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Repository Citation

Mitchell, Cheryl C. and Mitchell, Ferd H. (2000) "Handling Tort Recoveries for Persons Over and Under Age 65," *Marquette Elder's Advisor*: Vol. 2: Iss. 2, Article 9.

Available at: <http://scholarship.law.marquette.edu/elders/vol2/iss2/9>

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Handling Tort Recoveries for Persons Over and Under Age 65: Analysis and Options

Winning the case is only the first step in creating a satisfactory outcome for an injured elderly or disabled individual. Myriad rules pertain to the distribution of the award and distribution arrangements may affect current and future eligibility for programs such as Medicaid and SSI.

By Cheryl C. Mitchell and Ferd H. Mitchell

Winning or settling a personal injury claim on behalf of a disabled or elderly individual is only the first part of the battle. It is also necessary to evaluate the options for distribution of the funds received, to

meet statutory requirements, and assure that the best interests of the disabled or elderly person are protected. Before the distribution of personal injury funds, it is essential that an attorney determine the requirements of governmental programs and make sure all statutory claims are satisfied. Persons covered by Medicare must, under most circumstances, reimburse the government for any expenses paid by Medicare with respect to the injury, as a subrogation requirement,¹ and Medicaid will often require reimbursement for past assistance before funds are otherwise distributed.

After the payment for past assistance, it is then necessary to decide on the actions that should be taken with respect to any remaining funds. Persons who are receiving Supplemental Security Income (SSI) or Medicaid assistance may have their benefits terminated if they receive funds above a specified level,² and such limitations on assets and income will affect the various options. If the injured person is under age sixty-five, it is often desirable to transfer funds directly to an appropriate trust for the person. If the injured person is over age sixty-five, transfers of funds through various types of gifting may be desired options. This article describes the choices available as a result of a tort settlement, and the advantages and disadvantages of each.³

The Medicare Super Lien

Medicare is the federal government's medical care program for persons who are sixty-five years of age or older, disabled, or blind.⁴ The definitions of disability⁵ and blindness⁶ are statutory. Medicare coverage begins at age sixty-five for those who are eligible for Social Security.⁷ Coverage for blind and disabled persons does not commence until after a twenty-four-month duration of a qualified disabili-

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ty.⁸ When an individual receiving Medicare is injured, the federal government has the right to be repaid from any funds paid to the injured party as a tort settlement or recovery,⁹ if Medicare has made payment for either goods or services furnished in connection with the injury.¹⁰

Three critical questions must be asked prior to developing any disbursement plan for such funds. The first inquiry must be whether the injured individual is a Medicare recipient. If the answer to this question is affirmative, then the next issue is whether the Medicare program has paid for any of the medical or associated expenses related to the tort action. Medicare has what has been denominated as a “super lien”¹¹ that must be satisfied when Medicare funds have been used to pay for medical costs.¹² As one author noted, although technically not a “lien” at all because the government does not have any rights against property, the effects of the statute go far beyond any ordinary lien or right of recovery.¹³ The government must be repaid from any funds received within sixty days of the date funds are received.¹⁴ The government automatically has a right of recovery against any funds received in a personal injury action for reimbursement.¹⁵

While the federal statutes do not specifically permit the deduction of attorney’s fees from the Medicare repayment amount, the government does allow costs of recovery (including reasonable attorney’s fees) to be deducted from Medicare reimbursement.¹⁶ If an attorney unknowingly distributes funds to the client without notifying Medicare and satisfying the lien, third parties who have received payment (including attorneys) may be personally liable for payment to the government.¹⁷ The government is not required to reduce its lien on a pro-rata basis, so the entire settlement (less costs and attorney’s fees) might have to be paid to the government by an attorney.¹⁸

It is possible to request a reduction or elimination of the lien due to hardship.¹⁹ This request must be made in writing, and the reasons to justify the reduction or waiver should be specifically stated. Based upon the experience of the authors, at least six months should be allowed for a response by the government.

Medicaid Liens

Medicaid is a joint program between the federal government and each state that chooses to partici-

pate in the program.²⁰ Former President Ronald Reagan described Medicaid as a “safety net” program that is intended to help provide medical coverage for categorically needy individuals who are aged (over sixty-five), blind, or disabled with limited assets and no way to pay for medical care that they require.²¹ Medicaid is the “payor of last resort,” notwithstanding Medicare’s superior subrogation rights.²² Not all low-income individuals are covered by Medicaid, and there are strict eligibility criteria.²³ Medicaid pays for a variety of health care services, including, but not limited to hospitalization, rehabilitation, medical equipment, and long-term health care needs such as nursing home coverage.²⁴

When a tort settlement is received, the Medicaid program may have to be reimbursed for prior services provided before any further distribution of funds. It is unresolved as to whether this recovery applies only to services related to the tort or to all prior services. The lien recovery requirements vary from state to state, although the clear trend is to require reimbursement before funding a special needs trust (SNT).²⁵ An intriguing issue has recently arisen in the context of tort settlements and individuals on Medicaid, as to whether the state Medicaid agency can also insist that part of the tort proceeds be set aside for anticipated future Medicaid payments for the benefit of the injured individual. At least three courts have held that prior to funding an SNT for a person under the age of sixty-five, in addition to repayment of past Medicaid benefits, it is necessary to set aside additional amounts for future care.²⁶

An attorney must determine whether the individual has been a Medicaid recipient in the past, whether there are any lien requirements under state law, and how this lien applies to the specific case. For Medicaid, it is also possible to request a reduction or elimination of the lien due to hardship.²⁷

No SSI Lien Imposed

SSI is a federal program that provides income for persons with very limited assets and low levels of income who are disabled or over age sixty-five.²⁸ SSI provides cash assistance, but does not provide medical care or health care insurance.²⁹ In most states,³⁰ SSI eligibility also makes an individual eligible for coverage by the Medicaid program. SSI does not impose a lien on personal injury settlements.

Impact of a Settlement on Program Eligibility

After the payment of all liens, the receipt of the remainder of any settlement funds by the injured person will not affect Medicare coverage.³¹ However, such funds will typically have a significant effect on Medicaid and SSI eligibility because of the strict financial eligibility limits.³² For married persons, Medicaid eligibility can be maintained through the transfer of funds to the well spouse. For the single person, penalties will typically be imposed if funds are given away. There are some limited exceptions to penalties for transferring assets.³³ For example, transfers to a spouse, a child under the age of twenty-one or a child who is blind or disabled are not penalized.³⁴ In addition, transfers to a son or daughter who was residing in the home of the parent and who provided care for a period of at least two years prior to the institutionalization of the parent are not penalized.³⁵

In general, the receipt of remaining funds by a person on Medicaid or SSI will terminate his or her coverage.³⁶ If no other action is taken, the funds received must be spent to replace the Medicaid or SSI assistance until the funds are exhausted. The injured person can then reapply for the appropriate assistance. It is essential to determine the options that are available to produce the most desirable outcome for the injured person.

If received funds are not reported in a timely manner, any months during which SSI or Medicaid was received by an ineligible person will be counted as an overpayment.³⁷ The government must give notice of the overpayment to the recipient and advise of the right to request a waiver.³⁸ A waiver can be granted based upon "fault."³⁹ SSI overpayments can be repaid, or the government can withhold a portion of the individual's current SSI payments each month⁴⁰ during which the recipient is eligible until the overpayment is completely repaid.⁴¹ Medicaid overpayments may potentially lead to a recovery from remaining assets or allegations of fraud.⁴²

In many states, Medicaid has more liberal rules than SSI.⁴³ For example, a person who is aged, blind, or disabled may be categorically eligible for Medicaid, regardless of whether he or she is eligible for SSI. An individual who has more assets or income than allowed for SSI eligibility may be eligible for Medicaid, depending upon the state's Medicaid plan.⁴⁴

The most common example is an unmarried elderly person who is in a nursing home and whose monthly income is greater than an SSI-based standard, but not sufficient to pay the nursing home bill. Assuming the individual has no more countable assets or resources⁴⁵ than the allowable SSI limit of \$2,000,⁴⁶ they should be eligible for Medicaid coverage in the nursing home. Most of the person's monthly income would have to be paid toward the cost of care, with the government picking up the balance. Medicaid also provides for medical care, rehabilitation services, prescription drugs, and other related coverage.

Use of Trusts and Gifting

For persons under age sixty-five, opportunities sometimes exist to immediately transfer remaining funds into an appropriate trust to produce a preferred outcome for the injured person. An SNT can be prepared to make the funds unavailable to the beneficiary, except for well-defined uses. These funds may be used to purchase goods and services other than food, clothing, shelter, medical care and durable medical equipment, for those receiving SSI and Medicaid assistance, and will enable the individual to remain eligible.⁴⁷ To avoid a penalty for such a transfer to trust, on the death of the beneficiary, the remaining funds must go to reimburse Medicaid for the care provided or to a charitable purpose.⁴⁸

For persons over age sixty-five, there are different trust restrictions. Funds cannot be sheltered by placing them in a trust that attempts to avoid having to pay for care covered by Medicaid. By statute, if funds in such a Medicaid Qualifying Trust are available to pay for any needs for the injured person, they are an available resource for Medicaid.⁴⁹ Thus, the establishment of such a trust for a person over age sixty-five is not a useful strategy.⁵⁰

For those over age sixty-five, remaining funds that are received by the injured person will result in temporary termination of assistance. The injured person can choose to gift some of the funds (according to program restrictions) to an adult child or other relative, or use funds to purchase property that is not counted in determining SSI and Medicaid eligibility.⁵¹ If exempt property is purchased, it may be subject to a later Medicaid lien, which may limit the value of this option. Typically, there will be a gifting penalty period imposed before reeligibility can be established.⁵²

Restrictions on gifting for both the Medicaid and SSI programs may result in the injured person losing both Medicaid and SSI benefits for a period of time, if assets are given away. From 1988 until December 15, 1999, there was no penalty for transferring assets (including into trusts) for SSI recipients. This situation changed when Congress enacted the Foster Care Independence Act of 1999.⁵³ Under the new rules, there are penalties for transferring assets for less than adequate consideration, and penalty periods are now imposed for transfers to a trust.⁵⁴

The methods for calculating Medicaid penalty periods vary among states. Typically, gifts are aggregated by month and the penalty periods are combined. Assistance can be reestablished only after all penalty periods have ended. If a state has selected not to count fractional months, accelerated gifting options may be available.

An exempt asset (typically a residence) is a resource that is not counted for either Medicaid or SSI eligibility. If the injured party immediately purchases a home with the proceeds of a tort verdict or settlement, the funds used to purchase the home will not be counted. But the home will then be subject to the Medicaid lien upon the death of the Medicaid recipient or sale of the home. If the state does not penalize transfers that are less than one month of care, the owner may transfer fractional interests (less than 100 percent of the private pay rate) each month until the entire home is deeded. If the entire interest in the home is transferred in this manner, there will be no lien when the individual dies.

Example

An injured person receives a tort settlement of \$100,000. There is a Medicare super lien of \$10,000 and a Medicaid lien for prior medical payments of \$20,000. The remainder of \$70,000 is to be distributed.

If the person is under the age of sixty-five, the entire amount can pass directly into an SNT for the injured person without affecting Medicaid and SSI eligibility. The funds can then be used for restricted purposes while the individual continues to receive assistance. On the death of the beneficiary, the balance will be distributed according to statutory requirements.

For persons who are age sixty-five or older, the funds can pass to the injured individual, terminat-

ing eligibility,⁵⁵ or the funds can be invested in exempt assets, making the individual eligible within a month. Consider a person requiring Medicaid assistance at home, with monthly cost of replacing Medicaid services and goods and SSI assistance of \$2,000 per month. Assume that fractional months do not count and that an optimum gifting plan results for transfers of approximately \$8,000 per month,⁵⁶ with a penalty period of one month for each gift made. Each month, \$2,000 will be used for expenses and \$8,000 can be gifted. The gifted funds can pass to a child or other person.⁵⁷ The total asset balance will decrease by \$10,000 per month. After about seven months, reeligibility can be established. The gifted funds (of \$56,000) may later be used by the child, at his or her choice, on behalf of the injured person to supplement any governmental benefits.

Conclusion

Whenever a personal injury settlement is received, care must be taken to assure that the distribution of funds meets all statutory requirements and the best-interest test for the injured person. A failure to adequately understand the possible choices can result in an unsatisfactory outcome for the client even when the case is won or settled.

Endnotes

1. See 42 U.S.C. § 1395y(b)(2)(B)(ii)-(iii).
2. See 42 U.S.C. §§ 1381a, 1382.
3. A recent article provided background regarding two types of trusts that may be used with respect to Medicaid eligibility when a tort settlement is received; in this present article, such trusts are placed in context. See generally Roger M. Bernstein and Margrit S. Bernstein, *The Use of Special Needs Trusts in the Settlement of Personal Injury Cases*, 1 ELDER'S ADVISOR 58 (Summer 1999).
4. See generally Soc. Sec. Act, tit. XVIII (codified at 42 U.S.C., ch. 7); 42 C.F.R. §§ 405 *et. seq.*
5. See 42 U.S.C. § 1382c(a)(3)(A).
6. See 42 U.S.C. § 1382c(a)(2).
7. See 42 U.S.C. § 1395c.

8. See 42 U.S.C. § 1395c; 42 C.F.R. § 406.12(a).
9. See 42 U.S.C. § 1395y(b)(2)(B).
10. See *id.*
11. See Timothy V. Hoffman & George L. Acosta, *Beware of the "Super Lien": Medicare Payments' Effect on Personal Injury Cases*, 81 ILL. B.J. 81, 81 (1993).
12. See 42 U.S.C. § 1395y(b)(2)(B).
13. See generally Thomas J. Nyzio, *Medicare Recovery in Liability Cases*, 7 S.C. LAW. 20 (1996). See also *Zinman v. Shalala*, 835 F. Supp. 1163 (N.D. Cal. 1993).
14. See 42 C.F.R. § 411.24(h).
15. See 42 U.S.C. § 1395y(b)(2)(B)(i).
16. See 42 C.F.R. § 411.37.
17. See 42 C.F.R. § 411.24(g).
18. See generally *Cox v. Shalala*, 112 F.3d 151 (4th Cir. 1997).
19. See 42 U.S.C. § 1395y(b)(2)(B)(iv). In *Zinman v. Shalala*, 835 F. Supp. 1163, 1172 (N.D. Cal. 1993), the court ordered the Secretary of Health and Human Services to develop written guidelines for waiver requests based on "equity and good conscience."
20. See 42 U.S.C. §§ 1396, 1396a-u. Currently all fifty states, Puerto Rico, Guam, and the Virgin Islands participate in the Medicaid program. See also JOHN J. REGAN ET AL., *TAX, ESTATE AND FINANCIAL PLANNING FOR THE ELDERLY* § 10.02[1] (1999).
21. See 42 U.S.C. § 1396; 42 C.F.R. § 430.0.
22. See *Norwest Bank v. Doth*, 159 F.3d 328, 333 (8th Cir. 1998).
23. These rules are quite complicated. For a complete analysis of the applicable rules and regulations see REGAN, *supra* note 20, at § 10.7.
24. See 42 U.S.C. § 1396d(a); 42 C.F.R. §§ 440.1-440.180.
25. See 42 U.S.C. §§ 1396a(25), 1396k (regarding recovery requirements). In Illinois, New Jersey, New York, Washington, and Wyoming, courts have ruled that the Medicaid program must be repaid from tort recovery prior to funding special needs trust (SNT). ILLINOIS: See, e.g., *In re Calhoun*, 684 N.E.2d 842 (App. Ct. 1997). NEW JERSEY: See, e.g., *Waldman v. Candia*, 722 A.2d 581 (Super. Ct. App. Div. 1999). NEW YORK: See, e.g., *Cricchio v. Pennisi*, 683 N.E.2d 301 (1997); *Link v. Town of Smithtown*, 700 N.Y.S.2d 52 (App. Div. 1999); *Towne v. County of Saratoga*, 680 N.Y.S.2d 129 (App. Div. 1998). WASHINGTON: See, e.g., *Cuello v. Valley Farm Workers Clinic, Inc.*, 957 P.2d 1258 (Ct. App. 1998). WYOMING: See, e.g., *Cargill v. Wyoming*, 967 P.2d 999 (1998). See also Lawrence A. Friedman, *Medicaid Liens: Not All Need to be Repaid in Full Before Funding SNT*, ELDER L. REP., Feb. 1998, at 1. Other courts have ruled that the Medicaid program need *not* be repaid prior to funding of SNT; see, e.g., *Leddick v. DLP Tavern Corp.*, 652 N.Y.S.2d 1002 (App. Div. 1997); *Merer v. Romoff*, 660 N.Y.S.2d 241 (Sup. Ct. 1997).
26. See generally *Calvanese v. Calvanese*, 710 N.E.2d 1079 (N.Y. 1999); *Gold ex rel. Gold v. United Health Servs. Hosps., Inc.*, 701 N.Y.S.2d 123 (App. Div. 1999); *In re Santiago v. Melamud*, 698 N.Y.S.2d 449 (Sup. Ct. 1999).
27. See 42 U.S.C. § 1396p(b)(3); *In re Neale*, Wash. Dept. of Soc. and Health Servs., Office of Appeals, Docket No. 0995 A 1033, Case No. 37-A-526210-0 (June 4, 1996).
28. See generally 42 U.S.C. §§ 1381 *et seq.*; 20 C.F.R. §§ 416 *et seq.*
29. See 42 U.S.C. §§ 1382, 1382c(a); 20 C.F.R. § 416.211.
30. States are divided into two groups, those states that follow SSI rules and regulations in determining Medicaid eligibility rules and those that use more restrictive criteria. Those states using more restrictive criteria than SSI to determine eligibility for Medicaid are referred to as "§ 209(b)" states, under amendment § 209(b) of 1972 to the Social Security Act. See 42 U.S.C. § 1396a(f); 42 C.F.R. § 435.120(a). The § 209(b) states are, Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Utah, and Virginia.
31. See 42 C.F.R. § 406.10(a)(3).
32. See 42 U.S.C. §§ 1381a, 1382.

33. See 42 U.S.C. § 1396p(c)(2)(A)(i)–(iv).
34. See *id.*
35. See 42 U.S.C. § 1396p(c)(2)(A)(iv). Note that the care provided by the child must have allowed the parent applying for Medicaid to continue to reside at home and thereby avoid the higher cost of institutionalization.
36. See 42 U.S.C. §§ 1381a, 1382.
37. See 42 U.S.C. § 1383(b); 20 C.F.R. § 416.537.
38. See 20 C.F.R. § 416.558(a).
39. See 42 U.S.C. § 1383(b)(1)(B); 20 C.F.R. §§ 416.550, 416.552, 416.555.
40. See 20 C.F.R. §§ 416.560, 416.570.
41. The monthly amount the government can deduct from the individual's SSI check is either the amount of the benefit for the month or an amount equal to 10 percent of the individual's countable monthly income, whichever is less. See 42 U.S.C. § 1383(b)(1)(B).
42. See generally *Nevada v. Shively*, 871 P.2d 355 (Nev. 1994).
43. States may elect whether to cover other, optional groups of persons. See 42 U.S.C. § 1396a(a)(10)(A)(ii).
44. See 42 U.S.C. § 1396a (specifying the mandatory requirements that states must satisfy under the Medicaid program).
45. Resources that are not counted include the applicant/recipient's home and an automobile necessary for the individual to maintain a business, trade, or job, or which is the only source of transportation to and from essential services such as doctors, shopping, etc. Also exempt are property needed in connection with a job, trade, or business, life insurance policies with less than a combined face value of \$1,500 or less, or with a cash surrender value of less than \$1,500 and burial spaces and burial funds. See 42 U.S.C. § 1382b(a)(13)(B); 20 C.F.R. § 416.1210.
46. See 20 C.F.R. § 416.1205(c).
47. See HCFA Pub. 45-3 § SM3 3259.6 (B). HCFA State Medicaid Manual § 3259.6(B) was amended by HCFA Transmittal No. 64. Courts most often decide cases involving trust assets by determining whether any portion of the trust is "available to meet the needs" of the beneficiary. The law regarding trusts was amended by Congress in 1993. See also James N. Zartman, *Planning for Disability*, 15 PROBATE NOTES 11 (1989); Kenneth M. Coughlin, *Here Come the Trustbusters: States Move to Restrict Medicaid Planning*, ELDER L. REP., Nov. 1992 at 1; Harry S. Margolis, *Now It's the Law: Revised Medicaid Eligibility Rules Take Effect*, ELDER L. REP., Aug. 1993, at 1.
48. Trusts prepared under 42 U.S.C. § 1396p(d)(4)(A) permit the transfer of personal injury funds without penalty for persons under the age of sixty-five. These trusts, however, require that any amounts remaining in the trust at the death of the beneficiary must be used to reimburse the Medicaid program for expenses it has paid. Trusts prepared under 42 U.S.C. § 1396p(d)(4)(C) for persons over age sixty-five may pass the remainder to a charitable trust. See, e.g., A. Frank Johns, *Elder Law Attorneys Counsel to Civil Litigators: A Potential Network to Preserve Disabled Client Damage Awards Using the Supplemental Needs Trust*, NAELA Q., Spring/Summer 1998 at 3; Clifton B. Kruse, Jr., *The (c)(2)(B)(iv) Trust*, NAELA Q., Spring/Summer 1998 at 20.
49. See 42 U.S.C. § 1396p(d)(2)(B).
50. Some authors have suggested the establishment of an income-only trust as a viable option. Vincent J. Russo and Howard J. Atlas, *The Interplay Between Spousal Planning and Trusts Under OBRA '93*, NAELA Q., Fall 1994 at 4. Because an income-only trust makes income available to the Medicaid/SSI recipient, it must be paid toward the cost of care and cannot be retained by the individual. In addition, no part of the trust corpus may be available to pay for anything for the grantor. The authors believe that such trusts are of limited use in most situations.
51. See 42 U.S.C. § 1382b for a list of SSI exemptions.
52. See 42 U.S.C. § 1396p(c)(1)(B)(i).
53. See Pub. L. No. 106-169; 42 U.S.C. § 1382b(e) for trust rules under this Act.
54. See *id.*
55. See 42 U.S.C. §§ 1381a, 1382; 20 C.F.R. §§ 416.1322-416.1330.
56. This figure must be calculated on a state-by-state basis, by using the average cost of private pay nursing home care. Current figures can be obtained by contacting the state Medicaid agency. See 42 U.S.C. § 1396p(c)(1)(E)(i)–(iii).

57. Be aware of the potential for “step-transfers” when funds gifted to an individual are immediately retransferred to trust.