

SPECIAL NEEDS TRUST NEWSLETTER

MAY 2009

A. KEL LONG, III P.C.

3060 Peachtree Rd., Suite 1725

Atlanta, GA 30305

404 238-0174

AKL3PC@mindspring.com

www.AKELLONG.COM

MEDICARE SET-ASIDE TRUSTS

NEW REPORTING REQUIREMENTS

Beginning July 1, 2009, new rules apply regarding who must ensure compliance with the Medicare Set Aside rules. If you are a:

- 1) Liability insurer,
- 2) No-fault insurer,
- 3) Self-insurer, or
- 4) Workers compensation insurer,

then the insurer must determine whether any claimant who files a claim against the insurer is entitled to Medicare benefits. If the claimant is entitled to Medicare benefits, then the insurer must provide Medicare with that claimant's identity and other information to be required by the Secretary of Health and Human Services. Failure to comply results in a \$1,000 per day penalty imposed against the insurer. Regulations are expected to be issued by June, 2009 describing what information is required to be provided. The statutory references are found at: Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (PL 110-173) which amends the Medicare Secondary Payer (MSP) provisions of the Social Security Act (Section 1862(b) of the Social Security Act; 42 U.S.C. 1395y(b)).

NOTE: While these requirements and penalties are imposed on the defense side, we do expect that defense counsel will require information from the plaintiff side as they deem necessary, such as a determination of the plaintiff's Medicare eligibility or ineligibility.

SNT'S SHOULD INCLUDE AN AMENDMENT PROVISION

A recent case in Kansas highlights the need to include the ability to modify a Special Needs Trust to comply with Medicaid rule changes.

In the Kansas case, the trust was written and approved by the Court after the state had published regulations requiring specific references in the trust to protect the state's Medicaid

lien. The state disallowed the SNT for failure to comply with the existing regulations, thus rendering the adult ward ineligible for Medicaid benefits.

The trustee then amended the trust to include the required language. The amendment was done pursuant to a provision in the trust agreement allowing the trustee to amend in order to comply with Medicaid requirements. The Kansas District Court held that the amendment was effective, thus reinstating the ward's Medicaid benefits. *White v. Kansas Health Policy Authority*.

NOTE: I often create thru the trust agreement a trust protector committee comprised of well-meaning family members to serve in this role. The committee has the power to amend the trust in order to comply with future Medicaid rule changes. I find that a bank trustee may be reluctant to amend the trust without first obtaining court approval. The trust protector committee can act quickly and often without first requiring court approval to make this type of change to the SNT. With more Medicaid rule changes in the future a certainty, it is best to prepare ahead.

Assistance with Special Needs Trusts

Please let me know if I can assist you with any of the following:

- *Special Needs Trust preparation*
- *Settlement Trust preparation to provide long-term asset management*
- *Court approval of a minor or incapacitated adult ward's claim*
- *Appointment of conservator*
- *Medicaid Deeming waiver ("Katie Beckett" waiver)*
- *Medicare set-aside trust/arrangements*
- *Ahlborn allocations and Medicaid lien releases*
- *Trust administration issues or a Change of Trustee*
- *Trust amendments necessary to qualify for governmental benefits*