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

A client seeks your assistance with regard to representing him in a personal injury claim. He is a twenty-seven year old man who 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 Because of this, he is settlement. ineligible for SSI. Furthermore, since he was receiving Medicaid benefits because 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 that he is now required to personally fund his future medical expenses using the settlement proceeds that he received and any other available resources that he may have. Your client now asks you as his attorney why he wasn't told that the settlement could impact his eligibility for Medicaid and SSI. Later you receive a letter from the Disciplinary Committee of the Louisiana Bar Association. You're 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 a lifeline and it is critical for them to achieve and maintain eligibility for such program. Unfortunately, however, programs such as Medicaid place severe income and resource restrictions on applicants that can cause them to become ineligible for such benefits unless proper steps are taken to plan for unexpected contingencies.

Victims of 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

What is Medicaid? Medicaid was created in 1965 with the passage of Title XIX of the Social Security Act. 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, or to individuals who are eligible for Social Security disability benefits and have received such benefits in excess of two years. 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 the individual having 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. Medicare recipients may also be eligible for some long-term care benefits, but these benefits are capped to a period of time not to exceed 100 days.

Medicaid is unique in many ways from other federal programs such as Social Security and Medicare. Federal regulations define what groups of people and services the state must cover to qualify for federal matching funds for Medicaid. States define their programs to meet these federal requirements, but can also choose to broaden coverage to include other groups and benefits specified under federal law. Medicaid is primarily federally funded, but the states also provide a portion of Medicaid funding. States not only determine who will be covered and what services will be paid, but also determine how much providers will be paid for delivering care and how the program will be administered.

Most importantly, Medicaid is entirely state administered. Each state operates its own "version" of Medicaid under a state plan which must be submitted to the federal government for approval. Each state plan establishes eligibility criteria and payment methodologies and identifies which optional Medicaid services the state will provide.

Qualifying for Medicaid Can be Difficult

Persons seeking Medicaid eligibility can qualify through a number of different methods. For example, individuals who receive SSI also qualify for Medicaid benefits. Other individuals may qualify for Medicaid through "waiver" programs offered by the state. Waiver programs provide Medicaid and related benefits to eligible recipients. In many situations, these benefits are provided under more liberal rules than would normally apply to other Medicaid recipients. For example, some waiver programs permit disabled children under age 18 to become eligible without regard to the income and resources of their parents.

Unfortunately, there are numerous problems associated with qualifying for these programs. The programs have stringent income and resource limitations and other technical eligibility requirements. Because of limited funding, there are only a small number of waiver "slots" available to eligible persons, and the waiting lists for such programs are extremely long - in some cases in excess of ten years. Once slots open up, individuals who might be eligible must be reevaluated to determine their continuing Programs are also qualification. subject to the availability to funding and are severely affected by budgetary restraints.

Individuals seeking to become eligible for these programs are often required to exercise their rights through pursuit of time consuming administrative appeals. While appeals are waiting to be heard and decided, these individuals are often required to pay medical and long-term care expenses out of their own pocket while waiting to become eligible for benefits.

Medicaid Recipients Must Meet Stringent Means Tests

Louisiana's Medicaid programs provide a variety of benefits and services to eligible recipients. These benefits include physician and hospital care, prescription drug coverage, long-term care, respite services, skilled nursing home, dental care, monetary stipends, case management, eyeglasses and hearing aids, and assistive devices.

However, 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. Individuals are also prohibited from having income in excess of \$1,809 per month (2006 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 \$603 per month (2006 cap limit).

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 they are "at hand", i.e., when the person has the legal ability to make the assets available for Generally support and maintenance. speaking, the less available that resources are to the individual, the higher the likelihood that the resources will not be deemed to be "countable resources" 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. Countable resources include liquid assets, real estate, and other personal property that could be sold to provide for an individual's basic needs. However, there are exceptions to the countable resource rules. A claimant's principal place of residence (up to a maximum value of \$500,000), wedding and engagement rings, one automobile, and certain prepaid funeral contracts and life insurance 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.

Many individuals attempt to dispose of assets that might be deemed countable in order to try to achieve eligibility for Medicaid benefits. The results 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". Medicaid also has "look back" rules that apply to transfers. Under rules that were signed into law in February, 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. Furthermore, under new rules signed into law in February, 2006, 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. Transfer penalties can result in long periods of ineligibility for individuals that 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 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) and the Foster Care Independence Act of 1999 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 selfsettling 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". The name is a misnomer, though, since such trusts can "disqualify" a person from eligibility for Medicaid benefits.

However, the OBRA '93 legislation does contain limited exceptions. 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 twelve months, and (3) is under the age of 65, then a parent, grandparent, legal quardian, or a court can establish a trust for such individual into which that individual's assets can be placed such that the assets will be deemed noncountable for Medicaid eligibility purposes. It is important to note that under the legislation, the individual seeking Medicaid eligibility cannot be the settler of the trust. However, in order for such trust to be deemed a noncountable 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.

This type of trust is often referred to as an "under age 65 disability trust" or a A better way to "(d)(4)(a)" trust. describe such trust, however, is that it is a "quality of life" trust. In many circumstances, this type of trust can be extremely useful and important in preserving quality of life for an individual with disabilities by allowing the person to retain resources to be used for quality of life purposes while at the same time permitting the individual to remain eligible for Medicaid services and benefits.

How is a (d)(4)(a) trust created? This type of trust should always 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 actually 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 can best meet and serve the needs of the beneficiary will depend on 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, 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 persons from whom the client stands to inherit may need to look at establishing testamentary special needs trusts 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 can affect his eligibility for benefits such as Medicaid The client's rights and and SSI. 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 affect the settlement may have on such options.

Finally, it is important to remember that Medicaid planning is very complex and technical, and that 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 only be performed with the guidance and assistance of an attorney experienced in prudent and effective Medicaid planning techniques applicable in the State of Louisiana.