In courtrooms, at mediation tables and in seminars around Kentucky, you will find attorneys talking about how to satisfy Medicare’s conditional payment interest and how to properly protect Medicare’s future interest in a judgment, settlement or verdict (hereinafter collectively referred to as settlement). You will also find these same attorneys discussing how best to resolve a Kentucky Cabinet for Health and Family Services’ (CHFS) Medicaid lien. While this author is well aware of the importance of these aforementioned issues, so much so that he conducts seminars about them, he is often left wondering why there is not greater concern for how to protect a client’s eligibility for means-tested government benefits after the settlement proceeds are disbursed. As a result, this article focuses on what can happen when a client is left uninformed about how the money received from a settlement can impact his or her eligibility for means-tested government benefits.

Government Benefits Defined

Government benefits in the United States are primarily broken down into two main categories: (1) entitlement benefits and (2) means-tested benefits. Social Security, Social Security Disability Income (SSDI) and Medicare are all entitlement benefits. These are benefits that individuals become entitled to receive after reaching retirement age (generally speaking, 65) or becoming disabled. To be eligible for entitlement benefits, the individual applying for the benefit must have earned enough work credits to be found “fully insured” under Social Security. Social Security work credits are based on an individual’s total yearly wages or self-employment income, and an individual can earn up to four credits each year. The amount of income needed for a credit changes from year to year. In 2012, for example, an individual can earn one credit for each $1,130 of wages or self-employment income earned. Thus, when an individual earns $4,520, he or she has earned the maximum of four credits for the year.

On the other hand, eligibility for mean-tested benefits, such as Medicaid and Supplemental Security Income (SSI), is predicated upon the number of assets an individual owns and the amount of income he or she earns each month. SSI is a federal program that is intended to help people meet their basic living needs. Right now, the benefit pays eligible individuals a maximum of $698 per month. In Kentucky, often an individual who receives SSI also receives Medicaid benefits. Medicaid is a joint federal-state program that provides health insurance coverage to low-income children, seniors and people with disabilities. Medicaid pays for inpatient and outpatient hospital services, but it also covers a variety of other medical services such as those associated with long-term care, nursing home, and in-home and community-based medical care. While this benefit is generally only available to those who receive SSI benefits in Kentucky, there are several forms of Medicaid, and each benefit maintains its own unique set of eligibility standards.

The main difference between entitlement benefits and means-tested benefits is that eligibility for means-tested benefits requires the beneficiary to satisfy specific income and asset requirements while eligibility for entitlement benefits is purely based on an individual’s age, disability and work history.

Notice of a ‘Change in Circumstances’

Over the past several years, attorneys have grown accustomed to making certain that Medicare’s interest in a settlement is properly protected. Unfortunately, the same cannot be said for protecting a client’s eligibility for means-tested benefits. A little known fact about SSI and Medicaid is that a beneficiary of either benefit maintains a duty to report the receipt of proceeds from a settlement and that this report must be made within 10 days of its receipt. This obligation is set forth under both Kentucky and federal law and failure to notify either the CHFS or Social Security of the receipt of settlement proceeds could negatively impact a client’s (or the client’s family’s) eligibility for means-tested benefits. Failure to provide proper notice could result in an effort by CHFS...
or Social Security to recoup any benefits mistakenly paid to a beneficiary during a period of ineligibility or the enforcement of a penalty period against a beneficiary, which would cause him or her to become ineligible for benefits in the future.

In light of these concerns, it should be clear that if a client were to lose his or her eligibility for benefits due to a failure to notify Medicaid or SSI of the receipt of settlement proceeds, the first person who would have to answer for this loss in eligibility is the attorney who procured the settlement, most likely the plaintiff attorney. Thus, it is imperative that an attorney educates his or her clients about the need to properly notify CHFS and Social Security of any “change in circumstances” as required by the law. Failing to do so could result in any of the aforementioned problems, and this could ultimately lead to tragic results.

For example, take a client who is not on any government benefits but is about to settle a claim against a defendant. As part of the settlement, the client chooses to structure her settlement with a structured settlement annuity. At first glance this should be fine, but after a closer look, one would realize that the client’s three children all receive KCHIP benefits. Therefore, if no one is looking out for the children, the structured settlement annuity income could push the client’s monthly income over the threshold for KCHIP benefits, effectively causing her children to become uninsured as a result of the settlement. This is clearly an undesirable outcome and one that could be easily avoided. By changing the intake process and working to verify both a client’s and his or her family’s benefits before finalizing the terms of a settlement, an attorney can ensure that his or her clients avoid losing their eligibility for means-tested benefits.

**Verification of Benefits**

A simple truth remains. Unless the attorney verifies a client’s benefits with his or her caseworker, it is impossible to know how the receipt of settlement proceeds may impact a government benefit. Thus, this author suggests that the intake form used when opening a new client matter be modified to ask about the client’s and his or her family’s eligibility for both entitlement based and means-tested government benefits.
benefits. Then, when a client states that he or she or someone in his or her family receives government benefits, the attorney knows to verify that client’s benefits with the government benefits caseworker. Once the attorney verifies the benefits and corresponding eligibility standards for the benefit, the attorney is able to better advise the client on how to receive the settlement proceeds without impacting his or her eligibility. This simple act could end up being the difference between a happy client and a malpractice claim.

**Planning Options**

There are several planning options available to clients who are eligible for means-tested benefits, but the three most common planning methods are (1) Exemption Planning, (2) Special Needs Trust (SNT) Planning, and (3) Structured Settlement Annuity Planning.

**Exemption Planning**

Exemption planning means a client will purchase or “spend down” the settlement proceeds on various exempt assets within the same month as receipt. Each purchase must be fully documented and disclosed to the appropriate Social Security or Kentucky Medicaid caseworker at the end of the calendar month in which the settlement proceeds are received. As stated above, under Social Security and Medicaid rules, “countable” resources cannot exceed $2,000 in any given month. Thus, when implementing an exemption plan, it is vital that a strategy be put in place before the settlement proceeds are received. Without such a plan, the beneficiary could run the risk of reaching the end of the month without having spent the money down below $2,000.

The following “spend down” options or resources are generally NOT counted as a part of the resource test for SSI and Medicaid eligibility, thus they do not normally impact a client’s eligibility for means-tested benefits.

- Paying off existing debt;
- Renovating a home to make it more accessible;
- Prepaying for utilities, water, telephone, cable and other monthly expenses;
- Paying for healthcare services not otherwise covered by Medicaid;
- The purchase of a home and land adjacent to it;
- The purchase of all household goods and furnishings;
- The purchase of all “personal effects” including but not limited to jewelry, including wedding and engagement rings; personal care items; prosthetic devices; and educational or recreational items such as books or musical instruments;
- The purchase of one automobile; and
- The purchase of burial spaces for a claimant and his or her family.

**Special Needs Trust Planning**

Federal law permits an individual to establish a first party SNT in order to protect his or her eligibility for means-tested benefits. There are two different types of SNTs: (1) private SNTs, as defined by 42 USC §1396p(d)(4)(A), and (2) pooled SNTs, as defined by

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<thead>
<tr>
<th>42 USC 1396(d)(4)(A) Trusts – Private</th>
<th>42 USC 1396(d)(4)(C) Trusts – Pooled</th>
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<tr>
<td>Separate Trusts</td>
<td>Master Trust</td>
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<tr>
<td>State Specific</td>
<td>Nationwide</td>
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<tr>
<td>Must be under age 65</td>
<td>Must be under age 65</td>
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<tr>
<td>No additional funds after age 65</td>
<td>Funds can be added anytime</td>
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<td>Only a parent, grandparent, guardian or court can establish</td>
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<td>Mandatory Medicaid payback</td>
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<td>Need knowledgeable administrator to protect government benefits</td>
<td>Need knowledgeable administrator to protect government benefits</td>
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<td>Cost varies</td>
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<tr>
<td>Time consuming to establish</td>
<td>Easy to establish</td>
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<td>Need government agency approval</td>
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<tr>
<td>Trust can be used for most anything other than food and shelter</td>
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