

No. 10-1245

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ANDREW CIBULA, *ET AL.*,
Plaintiffs-Appellees,
v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

BRIEF FOR DEFENDANT-APPELLANT

TONY WEST
Assistant Attorney General
NEIL H. MacBRIDE
United States Attorney
WILLIAM KANTER
WILLIAM G. COLE
(202) 514-4549
Attorneys
Civil Division, Room 7320
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	2
A. Nature Of The Case.....	2
B. Course Of Proceedings And Disposition In The Court Below.	5
STATEMENT OF FACTS.....	8
SUMMARY OF THE ARGUMENT.....	13
ARGUMENT.....	18
THE UNITED STATES IS ENTITLED TO PAY J.C.'S FUTURE DAMAGES IN PERIODIC PAYMENTS THROUGH A REVERSIONARY TRUST.....	18
STANDARD OF REVIEW.....	18
DISCUSSION OF THE ISSUE.....	19
1. The “Changed Economic Climate” Rationale.	21
2. The “Early Discharge” Rationale.	24
3. The “Government Is Not Insured” Rationale.	28
CONCLUSION.....	31
RECOMMENDATION REGARDING ORAL ARGUMENT	
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases:

<i>Carter v. United States</i> , 982 F.2d 1141 (7th Cir. 1992).....	19, 26
<i>Cibula v. United States</i> , 551 F.3d 316 (4th Cir. 2009).	4, 13, 20
<i>Doe v. Chao</i> , 511 F.3d 461 (4th Cir. 2007).	16, 23
<i>Dutra v. United States</i> , 478 F.3d 1090 (9th Cir. 2007).....	25
<i>Frankel v. Heym</i> , 466 F.2d 1226 (3d Cir. 1972).....	25
<i>Hill v. United States</i> , 81 F.3d 118 (10th Cir.), <i>cert. denied</i> , 519 U.S. 810 (1996).	25
<i>Hull v. United States</i> , 971 F.2d 1499 (10th Cir. 1992).....	25
<i>Invention Submission Corp. v. Dudas</i> , 413 F.3d 411 (4th Cir. 2005).....	23
<i>Lozada v. United States</i> , 974 F.2d 986 (8th Cir. 1992).	26
<i>Lucas v. United States</i> , 807 F.2d 414 (5th Cir. 1986).....	26
<i>Nationwide Mutual Insurance Co. v. United States</i> , 3 F.3d 1392.....	19
<i>S. Atl. Ltd. P'ship of Tenn.</i> , 356 F.3d 576 (4th Cir. 2004).....	23
<i>Starns v. United States</i> , 923 F.2d 34 (4th Cir. 1991).....	19, 26
<i>Taylor v. United States</i> , 821 F.2d 1428 (9th Cir. 1987), <i>cert. denied</i> , 485 U.S. 992 (1988).....	26
<i>Turner v. United States</i> , 514 F.3d 1194 (11th Cir. 2008).	19
<i>United States v. Husband</i> , 312 F.3d 247 (7th Cir. 2002).....	23

Statutes:

Federal Tort Claims Act:

28 U.S.C. § 1346(b).....	1, 2, 19
28 U.S.C. § 2671-2680.....	2
28 U.S.C. § 2674.....	2, 4, 6, 8, 13, 18, 19, 21, 25, 26, 29
28 U.S.C. § 1291.....	1
Cal. Civ. Proc. Code § 667.7.....	3, 5, 6, 13, 20
Cal. Civ. Proc. Code § 667.7(a).....	7, 12, 17, 28
Cal. Civ. Proc. Code § 667.7(b)-(d).....	12
Cal. Civ. Proc. Code § 667.7(e)(1).....	7
Cal. Civ. Proc. Code § 667.7(f).....	30

Rules:

Fed. R. Civ. P. 59(e).....	5
----------------------------	---

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1245

ANDREW CIBULA, *ET AL.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR DEFENDANT-APPELLANT

JURISDICTIONAL STATEMENT

The judgment of the district court was entered December 15, 2009. The United States filed a timely notice of appeal on February 16, 2010. The district court had jurisdiction of this Federal Tort Claims Act (“FTCA”) case pursuant to 28 U.S.C. § 1346(b). This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291 since the appeal is from a final judgment that disposes of all claims.

STATEMENT OF THE ISSUE

This is a medical malpractice case under the Federal Tort Claims Act (“FTCA”). The FTCA makes the government liable for tort claims “to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. The substantive law that applies in this case is the law of California which provides that, upon a party’s request in a medical malpractice action like this one, awards of future damages shall be made in the form of periodic payments that terminate on the death of the judgment creditor.

The question presented in this case is whether the district court erred in rejecting, on remand from this Court, the government’s request to fashion a remedy similar to the California periodic payments statute by having the government pay the judgment award into a reversionary trust that would make periodic payments until the judgment creditor’s death, with any remaining corpus reverting to the government.

STATEMENT OF THE CASE

A. Nature Of The Case.

This is a personal injury action for medical malpractice brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The plaintiffs are Navy Captain Andrew L. Cibula, his wife Jennifer, and their son, “J.C.” J.C.

developed cerebral palsy after his birth in 1997. The Cibulas' FTCA action claimed that violations of medical standards of care by personnel at the Balboa Naval Medical Center in San Diego, California caused J.C.'s injuries. In 2007, the district court awarded plaintiffs \$28,389,289 in damages. Of this sum, \$25,184,489 was awarded to pay for J.C.'s future damages, to be paid into a trust managed by a guardian *ad litem*, Kelly Thompson. JA 149, 155.

The government did not challenge the district court's 2007 finding of liability or the amount of the award. Consequently, it paid plaintiffs in a lump sum the \$2,704,800 designated as compensation for J.C.'s past medical care. The government appealed to this Court only from the district court's ruling that the *future* damages awarded to the plaintiffs also had to be paid in a lump sum to be placed in a trust. The government claimed that, because J.C.'s injury had occurred in San Diego, California, that state's Civ. Proc. Code § 667.7 applied to this case. That statute, part of California's medical malpractice reform legislation, requires that future damages, including medical costs and estimated lost earnings, be paid periodically during the lifetime of the recipient whenever this mode of payment is requested by a party, and that they terminate upon the recipient's death. In the appeal from the 2007 district court decision, we claimed that the United States, while unable to make periodic payments, should have been permitted to

accomplish a similar result through a reversionary trust.

In 2007, the district court had refused to order such a mode of payment because Virginia law, not California law, applied to the case, and because Virginia law had no provision for paying malpractice awards by periodic payments. This Court, however, after first noting that “[t]he primary issue in this case is whether the district court erred in failing to place the damages awarded to the Cibulas into a reversionary trust” (*Cibula v. United States*, 551 F.3d 316, 318(4th Cir. 2009) (JA^{1/} 173), ruled that the United States was correct in believing that the California periodic payments law applied. JA 173. The case was remanded to allow the district court to “craft a remedy that holds the government liable ‘in the same manner and to the same extent as a private individual under like circumstances.’” JA 176-77, quoting 28 U.S.C. § 2674. This Court left it to the district court to “determine whether the creation of a reversionary trust would, if properly structured, impose liability on the government in the same manner and to the same extent as a private individual invoking § 667.7.” JA 177.

In its December 15, 2009 opinion filed after the remand, the district court held that it could not create a reversionary trust in this case because “such a trust

^{1/} This Court’s January 5, 2009 opinion in this case is included in the Joint Appendix in its F.3d format. All subsequent references to that opinion are given only their “JA,” not their “F.3d,” page numbers.

would . . . expose Plaintiffs to greater risk in contravention of section 667.7.” JA 279-80. This appeal challenges that ruling.

B. Course Of Proceedings And Disposition In The Court Below.

A complaint was filed against the United States by the Cibulas on November 30, 2005. JA 13. After an October 30-November 2, 2006 trial, the district court held the United States liable for J.C.’s condition in an opinion dated March 27, 2007. JA 82-155. The district court refused to grant the government’s request that the “periodic payments” requirement of California’s Civ. Proc. Code § 677.7 be applied to the payment of damages in this case. It concluded instead that this state law was a “post-judgment, remedial statute” which was not part of California’s substantive law. JA 147-48.

On April 12, 2007, the government filed a motion (Dkt. No. 47) to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), requesting that the court reconsider its decision not to apply California law requiring the payment of future damages by periodic payments. In a memorandum order filed August 29, 2007 (JA 156-66), the district court again refused to apply California law on the periodic payments question, ruling that the relevant statute was “a procedural rule not applicable in this case.” JA 157. The district court filed a new Final Judgment on August 30, 2007. JA 167-68.

The government appealed on October 26, 2007. In a decision dated January 5, 2009, this Court reversed the district court's determination that Cal. Civ. Proc. Code § 667.7 was a procedural rule that was inapplicable to this case. JA 176. This Court held that the California statute was substantive "[b]ecause application of § 667.7 would affect the government's ultimate liability," and remanded the case to the district court "to craft a remedy that holds the government liable 'in the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. § 2674." JA 176-77. It added the following statement:

In its opinion below, the district court did not make findings to determine whether the creation of a reversionary trust would, if properly structured, impose liability on the government in the same manner and to the same extent as a private individual invoking § 667.7. The detailed economics involved in the case caution against our making a specific ruling on the matter in the first instance.

JA 177.

In post-remand proceedings, the government proposed that, instead of requiring plaintiffs to set up the trust ordered in the its original opinion (JA 282), the district court fashion two reversionary trusts, one "to pay for J.C.'s future medical needs proximately resulting from his birth injury" (*id.*), and a second to cover his future lost wages. *Id.* The request for two separate trusts was made

because of uncertainty that payment of lost wages would cease at the time of J.C.'s death.^{2/} Payments^{3/} into the trusts would have been equal to the present value of the health care costs (\$22,823,718) and lost future earnings (\$2,360,771) calculated by plaintiffs' economist, Dr. Richard Lurito, and awarded on August 30, 2007.^{4/} JA 155, 282.

The district court held a hearing on November 4 and 6, 2009, receiving testimony from Dr. Lurito, and from another plaintiffs' economist, Dr. James Koch, and from J.C.'s guardian *ad litem*, Kelly A. Thompson. No testimony was received concerning the effect of the government's proposed reversionary interest on J.C.'s recovery. In its December 15, 2009 opinion, the district court ordered

^{2/} Pursuant to California law, funds for lost wages do not always revert to the judgment debtor on the judgment creditor's death. According to § 667.7(c), if at the time of death, the judgment creditor owes a duty of support, those entitled to that support will continue to be paid periodically. In this case, it is uncertain whether J.C. will ever owe such a duty of support to anyone.

^{3/} The judgment originally contained an award of \$2,704,800 for past care costs, but this was fully paid by the government, as noted in the December 15, 2009 opinion of the district court. JA 278, n.1.

^{4/} In the district court proceedings, the government did not request that the district court place the \$500,000 awarded for pain and suffering into a reversionary trust. Although the California statute would seemingly permit this (*see* § 667.7(a) and (e)(1)), the government's position at trial forecloses including pain and suffering in a reversionary trust. Consequently, the government plans to pay that sum at the conclusion of the litigation regardless of the outcome of this appeal.

the government to pay plaintiffs the future damages, \$25,684,489, previously awarded in 2007. The district court explained that:

. . . [A] reversionary trust cannot be properly structured under [Cal. Civ. Proc. Code] section 667.7 in this case because such a trust would either impose greater liability on the Government in contravention of [28 U.S.C.] § 2674 or expose Plaintiffs to greater risk in contravention of section 667.7.

JA 279-80. The district court thus added that, as to the full unpaid part of the future damages award, \$25,684,489:

. . . [T]he Government retains no interest in any fund that may remain at the expiration of J.C.'s life expectancy or funds remaining should J.C. fail to reach his life expectancy.

JA 291. However, the district court ordered that of this sum, only \$500,000, awarded for pain and suffering, and \$6,421,122 in attorneys fees be paid immediately. The remaining amount was ordered "placed into a special needs trust for the benefit of J.C." (JA 290-91) with SunTrust Bank acting as trustee. *Id.*

STATEMENT OF FACTS

At the close of the initial trial of this case in August, 2007, the district court awarded \$22,823,718 to pay for J.C.'s future medical costs (JA 164), and lost future earnings of \$2,360,771. *Id.* An award of \$2,704,800 was also given to provide for J.C.'s past health care, which has been fully paid. Two \$250,000

awards for pain and suffering for J.C. and his mother, which were the maximum allowed under California law, brought the total damage award to \$28,389,289. *Id.*

The district court's 2007 award for future damages, exclusive of the pain and suffering awards, relied on testimony from plaintiffs' economist, Dr. Richard Lurito. The court adopted Dr. Lurito's view that health care costs historically escalate due to inflation by 3-5% per year. JA 145. The court also accepted Dr. Lurito's testimony as to how much money, in today's dollars, would be required to buy investments that would pay for those damages over J.C.'s lifetime. The district court agreed with Dr. Lurito in 2007 that, while a portfolio of investments that included government, municipal and high grade corporate bonds would earn between 7.69% (U.S. Government bonds) and 8.63% (Aaa corporate bonds) per year, it was safer, for J.C.'s security, to assume a lower rate of return of 4.25%. JA 146. After increasing each item of future health care to account for future inflation, and then discounting these numbers by 4.25% (to account for the future return on the invested award), Dr. Lurito arrived at a present discounted value for J.C.'s future care costs of \$22,823,718. These were the damages awarded by the district court to provide for J.C.'s future medical care. JA 147.

A similar procedure was followed for determining J.C.'s lost future earnings. Dr. Lurito determined what J.C. would have earned, assuming he had

completed a bachelor's degree, and then adjusted this income figure to account for inflation and productivity growth, which the economist estimated to be 4.5% per year. JA 151. Dr. Lurito then discounted J.C.'s total lost lifetime income to present value, using the same 4.25% rate he used in discounting J.C.'s future health needs, and adjusting for taxes. *Id.* The plaintiffs' proposed award for J.C.'s lost earnings was \$2,360,771, this being again the precise sum that the district court awarded. JA 152. The district court ordered that this sum be placed in a trust controlled by a guardian *ad litem*, Kelly Thompson. Ms. Thompson subsequently retained SunTrust Bank to provide the management of the trust. JA 401.

In its remand decision, the district court relied again on Dr. Lurito's original testimony and his supplemental testimony given at the November 4, 2009 hearing. The court also relied on testimony of Dr. James Koch, a different economist, retained by plaintiffs to find "flaws in the government's [reversionary trust] proposal." JA 307. In spite of the government's objection to his testimony (JA 308), Dr. Koch testified that the economic climate had changed since Dr. Lurito testified at the original trial.^{5/} Dr. Koch stated that "as of October 2009, U.S.

^{5/} Dr. Koch admitted that he had based his testimony on the premise that the government only planned to permit payment of the present value of the gross payments calculated by Dr. Lurito. JA 377-78. When asked where he had learned

Government notes and bonds were earning far less than the required 4.25%.” JA 284. Thus, the court concluded that the judgment award (\$25,684,489), which had been deemed sufficient to meet J.C.’s needs at the time of the final judgment (August 30, 2007), could no longer meet those needs as of December 2009. JA 284-85.

While the district court concluded, based on Dr. Koch’s testimony, that investment rates had fallen in 2008-09, it accepted Dr. Lurito’s view from the earlier trial that inflation would continue to raise the cost of medical care and prospective wages as before. JA 283. Seemingly for this reason, the court concluded that any trust established for J.C., using the low risk investments the court had decided were appropriate in its original judgment, would now “experience a deficit of \$88,669,126 by the end of J.C.’s projected life expectancy.” JA 284-85.

The district court also noted that, were a reversionary trust to be imposed, “the Government would be discharged from the judgment immediately after making the lump sum payments.” JA 285. This would put J.C.’s receipt of funds

this, Dr. Koch was unable to provide any evidence, saying only that “it is something that [plaintiffs’ attorney] has told me that he believes is true.” JA 378. In fact, the government has never challenged Dr. Lurito’s payment schedule, which provides for supplying J.C. with “gross” payments increasing over his lifetime. *See* JA 348.

at risk, it held, since “Plaintiffs would not be able to recover additional sums from the Government should the trust funds be depleted.” *Id.*

The district court explained:

The fundamental flaw in the Government’s plan is that, unlike the periodic payment plans under section 667.7, the Government’s plan fails to provide either of two safeguards intended to ensure that the injured party is sufficiently compensated. First, a private defendant remains liable on the judgment under section 667.7 until all periodic payments are made; the private defendant is not subject to early discharge. *See* § 667.7(b)-(d). Second, a Court may require a private defendant “who is not adequately insured to post security adequate to assure full payment” of all future payments. § 667.7(a). The Government’s plan provides for neither of these safeguards. . . .

JA 286.

The district court also considered, and rejected as violative of the FTCA, two alternative plans put forward by plaintiffs. JA 287-88. The first would make the government liable for the judgment until all periodic payments were paid, forcing the government to accept a future obligation. The second would have required the government to pay the gross amount of the judgment without its being reduced to present value ((\$7,624,389 being paid directly to plaintiffs, and \$118,973,272 into a trust). The district court rejected both alternatives, holding that the first “would impermissibly subject the Government to a continuing

obligation” (JA 288)^{6/}, and that the second “would expose the Government to greater liability than that faced by a private defendant under like circumstances.”

Id.

The district court concluded, therefore, that Cal. Civ. Proc. Code § 667.7 simply cannot be implemented in any way under the FTCA. For this reason, the United States was ordered again to pay the full future damages of \$25,684,489 to plaintiffs or to plaintiffs’ agents – \$500,000 in a lump sum to J.C. and to his mother for pain and suffering, \$6,421,122 as fees for the plaintiffs’ attorneys, and \$18,763,367 in a trust managed by SunTrust bank (JA 290-91), the same bank that the government agreed to use to administer the reversionary trust. JA 400-01.

SUMMARY OF THE ARGUMENT

This Court ordered this case remanded to the district court “to craft a remedy that holds the government liable ‘in the same manner and to the same extent as a private individual under like circumstances.’” (JA 176-77), quoting 28 U.S.C. § 2674. The district court has failed to do this, providing no rational basis for its decision.

^{6/} The court’s willingness to allow the government to utilize a reversionary trust if it puts the gross award (before reduction to present value) of \$126,597,661 into the trust (JA 289, n.3), appears to contradict its ruling that placement of such a sum in the trust would violate the FTCA. JA 288-89.

After the initial trial, the district court determined, based on the calculations of plaintiff's expert economist, Dr. Richard Lurito, the precise amount of money needed each year to provide for J.C.'s lost income and for his health care costs. These amounts included inflation and, in the case of lost wages, productivity growth. JA 144-47, 151. Dr. Lurito had determined, based on what he considered very conservative projections, that a present payment of \$25,184,489 would, over J.C.'s lifetime, provide these funds. Neither the government nor plaintiffs ever challenged these figures. On remand, the district court, which had originally required that this sum be placed in a trust for the benefit of J.C. (JA 149), was required by this Court to "determine whether the creation of a *reversionary* trust would, if properly structured, impose liability on the government in the same manner and to the same extent as a private individual invoking § 667.7" (emphasis added), and then, if it were possible, to provide for such a trust. JA 176-77.

The district court's decision to impose a trust on plaintiffs, requiring them to place the full judgment amount in a trust to be managed by SunTrust Bank under the supervision of the guardian *ad litem*, Kelly A. Thompson, is virtually indistinguishable from the government's plan to have a similar trust established. The primary distinction between the district court's trust and the government's proposed trust is the existence, in the latter, of a reversionary interest, held by the

government, that takes effect if J.C. dies. Private parties in California receive such protection from the possibility that heirs, instead of injured parties, will profit from medical malpractice judgments. For this reason, the government has continued to insist that such protection must also be provided in this case.

We have also explained that, from the viewpoint of the injured party, J.C. is accorded considerably greater protection for his future by the payment of the present value of the award into the government's proposed trust than he would conceivably receive through the promise of future periodic payments from a private defendant. The reason, fundamentally, is that, with the government's trust, the claimants are assured of a very large financial resource while, with a promise to pay periodically, there is not that degree of assurance. Simply put, a bird in the hand is preferable to a bird in the bush.

The district court's conclusion that the government's plan exposes plaintiffs to greater risk than private parties are exposed to under California law is unjustified.²⁷ The three specific increased risks cited by the district court are not,

²⁷ This Court asked the district court to impose liability on the government in the same manner and to the same extent as a private individual invoking § 667.7. JA 177. The Court did not instruct the lower court to ascertain that *benefits to these plaintiffs* are equivalent to the benefits accorded to California plaintiffs. Any distinction between comparing the imposition of liability on the government and comparing the receipt of benefits by the plaintiffs seems insignificant, however. Thus, we challenge the district court's holding on both grounds.

in fact, increased risks at all.

First, the district court held that a reversionary trust should be rejected in this case because of the downturn in the economy since the original trial. The size of the award was, however, not raised as an appellate issue by either party and was not the subject of this Court's remand. Pursuant to this Court's "mandate rule," an issue that could have been but was not raised on appeal, is waived. *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007). Furthermore, this "risk factor" issue raised by the district court is not really addressed by the rejection of a reversionary trust. This point is evidenced by the fact that the district court's 2009 award is the same as its 2007 award.

Second, the district court, in its remand decision, concluded that the government would be placed in a better position than a private individual paying periodically under California law since the government "would be discharged from the judgment immediately after making the lump sum payments" and "[p]laintiffs would not be able to recover additional sums from the Government should the trust funds be depleted." JA 285. However, the district court's own preferred remedy of placing the precise same judgment sum in a trust, makes this a distinction without a difference. In either case, there will, of course, be some risk. However, the risks involved in being the beneficiary of a fully-funded trust are far

less than those of relying on future payments as provided by California law. Also, we note that this Court, in its decision remanding the case, said that:

The reversionary trust would allow the United States to make one lump-sum payment into the trust at the outset – presumably satisfying the prohibition against ongoing obligations – while the corpus of the trust would provide the Cibulas with periodic payments for J.C.’s future medical care and the balance would revert to the United States upon his death.

JA 174. Clearly, this Court fully understood, at the time of its remand, how a trust operates. It seems hardly appropriate, then, for a district court to reject just such a trust because of the mere possibility of loss, a possibility that always exists with any mode of payment (including cash payment), due to inflation, recessions, depressions, or other financial difficulties.

The final reason given by the district court for rejecting a reversionary trust in this case is that, under California law, a court “may require a private defendant ‘who is not adequately insured to post security adequate to assure full payment.’” JA 286, quoting § 667.7(a). The district court calls this, along with the previously discussed “delayed discharge” of liability, one of two “safeguards intended to ensure that the injured party is sufficiently compensated” which “the Government’s plan fails to provide.” JA 286. This claim is the weakest of all. Private parties and insurers can all go bankrupt. The government cannot. Plaintiffs are far safer being recipients of

a fully-funded trust from the government than having mere claims against private defendants or insurers that require those defendants to pay in the future.

The district court has determined that no reversionary trust could ever be justified in order to protect the United States against the possibility that payments meant for J.C. will, instead, go to his heirs. In making this determination, the district court effectively denies the government the right to be treated “to the same extent as a private individual under like circumstances” (28 U.S.C. § 2674), since a California defendant is not forced to continue to pay an injured person’s heirs after that person’s death. Because the district court’s ruling is clearly contrary to 28 U.S.C. § 2674, it should be reversed.

ARGUMENT

THE UNITED STATES IS ENTITLED TO PAY J.C.’S FUTURE DAMAGES IN PERIODIC PAYMENTS THROUGH A REVERSIONARY TRUST.

STANDARD OF REVIEW

The FTCA, specifically 28 U.S.C. § 2674, states that “[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances” The issue raised in this appeal is whether California’s limitation on awards of lump sum damages, requiring periodic payments of future damages when requested by a party to a malpractice action, is available to the United

States by means of a reversionary trust in this FTCA action. This is a question of law which is reviewed *de novo*. See *Starns v. United States*, 923 F.2d 34, 37 (4th Cir.) *cert. denied*, 502 U.S. 809 (1991).

DISCUSSION OF THE ISSUE

The FTCA waives the government's sovereign immunity only insofar as the United States, if it were a private defendant, would be liable under the law of the state in which the conduct that is alleged to be tortious occurred. 28 U.S.C. § 1346(b). Limiting the government's liability to the manner and the extent it would experience as a private party "under like circumstances" (28 U.S.C. § 2674) is "designed to prevent state legislatures from using the United States' waiver of sovereign immunity under the FTCA as an occasion to 'enrich their own citizens at the expense of the deepest pocket.'" *Nationwide Mut. Ins. Co. v. United States*, 3 F.3d 1392, 1396 (10th Cir. 1993), quoting *Carter v. United States*, 982 F.2d 1141, 1143 (7th Cir. 1992). Since the United States is seldom situated identically to private parties, the like circumstances inquiry requires only that the United States be analogized to a similarly situated private party. As the Eleventh Circuit held in *Turner v. United States*, 514 F.3d 1194, 1205 (11th Cir. 2008), "[u]nder the FTCA, our inquiry is not focused upon whether [a federal defendant] operates identically to those [private] entities specifically enumerated [by state law], but whether [the federal defendant] is

sufficiently analogous to them in order to receive the protection of the statute.” (emphasis added).

Cal. Civ. Proc. Code § 667.7 is designed to eliminate the potential windfall to heirs from a lump-sum recovery in a medical malpractice judgment. § 667.7(f). The government’s original appeal in this case was accordingly designed to allow for the government treatment analogous to, but obviously not the same as, the protection that California provides for private health care providers and their insurers. The district court, on remand, recognized that the government cannot receive that protection by the precise mechanism provided by California law, *i.e.*, a periodic payments schedule, because the FTCA has been repeatedly interpreted as not allowing continuing financial obligations. JA 287-88. *See also Cibula*, JA 174. However, rather than crafting an analogous remedy that recognizes the principle of the California provision, the district court has now held that the government is required to pay out the entire judgment immediately and irretrievably, unlike a California defendant. The United States is left, therefore, without any protection against being forced to enrich heirs of an injured plaintiff with awards meant for that plaintiff alone. JA 290.

The district court’s conclusion is fundamentally flawed and its decision to reinstate the lump-sum judgment is incorrect. The court has interpreted § 2674 to

exclude a remedy, a reversionary trust, that is legally analogous to that provided to private defendants by Cal. Civ. Proc. Code § 667.7.

The district court refused to allow a reversionary trust, which this Court had proposed (JA 177), for three related reasons. First, after the remand, the district court decided that the award it had made in its 2007 judgment was not generous enough. JA 282-85. Second, it held that, if a reversionary trust were imposed, the government “would be discharged from the judgment immediately after making the lump sum payment,” and that plaintiffs could not then “recover additional sums . . . should the trust funds be depleted.” JA 285. Third and finally, the court held that, under the California statute, a private defendant “who is not adequately insured,” must post security to assure full payment, while, under the government’s plan, no such safeguard would be in place. JA 286. None of these is a logical basis for holding that a reversionary trust cannot approximate, to the degree required by 28 U.S.C. § 2674, California’s periodic payments law.

1. The “Changed Economic Climate” Rationale.

This Court heard the appeal of this case to decide “whether the district court erred in failing to place *the damages awarded to the Cibulas* [in 2007] into a reversionary trust.” JA 173 (emphasis added). That indicates that the *size* of the award was not part of the remand. Plaintiffs filed no appeal on the size of the

judgment and, as this Court stated in its 2009 decision, “[t]he United States disputes neither the findings of fact nor the award of damages.” *Id.*

The method and design for paying the award from a government-funded reversionary trust was explained clearly by plaintiffs’ own economist, Dr. Lurito. He noted, in the October 4, 2009 hearing, that he had determined, at plaintiffs’ attorneys’ request, the gross costs of future medical care and lost income (JA 328) on a year-by-year schedule. JA 329, 338. These were the payments that needed to be made pursuant to the district court’s 2007 decision to provide J.C. with future medical needs and lost income. Dr. Lurito also explained that he had testified at the original trial, as he reaffirmed in the 2009 hearing, that the 4.25% rate of return on the principal amount of the judgment award was, and “is, absolutely” (JA 355) sufficient to pay the gross payments yearly. In other words, reiterating what he had said in 2006, Dr. Lurito stated that “a four and a quarter percentage discount rate was appropriate.” JA 354.

However, after hearing testimony from a second economist, also testifying for plaintiffs, about the current state of the economy (the “economic meltdown” of 2008-09), the court determined that conditions were different than those in existence when the judgment was filed. This, in the district court’s judgment, was a reason to reject a reversionary trust. JA 284-85. In making this determination, however, the district

court acted beyond its authority when it relied on evidence about economic conditions that developed *after* the remand, undercutting its own award of damages filed 2 1/2 years earlier.

Taking evidence about matters and deciding issues on remand that were not, in fact, remanded, has been barred by this Court. In *Doe v. Chao*, 511 F.3d 461 (4th Cir. 2007), the Court explained that “[t]he mandate rule,” is “a ‘more powerful version of the law of the case doctrine.’” 511 F.3d at 466, *quoting Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414 (4th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006). The *Doe v. Chao* panel stated that this rule:

restricts the district court’s authority on remand from the court of appeals. First, “any issue conclusively decided by this court on the first appeal is not remanded,” and second, “any issue that could have been but was not raised on appeal is waived and thus not remanded.” *United States v. Husband*, 312 F.3d 247, 250-51 (7th Cir. 2002); *see also S. Atl. Ltd. P’ship of Tenn.*, 356 F.3d [576 (4th Cir. 2004)] at 584 (stating that the mandate rule prohibits district courts from “reconsider[ing] issues the parties failed to raise on appeal”).

511 F.3d at 465. Since the *size* of the award was never at issue on the appeal, the district court had no authority to reconsider that issue. On remand, therefore, the district court could not justify rejecting a reversionary trust by holding that the judgment amount had been found to be too small because of recent economic

history.^{8/}

Even more fundamentally, though, the district court's concern about changed economic conditions is not a *logical* reason to reject a *reversionary trust*. Changes in the economic outlook might have been a logical, if judicially barred, reason to increase the judgment award from the amount awarded in 2007. But, the district court did not increase the award. Additionally, the district court actually provided for J.C.'s needs to be not just provided by a trust, but by a trust controlled by the same guardian *ad litem* and administered by the same bank, SunTrust Bank, that the government agreed to use. Nov. 6, 2010 hearing, pp. 10-11. The district court simply refused to sanction the institution of a *reversionary* trust although, logically, changed economic conditions would have no relevance to whether a reversionary interest is appropriate.

Since the district court had no authority to revisit the computation of its award, and since that computation has no possible relevance to whether to craft an equivalent to the California periodic payments statute in this case, this rationale for the district court's decision must be rejected.

^{8/} In his original report, Dr. Lurito explained that his 4.25% interest rate on assets was based on a 35-year period, from 1970-2005. JA 69-70. Dr. Koch, although he was also plaintiffs' witness, challenged this figure based on the rates of return available on the date of his testimony, October 4, 2009. JA 368.

2. The “Early Discharge” Rationale.

The district court next noted in its 2009 decision that any trust proposed by the government would result in the government’s being “discharged from the judgment immediately after making the lump sum payments.” JA 285. This is true. However, this Court had recognized in its decision that remanded this case that the government could not be liable for a continuing obligation. As it explained:

. . . [T]he FTCA has been interpreted to prohibit ongoing obligations against the United States. *Hull v. United States*, 971 F.2d 1499, 1505 (10th Cir. 1992); *Frankel v. Heym*, 466 F.2d 1226, 1228-29 (3d Cir. 1972).

JA 174. This Court would not have remanded this case if it had believed that the government’s inability to agree to an ongoing obligation barred the use of a reversionary trust.

This Court also understood that, in cases like *Hull*, reversionary trusts have been utilized to provide benefits similar to those provided under periodic payment statutes.^{9/} In its remand, this Court noted that the government was advocating a

^{9/} *Frankel* and *Hull* found that reversionary trusts could be imposed in FTCA cases only when such a remedy was in the best interests of the victims or if Congress were to provide expressly for that remedy. In those cases, however, there was no suggestion that a state periodic payments statute was being relied on pursuant to 28 U.S.C. §2674. This case is, thus, not like *Frankel* or *Hull*, but similar to other cases where the government has successfully based its claim to analogous treatment on state statutes, like *Hill v. United States*, 81 F.3d 118 (10th Cir.), *cert. denied*, 519 U.S. 810 (1996) (relying on a Colorado periodic payments

reversionary trust as “the best way to effectuate the FTCA’s requirement that the United States be held liable ‘in the same manner and to the same extent as a private individual under like circumstances,’ 28 U.S.C. § 2674 (2000)” (*id.*), and ordered the district court to “craft a remedy” that would hold the government liable in that manner and to that extent after determining if it could be done. JA 176-77.

Clearly, there is a difference between having a judgment debtor pay the present value into a trust and having it pay periodically. However, the advantages to the recipient of funds are not all, or even primarily, with the periodic payment alternative. The security of a “bird in the hand,” (*i.e.*, money to pay for future expenses) placed in a trust is surely better than the promise from a defendant or an insurance company of future payments over a long and uncertain period. Thus, the district court’s statement that paying periodically from a trust is not sufficiently analogous to making periodic payments seems as unjustified as were the unsuccessful arguments made in past years against applying state damages caps in FTCA cases.^{10/}

statute), and *Dutra v. United States*, 478 F.3d 1090 (9th Cir. 2007) (relying on a Washington State periodic payments statute).

^{10/} See *Starns v. United States*, 923 F.2d 34, 37 (4th Cir.), *cert. denied*, 502 U.S. 809 (1991) (Virginia damages cap applies to United States although federal hospitals were not licensed); *Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986) (Texas cap on damages applies to United States despite fact that government physicians are not licensed by state); *Taylor v. United States*, 821 F.2d 1428, 1431 (9th Cir. 1987), *cert. denied*, 485 U.S. 992 (1988) (United States

Additionally, what the district court has actually ordered in this case is payment of precisely the same sum to plaintiffs, \$25,184,489, that the government has said it will pay. Both the court's award for future payments to J.C. and the government's alternative involve placing the same amount of money in a trust for J.C.'s benefit. In either case, there is an "early discharge" of liability. Consequently, the same "defect," *i.e.*, the discharge of the government's debt before all payments have been made periodically, also pertains to its preferred remedy, payment of a lump sum to plaintiffs without any restrictions.

Interestingly, the district court also ordered that the lump sum award be placed in the trust controlled by the guardian *ad litem*, Ms. Thompson, and administered by SunTrust Bank. JA 291. At the November 6, 2009 hearing, the government stated that the trust it wanted approved would have the same corpus, with control by the same Ms. Thompson, and administration by the same bank. JA 401. Government counsel explained the *only* difference between the parties:

All we're talking about, Your Honor, all this dispute
reduces to at the end of the day is what happens at the end

may utilize California cap on damages even though its hospital was not licensed by the state); *Carter v. United States*, 982 F.2d 1141, 1144 (7th Cir. 1992) (Indiana cap on damages applies to government even though the United States did not contribute to the fund); *Lozada v. United States*, 974 F.2d 986, 987 (8th Cir. 1992) (Nebraska cap on damages applies to the United States although the government did not qualify under the state statute).

of the day in the event there [are] any funds left in the trust [when J.C. dies].

JA 401-02. In other words, there would be no difference in investment decisions, only a distinction between having the government, or, alternatively, J.C.'s heirs, receive the funds remaining in the trust after J.C.'s death. Thus, the district court condones payment of a lump sum into a trust for J.C.'s benefit except when any funds not needed for J.C.'s care might revert to the defendant who provided those funds. The fact that a reversionary trust would "immediately discharge" the government's liability does not appear to be a rational basis for rejecting a reversionary trust.

3. The "Government Is Not Insured" Rationale.

Finally, the district court points to a provision of the California statute that requires a defendant "who is not adequately insured to post security adequate to assure full payment' of all future payments." JA 286, quoting § 667.7(a). It notes that the government does not provide for this "safeguard." JA 286.

Under the California statute, the only defendant that is required to post security is a "judgment debtor who is not adequately insured." § 667.7(a). The government simply does not fit in that model, particularly since the government would place the entire discounted award in a reversionary trust, with orders to pay from that trust (including both principal and income received on the corpus), rather than from

revenues which might or might not continue to accrue over time for a private defendant. Receiving regular payments from a secure, prudently invested multi-million dollar trust, funded by the United States government, would appear far more secure than obtaining payments in the future from any private defendant, or even from an insurance company, which could go bankrupt.

Again, the amount that would be placed in this reversionary trust is the sum *already calculated by the district court* as sufficient to provide for J.C.'s future needs. The district court's alternative to the trust is simply another trust, which would be subject to the very same possibilities of erosion if economic conditions were to worsen.

* * * * *

This Court remanded this case to the district court to "craft a remedy" that allows the government to be treated like a California health care defendant if possible. The district court has now held that this is not possible, citing various rationales. None of these rationales is defensible. Furthermore, none of them has any logical connection to the government's retaining a reversionary interest in this award. A reversionary trust would, in fact, impose liability on the government that closely resembles the liability that a California defendant would face under § 667.7. Foreclosing that remedy as the district court has done is, therefore, in contravention

of the government's legal right under 28 U.S.C. §2674 to be treated analogously to a private state defendant.

The government has offered to pay the lump sum judgment which the district court determined was fair compensation in this case. Both the district court and the government have proposed placing that lump sum in a trust. The only difference between our position and that of the district court is that we insist on protection against the possibility that government funds meant for the benefit of an injured party will become a windfall to his heirs instead. It is solely for this reason that we have appealed this second time. The California statute was passed in part to:

eliminat[e] the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended.

Cal. Civ. Proc. Code § 667.7(f). The concern that gave rise to passage of § 667.7 pertains with equal validity to the federal government in its role as a health care provider. Restricting the payment of federal funds to those for whose benefit they were intended, when a state provides such protection for private health care providers, is both justified and appropriate.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court to require payment of future damages in a lump sum award. This Court should instruct the district court to place the awards for J.C.'s future damages, awarded for future health care and lost future earnings, in a reversionary trust or two such trusts with instructions that the trustee make payments periodically for J.C.'s life expectancy, as previously determined by the district court, with any remainder left in the trust or trusts after his death reverting to the federal government.

Respectfully submitted,

TONY WEST
Assistant Attorney General

NEIL H. MacBRIDE
United States Attorney

WILLIAM KANTER
WILLIAM G. COLE
(202) 514-4549
Attorneys
Civil Division, Room 7320
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

JULY 2010

RECOMMENDATION REGARDING ORAL ARGUMENT

Pursuant to the requirement of this Court's Rule 34(a), the United States suggests that oral argument could be useful in considering the relevance of the provisions of California's Medical Malpractice Act to the United States, when the government is a defendant in a medical malpractice action concerning alleged malpractice that took place in that state.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Fourth Circuit Rule 32(b), I certify that the foregoing brief complies with the type volume limitation of Rule 32(a)(7)(B) in that it contains 7201 words as indicated by the word-count total of the word-processing system used to prepare the brief. The brief was prepared in proportionally spaced typeface using WordPerfect 14-point Times New Roman.

/s/ William G. Cole

WILLIAM G. COLE

Attorney

Appellate Staff

Civil Division

U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following CM/ECF users:

Scott Michael Perry
Thomas W. Mitchell
Bruce J. Klores & Associates
1735 20th Street, N.W.
Washington, D.C. 20009

/s/William G. Cole
WILLIAM G. COLE
Attorney
Appellate Staff
Civil Division
U.S. Department of Justice

West's Ann.Cal.C.C.P. § 667.7

Part 2. Of Civil Actions (Refs & Annos)

Title 8. Of the Trial and Judgment in Civil Actions (Refs & Annos)

Chapter 8. The Manner of Giving and Entering Judgment

§ 667.7. Action against health care provider; periodic payments of future damages; contempt; legislative intent

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars (\$50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b)(1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In such cases the court which rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(4) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment.

CREDIT(S)

(Added by Stats.1975, 2nd Ex.Sess., c. 1, p. 3971, § 26. Amended by Stats.1975, 2nd Ex.Sess., c. 2, p. 3993, § 1.194, eff. Sept. 24, 1975, operative Dec. 12, 1975.)