IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FIRST CAPITAL SURETY & TRUST COMPANY, f/k/a MORGAN CHASE TRUST COMPANY,	)	
Petitioner,	)	
v.	)	*Civil Action No. 4194 -VCG*
REESE BARNES ELLIOTT, III, TRAVIS ALAN ELLIOTT, STEPHANIE ELLIOTT, DELAWARE HEALTH AND SOCIAL SERVICES, DIVISION OF MEDICAID AND MEDICAL ASSISTANCE, PENINSULA SURGICAL GROUP, P.A., BEEBE MEDICAL CENTER, INC., THE DOVER POST COMPANY, PENINSULA REGIONAL MEDICAL CENTER P/O PENINSULA REGIONAL HEALTH SYSTEM, HEALTHSOUTH CHESAPEAKE, A DIVISION HEALTHSOUTH CORPORATION, ABILITY REHAB ASSOCIATES, and UNKNOWN OCCUPANTS,	)	
Respondents.	)	

MEMORANDUM OPINION

Date Submitted: June 29, 2012
Date Decided: September 27, 2012

Jason C. Powell, of FERRY, JOSEPH & PEARCE, P.A., Wilmington, Delaware Attorney for Respondents Reese Barnes, III and Travis Alan Elliott.

Peter S. Feliceangeli, of STATE OF DELAWARE DEPARTMENT OF JUSTICE, Attorney for Respondents Rita M. Landgraf and Roseanne Mahaney.

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GLASSCOCK, Vice Chancellor

This case involves a question of first impression: to what extent may the State of Delaware recover correctly paid Medicaid payments from a Supplemental Needs Trust upon the death of the beneficiary? Specifically, may the State seek to recoup Medicaid payments made to the beneficiary before the trust was established? I conclude that Congress' intent, as expressed by statute, is that a state may recoup those Medicaid payments which would not have been made absent establishment of the trust, but not those properly made before the trust was created.

Medicaid is a program designed to provide funds for the medical treatment of the poor.[1] The Medicaid program is funded by both the federal and state governments.[2] The federal government pays the majority of the costs that "the State incurs for patient care, and in return the State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program."[3] If an individual has assets available to him above a statutory limit, he is ineligible to receive Medicaid assistance.[4] Congress, however, has authorized that certain substantially disabled individuals may establish a Supplemental Needs Trust

[1] *Ark. Dep't of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (U.S. 2006)
[2] *Id.*
[3] *Id.*
[4] *See Lewis v. Alexander*, 685 F.3d 325, 332 (3d. Cir. 2012) ("As with many government programs, eligibility for Medicaid is partially dependent on the claimant's income and assets.").

("SNT") whereby funds available to an individual, that would otherwise exclude him from receiving Medicaid, may be shielded from counting as income or assets when determining Medicaid eligibility.[5] This arrangement ensures that a qualified individual can receive assets and use them for his own benefit, to supplement Medicaid payments and improve his quality of life, yet remain eligible to receive Medicaid payments.[6] Congress, however, has mandated that when such a Medicaid recipient has set up an SNT, upon that individual's death, the State must recover from the SNT the "total" Medicaid expenditures paid to that individual.[7] In other words, the statute mandates that the State relax its Medicaid eligibility requirements through the use of SNTs, but then directs it to recoup its expenditures from the trust upon the recipients death.[8]

Here, the recipient became disabled through medical malpractice. He received substantial assistance from the State Medicaid program—over $350,000—before receiving a tort award of over $500,000.[9] The State could have, but failed to, assert subrogation rights against this recovery. The recipient created an SNT, and placed the funds in that trust. As a result, his Medicaid eligibility,

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[5] *See* 42 U.S.C. § 1396p(d)(4)(A) (2010).
[6] *See Lewis*, 685 F.3d at 333 (describing benefits such as "books, television, Internet, travel, and even such necessities as clothing and toiletries" as appropriate uses of SNT funds).
[7] 42 U.S.C. § 1396p(d)(4)(A).
[8] *See* 42 U.S.C. § 1396p(d)(4)(A) (exempting supplemental needs trusts from eligibility determinations while, at the same time, mandating repayment of disbursed funds to the state).
[9] This award was associated with claims of medical malpractice, the bases of which caused the recipient's disability.

which would otherwise have been lost, continued, and the State expended an additional $34,000 in Medicaid funds for his care. The recipient has died, and the State seeks recovery of the entire amount expended, nearly $400,000, from the trust. The remainder beneficiaries of the trust argue that the State is entitled to recover only the $34,000[10] that it expended as a result of the creation of the trust, and that the remaining assets should be paid to them consistent with the terms of the trust.

I. BACKGROUND

A. Facts

In October 2002, Reese Barnes Elliott ("Barney")[11] suffered injuries during a medical procedure, leaving him disabled. Barney had minimal assets.[12] As a result, in April 2003, he began receiving Medicaid benefits from the State of Delaware, which he continued to receive until his death on November 28, 2006 at the age of 51. His injuries also gave rise to a malpractice lawsuit[13] which was settled in May 2005 (the "Settlement"). After fees and costs, Barney received

[10] The precise amount disbursed by the State after the establishment of the Trust is $34,295.42.
[11] I will refer to Mr. Elliott as "Barney" because this is how he identified himself in the SNT. I do this to avoid confusion with Barney's sons, Reese Barnes Elliott, III and Travis Alan Elliott, who I will identify collectively as the "Elliott brothers." I do this for the sake of clarity and mean no disrespect.
[12] Unless noted otherwise, these facts are derived from the Amended Verified Complaint of Nov. 16, 2009 ("Am. Ver. Compl.").
[13] *Reese Barnes Elliott v. Sami Moufawad, M.D.*, C.A. No. 03C-07-022 RFS.

$550,627.81 of the Settlement.[14]

Under Medicaid, the State has subrogation rights to recover benefits paid from a third party who is liable for injuries causing the need for care and services to a Medicaid recipient.[15] That is, once the State has ascertained that a third party is legally liable, the State is directed by Federal Statute to seek reimbursement from the third party.[16] 25 *Del C.* Ch. 50[17] and 31 *Del. C.* § 522 provide that the State of Delaware can seek to recover Medicaid expenditures from a liable third party through the assertion of a subrogation claim or through a lien on real property.[18] In this instance, the State took no action and concedes that neither of these remedies is now available.[19]

The Settlement would have augmented Barney's assets so that they would have exceeded the maximum amount permitted for Medicaid eligibility.[20] Faced with the prospect of losing his Medicaid benefits, Barney consulted with an attorney to discuss how to retain them. Because of his disabilities, Barney was eligible to establish an SNT, and on June 23, 2005, an SNT was created (the

[14] Elliot Br. 5.
[15] 42 U.S.C. § 1396p(b)(1)(A) (2010).
[16] *Ahlborn*, 547 U.S. at 276.
[17] *See* 25 *Del. C.* §§ 5001-5006.
[18] 31 *Del. C.* § 522.
[19] Resp. Ans. Br. at 22. The State argues that Barney failed to make required disclosures to the State that would have put it on notice of its subrogation rights; the respondents strongly disagree. Nothing in this Opinion should be construed to resolve that issue.
[20] In Delaware, individuals must have less than $2,000 in resources to be eligible for long-term Medicaid care. 16 *Del. Reg.* 20300.1-20300.3.3, 20300 (Jan. 1989).

"Trust")[21] with Morgan Chase Trust Company[22] as trustee (the "Trustee"). The Trust was created on August 10, 2005, and the Settlement was used to fund the Trust.

The Trust's named beneficiaries are Barney's two sons, Reese Barnes Elliott, III and Travis Alan Elliott (together, the "Elliott brothers").[23] The primary purpose of Barney's Trust "is to maintain and enhance the general welfare and quality of life of Barney, in his best interest as determined by the trustee."[24] The Trust's secondary purpose is "to preserve trust principal for the remainder beneficiaries to the extent consistent with Barney's best interest and quality of life."[25]

The Trust's terms dictate that it is to be "considered an exempt trust, the assets of which will not be considered available assets in determining Barney's eligibility for Medicaid benefits, as provided in 42 U.S.C. § 1396p(d)(4)(A)."[26] Section 1396p(d) provides that "[f]or purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this title,"[27] trust

[21] I will use "SNT" when speaking of supplemental needs trusts in the abstract, and will refer to the specific trust Barney created as the "Trust." Supplemental needs trusts are variously referred to as "special needs trusts" or "supplemental care trusts" in literature.
[22] As of January 1, 2006, now known as First Capital Surety and Trust Company.
[23] *See infra* text accompanying note 11.
[24] Elliott Ex. A, at 48.
[25] Elliott Ex. A, at 48.
[26] Elliott Ex. A, at 48.
[27] 42 U.S.C. § 1396p(d)(1).

assets "shall be considered resources available to the individual."[28] However, Barney's Trust is governed by the terms of § 1396p(d)(4)(A), which provides the following exception:

> A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.[29]

Pursuant to the requirements set forth in § 1396p(d)(4)(A), Barney's petition, through which the Trust was created, requested that "[u]pon the death of the disabled person, the State must receive reimbursement, out of the trust fund remaining after the death of the disabled person, an amount equal to the total medical assistance paid by the State, through its Medicaid agency, on behalf of the disabled person."[30] The Trust directed this condition as follows:

> Upon the death of Barney, the trustee shall pay from the then remaining trust fund to each state or state agency which has provided medical assistance or care to BARNEY under Title XIX of the Social Security Act as such state or agency has expended for such care and of which it has notified the trustee in writing. If the trust is found insufficient, the trustee shall pay each such state or agency the same share of the trust fund as such state or agency's expenditure aforesaid

[28] *See id.* § 1396p(d)(3)(A)(i)(pertaining to revocable trusts) and § 1396p(d)(3)(B)(i) (pertaining to irrevocable trusts).
[29] 42 U.S.C. § 1396p(d)(4)(A).
[30] Pl.'s Ex. A, at 44.

> bear to the total of all such state and agency expenditures for BARNEY.[31]

The rest of the principal was then to go to the Elliott brothers under the terms of the Trust.

B. Procedural Posture

In March 2006, the Trustee purchased a home in Millsboro, Delaware (the "Property") on Barney's behalf out of the Settlement, which was titled into the Trust.[32] When Barney died in November 2006, the State of Delaware Department of Health and Social Services ("State") filed a claim to recover $399,881.96 from the Trust for Medicaid expenditures from April 8, 2003 through November 28, 2006 (the "Medicaid Claim"); the period comprising the entire period of Barney's eligibility, both before and after the Trust was established.[33] In 2009, the value of the Trust's assets was estimated at about $110,000 plus the Property;[34] therefore, on November 16, 2009, the Trustee filed an amended petition in this Court to sell the Property to satisfy the Medicaid Claim.[35] On June 25, 2010, the State filed a counterclaim against the Trustee seeking $399,881.96 and an order for the Trustee to sell the Property.[36]

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[31] Pl.'s Ex. A, at 49.
[32] Am. Ver. Compl. ¶ 34.
[33] *See* Ver. Compl., Nov. 25, 2008.
[34] Ver. Compl. ¶ 19.
[35] *See* Am. Ver. Compl., Nov. 16, 2009, ¶¶ 31-40.
[36] *See* Ver. Ans. & Countercl. of Resp'ts, Jun. 25, 2010, ¶ 40.

On August 2, 2010, the Elliott brothers filed a crossclaim against the State and a counterclaim against the Trust, alleging that the Medicaid Claim was inaccurate.[37] The Elliot brothers allege that the State is only authorized to collect repayment for the Medicaid benefits Barney received *after* the Trust was formed, which amounts to $34,295.42.

At an office conference, I directed the parties to brief the threshold legal issue ("Limited Issue") of whether, pursuant to § 1396p, the State may recover all the Medicaid expenditures it incurred during Barney's lifetime or only those expenditures that it incurred after the creation of the SNT.[38] I will confine my discussion here to the Limited Issue.

II. STANDARD OF REVIEW

A trust is to be interpreted consistent with the intent of the settlor.[39] Where, as here, the primary purpose of the settlor was that the trust conform to statutory requirements in order that the settlor receive benefits thereunder, the trust must be construed so as to comply with that statute. The language of Barney's Trust provides that the Trustee shall repay the State for medical assistance or care that the State has "expended for such care."[40] It is clear from the record that the settlor's primary intention was that the Trust qualify as an SNT, and the language

[37] *See* Ans., Crosscl. & Countercl. to Am. Ver. Compl., Aug. 2, 2010.
[38] Oral Arg. Tr. 25 (May 21, 2012).
[39] *Dutra de Amorim*, 460 A.2d at 514.
[40] Pl.'s Ex. A, at 21.

of the Trust must be interpreted accordingly.[41] Similarly, the goal of statutory construction is to realize the legislative intent expressed in the statute.[42] "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."[43] When the statute is unambiguous, there is no "need for judicial interpretation, and the plain meaning of the statutory language controls."[44]

When the statute is ambiguous—i.e. if "it is reasonably susceptible of different conclusions or interpretations" or "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature"[45]—then it should be construed "in a way that will promote its apparent purpose and harmonize it with other statutes within the statutory scheme."[46] Also, the Court may look to the legislative history to discern the intent of the legislature.[47]

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[41] *See Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983).
[42] *Del. Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) (quoting *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007)).
[43] *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).
[44] *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007) (internal quotation marks omitted).
[45] *LeVan*, 940 A.2d at 933 (quoting *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 175 (Del. 2001)).
[46] *LeVan*, 940 A.2d at 933 (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).
[47] *See Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 331-332 (Del. 2012) (analyzing the application of legislative history to that case).

III. ANALYSIS

The Limited Issue before me is whether the State may recover from an SNT all the Medicaid expenditures paid during the lifetime of the recipient, or only those expenditures made after the creation of the SNT. This question turns on the scope of the word "total" in §1396p(d)(4)(A).[48] The State argues that "total" encompasses all Medicaid expenditures incurred on Barney *during his lifetime*, not just those incurred after the creation of the SNT. The Elliott brothers argue that "total" means the total of only those Medicaid expenditures incurred after the creation of the SNT, that is, "total" in the context of the SNT. The Elliot brothers agree that the State is authorized to recover the Medicaid expenditures dispensed after the creation of the SNT, but contend that the State cannot recover all Medicaid benefits Barney received at any time and for any purpose.

I hold that "total medical assistance paid on behalf of the individual under a State plan under this subchapter"[49] encompasses all those expenditures which the State incurred as a result of the creation of the SNT. Thus the State may recover all its Medicaid expenditures paid on Barney's behalf after creation of the SNT, that is, those expenditures that the State would have avoided if Barney had not availed himself of an SNT.

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[48] "[T]he State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the *total* medical assistance paid on behalf of the individual under a State plan under this subchapter." 42 U.S.C. § 1396p(d)(4)(A) (emphasis added).
[49] *Id*.

In order to qualify as an SNT, the Trust must provide for the recovery by the State of "the total medical assistance paid on behalf of the individual under a State plan under this subchapter."[50] The State argues, reasonably to the extent the language is looked at in isolation, that "total" comprises all Medicaid expenditures incurred on behalf of Barney during his lifetime. The State points out that there is no express temporal limitation in § 1396p(d)(4)(A), and argues that "total" must thus be construed broadly to encompass the lifetime of an individual. But the lack of a temporal limitation does not solve the ambiguity; it is what gave rise to the ambiguity in the first place. The lack of a temporal limitation could reasonably recommend either a broad or narrow reading depending on the context and policy behind the statute. To say that the lack of a limitation itself implies the answer is to beg the question.

In order to evaluate the meaning of "total" in the subsection relating to SNTs, it is necessary to examine the statute, section 1396p, as a whole. Section 1396p, as originally, and currently, constituted, expressed a legislative intent that Medicaid benefits, once properly paid, could not be recouped.[51] The "anti-recovery" provision, section, 1396p(b), provides: "No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State

[50] *Id*.
[51] *See* 42 U.S.C. § 1396p (2010).

plan may be made."[52] The statute goes on to provide only three exceptions: (A) with respect to real property owned by the recipient;[53] (B) from the recipients' estate, for benefits received when the recipient was over 55 years of age;[54] or (C) in certain cases where the recipient has received long-term-care insurance benefits.[55] None of the three exceptions applies. "Correctly paid" benefits are benefits paid in accordance with law, and it is clear that benefits received by Barney were correctly paid. Thus, under the anti-recovery provisions of section 1396p, the State would not be entitled to recover benefits paid to Barney.

Congress has created exceptions to the anti-recovery provision, however. In 1993, Congress—in the context of tightening Medicaid eligibility[56]—relaxed the eligibility requirements for disabled Medicaid applicants by permitting SNTs.[57] Generally, sums settled by a recipient in trust are counted as available assets for determining Medicaid eligibility.[58] The 1993 amendments, however, allowed certain recipients (including, pertinently, profoundly disabled recipients under age

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[52] *See id.* § 1396p(b).
[53] *Id.* §§ 1396p(b)(1)(A), 1396p(a)(1)(B).
[54] *Id.* § 1396p(b)(1)(B).
[55] *Id.* § 1396p(b)(1)(C).
[56] *See Lewis v. Alexander*, 685 F.3d 325, 331 (3d Cir. 2012) ("Seeking to stamp out abusive manipulation of trusts to hide assets and thereby manufacture Medicaid eligibility, Congress created a comprehensive system of rules mandating that trusts be counted as assets.").
[57] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 1993 HR 2264 ("OBRA 1993")(creating the exception for special needs trusts); *Lewis*, 685 F.3d at 331 ("Congress also exempted from these rules certain trusts intended to provide disabled individuals with necessities and comforts not covered by Medicaid.").
[58] *See* OBRA 1993 § 13611; 42 U.S.C. § 1396p(d)(3)(A) ("[T]he corpus of the trust shall be considered resources available to the individual. . . .").

65) to establish SNTs, the assets of which are both available (at the discretion of a trustee) for the benefit of the recipient, and exempt for purposes of determining Medicaid eligibility.[59] In other words, absent employment of an SNT, Barney's receipt of $550,000 would have rendered him ineligible for *future* Medicaid benefits;[60] he would have remained ineligible until death or until his assets were dissipated to below the threshold for eligibility. The State would have been unable to recover from Barney for *past* Medicaid payments, however.[61] The 1993 amendment allowed Barney to put this recovery in an SNT without losing his eligibility for future Medicaid payment. This benefit to disabled recipients comes with a price, however: the trust must provide that "all amounts remaining in the trust upon the death of [the recipient] up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title" must be recoverable by the State.[62] This is the provision at issue here.

I must harmonize the anti-recovery provisions at section 1396p(b) with the SNT recovery provisions of section 1396p(d)(4)(A) to the extent possible.[63]

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[59] OBRA 1993 § 13611; 42 U.S.C. § 1396p(d)(4)(A).

[60] *See* 42 U.S.C. § 1396p(b) (preventing recovery of "correctly paid" benefits).

[61] In certain circumstances the State would be eligible to subrogate against a tortfeasor for benefits previously paid, but the State failed to act on its subrogation rights here. *See, e.g.*, *Sullivan v. Cnty. of Suffolk*, 174 F.3d 282, 286 (2d. Cir. 1999) (holding that a state could require a Medicaid beneficiary to satisfy a lien against a tort settlement before depositing the settlement proceeds in an SNT).

[62] OBRA 1993 § 13611; 42 U.S.C. § 1396p(d)(4)(A).

[63] *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2447 (2010) ("Where the text permits, congressional enactments should be construed to be consistent with one another.").

"[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[64] As a result, I must interpret these provisions as part of a "symmetrical and coherent regulatory scheme."[65]

Under the anti-recovery provisions, properly paid benefits may not be recouped by the State, absent three exceptions not pertinent here.[66] Therefore, to the extent the anti-recovery provision applies, no recovery by the State is possible. The later-enacted SNT provisions carved out an exception[67] to the anti-recovery provision, under which the remaining funds in an SNT *shall* be recouped, up to an amount equal to the "total medical assistance paid" to the recipient as of his death.[68] How am I to interpret this directive?

Congress made clear its general intention that properly paid benefits not be recoverable, except in specific circumstances.[69] The SNT provisions added such a circumstance. In order to conform to the general intent of Congress, that recoupment right must be read narrowly. I note that the recovery allowed at section 1396p(d)(4)(A) is only in the context of the SNT.[70] Reading section

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[64] *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).
[65] *See id.* (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995)).
[66] *See infra* notes 53-55 and accompanying text.
[67] Other exceptions to the anti-recovery provisions exist.
[68] 42 U.S.C. § 1396p(d)(4)(A).
[69] *See id.* § 1396p(b) (enumerating three exceptions where a state may recoup properly paid benefits).
[70] *See id.* § 1396p(d)(4)(A) (applying the recovery section to "[a] trust containing the assets of an individual . . . who is disabled . . . .").

1396p(d)(4)(A) narrowly, I determine that Congress created a new benefit, the SNT, under which a qualified recipient could retain both assets *and* the ability to receive future payments. As an accompaniment to this new benefit, which would cause extra funds to flow from the State to the recipient, it directed the State to recoup the cost of these (newly permitted) benefits via a new recovery right. The State could recover up to the total amount of the payments made in the context of the SNT, that is, payments that would not have been made absent the creation of the SNT.[71]

This reading of the statutory language is consistent with Congress's apparent intent in fashioning the SNT provisions—those provisions created a new benefit for recipients but also made the state whole for its additional expenditures by allowing recovery from the SNT at death, to the extent those resources remained in trust. For example, here the State of Delaware would have made $0 in post-tort-recovery payments had Barney's Trust *not* been created, since Barney's new wealth would have made him ineligible for benefits, and since his death came long before he would have paid down this new wealth. Instead, the State paid $34,000 on Barney's behalf after creation of the trust and is entitled to recoup that amount, at which point it will be in the same position it would have absent creation of the

[71] The record is not clear whether any Medicaid disbursements were made for Barney between the time the settlement funds were released to his counsel and the time the Trust was funded; accordingly, I make no decision with respect to whether the State could recoup such disbursements.

Trust. This interpretation is consistent with both Congress's general intent expressed in the anti-recovery statute as well as the more focused provisions concerning SNTs.

Looked at in this way, the SNT provisions represent a bargain on behalf of a recipient: in return for continued benefits, the state gets first recovery against the trust on the recipient's death, up to the total amount of benefits received due to the exclusion of assets via the trust. Upon a recipient's establishment of an SNT, the "essence of the bargain is that the State pays benefits during the beneficiary's lifetime, and is paid back from anything remaining in the trust after the beneficiary's death."[72] The reading urged by the State would strike a far different bargain: in return for continued benefits, the State gets to recoup all amounts paid on behalf of the recipient, including those amounts correctly paid before Trust's creation. These amounts were paid and not recoverable under the anti-recovery provisions before—and regardless of—any SNT. Therefore, under the State's reading, the establishment of an SNT creates a *retroactive* right to recovery of benefits with no relation to any SNT and in direct contravention of the anti-recovery provisions. Clearly, Congress *could* do this, but the evidence that it intended to appears nowhere in the SNT provisions.

In fact, it would be contrary to the intent of Congress, which was to extend a

[72] *In re Abraham XX*, 900 N.E.2d 136, 143 (N.Y. 2008) (Smith, J., dissenting).

benefit to recipients under section 1396p(d)(4)(A), providing for SNTs. Under the State's reading, the decision to utilize this "benefit" would require a complex calculation indeed. It would require a recipient to examine the amount of benefits he had received in the past, the amount he could expect to receive if eligible in the future, the amount of the potential expenditures on his behalf per unit time under an SNT, and his life expectancy. Should he calculate wrong, the result could be a windfall to the State. In fact, that would be the case here. Under the State's reading of the Medicaid statute, it expended an additional $34,000 on account of the establishment of Barney's Trust but would recoup nearly $400,000.[73] This is unlikely to have been the intent of Congress. If the State's interpretation is correct and had been available to Barney, the Elliott brothers argue, he would have foregone an SNT, correctly predicting an imminent death. Indeed, under the State's interpretation of the statute, this would be a common calculus. It strikes me as unlikely that Congress would have intended a recoupment scheme that would discourage the use of the benefit it had just created.

The parties have been able to locate only one reported opinion, *In re Abraham XX*,[74] a New York Court of Appeals case,[75] that directly addresses the Limited Issue. As the State points out, that decision supports its broad reading of

[73] The lifetime amount that State seeks that was paid to Barney is $399,881.96. Am. Ver. Compl. ¶ 33.
[74] *In re Abraham XX*, 900 N.E.2d 136 (N.Y. 2008).
[75] The New York Court of Appeals is New York's highest court.

recovery rights in the SNT provision. The State relies on *Abraham* to argue that "the words of the statute . . . are clear and absolute,"[76] and that the plain meaning of the statute is that "total" encompasses all Medicaid benefits paid to the individual during his lifetime.

In *Abraham*, a disabled child who received Medicaid assistance settled a malpractice suit, the proceeds of which—net of the State's subrogation rights—were placed in an SNT to preserve the child's Medicaid eligibility;[77] however, there was a gap between the receipt of settlement proceeds and the creation of the trust during which the State paid for the child's medical care but the State could not collect reimbursement from the settlement.[78] Interpreting § 1396p(d)(4)(A), the court upheld the State's right to collect reimbursement for all the medical services that it had provided to the child, both before and after the trust's creation.[79] The *Abraham* court relied primarily on what it found to be the unambiguous language of the statute; it noted that there was no temporal limitation in the statute, and concluded therefore that the only limitation was the amount left in the trust.[80] For the reasons stated above, however, I interpret the statute, read as a whole, differently, as did the dissent in *Abraham.* In fact, the dissent pointed out that the

[76] Resp't's Ans. Br. 18 (quoting *Abraham*, 900 N.E.2d at 140).
[77] *Abraham*, 900 N.E.2d at 137.
[78] *Id.* at 137-38.
[79] *Id.* at 140.
[80] *Id.*

adoption of the majority's rationale could in a later case result in a windfall of precisely the type the State seeks here. *Abraham,* obviously, is of persuasive value only. For the reasons stated above, I doubt that Congress intended the result reached by the *Abraham* majority.

IV. CONCLUSION

The rights and responsibilities of states and individuals under Medicaid are purely statutory. Congress could have created a system whereby Medicaid payments made to the poor would be generally recoverable from those individuals (or their estates) if they gained financial solvency. Such a system may or may not be wise policy, but that is irrelevant here. Instead, Congress has created a system where properly-made Medicaid payments may not be recouped except under specific scenarios. This case involves one such scenario, but only for a fraction of the payments made to Barney in his lifetime. For the reasons stated in the body of this opinion, I decide the Limited Issue as follows: 42 USC § 1396p(d)(4)(A) requires the State to be able to recoup from an SNT upon recipient's death up to the total amount paid to the recipient as a result of the establishment of that trust. Since it was Barney's intent in creating his Trust that the Trust comply with the statute, the State has the right to direct the trustee to repay that amount, $34,295.42.

The parties should confer and inform me of what issues, if any, remain for

decision.