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The Form that Will Transform Your Post-Mortem Retention

By Ron M. Landsman and Denise Fike

I. Retention is allowed under Federal law; states cannot restrict it

A. The statute

1. ***Payback required.*** In general, first party special needs trusts are required to have payback. 42 U.S.C. § 1396p(d)(4)(A), (B) an (C).

   a. **Individual trusts:** 42 U.S.C. § 1396p(d)(4)(A) provides that the rules that make self-settled trusts generally "available" do not apply to:

      [a] trust containing the assets of an individual under age 65 ... 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.

   b. **Income or "Miller v. Ybarra" trusts:** 42 U.S.C. § 1396p(d)(4)(B) provides that the rules that make self-settled trusts generally "available" do not apply to:

      A trust established in a State for the benefit of an individual if—

      (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust,

      (ii) 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; and

      (iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

c. **Pooled income trusts.** 42 U.S.C. § 1396p(d)(4)(C) provides that the rules that make self-settled trusts generally "available" do not apply to:

> A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
>
> (i) The trust is established and managed by a non-profit association.
>
> (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
>
> (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
>
> (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

2. ***Retention: There is an exception to payback for pooled trusts***

   a. **"To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust,** the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter." 42 U.S.C. 1396p(d)(4)(C).

   b. **This sets up a curious set of priorities.** If a potential beneficiary decides to direct money to the PSNT, who is it coming from? If the account at death is more than the Medicaid claim, then money retained by the trust comes first from the share that would otherwise go to the family, and only after the family is zeroed out does it come out of Medicaid's share. See the retention table on page 4.

B. Application of the statute

1. ***States cannot infringe what Federal law allows.***

   a. In *Lewis v. Alexander*, Pennsylvania tried to restrict the use of pooled trust accounts, imposing a variety of limitations on their funding and permissible distributions. Among the restrictions, the share of the deceased beneficiary's estate that the pool could retain was statutorily limited to 50%. 62 Pa. Stat. Ann. § 4114(b)(3)(iii). The Third Circuit looked at the statutory pattern and decided that Congress wanted to create a "binary system":

   > "After limited success with the Medicaid Qualifying Trusts provisions enacted in 1986, Congress made a deliberate choice to expand the federal role in defining trusts and their effect on Medicaid eligibility.

... Congress made a specific choice to expand the types of assets being treated as trusts and to unambiguously require States to count trusts against Medicaid eligibility. Its primary objective was unquestionably to prevent Medicaid recipients from receiving taxpayer-funded health care while they sheltered their own assets for their benefit and the benefit of their heirs. But its secondary objective was to shield special needs trusts from impacting Medicaid eligibility. ...

Congress' intent was not merely to shelter special needs trusts from the effect of 42 U.S.C. § 1396p(d)(3). It was to shelter special needs trusts from having any impact on Medicaid eligibility.

[W]ith such a rigorous system, it seems clear that Congress intended to create a purely binary system of classification: either a trust affects Medicaid eligibility or it does not."

Lewis v. Alexander, 685 F.3d 325, 343-344 (3d Cir. 2012)

b. The court analyzed the statute limiting pre-emption to 50% of the balance to determine whether it was pre-empted by federal law. Its pre-emption analysis required it to consider Congress' purpose and to ascertain whether enforcement of the state statute would interfere with that purpose. Plainly Congress did intend pooled trusts to retain funds; the contrast with the to other special needs trusts, which do not authorize retention, underscores Congress' intent to allow it for pooled trusts. 685 F.3d at 349. The problem for the state was that any argument that it could limit retention had no natural boundary; if it could limit it to 50%, there was no logical reason why the state couldn't limit it to 1%, or 0.0001%, which is to say, that it could entirely undo what Congress plainly intended to allow. 685 F.3rd at 349. "We cannot believe Congress would intentionally cripple its statute in that manner." Id. The discussion of retention appears at 685 F.3rd at 348-349.

II. The Problem – The Family Can Reward the Trust Only at Their Own Expense.

A. *Giving anything to the trust can only reduce the family share.*

1. The more they give, the less they get, period, until they get zero. After that, if anything passes to the trust, then Medicaid gets less, but the family is forever stuck at zero.
See the illustration on the following page.

2. Thus, if the family has any hope of salvaging anything from the account, they have no choice but to designate themselves as beneficiary after Medicaid's payback amount is paid, and giving anything to the Trust can only reduce it.

III. The Solution - Disaggregate the Family Choices.

A. *There are two choices:*

1. **Choice I –**
   If you are never going to get anything – because the Medicaid claim is more than the balance of the account at the beneficiary's death – who do you want the money to go to, Medicaid or the Trust?

2. **Choice II–**
   If you might get something – because the Medicaid claim is less than the balance of the account at the beneficiary's death – who do you want to get it?

B. This separate statement of the decisions to be made is reflected in our Exhibit C – attached.

Attachments

1. Retention Table. Simple illustration of the impact of family decision to make a bequest to the trust on its share of whatever remains.

2. First Maryland Disability Trust, Exhibit C - Port-Morten Instructions for Distribution of Assets

3. *Lewis v. Alexander*, 685 F.3d 325, 325-334, 342-344, 346-349 (2012).

Retention Table

What the family gives comes out of their share – until their share hits zero.

Account has $100,000; Medicaid claim is $50,000. Amount left to the trust:

Total Trust Account: $100,000		
$20,000 to Trust	$50,000 to Medicaid	Balance of $30,000 to Family

If the trust gets less, the family gets more:

Total Trust Account: $100,000		
$10,000 to Trust	$50,000 to Medicaid	Balance of $40,000 to Family

If the trust gets more, the family gets less:

Total Trust Account: $100,000		
$30,000 to Trust	$50,000 to Medicaid	Balance of $20,000 to Family

If the trust gets more, the family gets less until it is zeroed out; only then does anything come from Medicaid

Total Trust Account: $100,000	
$60,000 to Trust	$40,000 to Medicaid

THE FIRST MARYLAND DISABILITY TRUST

EXHIBIT C
POST-MORTEM INSTRUCTIONS FOR DISTRIBUTION OF ASSETS

This form indicates what will happen to any funds remaining in the Sub-Account at the death of the Beneficiary.

Please complete both parts. ***If the form is not completed, then the entire balance of the account will go to First Maryland Disability Trust, Inc.***

Part I – If the balance remaining in the Sub-Account is *less than* the amount claimed by all Medicaid programs, so that nothing can go family members or others, then First Maryland Disability Trust shall retain _____ % [from 0 to 100%] (written out: _____ percent) for its charitable purposes; I understand that the balance, if any, will go to the government.

_____
Signature

Witness:_____

Date: _____

Part II – If the balance remaining in the Sub-Account is *more than* the amount claimed by all Medicaid programs, then the account shall be distributed as follows:

☐ All to First Maryland Disability Trust, Inc.

OR

☐ Pay off the Medicaid claim and pay the excess to:

%(*)	Percent	To	But if he/she does not survive, then to
		First Maryland Disability Trust, Inc.	

(*) The total in this column should add up to 100%.

_____

Signature

Witness:_____

Date: _____

them, is both illogical and unjust." *Id.* at 591 (emphasis supplied). Nelson, in contrast, cannot credibly argue that it is "illogical and unjust" to consider his 1999 conviction when that conviction is explicitly referenced in the amended notice to appear.

For all of these reasons, the BIA did not act unreasonably in concluding that Judge Garth's opinion in *Okeke* did not control the outcome in this case. Rather, the BIA's conclusion that Nelson's reentry did not restart the clock is reasonable. The relevant portions of the statute are completely silent as to the effect of a reentry, save for the special rules providing that aliens who depart from the United States for extended periods of time break or interrupt their period of continuous residence/presence. 8 U.S.C. § 1229b(d)(2). If Congress had intended for an alien's departure from the United States to have any additional significance, it would have explicitly said so. Furthermore, there is no sound logical justification for attaching such significance to departure from the country. An alien who leaves for a two-day trip to Canada after committing a crime and lives in the United States for seven years after returning has no greater logical claim to be entitled to cancellation of removal than a similarly-situated alien who never leaves the country. Accordingly, the BIA's decision not to make such a distinction is reasonable and entitled to *Chevron* deference.

Zackery D. LEWIS, by his next friends; Richard Young; Lynn G. Hainer, Administratrix of the Estate of Addie Smith; Susan W. Coleman; Kathy A. Burger; Tracy Palmer; Kenny Atkinson, by his next friend; Bernice Tate, by her next friend; Mary Wagner; Michael Bidzilya, by his next friend; William Algar, by his next friend; Anthony Gale, by his next friends; The Arc Community Trust of Pennsylvania; The Family Trust, on their own behalf and on behalf of all other persons similarly situated

v.

Gary ALEXANDER, in official capacity as Secretary of Department of Public Welfare of the Commonwealth of Pennsylvania; Eric Rollins, in official capacity as Executive Director of the Erie County Assistance Office, Appellants.

No. 11–3439.

United States Court of Appeals,
Third Circuit.

Argued March 26, 2012.

Filed: June 20, 2012.

Background: Trustees and trust beneficiaries brought putative class action against Commonwealth of Pennsylvania officials, seeking declaratory judgment that state Medicaid statute conflicted with federal Medicaid Act by establishing improper eligibility criteria for special needs trusts. The United States District Court for the Eastern District of Pennsylvania, Jan E. Dubois, J., 276 F.R.D. 421, granted plaintiffs' motion for class certification and denied officials' motion for summary judgment. Officials appealed.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

(1) plaintiffs had Article III and prudential standing to maintain action;

(2) action was ripe for adjudication;

(3) Medicaid Act provision exempting special needs trusts from trust–counting rules imposed mandatory obligation on states;

(4) plaintiffs had private right of action under § 1983; and

(5) with exception of state statutes's enforcement provision, Medicaid Act preempted statute.

Affirmed in part and reversed and remanded in part.

1. Health ⇐462

No state is obligated to join Medicaid, but if they do join, they are subject to federal regulations governing its administration.

2. Health ⇐467

Generally, Medicaid provides assistance for two types of individuals: the "categorically needy," who are those who qualify for public assistance under the Supplemental Security Income (SSI) program or other federal programs, and the "medically needy," who are those who would qualify as categorically needy but whose income and/or assets are substantial enough to disqualify them.

See publication Words and Phrases for other judicial constructions and definitions.

3. Health ⇐467

Every state participating in Medicaid must provide assistance to the categorically needy, but states are not required to provide assistance to the medically needy.

4. Health ⇐467

If states participating in Medicaid choose to make medical assistance available to the medically needy, they are subject to various statutory restrictions in determining to whom medical assistance should be extended.

5. Trusts ⇐1, 140(1)

"Trust" is a legal instrument in which assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary; this structure means that the beneficiary does not actually own the assets of the trust, but instead has an equitable right to derive benefits from them.

See publication Words and Phrases for other judicial constructions and definitions.

6. Health ⇐471(6)

Generally, trusts are counted as assets for the purpose of determining Medicaid eligibility, with the exception of "special needs trusts," or "supplemental needs trusts," which are discretionary trusts established for the benefit of a person with a severe and chronic or persistent disability and are intended to provide for expenses that assistance programs such as Medicaid do not cover. Omnibus Budget Reconciliation Act of 1993, § 13611(d)(1)(C), 42 U.S.C.A. § 1396a note.

See publication Words and Phrases for other judicial constructions and definitions.

7. Trusts ⇐11(1)

"Pooled special needs trust" is a special arrangement with a non–profit organization that serves as the trustee to manage assets belonging to many disabled individuals, with investments being pooled, but with separate trust accounts being maintained for each disabled individual.

See publication Words and Phrases for other judicial constructions and definitions.

8. Federal Civil Procedure ⇐103.2

Federal Courts ⇐12.1

Constitutional standing is an essential and unchanging part of the case–or–controversy requirement of Article III. U.S.C.A. Const. Art. 3, § 1 et seq.

9. Federal Civil Procedure ⇐103.2, 103.3

Reduced to its constitutional minimum, Article III standing requires the party invoking federal jurisdiction to demonstrate three elements: (1) an injury in fact consisting of an actual or imminent invasion of a legally protected interest; (2) a causal connection between the injury in fact and the defendants' conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

10. Federal Civil Procedure ⇐188

Health ⇐510

Pooled special needs trust beneficiaries and trustees suffered injury in fact, as required to establish their Article III standing to bring putative class action against Commonwealth of Pennsylvania officials, alleging that state Medicaid statute conflicted with federal Medicaid Act by establishing criteria for such trusts, where plaintiffs were likely to have statute enforced against them, as each one fell within statute and state's Department of Public Welfare had stated its intention to enforce statute against plaintiffs. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414.

11. Federal Courts ⇐543.1

Constitutional standing is a jurisdictional requirement, and thus the Court of Appeals is obliged to examine standing, sua sponte, even if standing erroneously has been assumed below. U.S.C.A. Const. Art. 3, § 1 et seq.

12. Federal Civil Procedure ⇐103.2, 103.4

Prudential standing requires that: (1) a litigant assert his or her own legal interests rather than those of a third party; (2) the grievance not be so abstract as to amount to a generalized grievance; (3) and the plaintiffs' interests are arguably within the zone of interests protected by the statute, rule, or constitutional provision on which the claim is based.

13. Federal Civil Procedure ⇐188

Health ⇐510

Pooled special needs trust beneficiaries and trustees had prudential standing to bring putative class action against Commonwealth of Pennsylvania officials, alleging that state Medicaid statute conflicted with federal Medicaid Act by establishing criteria for such trusts, where plaintiffs asserted their own interests, their grievance was clear, distinct, and particular to their status as beneficiaries and trustee, and plaintiffs satisfied zone of interests test. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414.

14. Action ⇐3

Federal Civil Procedure ⇐103.2

Test for whether Congress intended to create a private right of action, which requires the court to look for rights–creating language clearly imparting an individual entitlement with an unmistakable focus on the benefited class, is narrower then, and fully encompassed within the boundaries of, the zone of interests test for prudential standing.

15. Declaratory Judgment ⇐62, 64

"Ripeness" requires a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and

reality to warrant the issuance of a declaratory judgment.

See publication Words and Phrases for other judicial constructions and definitions.

16. Federal Courts ⇐12.1

Most important factors in determining whether a case is ripe are the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment.

17. Federal Courts ⇐12.1

"Adversity," in the context of determining whether a case is ripe, requires opposing legal interests.

See publication Words and Phrases for other judicial constructions and definitions.

18. Declaratory Judgment ⇐124.1

Putative class action brought against Commonwealth of Pennsylvania officials by pooled special needs trust beneficiaries and trustees, seeking declaratory judgment to effect that state Medicaid statute improperly conflicted with federal Medicaid Act by establishing criteria for such trusts, was ripe for adjudication, where officials had obligation to enforce statute and plaintiffs sought to evade such enforcement, decision in case would establish whether statute could be enforced against plaintiffs and define plaintiffs' legal rights, and declaratory judgment would enable plaintiffs to make informed decisions regarding trust administration with full understanding of statute's effects. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414.

19. Federal Courts ⇐12.1

"Conclusivity," in the context of determining whether a case is ripe, depends on the ability of a decision to define and clarify the legal rights or relations of the parties.

See publication Words and Phrases for other judicial constructions and definitions.

20. Declaratory Judgment ⇐7, 62

Declaratory judgments have "utility," in the context of determining whether a case is ripe, because the clarity they bring enables plaintiffs, and possibly defendants, to make responsible decisions about the future.

See publication Words and Phrases for other judicial constructions and definitions.

21. Health ⇐471(6)

Medicaid Act provision, defining special needs trusts and exempting such trusts from being counted in Medicaid eligibility analysis, imposed mandatory obligation upon states participating in Medicaid, where Congress made specific choice to expand types of assets being treated as trusts and to unambiguously require states to count certain trusts against Medicaid eligibility, in order to prevent Medicaid recipients from receiving taxpayer–funded health care while sheltering their own assets and to protect special needs trusts from impacting Medicaid eligibility, and Act provided comprehensive system of asset–counting rules that created binary system in which trust affected Medicaid eligibility or it did not. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4).

22. Civil Rights ⇐1027, 1330(1)

To find a private right of action under § 1983: (1) the statutory provision must benefit the plaintiffs with a right unambiguously conferred by Congress; (2) the right cannot be so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute must impose a binding obligation on the states. 42 U.S.C.A. § 1983.

23. Civil Rights ⇐1052, 1330(6)

Pooled special needs trust beneficiaries had private right of action under § 1983, in action against Commonwealth of Pennsylvania officials, seeking declaratory judgment to effect that state Medicaid statute improperly conflicted with federal Medicaid Act by establishing criteria for such trusts, where Act provided eligible individuals with statutory right to receive medical assistance and to receive it with reasonable promptness, and statute changed eligibility requirements, thereby interfering with beneficiaries' right to receive medical assistance. Medicaid Act, §§ 1902(a)(8, 10, 18), 1905(a), 1917(d)(4), 42 U.S.C.A. §§ 1396a(a)(8, 10, 18), 1396d(a), 1396p(d)(4); 62 P.S. § 1414.

24. Civil Rights ⇐1052, 1330(6)

Pooled special needs trusts and trustees had private right of action under § 1983, in action against Commonwealth of Pennsylvania officials, seeking declaratory judgment to effect that state Medicaid statute improperly conflicted with federal Medicaid Act by establishing criteria for such trusts, even though plaintiffs, unlike trust beneficiaries, did not have right to receive medical assistance, where Act specifically exempted special needs trusts from trust–counting rules and instructed that state plans for medical assistance must comply with Act. Medicaid Act, §§ 1902(a)(8, 10, 18), 1905(a), 1917(d)(4), 42 U.S.C.A. §§ 1396a(a)(8, 10, 18), 1396d(a), 1396p(d)(4); 62 P.S. § 1414.

25. States ⇐18.3

Supremacy Clause creates an independent right of action where a party alleges preemption of state law by federal law. U.S.C.A. Const. Art. 6, cl. 2.

26. States ⇐18.11

Intent of Congress is the ultimate touchstone of preemption analysis.

27. States ⇐18.11

In its preemption analysis, a court starts with the basic assumption that Congress did not intend to displace state law.

28. United States ⇐82(2)

When dealing with Spending Clause legislation in a preemption analysis, courts require Congress to speak unambiguously; such legislation is in the nature of a contract between Congress and the states, and the states are entitled to know the conditions under which they are accepting. U.S.C.A. Const. Art. 1, § 8, cl. 1.

29. Health ⇐471(6)

Congress had overarching intent behind Medicaid Act provision defining special needs trusts and exempting such trusts from being counted in Medicaid eligibility analysis, for purposes of determining whether Pennsylvania statute improperly conflicted with Act by establishing criteria for such trusts, where Congress intended to mandate exemption of such trusts, intended that such trust be defined by specific set of criteria it set forth, and did not abrogate state's general laws of trust or their inherent power under those laws. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414.

30. Statutes ⇐195

In the absence of an explicit statement or a clear implication that states are free to expand a list, the canon of statutory construction, expressio unius est exclusio alterius, implies that states are not free to do so.

31. Health ⇐457
States ⇐18.79

Medicaid Act preempted repayment provision of Pennsylvania statute regarding reimbursement of agency that provided medical assistance to special needs trust beneficiary upon beneficiary's death or termination of trust, and, in case of

pooled trusts, barred trust from retaining more than 50% of amount remaining in beneficiary's trust account without any obligation to reimburse, where Congress, in enacting Act, intended to permit special needs trusts, at trust's discretion, to retain up to 100% of residual account balance after beneficiary's death. Medicaid Act, § 1917(d)(4)(C)(iv), 42 U.S.C.A. § 1396p(d)(4)(C)(iv); 62 P.S. § 1414(b)(3)(iii).

32. Health ⇐457
States ⇐18.79

Medicaid Act preempted expenditure provision of Pennsylvania statute requiring any expenditure from special needs trust must have reasonable relationship with beneficiary's needs, where statute showed state's concern with potential fraud and abuse, but Congress, in enacting Act's trust–counting rules, left various avenues open to counteract fraud and abuse special needs trusts by making special needs trusts subject to supervision by courts and legal actions to enforce trustee's fiduciary duties, and because such trusts were required to be managed by non–profit organizations, such trusts were further subject to legal rules applicable to those organizations. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414(b)(3)(ii).

33. Health ⇐457
States ⇐18.79

Medicaid Act preempted specials needs requirement in provision of Pennsylvania statute, which attempted to restrict pooled special needs trusts to beneficiaries with special needs that would not be met without trust, where Act only required that beneficiaries be "disabled," and, as to state's concern of potential fraud and abuse, Act left open various avenues open for state to counteract fraud and abuse, including ultimate option of withdrawing from Medicaid. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414(b)(2).

34. Health ⇐457
States ⇐18.79

Medicaid Act preempted age provision in Pennsylvania statute, which attempted to restrict pooled special needs trusts to beneficiaries under the age of 65, where Act contained no age restriction, and to extent that Act contained quirk by which individuals over 65 who transferred assets to pooled trust were ineligible for Medicaid for period of time, correcting that error was not subject to judicial correction. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414(b)(1).

35. Health ⇐457
States ⇐18.79

Medicaid Act did not preempt enforcement provision in Pennsylvania statute, permitting state agency to petition court to terminate special needs trust in event that agency had claim against trust property based on violation of statute's provisions, where such trusts presented unique type of trust in which trust was single legal entity, but with many separate beneficiaries having claims over specific accounts within trust, and statute, pursuant to state's general trust and non–profit law, reasonably sought to protect beneficiaries' rights in event of trustee violating those rights or, without good cause, refusing to make payments from trust. Medicaid Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 62 P.S. § 1414(c); 20 Pa. C.S.A. §§ 5301–5311, 5501–5589, 7711.

Stephen A. Feldman, Esq. (Argued), Feldman & Feldman, Jenkintown, PA, for Appellee.

Jason W. Manne, Esq. (Argued), Office of General Counsel, Department of Public Welfare, Pittsburgh, PA, for Appellant.

Shirley B. Whitenack, Esq., Schenck, Price, Smith & King, Florham Park, NJ, for Amicus Appellees.

Before: FUENTES, SMITH, and JORDAN, Circuit Judges.

OPINION

SMITH, Circuit Judge.

I

This case involves the interaction between state and federal law under the Medicaid system, a cooperative program between the state and federal governments to provide medical assistance to those with limited financial resources. 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. But Congress also exempted from these rules certain trusts intended to provide disabled individuals with necessities and comforts not covered by Medicaid. Seeking to ensure that these trusts were not abused, Pennsylvania enacted Section 9 of Pennsylvania Act 42 of 2005, codified at 62 Pa. Stat. Ann. § 1414 (Section 1414), to regulate these special needs trusts.

Plaintiffs brought a putative class action in the Eastern District of Pennsylvania challenging Section 1414's validity. Plaintiffs allege Section 1414 is preempted by the federal statute governing Medicaid eligibility, 42 U.S.C. § 1396p(d)(4). They seek injunctive and declaratory relief barring its enforcement. The District Court granted that relief, holding all but one of the challenged provisions of Section 1414 preempted. In reaching that holding, the District Court concluded that Plaintiffs' case was justiciable and that Plaintiffs had a private right of action under both Section 1983 and the Supremacy Clause. The District Court also held that Section 1414 was severable, certified a class of plaintiffs, and appointed class counsel.

This appeal followed. The parties do not challenge the District Court's decision to uphold the remaining provision of Section 1414 or the District Court's decisions on severability, certification, and appointment of class counsel. We conclude that Plaintiffs' case is justiciable and that they have a private right of action under both Section 1983 and the Supremacy Clause of the Constitution. On the merits of Plaintiffs' challenge, we conclude that the District Court was correct in its determination that Section 1414's 50% repayment provision, "special needs" provision, expenditure provision, and age restriction are all preempted by federal law. However, we conclude that the enforcement provision of Section 1414—when used to enforce provisions not otherwise preempted by federal law—is a reasonable exercise of the Commonwealth's retained authority to regulate trusts. We will affirm in part and reverse in part.

II

[1] Medicaid is a joint federal-state program providing medical assistance to the needy.[1] Enacted under Congress'

1. The Supreme Court has noted, echoing Judge Friendly, that Medicaid's "Byzantine construction ... makes the Act 'almost unintelligible to the uninitiated.'" *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981) (quoting *Friedman v. Berger*, 547 F.2d 724, 727 n. 7 (2d Cir.1976)). The District Court in *Friedman*, which the Supreme Court quoted, was even more direct: "The Medicaid statute ... is an aggravated assault on the English language, resistant to attempts to understand it." *Fried-*

Spending Clause authority, Medicaid is voluntary. No State is obligated to join Medicaid, but if they do join, they are subject to federal regulations governing its administration. *See Roloff v. Sullivan*, 975 F.2d 333, 335 (7th Cir.1992). Pennsylvania has elected to participate in Medicaid.

[2–4] Generally, Medicaid provides assistance for two types of individuals: the categorically needy and the medically needy. The categorically needy are those who qualify for public assistance under the Supplemental Security Income (SSI) program or other federal programs. *See Roach v. Morse*, 440 F.3d 53, 59 (2d Cir. 2006) (Sotomayor, J.); *Roloff*, 975 F.2d at 335. The medically needy are those who would qualify as categorically needy (because they are disabled, etc.) but whose income and/or assets are substantial enough to disqualify them. *Roloff*, 975 F.2d at 335.[2] Every State participating in Medicaid must provide assistance to the categorically needy. States need not provide assistance to the medically needy. *See id.* If States choose to make medical assistance available to the medically needy, they are subject to various statutory restrictions in determining to whom medical assistance should be extended.

Congress has created a comprehensive system of asset-counting rules for determining who qualifies for Medicaid. Under Medicaid's original asset-counting rules, individuals could put large sums of money in trust, thereby vesting legal title to those assets in the trust and reducing (on paper) the amount of assets owned by the individual.

[5] A trust is a legal instrument in which assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary. *Black's Law Dictionary* 1546 (8th ed. 2004) (definition of "trust"). This structure means that the beneficiary does not actually own the assets of the trust, but instead has an equitable right to derive benefits from them. (The benefits vary according to the terms of the trust.) The trust has long been a tool for evading the rigid strictures of the law, which has generally been a positive development. For example, in feudal England—the trust's birthplace—the trust allowed younger sons and daughters to inherit land despite strict rules at law against devising land by will. *See* Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. Pub. Int. L.J. 91, 101 (2000) (citing Austin Wakeman Scott, Abridgment of the Law of Trusts 11 (1960)). And the trust's unique structure makes it useful for countless salutary purposes in modern society.

But this same bifurcated ownership structure has been used to manufacture eligibility for government welfare programs like Medicaid. As with many government programs, eligibility for Medicaid is partially dependent on the claimant's income and assets. Wealthy individuals are expected to exhaust their own resources before turning to the public for

man v. Berger, 409 F.Supp. 1225, 1225–26 (S.D.N.Y.1976), *quoted by Schweiker*, 453 U.S. at 43 n. 14, 101 S.Ct. 2633.

2. "[T]he medically needy may qualify for financial assistance for medical expenses if they incur such expenses in an amount that effectively reduces their income to the eligibility level. Only when they 'spend down' the amount by which their income exceeds that level, are they in roughly the same position as [the categorically needy]: any further expenditures for medical expenses then would have to come from funds required for basic necessities." *Atkins v. Rivera*, 477 U.S. 154, 158, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986) (footnote and citation omitted).

assistance. But trusts can enable these same individuals to technically "own" nothing at all, even though they may have access to substantial wealth. Such claimants may then qualify for Medicaid. *See Johnson v. Guhl*, 357 F.3d 403, 405 (3d Cir.2004) ("Because Medicaid is available to the needy, creative lawyers and financial planners have devised various ways to 'shield' wealthier claimants' assets in determining Medicaid eligibility."). Individuals have gained access to taxpayer-funded healthcare while retaining the benefit of their wealth and the ability to pass that wealth to their heirs.

Congress understandably viewed this as an abuse and began addressing the problem with statutory standards enacted in 1986. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99–272, § 9506(a), 100 Stat. 82 (Apr. 7, 1986). These standards were repealed and replaced in 1993 by the current trust-counting rules. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, Title XIII § 13611(d)(1)(c), 107 Stat. 312 (Aug. 10, 1993) (OBRA 1993). Those rules are at issue in this case.

[6] In the 1993 OBRA amendments, Congress established a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility. But Congress also excepted from that rule three types of trusts meeting certain specific requirements. Taken together, these are generally called "special needs trusts" or "supplemental needs trusts." "A supplemental needs trust is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability and is intended to provide for expenses that assistance programs such as Medicaid do not cover." *Sullivan v. Cnty. of Suffolk*, 174 F.3d 282, 284 (2d Cir.1999) (internal quotation marks omitted). These expenses—books, television, Internet, travel, and even such necessities as clothing and toiletries—would rarely be considered extravagant.

[7] One type of special needs trust—the one at issue in this case—is the pooled special needs trust. "A 'pooled trust' is a special arrangement with a non-profit organization that serves as trustee to manage assets belonging to many disabled individuals, with investments being pooled, but with separate trust 'accounts' being maintained for each disabled individual." Jan P. Myskowski, *Special Needs Trusts in the Era of the Uniform Trust Code*, 46 N.H. Bar J., Spring 2005, at 16. The pooled special needs trust was intended for individuals with a relatively small amount of money. By pooling these small accounts for investment and management purposes, overhead and expenses are reduced and more money is available to the beneficiary.

The Medicaid statute says the following regarding pooled trusts:

> (4) This subsection [the rules counting trusts as available assets for purposes of Medicaid eligibility] shall not apply to any of the following trusts:
>
> . . . .
>
> (C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
>
> (i) The trust is established and managed by a non-profit association.
>
> (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
>
> (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by

> the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
>
> (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

42 U.S.C. § 1396p(d)(4).

In 2005, Pennsylvania sought to regulate pooled trusts (and special needs trusts more generally) by passing Section 1414, which states:

> Section 1414. Special Needs Trusts.—
>
> (a) A special needs trust must be approved by a court of competent jurisdiction if required by rules of court.
>
> (b) A special needs trust shall comply with all of the following:
>
> (1) The beneficiary shall be an individual under the age of sixty-five who is disabled, as that term is defined in Title XVI of the Social Security Act (49 Stat. 620, 42 U.S.C. § 1381 et seq.)
>
> (2) The beneficiary shall have special needs that will not be met without the trust.
>
> (3) The trust shall provide:
>
> (i) That all distributions from the trust must be for the sole benefit of the beneficiary.
>
> (ii) That any expenditure from the trust must have a reasonable relationship to the needs of the beneficiary.
>
> (iii) That, upon the death of the beneficiary or upon the earlier termination of the trust, the department and any other state that provided medical assistance to the beneficiary must be reimbursed from the funds remaining in the trust up to an amount equal to the total medical assistance paid on behalf of the beneficiary before any other claimant is paid: Provided, however, That in the case of an account in a pooled trust, the trust shall provide that no more than fifty percent of the amount remaining in the beneficiary's pooled trust account may be retained by the trust without any obligation to reimburse the department.
>
> . . . .
>
> (c) If at any time it appears that any of the requirements of subsection (b) are not satisfied or the trustee refuses without good cause to make payments from the trust for the special needs of the beneficiary and, provided that the department or any other public agency in this Commonwealth has a claim against trust property, the department or other public agency may petition the court for an order terminating the trust.
>
> . . . .
>
> (f) As used in this section, the following words and phrases shall have the following meanings:
>
> . . . .
>
> "Special needs" means those items, products or services not covered by the medical assistance program, insurance or other third-party liability source for which a beneficiary of a special needs trust or his parents are personally liable and that can be provided to the beneficiary to increase the beneficiary's quality of life and to assist in and are related to the treatment of the beneficiary's disability. The term may include medical expenses, dental expenses, nursing and custodial care, psychiatric/psychological services, recreational therapy, occupa-

maining funds in Mary Wagner's pooled account at her death[.]" Obviously, Mary Wagner's interests remain adverse to those of the Commonwealth.

Finally, the stipulated facts indicate that DPW has created and internally circulated a document addressing various provisions of the statute. Defendants argue that these guidelines have not been used to disapprove any accounts or expenditures, but that is beside the point. The document undermines Defendants' argument that they have not reached any conclusions on the scope and meaning of the statute. For example, they have concluded that "luxury items" cannot be bought with trust funds and that "[n]o assets can be added after age 65."

The issues raised by Defendants will often be present in declaratory judgment cases. Such actions are often brought specifically because legal rights and obligations are ambiguous or undefined. Plaintiffs seek to clarify those legal rights and obligations. We understand that DPW has been entrusted by the Pennsylvania Legislature with the duty of interpreting Section 1414 and we appreciate DPW's stated intent to interpret the statute reasonably. But Plaintiffs have satisfied *Step–Saver's* requirements. They are entitled to have Section 1414 examined in light of federal law and to have their legal rights and obligations clarified. We hold that Plaintiffs' claims are ripe for adjudication.

V.B

[21] Defendants' central argument, cutting across both the private-right-of-action and the merits sections of their brief, is that 42 U.S.C. § 1396p(d)(4) does not *mandate* that the States exempt special needs trusts meeting its criteria. Defendants' argument has been embraced by both the Second and Tenth Circuits. *See Wong v. Doar*, 571 F.3d 247 (2d Cir.2009); *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000). Meanwhile, the Eighth Circuit suggests in a passing reference that § 1396p(d)(4) is mandatory. *See Norwest Bank of N.D., N.A. v. Doth*, 159 F.3d 328, 330 (8th Cir.1998). Having given careful consideration to Defendants' arguments and to the positions of our sister circuits, we conclude that 42 U.S.C. § 1396p(d)(4) imposes mandatory obligations upon the States.

Defendants' key point is that the beginning of the special needs exemption states: "*This subsection* shall not apply to any of the following trusts[.]" 42 U.S.C. § 1396p(d)(4) (emphasis added). This language refers to the portion of the Medicaid statute requiring States to count trusts against eligibility. It abrogates that section insofar as it applies to special needs trusts. Both parties agree that this lifts the obligation levied upon the States by the trust-counting provisions and says that the States do not have to apply the trust-counting provisions to qualifying special needs trusts. But the provision does not specifically say that "Any trusts meeting these requirements shall not be counted as available assets for determining Medicaid eligibility."

Defendants argue that this creates a "gap" where the States can legislate. This was the Second Circuit's position in *Wong v. Doar*, 571 F.3d at 256–57 ("Congress's negative command that (d)(3) 'shall not apply' to the trusts referenced in (d)(4) does not, however, provide any guidance as to what rules *shall* apply to (d)(4) trusts."). Similarly, in *Keith v. Rizzuto*, the Tenth Circuit concluded that "Section 1396p(d)(4) ... provides an exception to a requirement. States accordingly need not count income trusts for eligibility purposes, but nevertheless may ... opt to do so." 212 F.3d at 1193; *see also Hobbs ex rel. Hobbs*

v. Zenderman, 579 F.3d 1171, 1179–80 (10th Cir.2009) (applying *Keith* to conclude that 42 U.S.C. § 1396p(d)(4)(A) does not confer a private right of action).

"[T]he intent of Congress is the 'ultimate touchstone' of preemption analysis." *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir.2010) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). And because "the best evidence of Congress's intent is what it says in the texts of the statutes," *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir.2002), we give controlling weight to the statutory text. But we believe that focusing solely on the words "[t]his subsection" has caused Defendants and several courts to miss the forest for the trees.

In enacting the trust provisions of OBRA 1993, Congress provided a comprehensive system for dealing with the relationship between trusts and Medicaid eligibility. After limited success with the Medicaid Qualifying Trusts provisions enacted in 1986, Congress made a deliberate choice to expand the federal role in defining trusts and their effect on Medicaid eligibility. Evidence of this can be found throughout the Medicaid statute. For example, the current text of 42 U.S.C. § 1396a(a)(18) requires States to comply with "section 1396p of this title with respect to ... treatment of certain trusts[.]" Before OBRA 1993, the provision instructed States to "comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, and transfers of assets[.]" 42 U.S.C. § 1396a(a)(18) (1992). It did not mention compliance with 1396p.

Congress made a specific choice to expand the types of assets being treated as trusts and to unambiguously require States to count trusts against Medicaid eligibility. Its primary objective was unquestionably to prevent Medicaid recipients from receiving taxpayer-funded health care while they sheltered their own assets for their benefit and the benefit of their heirs. But its secondary objective was to shield special needs trusts from impacting Medicaid eligibility. And the Supreme Court has emphasized the importance of giving full effect to all of Congress' statutory objectives, as well as the specific balance struck among them. *See Rodriguez v. United States*, 480 U.S. 522, 525–26, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice-and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

Congress' intent was not merely to shelter special needs trusts from the effect of 42 U.S.C. § 1396p(d)(3). It was to shelter special needs trusts from having any impact on Medicaid eligibility. This conclusion is rooted in the statutory text. If Congress had intended to do as the Defendants insist—provide an exception to the trust-counting rules through which the States were free to do as they wish—it seems unlikely that Congress would use the word "shall" in its command that "[t]his subsection shall not apply." Any number of constructions would have been more amenable to the Defendants' position. For example, Congress could have said: "States are not required to apply this subsection to any of the following trusts." Congress is not required to use any particular magic words, but its choice of an imperative like "shall" does give evidence of its intent.

Even more important is the structure of the asset-counting rules. While Defen-

dants focus on the specific mandate-and-exception structure of 42 U.S.C. § 1396p(d)(3) and (4), both of these sit within a complex and comprehensive system of asset-counting rules. Congress rigorously dictates what assets shall count and what assets shall not count toward Medicaid eligibility. State law obviously plays a role in determining ownership, property rights, and similar matters. Here Congress has not only provided a comprehensive system of asset-counting rules, it has *actually legislated on this precise class of asset.* Defendants argue that Congress left a gap or an unprovided-for case with regard to these trusts. But with such a rigorous system, it seems clear that Congress intended to create a purely binary system of classification: either a trust affects Medicaid eligibility or it does not.

Finally, while this shades into our preemption analysis, it is important to note that 42 U.S.C. § 1396p(d)(4) basically provides a federal definition for what constitutes a special needs trust. Through this statutory provision, Congress has set the boundaries for what will be considered a special needs trust under federal law. Pennsylvania's Section 1414 adds requirements to this definition. As our preemption analysis will demonstrate, States are not free to rewrite congressional statutes in this way.

For these reasons, rooted in the text and structure of the Medicaid statute, we respectfully disagree with the conclusion of the Second and Tenth Circuits. We hold that in determining Medicaid eligibility, States are required to exempt any trust meeting the provisions of 42 U.S.C. § 1396p(d)(4).[15]

15. Trusts are, of course, required to abide by a State's general law of trusts, the effects of which will be discussed in greater detail in our preemption analysis.

V.C.1

[22, 23] To find a private right of action under Section 1983: (1) the statutory provision must benefit the plaintiffs with a right unambiguously conferred by Congress; (2) the right cannot be so "vague and amorphous" that its enforcement would strain judicial competence; and (3) the statute must impose a binding obligation on the States. *See Blessing v. Freestone,* 520 U.S. 329, 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997); *Gonzaga Univ. v. Doe,* 536 U.S. 273, 282, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Defendants challenge the first and third parts of this test. We conclude that Plaintiffs have a private right of action under Section 1983.

Medicaid provides eligible individuals with the statutory right to receive medical assistance and to receive it with reasonable promptness. *See* 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10) & 1396d(a). Our Court has already concluded that Medicaid provides a private right of action under Section 1983 for interference with this right. *See Sabree ex rel. Sabree v. Richman,* 367 F.3d 180, 189 (3d Cir.2004). Plaintiffs have a right to receive reasonably prompt medical assistance so long as they meet the eligibility requirements as those requirements are defined by federal law. Plaintiffs allege that Section 1414 changes the eligibility requirements for medical assistance, contrary to federal law. Thus, it interferes with Plaintiffs' right to receive medical assistance. Plaintiffs therefore have a cause of action under Section 1983.

[24] It is a closer question whether the Trust Plaintiffs have a private right of action here. To be sure, they do not have a right to receive medical assistance. We nonetheless conclude that the Medicaid

state law by federal law. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."). We acknowledged as much in *St. Thomas–St. John Hotel & Tourism Ass'n v. Gov't of the U.S.V.I.*, 218 F.3d 232, 240 (3d Cir.2000) ("[A] state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption.... The Supreme Court has recognized that such a challenge presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.").[18]

Our opinion in *Gonzalez v. Young*, 560 F.2d 160, 166 (3d Cir.1977), is not to the contrary. There we concluded that 28 U.S.C. § 1343 did not confer jurisdiction over a claim that the federal welfare program preempted New Jersey law. But here Section 1331 provides federal question jurisdiction so long as there is a "civil action[ ] arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.[19] In any event, *Shaw* postdates *Gonzalez* and commands that jurisdiction and a cause of action are present here.

We are compelled to hold that the Supremacy Clause provides a private right of action here.[20]

V.D

Our preemption analysis must necessarily examine each individual component of the Pennsylvania statute to determine whether it conflicts with the Medicaid statute. But we begin by determining whether Congress had an overarching intent in enacting the trust-counting provisions and the special needs exemptions.

[26–28] The basic principles of a preemption analysis are familiar. First, "the intent of Congress is the 'ultimate touchstone' of preemption analysis." *Farina*, 625 F.3d at 115 (quoting *Medtronic*, 518

18. It is worth noting, though, that our statement in *St. Thomas-St. John* is only dicta, because the Supremacy Clause has no direct role in a conflict between federal law and territorial law. Such a conflict presents no competition between state and federal sovereignty.

19. Section 1331 could not be used in *Gonzalez* as the version in effect at the time had an amount-in-controversy requirement of $10,000. *See Gonzalez*, 560 F.2d at 164. That requirement was removed in 1980. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96–486, 94 Stat. 2369 (Dec. 1, 1980).

20. When this case was briefed, the Supreme Court was poised to revisit this issue in *Douglas v. Independent Living Center of Southern California*, 565 U.S. ——, 132 S.Ct. 1204, 182 L.Ed.2d 101 (2012). But though the question on which the Court granted certiorari squarely presented the issue, the Court expressly declined to "address whether the Ninth Circuit properly recognized a Supremacy Clause action to enforce this federal statute[.]" *Id.* at 1211. Instead, the Court remanded for consideration of agency determinations issued during the pendency of the appeal. *See id.* at 1206–08. The Court reached this decision over the strong dissent of the Chief Justice, joined by Justices Scalia, Thomas, and Alito. The dissenting justices would have concluded that "[w]hen Congress did not intend to provide a private right of action to enforce a statute enacted under the Spending Clause, the Supremacy Clause does not supply one of its own force." *Id.* at 1215 (Roberts, C.J., dissenting). Although the Supreme Court is free to revisit *Shaw* if it so desires, we are not. *Shaw* is binding precedent unless and until it is abrogated by the Supreme Court.

U.S. at 485, 116 S.Ct. 2240). Second, "we 'start[ ] with the basic assumption that Congress did not intend to displace state law.' " *Id.* at 116 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)). Third, when we are dealing with Spending Clause legislation, we require Congress to speak "unambiguously," because such legislation is in the nature of a contract between Congress and the States, and the States are entitled to know the conditions under which they are accepting. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

[29] Bearing these principles in mind, we discern an overarching intent behind the trust exemptions. First, Congress intended to mandate the exemption of special needs trusts from the trust-counting rules. We explained our reasoning for this conclusion in Section V.B.

[30] Second, Congress intended that special needs trusts be defined by a specific set of criteria that it set forth and no others. We base this upon Congress' choice to provide a list of requirements to be met by special needs trusts. The venerable canon of statutory construction—*expressio unius est exclusio alterius*—essentially says that where a specific list is set forth, it is presumed that items not on the list have been excluded. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n. 9, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that application of *expressio unius* leads to the conclusion that the qualifications for office expressed in the Constitution are the sole requirements and other requirements cannot be imposed); *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir.2007) (applying *expressio unius* to a list of requirements and concluding that expression of the "extreme hardship" requirement forecloses conclusion that additional requirements exist beyond "extreme hardship"). Absent an explicit statement or a clear implication that States are free to expand the list, *expressio unius* leads us to conclude they are not.

Third and finally, while Congress did not intend to allow additional burdens targeted specifically at special needs trusts, there is no reason to believe it abrogated States' general laws of trusts or their inherent powers under those laws. There is necessarily some tension between this conclusion and the bar on States adding requirements. For example, even application of the trustee's traditional duty of loyalty—to "administer the trust solely in the interests of the beneficiaries[,]" 20 Pa. Cons.Stat. Ann. § 7772(a)—could be considered an extra requirement. But we reject the conclusion that application of these traditional powers is contrary to the will of Congress. After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues.

These three conclusions—that the special needs exemptions are mandatory, that Congress' stated requirements for special needs trusts are exclusive, and that States retain their traditional regulatory authority—guide our preemption analysis here.[21]

21. We note briefly that we see no reason for application of the "no more restrictive" rule (NMR rule) in this case. The NMR rule bars States—in determining whether the medically needy are eligible for Medicaid—from using a methodology that is "more restrictive than the methodology which would be employed under the supplemental security income program." 42 U.S.C. § 1396a(a)(10)(C)(i)(III). While the NMR rule was heavily relied upon by the District Court and its application has been extensively briefed, using the NMR rule without consideration of Congress' underlying intent is like using a yardstick without knowing

V.D.1

[31] Pennsylvania's 50% retention provision provides:

> [U]pon the death of the beneficiary or upon the earlier termination of the trust, the department and any other state that provided medical assistance to the beneficiary must be reimbursed from the funds remaining in the trust up to an amount equal to the total medical assistance paid on behalf of the beneficiary before any other claimant is paid: Provided, however, That in the case of an account in a pooled trust, the trust shall provide that no more than fifty percent of the amount remaining in the beneficiary's pooled trust account may be retained by the trust without any obligation to reimburse the department.

62 Pa. Stat. Ann. § 1414(b)(3)(iii). The Medicaid statute, meanwhile, includes the following language:

> To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

42 U.S.C. § 1396p(d)(4)(C)(iv). These two provisions are irreconcilable. We conclude that Congress intended to permit special needs trusts—at the discretion of the trust—to retain up to 100% of the residual after the death of the disabled beneficiary. We therefore hold the repayment provision of Section 1414 preempted by federal law.[22]

Plaintiffs argue that the Medicaid provision leaves it to the trust to decide how much—if any—money should be provided to the State to reimburse it for Medicaid expenses. We agree. This construction accords with the statutory text and Congress' evident solicitude for these pooled trusts (evident by the fact that there is a special category of exemption for them.) Retaining the residual enables the trust to cover administrative fees and other overhead without increasing charges on ac-

where to start measuring. Regardless, the more direct approach is to apply Medicaid standards in resolving this case. As the Supreme Court has recognized, the Medicaid statute requires the States to base assessments of financial need (for both categorically needy and medically needy individuals) on resources "available" to the recipient. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981). The trust provisions are deliberately worded to require that States consider money held in trust "available" unless the trust is protected by one of the exemptions. 42 U.S.C. § 1396p(d)(3). (Use of Medicaid standards instead of SSI standards may be a distinction without a difference. The SSI standards incorporate by reference the Medicaid trust exemptions. *See* 42 U.S.C. § 1382b(e)(5). But given the complexity of Medicaid, we seek to simplify the analysis in any way we can.)

22. Defendants argue that there is a particular justiciability problem with the 50% repayment provision, as the Individual Plaintiffs supposedly have no interest in where the remainder goes after they die (as they have forfeited to the trust their right to the remainder) and Trust Plaintiffs do not have a "personal right" in the pooled trusts. (Appellants' Principal Br. at 26. n.7) We disagree. The injury to the Individual Plaintiffs does not arise from the disposition of property after their death. Rather, it arises from imposing additional requirements on their existing trust. If, for example, DPW reviews the trust agreement of an Individual Plaintiff and determines that the agreement is invalid for lack of a provision for repaying the State, DPW calls into question the validity of the Individual Plaintiff's trust and, by extension, their eligibility for medical assistance. This is an injury in fact sufficient to confer standing upon the Individual Plaintiffs. And for the reasons discussed above, we believe the relevant provisions of the Medicaid statute grant a private right of action to the Trust Plaintiffs.

counts of living beneficiaries At the same time, should the trust attempt to pass the money to the deceased's estate, this provision acts as a safeguard to ensure that the State gets repaid. *See* Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest,* 10 B.U. Pub. Int. L.J. 91, 132 (2000) ("To the extent the remaining balance in an individual trust account is retained by the pooled trust after the death of the beneficiary, the State is not entitled to be paid back. However, any amounts that are not retained by the pooled trust must be used to reimburse the State for the cost of medical assistance provided to the beneficiary during his or her lifetime.").

Defendants have not offered any reasonable alternative construction of the Medicaid provision. Their principal argument is that the Medicaid statute makes no mention of who gets to decide the percentage retained by the trust. But Plaintiffs' construction of the statute—which we find persuasive, particularly in the absence of a contrary construction from the Defendants—is that this is a protective provision, intended to shield the trust from repayment obligations. Permitting the States to choose how much the trust can retain would eviscerate that protection. While Pennsylvania seeks "only" 50% of the trust residual, States would be free to demand any amount they wished, with the possible exception of 100%, and the courts would be powerless to mediate these disputes. Absent some statutory guidance, there is no reasonable way for us to say that demanding 75%, 85%, or even 99.9% of the residual is any less permissible than demanding 50%. We cannot believe Congress would intentionally cripple its statute in that manner.

It is particularly noteworthy that this provision differs from the other three types of special needs trusts. In enacting the trust-counting rules, Congress designated three types of exempted trusts in successive statutory paragraphs at 42 U.S.C. § 1396p(d)(4)(A), (B), and (C). Both the first and second exemptions, 42 U.S.C. § 1396p(d)(4)(A) and (B), require repayment up to the total amount expended for medical assistance. The pooled-trust provision, 42 U.S.C. § 1396p(d)(4)(C), is the only one of the three exemptions that qualifies this repayment obligation and permits the trust to retain some portion of the residual. This is strong evidence of congressional intent. *See Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

There is no question that Congress could have chosen to strike the balance differently, determining that the trust could retain some portion of the residual while partially repaying the State. But Congress chose to strike the balance in favor of the trust. It is important to remember that the residual here is not being passed to the deceased beneficiary's estate. It is being retained by a charitable organization whose purpose is to operate special needs trusts for the benefit of the disabled. *See* 42 U.S.C. § 1396p(d)(4)(C)(i) (requiring that a pooled trust be "established and managed by a non-profit association"). To the extent any part of the residual *is* passed to the estate, States are free to seek repayment from those funds. But Congress has given the trust discretion to determine whether to retain the residual. We hold the repayment provision of Section 1414 preempted by federal law.

The Form that Will Transform Your Post-Mortem Retention

By Ron M. Landsman and Denise Fike

I. Retention is allowed under Federal law; states cannot restrict it

A. The statute

1. ***Payback required.*** In general, first party special needs trusts are required to have payback. 42 U.S.C. § 1396p(d)(4)(A), (B) an (C).

   a. **Individual trusts:** 42 U.S.C. § 1396p(d)(4)(A) provides that the rules that make self-settled trusts generally "available" do not apply to:

      [a] trust containing the assets of an individual under age 65 ... 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.

   b. **Income or "Miller v. Ybarra" trusts:** 42 U.S.C. § 1396p(d)(4)(B) provides that the rules that make self-settled trusts generally "available" do not apply to:

      A trust established in a State for the benefit of an individual if—

      (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust,

      (ii) 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; and

      (iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

   c. **Pooled income trusts.** 42 U.S.C. § 1396p(d)(4)(C) provides that the rules that make self-settled trusts generally "available" do not apply to:

      A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

      (i) The trust is established and managed by a non-profit association.

      (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

      (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

      (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.