

January 2014

Missing the Forest for the Trees: Why Supplemental Needs Trusts Should Be Exempt from Medicaid Determinations

Jeffrey R. Grimyser

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Health Law and Policy Commons](#), [Legislation Commons](#), [Medical Jurisprudence Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Jeffrey R. Grimyser, *Missing the Forest for the Trees: Why Supplemental Needs Trusts Should Be Exempt from Medicaid Determinations*, 89 Chi.-Kent L. Rev. 439 (2014).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol89/iss1/16>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

MISSING THE FOREST FOR THE TREES: WHY SUPPLEMENTAL
NEEDS TRUSTS SHOULD BE EXEMPT FROM MEDICAID
DETERMINATIONS

JEFFREY R. GRIMYSER*

INTRODUCTION

Imagine a middle-aged man who recently suffered from a stroke, causing him severe brain trauma. His disability is permanent, so he now lives in a nursing home and needs frequent medical assistance. He has no income because he can no longer work, but through Medicaid, his state helps him out—paying for his health care because his assets are low enough to qualify him for the program.¹ Later, his family decides to place his limited assets in a trust, the purpose of which is to have Medicaid continue to pay for his medical needs, but have the trust pay for items that Medicaid will not cover, such as books, television, internet, travel, clothing, and toiletries.²

Under the law of the state where the man lives, he becomes ineligible for Medicaid when the trust is established. The policy behind the state law is to prevent individuals who receive Medicaid from spending their available assets on non-medical needs. This law is especially critical now, as the state has huge budget deficit issues partly because of increasing Medicaid enrollment and expenditures.³

In 1993, Congress enacted several trust provisions within the Omnibus Budget Reconciliation Act of 1993 (OBRA)⁴ to prevent individuals from sheltering their assets in trusts while receiving Medicaid.⁵ OBRA has a default rule that broadly mandates that income and assets contained in most

*I would like to thank Professor Mary F. Radford of Georgia State University College of Law for her substantive assistance on this issue. Additionally, many thanks to Elizabeth, the love of my life, and to all of my family for their support during law school.

1. See *Ark. Dep't. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006).

2. See, e.g., *Lewis v. Alexander*, 685 F.3d 325, 333 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

3. For example, during the recent recession, roughly from 2007 to 2009, national Medicaid monthly enrollment increased by nearly six million and spending increased by thirteen percent. See JOHN HOLAHAN ET AL., KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID SPENDING GROWTH OVER THE LAST DECADE AND THE GREAT RECESSION, 2000-2009, at 1 (2011), available at <http://www.kff.org/medicaid/upload/8152.pdf>.

4. Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified as amended at 42 U.S.C. §§ 1396-1399 (2003)).

5. See *infra* Part III.C.

types of trusts be counted when a state Medicaid agency determines a person's Medicaid eligibility.⁶ But OBRA contains a narrow exception to the default rule for special needs trusts or supplemental needs trusts (SNTs),⁷ so called because they supplement a person's Medicaid by paying for items not covered by Medicaid.⁸ Thus, under federal law it is clear that the default rule does not apply to SNTs; however, 42 U.S.C. § 1396p(d)(4) fails to indicate what laws states may enact to regulate SNTs.

SNTs are relatively unknown tools for individuals with disabilities to receive Medicaid without "impoverish[ing] themselves," but "there is a long list of potential stumbling blocks" to use them.⁹ To begin, the trust must meet the elements for one of the three types of SNTs listed in the Medicaid statute.¹⁰ Additionally, the trust provisions have confused federal courts, causing a recent circuit split about whether assets contained within SNTs can be counted by state Medicaid agencies when they determine the trust beneficiaries' Medicaid eligibility and benefits.¹¹ On one hand, one can read § 1396p(d)(4) as being mandatory, which would require all states to exempt assets in SNTs when determining Medicaid eligibility. This would allow the beneficiaries to continue using SNTs and remain eligible for Medicaid, but would force the states, as payors, to cover more citizens under Medicaid. On the other hand, one can interpret § 1396p(d)(4) as being optional, which would permit each state to enact laws that disqualify beneficiaries of SNTs from receiving Medicaid. This would enable states to save some of their limited resources, but would cause the beneficiaries to lose their Medicaid benefits if they use SNTs.

This Note argues that § 1396p(d)(4) is best read as being mandatory on the states based on the applicable statutory interpretation tools. This issue has widespread implications because Medicaid is extremely important to the health of many indigent people. For instance, a recent study showed that expanding Medicaid eligibility has the potential to "significant[ly]

6. See 42 U.S.C. § 1396p(d)(3) (2006). Note, however, that use of the phrase "default rule" in this Note is merely referring to a descriptive term to show that § 1396p(d)(3) applies to nearly all trusts, rather than referring to the contract law term of art. See, e.g., *Lewis*, 685 F.3d at 333 (stating that in § 1396p(d)(3) "Congress established a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility.").

7. See § 1396p(d)(4).

8. Mary F. Radford & Clarissa Bryan, *Irrevocability of Special Needs Trusts: The Tangled Web That Is Woven When English Feudal Law Is Imported into Modern Determinations of Medicaid Eligibility*, 8 NAT'L ACAD. ELDER L. ATT'YS J. 1, 2 (2012). These trusts are also known as "special needs trusts" because they are generally used for individuals with special needs. See *id.* at 2-7.

9. Tara Siegel Bernard, *What's a Pooled Trust? A Way to Avoid the Nursing Home*, N.Y. TIMES, Nov. 4, 2010, at F4.

10. See *infra* Part I.C.

11. See *infra* Part II.

decrease” mortality rates of those eligible for Medicaid.¹² Federal legislation requiring states to pay for health care also touches upon state concerns over federalism.¹³ However, this Note argues that individuals with SNTs should be eligible for Medicaid because the SNTs were designed to supplement Medicaid, not prevent a person from receiving Medicaid.

Part I briefly explains the Medicaid statute, SNTs, and the OBRA amendments. Part II explains the circuit split and examines each circuit’s use of the statutory interpretation tools. Part III analyzes those tools to interpret § 1396p(d)(4), including the text, the legislative history, the Supreme Court precedent, and the agency interpretation. This Note then argues that § 1396p(d)(4) is best read as being mandatory on the states based on the purpose of the Medicaid statute and the structure of § 1396p(d). Finally, Part IV claims that the provision should be mandatory also based on policy considerations, including assisting the beneficiaries with disabilities, rejection of the states’ “sheltering assets” complaints, and creating a uniform interpretation of § 1396p(d)(4).

I. BACKGROUND OF MEDICAID, SUPPLEMENTAL NEEDS TRUSTS, AND OBRA

A. *The Medicaid Statute*

In 1965, Congress established Medicaid under Title XIX of the Social Security Act.¹⁴ Enacted in response to national concerns over citizens’ lack of affordable health care and rising medical costs,¹⁵ Medicaid was designed to help individuals without the financial resources obtain necessary medical care through medical assistance plans.¹⁶ It quickly became the primary federal program for providing medical care to indigent people through public funding.¹⁷

12. Benjamin D. Sommers, Katherine Baicker & Arnold M. Epstein, *Mortality and Access to Care Among Adults After State Medicaid Expansions*, 367 NEW ENG. J. MED. 1025, 1029 (2012) (discussing study showing mortality rates decreased over a five-year period in three states that expanded Medicaid eligibility in comparison to neighboring states that did not).

13. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012) (holding that the mandatory nature of the Medicaid expansion program under the Affordable Care Act was unconstitutional because Congress was “not free to . . . penalize States that choose not to participate in that new program by taking away their existing Medicaid funding”).

14. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended at 42 U.S.C. § 1396 (1965)). Further, Medicaid was enacted under Congress’ Spending Clause authority. *Lewis v. Alexander*, 685 F.3d 325, 331-32 (3d Cir. 2012), cert. denied, 133 S. Ct. 933 (2013).

15. See Radford & Bryan, *supra* note 8, at 5.

16. See *Harris v. McRae*, 448 U.S. 297, 301 (1980).

17. *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 262 n.19 (1974).

As of 2012, Medicaid was the nation's largest public health insurer, with a population exceeding fifty-five million.¹⁸ As a joint state and federal program, Medicaid had a combined federal-state cost of \$400 billion per year.¹⁹ To participate in the Medicaid program and receive federal funding, a state must have its medical assistance plan approved by the Secretary of the United States Department of Health and Human Services (HHS).²⁰ On average, Medicaid spending accounts for twenty percent of a state's overall budget, with the federal government funding about fifty to eighty-three percent of those costs.²¹

States may choose whether to participate in the Medicaid program,²² but the federal government encourages them to opt in to the program by providing financial incentives.²³ If a state chooses to participate, then it must comply with the federal regulations promulgated by the Centers for Medicare and Medicaid Services (CMS), which is a subdivision of the HHS.²⁴ In practice, all fifty states have joined the Medicaid program.²⁵ As long as the state's Medicaid plan complies with the federal regulations, the state Medicaid agency is responsible for the day-to-day administration and supervision of the program.²⁶ This in turn allows each state to customize their Medicaid programs while limiting costs.

To become eligible for Medicaid individuals must have "income and resources [that] are insufficient to meet the cost of necessary medical services."²⁷ Medicaid is generally given to two groups of individuals: the categorically needy, who qualify for public assistance under the Supplemental Security Income program (SSI) or other federal programs designed to assist low-income groups;²⁸ and the medically needy, who meet the non-financial eligibility requirements of the categorically needy, but whose

18. John D. Blum & Gayland O. Hethcoat II, *Medicaid Governance in the Wake of National Federation of Independent Business v. Sebelius: Finding Federalism's Middle Pathway*, from *Administrative Law to State Compacts*, 45 J. MARSHALL L. REV. 601, 610 (2012). Note that this figure does not account for the recent Affordable Care Act expansion. *Id.*

19. *Id.* at 611.

20. *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1208 (2012).

21. *Nat'l. Fed'n. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012).

22. *Ark. Dep't. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006).

23. *See, e.g., Sebelius*, 132 S. Ct. at 2604.

24. *Ahlborn*, 547 U.S. at 275. Note that the CMS was previously known as the Health Care Financing Administration. *Id.* at 275 n.3.

25. *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1232 (11th Cir. 2011).

26. *Reynolds v. Giuliani*, 506 F.3d 183, 188 (2d Cir. 2007).

27. *Univ. of Wash. Med. Ctr. v. Sebelius*, 634 F.3d 1029, 1031 (9th Cir. 2011) (quoting 42 U.S.C. § 1396-1 (2006)).

28. *Pharma. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 651 n.4 (2003) (citing 42 U.S.C. § 1396a(a)(10)(A)(i) (2006)).

income or assets are too high to qualify them as categorically needy.²⁹ Once a state has opted in to the Medicaid program, it must provide assistance to the categorically needy, but may provide coverage to the medically needy.³⁰

B. Supplemental Needs Trusts

A trust is generally a legal instrument where assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary.³¹ Because the beneficiary does not own the assets in the trust, but has an equitable right to use them, he or she may use the trust to avoid certain legal requirements.³²

Supplemental needs trusts are a narrow category of trusts that help individuals with severe and chronic disabilities pay for items and services that Medicaid will not cover.³³ This includes additional health care services and equipment, specialized or unique therapy, private health insurance, educational and vocational training, computers and software, case management services, and recreational activities.³⁴ SNTs are commonly used where a person with a disability receives a “‘lump sum’ of money from a lawsuit, inheritance, or other source.”³⁵ The typically modest assets in SNTs range from \$10,000 to \$150,000.³⁶

C. OBRA and § 1396p(d)(4)

In 1993, President Bill Clinton signed into law the Omnibus Budget Reconciliation Act of 1993.³⁷ Before OBRA, no federal law mentioned

29. *Id.* at 651 n.5 (citing § 1396a(a)(10)(C)).

30. *Schweiker v. Hogan*, 457 U.S. 569, 572 (1982).

31. *Lewis v. Alexander*, 685 F.3d 325, 332 (3d Cir. 2012) (citing BLACK’S LAW DICTIONARY 1546 (8th ed. 2004)), *cert. denied*, 133 S. Ct. 933 (2013). Similarly, the Medicaid statute defines a trust as “any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary [of the HHS] specifies.” § 1396p(d)(6).

32. *Lewis*, 685 F.3d at 332.

33. *See Sullivan v. Cnty. of Suffolk*, 174 F.3d 282, 284 (2d Cir. 1999). Note that third-party trusts, in contrast to special needs trust, are established with a third party’s assets and OBRA does not regulate them, so they are not the subject of this Note. *See Bradley J. Frigon & W. Eric Kuhn, Which SNT, When & Why*, 5 NAT’L. ACAD. OF ELDER L. ATT’YS J. 1, 7 (2009).

34. *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, 95-96 (2000). For a more comprehensive list of goods and services that beneficiaries may use SNTs to pay for, see Ruthann P. Lacey & Heather D. Nadler, *Special Needs Trusts*, 46 FAM. L. Q. 247, 260-61 (2012).

35. *Rosenberg*, *supra* note 34, at 95.

36. *Rosenberg*, *supra* note 34, at 97 n.27 (collecting cases).

37. *Ira Stewart Wiesner, Obra ‘93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 19 NOVA L. REV. 679, 681 (1995).

SNTs because only state laws regulated them.³⁸ OBRA was enacted partly in response to the states' budgetary crises caused by individuals abusing Medicaid eligibility rules by hiding their assets in trusts to remain eligible for Medicaid³⁹ or to provide an inheritance to their children and family.⁴⁰

Yet, OBRA significantly changed whether individuals could use trusts while remaining eligible for Medicaid.⁴¹ In 42 U.S.C. § 1396p(d)(3), Congress created a default rule: assets in a trust are considered available to the individual, such that the state must count them when determining the individual's Medicaid eligibility.⁴² This rule is unquestionably mandatory on the states based on the statute's text.⁴³

In § 1396p(d)(1) and (4), however, Congress created a "limited exception" for SNTs: the default rule does not apply if a beneficiary uses an SNT.⁴⁴ Specifically, § 1396p(d)(1) states, "subject to [§ 1396p(d)(4)], the [default] rules . . . shall apply" to Medicaid eligibility and benefits determinations.⁴⁵ Section 1396p(d)(4) then states that the default rule "shall not apply to any of the following [SNTs]."⁴⁶ As previously noted, § 1396p(d)(4) only states that the default rule does not apply to SNTs, but fails to note what rules may apply to SNTs. This lack of guidance has caused confusion among the courts and thus, the circuit split.

Further, Section 1396p(d)(4) lists three types of SNTs: individual, income, and pooled.⁴⁷ Because courts and scholars have referred to individual SNTs as special needs trusts,⁴⁸ to avoid confusion this Note will refer to each SNT by the above names and all three trusts collectively as SNTs. All three SNTs receive similar legal protection under OBRA, but there is a key

38. *Hobbs ex rel. Hobbs v. Zenderman*, 542 F. Supp. 2d 1220, 1231 n.11 (D.N.M. 2008), *aff'd*, 579 F.3d 1171 (10th Cir. 2009).

39. Wiesner, *supra* note 37, at 682-83.

40. Radford & Bryan, *supra* note 8, at 5-6.

41. Wiesner, *supra* note 37.

42. *See Sai Kwan Wong v. Doar*, 571 F.3d 247, 252 (2d Cir. 2009) ("In general, § 1396p(d)(3) requires a state, in the course of determining whether an individual is eligible for Medicaid, to consider assets placed in a trust by an individual seeking Medicaid benefits.").

43. *See, e.g., Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000) ("Section 1396p(d)(3) does not merely 'allow' states to count trusts in determining Medicaid eligibility; it *requires* them to do so.") (emphasis in original).

44. *Doar*, 571 F.3d at 252.

45. 42 U.S.C. § 1396p(d)(1) (2006).

46. § 1396p(d)(4).

47. *See* § 1396p(d)(4)(A)-(C).

48. *See, e.g., Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164, 1166 (10th Cir. 2005).

distinction in who receives each type of trust's remaining assets once the beneficiary dies.⁴⁹

Individual SNTs enable people with disabilities to contribute their own assets to pay for certain items.⁵⁰ The essential elements are: (1) the beneficiary is disabled as defined under SSI; (2) the beneficiary is under age sixty-five; (3) the trust was established for the beneficiary's benefit; (4) the trust was established by the beneficiary's parent, grandparent, or legal guardian, or by a court; and (5) the trust includes a payback provision, which allows the state to be repaid with the remaining assets in the trust when the beneficiary dies, up to the amount of total medical assistance paid previously by the state to the beneficiary.⁵¹

Income SNTs (or "Miller trusts")⁵² allow individuals living in nursing homes to qualify for Medicaid in a state that has an income cap for Medicaid eligibility.⁵³ The essential elements are: (1) the trust was established for the beneficiary's benefit; (2) the trust consists of only the beneficiary's unearned income, which includes pensions, Social Security, and other accumulated income; (3) the trust includes a payback provision; and (4) the beneficiary resides in a state that does not have a medically needy program for nursing facility services.⁵⁴

Pooled SNTs are for beneficiaries with lower incomes, but unlike individual SNTs, these beneficiaries have pooled their resources together into one trust to allow a non-profit organization to manage the trust and to reduce overhead expenses.⁵⁵ The essential elements are: (1) the beneficiary is disabled under SSI; (2) the trust was established and is managed by a non-profit organization; (3) each beneficiary's trust account was established for the beneficiary's benefit; (4) each trust account is kept separately; (5) each trust account was established by the beneficiary's parent, grandparent, or legal guardian, or by a court; and (6) the trust may pay back to the state any assets remaining in the beneficiary's account after his or her death, up to the amount of total medical assistance paid previously by the state to the

49. That is not to suggest that the other distinctions between the SNTs are not crucial for the parties or courts dealing these issues; however, these distinctions are not as relevant to this Note's topic of whether § 1396p(d)(4) should be read as being mandatory or optional on the states.

50. *Reames*, 411 F.3d at 1168.

51. 42 U.S.C. § 1396p(d)(4)(A) (2006). For the definition of disabled, see 42 U.S.C. § 1382c(a)(3)(A) (2006).

52. Note that these types of trusts are called "Miller trusts" based on a federal district court case. *See Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990).

53. *J.P. v. Div. of Med. Assistance & Health Servs.*, 920 A.2d 707, 711 n.3 (N.J. Super. Ct. 2007).

54. § 1396p(d)(4)(B). For further discussion of income SNTs, see Wiesner, *supra* note 37, at 721-34.

55. *Lewis v. Alexander*, 685 F.3d 325, 333 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

beneficiary.⁵⁶ Regarding this final element, unlike individual and income SNTs, pooled SNTs are not required to include a payback provision because the trust may keep the remaining assets.⁵⁷

II. THE CIRCUIT SPLIT

Since 2000, four federal circuits have considered whether § 1396p(d)(4) is mandatory on the states, and therefore whether SNTs must be exempt from Medicaid eligibility and benefit determinations.⁵⁸ If an individual creates an SNT in the Second⁵⁹ or Tenth Circuit,⁶⁰ then the provision is optional. These circuits have relied mostly on the lack of clear statutory language requiring states to follow § 1396p(d)(4) and agency interpretation. If, instead, the individual creates the exact same SNT in the Third⁶¹ or Eighth Circuit,⁶² then the provision is mandatory. These circuits have placed greater weight on the purpose of the Medicaid statute and the structure of § 1396p(d).

A. The Second and Tenth Circuits: § 1396p(d)(4) is Optional on the States

In 2000, the Tenth Circuit, in *Keith v. Rizzuto*,⁶³ addressed whether states must follow § 1396p(d)(4) when an individual places pension funds into an income SNT. In that case, a man with dementia associated with Alzheimer's disease resided in a nursing home facility, where he likely would remain for the rest of his life.⁶⁴ Both he and his wife's only sources

56. § 1396p(d)(4)(C).

57. *Lewis*, 685 F.3d at 349.

58. Note that nearly all of these circuits have analyzed § 1396p(d)(4) through claims brought under 42 U.S.C. § 1983, a claim requiring the plaintiff to show that a federal statute "unambiguously impose[d] a binding obligation on the States." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). Because Medicaid contains no "federal enforcement mechanism" for individuals denied benefits, individuals may sue the state Medicaid agencies under Section 1983 for violations of the Medicaid statute. Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 416-17 (2008). Here, the issue over whether § 1396p(d)(4) is mandatory on the states comes into play because § 1983 requires the trust beneficiaries to show that they had standing to sue the state Medicaid agencies by asking: (1) whether Congress "intended" that the statute benefit the plaintiff; (2) whether the right is too "vague and amorphous that . . . [it] would strain judicial competence"; and (3) *whether the statute "unambiguously imposed a binding obligation on the States."* *Blessing*, 520 U.S. at 340-41 (emphasis added).

59. *See Sai Kwan Wong v. Doar*, 571 F.3d 247 (2d Cir. 2009).

60. *See Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171 (10th Cir. 2009); *Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164 (10th Cir. 2005); *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000).

61. *See Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

62. *See Ctr. for Special Needs Trust Admin., Inc., v. Olson*, 676 F.3d 688 (8th Cir. 2012).

63. 212 F.3d at 1190.

64. *Id.* at 1191.

of income were his civil service and Veteran's Administration pensions.⁶⁵ After applying for Medicaid, he created an income SNT to prevent his pensions from disqualifying him from Medicaid.⁶⁶ But the state's Medicaid regulations allowed individuals to establish SNTs only if their monthly incomes fell short of the average cost of nursing home care in the region where they reside.⁶⁷ The state Medicaid agency denied the man's Medicaid application because his monthly pension income was above his region's average.⁶⁸ In response, he sought declaratory and injunctive relief under 42 U.S.C. § 1983⁶⁹ arguing that the state regulations were invalid for two reasons.⁷⁰ First, he argued that the state was barred from denying his Medicaid application based on the structure of § 1396p(d)—specifically, since § 1396p(d)(3) requires states to follow the default rule, and § 1396p(d)(4) exempts SNTs from the default rule, then § 1396p(d)(4) must also be mandatory.⁷¹ Second, he argued that the state regulation was preempted by § 1396p(d) under the Supremacy Clause because he could not comply with both the state and federal laws.⁷²

The Tenth Circuit rejected both of his arguments.⁷³ First, it found that he had “misapprehend[ed] the mandatory” nature of the Medicaid trust provisions.⁷⁴ The court agreed with him that states must follow the default rule, but § 1396p(d)(4) is precatory because it is only “an exception to a requirement.”⁷⁵ The court found that based on the clear legislative purpose and text, states are “free to decide” whether to count assets in SNTs when determining an individual's Medicaid eligibility.⁷⁶ Second, his preemption argument was rejected because an individual could comply with both the state and federal laws by having a pension lower than the average monthly cost of nursing home care in his region.⁷⁷

In *Reames v. Oklahoma ex rel. Oklahoma Health Care Authority*, the Tenth Circuit again analyzed § 1396p(d) in the context of whether Social

65. *Id.*

66. *Keith v. Rizzuto*, 212 F.3d 1190, 1191 (10th Cir. 2000).

67. *Id.* at 1191-92.

68. *Id.* Specifically, his combined pensions created a gross income of \$4,867 per month; however, his region's average for nursing home care was \$3,034 per month. *Id.* at 1191.

69. *See Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (discussing § 1983).

70. *Rizzuto*, 212 F.3d at 1192.

71. *Id.* at 1193.

72. *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* Additionally, the Tenth Circuit affirmed the district court's motion to dismiss his complaint for failure to state a claim. *See id.* at 1193-94.

Security income placed in an individual SNT is exempted from state Medicaid benefits determinations.⁷⁸ In *Reames*, a woman with a disability living in a nursing home received Social Security Disability (SSD) benefits, her sole source of income.⁷⁹ The SSD benefits were used almost entirely as co-pay for her monthly nursing home bills.⁸⁰ To prevent her SSD benefits from being used as co-pay, she applied for Medicaid and placed her SSD benefits in an individual SNT.⁸¹ She hoped that by doing so, Medicaid would pay for her nursing home care and the SNT would pay for her other items and services.⁸² The state Medicaid agency approved her application, but required the woman to still use her SSD benefits as co-pay for her nursing home care.⁸³ The state Medicaid agency was following a federal Medicaid regulation governing co-pay that required it to reduce Medicaid payments to nursing homes in an amount equal to the individual's income, which included SSD benefits.⁸⁴ In response, the plaintiff requested recovery for retroactive payments from the state for her past co-pay to the nursing home, and declaratory and injunctive relief to stop the state from forcing her to make any future co-pay to the nursing home.⁸⁵

The Tenth Circuit first dismissed her request for retroactive payments under the Eleventh Amendment.⁸⁶ In turning to the prospective remedies, the court examined the federal law's "conflicting" mandates.⁸⁷ On one hand, cross-references from § 1396p(d)(4) to the Social Security statute suggest that "assets" placed in SNTs, including SSD benefits, are shielded from Medicaid eligibility determinations.⁸⁸ On the other hand, the Medicaid regulation requires states to reduce Medicaid payments to individuals

78. 411 F.3d 1164 (10th Cir. 2005).

79. *Id.* at 1166.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* Specifically, the state Medicaid agency required her to pay \$796 of her \$846 SSD benefits to the nursing home as co-pay every month. *Id.*

84. *Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164, 1166 (10th Cir. 2005). Note that this portion of the court's opinion is referencing 42 C.F.R. § 435.733(a)(1) (West 2012).

85. *Id.* at 1167.

86. *Id.* at 1167-68. First, the Eleventh Amendment, which precludes individuals from suing the state both directly and indirectly for recovery of money from the state treasury, barred her claims against the state agencies. Second, the Eleventh Amendment barred her claims against the individual officers because she named the state, not the officers, in her complaint. *See id.* at 1167-68.

87. *Id.* at 1169.

88. *Id.* at 1168-69. Specifically, individuals may contribute "assets" in SNTs without having them treated as countable for Medicaid purposes. 42 U.S.C. § 1396p(d)(4)(A) (2006). Assets are defined as "all income and resources of the individual." § 1396p(e)(1). For making Medicaid determinations, the Medicaid statute then refers to the Social Security statute. *See* § 1396p(e)(2). Finally, the Social Security statute defines income as including governmental benefits, including SSD benefits. 42 U.S.C. § 1382(a) (2006).

based on their SSD benefits.⁸⁹ To resolve this conflict, the Tenth Circuit looked to the applicable agency's interpretation.⁹⁰

The State Medicaid Manual (SMM), in which the CMS fills gaps in the Medicaid statute,⁹¹ states that SSD benefits placed in an SNT are not counted when determining Medicaid eligibility, but are counted under "post-eligibility rules."⁹² The post-eligibility rules state that once an individual is found eligible for Medicaid the state must count SSD benefits when determining the amount of Medicaid benefits that the individual will receive.⁹³ The plaintiff in *Reames*, however, argued that the SMM conflicted with § 1396p(d)(1), which requires states to not count income in SNTs when determining both eligibility and the "amount of" Medicaid benefits.⁹⁴

To resolve the issue, the Tenth Circuit decided what level of deference should be given to the SMM by applying the Supreme Court's two-prong test under *Chevron*.⁹⁵ First, whether Congress has spoken on the precise issue, which if it has should be given the full effect of law.⁹⁶ Here, the specific issue was whether states were required to not count SSD benefits placed in an SNT when determining an individual's co-pay.⁹⁷ The Tenth Circuit found that, after mining through the "haphazard and complex" Medicaid statute, Congress had not addressed this precise question.⁹⁸ Under the second prong, the court should defer to the agency's interpretation only if it is "'reasonable' and 'based on a permissible construction of the statute.'"⁹⁹ Here, the Tenth Circuit ruled that the SMM had properly followed both the Medicaid and Social Security laws because the SMM shielded income other than SSD benefits from Medicaid's post-eligibility rules.¹⁰⁰ In other words, the SMM was consistent with federal law because it still provided "full protection" for other types of income funding SNTs,

89. *Reames*, 411 F.3d at 1168-69.

90. *Id.* at 1169.

91. *See* Sai Kwan Wong v. Doar, 571 F.3d 247, 253 (2d Cir. 2009).

92. *Reames*, 411 F.3d at 1169 (quoting CTRS. FOR MEDICARE & MEDICAID SERVS., STATE MEDICAID MANUAL § 3259.7(C)(5)(b) (2012) [hereinafter "SMM"], available at <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html>).

93. *Id.*

94. *Id.* at 1169 (quoting 42 U.S.C. § 1396p(d)(1)).

95. The Tenth Circuit also noted that in this case the *Chevron* test was "helpful," but "not necessarily dispositive." *Id.* at 1170 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

96. *Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164, 1170 (10th Cir. 2005) (citing *Chevron*, 467 U.S. at 842-43).

97. *Id.*

98. *Id.*

99. *Id.* (quoting *Chevron*, 467 U.S. at 843).

100. *Id.* at 1171.

but it included a “narrow carve[d]-out” exception for SSD benefits placed in SNTs.¹⁰¹ Additionally, the plaintiff’s argument was mistakenly based on a “tortured concatenation” of cross-references from § 1396p(d)(1) to the Social Security statute.¹⁰²

Next, the plaintiff argued that by assigning her SSD benefits to her SNT through direct deposit, the SSD benefits “belonged to the trust,” not her, and the state could not count them when determining her co-pay.¹⁰³ The Tenth Circuit rejected this argument based on the SMM, which exempts income in SNTs from Medicaid benefit determinations only if the income “actually belongs to the trust and not the individual.”¹⁰⁴ However, the court found that the plaintiff’s SSD benefits belonged to her as they had “pass[ed] through [her] hands before arriving” in her SNT.¹⁰⁵ Moreover, the Social Security statute specifically prohibits transferring or assigning SSD benefits.¹⁰⁶

In 2009, the Tenth Circuit, in *Hobbs ex rel. Hobbs v. Zenderman*,¹⁰⁷ addressed whether § 1396p(d)(4) is mandatory on the states for an individual who transfers an injury settlement into an individual SNT.¹⁰⁸ In *Hobbs*, a six-year-old boy was involved in a severe car accident that left him with traumatic brain injuries and seizures requiring significant daily assistance.¹⁰⁹ Three years later, he received a large injury settlement agreement, of which \$1.1 million was placed in an individual SNT.¹¹⁰ The trust’s corpus was partially used to pay the boy’s mother in exchange for caring for him and to purchase assets for the family.¹¹¹ After the boy had already begun receiving Supplemental Security Income and Medicaid benefits, the state Medicaid agency reviewed his SNT and determined that he was disqualified from Medicaid for two reasons.¹¹² First, the SMM required that the trust be used for the beneficiary’s “sole benefit,” not the benefit of his

101. *Id.* at 1172-73.

102. *Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164, 1171 (10th Cir. 2005).

103. *Id.* at 1170 n.5.

104. *Id.* at 1170 (quoting SMM § 3259.7(B)(1)).

105. *Id.* at 1171.

106. *Id.* at 1171 (citing 42 U.S.C. § 407(a) (2006)).

107. 579 F.3d 1171 (10th Cir. 2009).

108. *Id.* at 1175.

109. *Id.*

110. *Id.*

111. *Id.* at 1175-76. Specifically, the trust agreement contained a provision that allowed the boy’s mother to receive reasonable compensation for caring for him, so she was paid for dressing, monitoring, bathing, transporting, and training him. *Id.* at 1175. Additionally, the expenditures on family assets included a fifty percent interest in his family’s land and home, home furnishings, homeowner’s insurance, home maintenance and improvement, and life insurance on the boy’s parents. *Id.* at 1175-76.

112. *Id.* at 1176. Additionally, the Social Security Administration ceased paying SSI to the boy because his resources were above the \$2,000 limit. *Id.*

family.¹¹³ Second, the state's administrative code required that he only have \$2,000 in "countable resources" to be eligible for Medicaid, but his trust far exceeded that amount.¹¹⁴ In response, his family argued that § 1396p(d)(4) was mandatory on the states and thus, they were allowed to place the settlement in the SNT without him losing Medicaid eligibility.¹¹⁵ Proceeding under Section 1983, his family sought monetary damages, an injunction prohibiting the state Medicaid agency from treating the SNT as a countable resource, and declaratory relief holding that the SNT complies with § 1396p(d)(4).¹¹⁶

The Tenth Circuit held that § 1396p(d)(4) did not "unambiguously impose a binding obligation" on the states, and therefore the state could count the assets in his SNT when determining his Medicaid eligibility.¹¹⁷ The court acknowledged that "[a]lthough the statute might have been read" as being mandatory, "that construction [wa]s foreclosed by [its] opinion in *Keith*."¹¹⁸ Also, because of Medicaid's "extraordinarily complex set of interlocking" statutes and regulations, the Tenth Circuit owed the SMM deference because it was "consistent with statutory language, statutory purpose, and [was a] reasonable" interpretation of § 1396p(d)(4).¹¹⁹

Finally, in 2009, the Second Circuit weighed in on whether § 1396p(d)(4) was mandatory on the states in *Sai Kwan Wong v. Doar*,¹²⁰ which involved circumstances nearly identical to those addressed in *Reames*. In *Wong*, a middle-aged man with a permanent disability lived in a nursing home, and his sole source of income was SSD benefits.¹²¹ After Medicaid partially paid for his nursing home care,¹²² the state Medicaid agency reduced his Medicaid benefits and required him to use his SSD

113. *Id.* at 1176-77 (citing SMM § 3257(B)(6)).

114. *Id.* at 1176.

115. *Id.* at 1179.

116. *Id.* at 1177.

117. *Id.* at 1179 (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)). Additionally, the Tenth Circuit rejected the family's arguments that other provisions within the Medicaid statute created mandatory obligations on the states because those provisions were not relevant to this case. *See id.* at 1181-83.

118. *Id.* at 1180.

119. *Id.* at 1187. Additionally, the Tenth Circuit affirmed that the boy's substantive and procedural due process rights were not violated when the state counted the assets in his SNT. *Id.* First, the court rejected the substantive due process claim that the state had created unclear Medicaid standards because the state provided a sufficient standard for when determining Medicaid eligibility. *Id.* at 1184-87. Second, the boy's procedural due process rights were not violated because he was provided with a fair hearing, represented by his counsel, and permitted to submit evidence to an administrative law judge. *Id.* at 1187.

120. 571 F.3d 247 (2d Cir. 2009).

121. *Id.* at 253.

122. *Id.* For example, the court noted that in May 2007, Medicaid paid \$8,095.89 of his monthly nursing home bill, which exceeded \$9,000.00 per month. *Id.*

benefits to pay for his nursing home care based on post-eligibility rules under state law and the Medicaid regulations.¹²³ To stop this, the plaintiff created an individual SNT and deposited the SSD benefits into the trust.¹²⁴ The state Medicaid agency, however, still required him to use his SSD benefits to pay for his nursing home care based on the SMM.¹²⁵ The SMM provision at issue—the same one at issue in *Reames*—requires states to not count income placed in an SNT, including SSD benefits, when determining Medicaid eligibility, but count them for post-eligibility determinations.¹²⁶

In response, the plaintiff argued that the SMM was invalid because it conflicted with the text of § 1396p(d)(1) and (4), which exempts SNTs from eligibility and post-eligibility determinations.¹²⁷ He also argued that the structure of § 1396p(d) had created a “negative command” for the states—specifically, since § 1396p(d)(3) was mandatory on the states, the rules in § 1396p(d)(4) must also be mandatory.¹²⁸

To evaluate whether the SMM was invalid, the Second Circuit applied the two-prong *Chevron* test.¹²⁹ First, the court held that there was ambiguity as to what post-eligibility rules Congress intended with § 1396p(d)(1) and (4),¹³⁰ as those two provisions do not “provide any guidance” to the state Medicaid agencies.¹³¹ Second, the court ruled that the SMM did not warrant *Chevron* deference because agency manuals generally do not merit such deference.¹³² However, the SMM did warrant *Skidmore* deference,

123. *Id.* at 254. Specifically, the state calculated that his available income (\$1,024.81) was almost exactly the same as his SSD benefits (\$1,401.00). *Id.* at 253-54.

124. *Id.* at 254.

125. *Id.*

126. Sai Kwan Wong v. Doar, 571 F.3d 247, 253 (2d Cir. 2009) (citing SMM § 3259.7(C)(5)(b)).

127. *Id.*

128. *Id.* at 256-57. Before addressing these arguments, the Second Circuit “assumed” that the man had a private right of action under Section 1983 for “this appeal only” because his “claim on the merits” was rejected. *Id.* at 254 n.9. The court then addressed the man’s additional arguments. First, the court held that his reliance on *Sullivan v. Cnty. of Suffolk* was misguided, as the “context” of the case made his argument “at best dictum.” *Id.* at 257. Second, the court rejected his argument that Congress intended to include SSD benefits as “assets” when individuals place them in SNTs, because the provisions he cited to only shield assets when individuals “create” SNTs, but say nothing about post-eligibility rules once the SNT has been created. *Id.* at 258. Finally, the man’s procedural challenge to the federal regulation 42 C.F.R. § 435 was time-barred based on the Administrative Procedure Act’s rule that challenges to regulations expire six years after the issuance of a regulation. *Id.* at 263.

129. *Id.* at 255-56.

130. *Id.* at 256 n.11.

131. *Id.* at 257.

132. *Id.* at 258. However, the court did not foreclose the possibility that the SMM warranted *Chevron* deference: according to the court, this issue “raise[d] an interesting question,” but the court was “content simply to rely on the agency’s concession that *Skidmore*” deference was warranted. *Id.* at 259. Nonetheless, the court hinted towards *Chevron* deference being inapplicable to the case. First, it noted that the Secretary of the HHS “has neither ‘produced regulations’ pursuant to” this congressional delegation “nor ‘claimed’ *Chevron* deference for SMM [§] 3259.7.” *Id.* Additionally, the court had “recently observed, there are ‘few, if any, instances in which an agency manual, in particular, has been

which is a lower degree of deference than *Chevron* because it only provides “guidance” to the court¹³³ but only “to the extent [that] it [is] persuasive.”¹³⁴

After examining the text and structure of § 1396p(d)(4), the Second Circuit found that the SMM had properly filled the congressional gap for several reasons.¹³⁵ First, § 1396p(d)(4) contained no “textual limit” on the scope of the CMS’s authority to make Medicaid eligibility and post-eligibility determinations because Congress allows the CMS to fill the gap.¹³⁶ Second, the SMM was “fully consistent” with other Medicaid provisions that require individuals to contribute their available income to pay for their nursing home care.¹³⁷ Third, the CMS had specifically claimed that the SMM was a binding interpretation of § 1396p(d)(4) and the provision is not ad hoc but applicable to everyone.¹³⁸ Fourth, the relevant section of the SMM was issued one year after OBRA’s enactment and had not changed since, which showed that it was consistently followed.¹³⁹ Finally, the only legal challenge to the SMM was in *Reames*, which the Tenth Circuit rejected.¹⁴⁰

B. The Eighth and Third Circuits: § 1396p(d)(4) is Mandatory on the States

From 2000 to 2012, no federal circuit interpreting § 1396p(d)(4) held that it was optional on the states.¹⁴¹ The Eighth Circuit, however, created the circuit split when it determined that § 1396p(d)(4) was mandatory in the context of an individual using a pooled SNT. In *Center For Special Needs Trust Administration, Inc., v. Olson*,¹⁴² a man with a disability living in a nursing home transferred his money into a pooled SNT, and then applied for Medicaid.¹⁴³ Because the state Medicaid agency was mistaken about his age, it did not apply state and federal laws limiting transfers of

accorded Chevron deference.” *Id.* at 258 (quoting *Estate of Landers v. Leavitt*, 545 F.3d 98, 106 (2d Cir. 2008)).

133. *Id.* at 250 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

134. *Id.* at 256 (quoting *Leavitt*, 545 F.3d at 105).

135. *Id.* at 262.

136. *Id.* at 260.

137. *Id.* at 261.

138. *Id.* at 261-62.

139. *Id.* at 262.

140. *Id.*

141. Note that the Eighth Circuit evaluated the mandatory nature of § 1396p(d)(4), holding that a state Medicaid agency could impose a Medicaid lien on two women’s large personal injury settlements before the women placed the remaining funds in individual SNTs. *Norwest Bank of North Dakota, N.A., v. Doth*, 159 F.3d 328, 333 (8th Cir. 1998).

142. 676 F.3d 688 (8th Cir. 2012).

143. *Id.* at 693. Note that the court’s opinion does not indicate the source of the man’s money.

assets to SNTs over a certain age.¹⁴⁴ Medicaid then covered his nursing home care until his death, after which the state Medicaid agency discovered the error based on his age and demanded reimbursement from the non-profit organization (the plaintiff) that had managed the pooled SNT.¹⁴⁵ In response, the plaintiff sought declaratory and injunctive relief under Section 1983 to stop the state Medicaid agency from demanding reimbursement.¹⁴⁶

In a short explanation, the Eighth Circuit held that § 1396p(d)(4) imposed a mandatory obligation on the states because the first sentence of § 1396p(d)(4) was “couched in mandatory terms.”¹⁴⁷ Further, the court declined to apply the reasoning from *Keith* and *Hobbs* because the statute states that the default rule “shall not” apply to SNTs.¹⁴⁸

Finally, in *Lewis v. Alexander*, the Third Circuit addressed whether § 1396p(d)(4) was mandatory when a state enacts a law restricting the use of pooled SNTs.¹⁴⁹ In *Lewis*, eleven of twelve individuals in a pooled trust (the beneficiaries) had disabilities and received Medicaid.¹⁵⁰ To pay for items not covered by Medicaid, they placed their assets in pooled SNTs

144. *Id.* at 693-94 (noting that the federal law required that individuals under age sixty-five who transfer assets into pooled SNTs to pay a penalty, and the state law disqualified individuals over age sixty-five from receiving Medicaid if they transfer assets to an SNT established solely for the benefit the individual).

145. *Id.* at 694.

146. *Id.* Before addressing these issues, the Eighth Circuit first held that pooled SNTs do not require a payback provision or place an age limit on the beneficiary. *Id.* at 695-96. Further, the court ruled that the plaintiff did have standing to sue the state Medicaid agency because the state could still apply state law to the plaintiff in the future. *Id.* at 696-97. Next, the court rejected the plaintiff’s argument that the state had waived its right for reimbursement by initially providing him benefits because, although it was a mistake, there was no proof that the state had waived any right. *Id.* at 698. Finally, the plaintiff’s equitable estoppel claim was denied because the state’s mistake was not affirmative misconduct. *Id.*

147. *Id.* at 700. In addressing this issue, the court also held that the plaintiff had met the other two factors from the *Blessing* test: § 1396p(d)(4) clearly intended to benefit non-profit organizations because it was listed in the statute, and the right was not too vague or amorphous because beneficiaries must meet certain elements to use pooled SNTs. *See id.* at 699-700 (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)).

148. *Ctr. for Special Needs Trust Admin., Inc., v. Olson*, 676 F.3d 688, 700 n.2 (8th Cir. 2012) (quoting 42 U.S.C. § 1396p(d)(4) (2006)). Additionally, the court ruled that Congress has not foreclosed Section 1983 enforcement of the Medicaid Act. *Id.* at 699-700. Finally, the court ruled that the plaintiff did have a private cause of action under Section 1983, but its claim was without merit and federal law did not preempt the state regulation. *Id.* at 700-03. Specifically, there was no conflict between the state’s regulations (requiring individuals using pooled SNTs to be under age sixty-five) and § 1396p(d)(4) because Congress intended that individuals over age sixty-five using these trusts would still be subject to transfer penalty rules listed in § 1396p(c). *Id.*

149. 685 F.3d 325 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

150. *Id.* at 335. Specifically, only one beneficiary was not disabled or receiving Medicaid, but that beneficiary was the administratrix for the estate of her deceased niece, who was disabled and receiving Medicaid at the time of her death. *Id.* Additionally, two charitable organizations were also plaintiffs in this lawsuit: the first organization managed approximately \$23 million in funds for its approximately 117 pooled trust accounts, and the second managed approximately \$20 million in funds for its approximately 1,122 pooled trust accounts. *Id.* at 335-36.

that had generally “quite low” balances.¹⁵¹ Because their trusts did not comply with several provisions of a state law enacted to prevent sheltering assets, the state Medicaid agency sought to terminate some of the beneficiaries’ Medicaid benefits.¹⁵² In response, the beneficiaries brought a class action suit, under both § 1983 and the Supremacy Clause, seeking injunctive and declaratory relief to bar enforcement of the state law because it was preempted by § 1396p(d)(4).¹⁵³

The central issue in the case was whether § 1396p(d)(4) created a mandatory obligation on the states.¹⁵⁴ The state argued that § 1396p(d)(4) was optional based on the provision’s opening sentence: “This subsection shall not apply to any of the following [SNTs].”¹⁵⁵ According to the state, this sentence created a legislative “gap” because it did not proscribe what laws states may enact to regulate SNTs.¹⁵⁶ In turn, this allowed the states to enact laws to fill that gap. Here, the state argued that if Congress intended that § 1396p(d)(4) be mandatory then it would have used clear obligatory language, such as these SNTs “shall not be counted as available assets for determining Medicaid eligibility.”¹⁵⁷

The Third Circuit held that the first sentence of § 1396p(d)(4) had caused the Second and Tenth Circuits to “miss the forest for the trees.”¹⁵⁸ Instead, the Third Circuit found that § 1396p(d)(4) imposed a mandatory obligation on the states based on the “text and structure of the Medicaid statute.”¹⁵⁹ First, the Third Circuit wrote that Congress’ “choice of an imperative like ‘shall’” gave strong textual evidence that Congress did not intend to allow states to freely ignore § 1396p(d)(4).¹⁶⁰ If, instead, the provision was intended to be optional, as the state claimed, then Congress could have used “[a]ny number of [other] constructions,” such as “States are not required to apply [§ 1396p(d)(4) to SNTs].”¹⁶¹

Second, the Third Circuit noted that courts must follow all of Congress’ statutory objectives.¹⁶² Here, Congress had two purposes for

151. *Id.* at 335 (most of the balances in the pooled SNTs were between a few hundred to a few thousand dollars).

152. *Id.* at 337.

153. *Id.* at 331.

154. *Id.* at 342. Before turning to this issue, the Third Circuit first held that the beneficiaries had constitutional standing, prudential standing, and a case that was not ripe. *See id.* at 338-42.

155. *Id.* at 342 (quoting 42 U.S.C. § 1396p(d)(4)).

156. *Id.*

157. *Id.*

158. *Id.* at 343.

159. *Id.* at 344.

160. *Id.* at 343.

161. *Id.*

162. *Id.* (citing *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987)).

§ 1396p(d): the primary goal was to broadly prevent individuals from sheltering their assets in trusts while remaining eligible for Medicaid, but the secondary goal was to exempt SNTs from Medicaid determinations.¹⁶³ This small exception for SNTs allows individuals with disabilities to use SNTs to pay for necessities and comforts that would “rarely be considered extravagant.”¹⁶⁴ Thus, Congress intended not “merely to shelter” SNTs from the default rule, but also “to shelter [them] from having any impact on Medicaid eligibility.”¹⁶⁵

Third, the Third Circuit found that Congress made a “deliberate choice” to “expand the federal [government’s] role” in defining and regulating SNTs with § 1396, after prior Medicaid statutes had failed to limit Medicaid abuse.¹⁶⁶ Federal control over Medicaid was evidenced “throughout the Medicaid statute,” including 42 U.S.C. § 1396a(a)(18), which requires states to comply with all of § 1396p.¹⁶⁷ In effect, Congress had “set the boundaries for what will be considered a[n SNT].”¹⁶⁸

Fourth, the Third Circuit found that the structure of Medicaid’s asset-counting rules was the most important evidence of Congress’ intent.¹⁶⁹ The default rule and § 1396p(d)(4) are part of a “complex and comprehensive system” that “rigorously dictates” what assets must count and not count towards Medicaid eligibility.¹⁷⁰ By “actually legislating on this precise class of asset[s] . . . Congress intended to create a purely binary system of classification: either a trust affects Medicaid eligibility or it does not.”¹⁷¹ Therefore, the state was “not free to rewrite” § 1396p(d)(4).¹⁷²

Because the beneficiaries had a private right under both Section 1983 and the Supremacy Clause,¹⁷³ the Third Circuit turned to whether the state law was preempted by § 1396p(d)(4). In this case, the court noted that OBRA was not intended to displace the states’ general trust laws;¹⁷⁴ however, states must follow § 1396p(d)(4) and not impose any additional bur-

163. *Lewis*, 685 F.3d at 343.

164. *Id.* at 333.

165. *Id.* at 343.

166. *Id.* For a discussion of some of these prior laws, see *infra* Part III.C.

167. *Lewis v. Alexander*, 685 F.3d 325, 343 (3d Cir. 2012) (citing 42 U.S.C. § 1396a(a)(18) (2006)), *cert. denied*, 133 S. Ct. 933 (2013).

168. *Id.* at 344.

169. *Id.* at 343.

170. *Id.* at 344.

171. *Id.* (emphasis omitted).

172. *Id.*

173. *Id.* at 345-46. Note that the Third Circuit held that the beneficiaries also had a private right under the Supremacy Clause because they presented a federal question in seeking injunctive relief from a state regulation. See *id.*

174. *Id.* at 347.

dens on those requirements.¹⁷⁵ In conclusion, the Third Circuit held that several provisions of the state's law conflicted with § 1396p(d)(4) because "Congress intended that [SNTs] be defined by a specific set of criteria that it set forth," not the states.¹⁷⁶

III. ANALYSIS: APPLYING THE STATUTORY INTERPRETATION TOOLS

Interpreting 42 U.S.C. § 1396p(d)(4) has been difficult for the state Medicaid agencies and the federal circuits. Medicaid generally is an "extraordinarily complex set of interlocking" statutes and regulations.¹⁷⁷ As the Supreme Court stated, the Social Security Act's "Byzantine construction . . . makes the Act 'almost unintelligible to the uninitiated.'"¹⁷⁸ Further, the CMS has not issued any regulations for § 1396p(d).¹⁷⁹

This Note will interpret the provision by first analyzing § 1396p(d) with each statutory interpretation tool. Statutory analysis of § 1396p(d)(4) must begin by observing the ordinary meaning of the statute's language.¹⁸⁰ Next, this Note examines the legislative history of OBRA, the Supreme Court's precedent for § 1396p, and the agency interpretation. Finally, this Part collectively analyzes the tools to conclude that § 1396p(d)(4) is best read as being mandatory on the states based on the structure of § 1396p(d) and the purpose of the Medicaid statute.

A. The Text of § 1396p(d)

The relevant sections of § 1396p(d), titled "Treatment of trust amounts," govern the relationship between SNTs and Medicaid determinations:

175. *Id.*

176. *Id.* at 347. Specifically, the Third Circuit held that § 1396p(d)(4) preempted four of the five state law provisions at issue in the appeal. First, the state law's requirement that fifty percent of the pooled SNT be repaid to the state if the beneficiary dies was struck down because § 1396p(d)(4)(C) leaves it to the discretion of the trust. *Id.* at 348-49. Second, the state law's requirement that all trust expenditures have a "reasonable relationship" to the beneficiary's needs was preempted because § 1396p(d)(4) contains no similar limitation. *Id.* at 350. Third, the state law's restriction of pooled SNTs to beneficiaries only with "special needs that will not be met without the trust" and that "assist in and are related to the treatment of the beneficiary's disability" was struck down because § 1396p(d)(4) only requires that the beneficiary be disabled. *Id.* at 350-51. Fourth, the state law's restriction of pooled SNTs to beneficiaries only under age sixty-five was preempted because § 1396p(d)(4) contains no age restriction. *See id.* at 351-52. However, the state law's enforcement provision—allowing the state Medicaid agency to petition a court for an order to terminate the trust—was upheld because it was part of the state's retained authority to regulate trusts in the state. *Id.* at 352-53.

177. *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1186 (10th Cir. 2009).

178. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (quoting *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976)).

179. *Ctr. for Special Needs Trust Admin., Inc., v. Olson*, 676 F.3d 688, 700 (8th Cir. 2012).

180. *See, e.g., Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010) ("As in all such cases, we begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose.").

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

...

(3) [States the default rule that the corpus of a trust "shall be considered resources available to the individual," and that payments from the trust "shall be considered income of the individual."]

(4) This subsection shall not apply to any of the following trusts:

(A) [Requirements for the individual SNTs.]

(B) [Requirements for the income SNTs.]

(C) [Requirements for the pooled SNTs.]¹⁸¹

B. Analysis of the Text

Because § 1396p(d)'s text is short and lacks sufficient guidance, it is partly at fault for the circuit split. The text clearly states that SNTs are exempt from the default rule, but fails to indicate whether § 1396p(d)(4) is mandatory on the states. The Third and Eighth Circuits held that the word "shall" in both § 1396p(d)(1) and (4) means that the SNTs provisions are mandatory. In contrast, the Second and Tenth Circuits ruled that because the statute fails to indicate what rule applies when the default rule does not apply, each state may fill that gap as it chooses. For example, if a mother told her children to clean the house but said that this rule does not apply to her oldest child, those instructions do not inform the oldest child whether he or she must clean the house.

The Second and Tenth Circuits found that § 1396p(d) does not indicate what rule must apply to SNTs, but this argument is weak because the text is ambiguous. If Congress had wanted to make § 1396p(d)(4) optional or mandatory, then it could have used clear language in § 1396p(d)(4), such as "For the following SNTs, the default rule is optional (or mandatory) on the States." Thus, the text helps little in interpreting whether § 1396p(d)(4) is optional or mandatory on the states.

C. The Legislative History of § 1396p(d)(4)

Prior to § 1396p(d), 42 U.S.C. § 1396a(k) regulated the relationship between trusts and Medicaid eligibility, which attempted to stop Medicaid abuse by mandating that all assets in a "Medicaid Qualifying Trust" were

181. 42 U.S.C. § 1396p(d) (2006). For a discussion of the specific elements of the SNTs, *see supra* Part I.C.

available to the beneficiary.¹⁸² However, Section 1396a(k) failed to stop Medicaid abuse, so Congress repealed the law and replaced it with § 1396p(d) in 1993.¹⁸³

One goal for § 1396p(d) was to place stricter requirements on trusts.¹⁸⁴ Prior to § 1396p(d), trusts were viewed as the “single most offensive Medicaid estate planning vehicle” because individuals could manipulate Medicaid eligibility requirements by hiding their assets in trusts.¹⁸⁵ Additionally, states were having budgetary crises¹⁸⁶ and more individuals were seeking Medicaid than Medicaid agencies had anticipated or were capable of serving.¹⁸⁷ Thus, Congress wanted to close Medicaid’s eligibility “loopholes.”¹⁸⁸

The Subcommittee on Health and the Environment of the House Committee on Energy and Commerce addressed this issue with hearings titled “Medicaid Budget Reconciliation.”¹⁸⁹ The goal of the hearings was to eliminate \$7.8 billion from the Medicaid budget within five fiscal years.¹⁹⁰ Special interest groups such as the long-term care insurance industry and the state Medicaid agencies, both of which wanted to increase revenues and to reduce expenditures, mostly set the agenda for these hearings.¹⁹¹ An important leader for the long-term insurance industry argued in front of the Subcommittee that non-poor, elderly persons were causing serious financial problems by hiding their assets in trusts.¹⁹² In contrast, the President of the National Academy of Elder Law Attorneys argued in front of the Subcommittee that allowing states to restrict the use of trusts would be “punishing” individuals with mostly limited assets.¹⁹³

After the hearings, an amendment was proposed to fix the Medicaid eligibility issues, which was incorporated into the House Bill.¹⁹⁴ As a re-

182. *Ramey v. Reinertson*, 268 F.3d 955, 958-59 (10th Cir. 2001). For a discussion of MQTs, see Rosenberg, *supra* note 34, at 130.

183. *Ramey*, 268 F.3d at 959. Note that this § 1396a(k) should not be confused with the same titled provision in the Patient Protection and Affordable Care Act. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012).

184. *Ramey*, 268 F.3d at 959.

185. Wiesner, *supra* note 37, at 703.

186. *Id.* at 683.

187. *Id.* at 734.

188. *Id.* at 685.

189. *Id.* at 683-84.

190. *Id.* at 684.

191. *Id.* at 682.

192. *Id.* at 688-90.

193. *Medicare and Medicaid Budget Reconciliation: Hearings Before the Subcomm. on Health and the Env’t of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 426 (1993) (statement of Vincent J. Russo, President for National Academy of Elder Law Attorneys).

194. Wiesner, *supra* note 37, at 684 n.15.

sult, individual and income SNT provisions were added to the bill,¹⁹⁵ and disability advocates successfully argued to include pooled SNTs.¹⁹⁶ The Senate Bill included identical language as compared to the current rules in § 1396p(d)(4), except that individual SNTs did not have an age requirement,¹⁹⁷ though this requirement was later added.¹⁹⁸ Congress did not revisit the SNT provisions again,¹⁹⁹ and the final version of § 1396p(d) passed on August 10, 1993.²⁰⁰

D. Analysis of the Legislative History

The legislative history of OBRA and § 1396p(d)(4), which has been aptly referred to as “sparse,”²⁰¹ offers little help to determine whether the provision is mandatory or optional on the states. In fact, none of the federal circuits even analyzed the legislative history of § 1396p(d)(4). One commentator argued that there is a lack of congressional records because Medicaid amendments are “always among the final parts to be added to the huge budget reconciliation acts.”²⁰² Regardless, both sides of the debates argued over how trusts should affect Medicaid eligibility. States and insurance industry representatives wanted more restrictions to stop abuse by all trusts, while disability advocates lobbied to keep legal protections for individuals with disabilities.²⁰³ Beyond that, there is no affirmative evidence in the legislative history to help interpret § 1396p(d)(4).

However, an argument could be made that the lack of legislative history for SNTs shows that § 1396p(d)(4) should be mandatory on the states. Since Congress intended to close the Medicaid loopholes with OBRA,²⁰⁴ but SNTs were not part of the problem²⁰⁵ and there was no legislative history showing that Congress was particularly concerned with SNTs abusing Medicaid, it seems possible that Congress did not intend to restrict use of

195. Rosenberg, *supra* note 34, at 129.

196. *Id.*

197. Wiesner, *supra* note 37, at 713 n.130.

198. *Id.* Disability advocates believed that including the age requirement for individual SNTs was a technical drafting error. Rosenberg, *supra* note 34, at 129.

199. Rosenberg, *supra* note 34, at 130.

200. *Id.* at 140.

201. *Id.* at 127 n.211. Further, one federal district court noted that to say there is little legislative history for § 1396p(d)(4) is an “understatement,” and that even the “[c]ourt’s own best efforts have uncovered no sign that Congress ever mentioned this provision in any published report.” *Hobbs ex rel. Hobbs v. Zenderman*, 542 F. Supp. 2d 1220, 1228 (D.N.M. 2008), *aff’d*, 579 F.3d 1171 (10th Cir. 2009).

202. Rosenberg, *supra* note 34, at 128.

203. *Id.* at 127.

204. *Lewis v. Alexander*, 685 F.3d 325, 343 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

205. Radford & Bryan, *supra* note 8, at 7.

SNTs but instead only those trusts abusing Medicaid. Nonetheless, the legislative history (or lack thereof) is ultimately inconclusive about what Congress intended with § 1396p(d)(4).

E. The Supreme Court's Precedent Regarding § 1396p

Although the Supreme Court has not addressed whether § 1396p(d)(4) is mandatory on the states, it has shed some light on how to interpret § 1396p(d)(4). In *Arkansas Department of Health & Human Services v. Ahlborn*,²⁰⁶ the state Medicaid agency paid for medical assistance after a woman suffered severe injuries following a car accident.²⁰⁷ Later, the woman sued the tortfeasors who caused the accident seeking damages for her past medical expenses, permanent physical injuries, future medical expenses, past and present pain and suffering, and past and future loss of earnings.²⁰⁸ When both parties agreed to a settlement, the state Medicaid agency asserted a lien on the settlement seeking reimbursement for the total cost of payments made by the state for her care, even though only one-sixth of the settlement proceeds represented payments for her past medical expenses.²⁰⁹ The legal issue was which of the parties' "competing constructions" of § 1396 was correct.²¹⁰ The plaintiff argued that the state Medicaid agency was entitled to only the portion of the settlement that constituted reimbursement for past medical expenses.²¹¹ In contrast, the state Medicaid agency argued that it could demand reimbursement for the full amount of medical assistance that it paid.²¹²

The Supreme Court held for the plaintiff based on the third-party liability and anti-lien provisions in the Medicaid statute.²¹³ First, the text of the third-party liability provisions did not explicitly provide the state Medicaid agency with a right to collect for any expenses from liable third parties beyond past medical care.²¹⁴ The Supreme Court ruled that the state Medicaid agency's "reading ignore[d] the rest of the provision, which makes clear that the State" may only recover for past medical expenses.²¹⁵ Sec-

206. 547 U.S. 268 (2006).

207. *Id.* at 272-73.

208. *Id.* at 273.

209. *Id.* at 274. Specifically, the tortfeasors settled with the woman for \$550,000.00 and the state Medicaid agency claimed \$215,645.30. *Id.*

210. *Id.* at 275.

211. *Id.* at 274.

212. *Ark. Dep't. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 274 (2006).

213. *Id.* at 280.

214. *Id.*

215. *Id.* at 281 (citing 42 U.S.C. § 1396a(a)(25)(H) (2006)).

ond, the text of § 1396p(a), containing the anti-lien provisions, “[r]ead literally and in isolation,” prohibited states from placing liens against, or seeking recovery of benefits paid from, Medicaid recipients.²¹⁶ Only recovery for past medical expenses was allowed because it was “expressly provided” for in the Medicaid statute.²¹⁷

F. Analysis of the Supreme Court’s Precedent

Ahlborn did not address whether § 1396p(d)(4) is mandatory on the states.²¹⁸ However, the Supreme Court’s analysis shows how § 1396p(d)(4) should be interpreted as being mandatory on the states. First, the Court ruled that the Medicaid statute should be viewed as a whole, not each provision in isolation.²¹⁹ In *Ahlborn*, even though the state Medicaid agency’s reading of one sentence within the statute supported its conclusion, it had ignored the statute’s surrounding provisions protecting the Medicaid recipient. Second, the Court concluded that the state Medicaid agency could recover portions of an individual’s assets only if a statute clearly provides the state with that right. There, the statute plainly allowed for recovery of past medical expenses, but not for recovery of future expenses or pain and suffering.

Here, both conclusions support interpreting § 1396p(d)(4) as being mandatory on the states. First, examining the first sentence of § 1396p(d)(4) in isolation, as the state Medicaid agency did in *Lewis*,²²⁰ ignores the detailed definitions of SNTs and surrounding provisions in § 1396p(d). As discussed below, the structure and purpose of § 1396p(d) show that Congress created a binary system of rules for SNTs and non-SNTs.²²¹ Second, state Medicaid agencies should not be allowed to deny Medicaid benefits unless a statute unambiguously confers that right, but as mentioned above, § 1396p(d)(4) is unclear as to whether the provision is mandatory. Further, in *Ahlborn*, the Court found that the relevant statutory language “place[d] express limits on the State’s powers” to seek recovery of funds from Medicaid beneficiaries.²²² Similarly, the mandatory “shall”

216. *Id.* at 284 (citing § 1396p(a)).

217. *Id.*

218. *See id.* at 289 (“Because the opinions in those cases address a different question from the one posed here . . . we conclude that they do not control our analysis.”).

219. *See also* *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”).

220. *Lewis v. Alexander*, 685 F.3d 325, 342-43 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

221. *See infra* Part III.I.

222. *Ahlborn*, 547 U.S. at 283.

language in § 1396p(d)(4) limits the state Medicaid agencies' discretion regarding assets in SNTs affecting Medicaid eligibility by prohibiting them from applying the default rule.

G. The Agency Interpretation of SNT's Affect on Medicaid

The Centers for Medicare and Medicaid Services (CMS) issues the State Medicaid Manual (SMM) to help state Medicaid agencies administer the program.²²³ The SMM contains "official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies."²²⁴ While the SMM contains no provision stating whether § 1396p(d)(4) is mandatory or optional on the states, two provisions were at issue in the circuit split.²²⁵ First, the SMM's requirement that the SNT be used for the sole benefit of the beneficiary states, "a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual."²²⁶ Second, the SMM's eligibility and post-eligibility rules state, "[i]ncome placed in a[n SNT] . . . is not counted as available in determining Medicaid eligibility," but is "subject to the post-eligibility rules."²²⁷

H. Analysis of the Agency Interpretation

In terms of how much deference is properly accorded to the SMM, it is important to note that the SMM does not constitute law, bind any court, or warrant *Chevron* deference.²²⁸ Instead, agency manuals like the SMM are "informal" interpretations²²⁹ entitled to *Skidmore* deference only if they are persuasive.²³⁰ However, agency interpretations receive no deference if they conflict with the text²³¹ or purpose of a statute.²³²

223. Sai Kwan Wong v. Doar, 571 F.3d 247, 253 n.6 (2d Cir. 2009)

224. SMM, *supra* note 92, at § (B)(1).

225. Note that because the SMM provisions were not discussed in either *Olson* or *Lewis*, agency interpretation was not at issue in those cases.

226. SMM, *supra* note 92, at § 3257(B)(6).

227. SMM, *supra* note 92, at § 3259.7(C)(5)(b). Note that this portion of the SMM explicitly mentions only income SNTs, but the SMM states that it applies to all three SNTs. *Id.*

228. See *Doar*, 571 F.3d at 258-59; see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in . . . agency manuals . . . lack the force of law [and] do not warrant *Chevron*-style deference."). But see *Wis. Dep't. of Health & Family Servs. v. Blumer*, 534 U.S. 473, 496 n.13 (2002) (the Supreme Court has "long noted Congress' delegation of extremely broad regulatory authority to the Secretary [of the HHS] in the Medicaid area.").

229. Sai Kwan Wong v. Doar, 571 F.3d 247, 250 (2d Cir. 2009).

230. *Gonzales v. Or.*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

231. See, e.g., *Ohio Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.").

Here, the SMM's sole benefit rule correctly follows the statute, but its post-eligibility rule does not.²³³ The SMM's sole benefit rule is consistent with OBRA because § 1396p(d)(4) clearly states that all SNTs must be established for the benefit of the individual.²³⁴ The SMM's post-eligibility rule, however, conflicts with the text of the statute because § 1396p(d)(1) specifically states that the default rule for trusts does not apply when determining an individual's "eligibility" and "amount of" Medicaid benefits.²³⁵ Additionally, since CMS did not explain why it interpreted § 1396p(d) in the way that it did,²³⁶ the SMM's post-eligibility rule might not even warrant *Skidmore* deference.²³⁷ As in *Ahlborn*, courts should "decline to treat [an] agency's reasoning as controlling" when it shows a "conscious disregard for the statutory text."²³⁸ Because the SMM is poorly written,²³⁹ contains confusing cross-references,²⁴⁰ and has even confused astute federal judges,²⁴¹ state Medicaid agencies should not follow the SMM's post-eligibility rules. Therefore, § 1396p(d)(4) should not be read as being optional on the states based on the SMM.

232. *Ramey v. Reinertson*, 268 F.3d 955, 963 (10th Cir. 2001).

233. Note that the Tenth Circuit in *Reames* did not rely solely on the SMM and therefore was correct in its holding. *See Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164, 1172 (10th Cir. 2005) ("[W]e cannot ignore the plain language of the [Social Security statute governing payment of Social Security benefits], which expressly forbids assignment of Social Security benefits.").

234. *See* 42 U.S.C. § 1396p(d)(4)(A), (B), (C)(iii) (2006).

235. § 1396p(d)(1).

236. *See Sai Kwan Wong v. Daines*, 582 F. Supp. 2d 475, 483 (S.D.N.Y. 2008), *aff'd sub nom.*, *Sai Kwan Wong v. Doar*, 571 F.3d 247 (2d Cir. 2009).

237. *See, e.g., Detsel v. Sullivan*, 895 F.2d 58, 65 (2d Cir. 1990) (*Skidmore* deference was not warranted since the agency "failed to produce any evidence indicating the rationale for [its] interpretation"), *see also Boykin v. Key Corp.*, 521 F.3d 202, 208 (2d Cir. 2008) (since an agency provided little "explanation of the considerations or reasoning underlying its practice" the agency interpretation was not entitled to *Skidmore* deference).

238. *Ark. Dep't. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 292 (2006).

239. *See, e.g., Jacqueline d. Farinella, Note, Come on in, the Water's Fine: Opening Up the Special Needs Pooled Trust to the Eligible Elderly Population*, 14 *ELDER L.J.* 127, 152 (2006) (arguing the SMM "inadequately guides" state Medicaid agencies "by listing the criteria of a [pooled SNT] with the exact language used in the statute" and "confusingly assert[ing] that establishing a [pooled SNT] 'may or may not constitute a transfer of assets for less than fair market value'").

240. *See, e.g., Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164, 1169 n.4 (10th Cir. 2005) (noting how the SMM states that the section for pooled SNTs applies to individual SNTs).

241. For example, in *Reames*, the Tenth Circuit stated, "Oklahoma sets forth its policies for administering Medicaid benefits in its [SMM]." *Id.* at 1169. However, as discussed above, the CMS writes the SMM, not any state. *See SMM, supra* note 92.

I. Conclusion: § 1396p(d)(4) is Best Read as Being Mandatory

Interpreting the Medicaid statute can be difficult due to the sometimes-unclear text and thin legislative history.²⁴² The Second and Tenth Circuits, however, were persuaded that § 1396p(d)(4) is optional on the states by focusing on the lack of clear language stating that the provision is mandatory. However, this argument “ignores the simplest and clearest explanation: that Congress excepted [assets in SNTs] from all eligibility and benefits calculations [and therefore] [n]o gap exists” for the states to legislate.²⁴³ Thus, the most logical interpretation of § 1396p(d)(4) is evidenced from the structure and overall purpose of § 1396p(d), and other provisions within the Medicaid statute, which show that § 1396p(d)(4) should be mandatory on the states.²⁴⁴

In enacting § 1396p(d), Congress had two goals in mind: to prevent non-SNTs from abusing Medicaid, and to create a narrow exception for SNTs.²⁴⁵ The structure of the statute follows these goals because in § 1396p(d) Congress created a “comprehensive” and “binary system” where a person is attempting to use a trust and receive Medicaid.²⁴⁶ First, if the person is not using a SNT, then the default rule in § 1396p(d)(3) clearly controls and thus, the assets in the trust must be counted when determining the person’s Medicaid eligibility. Second, if the person is using a SNT, then § 1396p(d)(1) states that the default rule does not apply and the SNT must meet the specific elements listed in § 1396p(d)(4). Both § 1396p(d)(1) and (4) also contain mandatory language that place SNTs in a separate category from all non-SNTs. Therefore, Congress enacted this binary system to create mandatory rules for both non-SNTs and SNTs.

However, to interpret § 1396p(d)(4) as being optional on the states requires disregarding one-half of Congress’ binary system because then states may freely create any rule for SNTs. In other words, § 1396p(d)(4) has no utility if a state wishes to ignore those provisions. But the Second and Tenth Circuits failed to explain why Congress, after meticulously defining SNTs, would it leave it up to the states to decide how SNTs are regulated.

242. See *Herweg v. Ray*, 455 U.S. 265, 279 (1982) (Burger, C.J., dissenting) (referring to the Medicaid statute as a “morass of bureaucratic complexity”).

243. Sai Kwan Wong v. Daines, 582 F. Supp. 2d 475, 484 (S.D.N.Y. 2008), *aff’d sub nom.*, Sai Kwan Wong v. Doar, 571 F.3d 247 (2d Cir. 2009). Note that the Second Circuit disagreed with the district court’s interpretation and instead accorded *Skidmore* deference to the SMM because there was “ambiguity as to Congress’ intent” in § 1396p(d)(4). *Doar*, 571 F.3d at 256 n.11.

244. See, e.g., *Crandon v. U.S.*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”).

245. *Lewis v. Alexander*, 685 F.3d 325, 343 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

246. *Id.* at 332, 344.

Instead, to give “full effect to [both] of Congress’ statutory objectives”²⁴⁷ of preventing Medicaid abuse and exempting SNTs from Medicaid determinations, § 1396p(d)(4) should be mandatory on the states.

Besides § 1396p(d)(1) and (4), other provisions within the Medicaid statute provide convincing evidence that § 1396p(d)(4) should be mandatory on the states. First, Congress required states to comply with all of § 1396p, including the SNT provisions.²⁴⁸ Second, in § 1396p(d)(5), Congress granted a state discretion to “waive” the rules in § 1396p(d) if an individual within the state would suffer an “undue hardship,” but only if the state’s waiver procedure is approved by the HHS Secretary.²⁴⁹ This means that Congress created an exception to § 1396p(d)(4) but only if it harms the individual, not the state—and even then, the state’s waiver is still subject to the federal government’s control. Finally, when Congress intended for the states to have discretion it used clear, repetitive language—“at the option of [a] state”—at least six times within § 1396p to indicate such discretion.²⁵⁰ It makes no sense to say that Congress created an optional rule in § 1396p(d)(4)—couched in mandatory terms—but did not include the same discretionary language used repeatedly throughout the same section of the statute. In sum, both § 1396p(d) and several other provisions within the Medicaid statute strongly support interpreting § 1396p(d)(4) as being mandatory on the states.

IV. POLICY CONSIDERATIONS

Legitimate policy considerations also support the interpretation that § 1396p(d)(4) is best read as being mandatory on the states, including (1) protecting those with disabilities, (2) rejecting the states’ “sheltering assets” argument, and (3) interpreting § 1396p(d)(4) uniformly.

A. Beneficiaries with Disabilities

Section 1396p(d)(4) should be mandatory on the states because individuals with disabilities cannot benefit from SNTs unless the assets in the trusts are exempt from Medicaid eligibility and benefit determinations. The

247. *Id.* at 343.

248. *See* 42 U.S.C. § 1396a(a)(18) (2006).

249. *See* § 1396p(d)(5).

250. *See* Petition for Writ of Certiorari at 15-16, *Keith v. Rizzuto*, 531 U.S. 960 (2000) (No. 00-437), 2000 WL 34000749 (citing 42 U.S.C. § 1396p(b)(1)(B)(ii), (b)(4)(B), (c)(1)(A), (c)(1)(C)(ii), (c)(1)(E)(i)(II), (c)(1)(E)(ii)(II) (2006)).

Medicaid program was initially created to help those with disabilities.²⁵¹ The entire purpose for SNTs, however, is to “mitigate the inadequacies of government benefit programs” for individuals with disabilities by having SNTs pay for their non-medical needs.²⁵² These individuals struggle to pay for both their medical and non-medical needs because they often have severe physical and/or cognitive impairments.²⁵³ In fact, § 1396p(d)(4) itself requires that individuals have a statutorily defined disability or live in a nursing home to use the SNTs.²⁵⁴ However, if a state Medicaid agency counts assets in a SNT when determining Medicaid eligibility, an individual with a disability residing in that state is presented with a catch-22: either receive Medicaid and be prohibited from using SNTs; or use a SNT and automatically become ineligible for Medicaid. This ultimatum effectively swallows any utility for SNTs because individuals with disabilities cannot use SNTs to pay for things that Medicaid will not cover.

Additionally, the Supreme Court has recognized the importance of preventing states from excluding individuals otherwise eligible for public aid under the Social Security Act. In *Townsend v. Swank*,²⁵⁵ the Court held that a state could not alter eligibility requirements for a federal aid program without “congressional authorization . . . clearly evidenced from the Social Security Act or its legislative history.”²⁵⁶ Further, the “principle that accords substantial weight to interpretation of [the] statute” is that “aid be furnished ‘to all eligible individuals.’”²⁵⁷ Here, because both the Medicaid statute generally and the SNT provisions help individuals with disabilities, the states should be prohibited from counting assets in SNTs when making Medicaid determinations.

B. The “Sheltering Assets” Argument

One of the biggest arguments for why it has been argued that § 1396p(d)(4) should be optional on the states is the fear that beneficiaries, especially those with great wealth, will shelter their assets in SNTs while receiving Medicaid benefits.²⁵⁸ However, the Medicaid statute limits this

251. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012) (“Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care.”) (emphasis added).

252. Rosenberg, *supra* note 34, at 94.

253. *Id.* at 109.

254. See 42 U.S.C. § 1396p(d)(4)(A), (B)(iii), (C) (2012).

255. 404 U.S. 282 (1971).

256. *Id.* at 286.

257. *Id.* (quoting *King v. Smith*, 392 U.S. 309, 333 n.34 (1968)).

258. Federalism concerns also clearly play a part in these situations. See, e.g., *Horne v. Flores*, 557 U.S. 433, 448 (2009) (“Federalism concerns are heightened when . . . [the federal government’s man-

abuse by requiring that a SNT be used only for the benefit of the beneficiary.²⁵⁹ Additionally, both individual and income SNTs require a payback provision where the remaining assets in the SNT must be used to first pay back the state for all of its expenditures after the beneficiary's death.²⁶⁰ This represented a "bargain" between the states and the beneficiaries: the beneficiary remains eligible for Medicaid while using the SNT, but the state will be paid back before the beneficiary may give any remaining assets to his or her heirs.²⁶¹ Moreover, while pooled SNTs do not require a payback provision, the beneficiary's heirs will not receive any remaining assets in the trust because the state is reimbursed for the amount of medical expenses previously paid to the beneficiary except for those "retained by the trust."²⁶² The funds kept by the trust could be used to pay for administrative costs, given to charity, used to create additional trust accounts for new beneficiaries, or used to provide additional items and services to the existing beneficiaries.²⁶³ Finally, a beneficiary must still satisfy a state Medicaid lien from the proceeds of a tort settlement against a third party before depositing any of the settlement into the SNT.²⁶⁴

Nonetheless, even if individuals try to use SNTs to shelter their assets, states have other means to stop the abuse. One tool is to enact a state law that limits Medicaid abuse through trusts,²⁶⁵ as Congress did not intend to displace state trust law with OBRA.²⁶⁶ In fact, state law, not federal law, generally governs the laws surrounding SNTs,²⁶⁷ which developed sometime during the latter part of the twentieth century.²⁶⁸ States can also petition Congress to change § 1396p(d) or withdraw from the Medicaid program entirely if SNTs continue to abuse their Medicaid programs.²⁶⁹

date] has the effect of dictating state or local budget priorities" because "[s]tates and local governments have limited funds.").

259. See 42 U.S.C. § 1396p(d)(4)(A), (B), (C)(iii) (2006).

260. See § 1396p(d)(4)(A), (B)(ii).

261. Rosenberg, *supra* note 34, at 131.

262. § 1396p(d)(4)(C)(iv).

263. Rosenberg, *supra* note 34, at 135.

264. *Sullivan v. Cnty. of Suffolk*, 174 F.3d 282, 286 (2d Cir. 1999).

265. However, state laws must not conflict with any federal law. See *Lewis v. Alexander*, 685 F.3d 325, 350 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

266. See *id.* at 347.

267. *Sai Kwan Wong v. Daines*, 582 F. Supp. 2d 475, 479 (S.D.N.Y. 2008), *aff'd sub nom.*, *Sai Kwan Wong v. Doar*, 571 F.3d 247 (2d Cir. 2009).

268. Rosenberg, *supra* note 34, at 144.

269. However, states may have difficulty petitioning Congress for change considering the political process, and withdrawing from the Medicaid program may be unrealistic given the need for federal funding.

Ultimately, individuals sheltering assets in trusts caused problems for state Medicaid agencies and likely will continue to do so.²⁷⁰ SNTs, however, were not the type of trusts that were abusing the Medicaid system when Congress enacted § 1396p(d).²⁷¹ Furthermore, one commentator has suggested that SNTs could actually save state resources, because when beneficiaries use SNTs to provide for their non-medical needs, they may need less publicly funded medical care.²⁷² In sum, because the sheltering assets argument fails to account for the legal protections afforded to the states, it cannot be used to interpret § 1396p(d)(4) as being optional on the states.

C. A Uniform Interpretation

The circuit split over interpreting § 1396p(d)(4) has created several problems.²⁷³ However, the split will not be solved soon, as the Supreme Court has denied writ of certiorari for *Keith*,²⁷⁴ *Reames*,²⁷⁵ and *Lewis*.²⁷⁶ Because the primary benefit of having one federal statute governing SNTs is clarity for all parties,²⁷⁷ § 1396p(d)(4) should be mandatory to make sure that jurisdictions do not differ in their interpretation of the provision.²⁷⁸

Section 1396p(d)(4) should be uniformly interpreted to assist as those harmed by an inconsistent interpretation. First, the beneficiaries and their family members must discover their jurisdiction's interpretation and their state's laws regarding trusts.²⁷⁹ If a beneficiary's SNT complies with his or her state's trust laws, then the beneficiary may not bring the SNT to another state that either has different laws regarding SNTs or does not exempt

270. See, e.g., *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.").

271. Radford & Bryan, *supra* note 8, at 7.

272. See Rosenberg, *supra* note 34, at 96 n.25. Additionally, an SNT allows an individual with a disability who receives a personal injury settlement or verdict to use the SNT to pay for items that Medicaid fails to pay for. See *id.* at 136.

273. See Farinella, *supra* note 239, at 129 (arguing that "careless drafting [of § 1396p(d)(4)(C)] has led to a number of other difficult and even dangerous outcomes, including disparate treatment under state law and disparate structures by the managing nonprofit organizations").

274. *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000), *cert. denied*, 531 U.S. 960 (2000).

275. *Reames v. Okla. ex rel. Okla. Health Care Auth.*, 411 F.3d 1164 (10th Cir. 2005), *cert. denied*, 546 U.S. 1225 (2006).

276. *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

277. Rosenberg, *supra* note 34, at 123.

278. Note that all three types of SNTs should be treated the same when courts interpret § 1396p(d)(4). See *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1180 n.3 (10th Cir. 2009) (noting that because all SNTs under § 1396p(d)(4) use the "same statutory language" there is no reason to treat them differently in terms of their mandatory obligations on the states).

279. See Rosenberg, *supra* note 34, at 123 ("Some states rely on the common law and 'generic' trust statutes to guide the interpretation of SNTs. Other states have enacted specific statutes that govern supplemental needs trusts.").

SNTs from Medicaid determinations. Second, state Medicaid agencies administering the program must discover their federal jurisdiction's interpretation of § 1396p(d)(4). If the SNT is created in a jurisdiction that has not yet ruled on the issue,²⁸⁰ then both the beneficiaries and the state Medicaid agencies must spend time, energy, and resources to argue their interpretations of the provision to the federal district courts, and possibly through the appeals process. Third, the attorneys drafting the SNTs must stay informed of all these developments to best protect their clients' assets, which can be difficult given the complexity of the Medicaid statute and regulations,²⁸¹ and the sheer amount of legal fields in which these attorneys must have expertise.²⁸²

All parties involved in these issues need a clear and simple rule to follow.²⁸³ One can reasonably assume that when Congress expanded the federal government's role in regulating SNTs, one of its goals was to create uniformity. Therefore, to avoid having the federal circuits differ in their interpretations of § 1396p(d)(4), the provision should be mandatory on all states.

CONCLUSION

The current circuit split over the relationship between Medicaid and supplemental needs trusts threatens the increasing use of SNTs.²⁸⁴ The circuits holding that § 1396p(d)(4) is optional on the states have gotten "lost in the Medicaid maze" by focusing primarily on its unclear text.²⁸⁵ However, after examining the text of § 1396p(d), and the relevant policy considerations, it becomes clear that Congress wanted to exempt assets in SNTs from Medicaid determinations. Therefore, § 1396p(d)(4) is best read as being mandatory on the states based on the entire forest, not just the trees.

280. Currently, only the Second, Third, Eighth, and Tenth Circuits have interpreted whether § 1396p(d)(4) is mandatory on the states.

281. *Hobbs*, 579 F.3d at 1186.

282. The category of legal fields that these attorneys might be required to know includes, but is not limited to, disability law, tax law, long-term investments, Medicaid eligibility and benefits (and potentially SSI issues), trusts and estate law, and liability issues.

283. Additionally, at least one commentator has suggested that Congress amend § 1396p(d)(4)(C) to indicate more clearly how pooled SNTs should be administered, and that the CMS should also include a model pooled SNT in the SMM to guide the states. *See Farinella, supra* note 239, at 164-65.

284. *See Lacey & Nadler, supra* note 34, at 247 ("[I]nterest in and demand for Special Needs Trusts (SNTs) is on the rise.")

285. *Herweg v. Ray*, 455 U.S. 265, 282 (1982).