

THE GAVEL

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Overcoming Liability
Waivers: Gross
Negligence

Judicial Interview:
Hon. Wendy Lindley



In-Depth Analysis

**INSURANCE: THE ENGINE
THAT DRIVES THE
SETTLEMENT TRAIN**

**ANNIVERSARY FLASHBACK:
DILLON V. LEGG: 3 SIMPLE
QUESTIONS**

**AFFORDABLE CARE ACT'S
FINANCIAL EFFECT ON
SETTLEMENT PLANNING**



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Affordable Care Act's Financial Effect on Settlement Planning

Settlement planning is the process of ensuring that a plaintiff who has a significant disability, lacks capacity, or has a complex financial situation will receive his or her litigation proceeds in such a way that it will not jeopardize his or her future retention of other benefits. The imminent implementation of the Affordable Care Act (ACA) presents a new challenge (and opportunity) for plaintiffs with disabilities. This article will employ a sophisticated financial analysis to determine when it makes financial sense for a plaintiff's litigation recovery to be held in a special needs trust (SNT) or not. After analysis, the authors have determined that it will make financial sense to utilize an SNT if the plaintiff also receives Supplemental Security Income (SSI) unless the net settlement to

IN-DEPTH ANALYSIS



SCOTT MACDONALD, CSNA

In order to qualify for traditional Medi-Cal, a person with a disability must retain less

option but to place his or her litigation recovery into an SNT if they wished to preserve eligibility for Medi-Cal and preserve funds for future use.

There are many non-healthcare related reasons for a person with a disability to place funds in an SNT. The SNT preserves eligibility for SSI, which is often their only access to income. Plus, any person with a disability who lacks capacity and has public benefits must have his or her litigation recovery placed into some type of ongoing court supervised entity, typically a conservatorship or SNT. See Prob. Code §§3600-3613^{2,3}. In the author's opinion, having established and supervised hundreds of SNTs and conservatorships, it is nearly always preferable to have the funds managed in an SNT rather than a conservator-

“It is nearly always preferable to have the funds managed in an SNT rather than a conservatorship ...”

the plaintiff is just under \$3,000,000. This article will go through the analysis all plaintiffs with disabilities should utilize in reaching these life-altering decisions.

There are many factors to settlement planning, but one concern has always been lifetime access to affordable healthcare. For persons with disabilities, this has been a challenge because Medi-Cal is often their only option for healthcare. Moreover, before the enactment of ACA, persons with disabilities were oftentimes barred from private health insurance because the insurance companies automatically denied them due to their disabling pre-existing condition.

Financial content by Scott MacDonald, Senior Financial Advisor for Merrill Lynch Wealth Management and Certified Special Needs Advisor (CSNA). Legal content by Kevin Urbatsch, J.D.

than \$2,000 in his or her name. A person with a disability was allowed to retain more than \$2,000 in his or her name if a SNT authorized by 42 U.S.C. §1396p(d)(4)(A) or (C)¹ is used. Thus, up until now, most plaintiffs with disabilities had no other



KEVIN URBATSCH, J.D.

ship because it is less expensive and easier to do so.

Even for those persons with disabilities who do have legal capacity, it is rare that they have the sophistication to properly manage any type of wealth in a reasonable and pragmatic fashion. An SNT would allow a plaintiff to preserve eligibility for benefits (without court supervision) and have a trustee who has a fiduciary obligation to utilize these funds for the plaintiff's sole benefit under a prudent investment standard. Further, the availability of unfettered access to cash for many persons with disabilities makes them prime targets for financial predators from strangers and even from family members looking to take advantage. Under these circumstances, an SNT will provide the best option to safeguard and protect a person with a disability.

There are also a few situations where maintaining Medi-Cal eligibility is of utmost importance, as Medi-Cal is the only payor for certain types of benefits. This includes In-Home Support Services (IHSS) that allows a person with a disability to remain in their residence and skilled nursing home care for those whose healthcare needs require round-the-clock care in a facility. The Medi-Cal program also provides access to certain waiver programs that provide free targeted solutions for the unique needs of persons with disabilities, which cannot be replicated or replaced with the ACA programs.

The ACA changes things for persons with disabilities. For the first time, ACA requires insurance companies to not discriminate against persons with pre-existing conditions. This means that private health insurance will be available for persons with disabilities. The ACA also makes private healthcare more attractive because it removes the life-

time limits on health insurance that made private plans unattractive to many persons with profound disabilities. The ACA caps the amount of money that a person will have to pay out-of-pocket each year depending on a person's income level. For example, if the 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 \$6,250 per year⁴.

The ACA allows individual states to adopt expanded Medi-Cal. Expanded Medi-Cal takes away the resource requirement for Medi-Cal and instead focuses on the individual's income. California has already passed expanded Medi-Cal. Thus, for people between ages of 19 to 65, Medi-Cal eligibility will be expanded to include individuals with incomes up to 133 percent of the Federal Poverty Limit (FPL) (plus an automatic 5 percent income disregard) (\$15,586 for

individual in 2013)⁵. It is important to note that this new expanded program does not apply to persons currently receiving Medi-Cal or applying for long-term care nursing home care and some other restrictions. The ACA also provides government-subsidized assistance to healthcare premiums for those with incomes of 138% through 400% of the FPL (\$15,586-\$45,960 for individuals in 2013)⁶.

For those plaintiffs with a disability who have capacity and are determining whether it makes financial sense to utilize an SNT or to take their litigation recovery in their own name and forego public benefits, the essential question is: will foregoing an SNT and purchasing ACA insurance via the California exchange improve their future financial situation?

There appear to be at least four options for the person with a disability who obtains a litigation recovery.

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THE RESOLUTION EXPERTS



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1. Use an SNT only;
2. Use an SNT but also buy ACA private healthcare;
3. Not use an SNT and buy ACA private insurance; or
4. Not use an SNT but rely on new expanded Medi-Cal.

Under each option that uses an SNT, a probabilistic forecast was completed counting the costs estimated in establishing an SNT at \$3,000, maintaining an SNT at 1% of trust assets per year, and then adjusted for future inflation estimated at 2.5% per year. The financial calculation includes counting SSI that provides a monthly check of \$856.67 for an individual in California in 2013. The SSI check is also subject to a cost of living adjustment (COLA) estimated at 2.5% per year.

Under each option that includes purchase of ACA insurance, the healthcare expenses were calculated using California's Silver Plan premium levels derived from the average published rate for each of 19 regions from the Covered California publication, *Health Plans & Rates for 2014: Making the Individual Market in California Affordable*. The amounts (where applicable) were also reduced by the applicable governmental subsidy for low-income individuals as well as the full annual out-of-pocket maximum expense for the Silver Level Plan. All income and expense items were inflated using the same rate assumption as for the SNT options.

The chart below describes the achievable lifestyle that a 40-year-old woman with a disability who receives SSI and Medi-Cal could obtain utilizing different litigation net recovery amounts.

As seen below, if a plaintiff receives a net settlement amount of \$2,868,000, it still

makes financial sense to utilize an SNT to achieve a higher monthly income than to 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 resulted in dramatically increased standards of living for all age groups tested, across all settlement levels.

The primary reason for these results is access to SSI over a lifetime with a COLA. The value of that income is generally in the hundreds of thousands of dollars for most beneficiaries. For example, consider a \$1,000,000 settlement. Funding the litigation recovery into an SNT could provide an attainable annual total budget of \$33,484. If instead, the plaintiff took the settlement in his or her own name and purchased private healthcare, the annual budget would be reduced to \$15,494. This is an annual reduction of \$17,690 of available income. If you add in the loss of the SSI's COLA

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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%	138% [y]	174.06%	348.13%	600.70%
Average Annual ACA Premium (Net Subsidy) [z] ⁷	\$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.

Chart Footnotes:

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% 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% annual administrative expenses. Assumes \$856 monthly SSI income received with 2.5% 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% 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% of the Federal Poverty Limit (\$15,282) plus 5% (\$11,490 * .05% = \$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.

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(estimated at 2.5%), the plaintiff in this scenario would be taking a 52% annual pay cut by not utilizing an SNT.

Under lower net settlement amounts, the effect on annual spending is even more dramatic. If the person with a disability

receives a \$100,000 net settlement, the annual achievable lifestyle with the SNT could be \$12,610. If they chose to not fund the settlement into an SNT and lost the SSI, the annual spending amount would be \$3,614 – a 71% reduction for life!

The plaintiff with a disability still has the opportunity to utilize private healthcare even if they select the SNT option. There is no legal prohibition against an SNT trustee

paying for private healthcare. This has the added benefit of providing a higher quality healthcare through private insurance and limit (or eliminate) the SNT Medi-Cal pay-back after the plaintiff dies. It was surprising to see that using this option was generally far superior on a cost-benefit analysis than doing without the SNT.

There will still be plaintiffs 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 plaintiff should be making this decision with the benefit of all the factors that go into an appropriate settlement plan.

The ACA provides a dramatic improvement in healthcare options for plaintiffs with disabilities. Nonetheless, it would be irresponsible to assume that special needs settlement planning and SNTs should be eliminated simply because health insurance options have multiplied. 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. It is still recommend that proper consultation with specialized legal and wealth management professionals is essential to the best outcome for plaintiffs and to limit the liability of consumer attorneys.

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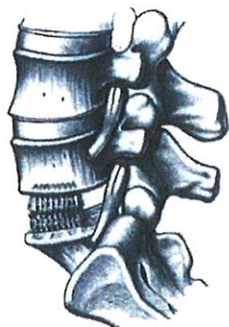
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