. A waiver can be requested of a Medicare contractor after settlement is reached and Medicare has set a final claim amount based on financial hardship. Alternatively, only CMS has authority to compromise a Medicare lien. A request for compromise may be made prior to or after settlement. A partial waiver based on facts and circumstances may be granted against a specific entity. If the initial request for waiver, compromise or partial waiver is denied, an appeal for reconsideration may be made.[13]

### *The Medicaid Lien*

Federal law requires each state Medicaid program to ascertain the legal liability of third parties to reimburse for medical assistance provided by the state, and to recover from third parties the cost of medical assistance provided.[14] In New Jersey, the attorney general is required to enforce rights against third parties for recovery of medical assistance payments. The Medicaid recipient, or his or her guardian, executor, administrator or other appropriate representative who brings an action for damages against a third party, must provide written notice to the appropriate Medicaid agency. As a condition of eligibility for medical assistance, a Medicaid recipient assigns to the state any rights to payment for medical care from a third party.[15]

The United States Supreme Court has held that federal laws requiring a Medicaid recipient to assign payments from third parties only extended to medical care, and did not allow state Medicaid agencies to collect on amounts attributable to future expenses, permanent injury and lost earnings.[16]

Medicaid may waive or compromise the enforcement of a lien in hardship situations. In some states, however, hardship waivers are not available. The New Jersey Appellate Division found that states have a duty of repayment to the federal government of monies expended by the federal government, even if the state compromises a lien, and therefore the state of New Jersey can refuse to compromise the lien.[17]

Failure to notify the appropriate agencies when a lien may exist may result in the attorney's liability for satisfaction of the lien. An attorney was held liable for satisfaction of a lien where he or she elected to structure an entire settlement, other than attorney's fees, thus failing to protect Medicaid's lien.[18]

### *Employee Retirement Income Security Act (ERISA) Liens*

ERISA preempts state law in the area of self-funded employee benefit plans.[19] There are two important exceptions known as the savings clause and the deemer clause. The savings clause states that ERISA does not exempt any person from any state law regulating insurance banking or securities.[20] The deemer clause states that an employee benefit plan or trust under such a plan shall not be deemed an insurance company or other insurer, bank, trust company, or investment company for purposes of any state law regulating insurance companies, insurance contracts, banks, trust companies or investment companies.[21] It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA.

The saving clause returns to the states the power to enforce those state laws that "regulate insurance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be

"deemed" to be an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.[22]

As a result, a self-insured employee benefit plan has federal preemption under ERISA and recovery is governed by the terms of ERISA, whereas an employee benefit under an insurance company plan is subject to state law with regard to any right of recovery. ERISA provides that a civil action may be brought by a plan fiduciary to obtain appropriate equitable relief to enforce any provisions of ERISA or the terms of the plan.[23]

In *Sebeboff v. Mid Atlantic Med. Servs., Inc.*,[24] the seminal case on ERISA liens, the fiduciary of an ERISA health insurance plan sued the beneficiaries to collect medical expenses paid by the plan on their behalf. The plan contained an "Acts of Third Parties" provision requiring beneficiaries to reimburse the fiduciary for all third-party recoveries. The beneficiaries were injured in an auto accident, and the plan paid their medical expenses. The fiduciary sought reimbursement of those expenses upon the settlement of the beneficiaries' tort case. The Court held the fiduciary's action to enforce the acts of third parties provision was authorized as equitable relief under Section 502(a)(3) of ERISA.

To determine whether there is an ERISA lien, the special needs attorney must first determine whether the plan is self-funded, and therefore governed by ERISA and not state law. If it is an ERISA plan, the plan itself must be reviewed to determine whether its language provides a right of recovery. In addition to looking to the language of the plan, there are other possible defenses to an ERISA claim: the "make whole" doctrine; equitable contract defenses; specific fund doctrine; and application of *Ahlborn*.[25]

The make whole doctrine, whereby an injured person should be fully compensated for injuries prior to reimbursement for medical expenses, is the default law in most states, and is part of federal common law. Specific language in a plan can negate the doctrine; however, standard subrogation language does not negate it.[26] Cases involving the make whole doctrine have produced mixed results.[27]

Enforcement of an ERISA lien is an equitable action arising out of contract law. As a result, equitable defenses may be effective counters to an ERISA claim.[28] Among these are the defenses of "equity will not aid in the enforcement

of forfeiture" and "unclean hands."

The specific fund doctrine was the principal at work in *Sebeboff*. Settlement funds in *Sebeboff* were set aside during the resolution of the lien. The Court held that the lien was only enforceable against a specifically identified fund. The plan language limited its right of recovery to the amount paid for care associated with the injury, not the entire settlement. As a result, the language of the ERISA plan must be analyzed to determine if it identifies a specific fund or if it does not limit the plan's recovery to the amount paid for care associated with the injury. If not, the lien is not enforceable.

## Medicare Set-aside Trusts

While resolving Medicare liens addresses medical expenses paid by Medicare *prior* to the settlement of a case, Medicare set-asides address medical expenses that will be incurred *after* the settlement of a case. A portion of the settlement is set aside in a trust created for this purpose. The Medicare Secondary Payer Program (MSP) provides that Medicare is a secondary payer for any medical services for which payments have been made, or can reasonably be expected to be made. Payment of future medical expenses is covered under the MSP.

Worker's compensation is a program that compensates workers for injuries sustained on the job. If an injured worker is eligible for Medicare, Medicare is a secondary payer of medical expenses to worker's compensation. Most state worker's compensation programs provide for final settlements to close a claim, ending the employer/insurer's financial obligation. Once a final settlement is reached, the injured worker cannot look to the employer/insurer for payment of medical expenses associated with the injury.

Medicare has an interest in a lump-sum settlement to the extent that the funds are intended to pay future medical expenses. To prevent such a settlement from shifting responsibility for payment of future medical costs from the primary payer to Medicare, Medicare requires a portion of the settlement to be set aside for payment of future medical benefits that Medicare would otherwise pay.[29] The amount of the set-aside is determined on a case-by-case basis, and should be reviewed by CMS. Once the CMS determined set-aside amount is exhausted and accurately accounted for to CMS, Medicare becomes the primary payer for future Medicare-covered expenses.[30]

Worker's compensation commutation cases are settlement awards intended to compensate individuals for future medical expenses resulting from a work-related injury. Compromise settlements, on the other hand, are deemed to be a worker's compensation payment for current or past medical expenses. Medicare set-asides are only required in commutation cases.

### *Third-party Liability Cases*

All insurers, third-party health plans, self-insured plans and self-administered plans are required to identify situations where the plan is or has been a primary plan to Medicare. Failure to comply results in a penalty of $1,000 for each day of noncompliance for each individual for whom the information should have been submitted.[31] Medicare does not require set-asides for third-party liability cases at this time, mainly because CMS does not review liability settlements as it does worker's compensation settlements. Therefore, there is no mechanism in place to calculate a set-aside amount to protect Medicare's interests.

Nevertheless, plaintiffs' attorneys may wish to calculate a set-aside amount using the rules CMS imposes on worker's compensation cases. Alternatively, there are companies that specialize in determining the amount of Medicare set-asides and establishing Medicare set-aside trusts.

## Structured Settlement Planning

A structured settlement commonly involves the purchase, by the defendant's insurance carrier, of an annuity calculated to pay certain sums at regularly scheduled intervals in the future. Insurance carriers representing defendants in a personal injury case often favor structured settlements because they can settle the case for less money up front than the actual value of the case. Insurance companies, however, often are unwilling to disclose the amount that will be paid to purchase the annuity. This makes it difficult for the plaintiff's lawyer to evaluate the merits of the settlement offer.

Structured settlements are intended to provide a secure and fixed stream of recurring payments to a claimant over a long period of time. They avoid dissipation of lump sums by injured parties who may then be left without means of support. Strong public policy in favor of deterring claimants from squandering their settlements or awards has led to favorable tax rules for structured settlements.

Structured settlement proceeds are not subject to income tax. The proceeds, however, can be subject to federal estate tax if the settlement is structured with guaranteed payments so the person with disabilities would receive payments for life and another person would receive payments upon the death of the disabled person. Under those circumstances, the present value of the payments to be received by the other person would be included in the deceased person's estate.

Structured settlement annuities can be combined with lump-sum payments to meet the specific needs of the injured individual. For example, lump-sum payments can be used to pay medical bills, rehabilitation costs and debts of the injured party.

Settlements can be structured without the purchase of an annuity. The plaintiff can settle the matter for a lump-sum and future payments, and assign a certain amount of the settlement proceeds to a structured settlement trust. The trustee invests the proceeds to maximize asset growth and income, and makes periodic payments to the injured party.

## Structured Settlement Planning with Special Needs Trusts

Payments from a structured settlement can be made to a special needs trust. A special needs trust enables the individual with disabilities to retain existing means-tested public benefits, such as SSI and Medicaid, or to financially qualify for such benefits while having funds available to supplement the individual's needs that are not covered by government programs. The trust funds can be used for a myriad of purposes, such as additional support services at home, vacations, companions, vehicles and a residence. If a special needs trust is created, the amount in the trust paid back to Medicaid will be deductible for federal estate tax purposes as a claim against the estate.

A structured settlement may be advantageous to the plaintiff because of the availability of large sums of money to the trustee of a special needs trust. Structured settlement payments often provide a fixed stream of income, and therefore, they usually will not be subject to unfavorable economic conditions, such as recessions or inflation.

One of the disadvantages of structured settlements, however, is the inability of the injured party to change the amount received or the schedule of payments. When circumstances change and the injured party needs a lump sum of money (to purchase a house, for example) the injured party cannot simply give the annuity back to the life insurance company for a lump sum.

Similarly, the injured party is unable to unilaterally change the payee of the structured settlement. Yet often there is a need to make such a change when it is subsequently determined that the payments should be deposited into a special needs trust so the injured person can receive public benefits.

If structured settlement payments are going to be placed into a special needs trust, the defendant, or his or her assignee, should purchase the structured settlement to avoid constructive receipt by the plaintiff or the special needs trust, and to avoid the loss of the benefit of tax-free interest.

The trustee of the special needs trust should be named as the recipient of the structured settlement payments. If the individual with disabilities is named as the recipient, the payments can disqualify the disabled person from receiving means-tested benefits, such as SSI and Medicaid. A judgment involving both a structured settlement and a special needs trust should direct the periodic payments from a structured settlement to 'pour over' into the special needs trust.

## Qualified Settlement Funds

Section 468B of the Internal Revenue Code authorizes the establishment of qualified settlement funds. A qualified settlement fund (QSF) permits a plaintiff to set up a structured settlement without participation by the defendant, so the plaintiff can receive certain tax advantages of these settlements with provisions that best meet his or her needs. QSFs typically are used to settle class action litigation, but they also can be used by plaintiffs with individual claims. QSFs provide defendants with an immediate tax deduction, as well as a full release.

After the settlement or trial proceeds have been deposited into the QSF, the funds can be turned over to the plaintiff, paid into a special needs or other trust, or used to buy a structured-settlement annuity that would provide the same tax advantages to the plaintiff as a structured settlement purchased by a defendant insurer.

## Guardianships/Conservatorships

When the injured party is mentally incapacitated or a minor, it may be necessary to have a guardian or conservator appointed to prosecute and settle the personal injury litigation, or to provide judicial oversight of the settlement or litigation proceeds. The special needs attorney can file a guardianship or conservatorship proceeding under Rule 4:86 and assist the personal injury attorney in obtaining court approval for the settlement and the establishment of a special needs trust.

## Determining the Appropriate Fiduciaries

The assistance of the special needs attorney is valuable in identifying an appropriate guardian and trustee. That attorney can recommend corporate fiduciaries, when appropriate, and counsel the injured party or family members with respect to the qualifications that should be considered in choosing fiduciaries. Family members may not be the best choice as trustee.

A fiduciary must exercise a high degree of care when dealing with and managing the property of a ward or beneficiary. A fiduciary's interest cannot conflict with the duty of loyalty.[32] This high standard is quite rigid. A trustee is a fiduciary, and, among other things, a trustee must follow the terms of the trust regarding how it should be managed.

Guardians and trustees must keep accurate records. The fiduciary may be required to act in accordance with the state's Prudent Investor Act or as a reasonably prudent investor pursuant to the common law of a state that has not

enacted the Prudent Investor Act. Some states require trustees of third-party trusts to render accountings on a regular basis (such as once a year), and the trust itself may contain provisions regarding how often the trustee must provide such an accounting.

New Jersey regulations mandate additional responsibilities for special needs trustees, including, *inter alia*: 1) periodic accountings of all expenditures be submitted to the appropriate public benefits agency; 2) advance notice to the state of any expenditure in excess of $5,000, and of any amount that would substantially deplete the principal of the trust; and 3) reporting additions to trust *corpus* to the appropriate public benefits agency.[33]

## Resource and Income Limitations

A trustee of a special needs trust must understand the public benefits programs that may be available to the beneficiary. A special needs trust is intended to preserve eligibility for means-tested government benefits programs such as SSI and Medicaid. Such programs limit the amount of resources the beneficiary can own and the amount of income he or she can receive. The beneficiary's receipt of income or the provision by the trust funds of food or shelter can adversely affect eligibility for such programs. Accordingly, the trustee must administer a special needs trust with constant consideration of those resource and income limitations.

## Endnotes

1. 20 C.F.R. § 416.1216(a)-(b).
2. 42 U.S.C.A. § 1396 *et seq.*, N.J.S.A. 30:4D-1 to 52.
3. 42 U.S.C.A. § 1382c(a)3A.
4. 42 C.F.R. § 406.5.
5. 42 U.S.C.A. §§1437-1440 and 42 C.F.R. §§ 813.101-813.110.
6. 29 U.S.C.A. §§ 1101 *et seq.*
7. 42 U.S.C. 1395y(b).
8. 42 U.S.C.A. §1395y(b)(2).
9. Medicare Prescription Drug, Improvement and Modernization Act of 2003, P.L. 108-173 (Dec. 8, 2003).
10. Thomas D. Begley Jr. and Angela E. Canellos, *Special Needs Trust Handbook*, 2009 Supplement, (Frederick, Maryland: Aspen Publishers, 2009), p. 11-50.
11. 42 C.F.R. § 411.24(c)(1)(ii).
12. 42 C.F.R. § 411.37(a).
13. Thomas D. Begley Jr. and Angela E. Canellos, *Special Needs Trust Handbook*, 2009 Supplement, (Frederick, Maryland: Aspen Publishers, 2009) pp. 11-48 and 11-49.
14. 42 U.S.C. § 1396a(a)(25)(A) and (B).
15. 42 U.S.C. § 1396k(a)(1), N.J.A.C. 10:49-14.1.
16. *Arkansas Dept. of Health and Human Servs., et al. v. Ahlborn*, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).
17. *Waldman v. Candia*, 317 N.J. Super. 464 (App. Div. 1999); *See also, In re Keitur*, No. A-5163-98 (App. Div. 2000) (slip op.).
18. *Burlington County Board of Social Services v. Kaplan et al.*, No. A-2203-01T2 (App. Div. Feb. 25, 2003) (unpublished opinion).
19. 29 U.S.C. § 1001 *et seq.*
20. 29 U.S.C. § 1144(b)(2)(A).
21. *FMC Corp. v. Holliday*, 498 U.S. 52, 58.
22. 29 U.S.C. § 1144(b)(2)(B).
23. 29 U.S.C. § 1132(a)(3).
24. *Sebeboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006).
25 547 U.S. 268 (2006).
26. Thomas D. Begley Jr. and Angela E. Canellos, *Special Needs Trust Handbook*, 2009 Supplement, (Frederick, Maryland: Aspen Publishers, 2009) pp. 11-57 and 11-58.
27. *Id*
28. *Copeland Oaks v. Haupt*, 209 F. 3d 811 (6th Cir. 2000); *In re Paris*, 211 F. 3d 1265 (4th Cir. 2000); *Moore v. CapitalCare, Inc.*, 461 F. 3d 1 (D.C. Cir. 2006).
29. Thomas D. Begley Jr. and Angela E. Canellos, *Special Needs Trust Handbook*, 2009 Supplement, (Frederick, Maryland: Aspen Publishers, 2009) p. 11-58.
30. 42 U.S.C. § 1395y(b).
31. 42 U.S.C. 1395y(b)(7).
32. *In re Carter's Estate*, 6 N.J. 426, 436, 78 A.2d 904, 909 (N.J. Sup. Ct. 1951); *Staats v. Bergen*, 17 N.J. Eq. 554 (N.J. 1867); *Stanley's Estate v. Fidelity Union Trust Co.*, 108 N.J. Eq. 564, 565-66, 138 A. 388, 388-89 (N.J. Ch. 1927). *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994).
33. N.J.A.C. 10:71-4.11(g)

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