

“Mind the gap” in government benefits caused by a settlement

By Cameron Lindahl

The path to settlement of the claim of an injured person seeking government benefits (“applicant”) is similar to a long commute on public transit for two main reasons: First, if you are a person living with a disability the path to safety post-settlement is significantly more dangerous because the government has more rules for those applicants who are no longer able to work. Secondly, it’s dramatically harder if you don’t have a trusted travel companion familiar with the route, such as your applicant attorney. Are you aware that if you accept a settlement over \$2,000 it may jeopardize the applicant’s household’s eligibility for health insurance (i.e. Medi-Cal or Medicaid), and/or their income (i.e. Supplemental Security Income, SSI). This article will help applicant attorneys become that trusted travel companion on the path to identify and “mind the gap” for applicants who are recipients of means-tested benefits (i.e. Medi-Cal/Medicaid and SSI). Furthermore, we will address different solutions for these applicants and explain some policy changes that have made Special Needs Trust more attractive.

Benefits to Mind

To better understand the impact of a settlement on an applicant’s eligibility, the table in Figure 1 sorts common benefits into three categories: means-tested, other, and entitlement. The first and most important, *means-tested benefits* will be negatively impacted by a settlement of \$2,000 or more (\$3,000 for a married couple) because these benefits have an asset and income eligibility test. Coordinate strategies to protect ongoing eligibility with a government benefits expert. Lastly, *entitlement* benefits are generally not affected by a settlement as long as Medicare Secondary-Payer Act [MSP] compliance is considered. In sum, Medi-Cal for those disabled and unable to work, and Supplemental Security Income (SSI), will be jeopardized for a single individual accepting a settlement over \$2,000.

What “Gap” Is the Settlement Award Creating?

The worst gap in coverage is always to the applicants who require long-term care services for their ongoing support, a service covered by Traditional Medi-Cal, but not covered under Medicare. This includes Medi-Cal paying the agency (i.e. In-home Support Services, IHSS) for caregivers to provide care in the applicant’s residence for up to 283 hours a month. These caregivers can be family members or friends, an important advantage because paying someone in the household to provide care may help to raise the overall income and standard of living in the home. Medi-Cal

also pays the cost of a skilled nursing facility, rehabilitation facility, nursing home, etc. for longer than 100 days which Medicare does not. The most important concept communicated in this article is if an applicant needs long-term care services, speak with a qualified expert before disbursing a settlement.

A common misconception is, “My applicant has Medicare, they don’t need Medi-Cal.” The inaccuracy of this statement extends beyond the advantages of long-term care services mentioned above. Medicare is the primary payer (partially funded by the applicant’s income taxes), and Medi-Cal is the secondary payer (funded by taxpayers). For dual-eligible applicants, Medi-Cal often covers medical bills that Medicare does not (<https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/Downloads/MedicareMedicaidEnrollee-Categories.pdf>). Additionally, Medi-Cal covers the monthly premium from Medicare of approximately \$135 a month, which is usually more than the costs associated with administering a Special Needs Trust account with a non-profit trustee. In sum, eligibility for Medicare does not negate the significance of Medi-Cal eligibility, especially for those with long-term care needs or those with tight monthly budgets that could be derailed by an increase in reoccurring medical bills.

Supplemental Security Income (SSI) provides a floor of income to cover basic living expenses (i.e. shelter, utilities, and food) for those who are disabled and



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unable to work in the United States. California supplements the maximum Federal Benefit Rate of \$783 due to the high cost-of-living in the state to provide a maximum of \$943.72 (\$1,582.14 for married individuals) a month. In California, one dollar of SSI automatically qualifies you for Traditional Medi-Cal. In other words, if eligibility is lost for SSI, the applicant also loses eligibility for Traditional Medi-Cal and would be forced to reapply. SSI is the biggest red flag that arises in cases due to its strict eligibility rules and its connection to Medi-Cal eligibility in California.

Identify Early and Easily

Identifying applicants on means-tested benefits should start by asking the applicant's household monthly income. Most workers compensation attorneys that have been identifying applicants on means-tested benefits for years usually start with asking about Medi-Cal. As shown in **Figure 1: Categorization Can Help**, there are two types of Medi-Cal that commonly arise during the settlement process and the effect of a settlement award on this benefit varies significantly. Many individuals receive Expanded Medi-Cal based on having an annual income lower than 138 percent of the federal poverty level; there is no asset test. This type of health coverage is designed for individuals with low income who are currently working or will return to work. Traditional Medi-Cal, on the other hand, is health insurance coverage for those who are disabled and unable to maintain gainful employment.

Figure 1

Categorization Can Help

1

Means-Tested (often Needs-Based) = Resource and Income Test Required for Eligibility

- Supplemental Security Income
- Traditional Medi-Cal (disabled and unable to work)
- HUD Housing (formally Section 8)

2

Other = May have a resource or income test for Eligibility

- Expanded Medi-Cal (low income and able to work)
- VA Benefits

3

Entitlement = Generally not affected by a settlement

- Social Security Disability Insurance (SSDI)
- Social Security Retirement
- Social Security Survivor Benefits
- Medicare (excluding MSP compliance)

Figure 2

Intake/Exit Interview

1. Is anyone in the household receiving SSI?
 - Single = \$783*, Married = \$1,157*
 - In CA: Single = \$943.72*, Couple = \$1,582.14*
2. Is anyone in the household receiving Medicaid **and** any form of income from Social Security?
3. Will you apply for "disability" with the Social Security Administration or medical insurance (Medicaid) post-settlement?
 - "Disability" = Supplemental Security Income "SSI," or Social Security Disability Insurance "SSDI"

*Maximum amounts can vary for people with severe disabilities.

Expanded Medi-Cal/Medicaid for those returning to work doesn't have an asset test, meaning that they could net \$1,000,000 and still preserve eligibility after the first month of ineligibility. Using Medi-Cal as the sole identifying factor is significantly flawed for a variety of reasons and should be replaced by asking the questions below related to income first.

If the answer is yes to any of the questions in **Figure 2 – Intake/Exit interview**, the applicant could jeopardize their household's eligibility for means-tested benefits by accepting a settlement over \$2,000. It's important to note that a Medicare Set-Aside (MSA) account is still considered a countable asset for Medi-Cal and SSI eligibility. Additionally, "Household" is included below because the rules of deeming can cause a parent's eligibility to affect their child's and their spouse's eligibility (<https://www.ssa.gov/ssi/spotlights/spot-deeming.htm>, <https://secure.ssa.gov/appt10/poms.nsf/lrx/0501320400>). The section following will explain the logic behind each of the below questions in order to better apply them to a firm's intake process.

In reference to question one, the problem with asking a applicant "if their household receives SSI" is that most recipients don't know the name of the income and commonly refer to it as their "Social Security check." However, if the amount is at or below the maximum amount of SSI for California, they are receiving at least one dollar of SSI and they stay eligible for Medi-Cal. This number can change from year-to-year on January 1st, but anyone can search "Max Supplemental Security Income in California" and select the Social Security Administration's website to locate this number well past this date of publication (<https://www.ssa.gov/pubs/EN-05-11125.pdf>). The best way to verify the type of income is to have the client gather a Benefits Verification Letter by visiting their local office or by creating an account online at www.ssa.gov/myaccount. Identifying the amount of income an applicant receives monthly is the most efficient place to start when identifying applicants on means-tested benefits.

Is anyone in the household receiving Medicaid AND any form of income from Social Security? Medi-Cal and the Social Security Administration share the same

definition for "disabled." In other words, if the Social Security Administration has determined that an individual is disabled (i.e. a recipient of SSI, Social Security Disability Insurance or SSDI, or Social Security Retirement), then Medi-Cal classifies the individual the same way resulting in them receiving means-tested Traditional Medi-Cal. Fair warning, this has little to no association with the definitions used within the Workers Compensation system. It's possible for a applicant in California to receive Traditional Medi-Cal without any form of income from the Social Security Administration, but it is relatively rare and usually only occurs with undocumented applicants who do not qualify for any forms of income from the Social Security Administration or for those with severe disabilities on a Medi-Cal waiver. Pro Tip: if the applicant is receiving Medicare and Medi-Cal, they are receiving Traditional means-tested Medi-Cal. In sum, if the applicant is disabled and unable to earn gainful employment (approx. \$1,200 a month, <https://www.ssa.gov/oact/cola/sga.html>), they are receiving means-tested Traditional Medi-Cal and you need to discuss protection for their ongoing benefits eligibility.

Will the applicant apply for "disability income" with The Social Security Administration or medical insurance (Medi-Cal) post-settlement? ("Disability" = Supplemental Security Income "SSI," or Social Security Disability Insurance "SSDI") The logic behind question three is self-explanatory, if the applicant needs to apply for means-tested benefits post-settlement (i.e. health insurance through Medi-Cal and/or income through SSI), they will need to consider protecting their ongoing eligibility. An applicant with capacity can establish their own Special Needs Trust, but that should not be used as a justification to not address preserving eligibility before disbursing a settlement. If an applicant accepts a settlement and decides to give money to a loved one, this "bars that individual's eligibility for Medi-Cal for up to five years and SSI for up to three years" (https://www.ssa.gov/OP_Home/cfr20/416/416-1246.htm). This is because it's common for individuals to shed assets to make the taxpayer pay for their medical insurance or caregiving costs through Medi-Cal. In a latter section, we will address solutions that don't involve

a Special Needs Trust, that can come in handy when the applicant simply won't be compliant with a trustee. Asking question three isn't just good for the applicant, it also shows them that the firm is people-centered and cares about their client's success post-settlement.

Increased Autonomy with a Special Needs Trust

A Special Needs Trust is the most common solution to preserve eligibility for Medi-Cal and SSI because it is versatile to many different situations and has no contribution limit. Additionally, policy changes in 2018 have made Special Needs Trust more attractive to establish. The most notable change comes from the approval of a secured debit card, or in other words, a VISA card with a preloaded amount equal to the applicant's spending plan or budget. In short, the applicant swipes the card as credit and stores the receipts in an envelope or smartphone, and then sends them to the trustee at the end of the month to replenish the card. If necessary, these cards also allow limitations to be placed on the card to fit the applicant's needs. Furthermore, funds can be transferred within a business day to the card to allow the flexibility needed for large purchases and emergency situations. The advantages of this cannot be overstated because it allows trustees to give their applicants the autonomy they desire. In short, trustees of Special Needs Trusts have more flexibility than they have ever had historically which translates to greater autonomy for the applicant.

Some of the other sweeping policy changes that increase the autonomy provided to applicants of a Special Needs Trust also include:

- In the past, all Special Needs Trusts needed to be used for the "sole benefit" of the applicant; this has been replaced with "direct benefit." This provides the trustees with greater discretion and flexibility regarding disbursements.
- Increased flexibility on the number of caregivers that accompany an applicant during travel.
- Transfers to Achieving a Better Life Experience (ABLE) accounts from a Special Needs Trust are exempt. This is helpful for a variety of reasons, but the most notable is for SSI recipients who can avoid a reduction of benefits.

Who to Trust and Other Attractive Solutions

A qualified expert on this topic, such as a Special Needs Planning attorney or a representative from a non-profit Trustee, is generally used by applicant attorneys to help with these issues, but caution should be used when selecting the best expert. There are some great organizations that require annual recertification such as The Academy of Special Needs Planners (ASNP) and the National Academy of Elder Law Attorneys (NAELA). Even then, it's important to understand how that expert gets paid and the potential conflict of interest they may have when providing support to your firm.

If the only solution an "expert" mentions is a Special Needs Trust, then they are a salesperson, not an expert who wants to operate in the best interest of your applicant. It's probably because that's the only way they get paid, and that's normal, but as the applicant's attorney you should be mindful of this bias due to your fiduciary duty owed to your applicant. A Special Needs Trust may be the most common solution, but that doesn't mean it is always the best fit. For example, below are three common solutions that should be addressed by an expert when presenting options to preserve Medi-Cal or SSI for your applicant.

- *A Spend Down:* This is the most economical way to preserve eligibility, but is generally only used for small settlements, by applicants with past debt, or when applicants want to make one big purchase (i.e. usually a car or house purchase). This strategy involves spending the entire award (i.e. except \$2,000 or less) within the same calendar month it's received. Please note, all the funds must be spent on the applicant and cannot be given away to loved ones. This is not generally used for minors or for adults without capacity due to California's probate codes.
- *An ABLE account:* This is a less expensive alternative to maintain than a Special Needs Trust, but limiting this strategy to competent adults, it has little oversight to protect the applicant from misappropriation. It has an annual contribution limit of \$15,000 (tied to the gift tax), a maximum cap of \$100,000 and can only be used by those disabled prior to the age of 26.
- *Forgoing eligibility:* For someone without a need for long-term care services

it sometimes makes more sense to purchase a private health insurance policy. This is most common in large cases with plenty of funds available and limited recurring health needs from the applicant, or on cases where an applicant simply refuses to be compliant with a Trustee.

Conclusion

The purpose of this article is to help encourage applicant attorneys who work months, if not years, fighting for a settlement to

"mind the gap" created by accepting a settlement award over \$2,000. In an effort to ensure applicant attorneys in California are well trained to be trusted travel companions, this article describes the benefits of preserving means-tested benefits (especially for those with long-term care needs), provide an easy way to identify applicants through a revised intake interview process, and illuminated the potential bias an expert may have. We hope this encourages firms to be champions for those living with disabilities. ■