

1 Gerald A. McIntyre CA Bar No. 181746
gmcintyre@justiceinaging.org
2 JUSTICE IN AGING
3660 Wilshire Boulevard, Suite 718
3 Los Angeles, CA 90010
Phone: (213) 639-0930
4 Fax: (213) 550-0501

5 Attorney for Plaintiffs
Complete list of counsel on following page
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11 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 HUGH HELD and
13 KELLEY RICHARDSON-WRIGHT,
on behalf of themselves
14 and all other similarly situated,

15 Plaintiffs,

16 v.

17 CAROLYN W. COLVIN,
Acting Commissioner of Social
18 Security, in her official capacity,

19 Defendant.
24

Case No. 2:15-cv-1732 PA (JCx)

**DECLARATION OF STEPHEN
BYCHOWSKI IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

1 Gerald A. McIntyre CA Bar No. 181746
gmcintyre@justiceinaging.org
2 Denny Chan CA Bar No. 290016
dchan@justiceinaging.org
3 JUSTICE IN AGING
3660 Wilshire Boulevard, Suite 718
4 Los Angeles, CA 90010
Phone: (213) 639-0930
5 Fax: (213) 550-0501

6 Anna Rich CA Bar No. 230195
arich@justiceinaging.org
7 JUSTICE IN AGING
1330 Broadway, Suite 525
8 Oakland, CA 94612
Phone: (510) 663-1055

Vickie L. Henry CA Bar No. 168731
vhenry@glad.org
GAY & LESBIAN ADVOCATES
& DEFENDERS
30 Winter Street, Suite 800
Boston, MA 02108
Phone: (617) 426-1350
Fax: (617) 426-3594

Claire Laporte (pro hac vice)
MA Bar No. 554979
ccl@foleyhoag.com
Marco J. Quina (pro hac vice)
MA Bar No. 661660
mquina@foleyhoag.com
Catherine C. Deneke (pro hac vice)
MA Bar No. 673871
cdeneke@foleyhoag.com
Stephen T. Bychowski (pro hac vice)
MA Bar No. 682241
sbychowski@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Phone: (617) 832-1000
Fax: (617) 832-7000

1 I, Stephen Bychowski, declare as follows:

2 1. I am a member of the Bar of the Commonwealth of Massachusetts. I
3 am one of the attorneys representing Plaintiffs in *Held v. Colvin*, No. 2:15-cv-
4 1732.

5 2. Attached as Ex. A is a true and correct copy of POMS SI 02001.020
6 downloaded from the Social Security Administration's ("SSA") official website.

7 3. Attached as Ex. B is a true and correct copy of a news release posted
8 by SSA on January 31, 2014 entitled *Social Security Publishes New Supplemental*
9 *Security Income Rules Involving Same-Sex Married Couples*.

10 4. Attached as Ex. C is a true and correct copy of the Emergency
11 Message EM-15016 issued by SSA effective May 6, 2015.

12 5. Attached as Ex. D is a true and correct copy of the California Elder
13 Economic Security Index available at
14 <http://www.insightcced.org/communities/cfess/eesiDetail.html?ref=60>.

15 6. Attached as Ex. E is a true and correct copy of SSA's Acquiescence
16 Ruling 92-5(9) available at
17 http://www.socialsecurity.gov/OP_Home/rulings/ar/09/AR92-05-ar-09.html.

18 I declare under penalty of perjury that the foregoing is true and correct and
19 that this declaration was signed this 17th day of June, 2015 in Boston,
24 Massachusetts.

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/s/ Stephen T. Bychowski
Stephen T. Bychowski

EXHIBIT A

Social Security

Official Social Security Website

Menu



Program Operations Manual System (POMS)

TN 24 (11-01)

SI 02001.020 Title XVI Rate Increases and Rate Charts

A. Policy

1. Federal Benefit Rates (FBRs) and Essential Person (EP) Increments

- a. **Whenever title II benefits increase** because of a rise in the cost-of-living, the FBRs for an eligible individual and an eligible couple increase. The EP increment also increases.
- b. **Before 7/83**, if these rates after increase were not a multiple of \$1.20 on a yearly basis, they were raised to be a multiple of \$1.20 on a yearly basis (\$0.10 on a monthly basis). The increased rates were paid each July.
- c. **For 7/83**, there was no Cost-of-Living Adjustment (COLA). In place of a COLA, there was a special increase.
- d. **Beginning with 1/84, COLAs occur in January.** For 1/84 and after, if the rates after increase are not a multiple of \$12 on a yearly basis, they are lowered to be a multiple of \$12 on a yearly basis (\$1 on a monthly basis).

2. Optional State Supplement (OSS) Levels and Minimum Income Levels (MILs)

- a. **The law requires States to pass along COLAs or lose title XIX (Medicaid) funds.** A State may choose to maintain supplementary payment levels and/or maintain total expenditures for supplementary payments. (See SI 01401.001 and SI 01403.001.)
- b. States electing to maintain supplementary payment levels must maintain both optional and mandatory supplements at the required levels. In States with federally administered programs, **the combined Federal/optional State supplement levels or individual MILs are increased by the amount of the COLA to the FBR.** (See SI 01415.001 for OSS levels.

See SI 02005.082D.3. for information about MIL increases.)

- c. Because there was no COLA in 7/83, a special rule applied for the maintenance of **payment levels option**. States could increase the combined Federal/State payment levels (or MILs) by either the full amount of the special increase or by 3.5 percent (the amount the FBR would have increased under regular cost-of-living procedures).

B. Charts - FBRs 1/74 through 3/82

1. Federal Benefit Rates (1/74 through 6/78) ¹

	1/74 to 6/74	7/74 to 6/75	7/75 to 6/76	7/76 to 6/77	7/77 to 6/78
Individual	\$140.00 \$420.00	\$146.00 \$438.00	\$157.70 \$473.10	\$167.80 \$503.40	\$177.80 \$533.40
1/3 rd Reduction ²	\$ 93.34 \$280.00	\$ 97.34 \$292.00	\$105.14 \$315.40	\$111.87 \$335.60	\$118.54 \$355.60
Medicaid Care ³	\$ 25.00 \$ 75.00	\$ 25.00 \$ 75.00	\$ 25.00 \$ 75.00	\$ 25.00 \$ 75.00	\$ 25.00 \$ 75.00
Individual and Spouse ⁴	\$210.00 \$630.00	\$219.00 \$657.00	\$236.60 \$709.80	\$251.80 \$755.40	\$266.70 \$800.10
Both – 1/3 rd Reduction ²	\$140.00 \$420.00	\$146.00 \$438.00	\$157.74 \$473.20	\$167.87 \$503.60	\$177.80 \$533.40
Both – Medicaid Care ³	\$ 50.00 \$150.00	\$ 50.00 \$150.00	\$ 50.00 \$150.00	\$ 50.00 \$150.00	\$ 50.00 \$150.00
One – Medicaid Care ^{3, 5}	\$165.00 \$495.00	\$171.00 \$513.00	\$182.70 \$548.10	\$192.80 \$578.40	
One – 1/3 rd Reduction ^{2, 5} Other – Medicaid ³	\$118.34 \$355.00	\$122.34 \$367.00	\$130.14 \$390.40	\$136.87 \$410.60	
Essential Person Increment ⁶	\$ 70.00 \$210.00	\$ 73.00 \$219.00	\$ 78.90 \$236.70	\$ 84.00 \$252.00	\$ 89.00 \$267.00

2. Federal Benefit Rates (7/78 through 3/82) ¹

	7/78 to 6/79	7/79 to 6/80	7/80 to 6/81	7/81 to 3/82
Individual	\$189.40 \$568.20	\$208.20 \$624.60	\$ 238.00 \$ 714.00	\$ 264.70 \$ 794.10
1/3rd reduction ²	\$126.27 \$378.80	\$138.80 \$416.40	\$ 158.67 \$ 476.00	\$ 176.47 \$ 529.40
Medicaid Care ³	\$ 25.00 \$ 75.00	\$ 25.00 \$ 75.00	\$ 25.00 \$ 75.00	\$ 25.00 \$ 75.00
Individual and Spouse ⁴	\$284.10 \$852.30	\$312.30 \$936.90	\$ 357.00 \$1071.00	\$ 397.00 \$1191.00
Both – 1/3rd reduction ²	\$189.40 \$568.20	\$208.20 \$624.60	\$ 238.00 \$ 714.00	\$ 264.67 \$ 794.00
Both – Medicaid Care ³	\$ 50.00 \$150.00	\$ 50.00 \$150.00	\$ 50.00 \$150.00	\$ 50.00 \$150.00
One – Medicaid Care ^{3, 5}				
One – 1/3rd reduction ^{2, 5} Other – Medicaid ³				
Essential Person Increment ⁶	\$ 94.80 \$284.40	\$104.20 \$312.60	\$ 119.20 \$ 357.60	\$ 132.60 \$ 397.80

¹ The monthly rates are shown on the first line for each category and the quarterly rates are shown on the second line.

² This rate has been adjusted by the 1/3 reduction. See SI 00835.200 to determine if the Value of One-Third Reduction (VTR) applies (effective 04/82 the reduction is treated as income).

³ See SI 00520.000 to determine if this rate applies.

⁴ This FBR also applies if one member of the couple is living in the household of another and receives in-kind support and maintenance (see SI 00835.000).

⁵ Applies only before 10/76.

⁶ See SI 00501.100 to determine if an increment applies.

C. Charts - FBRs 4/82 through 12/15

1. Federal Benefit Rates (4/82 through 12/84)

	4/82 to 6/82	7/82 to 6/83	7/83 to 12/83	1/84 to 12/84
Individual	\$264.70	\$284.30	\$304.30	\$314.00
VTR ¹	\$ 88.23	\$ 94.76	\$101.43	\$104.66
Individual and Spouse	\$397.00	\$426.40	\$456.40	\$472.00
VTR ¹	\$132.33	\$142.13	\$152.13	\$157.33
Essential Person Increment ²	\$132.60	\$142.50	\$152.50	\$157.00

2. Federal Benefit Rates (1/85 through 12/88)

	1/85 to 12/85	1/86 to 12/86	1/87 to 12/87	1/88 to 12/88
Individual	\$325.00	\$336.00	\$340.00	\$354.00
VTR ¹	\$108.33	\$112.00	\$113.33	\$118.00
Individual and Spouse	\$488.00	\$504.00	\$510.00	\$532.00
VTR ¹	\$162.66	\$168.00	\$170.00	\$177.33
Essential Person Increment ²	\$163.00	\$168.00	\$170.00	\$177.00

3. Federal Benefit Rates (1/89 through 12/92)

	1/89 to 12/89	1/90 to 12/90	1/91 to 12/91	1/92 to 12/92
Individual	\$368.00	\$386.00	\$407.00	\$422.00
VTR ¹	\$122.66	\$128.66	\$135.66	\$140.66
Individual and Spouse	\$553.00	\$579.00	\$610.00	\$633.00
VTR ¹	\$184.33	\$193.00	\$203.33	\$211.00

Essential Person Increment ²	\$184.00	\$193.00	\$204.00	\$211.00
Ineligible Child Allocation	\$185.00	\$193.00	\$203.00	\$211.00

4. Federal Benefit Rates (1/93 through 12/96)

	1/93 to 12/93	1/94 to 12/94	1/95 to 12/95	1/96 to 12/96
Individual	\$434.00	\$446.00	\$458.00	\$470.00
VTR ¹	\$144.66	\$148.66	\$152.66	\$156.66
Individual and Spouse	\$652.00	\$669.00	\$687.00	\$705.00
VTR ¹	\$217.33	\$223.00	\$229.00	\$235.00
Essential Person Increment ²	\$217.00	\$223.00	\$229.00	\$235.00
Ineligible Child Allocation	\$218.00	\$223.00	\$229.00	\$235.00

5. Federal Benefit Rates (1/97 through 12/00)

	1/97 to 12/97	1/98 to 12/98	1/99 to 12/99	1/00 to 12/00 ³
Individual	\$484.00	\$494.00	\$500.00	\$513.00
VTR ¹	\$161.33	\$164.66	\$166.66	\$171.00
Individual and Spouse	\$726.00	\$741.00	\$751.00	\$769.00
VTR ¹	\$242.00	\$247.00	\$250.33	\$256.33
Essential Person Increment ²	\$242.00	\$247.00	\$250.00	\$257.00
Ineligible Child Allocation	\$242.00	\$247.00	\$251.00	\$256.00

6. Federal Benefit Rates (1/01 through 12/04)

	1/01 to 12/01³	1/02 to 12/02	1/03 to 12/03	1/04 to 12/04
Individual	\$531.00	\$545.00	\$552.00	\$564.00
VTR ¹	\$177.00	\$181.66	\$184.00	\$188.00
Individual and Spouse	\$796.00	\$817.00	\$829.00	\$846.00
VTR ¹	\$265.33	\$272.33	\$276.33	\$282.00
Essential Person Increment ²	\$266.00	\$273.00	\$277.00	\$282.00
Ineligible Child Allocation	\$265.00	\$272.00	\$277.00	\$282.00

7. Federal Benefits Rates (1/05/-12/08)

	1/05 to 12/05	1/06 to 12/06	1/07 to 12/07	1/08 to 12/08
Individual	\$579.00	\$603.00	\$623.00	\$637.00
VTR ¹	\$193.00	\$201.00	\$207.66	\$212.33
Individual and Spouse	\$869.00	\$904.00	\$934.00	\$956.00
VTR ¹	\$289.66	\$301.33	\$311.33	\$318.66
Essential Person Increment ²	\$290.00	\$302.00	\$312.00	\$319.00
Ineligible Child Allocation	\$290.00	\$301.00	\$311.00	\$319.00

8. Federal Benefits Rates (1/09-12/14)

	1/09 to 12/11	01/12 to 12/12	01/13 to 12/13	01/14 to 12/14
Individual	\$ 674.00	\$ 698.00	\$ 710.00	\$ 721.00
VTR ¹	\$ 224.66	\$ 232.66	\$ 236.66	\$ 240.33

Individual and Spouse	\$1011.00	\$1048.00	\$1066.00	\$1082.00
VTR ¹	\$ 337.00	\$ 349.33	\$ 355.33	\$ 360.66
Essential Person Increment ²	\$ 338.00	\$ 350.00	\$ 356.00	\$ 361.00
Ineligible Child Allocation	\$ 337.00	\$ 350.00	\$ 356.00	\$ 361.00

9. Federal Benefits Rates (1/15 to 12/15)

	01/15 to 12/15
Individual	\$733.00
VTR ¹	\$244.33
Individual and Spouse	\$1,100.00
VTR ¹	\$366.66
Essential Person Increment ²	\$367.00
Ineligible Child Allocation	\$367.00

10. Federal Payment Limit (7/88 On) ⁴

\$30 – Individual

\$60 – Couple

¹ See SI 00835.200 to determine if the VTR applies.

² See SI 00501.100 to determine if an increase applies.

³ Benefits paid in January 2000 through July 2001 were based on Federal Benefit Rates of \$512.00 and \$530.00, respectively. Pursuant to Public Law 106-554, beginning in August 2001, monthly payments for 2000 and 2001 were effectively based on the higher \$513.00 and \$531.00 amounts.

⁴ See SI 00520.001 to determine if this rate applies.

To Link to this section - Use this URL:

<http://policy.ssa.gov/poms.nsf/lnx/0502001020>

SI 02001.020 - Title XVI Rate Increases and Rate Charts - 10/29/2014

Batch run: 10/29/2014

Rev:10/29/2014

EXHIBIT B

Friday, January 31, 2014
For Immediate Release



LaVenja J. LaVelle, Press Officer
press.office@ssa.gov

News Release

SOCIAL SECURITY

Social Security Publishes New Supplemental Security Income Rules Involving Same-Sex Married Couples

Social Security has published new instructions that allow the agency to process some Supplemental Security Income (SSI) claims by individuals who are in a same-sex marriage. These instructions come in response to last year's Supreme Court decision in U.S. v. Windsor which found Section 3 of the Defense of Marriage Act unconstitutional.

SSI is a program based on financial need, and the agency must consider the income and resources of the recipient and his or her spouse when determining eligibility and monthly payment.

"As with previous same-sex marriage policies, we worked closely with the Department of Justice," said Carolyn W. Colvin, Acting Commissioner of Social Security. "With the release of these instructions, we continue our commitment to treating all Americans fairly, with dignity and respect."

If a person believes he or she may be entitled to or eligible for benefits, they are encouraged to apply now.

To learn more, please visit www.socialsecurity.gov/people/same-sexcouple.

#

EXHIBIT C

Social Security

Official Social Security Website

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Emergency Message

Identification

Number:

EM-15016

Intended Audience:

All RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/
OCO-CSTs/ODAR

Originating Office:

ORDP OISP

Title:

**SSI Same-Sex-Marriage Cases: Hold SSI Post-Eligibility Actions that Would
Result in Overpayments for Past Months but Process Actions Affecting
Future Months**

Type:

EM - Emergency Messages

Program:

Title XVI (SSI)

Link To Reference:

See **References** at the end of the EM.

Retention Date: October 30, 2015

A. Purpose

This emergency message (EM) provides instructions to hold, effective immediately any Supplemental Security Income (SSI) post-eligibility (PE) action that would result in an overpayment for past months due to:

- deeming of income or resources based on recognition of a same-sex marriage; or
- applying the couple's payment rate or couple's resource limit to a member of a same-sex couple.

Regardless of when the change occurred or when SSA first learned of the event, do not create an overpayment on a recipient's SSI record due to recognition of a same-sex marriage.

This EM also provides instructions to process SSI PE actions that reduce future SSI payments, including actions that result in ineligibility for SSI for a future month. Process PE actions to

reduce or suspend SSI payments only for future months, according to Treasury payment tape cut-off dates and Goldberg-Kelly due process requirements.

More instructions will follow.

B. Hold PE actions that would result in overpayments for past months but process PE actions affecting future months

For a case where processing PE actions would result in an overpayment for past months AND potentially lower or suspend SSI payments in future months, based on recognition of a same-sex marriage or applying the couple's payment rate or couple's resource limit to a member of a same-sex couple:

- Follow procedures in D.1 in this EM to hold PE actions that would result in overpayments for past months; and
- Follow procedures in D.2 in this EM to process PE actions affecting future months.

C. Determine the effect of a same-sex marriage, a change in the recipient's permanent home from a state that does not recognize same-sex marriage to one that does, or a change in state law regarding same-sex marriage

To determine the effect of same-sex marriage on an SSI recipient's payment amount or eligibility, follow instructions in GN 00210.800F.2. and GN 00210.850E.2. (as applicable, for parent-child deeming), only through the step that calls for performing manual eComputations. Perform an eComputation for each month following the month in which the change occurred.

D. Hold or process PE actions involving same-sex marriage, a change in the recipient's permanent home from a state that does not recognize same-sex marriage to one that does, or a change in state law regarding same-sex marriage

Compare the eComputation results for each month to the Federal Amount Due and State Amount Due in the Computation History (CMPH) segment of the recipient's SSID query. Hold or process actions according to these instructions:

1. Hold PE actions that would result in an overpayment for past months

Hold all actions that would result in an overpayment for past months due to deeming of income or resources based on recognition of a same-sex marriage or applying the couple's payment rate or couple's resource limit to a member of a same-sex couple. If you

find that the eComputations indicate that we overpaid the recipient for some months and underpaid him or her for other months, do not process the post-eligibility action(s) that would result in overpayments for past months. Do not release the underpayment.

- Follow instructions in GN 00210.005B.4 to hold these SSI PE actions
- Set up a Modernized Development Worksheet (MDW) as instructed in GN 00210.005B.4.
- Add the following remark to the Supplemental Security Record (SSR): “HOLD 626 WINDSOR PE ACTION per EM-15016.”
- If a recipient or representative payee questions the potential effect of the marriage change on payments we have already issued, do not discuss possible future OP actions other than to confirm that we will notify him or her of any payment or eligibility determinations or proposed actions.

2. Process actions affecting future payments

Process all actions that would result in a reduction of a future SSI payment amount or a determination of future ineligibility for SSI payments due to deeming of income or resources based on recognition of a same-sex marriage or applying the couple’s payment rate or couple’s resource limit to a member of a same-sex couple.

Follow instructions in GN 00210.800F2 and GN 00210.850E.2 (as applicable, for parent-child deeming), using the Force Due process to reduce or stop SSI payments only for future months.

IMPORTANT: Use the Force Due process only for actions affecting future months that are still subject to reduction, that is, only when the recurring tape (Treasury) cutoff for that payment month has not passed and when you are able to provide due process notification according to instructions in SI 002301.301C.3. Even if the recipient reported the change involving a same-sex marriage in the past, reduce or stop only future SSI payments.

Otherwise, you will create an overpayment, contrary to the instructions in this EM.

Direct all program–related and technical questions to your RO support staff or PSC OA staff. RO support staff or PSC OA staff may refer questions or problems to their Central Office contacts.

References:

GN 00210.005 Same-Sex Marriage or Non-marital Legal Relationship- Holding Certain Claims,

Appeals, Post-Eligibility Actions, and Post-Entitlement Actions

GN 00210.800 Same-Sex Marriage, SSI Same-Sex Couples, and SSI Deeming from a Same-Sex Ineligible Spouse

GN 00210.850 Same-Sex Parents, a Parent's Same-Sex Marriage, and Supplemental Security Income (SSI) Parent-Child Deeming – Initial Claim and Post-Eligibility Cases

SM 01601.790 Computation History - CMPH

SI 002301.301 Overview of Goldberg/Kelly (GK) Processing

EM-15016 - SSI Same-Sex-Marriage Cases: Hold SSI Post-Eligibility Actions that Would Result in Overpayments for Past Months but Process Actions Affecting Future

Months - 05/06/2015

EXHIBIT D

What Seniors Need to Make Ends Meet: Elder Index in California

[Learn Who is Struggling Most in California > >](#)

[Elder Index for Seniors with Adult Children at Home > >](#)
[Elder Index for Seniors Raising Grandchildren > >](#)

The Elder Index measures the cost of older adults' basic expenses: housing, food, medical care, and transportation.

Seniors - no matter what their source of income - often struggle to make ends meet in California. Neither the median Social Security payment nor the maximum Supplemental Security Income payment is enough to cover seniors' basic needs.

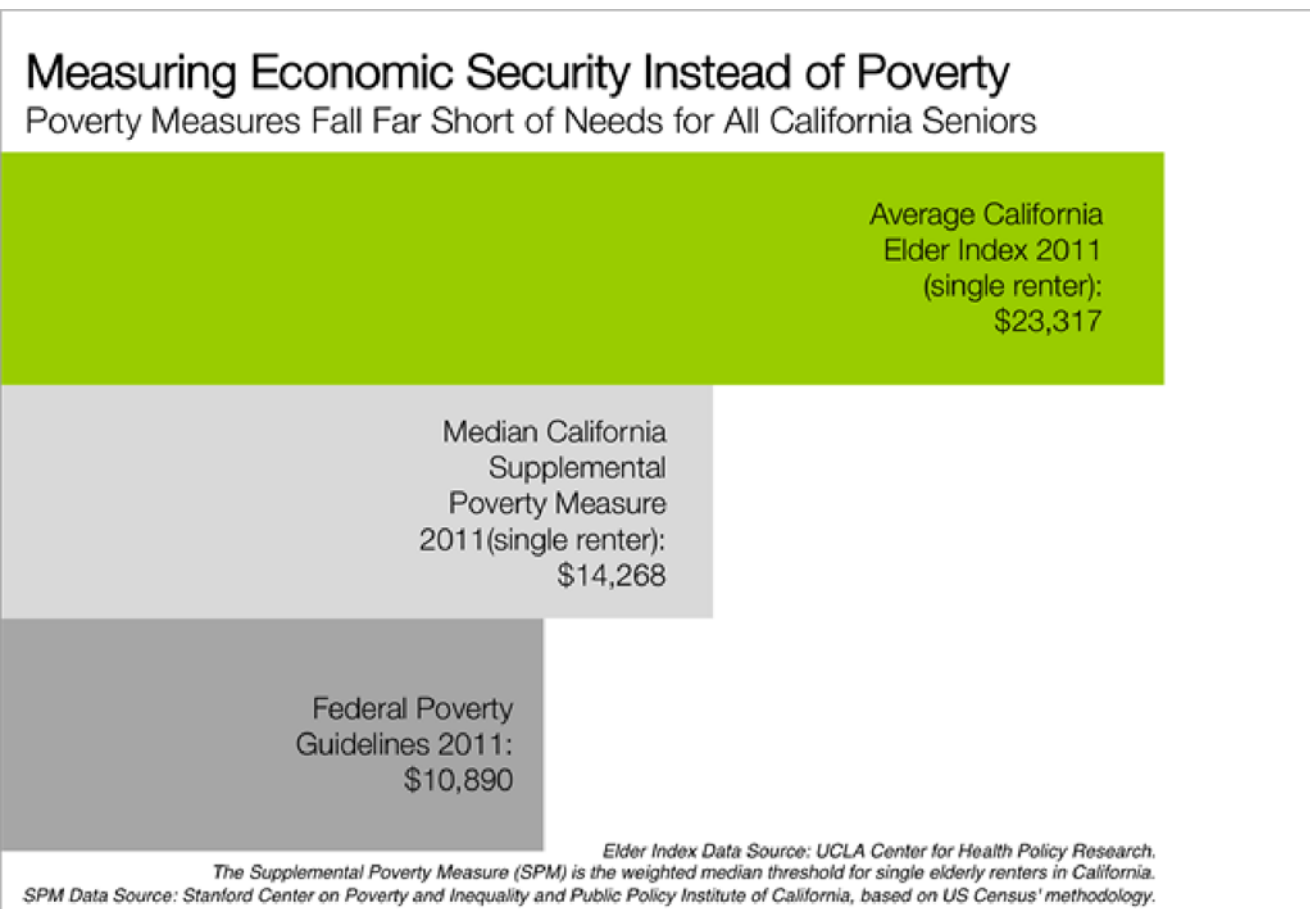
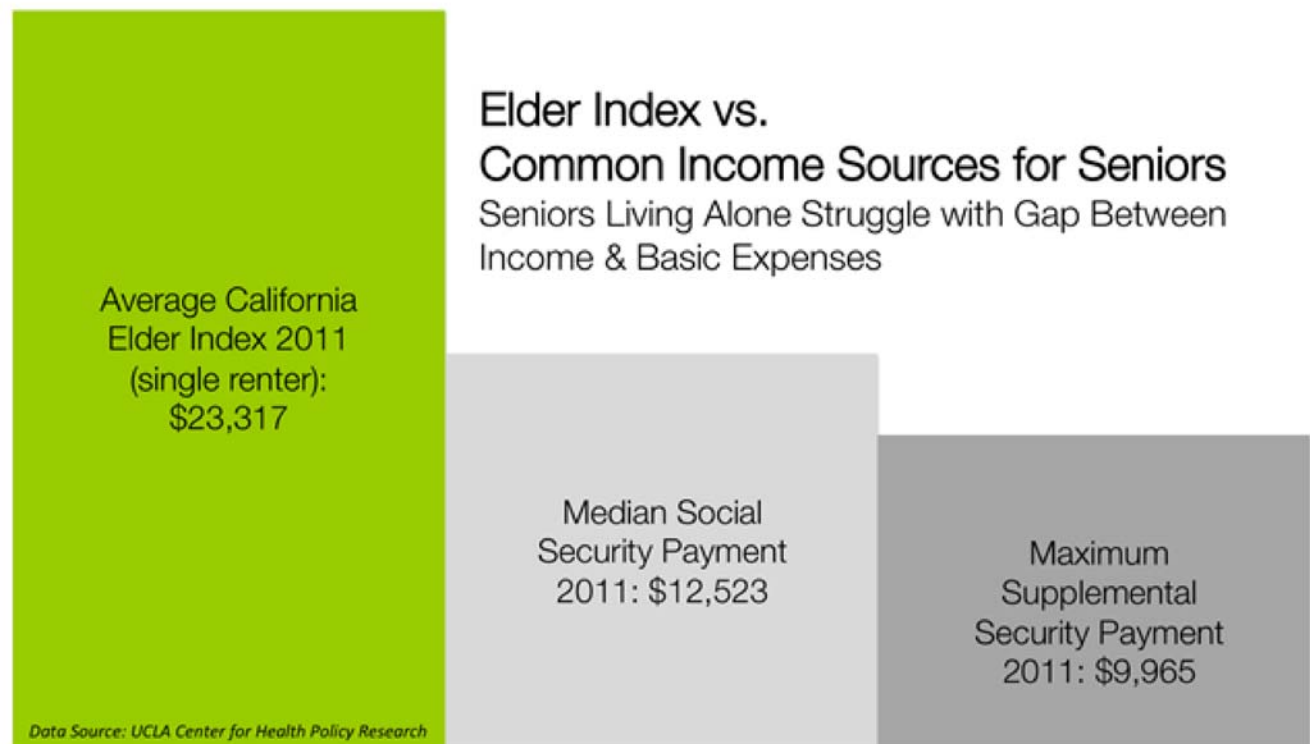
While support programs can help, many use the Federal Poverty Guidelines (FPL) to determine eligibility. The problem is that the FPL is the same dollar amount across the country, and does not reflect today's cost of living. The result? Thousands of economically insecure seniors fall through the cracks of our public systems with too much income to qualify for help, but not enough to get by.

Elder Index: Basic Expenses	
Single Renter Living Alone CA Average	

The California Elder Index is a county-specific measure of the minimum income necessary to cover all of a senior's basic needs.	

Rent (one bedroom apt.)	\$864
Food	\$257
Healthcare	\$334
Transportation	\$239
Miscellaneous	\$249

Monthly Total	\$1,943
ANNUAL TOTAL	\$23,317*
* Annual total may not equal the sum of monthly totals due to rounding.	



California, 2011

Elder Economic Security Standard™ Index

Elder Index Per Year, Annual Comparisons, and Basic Monthly Expenses for Selected Household Types

Elder Index Per Year†

Income Needed to Meet Basic Needs (based on monthly expenses shown below*)	Elder Person			Elder Couple		
	Owner w/o mortgage	Owner w/mortgage	Renter, one bedroom	Owner w/o mortgage	Owner w/mortgage	Renter, one bedroom
	\$17,893	\$32,488	\$23,317	\$27,272	\$41,867	\$32,696

Annual Comparison Amounts

Federal Poverty Guideline (2011 DHHS)	\$10,890	\$10,890	\$10,890	\$14,710	\$14,710	\$14,710
% of Federal Poverty [Elder Index divided by (/) Federal Poverty Guideline]	164%	298%	214%	185%	285%	222%
SSI Payment Maximum, California 2011	\$9,965	\$9,965	\$9,965	\$16,886	\$16,886	\$16,886
SSI Income Gap [SSI Payment Maximum minus (-) Elder Index]	-\$7,928	-\$22,523	-\$13,352	-\$10,385	-\$24,981	-\$15,810
Median Social Security Payment 2011	\$12,523	\$12,523	\$12,523	\$20,483	\$20,483	\$20,483
Soc Sec Income Gap [Average Social Security Payment minus (-) Elder Index]	-\$5,370	-\$19,965	-\$10,794	-\$6,789	-\$21,384	-\$12,213

*Basic Monthly Expenses Used to Calculate Elder Index

Monthly Expenses	Elder Person			Elder Couple		
	Owner w/o mortgage	Owner w/mortgage	Renter, one bedroom	Owner w/o mortgage	Owner w/mortgage	Renter, one bedroom
Housing	\$412	\$1,629	\$864	\$412	\$1,629	\$864
Food	257	257	257	479	479	479
Transportation	239	239	239	335	335	335
Health Care (Good Health)	334	334	334	667	667	667
Miscellaneous @ 20%	249	249	249	379	379	379
Elder Index Per Month	\$1,491	\$2,707	\$1,943	\$2,273	\$3,489	\$2,725

†Note: Annual total may not equal the sum of monthly totals due to rounding.

For the complete report, methodology or other counties visit:

<http://healthpolicy.ucla.edu/elder-index2011>

For more information about the California Elder Economic Security Initiative™ program visit:

<http://www.insightccd.org/communities/cfess/cal-eesi.html>



Wider Opportunities for Women

Back

EXHIBIT E

Social Security

Official Social Security Website

Acquiescence Rulings

AR 92-5(9)

EFFECTIVE/PUBLICATION DATE: 06/22/92

ACQUIESCENCE RULING 92-5(9)

AR 92-5(9): *Quinlivan v. Sullivan*, 916 F.2d 524 (9th Cir. 1990) -- Meaning of the Term "Against Equity and Good Conscience" in the Rules for Waiver of Recovery of an Overpayment -- Titles II and XVI of the Social Security Act; Title IV of the Federal Mine Safety and Health Act of 1977.
[1]

ISSUE:

Whether the Secretary may find that recovery of an overpayment is "against equity and good conscience" only under the specific circumstances set forth in the regulations.

STATUTE/REGULATION/RULING CITATION:

Sections 204(b) and 1631(b)(1)(B) of the Social Security Act (42 U.S.C. 404(b) and 1383(b)(1)(B)), 20 CFR 404.506, 404.509, 410.561a, 410.561d, 416.550, and 416.554; Section 413(b) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 923(b)).

CIRCUIT:

Ninth (Alaska, Arizona, California, Guam, Hawaii (including American Samoa), Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington)

Quinlivan v. Sullivan, 916 F.2d 524 (9th Cir. 1990)

APPLICABILITY OF RULING:

This Ruling applies to determinations or decisions at all administrative levels (i.e., initial,

reconsideration, administrative law judge hearing and Appeals Council).

DESCRIPTION OF CASE:

The plaintiff, Mr. Quinlivan, was incarcerated from 1963 to 1985 for a felony conviction. He received disability insurance benefits while in prison.

In 1980, the Social Security Act was amended to prohibit payment of disability benefits to certain incarcerated felons. Mr. Quinlivan continued to be paid benefits from 1980 to 1982, resulting in erroneous payments. He was unaware of the change in the law and was without fault in receiving these payments.

After receiving a booklet from the Social Security Administration (SSA) in early 1982, Mr. Quinlivan wrote a letter to SSA informing it of his situation. SSA then sent him a notice stating that he had been overpaid for two years and requested repayment. He requested reconsideration and a waiver of recovery of the overpayment. Apparently this request was not processed and another notice of overpayment was sent in 1984. The plaintiff again sought waiver of recovery of the overpayment. A personal conference with an SSA representative was held in 1984, but no decision was issued at that time.

Mr. Quinlivan was released from prison in 1985. He spent his accumulated savings, including the overpayment. In 1987, SSA denied his request for reconsideration and Mr. Quinlivan thereafter requested a hearing. In 1988, an Administrative Law Judge denied the request for waiver of the recovery of the overpayment and this decision became the final decision of the Secretary when the Appeals Council denied review. Mr. Quinlivan then sought judicial review in the district court. The district court affirmed the Secretary's decision and Mr. Quinlivan filed an appeal with the United States Court of Appeals for the Ninth Circuit.

HOLDING:

The Ninth Circuit Court of Appeals held that requiring Mr. Quinlivan to repay the overpayment would be against equity and good conscience.

The court indicated that although the Social Security Act does not define the phrase "against equity and good conscience," the Secretary has interpreted it in 20 CFR 404.509(a) to be limited to situations where the claimant changed his or her position for the worse, relinquished a valuable right, or lived in a separate household from the overpaid person at the time of the overpayment and did not receive the overpayment. In making its decision on this case, the court stated that the question before it was "whether the agency's interpretation is based on a reasonable construction of the statute."

The court held that the legislative history of section 204(b) of the Social Security Act demonstrates that Congress intended to broaden the availability of waiver and that the Secretary's interpretation of the phrase "against equity and good conscience" was too narrow. Accordingly, the court concluded that:

[T]he meaning of the phrase, "against equity and good conscience," cannot be limited to the three narrow definitions set forth in the Secretary's regulation. Congress intended a broad concept of fairness to apply to waiver requests, one that reflects the ordinary meaning of the statutory language and takes into account the facts and circumstances of each case.

In applying this standard, the court noted that Mr. Quinlivan had no material goods, no means of transportation, no income and he had only worked sporadically in a few temporary jobs. Additionally, the court pointed to the presence of a psychological impairment as a factor in favor of waiver of recovery of the overpayment. Given these circumstances, the court found it would be against "equity and good conscience" to have Mr. Quinlivan repay the funds.

STATEMENT AS TO HOW *QUINLIVAN* DIFFERS FROM SOCIAL SECURITY POLICY:

Under 20 CFR 404.509(a), 410.516d, and 416.554, recovery of an overpayment is "against equity and good conscience" if the individual has changed his or her position for the worse or relinquished a valuable right because of reliance upon a notice that a payment would be made or because of the overpayment itself. In addition, recovery is considered to be "against equity and good conscience" under title II and title XVI, if the individual was living in a separate household from the overpaid person (title II) or his or her eligible spouse (title XVI) and did not receive the overpayment. These specific circumstances are the only ones which permit a waiver of recovery of an overpayment on the basis that recovery is "against equity and good conscience" under SSA policy.

As stated above, the Ninth Circuit has held that the phrase, "against equity and good conscience," cannot be limited to the three specific definitions set forth in the regulations, but rather a broad concept of fairness is to be applied under which *all* the facts and circumstances of the case must be taken into account. The court emphasized that its interpretation of the equity and good conscience standard does not mean that, whenever an individual is found to be without fault in creating the overpayment, it necessarily follows that waiver is appropriate. The court noted that the standard must be cautiously applied to the circumstances of each case.

EXPLANATION OF HOW SSA WILL APPLY THE DECISION

WITHIN THE CIRCUIT:

This Ruling applies only to cases involving claimants who reside in Alaska, Arizona, California, Guam, Hawaii (including American Samoa), Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, or Washington at the time of the determination or decision at the initial, reconsideration, Administrative Law Judge or Appeals Council levels.

If it is determined that a claimant is "without fault" in causing or accepting an overpayment, it may need to be determined whether adjustment or recovery of the overpayment would be "against equity and good conscience." In determining whether recovery of an overpayment would be "against equity and good conscience," the adjudicator will not limit his or her inquiry to the three specific circumstances set forth in the regulations. The decision must take into account all of the facts and circumstances of the case and be based on a broad concept of fairness. Factors such as, but not limited to, the nature of the claimant's impairment, the amount and steadiness of the claimant's income, and the claimant's assets and material resources should all be considered in the decision as to whether recovery of an overpayment should be waived on the basis that recovery would be "against equity and good conscience."

[¹] Although *Quinlivan* was a title II case, the phrase "against equity and good conscience" is similarly defined in regulations governing the title XVI Supplemental Security Income program and in the Secretary's regulations concerning benefits under the Federal Mine Safety and Health Act of 1977. Therefore, this Ruling extends to title II and title XVI claims under the Social Security Act and to claims for Black Lung benefits.

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