



**DEPARTMENT OF HEALTH & HUMAN SERVICES**  
**Health Care Financing Administration**

**Center for Medicaid and State Operations**  
**7500 Security Boulevard**  
**Baltimore, MD 21244-1850**

January 20, 1998

Dear State Medicaid Directors:

This letter is one of a series that provides guidance on the implementation of the Balanced Budget Act.

We are writing to you concerning a class action lawsuit entitled, "Factor VIII or IX Concentrate Blood Products Litigation," MDL 986 (No. 93-C-7452, Northern District of Illinois). Under a recent settlement, four manufacturers of blood plasma products will pay \$100,000 to each of 6,200 hemophilia patients who are infected with human immunodeficiency virus (HIV). Approximately 1,000 of the HIV-infected patients are already eligible for Medicaid. Payments made under the settlement to these individuals would in most instances cause them to exceed the income and/or resource limits for Medicaid eligibility.

To avoid potential loss of Medicaid for these individuals, section 4735 of the Balanced Budget Act of 1997 (BBA) provides that, notwithstanding any other provision of law, payments made to class members under this settlement are not to be considered as income or resources in determining either eligibility for, or the amount of benefits under, the Medicaid program. Following is information about how this provision applies in specific situations concerning Medicaid eligibility.

### **SSI and Medicaid**

As explained previously, the settlement payments are not considered income or resources in determining eligibility for, or the amount of benefits under, the Medicaid program. However, section 4735 does not similarly exempt the settlement payments from being treated as income or resources under the SSI program. Thus, the settlement payments will be counted as income or resources under SSI.

However, loss of SSI should not result in loss of categorical Medicaid eligibility for these individuals. Regulations at 42 CFR 435.122 require States to provide Medicaid to individuals who would be eligible for SSI or an optional State supplement except for an eligibility requirement used in those programs that is specifically prohibited under Medicaid. The settlement payments are counted as income and resources under SSI, but cannot be so counted under Medicaid. Thus, under 42 CFR 435.122 States must provide Medicaid to individuals who lose SSI because of receipt of the settlement payments, even if their sole basis for eligibility for Medicaid was receipt of SSI.

### **Income Derived from the Settlement Payments**

While the settlement payments themselves are not counted as income or resources under Medicaid, section 4735 does not similarly exempt any income that may be derived from those payments. Thus, if the payments are placed in an interest-bearing account, or some other investment medium that produces income, the income generated by the account may be countable as income to the individual. To determine whether the income is in fact countable, States should apply their regular Medicaid State Plan methodologies for counting unearned income.

### **Transfers of Assets and Treatment of Trusts**

Settlement payments are not counted as income or resources in determining eligibility, or the amount of benefits, under Medicaid notwithstanding any other provision of law. This "notwithstanding" clause effectively precludes applying penalties under section 1917 of the Act to individuals receiving settlement payments who dispose of part or all of the payments in a manner that normally would be considered a transfer of assets for less than fair market value. Also, the "notwithstanding" clause precludes counting as available in any way settlement payments that may be placed in trusts which would normally be governed by the trust provisions at section 1917(d) of the Act. Assessing a transfer penalty, or counting settlement payments placed in a trust, would

effectively treat the payments in a manner that could affect eligibility for, or the amount of benefits under, the Medicaid program, and would violate the requirements of section 4735.

### **Operational Concerns**

States should be aware of certain operational problems concerning recipients of settlement payments which HCFA is working to resolve. As explained earlier, the settlement payments are counted as income and resource under SSI, but not under Medicaid. Under regulations at 42 CFR 435.122, States must continue to provide Medicaid to individuals who lose SSI because of receipt of the settlement payments. However, identification of settlement recipients is difficult because, under the terms of the settlement, the names of those receiving the payments were sealed by the court.

This means that HCFA cannot provide lists of payment recipients to States for cross-checking against State Medicaid records. Similarly, the SSI program cannot specifically identify payment recipients, and so cannot indicate to States, via the State Data Exchange (SDX) or other means, that a particular individual has lost SSI because of receipt of a settlement payment. The SDX will only show standard codes for loss of SSI because of excess income or resources.

As a result, States probably will not be able to identify settlement payment recipients who lose SSI as individuals who should continue to receive Medicaid under 42 CFR 435.122 unless those individuals actually contact the State Medicaid agency to identify themselves as payment recipients. This means that a number of payment recipients could lose Medicaid, regardless of 42 CFR 435.122, simply because the State has no other way of telling whether a particular individual has lost SSI because of receipt of a settlement payment, or for reasons having nothing to do with those payments.

In an effort to prevent unnecessary loss of Medicaid for individuals receiving settlement payments, HCFA has contacted the Settlement Law Group, the law firm which is managing the settlement and the payments to settlement recipients. The Settlement Law Group has already issued at least one letter of its own to settlement payment recipients warning them that they may lose Medicaid, and telling them to visit their local Medicaid office to ensure continued eligibility. The Settlement Law Group also has agreed to work with HCFA in further attempts to reach those individuals who are at risk of losing Medicaid. Under this agreement, HCFA will provide information about Medicaid, and what individuals must do to maintain their eligibility, to the group for re-transmission to settlement payment recipients.

If you have any questions about this provision or this letter, please contact Roy Trudel of my staff at 410-786-3417.

Sincerely,

/s/

Sally K. Richardson

Director

Center for Medicaid and State Operations

cc: All Regional Administrators

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