

6 Real-World Considerations for Advanced Settlement Planning



(Royalty free image: <https://unsplash.com/photos/zBsdRTHllm4>, Credit: Unsplash / rebelvisual)

The following is adapted from [The Art of Settlement](#).

Jan Smith was the victim of medical malpractice at a hospital. Jan was in her early forties when she decided to have elective surgery on her back for degenerative disc disease. During the surgery, a problem developed while being intubated and the procedure was cancelled.

Mrs. Smith was moved to the ICU and no neurologic monitoring was performed that evening after being moved from the surgical suite. The next morning, Mrs. Smith was found to be quadriparetic. A suit was brought against multiple defendants with a significant seven-figure recovery secured. Mrs. Smith and her family had Medicaid coverage and SSI. She had also applied for Social Security Disability Income (SSDI). At the time of settlement, there was no Medicare eligibility, since she had not been approved for SSDI and she wasn't sixty-five.

In the confusing landscape of public benefits and planning issues that arise today for trial lawyers when settling catastrophic injury cases, finding your way can be a daunting task. In the

paragraphs that follow, I'll use Mrs. Smith's real-world example to identify six key considerations to look out for when you're settling a case for a catastrophically injured client.

1. Public Benefits Versus ACA Coverage

As a starting point, the first question is, does it make sense for Mrs. Smith to give up her needs-based benefits completely by taking the settlement in a lump sum and becoming privately insured through coverage under the Affordable Care Act?

This isn't a question that can be answered with a simple yes or no. There are multiple considerations before deciding to eschew coverage afforded by Medicaid and Medicare along with the needs-based Social Security benefit, SSI. First is whether the ACA coverage will be around for the long term. Will it be repealed at some point? Will portions of it be repealed making it a nonviable option?

Second, does the case involve needs that aren't provided for by the Affordable Care Act coverage such as in-home, skilled attendant care or long-term facility care? These services can be very costly and may be covered by Medicaid in many states but are not covered by ACA plans. In Mrs. Smith's case, she will have a significant amount of attendant care needs that can be covered by certain Medicaid programs available in her home state but not by the ACA.

2. Public Assistance Program Analysis

Because Mrs. Smith is eligible for Medicaid and SSI as well as having applied for SSDI, further explanation of these benefits makes sense to adequately understand the issues involved in planning for her recovery. There are two primary public benefit programs that are available to those who are injured and disabled. The first is the Medicaid program and the intertwined Supplemental Security Income benefit (SSI).

The second is the Medicare program and the related Social Security Disability Income/Retirement benefit (SSDI). Both programs can be adversely impacted by an injury victim's receipt of a personal injury recovery. Understanding the basics of these programs and their differences is imperative to protecting the client's eligibility for these benefits. So how do we protect Mrs. Smith's current and potential future benefits?

3. Planning Techniques for Keeping Mrs. Smith Eligible for Public Assistance

Since Mrs. Smith receives Medicaid/SSI, a Special Needs Trust can be created to hold the recovery and preserve public benefit eligibility since assets held within a Special Needs Trust are not a countable resource for purposes of Medicaid or SSI eligibility.

The 1396p provisions in the United States Code govern the creation and requirements for such trusts. There are two primary types of trusts that may be created to hold a personal injury recovery each with its own requirements and restrictions.

First is the (d)(4)(A) Special Needs Trust which can be established only for those who are disabled and are under age sixty-five. This trust is established with the personal injury victim's recovery and is established for the victim's own benefit. It can only be established by a parent, grandparent, guardian, or court order.

Second is a (d)(4)(C) trust typically called a pooled trust that may be established with the disabled victim's funds without regard to age. A pooled trust can be established by the injury victim unlike a (d)(4)(A).

4. Planning Techniques to Ensure Mrs. Smith Will Not Lose Medicare Coverage in the Future

Mrs. Smith has applied for SSDI which means technically, according to CMS guidance, she has a "reasonable expectation of becoming a Medicare beneficiary within thirty months." CMS recommends that injury victims set aside a sufficient amount to cover future medical expenses that are Medicare covered..

In certain cases, a Medicare Set-Aside may be advisable in order to preserve future eligibility for Medicare coverage. A Medicare Set-Aside allows an injury victim to preserve Medicare benefits by setting aside a portion of the settlement money in a segregated account to pay for future Medicare-covered healthcare. The funds in the Set-Aside can only be used for Medicare-covered expenses for the client's injury-related care.

5. Dual Eligibility: The Intersection of Medicare and Medicaid—SNT/MSA

Since Mrs. Smith is potentially a Medicaid and Medicare recipient, extra planning is in order. If it is determined that a Medicare Set-Aside is appropriate or needed in the future, it raises some issues with continued Medicaid eligibility. A Medicare Set-Aside account is considered an available resource for purposes of needs-based benefits such as SSI/Medicaid.

If the Medicare Set-Aside account is not set up inside a Special Needs Trust, the client will lose Medicaid/SSI eligibility. Therefore, in order for someone with dual eligibility to maintain their Medicaid/SSI benefits, the MSA must be put inside a SNT. In this instance, you would have a hybrid trust which addresses both Medicaid and Medicare. It is a complicated planning tool but one that is essential when you have a client with dual eligibility.

6. Financial Settlement Planning Considerations

While we have discussed Mrs. Smith's public benefit preservation issues above, what about the management of her significant recovery? The first option is to take all of the personal injury recovery in a single lump sum. If this option is selected, the lump sum is not taxable, but once invested, the gains become taxable and the receipt of the money will impact his or her ability to receive public assistance. A lump sum recovery does not provide any spendthrift protection and leaves the recovery at risk for creditor claims, judgments, and wasting. The personal injury victim has the burden of managing the money to provide for their future needs, be it lost wages or future medical. Needs-based public benefits would be a lost option if a lump sum is taken as would any reduction in the premium costs for the ACA insurance programs.

The second option is receiving "periodic payments" known as a structured settlement instead of a single lump sum payment. A structured settlement's investment gains are never taxed, it offers spendthrift protection and the money has enhanced protection against creditor claims as well as judgments. A structured settlement recipient can avoid disqualification from public assistance when a structured settlement is used in conjunction with the appropriate public benefit preservation trust. However, a structured settlement alone will never protect the disabled injury victim's needs-based public benefits.

A third option, which should always be considered, is to create a "settlement trust" as an alternative to structured settlements. Settlement trusts are typically spendthrift irrevocable trusts managed by a professional trustee and can also contain special needs provisions to allow for preservation of needs-based benefits. These trusts provide liquidity and flexibility that a structured settlement can't offer while at the same time protecting the recovery.

How Mrs. Smith was Protected

After assessing Mrs. Smith's situation, a settlement trust was created that had two buckets: one with an immediate fixed income portfolio of annuities that provide periodic payments, and a cash reserve to be used when the need arises. The settlement trust had provisions that allowed Mrs. Smith to retain her eligibility for public assistance, which was a win-win solution.

There are no easy answers to settlement questions. Complex settlements require detailed planning and creative solutions. It is up to the personal injury lawyer to discuss those options fully with the client so they can make an informed decision.

For more advice on advanced settlement planning, you can find [The Art of Settlement on Amazon](#).

Jason D. Lazarus, J.D., LL.M., CSSC, MSCC is the founder and Chief Executive Officer of Synergy Settlement Services. Synergy offers healthcare lien resolution, Medicare secondary payer compliance services, pooled trust services, settlement asset management services and structured settlements. He is also the managing partner and founder of the Special Needs Law Firm; a Florida law firm that provides legal services related to public benefit preservation, liens and Medicare Secondary Payer compliance. Jason is an Amazon Best-Selling author and his

book; Art of Settlement is a detailed guide for trial lawyers related to regulatory compliance when resolving catastrophic claims. His written work has been cited, as authoritative on Medicare compliance, by the Supreme Court of Florida and the United States Southern District of Florida. Mr. Lazarus received his B.A. from the University of Central Florida and his J.D. with high honors from Florida State University. He received his LLM in Elder Law with Distinction from Stetson University College of Law.