The Disabled in Debt to Social Security: Can Fairness Be Guaranteed?

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I. INTRODUCTION

Debt—who owes what to whom, or to what, and how that debt gets paid—is a subject much larger than money. It has to do with our basic sense of fairness, a sense that is embedded in all of our exchanges with our fellow human beings.

This article addresses the problem often faced by poor individuals who receive government benefits because of an identified physical or mental disability, or both, that is so severe...
that it prevents such individuals from working. By definition, the
disability must last at least twelve months or be expected to result in
death. Such beneficiaries are considered to be disabled from
performing any type of work.

Despite the permanent nature of one’s disability, a beneficiary
may decide at some point that he or she would like to try to work.
It is this event, although not only this event, that most often
triggers the problem of overpayments for beneficiaries of
government disability benefits. Administrative Law Judges of the
Social Security Administration (“SSA”), their law clerks, local office
employees, and lawyers who represent claimants must maneuver
through the law pertaining to this vast federal agency. Yet, unless
they are Internet savvy and closely study the SSA’s website,
www.socialsecurity.gov, claimants are many steps removed from
understanding the technicalities of the system from which they
receive disability benefits. The disabled beneficiaries, who live
from monthly Social Security checks, bear the risk of the
consequences of an overpayment of benefits; they owe the debt to
the SSA. If a beneficiary does nothing, he or she will receive
reduced amounts in his or her already scant monthly checks.

One purpose of this article is to demonstrate the complex
nature of the overpayment situation and how it necessitates legal
representation. Hiring a lawyer, however, is virtually impossible in
most cases since an overpaid benefits recipient is already in the
minus column and can rarely afford representation. Thus, unlike

3. Id.
4. Most recent statistics evidence that from 2003–2007, a total of over $419.8
   billion was paid to beneficiaries through the Disability Insurance program. SOC.
   SEC. ADMIN., SSA’S FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT
   2008 PERFORMANCE REPORT]. “Of that total, $6.2 billion was overpaid, representing
   1.5 percent of outlays.” Id.
5. 20 C.F.R. § 416.571 (2008) provides that:
   Any adjustment or recovery of an overpayment for an individual in
current payment status is limited in amount in any month to the lesser of
   (1) the amount of the individual’s benefit payment for that month or (2)
an amount equal to 10 percent of the individual’s total income
   (countable income plus SSI and State supplementary payments) for that
month.
the disability claimant who successfully seeks benefits initially and whose counsel receives at least 25% of the past-due benefits, the disabled beneficiary has the most at stake but the least ability to challenge an overpayment.

The SSA’s rules and regulations that govern the delivery of wage substitution benefits to the disabled work best for those individuals who do not try to work, who do not relocate, who save no money, and who never change their marital status. These otherwise generally positive life events create a predicament for the Social Security Disability (“SSD”) or Supplemental Security Income (SSI) program. A recipient of SSD benefits has paid the required contribution into the Social Security trust fund to be eligible for these insurance-like benefits. Recipients of Social Security Disability (“SSD”) benefits have paid the required contribution into the Social Security trust fund to be eligible for these insurance-like benefits. See 20 C.F.R. §§ 404.101–246 (2008). SSD is Title II of the Social Security Act. 42 U.S.C. § 434 (2006). Since it is not a means-tested, needs-based program like Supplemental Security Income (“SSI”), the only relevant inquiry regarding earnings is whether the claimant’s earnings demonstrate that the claimant possesses the capacity to work full-time and thus, should be removed from benefits status. 20 C.F.R. § 404.1574 (2008). This capacity is determined by calculating the amount that a claimant on SSD earns. Id.

In 2009, a recipient may earn less than $700 and still be eligible for SSD benefits. Soc. Sec. Admin., Working While Disabled—How We Can Help 5–6 (2009), http://www.socialsecurity.gov/pubs/10095.pdf. But when a claimant performs services for which the claimant was paid the relevant amount in that year, the claimant’s disability will end in nine months, which need not be consecutive. 20 C.F.R. § 404.1592 (2008). This is called the Trial Work Period, which is intended to encourage the disabled person to attempt to work without being immediately severed from the SSD program. Id.

Even after the claimant’s disability ends, a period of thirty-six months, called the Reentitlement Period, permits a claimant to earn less than the monthly amount that represents substantial gainful activity (“SGA”) in that year, which in 2008 was §404.1592a(b) (2008); see also U.S. Soc. Sec. Admin., Office of Policy, Program Highlights, 2008–2009, http://www.socialsecurity.gov/policy/docs/quickfacts/prog_highlights (last visited Feb. 12, 2009) [hereinafter PROGRAM HIGHLIGHTS]. In the month that the claimant’s earnings exceed the SGA amount, SSD benefits will still be paid for that month and the following two months, which is known as the grace period. 20 C.F.R. § 404.1592a(a)(2)(i) (2008). Generally, this Reentitlement Period will end thirty-six months after the initial Trial Work Period ended. Id. § 404.1592a(b)(2)(i). If the claimant becomes disabled after the end of the Reentitlement Period but within sixty months of the prior termination of benefits, the claimant may request to be reinstated. 20 C.F.R. § 404.1592b (2008). However, after expiration of the sixty-month period, the claimant must begin a new application if he or she becomes disabled. Id.
Income (“SSI”) recipient. Even with the proper required reporting, these events will often lead to overpayment problems. Of these enumerated life changes, procuring employment was reported as the number one source of overpayments in 2000, to the amount of $477 million, or 22% of all overpayments. In 2003, the total amount paid erroneously to beneficiaries of SSA disability programs had totaled $990 million. In 2008, “Substantial Gainful Activity,” or employment, continued to be reported as a major cause of overpayments in both the SSD and SSI programs. Also in 2008, unreported financial resources, such as bank accounts, represented the second largest source of SSI overpayments, to the amount of $394 million, or 18% of overpayment errors.

Recovering the money already paid out becomes a slow, if not fruitless endeavor for the Social Security Administration, and a disturbingly stressful worry for the recipient. The Deputy Commissioner of the SSA identified a key goal in 2002: to remove SSI from the high-risk designation that the Government Accountability Office (“GAO”) placed on the program in 1997. By the time the SSA attempts to recover the overpaid benefits, the recipients have spent the money, and not always because they

8. The SSI program “is the nation’s largest cash assistance program for the poor.” Press Release, Soc. Sec. Admin., Supplemental Security Income Program Removed from High-Risk List (Jan. 30, 2003), available at http://www.sociasecurity.gov/pressoffice/pr/SSIHighRisk-pr.htm. Those who receive SSI under Title XVI of the Social Security Act are vulnerable for overpayments not just because of work they may attempt, but also for income from any source, like gambling winnings, gifts, spousal earnings, and numerous other types of income. 42 U.S.C. § 1381a (2008); 20 C.F.R § 416.1102 (2008) (“Income is anything you receive in cash or in kind that you can use to meet your needs for food and shelter.”). Thus, SSI recipients inherit money or settle cases at their peril if they do not notify the Social Security Administration. However, from the experience of representing those who scrupulously notify the SSA, such recipients often suffer the consequences of a large program that is not promptly responsive.


11. 2008 PERFORMANCE REPORT, supra note 4, at 173.

12. Id.; see also Fraud and Abuse Hearing, supra note 9, at 44.

13. Fraud and Abuse Hearing, supra note 9, at 8 (statement of James B. Lockhart III, Deputy Comm’r of the Soc. Sec. Admin.).
knowingly or deliberately accepted funds to which they were not entitled. A 2004 GAO report found that in 2003, the total overpayment debt increased to nearly $3 billion.\textsuperscript{14} Many beneficiaries, who are charged with overpayments after having made the required reports of changes in their circumstances, regretfully admit that they assumed they were entitled to the checks they received after reporting the changes. They could not fathom that the government would send them money to which they were not entitled.\textsuperscript{15} The problem of overpayments in the government disability programs must be acknowledged as primarily one of clarity and transparency. The SSA places the responsibility on recipients to report “any changes”\textsuperscript{16} without explaining the consequences of those changes.\textsuperscript{17} Whether the lack of clarity can be explained by an attempt to keep the rules simple, or to prevent recipients from “gaming the system,” it is unacceptable and ill-serves the programs. The prospect of having to repay a large overpayment deters some recipients from trying to work, which is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} See, e.g., Deborah I. Ginsberg, Preventing Social Security Overpayments to Older Claimants, 3 Eld. L.J. 275, 292 (1995). Ginsberg states that social factors often lead recipients of benefits to overly trust the SSA. Id. For example, “[t]hey know what they are doing” was one comment made by an older woman who continued to receive children’s benefits after her children reached majority. Id.
\item \textsuperscript{16} In testimony before the Subcommittee on Human Resources of the House Ways and Means Committee on the subject of Fraud and Abuse in the Supplemental Security Income Program, James B. Lockhart III, Deputy Commissioner of the Social Security Administration, said:
\begin{quote}
Earnings reporting is, again, a very complicated thing in this Agency and the SSI program because you have to look at living arrangements and in-kind income. So, it becomes relatively complicated. We do about 16 million changes a year on a program that only has 6.7 million people in it, so there is a lot of activity here.
\end{quote}
\textit{Fraud and Abuse Hearing, supra note 9, at 19–20} (testimony of James B. Lockhart III, Deputy Comm’r of the Soc. Sec. Admin.).
\item \textsuperscript{17} Form SSA-8203-BK (5-2003) cautions:
\begin{quote}
The amount of your SSI check is based on the information you tell us. To continue getting the right payment amount, you must report certain changes that happen to you. Changes could make your check bigger or smaller. You must tell us about changes within 10 days after the month they happen. If you do not report changes, we may have to take as much as $25, $50, or $100 out of future checks you receive.
\end{quote}
\end{itemize}
\end{footnotesize}
contrary to the SSA’s goal to encourage beneficiaries to become productive, independent citizens.\textsuperscript{18}

This article will first discuss the circumstances that give rise to overpayments, particularly from the experiences of four clients from the University of Pittsburgh School of Law’s Health Law Clinic. This discussion also covers how the courts handle appeals from SSI and SSD recipients whose applications for waivers from the obligation to repay the SSA were denied. This article then attempts to describe, from a recipient’s point of view, what is missing from the SSA benefits system. Despite the SSA’s loss of billions of dollars in overpaid benefits, which in large part it attributes to an increase in overpayment waivers,\textsuperscript{19} its stated self-critique places the source of the problem on inadequate prevention and detection tools to keep up with recipients of both Supplemental Security Income and Social Security Disability Insurance who work.\textsuperscript{20} Thus, the SSA characterizes the problem of overpayments as an enforcement problem—a debt that must be paid by the recipients.

Yet, attempting to recoup already paid benefits is unwieldy, expensive, and in some cases, unfair. Rather, the Social Security Administration would benefit from direct, specific, and frequent communications with beneficiaries that leave no doubt about their responsibilities as beneficiaries of disability benefits. Robert Robertson, from the General Accounting Office, explained the following in response to a question from Representative James McDermott concerning what proportion of overpayments are fraudulent, that is, a result of willful deception of the department:

\textit{Is it intentional fraudulent type of activity that is creating these overpayments? Is it unintentional? What are the proportions for these types of overpayments? . . . I would say that if you are looking at simplification, you are really possibly getting to correction of both types of errors, intentional and unintentional.}\textsuperscript{21}

This acknowledgment of the GAO examiner demonstrates that at least seven years ago, the problem of the complicated program

\begin{itemize}
  \item \textsuperscript{18} 2004 GAO Report, \textit{supra} note 14, at 1. “We recognize that ensuring program integrity while focusing on the important goal of returning individuals with disabilities to work presents additional challenges for SSA.” \textit{Id.} at 4.
  \item \textsuperscript{19} \textit{Id.} at 3.
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} \textit{Fraud and Abuse Hearing, supra} note 9, at 58.
\end{itemize}
rules was well known and was, at least in part, a basic reason that overpayments of Social Security benefits were so high. But an additional problem requiring attention is that the program is non-responsive and inaccessible to ordinary recipients.

The purpose of this article is to urge greater transparency within the Social Security Administration to inform both SSD and SSI recipients of how work and other income will impact their benefits. The article also asserts that local SSA offices must be outfitted with better record-keeping techniques to ensure that recipients who report changes are credited with those reports. This article contends that part of the process is that the SSA must provide recipients with clarity of information regarding what amounts they may earn without losing their SSD benefits, and what specific income may jeopardize the benefits of SSI recipients. Local offices must assign a specific employee to handle reports of income and resources, and must encourage recipients to call this person with any questions. This employee must answer the phone, or must tell callers when they will return their calls. All of these initiatives will help prevent the eventual overpayment situation, which is both costly to the Social Security Administration and stressful to the recipient.

II. REPRESENTING THE OVERPAID RECIPIENT

The impetus for this article grew from the author’s experiences representing clients through the University of Pittsburgh School of Law’s Health Law Clinic (hereinafter “the Clinic”). The Clinic experienced a noticeable increase in inquiries and cases pertaining to overpaid benefits from 2007 to 2008. The SSA appears to have stepped up its efforts to recover erroneously paid benefits, to the great confusion and consternation of beneficiaries. Almost all of the clients whom the Clinic represented in overpayment matters related to their return to work claimed to have reported their work status to the SSA by calling the “800” number. Thus, when the checks continued to arrive, the clients mistakenly assumed that the SSA had made the necessary inquiry and concluded that they were indeed still entitled to the benefits. The Clinic’s experience coincides with SSA data that the

number one source of overpayments in both disability programs is unreported wages. The rise of overpayment problems related to work activity appears to coincide with the increased initiatives over the past decade to provide work incentives to the disabled.

Moreover, especially in difficult economic times, most people will attempt to return to work when they are presented with the opportunity. The SSA, however, has failed to maintain current information regarding beneficiaries’ reported earnings changes. This failure to respond is the source of the overpayment problem, which does not serve the beneficiaries, the taxpayers, or the Social Security trust fund. When this inability to respond to reported changes in a timely fashion is coupled with the stated policies in both SSD and SSI regulations that define “fault” only in terms that pertain to the overpaid individual, a sense of unfairness and a lack of due process pervade the overpayment problem. Failure to include the fault of the Social Security Administration results in “instances of considerable hardship.”

A superficial consideration of the statistics, along with the various reports by the GAO to congressional committees, would lead the members of such committees to assume that SSI and SSD recipients overtly disregard the rules regarding the inability to receive benefits while they are working. An understanding of a
beneficiary’s point of view, however, reveals a different story. No one can deny that some beneficiaries do commit fraud by withholding information when they apply for benefits by working under the proverbial table, and by failing to report income from other sources as they are obliged to do under the SSI program. This article does not advocate for such individuals, who should be held accountable. The mistake that the Administration, Congress, and the courts unfailingly make, however, is to assume that all overpaid beneficiaries have knowingly ignored the rules. This has not been the Clinic’s experience in representing many such individuals.

III. STATUTES AND REGULATIONS GOVERNING OVERPAYMENTS

Congress provided for the recovery of overpayments of Social Security benefits in Title 42 of the United States Code. When a person has received more or less than the correct amount of payment, proper adjustment or recovery shall be made under regulations prescribed by the Commissioner of Social Security. Specifically, with regard to overpayments, the Commissioner shall:
- decrease any payment... to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment... payable to his

- There shall be no recovery by the United States from any person receiving payments under this title, to which he was not entitled, if in the judgment of the Board such person is without fault and such recovery would defeat the purpose of the benefits otherwise authorized, or would be against equity and good conscience.

Id.

estate . . ., or shall obtain recovery by means of reduction in tax refunds based on notice to the Secretary of the Treasury , or shall apply any combination of the foregoing.

The statute, however, also provides that anyone who is without fault may not be subject to such a recovery in certain circumstances. In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience. In making for purposes of this subsection any determination of whether any individual is without fault, the Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language).

The regulations promulgated by the Commissioner of the Social Security Administration, pursuant to this authority, are set forth in sections of the Code of Federal Regulations that pertain to each program. The sections on the procedures pertaining to applications for waiver are of particular relevance to this article. The key element to obtain a waiver of the obligation to repay an overpayment is that the recipient must show that the overpayment occurred through no fault of the recipient. Although the three ways to prove fault differ in the order in which they appear in each respective regulation, they are identical for both programs:

30. Id.
31. Effective September 27, 2008, in the case of SSI recipients, Social Security personnel were given the authority to waive administratively an overpayment of $1,000 or less, which doubles the previous eligible amount. Soc. Sec. Online, POMS Section SI 02260.030 Impede Effective or Efficient Administration, https://secure.ssa.gov/apps10/poms.nsf/lnx/0502260030!opendocument (last visited Mar. 3, 2009). The rationale for this administrative waiver is that recovering an amount that is less than $1,000 “impedes effective or efficient administration” when the nationwide average cost of recovering the overpayment equals or exceeds the amount of the overpayment. Id.
34. See id. § 404.506; see also id. §§ 416.550–556.
35. See id. §§ 404.506–507; see also id. §§ 416.550, 552.
... an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following: (a) Failure to furnish information which the individual knew or should have known was material; (b) An incorrect statement made by the individual which he knew or should have known was incorrect (this includes the individual’s furnishing his opinion or conclusion when he was asked for facts), or (c) The individual did not return a payment which he knew or could have been expected to know was incorrect.36

Whether one is an SSI or SSD recipient determines the level of vigilance one must maintain to avoid being overpaid and becoming liable to repay the benefits supposedly due in the months one is ineligible.37 SSI, as the means-tested, needs-based program, derives its eligibility from a person’s lack of income or resources.38 Certain resources are exempt as countable and are excluded.39 These are the home in which one lives and has an ownership interest in, plus the property on which it stands;40 household goods and personal effects valued at under $2,000;41 an automobile regardless of value;42 life insurance policies up to $1,500 cash surrender value;43 burial spaces and burial funds;44 and property that is essential to self-support funds excluded by other statutes.45 A person on SSI must report the receipt of resources that are not within the certain

37. Marie A. Failinger observes that unemployment recoupment provisions contain more positive aspects concerning lack of fault than do comparable provisions in the AFDC program at that time, or the Food Stamp programs. Marie A. Failinger, Contract, Gift, or Covenant? A Review of the Law of Overpayments, 36 Loy. L. Rev. 89, 134 (1990). Failinger observes that “SSI retains distinctions between real self-interested wrongdoers and other accidentally overpaid individuals. Thus, SSI repayments law gives recipients the sense that they have some responsibility for, and control over, whether they will be required to repay money they have already spent.” Id.
39. Id. § 416.1210.
40. Id. § 416.1210(a).
41. Id. § 416.1216. This is the limit for an individual. Id. The limit for a qualifying individual and spouse is $3,000. Id.
42. Id. § 416.1218(b)(1).
43. Id. § 416.1230.
44. Id. § 416.1231(b).
45. Id. §§ 416.1225–27.
excluded categories or suffer suspension of benefits. 46

IV. OVERPAYMENTS AND THE SSI RECIPIENT

Some SSI recipients do not realize when they have run afoul of the rules regarding resources. Resources are defined as “cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.” 47 Resources include cash or other property that can be converted to cash within twenty days. 48 Most are aware that they may not possess more than $2,000 in their bank accounts at any one time. 49 The resource limit, however, pertains to any things of value that a person owns. 50

Recipients do not readily comprehend the nuances of the regulation. For example, a person represented by the Clinic was already receiving SSI benefits because of a psychiatric impairment. On a day in December, the client went to her mother’s duplex next door to find that her mother had apparently died in the previous twelve hours. For months after her mother’s death, the client experienced a severe relapse of the psychiatric impairment. The client felt that if she had been more attentive, her mother might not have died. She held on to anything that reminded her of her mother, including savings bonds on which her mother had named her as co-owner and that, unbeknownst to the client, passed to her by operation of state law on the day of her mother’s death. Three years later, the client finally decided to cash in the bonds to buy a new car, one of the excluded resources. 51 Cashing in the savings bonds triggered action by the SSA, and the client received a notice that she had not been eligible for SSI benefits from the day her mother died and during the three years the savings bonds lay in her strong box. The amount of the overpayment was calculated by multiplying the amount of her benefits, times the number of months since her mother’s death, resulting in a total amount to be repaid to the SSA of over $20,000. 52 The client explained that she

46. Id. § 416.1324.
47. Id. § 416.1201(a).
48. Id. § 416.1201(b).
49. Id. § 416.1205(c).
50. Id. §§ 416.1201–.1207.
51. A car is an exempt resource. Id. § 416.1218(b)(1).
52. 20 C.F.R. § 416.537(b) (2008) provides, in relevant part: “Overpayments may occur, for example, when the person who received payments . . . is
never thought that the bonds would cause these problems, especially as they did not benefit her until she cashed them in. Unfortunately, that was not the law and the client suffered the consequences to her mental health, induced by the enormous stress of the legal troubles with the SSA.

It was fortuitous, however, that the client found her way to the Clinic, which was able to provide her with free legal services to represent her at a hearing.\(^5\) In meeting the evidentiary burden to prove that the overpayment was not the client’s fault, the Clinic procured a report from her psychiatrist. The report explained the traumatic effect that finding her deceased mother had on the client such that she avoided disposing of anything that belonged to her mother for years after her death. The savings bonds were among those items, and were only worth about $2,500. The administrative law judge correctly applied the regulation that interprets “without fault” to depend on “all the pertinent circumstances surrounding the overpayment in the particular case,” and waived the obligation to repay the benefits she received during the period she retained the bonds without cashing them in.\(^6\)

In the SSI context, excess resources are a major cause of ineligibility. The Clinic has represented SSI clients charged with having been overpaid benefits upon receiving lottery winnings, a

\(53\). It would be a rare circumstance if an overpaid person could afford to hire a lawyer through the appeal process. Contrasting the overpayment situation with the initial application, a lawyer will undertake representation of the latter client because her fee will be taken from past-due benefits of the client. In the overpayment scenario, the client is accused of having been overpaid and in debt to the SSA. In such a situation, there is no money to spare and the client tries to work herself out of a very deep hole occasioned by the overpayment charge.

\(54\). The regulation states:

The Social Security Administration considers the individual’s understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition).

lawsuit settlement, an inheritance, and upon moving out of the family home when it became uninhabitable. Except for the client who received the settlement, the Clinic did not know the clients at the time of the alleged overpayments and was retained to appeal denials of waiver applications.

One of the regrets that a lawyer may feel when representing a client charged with having been overpaid SSI benefits is that he or she was not able to counsel the client at the time of the event. When the Clinic represented the SSI recipient who received a modest lawsuit settlement, the Clinic was positioned to advise him of his reporting duty. The client authorized the Clinic to notify the local SSA office that he received the settlement funds and had immediately deposited a portion of the money into a special needs trust. Nevertheless, the amount the client withheld from the trust exceeded $2,000. He received two more SSI checks, but did not set them aside or return them, and he is currently in the process of repaying them. Contrary to other cases, however, these two months of overpaid benefits were manageable, resulting in the recipient repaying the SSA in a relatively short period of time. In order to begin receiving his SSI checks again once the excess funds were spent, the client was given an appointment at the district office and was told to bring in evidence of how he spent all the money he received that exceeded the $2,000 resource limit. Without the Clinic’s ongoing counseling and advice about the necessity of keeping all receipts and proof of how he disposed of the funds, the client would likely still be attempting to regain active pay status with

55. A special needs trust is provided for in 42 U.S.C. § 1396p(d)(4)(C) (2000): A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
   
   (i) The trust is established and managed by a nonprofit association.
   (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
   (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
   (iv) To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

56. See 20 C.F.R. § 416.1205(c) (2008) (establishing a $2,000 resource limit for SSI individual beneficiaries).
SSI. Overall, the client struggled to understand how the program worked. The most complicated and costly overpayment problems, however, arise in the employment context. In the Clinic’s experience, the SSI recipient who earns money, even if she reports the fact, will eventually be charged with having been overpaid, and usually for a period of years. When SSI recipients work, an offset related to the amount earned appears in a future check, usually two months later.  

Earned income is treated differently from unearned income in that less is subtracted from the monthly check for each dollar earned. After exempting $65 from the total earned, the remaining amount is divided in half to determine the amount to be subtracted from the future check. Nevertheless, recipients are told only that they must report any work they perform, no matter how little they make. Hand in hand with reporting the work is the requirement that the recipient submit proof of earnings within ten days after the month in which she is paid. To comply with the rules, a working SSI recipient must be rigorous in her reporting, or suffer the consequences. The SSI website contains warnings about returning checks to which one is not entitled, yet not all recipients consult the website.

57. See id. § 416.420(a) (“We generally use the amount of your countable income in the second month prior to the current month to determine how much your benefit amount will be for the current month.”).
58. See id. § 416.1110.
59. See id. § 416.1112(c)(5) (providing that $65 of earned income in a month is not counted as earned income).
60. Id. § 416.1112(c)(7) (providing that one-half of remaining earned income is not counted as earned income).
61. See SOC. SEC. ADMIN., WHAT YOU NEED TO KNOW WHEN YOU GET SUPPLEMENTAL SECURITY INCOME (SSI) 10, SSA Pub. No. 05-11011, ICN 480265 (Mar. 2008), available at http://www.socialsecurity.gov/pubs/11011.pdf [hereinafter WHAT YOU NEED TO KNOW (Mar. 2008)] (“If you have income other than your SSI, you must tell us about it. And you should tell us if the amount of your other income increases, decreases, or if the income stops. Usually, changes in your income in a month will affect your SSI payment two months later.”).
62. Id. at 23.
63. See 20 C.F.R. § 416.708 (2008) (explaining what a person must report to achieve efficient administration of the Supplemental Security Income program); see also id. § 404.453 (explaining the circumstances under which the Social Security Administration makes a penalty deduction when a recipient fails to report earnings timely).
64. See WHAT YOU NEED TO KNOW (Mar. 2008), supra note 61, at 7 (“But, if you receive more money than usual, you should call or visit your Social Security office. You must return any extra money you are not supposed to get even if it is not your
Another client who suffered from a severe mental impairment collected SSI and earned money as a waitress at a full-time job. She was thirty-five years old and the waitressing job had lasted fourteen months, longer than any other job she had previously attempted. The Clinic attended a face-to-face meeting at the local SSA office to discuss the application for waiver that the client had filed. The client spoke of her attempts to communicate with someone to report the job and to determine what she must do to comply with the reporting requirements. She contended that no one ever answered the phone at the local SSA office when she called. Finally, she walked into the office one day and met with a clerk who told her that it was obvious that no one had ever explained her responsibilities. The clerk told the client that she would send her the necessary forms to complete in order to report her earnings. The client never received the forms. Five months later, the client returned to the same local office and demanded to be removed from SSI. Three months later, the client received a notice that she would no longer receive benefits but that she owed the SSA $9,000 for all the months she earned wages and was not eligible for SSI. The months of ineligibility extended on and off for a period of six years.

During the face-to-face meeting, it became clear to all who were present in the cubbyhole where the Clinic’s attorneys met the client that this young woman was incapable of dealing with what she must do to work even part-time and still receive her benefits. It had never been determined that she was in need of a representative payee to handle her affairs. Even more fault that you got it.”

65. See 20 C.F.R. § 416.610 (2008). When payment will be made to a representative payee:

(a) We pay benefits to a representative payee on behalf of a beneficiary 18 years old or older when it appears to us that this method of payment will be in the interest of the beneficiary. We do this if we have information that the beneficiary is—

(1) Legally incompetent or mentally incapable of managing benefit payments; or

(2) Physically incapable of managing or directing the management of his or her benefit payments; or

(3) Eligible for benefits solely on the basis of disability and drug addiction or alcoholism is a contributing factor material to the determination of disability.

(b) Generally, if a beneficiary is under age 18, we will pay benefits to a representative payee. However, in certain situations, we will make direct payments to a beneficiary under age 18 who shows the ability to manage
significantly, no one had determined that her disability had ceased. Nevertheless, the only way the client could manage the challenges of trying to work was to remove herself from SSI. While doing so, she also quit her job because of the high levels of stress it caused her. In the end, the client left the meeting without benefits, more than $9,000 in debt, and unemployed, having quit her job two weeks before. Within a week, however, the Clinic received a favorable decision on her waiver application. To her great relief, the SSA granted her the waiver for the full amount.

V. THE SOCIAL SECURITY DISABILITY BENEFICIARY WHO WORKS

As with SSI, those who receive benefits under the insurance disability program, SSD, must report performing any work or substantial gainful activity. Pamphlets instruct recipients to report the information to the Social Security Administration, no matter how much or how little they earn. The SSD recipient will trigger the Trial Work Period once she reports earnings exceeding the Trial Work Period amount for that month. In 2008, the amount

the benefits. For example, we make direct payment to a beneficiary under age 18 if the beneficiary is—
(1) A parent and files for himself or herself and/or his or her child and he or she has experience in handling his or her own finances; or
(2) Capable of using the benefits to provide for his or her current needs and no qualified payee is available; or
(3) Within 7 months of attaining age 18 and is initially filing an application for benefits.

Id. 66. Recipients are instructed:

If you work while receiving disability payments you should tell us if you take a job or become self-employed, no matter how little you earn. If you are still disabled, you will be eligible for a trial work period, and you can continue receiving benefits for up to nine months. Also, tell us if you have any special work expenses because of your disability (such as specialized equipment, a wheelchair or even some prescription drugs) or if there is any change in the amount of the expenses.


67. Id. (“You should tell us if you take a job or become self-employed, no matter how little you earn.”); see also WHAT YOU NEED TO KNOW (Mar. 2008), supra note 61, at 22 (“Tell us right away if you go to work—no matter how little you earn.”).

68. The Trial Work Period amount, which is known as the Monthly Federal Payment Standard, is nearly $300 less than the SGA amount. See PROGRAM HIGHLIGHTS, supra note 7. This fact has been a source of confusion to the Clinic’s
was $637. When the claimant earns that amount for nine months (not necessarily consecutively) he or she enters three years of what is known as the Reentitlement Period. During this period, when earnings exceed the higher amount known as “substantial gainful activity,” the recipient will be afforded two more months of benefits.

One of the SSD recipients whom the Clinic represented on an overpayment matter faced more than three years of overpayments totaling nearly $30,000, despite meticulous reporting to the SSA and recordkeeping. The client was in active treatment for an anxiety disorder and several other mental impairments. Despite being on medications, she was prone to decompensation in stressful situations but her psychiatrist recommended low-stress and part-time work if it would have a therapeutic effect on her. The client notified the SSA by phone that she was working part-time. After a while, she began to receive requests for information about her work and earnings. Both she and her representative payee paid attention to all notices that the SSA sent, some of which contradicted previous notices pertaining to overpayments and money owed. Several years elapsed before the SSA notified the client that she was overpaid and owed the SSA nearly $30,000. The client was devastated and required numerous sessions with her psychiatrist and therapist, frequent phone calls to the Clinic for reassurance, and attendance at two hearings on the matter. This client uttered the refrain of many of the Clinic’s clients: 1) why has so much time passed before the SSA notified me of the fact of the overpayment?; and 2) how can these overpayments be avoided in the first place? The accrual of time often results in the recipient owing many thousands of dollars. An enrollee in either SSI or SSD, blessed with an otherwise healthy mental state, is nevertheless frightened, incredulous, and anxiety-ridden. For those who labor with psychiatric deficits, the situation is devastating.

 clients who mistakenly believe that earning less than $940 will not trigger the Trial Work Period. However, the threshold amount for the Trial Work Period was $637 in 2008. See supra note 7 (discussing the Reentitlement Period).
When a recipient of SSD, as with those who receive SSI, is cited for an overpayment, the person may file an application for a waiver of the obligation to repay the overpayment. The Social Security Administration and its employees explain through their pamphlets and website:

If you receive a check that you know is not due, take it to any Social Security office or return it to the U.S. Treasury Department at the address on the check envelope. You should write VOID on the front of the check and enclose a note telling why you are sending the check back. If you have direct deposit and receive a payment you should not have gotten, call or visit your Social Security office. We will tell you how you can return it.

In the case of the anxiety-ridden SSD recipient who worked part-time, she would have benefited, and probably avoided the overpayment, had she been told what amount of money she could earn without triggering the Trial Work Period and subsequent Extended Period of Eligibility that set her on the path to overpayment.

Two basic reasons for the egregious number of overpayments and the inability of the SSA to collect on them are identified from the experiences of the clients whose stories are related herein: 1) the SSA’s failure to promulgate transparent rules for recipients of disability benefits at the time they become eligible for the benefits, and 2) the SSA’s failure to respond quickly to reported information by recipients of life-event changes, which results in continued overpayments and causes extreme hardship for recipients.

VI. THE RESPONSE OF COURTS

Why does the Social Security Administration wait such a long time before notifying a recipient that he has been overpaid? In Sullivan v. Everhart, the U.S. Supreme Court examined the practice of calculating the difference between past underpayments and past overpayments before making final adjustments for an entire period between the month of the initial underpayment or overpayment, and the month of the formal determination of error. The Court

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73. 20 C.F.R. § 404.506 (2008).
74. See WHAT YOU NEED TO KNOW (Nov. 2008), supra note 66.
examined this practice of “netting,” and ultimately found that it is a permissible construction of the Social Security Act.\footnote{Id. at 92–93.}

The claimant in Sullivan argued that he was denied the chance to challenge the overpayments guaranteed by 42 U.S.C. § 404(b), which was reinforced by the Court’s earlier affirmation of the right to a hearing on the recoupment.\footnote{Id. at 86–87 (citing Califano v. Yamasaki, 442 U.S. 682, 697 (1979)).} The Court, however, disagreed with both the district court and court of appeals, finding that netting regulations are facially valid.\footnote{Id. at 95.} The use of netting regulations in an individual case of necessity must await the passage of time. Although the claimant’s challenge did not address the time period itself, but rather the denial of the right to seek a waiver of recoupment of the overpayments, the Supreme Court characterized the time involved as a positive thing.\footnote{Id. at 93–94.} The Court stated, “[i]t seems to us not arbitrary and capricious to establish a grace period within which these determinations can be considered and formally made; they should not be spur-of-the-moment decisions.”\footnote{Id. at 93.} This practice, however, extends and complicates the overpayment period and the growing overpayment debt calls into question the necessity for the delay.

Overpaid claimants who appeal the denial of their requests for waiver confront the standard of judicial review that is set forth for all cases involving the denial of Social Security benefits: “The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . .”\footnote{42 U.S.C. § 405(g) (2000).} Substantial evidence is defined as “less than a preponderance, but is enough that a reasonable mind would find it adequate to support a decision.”\footnote{Beckley v. Apfel, 152 F.3d 1056, 1059 (8th Cir. 1998).} The way the substantial evidence standard is employed in overpayment cases produces a variety of results, based on facts that are unique and specific to each case. In most cases, recipients who appeal the denial of an application for a waiver of the obligation to pay back overpayments no longer have the erroneously paid benefits, warranting the request for waiver of the requirement to repay them. The time period that the Supreme Court found to be a guard against spur-of-the-moment decisions...
only enlarges the individual’s debt to unmanageable proportions.

A. No Fault, but Ability to Repay

Valley v. Commissioner of Social Security illustrates how these enormous overpayments accrue. Mr. Valley was injured in a swimming pool accident in 1989 and began to receive Social Security Disability benefits in 1990. Five years later, in 1995, Valley notified the Social Security Administration of the fact that he had returned to work in a family-owned business. However, Valley continued to receive disability benefits checks. Then, in January 1996, Valley sought clarification from the SSA regarding his entitlement to continued benefits. In response, the SSA sent him a pamphlet entitled “Benefits for Disabled People Who Return to Work.” The SSA also asked him to complete a form describing his employment. The form explained that if Valley’s work constituted substantial gainful activity, he would be ineligible for disability benefits. Although Valley complied with these requests, he continued to receive checks through 1999, four years after his initial notice to the SSA that he was working.

In June 2000, Valley received a notice from the SSA requesting that he remit $73,244 in overpaid benefits. Valley filed a request for waiver claiming it was not his fault the SSA continued to send him benefits. Proving lack of fault is the first prong that a claimant must satisfy to succeed in a request for waiver of the obligation to repay an overpayment. The second prong a claimant must prove is that repayment would be against the purpose of Title II of the Social Security Act, or against equity and

83. See Valley v. Comm’r of Soc. Sec., 427 F.3d 388 (6th Cir. 2005).
84. Id. at 390. Valley received SSD benefits, not SSI benefits, because he worked at least twenty out of the previous forty quarters prior to the date on which he claims he became disabled. See Soc. Sec. Online, Disability Benefits, http://www.ssa.gov/pubs/10029.html#part2 (last visited Mar. 3, 2009) (providing work requirements needed to obtain SSD benefits).
85. Valley, 427 F.3d at 390.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id. at 391 (citing 42 U.S.C. § 404(b) (2006)).
good conscience.\textsuperscript{95} Valley was unable to prove this second prong since he had monthly net earnings of approximately $7,000 and possessed investment funds of approximately $315,000.\textsuperscript{96} Thus, both the administrative law judge (“ALJ”) and the Sixth Circuit Court of Appeals stated that they did not even need to address the first prong regarding whether Valley was without fault in accepting the overpayment.\textsuperscript{97} Valley’s ability to repay the overpayment remained intact.\textsuperscript{98} Ultimately, because Valley possessed significant assets to repay his overpayment, his request for waiver was denied.\textsuperscript{99}

The same was true of the SSI benefits recipient in Bailey v. Apfel, a case in which the ALJ found that the recipient was not at fault for any overpayments.\textsuperscript{100} Yet, because the recipient received proceeds from the sale of real estate in his mother’s estate (the source of his original overpayment), the ALJ concluded, and the district court affirmed, that recovery of the overpayment would not defeat the purpose of the SSI program or disregard equity and good conscience.\textsuperscript{101}

Similarly, the claimant in Woods v. Shalala was found to be without fault due to her limited mental abilities.\textsuperscript{102} However, because “[e]nforcing the repayment of the $7,866.08 in overpaid benefits would still leave [the claimant] with sufficient resources to support herself for several months before again becoming eligible for SSI benefits,” the district court affirmed the Secretary’s determination that the claimant must repay the overpayment.\textsuperscript{103} In Evans v. Shalala, the ALJ also found that the claimant was without fault.\textsuperscript{104} Recovery of the overpayment, however, would not defeat the purpose of the Social Security Act because the SSI claimant had a bank account containing $15,094.\textsuperscript{105}

Thus, the waiver test does not require a finding of volitional, deliberate concealment of information from adjudicators.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id. at 393.
\item \textsuperscript{98} Id. at 392.
\item \textsuperscript{99} Id. at 391.
\item \textsuperscript{100} Bailey v. Apfel, 80 F. Supp. 2d 535 (1999).
\item \textsuperscript{101} Id. at 537, 540.
\item \textsuperscript{103} Id. at 160–62.
\item \textsuperscript{104} Evans v. Shalala, No. 94 C 2680, 1994 WL 630834, at *2 (N.D. Ill. Nov. 7, 1994).
\item \textsuperscript{105} Id. at *5.
\end{itemize}
\end{footnotesize}
Decision-makers employed by the Social Security Administration or members of the federal judiciary may deny a waiver application where the beneficiary’s resources are adequate to repay the overpayments.

B. Evidence of Fault as Claimant Knew or Should Have Known of the Overpayment

Substantial evidence of fault sufficient to deny the first prong of the waiver test has been found in several cases, including under the following circumstances: when a recipient waited four months to disclose that she remarried; when a recipient failed to inform the SSA of his incarceration; when a beneficiary admitted at a hearing on the waiver application that he knew the agency was erroneously paying him disability benefits that were no longer due; and when a recipient testified that he knew ongoing payments may have been incorrect.

Fault sufficient to constitute substantial evidence was also found in a case in which a claimant admitted at the hearing that she had received notice of the requirement to report any income received, and that she had the education and intellectual ability to understand the requirement. The same was true of a recipient who had access to bank accounts to which he was a signatory, despite his testimony to the contrary. In another case, fault was found where a recipient worked part-time but earned more than

106. A beneficiary, whose application for waiver is denied, proceeds through the administrative process with a hearing before an administrative law judge and an appeal to the Appeals Council. See 20 C.F.R. §§ 416.1444, .1467 (2008). If at both of these levels, she is still found to have been overpaid and obliged to repay the amount, the next level of appeal is with the federal district court in her district, assuming that the Commissioner of Social Security has rendered a final decision. See 42 U.S.C. § 405(g) (2000); see also 20 C.F.R. § 416.1481 (2008). From that venue, appeal is to the circuit court, and thereafter via petition for certiorari to the United States Supreme Court. 28 U.S.C. § 1254 (2006).


Further, a representative payee, who was a recipient’s brother, failed to investigate the nature of Guatemalan stocks in his sister’s name, and his receipt of dividends for the stock for three years belied his testimony that he did not know of them. In yet another case, even though the SSA mistakenly overpaid a claimant, the court found a claimant “at fault” because the evidence presented at her hearing, which included evidence of her suffering from bipolar disorder, did not render her incapable of understanding that she was not entitled to benefits after her extended period of eligibility. Additionally, a claimant’s two years of college, work history, and the fact that he knew about the Trial Work Period all supported an ALJ’s conclusion that he should have known something was wrong when he still received disability benefit checks beyond the Trial Work Period.

Even an honest mistake may be sufficient to constitute fault. Citing Center v. Schweiker to reverse the decision of the magistrate judge’s decision, the United States District Court for the Northern District of Iowa concluded that even if the claimant did not understand the notification letters that he acknowledged receiving, he failed to seek assistance in understanding them. The court therefore held that the claimant was “not without fault” in causing the overpayment. In another case, a claimant should have known he was required to report his excess earnings to the SSA. Another claimant, a Laotian without English skills and the father of a blind, mentally disabled daughter, had to demonstrate more than a mere absence of bad faith to prove lack of fault for overpayment. Finally, a claimant found to be at fault for failure to spend a past-due benefits SSI check in time was ordered to repay $6,182 in benefits that he received while the check remained in his bank account. As seen in all the above cases, federal district

119. Id.
120. Chapman v. Bowen, 810 F.2d 151, 152 (8th Cir. 1986).
courts do not hesitate to affirm an ALJ’s finding of substantial evidence of fault from a consideration of the totality of the circumstances of a case.

C. Remand on Absence of Fault Evidence

District courts and courts of appeals remand overpayment cases when the record reveals that the ALJ did not evaluate the pertinent circumstances relevant to the claimant pursuant to 20 C.F.R. § 404.507. These include the individual’s age, intelligence, education, mental and physical condition, and whether limited education or memory loss affected his understanding of whether he was overpaid.

In one case, the evidence revealed that it was only after finding that the claimant had been overpaid that she was notified in writing that gross income averaging more than $810 in 2004 would qualify as substantial gainful activity. Thus, the ALJ would determine on remand whether she was aware of the income limits prior to the written notice, during which she also worked and exceeded substantial gainful activity. Whether a claimant’s mental state supported a finding of no fault in his failure to notify the SSA, and the significance of his good faith belief in continued eligibility, was the subject of remand in another case. In several cases the reviewing courts have remanded for specific findings by the ALJ as to the credibility of the claimant.

126. Id. at *8.
128. Valente v. Sec’y of Health & Human Servs., 733 F.2d 1037, 1046 (2d Cir. 1984) (refusing to uphold the ALJ’s finding of fault regarding the “overpayment” checks and ordering the ALJ to consider, inter alia, claimant’s credibility); Viehman v. Schweiker, 679 F.2d 223, 229 (11th Cir. 1982) (remanding to determine whether the ALJ based his ruling on a credibility determination, which was critical to a finding of substantial evidence to support a finding of fault); Powers v. Barnhart, No. 00-4076-SAC, 2002 U.S. Dist. LEXIS 23863, at *15 (D. Kan. June 4, 2002) (remanding for a credibility finding because the record contained numerous reports of work by claimant, yet the ALJ nevertheless found him to be at
where an assessment of credibility appears to be crucial in determining whether a claimant is without fault.

Notwithstanding that a claimant may be found to be at fault even when the SSA created the problem, some courts have remanded for judgment for the claimant on such facts. For example, in Rini v. Harris, the court stated:

The fault in this case belongs at the agency’s doorstep. Rini testified that he didn’t know when the trial period terminated. He relied on the explanation that the people at Social Security must know what they are doing. 129

While the court acknowledged that the claimant came to an erroneous conclusion, it was nevertheless a reasonable error. 130

In Arik v. Bowen, 131 the district court reversed the finding of fault because the ALJ applied an objective standard, the reasonable benefit participant, rather than the correct subjective standard based on the facts at hand. 132 In another example, the court laid the sole blame for the overpayment on the SSA, asserting that the efficient operation of an interview after a date when the SSA should have questioned the recipients about their resources could have avoided any overpayment. 133 The evidence in another case established that while a claimant’s husband was on unemployment compensation, the claimant notified the district office upon each receipt of benefits and was told “not to worry, and that the matter would be taken care of.” 134 Under these circumstances, the district court reversed the ALJ’s finding of fault and awarded a waiver of recovery of the overpayment. 135 More recently, a district court found there was no evidence that the claimant was notified as to what amount he could earn and still be eligible for benefits. 136 In considering the record as a whole, the court therefore found that the claimant lacked fault in erroneously receiving SSI benefits since

129. Rini v. Harris, 615 F.2d 625, 627 (5th Cir. 1980).
130. Id.
132. Id. at *2–3.
135. Id. at 45.
he continued to receive SSI benefits after he properly notified the SSA of his employment, and since he stated that he was never informed about the impact of his earnings. The ALJ’s failure to inquire into a claimant’s impairment-related work expenses and their impact on whether the claimant was overpaid, mandated a remand in *Howard v. Astrue*, to determine whether the claimant was entitled to reduce his overpayment amount based on the expenses he had to pay to work.

**VII. LEGAL REPRESENTATION**

The fact that many overpayment cases have been appealed, and therefore provide a measure of guidance to both lawyers for recipients of benefits and the SSA, does not indicate that the problems with overpayments are being fairly addressed. As seen in the above case reviews, both sides lose by the passage of time. Accordingly, the court in *Ford v. Apfel* explained the inadequacy of the SSA’s resources to assist SSI beneficiaries who had questions about notices pertaining to their benefits.

In 1997, claimants placed 75.3 million calls to the toll-free number. Of those 19.8 million calls, 26.3%, were met with a busy signal or were terminated by SSA or the caller before conducting a conversation with a representative. In 1996, claimants placed 94.2 million calls to the toll-free number. Of those, 46.2 million calls, 49%, were met with a busy signal or terminated before a conversation.

Alternatively, claimants requiring assistance may bring the notices to the field office for explanation. Between January 18, and February 11, 1994, the SSA’s Office of Inspector General (“OIG”) estimated that 8,100 people visited field offices each day.

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137. *Id.* at 1361–62.
138. SSA regulations provide that “in determining your countable earned income . . . we will subtract the reasonable costs to you of certain items and services which, because of your impairment(s), you need and use to enable you to work. The costs are deductible even though you also need or use the items to carry out daily living functions unrelated to your work.” 20 C.F.R. § 416.976(a) (2008).
141. *Id.* at *23–24 (citation omitted).
The *Ford* court concluded that the challenged SSA notices did violate the plaintiffs’ constitutional rights to due process of law and that the SSA’s advice in its automated notices that claimants contact “groups that can help you find a lawyer or give you free legal services if you qualify” did not solve the problem. The court thus found for the class action plaintiffs on the issue of adequacy of notice.

Increased legal representation would provide positive change only at the beginning of the problem, with assistance to a beneficiary in comprehending the initial notice of overpayment. Yet, as the *Ford* court realized from the testimony of the past president of the Legal Services Corporation (“LSC”), reduced funding for the LSC meant no assistance to SSI recipients at that time for comprehension of SSA notices. Furthermore, “[i]n the absence of assistance from LSC and the paid professionals of the legal profession, claimants are left either to their own devices or to the sporadic assistance of individual practitioners willing to assist claimants on a pro bono basis.”

Today, the situation is even worse. In 2005, the LSC produced a report entitled “Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans.” The report asserted that LSC-funded programs handle almost one million cases a year—a fraction of the need for civil legal aid among low-income Americans. The report further confirmed “that our nation falls far short of meeting the need for civil legal aid among low-income Americans.” In an LSC fact sheet, LSC describes its report and findings as follows:

For two months, LSC-funded programs recorded the number of eligible people who came to their offices that they were unable to serve. On average, for every person

142. *Id.* at *33.
143. *Id.* at *18.
144. *Id.* at *32.
147. *Id.* at 5.
served, one was turned away – just 50 percent of those who actually sought help received it.

Other surveys indicate that 80 percent of the need is unmet. Even this may be an understatement – many people who are eligible for civil legal aid do not seek it. Moreover, the analysis for the Justice Gap Report was completed before Hurricane Katrina simultaneously swelled the need for civil legal aid and the number of people without access to it.

In 2007, LSC released the report’s second edition, finding that the unmet legal needs remained the same as those reported in 2005.

VIII. CONCLUSION

The fact that some claimants prevail in seeking waivers of repayment obligations upon showing substantial evidence that they reported work activity, or reasonably relied on the receipt of benefits checks as justified, or were found to be credible even without convincing documentary proof, does not mean “the system works.” As discussed throughout this article, some reviewing courts weigh the SSA’s latitude in addressing beneficiaries’ reported changes in favor of the claimants. District offices and administrative law judges, however, apply program rules that attribute fault to these same beneficiaries because they “should have known” they were not entitled to the benefits that continued to arrive after their reports of the relevant changes.

Lawyers counsel SSI and SSD recipients when they first become eligible for benefits to keep meticulous records of their reports of changes to the SSA, whether to their district offices or to the “800” number. However, few recipients are represented when they attempt to return to work in some capacity, inherit money from a relative, or change their marital status. The SSA remains a program for the ordinary, low-income, unrepresented recipient. Its rules must therefore be readily available and understandable to the ordinary, unrepresented beneficiary. In addition to accessible rules, there must be access to district office personnel. Each office

150. Helaine M. Barnett, Preface to JUSTICE GAP, supra note 146.
must have a person on its staff whose responsibilities are dedicated only to overpayment issues. An ordinary, unrepresented recipient of benefits must be able to call and speak to that person directly. The SSA should spread its energies to prevention initiatives. There is no better time for a change in focus than now with the recent launching of the New Ticket Express, a SSA effort to expand work opportunities for the disabled.152

The most important change that the Social Security Administration should implement, however, is a realization that most people want to abide by the rules.153 They expect the same from their government, such that it will not send them a benefit to which they are not entitled. While a certain confidence in the SSA is a good thing, it is certainly dashed upon the first overpayment notice, which the beneficiary did nothing to cause. The beneficiary complied with the rules as he or she understood them, which were to report changes, especially upon returning to work.

A conversion to an accessible, responsive SSA would prevent the accumulation of enormous, unrecoverable overpayments while instilling confidence in all citizens, including those who pay into the SSA system and those who receive disability benefits. Recently, on November 7, 2008, SSA Commissioner Michael J. Astrue released the SSA’s Fiscal Year 2008 Performance and Accountability Report.154 The SSA identified Strategic Goal 4 as to “Preserve the Public’s Trust in Our Programs.”155 Objective 1 is to “Curb

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153. See Jill Ann Boskey, Representing the Elderly Client of Modest Means: Supplemental Security Income, in Elder Law Institute 1994, 94 (PLI Estate Planning & Admin., Course Handbook Series No. D4-5254) (“The local Social Security office employees who make the initial determinations of ‘fault’ are often hardened by years of contact with desperate and marginal individuals and by their responsibility to protect the public fisc. As a result, these employees have an unfortunate tendency to believe that claimants generally go to great lengths to cheat the government and are almost always ‘at fault’ in causing an overpayment.”).


Improper Payments.” 156 The report blames inaccurate payments to recipients on “budget constraints and increasing core and non-traditional workloads.” 157 While the report expresses the SSA’s concerns from a stewardship point of view, certainly a better run program with accurate payments and notices carries with it the concomitant benefit to low-income recipients who cannot decipher the notices, understand the reasoning behind the reporting duties, represent themselves or hire counsel in proceedings to challenge the overpayment notices, or repay the amounts determined to have been overpaid. We all have a stake in the guaranteed fairness of the Social Security disability programs.

156. Id.
157. Id. at 24.