Commentary on the Impact of Affordable Care Act on the Special Needs Practice

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It is a split decision. The Supreme Court upheld the constitutionality of health insurance industry reforms, but limited the federal government's ability to force the extension of Medicaid to millions of uninsured poor working families. At first blush, special needs practitioners would think, given our current concentration on securing Medicaid eligibility in the special needs area, that the Supreme Court's decision which slows the expansion of Medicaid would favor continued and increased growth of our special needs trust practices. In reality, however, it is just the opposite. It is the health insurance reforms in the Affordable Care Act that dictate the future of our practices.

This comment seeks to explain why, for some of us, the Supreme Court decision upholding the constitutionality of the Affordable Care Act (ACA) will have a tremendous negative financial impact on our law practices – but for a wonderful reason: clients will not need us to the same degree they do today. Unless there is political intervention in January of next year due to a change of government in November, our potential client base is about to shrink substantially due to the full implementation of health insurance reforms in seventeen months, on January 1, 2014.

From the outset, let us make clear that the group of attorneys who will be most affected are those of us who derive substantial income from the preparation or administration of special needs trusts and the representation of claimants for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) disability claims – two main parts of my law firm's practice.

Unaffected by the Affordable Care Act and the Supreme Court decision are attorneys who limit their practice to traditional "elder law," defined as assisting persons in acquiring Medicaid payment of nursing home costs. That is not the focus of this commentary. The target population of the traditional elder law attorney in Florida, for example, is the 50,000 of the 70,000 nursing home residents who are eligible for Medicaid's Institutional Care Program. These 50,000 compare to the 600,000 persons in Florida who have been found "disabled" but are not in nursing homes – the current potential clientele for the special needs practice.

The number of persons eligible for Medicaid nursing home eligibility is not reduced by any provision of the Affordable Care Act. However, traditional elder law attorneys will still be somewhat affected by the fallout as special needs attorneys seek to replace income lost by ACA's provisions seek to increase their share of the elder law market.

For the special needs trust practitioner, the focus is on "disability" not age or residence. Currently, the legal status of "disabled" is both a negative and a positive. Being "disabled" under the law negatively affects, to the point of exclusion, an individual's ability to purchase private health insurance due to a "pre-existing condition." In spite of the customer's financial ability to purchase private health insurance, companies will not sell it to a "disabled" individual. On the positive side, currently at least, the legal status of "disabled" as determined by the Social Security Administration (SSA) or a state Medicaid agency, fulfills the first prong to securing public health care (Medicaid). The

second prong, having little income and few assets, is the driving force for the special needs practitioner - helping individuals legally shelter excess resources (those over $2,000) in the safe harbor of a non-countable Special Needs Trusts.

The Affordable Care Act changes this positive-negative dynamic because it reforms health insurance industry practices. To the person who has both disabilities and money, the political focus on the "individual mandate" – "I am now required to buy health insurance" – was never a problem. Persons with disabling conditions desperately needed health insurance. And those with funds wanted to buy it. Until ACA came along, their only choice, however, was public insurance through Medicare or Medicaid eligibility, which in turn, in the vast majority of states, required a favorable determination of eligibility for SSDI or SSI disability benefits. One (a finding of disability) triggers the other (health insurance eligibility) and currently provides the only option to secure medical care for millions of persons with disabling conditions who are rejected due to pre-existing conditions.

Who are "disabled clients with funds?" Generally, they are our typical special needs trust (SNT) clients who suddenly acquire wealth through an inheritance or a personal injury settlement. ACA changes the world for persons with disabilities and funds who will now have a choice between public or private health insurance. For significant financial as well as health reasons, we believe that private health insurance, not Medicaid, will be soup d'jour for the vast majority of SNT clients for the reasons we outline below.

Is the lack of Medicaid expansion critical to our SNT clients? Although Medicaid may or may not be expanded to the working poor in a particular state, what is nationally significant and uniform under the Act and the Supreme Court's decision, are the health insurance industry reforms that open private insurance to our disabled clients with funds. The industry reforms apply to all states and do not require state approval.

News reports that some conservative governors will not extend ACA provisions to their state is limited to the second prong of the Supreme Court decision, a state's right to reject Medicaid expansion to the working poor. But Medicaid expansion is irrelevant to our SNT clients since they will be no longer a captive of the Medicaid system. Due to the first prong of the Supreme Court decision, the constitutionality of health insurance industry reforms, our nouveau riche potential SNT clients will benefit from the Affordable Care Act.

The most obvious and significant industry reform important to our SNT clients is the elimination of pre-existing conditions as a bar to purchasing private health insurance. However, ACA also eliminates annual or lifetime caps, rescission of insurance policies, non-renewability, and higher premium costs for persons with pre-existing conditions. For individuals with significant medical problems, elimination of cost-containment ceilings is just as important as access to the door of private medical care. It is not unusual to see clients who have maxed out their lifetime cap and are now seeking public health insurance.

Why would clients opt to pay for private health insurance rather than "free" Medicaid? The two major reasons are first, securing health insurance without a payback on death and second, access to significantly better medical care.

Any SNT drafting attorney can easily come up with all the other reasons. They are the "points of resistance" heard daily in initial SNT client conferences as to why the client does not want a special needs trust. You can make your own list.

Stated positively, additional reasons to opt out of the SNT-SSI-Medicaid route and purchase private health insurance directly include the ability to have both full medical insurance and the dignity of having direct control of one's own resources (no trustee required as with SNTs) as well as eliminating a long list of things that have no intrinsic value – by that I mean having to use a means (SNTs) to an end (access to medical care). Purchasing private insurance eliminates hiring and paying an attorney to draft a special needs; lifetime payment of bank and trustee fees which can be as much as $15,000 per year even in "small" (under $1 million) trust cases; restricted access to one's personal funds without having a trustee jump through the hoops of the five trust distribution rules; removing the limitation on sharing the newfound wealth with spouses, children and others without the limitations of the SSI/Medicaid "sole benefit rule;" and the elimination of court fees or hearings to establish a special needs trust as now sometimes required.

On the financial side, the most significant benefit of using private health insurance over public health insurance will be the avoidance of the Medicaid payback. I will not have Medicaid payback when I die because I am not using Medicaid. I have private health insurance. For persons with disabilities, who may need significant medical care, using Medicaid can build up a very large lien very quickly. Since by law private health insurance premiums for "sick" privately insured clients will be identical to those of us in good health, it's pretty much a no-brainer to opt for private health insurance – get better care for only the small cost of the premium, not the cost of full reimbursement for the payments made to all medical providers during one's life.

There is another reason that clients will opt for private health insurance. It's the same reason that none of us work to arrange our finances to put our children or ourselves on Medicaid: in many states, it's simply terrible coverage and getting worse. For example, in Florida only 8 percent of physicians take Medicaid. There are long waiting lists of three to six months to see a primary care physician. Referral to a specialist is often nearly impossible or may involve a 150 mile roundtrip to find the closest physician specialist who is among the 8 percent who take Medicaid. For example, counties with twenty or more conveniently located private pediatric neurologists sometimes have none who accept Medicaid. Furthermore, a client who is ill or injured needs a better insurance plan than the rest of us who may only see a doctor every five years for a checkup. Medicaid is not that plan. The client needs the best hospitals and best physicians in town. Therefore, a disabled client who just settled a personal injury case for a substantial amount has to look at good private insurance as the first option, not the politically maligned and consistently attacked poor man's insurance, Medicaid.

In making that choice between private health insurance and public Medicaid via a special needs trust with a Medicaid payback for the typical potential SNT client, the result is pre-ordained.

How do we know that? In Florida and twenty other states, ObamaCare is already in place for persons with pre-existing conditions who have been excluded from the private health insurance market. At this point a limited number of them are eligible for the federal Pre-existing Condition Insurance Program (PCIP) described at www.pcip.gov. Almost every single month, however, our office has "lost" a new SNT case to the PCIP program (purchasing great private health insurance) when we presented the pluses and minuses of both to the client. Fully informed client choice will almost always end up with an unopened SNT file.

Will there still be some clients who will opt for special needs trusts? Yes, but to a very limited degree. As we noted from the onset, the subset of those continuing to need SNTs includes clients who need long term nursing home care or its alternatives and who want to shift the cost to Medicaid. In addition, those clients with small settlements or inheritances whose newfound wealth is insufficient to pay private health premiums and co-pays will opt for SNTs without regard to the Medicaid payback. They have no choice.

Is there any good news for your practice? Yes. In January, 2014, old SNT clients may become clients again. At that point former clients who are now SNT beneficiaries become eligible to purchase private health insurance. Just because one is eligible for Medicaid does not mean one has to continue on public insurance or that it is desirable to do so. What will be the options for clients who already have SNTs?

First, one option may be to terminate the SNT, pay off the existing Medicaid lien, purchase private health insurance, and avoid the additional larger lien at death. With a highly competent client who can manage funds without the advice of a trustee, terminating the trust and eliminating $15,000 per year in trustee fees is an attractive option. In terminating the SNT, the SSI client must also be willing to give up the monthly check, which amounts to a net of approximately $450 per month (after the In-kind Support and Maintenance deduction from the full SSI benefit). The loss of $450 per month must be measured against the elimination of trust management fees and related tax preparation costs, as well as the "soft" advantages of not having a special needs trust noted above (dignity, access, sharing, etc.). Obviously, one would not pay off the Medicaid lien and close the trust if the lien is larger than the trust estate, or if the trust had insufficient resources to pay health insurance premiums and co-pays.

A second option for some clients will be to continue the trust in place for the purpose of financial management, but have the trustee purchase better private health insurance. This will have the dual benefit of securing better health care and not increasing the Medicaid lien payback at death. There is no requirement to pay off the Medicaid lien if the person goes off benefits. Only death triggers the obligation to pay the Medicaid death lien. The option of giving up SSI and Medicaid but not terminating the trust will also have the advantage of making trust administration easier since the limitations on distributions would be removed if the client opted to also give up SSI eligibility. Trustees could make direct payment of funds to the beneficiary, for example.

A third option may be to continue the trust, purchase private health insurance, and maintain SSI and Medicaid eligibility. In other words, the client would continue to be eligible for SSI and Medicaid, but would add private health insurance to the mix. Private health insurance is primary. This will reduce the lien, but leave in place the monthly SSI income, and the backup of Medicaid eligibility for those things that private insurance may not cover. In this scenario, unlike the one above, the trustee will still have to follow the five rules for trust distributions to maintain SSI eligibility. Many young adult clients are already in this situation. They have a SNT and SSI and Medicaid eligibility, but are also covered under their parents' health insurance. Under ACA, other clients without parental coverage, will also be able to have both public and private insurance – and SSI. This third option will be more attractive when the trustee is serving pro bono.

Is there a future need for special needs attorneys at the point of the client's receipt of an inheritance or a personal injury settlement to replace the d4A or d4C trust? Yes. Expertise in money management through trusts in general will become important. Often PI attorneys are as worried about the client's ability to manage funds as they are about maintaining access to health care. For example, a young man with borderline IQ who lost a leg playing football will not have significant future medical needs. He may even be employable as a single amputee. But handing him $500,000 in a single lump payment clearly has drawbacks. Special needs trust attorneys have acquired expertise over the years that could be useful in post-settlement life planning as well as estate planning for the newly wealthy. These attorneys understand the pros and cons and limitations, particularly in the era of J. G. Wentworth re-purchase of structured settlement annuities. Special needs attorneys also have experience negotiating with banks on fees and the terms of trust administration agreements, and know which banks and trust companies are compatible with or a good fit for our clients and their individual lifestyles and needs. We also know how to insert Trust Protectors and co-trusteeship in trust situations so that there is a braking force on excessive depletion of trust assets. Special needs trust experience can still be a "value-added" benefit to the client, his family and the personal injury attorney, even after the issue of securing health care has been removed, and a normal SNT is not used. Whether personal injury attorneys will call upon special needs trust attorneys will depend in large part on whether SNT attorneys pivot away from a Medicaid-eligibility centered approach, and market instead a litigation solutions financial planning benefit model.

This commentary is not directed at the impact of ACA on personal injury practice, but it cannot be ignored that the size of jury verdicts and settlements, which are the res of our trust estates, will be reduced under ObamaCare. If you have attended pretrial mediations or jury summation in a personal injury cases, you'll note that the "life care plan" prepared by plaintiff's attorney's Certified Rehabilitation Counselors in conjunction with actuaries and financial planners is the basis for the largest verdicts and settlements, particularly in states which have followed the national trend of reducing compensable pain and suffering. Under ACA, the injured plaintiff will be assured of access to health care in the future, at only the cost of the premiums and co-pays. Since "future medical expenses" are the bulk of the injury claim, does ACA not reduce the size of the settlement by 80% or more? The defense response to a personal injury claim will be to offer structured settlements to pay directly the plaintiff's future health insurance premiums and co-pays. Pain and suffering, lost of consortium, derivative claims and even lost

future earnings have in the past been the smaller elements of a personal injury or medical malpractice award. Consequently, it will become rare to see $10 million verdicts and settlements.

Finally, a note about the impact of ACA on the special needs practice for those of us who include SSI and SSDI representation in our practices. The Affordable Care Act will adversely affect (to the claimants' benefit!) our Social Security practice in three ways.

First, and this is obviously anecdotal, our office has run informal surveys of disability claimants, asking them during the initial interview, "If we could strike a deal with the government where they would give you health care, would you agree to drop your claim for a disability check?" About half the respondents said they would. The impetus for applying for disability was to trigger eligibility for medical care through Medicaid or Medicare. Families can often provide food and shelter, even entertainment and other extras, to a member with disabilities. What they can't do is pay for an operation, a $200,000 hospital stay, or even $1,800 per month for medicine. Furthermore, some people don't want to apply for disability due to the stigma of being declared "disabled." Recently a parent considered stopping, on the very steps of the courthouse, our SSI claim for her 28 year old developmentally disabled son because our legal brief argued that her son met the federal Listing of Impairments for Mental Retardation. She so opposed the phrase (eliminated by federal law in all agencies except SSA), that she seriously considered stopping the proceedings minutes before they were to begin. But she, like others, was driven to continue the SSI claim due to the need to trigger medical insurance. I am quite certain that had access to medical insurance been assured as it will be on January 1, 2012, she would have avoided the SSI declaration of "disability" due to son's "mental retardation." Under ACA, individuals who can themselves afford private health insurance, or who have family who will buy it for them, will now be able to maintain their personal values and dignity. And not apply for disability.

Second, ACA is going to affect the number of disability appeals even if it were not to reduce the number of claims. As most Social Security practitioners can attest, we often win cases that were denied by SSA at the early stages because we assist clients in getting the right medical treatment at public hospitals and community health clinics. Then armed with that information, we can demonstrate through lab reports, MRIs and other objective evidence, that the claimant meets the Listing of Impairments or is otherwise qualified for benefits. SSA has neither the duty nor the resources to assist disability claimants in finding medical care. It is the lack of medical records that causes SSA at the early stages to deny claims. Obviously, if individuals with medical problems are getting treated, there will be fewer errors in denying claims, and therefore, fewer appeals.

Third, with access to on-going treatment to eliminate or to control medical problems, some people will be able to continue to work, or if in an acute stage, will get treatment to keep medical situations from becoming chronic. Norway with its 2.8% unemployment rate has been highly successful in maintaining a healthy workforce, and for those injured or ill, returning individuals to work quickly. In the U.S., successful disability claims must meet "the SSA duration requirement" - that the claimant has a disabling medical impairment which, despite treatment, continues for a period of at least 12 months (or would result in death in less than 12 months such as with terminal cancer). Due to better health care ObamaCare will result in fewer claims that meet the duration requirement. A recent client illustrates

the point. I noticed in her extensive medical file that she is hospitalized about every four months. Under EMTALA, the Emergency Medical Treatment and Active Labor Act passed by President Reagan, even without a patient's insurance coverage or funds, hospitals are required to treat acute emergencies, stabilize the patient, and release. When I inquired why this client was hospitalized every 4 months, she explained that upon discharge from her normal ten-day hospital stay, the hospital provides her with medication for 90 days. The medication costs in excess of $1,500 per month if you don't have insurance (insurance companies negotiate much lower costs). After it runs out in 90 days, her health begins to deteriorate and she is re-hospitalized, only to repeat the cycle. She would probably not be "disabled" under the Social Security Act's definition if she were able to be on medications continuously. That will now happen under the Affordable Care Act. A healthier workforce will result in fewer disability claims.

The Affordable Care Act, as Joe Biden whispered to President Obama at the signing ceremony, is "a big f#@ng deal" with potential for a transformational impact on the special needs practice. It is even a much bigger deal than Joe knows for our clients with special needs. Change makes most of us uncomfortable, but change is a constant in our lives. This is one time when attorneys can both lament the negative impact of national legislation on our financial well-being, and rejoice in the concomitant good fortune of our clients who can now join the private health insurance market with the rest of us as equal citizens with their dignity intact.

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