



Attorneys Explain Interplay of SNTs and Medicare Set-Asides

Representing SNA at the recent annual conference of the National Alliance of Medicare Set-Aside Professionals (NAMSAP), Kristen L. Behrens, of the [Begley Law Group](#), and Shannon A. Laymon-Pecoraro, of the [Hook Law Center](#), discussed how to integrate Medicare set-asides (MSAs) with first party special needs trusts (SNTs) created to hold personal injury settlements.

An SNT is an estate planning instrument that enables an individual with disabilities to protect their eligibility for public benefits, while retaining financial resources intended to supplement the basic expenses covered by government programs. Failure to adequately consider options for optimizing a client's eligibility for public benefits may leave settlement advisors and the attorneys involved open to malpractice and ethics charges.

When establishing an SNT, they explained, it's important for the beneficiary and family to discuss their priorities and budget with the drafting attorney. Immediate needs, such as an accessible van, home or repayment of debt, should be considered in determining how to apportion the settlement between cash and the possible purchase of a structured settlement annuity. Because there are limits to the SNT, such as the "sole benefit rule" and the "food and shelter rule," distributions must be carefully considered by the trustee. The counseling session will help manage the beneficiary's expectations.

The speakers stressed that a trustee's responsibilities are significant, requiring an understanding of public benefits, investments, tax regulations and bookkeeping. The trustee must be alert to evidence of abuse or sub-standard service providers and, given the individual's exposure to liability, should be "insurable, bondable or have deep pockets."

[In the case of a dual eligible, or someone receiving both Medicare and Medicaid benefits](#), both Medicare and Medicaid are legally entitled to reimbursement for services rendered to the beneficiary. In the case of Medicare, expenses resulting from the injury in question must be estimated at the time of settlement and a "Medicare set-aside" should be established and incorporated within the SNT. In the case of Medicaid, states must be reimbursed, up to the amount expended by Medicaid during the beneficiary's life, from funds remaining in the SNT upon the beneficiary's death.

Some individuals may attempt to avoid establishing a Medicare set-aside as a result of Medicaid coverage. However, Behrens and Laymon-Pecoraro noted that Medicaid

recipients are automatically enrolled in Medicare Part D, which may result in Medicare secondary payer issues.

Similarly, Medicaid recipients may request that settlement proceeds be distributed to them, in lieu of being placed into an SNT, and voluntarily terminate Medicaid coverage. Behrens and Laymon-Pecoraro stressed that, as a result of the extensive medical expense often associated with disabilities, out-of-pocket costs may quickly deplete a settlement. They also cautioned that although many people believe that the Affordable Care Act's elimination of pre-existing conditions provides individuals with disabilities access to coverage similar to that provided by Medicaid, some programs, such as state waiver programs or long-term care services, are not available under traditional acute care policies. Careful analysis should be used when electing to terminate Medicaid coverage.

They closed by stressing that SNTs are complex, highly regulated instruments, requiring specialized knowledge. Involving a special needs attorney as early in the settlement process as possible can avoid serious errors.

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