Payback and Termination of an OBRA '93 Trust

By Theresa M. Varnet, Esq.

An OBRA '93 Trust is a trust funded with assets within the legal control of a person with disabilities, and which, at the death of such person, a payback to the state or states that provided medical assistance (Medicaid/Public Aid) paid in accordance with the applicable federal medical assistance program (Medicaid Statutes and Regulations) is required. The payback requirement is unique to OBRA '93 Trusts. Supplemental Needs Trust created with the funds of the parent or someone other than the disabled person need not have a payback requirement. If OBRA trust assets are not to be considered a resource for government benefit eligibility, the Medicaid regulations require that the trust specifically direct the trustee to reimburse the state at the death of the disabled beneficiary.

If the beneficiary received the assets as a personal injury award, the beneficiary must satisfy Medicaid and Medicare liens prior to funding an OBRA Trust. The Medicaid and Medicare liens that must be paid include payments for the benefit of the beneficiary after the date of injury up through the date of settlement of the case. If the beneficiary was receiving Medicaid or Medicare prior to the injury, those benefits do not need to be reimbursed prior to funding the OBRA trust. The theory for Medicare recovery after a personal injury award is similar to any insurance coverage that may have advanced payment for medical care after a personal injury. Like the insurance company, Medicare has a claim against the defendant (tortfeasor) for the amount it had to pay for the "insured" Medicare recipient. Both Medicaid and Medicare may compromise the lien amount and accept payment of a small percentage of the lien depending on the total settlement. Medicare has recently enhanced its ability to monitor health care payments for person injury award recipients and has voiced its intention to enforce decades' old rules regarding Medicare set aside accounts. Currently there is confusion among legal professionals regarding Medicare's actual enforcement, but as technology allows better monitoring, Medicare is likely to seek enforcement and recovery.

The Department of Human Services (DHS) may have advanced funds for the beneficiary during pendency of the lawsuit as well, and will usually seek at least partial recovery before the personal injury award may be used to fund an OBRA Trust.

At this time, it is not the practice of Medicaid or DHS (at least in Illinois) to attempt to recover for payments or services provided to the beneficiary prior to a personal injury before the beneficiary transfers the assets to an OBRA Trust.

At the death of the beneficiary, however, Medicaid and DHS will seek reimbursement for all payments they have made on behalf the beneficiary, except for those that have been paid or compromised for the period after the personal injury up to the settlement. Even though the beneficiary was eligible for government benefits prior to an injury, at the death of the individual, Medicaid will seek recovery if assets are later received and transferred into an OBRA Trust. Unlike Medicaid rules, which have required reimbursement since their enactment in 1993, DHS rules have always authorized a claim for reimbursement from the estates of persons for whom it has advanced funds.

Medicare payments, other than those payments made pursuant to a personal injury and for which it claims subrogation, are not required to be reimbursed as Medicare is an entitlement that accompanies Social Security or Social Security Disability Income (SSDI).

As a planning matter, if the beneficiary had been receiving Medicaid benefits for many years prior to an injury and if the life expectancy is short, it may be preferable not to establish an OBRA Trust. Without an OBRA Trust, the beneficiary would be ineligible for government benefits and must pay privately for care, but no payback for Medicaid for benefits prior to the injury would be required. Depending on the cost of care, private pay may leave some funds in the hands of the beneficiary which could go to his or her heirs. In a case we handled, the beneficiary began receiving Medicaid benefits in 1972, and also received DHS services since the mid 70s. He was injured in 1993, received an award in excess of $1 million, and incurred liens of about $100,000 since the injury. At his death recently, Medicaid and DHS demanded reimbursement of the total amount expended during his life all the way back to 1972 which totaled more than $600,000.

At the death of the beneficiary, the Trustee should request a payback statement from Medicaid. The name, birth date and social security number of the beneficiary are required to obtain the payback amount. It may be important to review the payback records as there may be some discrepancies or duplications of charges. If you request it, you can receive an itemized printout of the charges.

The trustee must account for expenditures made during the life of the trust, so good records should be kept. In a case we handled, the trustee spent over $50,000 in three years and had only $10,000 available for payback. HFS requested a full accounting of the expenditures since the trust was unable to pay the full lien amount.

Where the estate has sufficient funds to reimburse Medicaid and DHS, they will seek full reimbursement. It is the policy of both DHS and Medicaid that there is no compromise of liens at the death of the beneficiary.

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