

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**

---

**REPLY 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>
INTRODUCTION.....	1
ARGUMENT.....	4
A.    The “Changed Economic Climate” Rationale.....	4
1.    The “mandate rule” did not permit the district court to consider evidence of a “changed economic condition”. .....	6
2.    The \$25+ million award will most likely be sufficient for J.C.’s needs.....	8
3.    Plaintiffs’ “changed economic climate” argument is logically irrelevant to whether a reversionary trust should be permitted.....	12
B.    The “Early Discharge” Rationale.....	13
C.    The “Government Is Not Insured” Rationale.....	16
D.    Plaintiffs Are Incorrect In Alleging That “This Right To Keep The Lump-Sum Payment At Death Is Always Earned And Is Never A Windfall”. .....	18
CONCLUSION.....	22
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

<b>Cases:</b>	<b><u>Page</u></b>
<i>Doe v. Chao</i> , 511 F.3d 461 (4th Cir. 2007).....	6, 7
<i>Dutra v. United States</i> , 478 F.3d 1090 (9th Cir. 2007).....	3, 14, 21
<i>Hill v. United States</i> , 81 F.3d 118 (10th Cir.), <i>cert. denied</i> , 519 U.S. 810 (1996). ....	3, 14, 20, 21
<i>Jones &amp; Laughlin Steel Corp. v. Pfeifer</i> , 462 U.S. 523 (1983).....	15, 16
<i>Nemmers v. United States</i> , 795 F.2d 628 (7th Cir. 1986). ....	10, 20
<i>Salgado v. County of Los Angeles</i> , 967 P.2d 585 (Cal. 1998).....	14
<i>Turner v. United States</i> , 514 F.3d 1194 (11th Cir. 2008).....	20
<i>United States v. Husband</i> , 312 F.3d 247 (7th Cir. 2002).....	7
 <b>Statutes:</b>	
Cal. Civ. Proc. Code § 667.7. ....	6, 14, 15, 16, 17, 21, 22
Cal. Civ. Proc. Code § 667.7(a). ....	16
Cal. Civ. Proc. Code § 667.7(f). ....	18, 19
 Federal Tort Claims Act:	
28 U.S.C. § 1346(b).....	1
28 U.S.C. § 2671. ....	1
28 U.S. C. § 2674. ....	3
43 U.S.C. § 1396p(d)(4)(A).....	6

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

---

REPLY BRIEF FOR DEFENDANT-APPELLANT

---

**INTRODUCTION**

In two appeals of this FTCA<sup>1/</sup> medical malpractice case, the federal government's only aim has been to ensure that the award of damages approximates what would be allowed if the government were a private defendant. The current appeal involves no dispute about the liability or damages. It only concerns whether a reversionary trust can be ordered, consistent with California state law and the FTCA, that allows the government to recoup part of the damages awarded for the

---

<sup>1/</sup> Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* ("FTCA")

plaintiff, J.C., in the case of his death.

We have explained that, if the district court's award at issue here, \$25,184,489, had been awarded as damages in a private California state case, California being the state whose substantive law applies for FTCA purposes in this case, the defendant would have been allowed to pay the award in periodic installments, which would continue only so long as the injured plaintiff lived. If the injured plaintiff died prematurely, those payments would stop and the injured party's heirs would not reap a windfall.

Since the government cannot make periodic payments over time, we twice have asked the district court to award damages in the form of a reversionary trust, with an initial corpus of \$25,184,489, so that regular payments, of the same amounts as would be made periodically under state law in a case involving private litigants, could be paid to the injured child here, "J.C." The district court has twice refused to do that. The first time, the district court refused because it held that California's law on periodic payments did not apply to this Eastern District of Virginia case. This Court reversed that decision. The second time, the district court has held that no reversionary trust could appropriately replicate California's periodic payment provision.

It is this second decision by the court that is addressed in the current appeal.

We indicated to the district court on remand (JA 210) that funding a reversionary trust is an appropriate remedy that approximates a periodic payments provision and we noted that two other federal circuits had approved the use of reversionary trusts in just such circumstances. *Hill v. United States*, 81 F.3d 118 (10th Cir.), *cert. denied*, 519 U.S. 810 (1996) (relying on a Colorado periodic payments statute to permit a reversionary trust in an FTCA case), and *Dutra v. United States*, 478 F.3d 1090 (9th Cir. 2007) (relying on a Washington State periodic payments statute in a similar situation). Nonetheless, the district court, in its remand decision, failed to mention either of these appellate decisions. The district court instead determined that “no reversionary trust could be created in this case that would comply with both [the FTCA] and [the California periodic payments statute].” JA 289.

In the government’s opening appellate brief, we showed that, after our first appeal, this Court had instructed 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. We explained that, in its opinion, this Court had recommended consideration of a reversionary trust, if it would, in fact, “impose liability on the government in the same manner and to the same extent as a private individual invoking” the California periodic payments statute. JA 177.

The district court on remand subsequently refused to allow a reversionary trust. We explained in our opening appellate brief that the district court had given three rationales for rejecting the use of a reversionary trust in this case (Opening Br., pp. 19-31), and that none of them was supportable. These three rationales were (a) that, at the time of the remand, the economic climate in the United States had deteriorated since the date of the original decision, so that the original award, paid periodically, would be insufficient; (b) that a reversionary trust would permit an inappropriately “early discharge” of the government’s liability to J.C.; and (c) that a reversionary trust would not be safe for J.C. since the government is not insured as private defendants are required to be under the California law.

In plaintiffs’ responsive brief, they claim each of these rationales is meritorious. Apppees’ Br., pp. 36-48. They also allege that allowing the government to presently fund a reversionary trust for J.C.’s benefit with over \$25 million both presents an “unconscionable hardship” (Apppees’ Br., p. 44) for him and gives “a windfall for the government.” Apppees’ Br., p. 54. In this reply brief, we answer their claims and allegations in turn.

## **ARGUMENT**

### **A. The “Changed Economic Climate” Rationale.**

In our opening brief, we explained that the size of the award in this case was

never at issue on the appeal. Opening Br., p. 23. The relevant damages awarded to J.C. were originally \$25,184,489, an award that has never been challenged by either side.<sup>2/</sup> This Court did not remand the case to the district court to reconsider the judgment *amount*, and no party suggested that that judgment amount should be reconsidered. The only issue was how this sum of money was to be paid – as a lump sum payment, or periodically from a reversionary trust.

The first of the district court’s rationales for rejecting the reversionary trust alternative was that, at the remand hearing, held on November 4, 2009, during a severe recession, the rates of return on investments had dropped below what they had been three years earlier when the court had held its initial hearing. At the earlier hearing, the district court had determined that \$25,184,489 was the appropriate present value for J.C.’s lost future income and future medical expenses. Thus, the district court found payment of this award into a trust “clearly puts plaintiffs at risk of being insufficiently compensated.” JA 285. We gave three reasons why this acknowledged change in the economic climate (JA284-86) from 2006 to 2009 does

---

<sup>2/</sup> The total award was \$28,389,289. JA 167. The award of \$2,704,800 for past care costs was fully paid by the government, as noted in the December 15, 2009 remand decision by the district court (JA 278, n. 1), prior to that decision. An additional \$500,000 award for J.C.’s and his mother’s pain and suffering, which was originally part of this appeal, have been authorized for payment by the Justice Department.

not justify the rejection of a reversionary trust.

**1. The “mandate rule” did not permit the district court to consider evidence of a “changed economic condition.”**

We explained in our opening brief that the district court erred, on remand, in taking evidence about and relying on testimony about the fall in dividends, interest, and share prices in 2008-09 to undercut its original 2007 decision in this case. We argued that, pursuant to this Court’s “mandate rule” as explained in *Doe v. Chao*, 511 F.3d 461 (4th Cir. 2007), the district court did not have the authority to reconsider the present value calculations that determined the size of the award, in order to justify rejecting the use of a reversionary trust.<sup>3/</sup> Opening Br., p. 23.

Plaintiffs admit that the mandate rule “prohibited the district court from considering questions that this Court ‘laid to rest’ in *Cibula I*” (Appees’ Br., p. 42) but argue that the present value of damages was not “laid to rest” because the issue of the reversionary trust remained unresolved. We strongly believe that the district

---

<sup>3/</sup> The mandate rule also prevents the district court from changing the trust authorized by the court in its original opinion (JA 149) to a “special needs” trust, as authorized by the order following the remand hearing. JA 290. Pursuant to 43 U.S.C. § 1396p(d)(4)(A), a disabled person may receive Medicaid even when he has substantial assets, so long as those assets are in a special needs trust. A “special needs” trust could result in Medicaid funds paying for part of J.C.’s future medical expenses and, upon his death, compensation being paid from the trust to the state which provided part of those Medicaid funds. Such a payment has no analogue to a judgment debtor’s obligations under § 667.7.

court did “lay to rest” the question of damage amounts, and specifically, the proper interest figures to be applied and the costs of future care and likely salary for J.C., if he had not been injured. These factual determinations were all part of the district court’s initial decision. JA 59-66, 69-71. They are separate and distinct from the reversionary trust issue.

However, even if this were not clear, plaintiffs fail to mention that the mandate rule given in *Doe v. Chao* has two parts. While it does, as plaintiffs argue (Appees’ Br., p. 42), restrict a district court’s authority to decide “any issue conclusively decided” by this Court (511 F.3d at 465), the mandate rule also prohibits district courts from reconsidering “any issue that could have been but was not raised on appeal.” *Id.*, citing *United States v. Husband*, 312 F.3d 247, 250-51 (7th Cir. 2002). Plaintiffs have never challenged the judgment total on appeal, or specifically the interest rate determined by the district court and incorporated in the present value calculation made at the time of the judgment. They have given no response to our invocation of this second prong of the mandate rule. The mandate rule thus applies and barred plaintiffs from challenging the sufficiency of the district court’s decision that the interest rate on J.C.’s capital investments would average 4.25% for the next sixty years. The mandate rule prohibited them from challenging during the remand proceedings a decision they did not appeal, and bars them from challenging it again

before this court. “Changed economic conditions,” therefore, as a matter of law, cannot be a rationale for rejecting a reversionary trust.

**2. The \$25+ million award will most likely be sufficient for J.C.’s needs.**

Plaintiffs would have this Court ignore the mandate rule because reliance on the 4.25% interest rate on assets, that was calculated by the *plaintiffs’ own economist*, Dr. Richard Lurito, and testified to on November 1, 2006, during the original trial, renders the award based on his calculations “unconscionable” now. Appees’ Br., pp. 44. Plaintiffs argue that the drop in interest rates between 2006 and 2009 “causes severe hardship for an injured plaintiff such as JC” (Appees’ Br., p. 44, 46) because of “the undisputed reality – that the \$25 million will not pay all of [J.C.’s] future damages” (Appees’ Br., p. 55), and because the proposed trust will “not have enough money to pay the judgment for future damages.” Appees’ Br., p. 1.

This is not “the undisputed reality.” The reality is that the funds that both the district court and the government have proposed be placed in a trust are fully likely to pay all of J.C.’s damages. Plaintiffs’ contrary claim is based on evidence presented by an economist, Dr. James Koch, who testified at the November 4, 2009 remand hearing only about *current* returns on equity. Dr. Koch testified that 4.25%, the

estimated annual return on invested assets<sup>4/</sup> given by Dr. Lurito at the original hearing in this case, was not a safe and conservative return on equity *three years later*. Appees' Br., pp. 12, 41. Dr. Koch had explained that "[c]urrently, even if one invested all of the funds in 30-year U.S. Government bonds, they would only yield something in the range of 4.2 percent." JA 368. Dr. Koch had added that, in November 2009, "it's just not plausible to assume that you're going to receive 4.25% after tax. . . ." JA 369.

There are two basic logical problems with relying on Dr. Koch's testimony (besides its contravention of the of this Court's mandate rule). First, the district court assumed, in relying on it, that estimated investment returns for a 60-year period in the future should be based on one day's, or possibly one month's, statistics during a severe recession rather than on an average of a number of past years. Second, since Dr. Koch's testimony only addressed the level of interest rates (which he assessed based on a snapshot view of rates on one day in 2009), and did not also recompute the costs of medical goods and services or wage increases that Dr. Lurito had computed three years earlier on the basis of 35 years of data, it did not present a balanced financial analysis.

---

<sup>4/</sup> Plaintiffs call this "*the government's* assumed 4.25% average tax-free rate of return. Appees' Br., p. 11. Actually, it is the rate of return *they* proposed and that this district court utilized in its judgment in this case. JA 151.

First, economists do not customarily base future projections on one day's statistics. In a case cited and relied on repeatedly by plaintiffs in their brief, *Nemmers v. United States*, the Seventh Circuit noted that economic evidence showed "that wages historically rose" (795 F.2d at 633) at a certain rate, and the "long term interest rate" and "long term inflation rate" (emphasis added) were at certain levels. *Id.* That court did not base projections on evidence of what happened to wages during one year, or what the interest rate was on one day.

It is obvious that there will be lower returns on investments in the midst of a serious recession. But recessions do not last forever. These plaintiffs go astray in arguing that courts should make decisions on future interest and dividend rates based on a single day's statistics, as Dr. Koch did. Dr. Lurito, in contrast, followed the conventional approach, explaining in his report, *submitted by plaintiffs* at the original trial, that *his* conclusions about future interest and dividend rates were based on the averages for a 35-year period:

*Over the 1970-2005 period, long-term, taxable U.S. Government bonds have yielded, on the average 7.69% per year [citation omitted]. On the other hand, Aaa corporate bonds, being somewhat riskier, have yielded 8.63% per year over this same period. [citation omitted] Other types of assets, such as common stocks or lower grade bonds, have still higher yields owing to the greater level of risk associated with holding them. . . . Because there is no universally accepted rate for this purpose, calculations of*

the present value of [J.C.'s] future income have been made on the basis of a 4.25% interest rate. This constitutes a rate of return which a prudent trustee might aim for in current financial markets. Higher rates would require that higher levels of risk be taken and would seem to go beyond risk levels a prudent trustee might want to accept.

JA 69-70 (emphasis added). Dr. Lurito explained that he used the same 4.25% interest rate when he calculated J.C.'s need for revenue to cover future care costs. JA 71-72. It is obvious from his choice of a 4.25% interest rate, after noting that safe government long-term securities had awarded 7.69% over his 35-year period, that he gave every benefit of every reasonable doubt to the plaintiffs in making his calculations. Thus, it is hardly credible for plaintiffs to contradict their own expert's (Dr. Lurito's) testimony with the views of an economist (Dr. Koch) in order to compute an estimate of rates for sixty years in the future by relying on one day's statistics.

Second, while plaintiffs argue in their brief that the anticipated investment income on a \$25+ million trust fund should be measured on one day's rates during a serious recession, the assumptions that plaintiffs relied on regarding increases in J.C.'s future income (based on a 35-year average, JA 68) and medical cost factors (based on "[Dr. Lurito's] evaluation of the historical increase in the costs," (JA 73) were

averaged over a period of years.<sup>5/</sup> This led to the distorted calculations that plaintiffs presented to the district court in the remand hearing. Obviously, by assuming very low interest rates on invested capital in November 2009, but inflation and labor costs as they existed in November 2006, before the onset of the recession, larger investments were needed to cover expected costs. The earlier testimony from Dr. Lurito, on the other hand, properly relied on historical data for both interest rates *and* inflation/labor costs, not a “November 4, 2009” value for interest rates for the one and a 35-year average for the other. While the highly-skewed computations that relied on Dr. Koch’s testimony were accepted by the district court (JA 283-85), the dire consequences foreseen by that district court and by plaintiffs (Appees’ Br., p. 12) resulting from them are, accordingly, phantom fears.

**3. Plaintiffs’ “changed economic climate” argument is logically irrelevant to whether a reversionary trust should be permitted.**

Finally, we note that the “changed economic climate” argument for rejecting use

---

<sup>5/</sup> In his 2006 testimony, Dr. Lurito increased J.C.’s income by 4.5% annually to account for J.C.’s expected annual rise in income, and included annual cost escalation factors for medical commodities which ranged from 2.5% to 4.5%. JA 70-74. Dr. Lurito’s calculations, therefore, after discounting it for a 4.25% anticipated long-term interest rate, resulted in slightly less than a zero percent net discount rate for most of the award, meaning that the income gained in investing the \$25+ million fund would grow at a slightly lower rate than either J.C.’s expected salary increases over his lifetime, or the increased costs of medical services over his 72-year assumed lifespan.

of a reversionary trust is not only legally barred and factually baseless, but logically irrelevant. As we explained in our opening brief, plaintiffs are not asking for an increased award to protect J.C. from the “changed economic climate.” An affirmance of the district court’s December 18, 2009 judgment will not give them one additional dollar. The investment of funds also will not, presumably, be any different (since the trustee and guardian will be the same in either case) if the reversionary trust is allowed. The only difference is what will happen to the part of the award that has not been used for J.C.’s care if he dies prematurely. Thus, for three separate reasons, the district court’s “changed economic climate” rationale for rejecting a reversionary trust is baseless.

**B. The “Early Discharge” Rationale.**

The district court noted in its decision on remand 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. The payment of a lump sum (either to a plaintiff or to a trust), as we noted in our opening brief (p. 25), is the only way that the government can pay an FTCA judgment. Plaintiffs, however, claim that an “early discharge” would “obviously relieve the government of its liability for JC’s future damages before they had been paid in full.” *Appees’ Br.*, p. 48.

Plaintiffs prove too much, for payment of a lump sum to a trust (just not a

*reversionary* trust) as the district court has twice proposed (JA 149, 290), which is the result for which *plaintiffs* are currently litigating in this Court, provides for just such an “early discharge,” *i.e.*, an immediate discharge of liability upon payment of the \$25+ million award. Their argument that one kind of trust is permitted, while a reversionary trust is not, is simply illogical.

Also illogical is plaintiffs’ argument that the proper way to set up a reversionary trust is to assume that a lump sum award invested today will produce no dividends or interest over the next sixty years. This is the premise for their claim that the government can obtain a reversionary trust only if it places \$125 million (Appees’ Br., p. 49), or \$126 million (Appees’ Br., p. 9) in a trust, so that payment of J.C.’s expenditures can be absolutely guaranteed. Appees’ Br., p. 49. Courts do not base their estimate of damages on the most extreme situations imaginable. If that were so, courts would assume life expectancies of 120 years, base awards on the highest inflation rates ever recorded, and, as plaintiffs are proposing here, choose future interest rates based some of the lowest returns on equity in recent memory. <sup>6/</sup>

---

<sup>6/</sup> Plaintiffs cite *Salgado v. County of Los Angeles*, 967 P.2d 585 (Cal. 1998), to show that defendants seeking the benefits of § 667.7 must always pay damages precisely as set out in the California statute. This is, of course, because private defendants subject to that statute are not constrained by the government’s prohibition on “continuing obligations” which was recognized by this Court in the current case (JA 174) and by the Ninth and Tenth Circuits. *Dutra*, 478 F.3d at 1092, and *Hill*, 81 F.3d at 121.

The Supreme Court explained, in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), that future lost earnings determinations should be based on “the *estimated* lost stream of future earnings” (462 U.S. at 547) and an “*estimate* of future price inflation.” 462 U.S. at 548 (emphasis added). There is no rule requiring that awards be inflated to allow for every unforeseeable contingency. In *Pfeifer*, accordingly, the Supreme Court explained that “we do not believe a trial court . . . should be reversed if it adopts a [net discount] rate,” (the estimated interest rate minus estimated annual salary raises – for lost future income calculations, or minus estimated annual cost increases in future care calculations) “between 1 and 3% and explains its choice.” 462 U.S. at 548-49. In the present case, Dr. Lurito calculated less than a zero percent net discount rate, as explained above (p. 11, n. 5), which *more favorable to plaintiffs* than the *Pfeifer* “between 1 and 3%” figure. Yet they complain that this permits an “early discharge” that is unfair to J.C. There is no basis to that charge.

Another point is that plaintiffs’ “early discharge” argument assumes that the California statute, Cal. Civ. Proc. Code § 667.7, was intended by the California legislature to give plaintiffs in medical malpractice cases a remedy that was superior in value to a lump sum payment. This is nonsense. The statute states that the trial court “shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages.” That is what

the district court did, when it accepted Dr. Lurito's computations in 2007. The language of the statute then adds that:

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.*

§ 667.7(f) (emphasis added). The state legislature's intent was not to grant plaintiffs a way of expanding the judgment debtors' liability beyond what it was under prior law, but to reduce it in cases where the injured plaintiff dies prematurely. In this case, the district court failed to follow the Supreme Court's decision in *Pfeifer* or consider the reasonable application of the California statute to the FTCA. Plaintiffs' claim that a reversionary trust allows for an illegal "early discharge" of its liability under Cal. Civ. Proc. Code § 667.7 is baseless.

**C. The "Government Is Not Insured" Rationale.**

The government, in its opening brief, also claimed that the district court erred in basing its refusal to allow a reversionary trust on grounds that "a Court may require a private defendant 'who is not adequately insured to post security adequate to assure full payment' of all future payments." JA 286 (quoting § 667.7(a)). We argued that a payment by the government of the entire lump-sum award into a trust administered

by plaintiffs' own selected trustee and guardian *ad litem* was more secure than any promise to pay any award periodically, irregardless of how much security insured its payment. Opening Br., p. 29.

In plaintiffs' response to this argument (Appees' Br., pp. 36-40), they inexplicably state that a reversionary trust is like "an under funded annuity company." Appees' Br., p. 36. As explained above, the deposited funds are those which the district court held would pay for J.C.'s future medical care and his lost future estimated income. This cannot be analogized to "an underfunded annuity company." Instead, it is a lump-sum payment into a trust managed by plaintiffs' agents in a sum estimated by their own expert economist to provide full care plus other benefits for J.C.

Plaintiffs rely on hyperbole, rather than logic, to reject use of a reversionary trust. They say, with no logical basis, that the \$25+ millions held in trust for J.C. "will in this case" go bankrupt. Appees' Br., p. 38. They claim that "the investment risk that the government is required to bear under § 667.7 would instead be thrust onto the Cibulas."<sup>7/</sup> Appees' Br., p. 39. They claim that an award to J.C. of \$25+ million for his care contravenes "fundamental principles of fairness and justice" because it results

---

<sup>7/</sup> This argument is particularly odd since plaintiffs are requesting this Court to "thrust" the investment risk on to the Cibulas by awarding the same sum (\$25, 184,489) to them to invest.

“in unjust enrichment of the government – the tortfeasor – at the expense of JC – its innocent victim.” Appees’ Br., p. 40. This is not true. J.C. stands to lose nothing by the use of a reversionary trust, since the only difference in plaintiffs’ recovery would happen after his premature death.<sup>8/</sup>

**D. Plaintiffs Are Incorrect In Alleging That “This Right To Keep The Lump-Sum Payment At Death Is Always Earned And Is Never A Windfall.”**

Plaintiffs argue in the final section of their brief that, because J.C.’s heirs are taking the risk that \$25+ million will not be sufficient to care for him, they deserve any part of the award to J.C. remaining at the time of his death. Appees’ Br., pp. 52-57. In their words, “[i]n return for bearing that risk [that \$25+ million will be insufficient] and suffering its consequences, JC’s survivors immediately earn[ed] the right to keep the present-value payment whenever he dies.” Appees’ Br., p. 55. They conclude that “[t]his right to keep the lump-sum payment at death is always earned and is never a windfall.” *Id.*

The answer to this allegation is in the California statute itself which states that the law is intended to eliminate “the potential windfall from a lump-sum recovery

---

<sup>8/</sup> Plaintiffs’ hyperbole extends to their lawyers’ undocumented claim that the government is suggesting that they “are insisting on a \$125 million trust in order to increase the attorneys’ fee award.” Appees’ Br., p. 53, n. 7. Such a suggestion does not appear in the government’s opening brief and is not the government’s position before this Court.

which was intended to provide for the care of an injured plaintiff . . . , leaving the balance of the judgment award to persons and purposes for which it was not intended.” Cal. Civ. Proc. Code § 667.7(f). Plaintiffs cannot claim a “right” to a “windfall” under a statute specifically intended to deny such recovery.

Plaintiffs claim that they are assuming a risk under a reversionary trust that they would not be forced to assume if the tortfeasor were a private California hospital rather than a government hospital, located in California. Appes’ Br., pp. 52-53. This is only true in a very superficial sense.

It is obviously correct that a private defendant is liable for future damages that have not been reduced to present value (since they will be paid in the future). However, as we stated in our opening brief, it was plaintiffs’ own witness, Dr. Lurito, who calculated what those future damages were worth at the time of the judgment. Also, as we noted in that opening brief, any deferral of payment runs its own risks. A private defendant may declare bankruptcy or go out of business, depriving a California plaintiff like J.C. of a full recovery. So might that defendant’s insurance company. These unfortunate events cannot happen when a judgment debtor makes a cash deposit of the full present value of an award into a trust.

The possibilities of non-payment of future obligations have never been clearer than during the past several years, when financial and insurance firms faltered during

the recent recession. Such risks are totally absent when the government pays the full judgment amount into a trust, whether it is reversionary or not.<sup>2/</sup>

The risks posed by a periodic payment scheme or a reversionary trust are not precisely identical. But the Tenth Circuit in *Hill* said specifically that they did not have to be. In *Hill*, the court agreed to the creation of “a reversionary trust that would *approximate* the result contemplated by” the periodic payments provision of the Colorado periodic payments law. 81 F.3d at 121 (emphasis added).

In spite of the language of *Hill*, plaintiffs insist that “[t]he reversionary trust in this case must therefore impose liability on the government to the *same* extent as a private defendant making periodic payments.” Appees’ Br., p. 22. An additional response to plaintiffs is found in *Turner v. United States*, 514 F.3d 1194, 1205 (11th Cir. 2008). In *Turner*, the Eleventh Circuit explained that “[u]nder the FTCA, our

---

<sup>2/</sup> Plaintiffs cite (Appees’ Br., p. 56) *Nemmers v. United States*, 795 F.2d 628, (7th Cir. 1986), as evidence that the FTCA does not permit reversionary trusts. However, *Nemmers* holds only that, in an FTCA case, the government may not lower its damages award by proving that an annuity to provide the required care can be purchased for less than the judgment award, based solely on economists’ calculations. 795 F.2d at 635-36. This is why the Seventh Circuit complained that “[i]f the [district] court reduces the award to prevent the ‘windfall’ [caused by awarding more than the cost of an annuity], then [the child’s] guardian no longer can exchange the full award for an annuity covering [the fill life expectancy’s] expenses.” In the current case, the government has proposed paying *the full judgment award* into a trust. Thus, the concerns expressed in *Nemmers* are not present.

inquiry is not focused upon whether [a federal defendant] operated identically to those [private] entities . . . but whether [the federal defendant] is sufficiently analogous to them in order to receive the protection of the statute.” Thus, the term “same” as used in § 2674 does not require a reversionary trust to be “identical” to a periodic payments remedy, but only “sufficiently analogous.” *See also* Opening Br., p. 26, n. 10 (listing cases allowing the government to rely on state damages caps even when it could not comply with state statutory provisions in the same way as private defendants.)

Plaintiffs also say that a reversionary trust for a minor can only be allowed if it is found “in the best interests of the child” (Appees’ Br., pp. 46, 52), or if the parents have consented. Appees’ Br., p. 52. These requirements, however, have not been imposed in FTCA cases like *Hill* or *Dutra*, where the applicable state law specifies periodic payments. For this reason, the cases plaintiffs cite (Appees’ Br., pp. 51-52), from states without periodic payments laws, have no relevance here. Just as in *Hill* and *Dutra*, the state statute involved here, Cal. Civ. Proc. Code § 667.7, grants to medical malpractice defendants the right to avoid payments of judgment damages to heirs that were intended to benefit injured plaintiffs.

In this appeal, plaintiffs argue for a full judgment award to themselves that is not contingent on whether the intended beneficiary of that award receives the entirety of the award or not. The government, in accord with § 667.7, seeks only to ensure that

the award goes to the intended beneficiary. It is clear that only by reversing the district court's ruling in this case can the intent of Cal. Civ. Proc. Code § 667.7 be realized.

### CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court to require payment of future damages, as determined in its August 30, 2007 judgment (JA 167-68) in a special needs trust (JA 290). This Court should instruct the district court to place the awards for J.C.'s future damages, to pay for future health care and lost future earnings, in a reversionary trust or two such trusts<sup>10/</sup> with

---

<sup>10/</sup> Plaintiffs are incorrect (Appes' Br., p. 7, n. 2) that the government abandoned its proposal for two trusts. In the filing cited by them (Dkt. No. 78, p. 4), the government merely agreed not to object to one trust if that would reduce the administrative costs to J.C.'s guardian.

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

OCTOBER 2010

### **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 5390 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 13th day of October, 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

I also sent by Federal Express on this date eight copies of the brief to the Clerk and two copies to Messrs Perry and Mitchell at the above address.

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

**Prudence Mackenzie**

---

**From:** ecfnoticing@ca4.uscourts.gov  
**Sent:** Wednesday, October 13, 2010 10:18 AM  
**To:** Prudence Mackenzie  
**Subject:** 10-1245 Andrew Cibula v. US "BRIEF FILED (all formal, non-sealed briefs/electronic & paper form)"

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\* Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

**United States Court of Appeals for the Fourth Circuit**

**Notice of Docket Activity**

The following transaction was entered on 10/13/2010 at 10:18:05 AM EDT and filed on 10/13/2010

**Case Name:** Andrew Cibula v. US  
**Case Number:** 10-1245  
**Document(s):** Document(s)

**Docket Text:**

BRIEF filed by Appellant US in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 10/13/2010.. Is this a redacted brief?No. If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A. [998444318] [10-1245] (WGC)

The following document(s) are associated with this transaction:

**Document Description:** BRIEF FILED (all formal, non-sealed briefs/electronic & paper form)

**Original Filename:** Cibula 2d reply brief.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1105645354 [Date=10/13/2010] [FileNumber=998444318-0]  
[08d0a23f08aa60c43f0390073dc6b98b13ce78a9fd534ce540cdf3cf710e908c08295be80782f9b54

**Notice will be electronically mailed to:**

Mr. Perry, Scott Michael: smp@klores.com  
Mr. Barghaan, Dennis Carl, Jr., Assistant U. S. Attorney: dennis.barghaan@usdoj.gov, USAVAE.ALX.ECF.Civil@usdoj.gov  
Mr. Klores, Bruce Jay: bjk@klores.com, plv@klores.com, twm@klores.com  
Mr. Cole, William George, Attorney: william.cole@usdoj.gov  
Mr. Mitchell, Thomas Wilfred: twm@klores.com, bjk@klores.com, hlc@klores.com, plv@klores.com, vaw@klores.com  
Mr. Sher, R Joseph, Assistant U. S. Attorney: joe.sher@usdoj.gov, usavae.alx.ecf.civil@usdoj.gov

The following information is for the use of court personnel:

**DOCKET ENTRY ID:** 998444318  
**RELIEF(S) DOCKETED:**

10/13/2010

**DOCKET PART(S) ADDED: 6459823, 6459824**