

SPECIAL NEEDS

ACA Brings a New Option For Disabled Plaintiffs

Buying a private plan under Obama Care may be the best thing for your client

By Mark R. Friedman

There are winners and losers to the Affordable Care Act, and perhaps the greatest winners are people who need a lot of medical care.

The Patient Protection and Affordable Care Act of 2010 (ACA), popularly known as Obama Care, has generated sweeping controversy, from the website to insurance cancellations to the page count. Yet despite all the negative press, the ACA is a boon to people who need expensive acute medical care. The new law, together with special needs trusts and other existing law, creates opportunities for lawyers to better serve certain clients, including many plaintiffs.

Some Plaintiffs Rely on Public Assistance for Care

After the trial is over or the settlement agreement is signed, some personal injury plaintiffs are left with debilitating injuries and lifelong disabilities. These plaintiffs often rely on disability benefits, including cash assistance from the Social Security Administration, and medical assistance through Medicare

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and Medicaid.

For plaintiffs who cannot work, litigation recoveries and disability benefits may be their only source of support for the rest of their lives. That is why it is crucial to maximize the value of these resources.

Before distributing litigation recoveries to the plaintiff, the attorney should ensure doing so will not cause the plaintiff to lose his benefits. For plaintiffs eligible for Medicare, the attorney must protect Medicare's secondary payer interests, possibly with a Medicare set-aside.

Disabled plaintiffs who are not eligible for Medicare—which typically includes disabled children, adults who have not worked regularly and certain public employees—usually rely on Medicaid for care.

However, Medicaid is means-tested. It has financial requirements that preclude from coverage people who have a large amount of money in their name. In other words, if litigation proceeds are distributed directly to your client, he will be ineligible for Medicaid. He will not be able to receive medical assistance until he spends down the entirety of the recovery meant to compensate his injuries. That may happen very quickly, with no assistance and large medical bills, leaving your disabled client destitute.

Special Needs Trust Allows Plaintiffs to Keep Medicaid

To give disabled people some chance at a reasonable quality of life, Congress passed legislation in 1993 that allows lawyers to create a first-party Special Needs Trust (SNT). This is a special kind of trust that is funded with the beneficiary's own money, e.g., litigation proceeds.

An SNT can be used to preserve a plaintiff's eligibility for means-tested benefits, like Medicaid and cash assistance. Instead of paying litigation proceeds directly to the plaintiff, the money is put under the control of the SNT trustees. The trustees spend the money on things that benefit the plaintiff. The trust assets don't disqualify the plaintiff from benefits, because the plaintiff doesn't own the money and has no control over how it is spent. Medicaid and other benefits meet the plaintiff's basic needs (food, shelter, basic health care). Litigation proceeds are available for special needs—things that improve the beneficiary's life in light of his disabilities, such as therapies, professional services, home or vehicle modifications, education, etc.

The snag is that first-party SNTs are required to repay Medicaid on the beneficiary's death. If anything remains in the SNT when the beneficiary dies, it must first be used to repay the government for care Medicaid has paid for, before it can go to the beneficiary's heirs. The amount Medicaid demands often exceeds the remainder in the trust, leaving the plaintiff's family with nothing.

Medicaid payback presents some people with disabilities with a cruel di-

lemma: To get the care they need, they must leave their heirs bereft.

ACA Provides Coverage to People with Disabilities

Now, there may be another option.

Previously, Medicaid was the only way for many people with disabilities to receive care, other than paying for it at outrageous noninsurance rates. Health insurance companies make their money when people pay more in premiums than they use in care. People who need expensive specialty drugs and frequent medical procedures are by definition a losing prospect for the insurer, and many people with disabilities had difficulty buying insurance.

Now, the ACA allows many people to obtain coverage for the first time. As of 2014, all plans sold to individuals must meet the ACA's requirements, many of which greatly benefit persons with disabilities.

Insurers may not refuse to cover someone because of a preexisting condition, nor place lifetime limits on necessary care. Plans must cover essential health benefits, including certain therapies and mental health services. Insurance plans must also offer comprehensive pharmaceutical coverage and allow

patients to obtain specialty drugs. As of 2015, most plans are prohibited from charging subscribers more than \$6,350 in co-pays and co-insurance in a given year, providing enormous relief to people who need a lot of care.

The ACA also creates transparency requirements that allow shoppers to select appropriate plans.

All plans are required to cover the same procedures and drugs, but vary as to how much cost the plan covers. The ACA creates a tiered value system to individual plans: the metal levels. Bronze plans offer the least coverage and have the lowest premiums, while platinum plans cost the most in premiums but should cover 90 percent of costs. In other words, individuals who purchase a platinum plan should be exposed to no more than 10 percent of the cost of medical care.

Maximizing Plaintiffs' Recoveries Through the ACA

So what does this mean for disabled plaintiffs?

The ACA provides a new path for people who need extensive care. For Medicare-ineligible disabled plaintiffs, Medicaid is no longer the only game in town.

Plaintiffs may consider forgoing Medicaid and using the SNT to purchase a private health insurance plan. This involves more upfront costs—the SNT must pay for premiums, co-pays and co-insurance, while with Medicaid most care is free or very low-cost. However, unlike with Medicaid, the SNT need not repay the insurance company for care costs when the plaintiff dies. In the long run, funding care through private insurance instead of Medicaid could save the plaintiff's family vastly, because any amount left in the trust can be paid to heirs instead of the government.

Like many special needs planning techniques, whether this technique is appropriate depends entirely on the client's circumstances. Plaintiffs should consult with their special needs attorney, financial advisor and family as to the best method to pay for care.

Conclusion

If your client may be disabled, then it is essential to maximize the value of recoveries. A special needs attorney can work with you to determine the best ways to support your client, and that may include buying a private insurance plan under the ACA. ■