

Social Security Administration Retreats from “Unknowing Flight” Doctrine and Will Pay Hundreds of Millions in Back Benefits

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Willie Mae Giacanni, a 79-year-old retired woman living in northern Nevada, was shocked when the Social Security Administration (SSA) suspended her monthly social security benefits due to an outstanding New York warrant for a felony committed in 1972. Giacanni had not, as far as she knew, committed a felony in 1972 or at any other time, nor had she ever been in New York. Even more shocking were the charges: kidnapping and rape.¹

After numerous calls to the New York Police Department’s fugitive-enforcement division, she learned that the individual wanted for the crime was a Willie Thomas. Giacanni’s former surname is Thomas, but Willie Thomas has a different middle name, social security number, race, and, not surprisingly, gender.

New York detectives sent a letter confirming that the outstanding warrant was clearly not for Giacanni. SSA’s response? Because “the letter does not specifically state that the warrant has been dismissed,” her benefits were not yet allowed to be restored.

The recent settlement of a class action lawsuit, *Martinez v. Astrue*, finally ends the nightmare for people such as Giacanni—nationwide older adults and individuals who have disabilities and whose benefits were denied or suspended pursuant to SSA’s “fleeing felon” policy.² Since 2000, over 200,000 individuals with an outstanding warrant in their name were determined to be “fleeing” felony prosecution and had their social security or Supplemental Security Income (SSI) benefits denied, suspended, or terminated under the policy.

The policy’s impact has been devastating. Many people were left with no source of income and no way to pay rent, buy groceries, or maintain their health. Those without friends and family to support them were forced to leave their homes for the streets.

Class members stand to benefit immensely from the settlement. The *Martinez* class certified by the district court includes “all persons whose SSI, Special Veterans Ben-

¹Willie Mae Giacanni’s story is recounted in Ellen E. Schultz, *Social Security Owes “Fugitives” Millions*, WALL STREET JOURNAL, Sept. 26, 2009, at A3.

²*Martinez v. Astrue*, No. 08-cv-4735 CW (N.D. Cal. Sept. 26, 2009).

efits, or [Old-Age, Survivors, and Disability Insurance (OASDI)] benefits have been suspended or denied or who have been notified of a proposed suspension or denial of such benefits for fleeing... or who are not permitted to serve as representative payees ... for fleeing³ Over 200,000 people whose benefits have been suspended or denied since January 1, 2000, are potentially eligible for retroactive benefits in varying amounts; approximately 80,000 are potentially eligible for full retroactive reinstatement of benefits totaling over \$500 million. For those rendered homeless and destitute by the SSA policy, the settlement could make the difference between a return to stable housing and life on the streets. Here we describe the *Martinez* case and settlement and suggest ways to ensure that clients receive the maximum relief possible.

I. Legal Background and *Martinez* Claims

When the “fugitive felon” provision was enacted in 1996, it seemed innocuous to most observers. Not until several years later did the provision’s broad impact become apparent.

A. Illegal Implementation of the “Fleeing Felon” Law

In adopting the “fleeing felon” provision, Congress sought to prevent people fleeing the law from using government benefits to avoid arrest. Originally applied to the SSI program as part of the 1996 welfare reform legislation, the provision makes ineligible for benefits anyone who is (1) “fleeing to avoid prosecution” for a felony, (2) “fleeing to avoid ... custody or confinement after conviction”

for a felony, or (3) “violating a condition of probation or parole” for any offense.⁴ SSA issued implementing regulations stating that it would deny or suspend benefits only “on the basis of an appropriate finding” that an individual “[i]s fleeing, or has fled, to avoid prosecution” or “is fleeing, or had fled to avoid, custody or confinement after conviction” for a felony.⁵

Despite this clear statutory and regulatory language limiting the penalty to those “fleeing” prosecution, SSA established a *de facto* policy to deny and suspend benefits on the basis that an individual was the subject of an outstanding felony warrant—even if the individual did not know of the warrant or the underlying charges. In August 2003 SSA amended its Program Operations Manual System (POMS) to conform to the policy already in effect.

Initial application of the statutory provision was very limited, but after 2000, as SSA reached database-matching agreements with an increasing number of jurisdictions, the number of SSI suspensions became significant and grew year by year, with tens of thousands losing benefits each year.⁶ For the most part, the program picked out individuals whom state law enforcement officials were uninterested in pursuing because the alleged offense was too minor in nature or too remote in time or both. SSA knew that law enforcement authorities were not interested in pursuing these people because, before taking any action to suspend benefits, the agency notified the issuer of the warrant as to the individual’s whereabouts. Only after the law enforcement agency notified SSA that it was uninterested, or after sixty days had passed without law enforcement agency

³Anyone who has had a “final federal court disposition” on the issue is specifically excluded from the class. For the final order approving the settlement, the stipulation of settlement, and other *Martinez* documents, go to the website of the National Senior Citizens Law Center at www.nslc.org/areas/social-security-ssi/Martinez-Settlement/Court-Documents.

⁴Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (the welfare reform legislation, which established an identical condition on eligibility for food stamps and Temporary Assistance for Needy Families (TANF); the Supplemental Security Income “fleeing felon” provision is codified at 42 U.S.C. § 1382(e)(4)(A)). The *Martinez* case did not deal with the probation or parole violation provision of the statute since that provision did not contain a “fleeing” requirement.

⁵20 C.F.R. §§ 416.1339(b), 408.810(b) (2009).

⁶For a detailed account of the agency’s early years of implementing the “fleeing felon” provision against Supplemental Security Income (SSI) recipients, see Gerald McIntyre, *Have You Seen a Fleeing Felon? Social Security Administration Targets SSI Recipients with Outstanding Warrants*, 36 CLEARINGHOUSE REVIEW 474 (Jan.–Feb. 2003).

action, did SSA initiate action to suspend SSI benefits.⁷ Many of the matches and automatic benefit suspensions involved false or unproven allegations, minor infractions, or long-dormant warrants. In some cases the warrant was for a different person since, in cases where the social security number was unavailable or the number on the warrant did not match the number of someone receiving benefits, the program would match people with warrants based on first and last name and birth date alone. The “fleeing felon” policy was ineffective at capturing criminals but became a devastating dragnet for seniors and individuals with disabilities.

In the Social Security Protection Act of 2004, Congress extended application of the “fleeing felon” law to Title II of the Social Security Act—the OASDI program—effective on January 1, 2005, and to anyone serving or seeking to serve as a representative payee for an SSI or Title II beneficiary.⁸ The 2004 law also established mandatory and discretionary good-cause exceptions for both Title II and SSI benefits.⁹ The mandatory good-cause exception applies when (1) a court “has found the person not guilty ..., dismissed the charges ..., vacated the warrant for arrest ..., or issued any similar exonerating order (or taken similar exonerating action)” or (2) “the person was erroneously implicated ... by reason of identity fraud.”¹⁰ The statute also authorized the commissioner, “for good cause shown, based on mitigating circumstances,” to make an exception in any case, provided that both the underlying offense and any probation or parole violation are nonviolent and not drug-related.¹¹

However, SSA chose to interpret this discretionary good-cause exception very

narrowly and established onerous documentation requirements for both mandatory and discretionary good cause. The regulations set forth two options for discretionary good cause.¹² Under Option A, (1) the underlying offense or probation or parole violation must be nonviolent and not drug-related, (2) the individual must not have been convicted of or pled guilty to any subsequent felony, *and* (3) the law enforcement agency must indicate that it will not extradite or is unwilling to act on the warrant. Under Option B the individual must satisfy the first two requirements of Option A *and* three additional criteria: that the warrant was issued at least ten years before SSA learned of it, that no other warrant exists, *and* that the individual lacks the mental capacity to resolve a warrant as evidenced by one of the diagnostic codes listed in POMS GN 02613.910 or the individual is incapable of managing payments, is legally incompetent, or has a representative payee or resides in a long-term care facility, such as a nursing home or mental treatment or care facility.

The requirement that a law enforcement agency state its refusal to extradite or act on the warrant proved particularly burdensome. That the law enforcement agency was not interested in pursuing the warrant was almost always self-evident, but getting officials to so state for the record was not easy. For those who lacked the money (because their benefits had been cut off) or were too ill or frail, traveling to the jurisdiction that had issued the warrant was especially unfeasible.

B. Legal Challenges to SSA’s Policy

2004 also marked the first reported court decisions on SSA’s policy. In each case the statutory language does not al-

⁷GENERAL ACCOUNTING OFFICE, GAO-02-716, WELFARE REFORM: IMPLEMENTATION OF FUGITIVE FELON PROVISIONS SHOULD BE STRENGTHENED (2002), <http://bit.ly/4ql7Kf>.

⁸Social Security Protection Act, Pub. L. No. 108-203, §§ 103, 203, 118 Stat. 493 (2004).

⁹For a more detailed explanation of the good-cause provisions, see SSA Implements New “Fugitive Felon” Provisions, http://www.nslc.org/areas/social-security-ssi/area_folder.2006-09-26.2745496389/article.2006-11-13.6159336442.

¹⁰42 U.S.C. §§ 402(x)(1)(B)(iii), 1382(e)(4)(B).

¹¹*Id.* §§ 402(x)(1)(B)(iv), 1382(e)(4)(C).

¹²Program Operation Manual System (POMS) SI 00530.015B2 (2008) (<https://secure.ssa.gov/apps10/poms.nsf/lnx/0500530015>), GN 02613.025B2 (2007) (<https://secure.ssa.gov/apps10/poms.nsf/lnx/0202613025>).

low suspension of benefits based solely on an arrest warrant, the court found.¹³ In response SSA changed the language of the notices it sent out when suspending benefits; the notices previously tracked the statutory language (“fleeing to avoid prosecution”) in stating the reason for the proposed suspension. Beginning in 2005 the notices no longer tracked that language; instead the notices stated that the statute did not permit payment of benefits when someone had an outstanding arrest warrant. In other words, according to the new suspension notices, the statute said exactly what the courts ruled it did not say.

On December 5, 2005, to implement the Social Security Protection Act, SSA issued proposed regulations that simply adopted existing agency practice.¹⁴ The next day the U.S. Court of Appeals for the Second Circuit ruled that the “the plain language of the statute and its implementing regulation” preclude SSA from determining that a person is “fleeing to avoid prosecution” based solely on the existence of an outstanding warrant for a person’s arrest.¹⁵ The Second Circuit held that instead there must be a “conscious evasion of arrest or prosecution,” that “benefits may be suspended only as of the date of a warrant or order issued by a court or other authorized tribunal *on the basis of a finding that an individual has fled or was fleeing from justice,*” and that a person’s flight must be “undertaken with a specific intent, i.e., to avoid prosecution.”¹⁶ Felipe Oteze Fowlkes was an individual plaintiff who had proceeded *pro se* until counsel was appointed to represent him in the court of appeals, and thus the case did not offer an opportunity for classwide relief.

Some might reasonably have expected the Second Circuit’s decision, on top of the earlier district court rulings, to lead SSA to change its policy. Any such expectations proved futile. Instead SSA responded to the *Fowlkes* decision the way it usually does to adverse circuit court rulings; in an “acquiescence ruling” the agency stated that it would follow the Second Circuit’s ruling only as to beneficiaries and representative payees who live in Connecticut, New York, or Vermont—the states that constitute the Second Circuit.¹⁷ Beneficiaries elsewhere would still be deemed to be “fleeing” prosecution or confinement even when they were unaware of being sought by authorities.

Clearly no litigation by a single individual could force SSA to abandon its illegal practices. In October 2008 plaintiffs, represented by the National Senior Citizens Law Center, along with pro bono counsel from the law firm of Munger, Tolles & Olson, the Mental Health Project of the Urban Justice Center, Disability Rights California, and the Legal Aid Society of San Mateo County, filed in the Northern District of California a proposed class action lawsuit alleging violations of the Social Security Act. Lead named plaintiff and SSI recipient Rosa Martinez had been matched to a decades-old warrant from Miami on the basis of nothing more than her first and last name and date of birth—never mind that Martinez had been pregnant in Chicago at the time of the alleged offense and was a full eight inches shorter than the woman described in the warrant and had a completely different social security number. Since getting the Miami warrant vacated was impossible for Marti-

¹³*Blakely v. Commissioner*, 330 F. Supp. 2d 910 (W.D. Mich. 2004); *Hull v. Barnhart*, 336 F. Supp. 2d 1113 (D. Or. 2004); *Garnes v. Barnhart*, 352 F. Supp. 2d 1059 (N.D. Cal. 2004); *Thomas v. Barnhart*, 2004 WL 1529280 (D. Me. June 24, 2004), *aff’d*, 2004 WL 1770151.

¹⁴70 Fed. Reg. 72411 (Dec. 5, 2005).

¹⁵*Fowlkes v. Adamec*, 432 F.3d 90, 96 (2d Cir. 2005); accord *Reff v. Astrue*, 2008 WL 4277713 (D. Minn. Sept. 15, 2008); *Caldwell v. Astrue*, 2008 WL 2713714 (E.D. Tenn. July 10, 2008); *Blakely v. Commissioner of Social Security*, 330 F. Supp. 2d 910 (W.D. Mich. 2004); *Hull v. Barnhart*, 336 F. Supp. 2d 1113 (D. Or. 2004); *Thomas v. Barnhart*, 2004 WL 1529280 (D. Me. June 24, 2004); *Garnes v. Barnhart*, 352 F. Supp. 2d 1059 (N.D. Cal. 2004).

¹⁶*Fowlkes*, 432 F.3d at 96–97 (emphasis added).

¹⁷Social Security Acquiescence Ruling 06-1(2), 71 Fed. Reg. 17551 (April 6, 2006); see also Congressional Research Service, Social Security Administration: Suspension of Benefits for Fugitive Felons and the Agency’s Response to the *Fowlkes* Decision, (April 27, 2006) (outlining the legislative and regulatory history and describing the *Fowlkes* opinion and the acquiescence ruling).

nez, she faced the imminent loss of her sole source of income.

II. *Martinez* Settlement Provisions

In April 2009, just before an initial hearing on the merits, with multiple cross-motions briefed and after intense negotiations with the participation of a magistrate judge, the parties reached an agreement in principle to settle the case. As part of the preliminary agreement, SSA agreed immediately to abandon its policy of automatically suspending or denying benefits. After substantial additional negotiations, the agreement was memorialized and submitted for court approval, which was granted on September 24, 2009.

A. Change in Policy

The centerpiece of the settlement is SSA's agreement that it would no longer automatically deny or suspend benefits, or deny or suspend status as a representative payee, solely on the basis of an outstanding warrant for the applicant, beneficiary, or representative payee unless the warrant charged escape or flight. SSA may still use warrant information when it decides whether a person is suitable to serve as a representative payee. The change in policy was first released in Emergency Messages (EM) 09024 (March 31, 2009) and 09025 (April 1, 2009). All SSA decisions on pending claims since April 1 should have been made in accordance with the changed policy. SSA intends to incorporate the new policy in the POMS and ultimately in a new regulation.¹⁸

Some groups of people will continue to be subject to the “fleeing felon” provisions of the Social Security Act. First, as described in EM 09025, three National Crime Information Center felony offense codes, “escape” (4901), “flight to avoid” (prosecution, confinement, etc.) (4902), and “flight-escape” (4999) will continue to be used to suspend or deny benefits.

These three codes are a small fraction of the 424 types of warrants listed by the National Crime Information Center, and they represent an insignificant percentage of all warrants issued.

Note that the *Martinez* settlement does not restrict SSA's ability to continue informing law enforcement agencies about people who receive or apply for benefits and who have outstanding felony arrest warrants. Such sharing of information with law enforcement was never an issue in the case.

More significant, the change in policy does *not* apply to people whose benefits have been denied or suspended on the basis of an outstanding warrant for an alleged violation of a condition or probation or parole. These individuals were never part of the *Martinez* case since the legal issues are distinct. Their claims are being litigated in *Clark v. Astrue*, in which the Second Circuit is reviewing a New York district court judgment upholding the SSA policy.¹⁹

B. Major Retroactive Relief

Under the settlement, some form of retroactive relief is available to class members whose benefits have been suspended or denied since January 1, 2000. However, the amount and timing of relief and the procedure for obtaining it vary with the timing of the initial suspension, denial, or appeal thereof, and type of benefits involved. All payments are subject to the Social Security Act's regular payment, nonpayment, and reduced-payment rules.

Group 1 consists of class members whose benefits were suspended on or after January 1, 2007, because of a felony arrest warrant, *or* who were the subject of an administrative appeal decision on a benefit suspension after January 1, 2007, *or* who filed an administrative appeal of a benefit suspension at any time and did not receive a final administrative appeal decision by August 11, 2008.²⁰

¹⁸The Social Security Administration (SSA) published the first installment of the new policy in the POMS in December 2009 as GN 02613.865-.885; see <http://bit.ly/5BUy77>.

¹⁹*Clark v. Astrue*, 2008 WL 4387709 (S.D.N.Y. Sept. 22, 2008), *appeal docketed*, No. 08-5801-cv (2d Cir. 2008).

²⁰We have broken the class into these groups to simplify our description of the relief available. However, SSA does not describe the groups in this way.

Most individuals in Group 1 will receive full retroactive benefits for the period during which their benefits were suspended pursuant to the challenged policy. For those who were receiving social security benefits, reinstatement should be automated and they should not have to visit a social security office. Those who were receiving SSI benefits will receive a letter telling them to contact SSA to make an appointment in order to document continued financial eligibility for the months in which benefits were suspended. For everyone in Group 1, all overpayment collections will automatically stop and any overpayments already recovered will be refunded. Nobody in this group will have to file a new application or undergo a disability determination prior to reinstatement.

In implementing a settlement of this magnitude, glitches will be inevitable in individual cases. Individuals who do not receive benefits to which they believe they are entitled under the *Martinez* settlement should *appeal through the SSA administrative appeals process*. Advocates are encouraged to contact the National Senior Citizens Law Center with information about areas of possible noncompliance.

Group 2 consists of class members who applied and were denied benefits on or after January 1, 2007, because of a felony arrest warrant, *or* were the subject of an administrative appeal decision on a benefit denial after January 1, 2007, *or* filed an administrative appeal of a benefit denial at any time and had not received a final administrative appeal decision by August 11, 2008.²¹

Class members in Group 2 who were applying for social security benefits should have had all other aspects of their claim fully developed before being told that benefits could not be paid because of the warrant. Thus they should receive full retroactive benefits back to the date from which benefits should have been paid based on their original date of application. As with Group 1, this is generally ex-

pected to be an automated process. If they were applying for SSDI (Social Security Disability Insurance) benefits, their no longer meeting the “date last insured” requirement does not matter as of today.²²

For Group 2 class members whose applications for SSI benefits were denied, if the application was for SSI only, the denial likely came before other aspects of their SSI eligibility were developed. If so, these applicants will have to establish that they meet the other eligibility requirements—including a disability determination for those under 65 at the time of application. Once determined eligible, however, they will receive full retroactive payments from the original date of application. In the event that a Group 2 class member was determined to be disabled in connection with the earlier SSI application, SSA will not make a new disability determination before payment of retroactive benefits.

Group 3 comprises class members whose benefits were suspended or denied between 2000 and 2006 *and* who did not have a live administrative claim on August 11, 2008.

The relief available to this group is more limited but nonetheless significant. Group 3 class members will receive a notice from SSA advising of the change in policy and inviting them to reapply for benefits. Those who reapply and are found to be otherwise eligible will receive a protective filing date of April 1, 2009. By the time this group goes in to file a new claim, the April 1, 2009, protective filing date will mean at least an extra year of retroactive benefits that they would not otherwise have. Individuals in Group 3 *must* contact SSA within six months of receiving the notice in order to benefit from the protective filing date. Notices will be mailed to claimants’ last known address.

From members of Group 3 who had already managed to get their benefits restored, SSA will stop collecting any overpayment based on alleged flight but will not refund previously withheld alleged overpayments.

²¹We use the term “denial” in reference to both SSI and Title II benefits; SSA does not use that term for these actions in connection with Title II benefits and labels the claim as having been allowed and the benefits “suspended.”

²²To qualify for SSDI (Social Security Disability Insurance), a claimant must be disabled as of the “date last insured” (20 C.F.R. §§ 404.130 *et seq.* (2009)).

IMPORTANT! The practice of failing to process appeals, widespread at many social security district offices, will result in many people being misidentified as not having appealed a suspension or denial. As a result, SSA may treat many class members as belonging to Group 3 when they ought to be in Group 1 or Group 2 even though the individuals did appeal the suspension or denial and have not received a decision on reconsideration. Advocates should explore the facts thoroughly with each individual in Group 3 to determine whether an appeal was filed and when. Still other members of Group 3 will have good cause for missing the appeal deadline if, as was common, the local social security office told them that these determinations could not be appealed as long as there was an outstanding warrant.²³ Establishing the existence of an unresolved appeal or good cause for missing the appeal deadline can result in several years’ worth of additional retroactive benefits. The National Senior Citizens Law Center is interested in hearing from advocates about their experiences on this issue.

C. Expected Timeline for Relief

Those in Groups 1 and 2 who applied for or received social security benefits began receiving notices in mid-December 2009, and benefits should resume between December, 2009 and the second quarter of 2010.²⁴

SSI recipients will have to wait somewhat longer for relief. SSI recipients in Groups 1 and 2 should receive their notice between April and December 2010 and, if they are still financially eligible, their benefits should resume in that same period unless a disability determination is required. If they applied for benefits on the basis of disability and SSA did not make a disability determination at the time of application, a determination will be required before benefits may start.

Class members in Group 2 who were applying for SSI only may want to file a new application if they do not already have a

favorable disability determination. However, follow-up will be important to be sure that these individuals receive the full retroactive relief to which the settlement entitles them.

Class members in Group 3 whose social security benefits were suspended can expect to receive in June 2010 an informational notice inviting them to request reinstatement of their benefits within six months in order to obtain the April 1, 2009, protective filing date. SSA will stop collecting overpayments after sending the informational notice.

Class members in Group 3 whose SSI benefits were suspended or denied should receive by September 2010 an informational notice advising them of the change in policy and inviting them to file a new application within six months in order to obtain an April 1, 2009, protective filing date. SSI class members in Group 3 may want to file a new application now since a new application is going to be required in any event. However, they may need to follow up to be sure they get the benefit of the protective filing date.

These time frames are subject to change. If the National Senior Citizens Law Center learns of any significant changes in these time frames, we will post the new information on our website, www.nslc.org/front-page/areas/social-security-ssi/Martinez-Settlement.

III. Helping *Martinez* Class Members Access Relief

Outreach and education by advocates will be key to ensuring that the benefits of the *Martinez* settlement reach those most in need. Individuals who lost benefits under the policy likely were forced to move since without benefits they would likely have been unable to afford their rent or mortgage. Some moved in with relatives or friends, and many probably became homeless. Aggressive outreach efforts are necessary to ensure that these individuals claim the benefits they are owed, especially people in Group 3, who are likely

²³20 C.F.R. §§ 404.911(a)(2) and 416.1411(a)(2) both provide that good cause for missing a deadline can be established where “our action misled you.”

²⁴A sample of the notice sent out to Title II beneficiaries in December can be found at POMS GN 02613.865D.

to be the most difficult to reach and who must contact SSA within six months of receiving a notice to retain the protected filing date of April 1, 2009.

Many class members are likely to have already contacted local legal aid programs for help in appealing the loss of benefits or applying for health, housing, or cash assistance to replace the lost income. Review old intakes and client records for potential class members, and make sure that intake screeners are familiar with the issue and know to look out for class members. Review intake procedures and, if necessary, add questions to identify potential class members, who may have not heard about the settlement and may be calling about another problem.

Affirmative outreach is also important. Visits to homeless shelters, food banks, and soup kitchens will likely uncover class members. The National Senior Citizens Law Center has prepared a consumer fact sheet for use in outreach; it is available at www.nslc.org and can be easily adapted to include contact information for local advocates.

All class members should be advised to make sure that SSA has their current address to ensure that they receive SSA notices. Recipients of social security benefits can update their addresses online at <https://secure.ssa.gov/apps6z/ICOA/coa001.jsp>, but this option is not available to SSI recipients, who instead should contact their local SSA office to give their current address and telephone number and ask to be put on the *Martinez* list, which each social security field office must maintain.²⁵ Social security beneficiaries can also call or visit a local office to request an address change, although the online process is preferable.

For a list of strategies for maximizing your clients’ relief, see the “Practice Tips” box on page 487.

The *Martinez* settlement may not be the final chapter in the “fleeing felon” saga. On October 15, 2009, at the request of Rep. Sam Johnson (R-Tex.), ranking minority member of the Subcommittee on Social Security of the House Committee on Ways and Means, SSA’s Office of the Inspector General released a report bemoaning the settlement’s impact and recommending legislative changes to ensure the “future success” of the “fleeing felon” program, that is, amending the statute to conform to SSA’s practice as it existed before *Martinez*.²⁶ The commissioner of social security has also submitted a proposal to the Office of Management and Budget to amend the statute. Although the text of the commissioner’s proposal is not public, the commissioner wrote in fall 2008 to Vice President Dick Cheney and House Speaker Nancy Pelosi (D-Cal.) to suggest an amendment to authorize suspension of benefits on the basis of an arrest warrant.

Varied resources are available to advocates who want to learn more about the *Martinez* settlement and its impact on clients. You can find consumer handouts and an advocates’ guide to the settlement besides case documents (including the settlement agreement) on the National Senior Citizens Law Center’s website.²⁷ The center has created a *Martinez* settlement e-mail list that is a source of regular updates on SSA’s compliance with the implementation timeline; to join the e-mail list, send an e-mail to Oakland@nslc.org. We are also available to provide technical assistance to advocates.

The *Martinez* settlement gives significant relief to the individuals who fell victim to SSA’s illegal policy. We look forward to working with advocates to ensure that the benefits of this settlement reach as many individuals as possible.

COMMENTS?

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors



²⁵EM (Emergency Messages) 09025; POMS GN 02613.885B4.

²⁶Office of the Inspector General, Social Security Administration, A-01-09-29177, Congressional Response Report: The Social Security Administration’s Fugitive Felon Program and the Martinez Settlement Agreement, (2009), <http://bit.ly/5YqBqo>.

²⁷See <http://www.nslc.org/areas/social-security-ssi/Martinez-Settlement>.

Practice Tips in Representing *Martinez* Class Members

1. Pending Appeals

Any class member who has an appeal pending at the reconsideration, administrative law judge, or Appeals Council stage is entitled to an immediate on-the-record determination pursuant to processing instructions set forth in Emergency Message (EM) 09025, which instructs the decision maker to “apply the policy in this EM when making the appeal decision.” For basic information about the Supplemental Security Income (SSI) rules and appeals procedures, consult the Social Security Administration (SSA) brochure at www.ssa.gov/ssi/text-understanding-ssi.htm. Note that this document has not yet been updated to reflect the *Martinez* agreement (EM 09025, Fugitive Felon: Stop Suspension or Denial of Individuals with Felony Warrants Affected by the *Martinez* Settlement (April 1, 2009)). Advocates report success in obtaining favorable on-the-record administrative law judge decisions when they invoke this provision; doing so should be equally effective in appeals of suspensions, denials, and overpayment determinations.

2. Identifying Class Members Entitled to Full Retroactive Benefits

Class members who are improperly identified by SSA as belonging to Group 3 (see page 484) but who in fact had appealed a benefit denial or suspension and had not received a decision by August 11, 2008, should receive full retroactive benefits. Class members who would otherwise be in Group 3 may have good cause for missing the appeal deadline if, upon inquiry at the local social security office, they were told (as many were) that these determinations could not be appealed as long as there was an outstanding warrant. Advocates should help these class members file a request for reconsideration to ensure that SSA properly identifies them as members of Group 1 or 2.

3. Planning Use of Retroactive Benefits

The size of the retroactive benefits will, in many cases, be sufficient to make a significant difference in people’s lives, for example, by enabling them to obtain decent housing. Impress upon clients the importance of devising a plan for using the money before they receive it since an opportunity like this

is unlikely to recur. Where possible, connect class members with community organizations that can help them with planning; before class members start coming into your office, set up a cooperative arrangement with relevant community agencies and educate them about the settlement. You can then refer clients to these agencies and, even more important, you can reach the large number of people who will *not* come to your office but who may be in contact with the agencies.

4. Special SSI Resource Rule

Retroactive payments under the settlement, whether SSI or Title II, will be excluded from countable resources for nine months following the month of receiving the payments (20 C.F.R. § 416.1233 (2009)). Be sure to inform clients that they need to spend down to the \$2,000 resource limit before the end of the nine-month period in order to remain eligible for SSI. The resource rules do not apply to people who were receiving Title II benefits only.

5. Special Consideration on Resources for Concurrent Beneficiaries

Concurrent SSI and Title II beneficiaries who are entitled to retroactive relief will probably receive their Title II retroactive payment before any SSI retroactive payment. They must not commingle the SSI payment with any remaining Title II money so that they will be able to calculate the nine month period for each benefit properly (20 C.F.R. § 1233(d)).

6. SSI Transfer Penalty

Advising SSI recipients and concurrent beneficiaries of the SSI transfer penalty—and the potentially severe consequences of ignoring it—is *extremely* important. Under this penalty anyone who transfers a resource for less than fair market value becomes ineligible for SSI for a number of months determined by the amount of the uncompensated transfer divided by the SSI monthly payment rate (42 U.S.C. § 1382b(c)). Thus transfer of a few thousand dollars can result in several months of ineligibility. Under SSA’s interpretation of this statutory provision, repayment of a loan where the obligation is legally enforceable does not result in a penalty, but repayment when the obligation is merely moral triggers the penalty. This is a common dilemma for people

Practice Tips in Representing *Martinez* Class Members (continued)

who received support from family and friends during the period they went without benefits. Significant gifts can also result in a period of ineligibility.

7. Second Circuit Practitioners

The *Fowlkes* decision and Acquiescence Ruling 06-1(2) prohibited the suspension or denial of benefits only when it was based solely on an arrest warrant. In *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), the court ruled that the mere existence of a warrant did not necessarily constitute flight within the meaning of the statute (see text accompanying note 15, page 482). SSA, however, chose to abandon completely the enforcement of the “fleeing” portion of the statute in the Second Circuit (Office of the Inspector General, Social Security Administration, A-01-07-17039, Audit Report, Title II Benefits to Fugitive Felons and Probation or Parole Violators (July 2, 2008), <http://bit.ly/6i2zUQ>). During this period SSA continued to apply the same policy with respect to warrants for alleged violations of probation or parole as in the rest of the country. As a result no one in that three-state area—Connecticut, New York, and Vermont—has had benefits suspended or denied on this basis since April 2006. Thus the impact of *Martinez* will be considerably less in the Second Circuit than in the rest of the country. How-

ever, people who moved into the Second Circuit after having their benefits cut off or denied elsewhere may be entitled to some retroactive relief. Undoubtedly some people whose benefits were suspended or denied prior to the *Fowlkes* decision and who have not since been reinstated will now be entitled also to the April 1, 2009, protective filing date if they respond within six months of receiving a notice from SSA. A very small group with warrants relating to a charge of “flight” or “escape” who benefited from SSA’s complete cessation post-*Fowlkes* of enforcing the “fleeing” provision will now lose their benefits.

8. Overpayments—Group 3

Anyone in Group 3 who is currently having an overpayment recovered from monthly social security or SSI benefits should immediately request a waiver of recovery (20 C.F.R. §§ 404.506(c), 416.550 (2009)). Although SSA will probably cease continuing to recover the overpayment by the end of 2010, under the terms of the settlement, money already collected will not be refunded. Meeting the “without fault” requirement should be relatively easy since class members were not fleeing and, in many instances were not even asked about any warrant when applying for benefits.