The Affordable Care Act and settlement planning

Plaintiffs with disabilities may require a Special Needs Trust to preserve eligibility for Medi-Cal and other government-subsidized health insurance

By Kevin Urbatsch

The Affordable Care Act (ACA) makes healthcare more reasonable and accessible for many Americans.[1] The enactment of the Affordable Care Act poses both a new opportunity and challenge for plaintiffs with special needs.

This article will discuss options for plaintiffs navigating affordable health care options for special-needs' individuals. Scott MacDonald, a senior financial advisor for Merrill Lynch Wealth Management and a Certified Special Needs Advisor (CSNA), will provide additional context by discussing specific financial examples for an individual.

Current limitations

There are many aspects to settlement planning but one concern has always been lifetime access to affordable healthcare. This has been a challenge for persons with special needs since workplace health-care is not available to them, often making California's Medicaid welfare program, Medi-Cal, their only option. Additionally, persons with special needs historically have been automatically denied private health insurance because of their pre-existing disabling condition.

An advancement that the ACA makes for people with disabilities is accessibility. The ACA requires insurance companies to treat all customers equally and not to segregate people with these pre-existing conditions. In other words, private health insurance will become available for the first time for persons with special needs. The ACA also makes private health-care more appealing for persons with

Special Needs Trust Planning and the ACA

By Scott MacDonald

For plaintiffs with special needs who have capacity and are deciding whether it makes financial sense to utilize a Special Needs Trust (SNT), we explore the question: Will foregoing an SNT and purchasing health insurance via the California ACA exchange, Covered California (www.CoveredCA.com), improve their future financial situation?

The chart below describes the achievable lifestyle of a 40-year-old woman with a disability who receives Supplemental Security Income (SSI) and Medi-Cal, exploring different financial amounts resulting from litigation.

These figures are striking. As seen above, if an individual receives a financial amount of $2,868,000, utilizing an SNT can help them to achieve a higher monthly income, rather than take the funds and purchase private health insurance. In fact, across all options, the value of adopting an SNT and receiving the resulting SSI payments results in dramatically increased standards of living.

The primary reason for these outcomes is access to SSI over a lifetime with a cost of living adjustment (COLA). The value of that income is generally in the hundreds of thousands of dollars for most beneficiaries.

Under lower financial amounts, the effect on annual spending is even more vivid. If an individual with special needs receives $100,000, the annual achievable lifestyle with the SNT would be $12,610. If they make the decision not to fund the settlement into an SNT and lose the SSI as a result, the annual spending amount would be $3,614 – a 71 percent reduction for life!

The individual with special needs can still utilize private healthcare even if they select the SNT option. This has the added benefit of providing a higher quality healthcare through private insurance and limit (or eliminate) the SNT Medi-Cal payback after the plaintiff dies. It is surprising to see that using this option is generally far superior on a cost-benefit analysis than doing without the SNT.

There will still be individuals who are disabled and have capacity who will want their settlements in their own name (and under their control) despite the financial benefit of not doing it this way. There is certainly nothing wrong with this approach, but the individual should be making this decision with the benefit of all the factors that go into an appropriate settlement plan.

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PLANNING PROJECTIONS (40 YEAR OLD FEMALE)

SETTLEMENT NET ASSET LEVEL =>	**$100K**	**$396K**	**$500K**	**$1 M**	**$2.868 M**
		Net Spendable Income – Annual Amount [u]			
SNT Only [v]	$12,610	$23,751	$22,208	$33,484	$67,500
No SNT, Buy ACA Insurance [w]	EM	EM	$11,196	$15,794	$67,504
SNT with ACA Supplemental [w]	EM	EM	$17,700	$20,684	$53,766
No SNT, Expanded Medi-Cal	$3,614	$14,291	NQ	NQ	NQ
Income Percent of Federal Poverty Limit [x]	34.80 percent	138 percent [y]	174.06 percent	348.13 percent	600.70 percent
Average Annual ACA Premium (Net Subsidy) [z][i]	$0	$0	$4,508	$12,800	$15,552
Average Monthly ACA Premium (Net Subsidy)	$0	$0	$376	$1,067	$1,296

Source: Merrill Lynch Wealth Management Analysis through the Wealth Outlook Program, May 2013. [i] Covered California (2013). Health Plans & Rates for 2014: Making the Individual Market in California Affordable, 32-76.

Footnotes to Chart

EM = Qualifies for the Expanded Medi-Cal Program
NQ = Not Qualified for Expanded Medi-Cal Program
u – After-tax spendable income, net of premium or SNT expenses, assuming 2.5 percent COLA through actuarial life expectancy of the beneficiary
v – Net Spendable Income for SNT options has been reduced by $3,000 expense to establish the SNT and 1 percent annual administrative expenses. Assumes $856 monthly SSI income received with 2.5 percent annual COLA.
w – Net Spendable Income for ACA options has been reduced by average annual premium and maximum annual out of pocket expenses for the respective income level (based on percent of FPL)
x – Assumes 4 percent annual taxable income based on the settlement net asset level
y – Maximum annual income level to qualify for the Expanded Medi-Cal Program is 133 percent of the Federal Poverty Limit ($15,282) plus 5 percent ($11,490 *.05 percent = $574.50) any income disregard = $15,856 for 2013
z – Average of highest premium rate for that income level across the 19 California regions. Amount shown is beneficiary's cost after federal subsidy.

profound disabilities because it removes the lifetime limits on health insurance that had made private plans unattractive.

Medi-Cal and Special Needs Trust

Traditionally, an individual with special needs had to have less than $2,000 in his or her own name in order to qualify for Medi-Cal. That person could have more if he or she utilized a Special Needs Trust (SNT) authorized by 42 U.S.C. §1396p(d)(4)(A) or (C)[2]. Until now, most plaintiffs with special needs had no other choice but to place his or her litigation recovery into an SNT if they wanted to be eligible for Medi-Cal – often their only option for healthcare – and simultaneously preserve funds for future use.

A plaintiff's litigation recovery will often be the first wealth that they encounter. Rarely do persons with special needs have the financial aptitude to appropriately manage any type of wealth. Even for those persons with disabilities who do have legal capacity, it is uncommon that they can manage their capital in a reasonable and practical fashion. By definition, plaintiffs with special needs who qualify for Medi-Cal or Supplemental Security Income (SSI) are also unable to find gainful employment.

The availability of unencumbered access to cash combined with an inability to properly maintain their personal finances make persons with special needs a prime target for financial predators looking to take advantage of them. For that reason alone, an SNT is imperative. The trust allows disabled individuals to preserve their suitability for benefits (without court supervision). Concurrently, the individual has a trustee who has a fiduciary obligation to utilize these funds for the plaintiff's sole benefit under a prudent investment standard. Under these circumstances, an SNT provides those with special needs the best chance for a lifetime of financial protection.

There are several situations where maintaining Medi-Cal eligibility is critical. This specific welfare program is the only payer for certain types of benefits such as In-Home Support Services (IHSS). The Medi-Cal program also offers access to certain waiver programs that provide free, targeted solutions for the unique needs of disabled persons, which cannot be replicated or replaced with the new ACA health insurance programs.

Expanded Medi-Cal

The ACA caps the amount of money that a person will have to pay out-of-pocket each year toward medical costs. For example, if a person in California earns less than $17,235 a year in 2013, the annual out-of-pocket limit he or she has to pay is $2,250. Otherwise, the general ACA annual out-of-pocket limit for an individual is $6,350 per year.[3]

President Obama's health-reform law also allows the adoption of expanded Medicaid by individual states. By implementing expanded Medicaid (Medi-Cal here in California), states take away the resource requirement for Medicaid and in its place focus on an individual's income. Therefore, for people between the ages of 19 and 65, California's Medi-Cal eligibility will include persons with incomes up to 133 percent of the Federal Poverty Limit (FPL)[4] – plus an automatic five percent income disregard or $15,586 for individual in 2013.[5]

Furthermore, the ACA provides government-subsidized aid to health-care premiums for those with incomes of 138 percent through 400 percent of the FPL ($15,586 - $45,960 for individuals in 2013).[6] Nonetheless, it is important to note that persons already receiving Medi-Cal or who are applying for long-term nursing home care are not eligible for this new, expanded program.

Conclusion

To summarize options available due to the ACA, persons with special needs have at least four choices for litigation recovery: (1) Use an SNT only; (2) Use an SNT but also buy ACA private healthcare; (3) Do not use an SNT and buy ACA private insurance; or (4) Do not use an SNT but rely on the new expanded Medi-Cal.

While the ACA provides a substantial improvement in health care options for plaintiffs with special needs, it would be irresponsible to assume that special needs settlement planning and SNTs should be eliminated. As all client cases are unique, a thoughtful financial and legal analysis of each individual plaintiff's situation is essential to their future well-being. Proper consultation with specialized legal and financial professionals is essential in obtaining the best outcome for plaintiffs and limiting the liability of consumer attorneys.

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Endnotes

[1] "Affordable Care Act," U.S. Department of Health and Human Services

[2] U.S. Government Information (n.d.). Title 42—The Public Health and Welfare, 6-7, Retrieved from http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/ USCODE-2010-title42-chap7-subchapXIX-sec1396p.pdf

[3] Covered California (2013). Health Plans & Rates for 2014: Making the Individual Market in California Affordable, 4-5.

[4] Office of the Legislative Counsel (May 2010). Compilation of Patient Protection and Affordable Care Act, 198-205, Retrieved from http://housedocs.house.gov/energycommerce/ ppacacon.pdf.

[5] *2013 Poverty Guidelines*. (2013, January 24). Retrieved June 4, 2013, from US Department of Health & Human Services: http://aspe.hhs.gov/poverty/13poverty.cfm

[6] *2013 Federal Poverty Guidelines*. (n.d.). Retrieved June 4, 2013, from Families USA: http://www.familiesusa.org/ resources/tools-for-advocates/guides/federal-poverty-guidelines.html