

THE PROBLEM

WITH

Imagine you represent a victim of negligence who needs lifetime care. The defendant agrees to settle but unconditionally insists that a large portion of the funds be placed in a restrictive reversionary trust that reverts to the defendant if your client dies. Moreover, the settlement will cause your client to lose government-program eligibility, which he or she depends on to regain a healthy life.

Sound draconian? Many families—especially military ones—find themselves in this situation. Already a victim of the federal government’s negligence and forced to deal with the challenges of pursuing a case under the Federal Tort Claims Act (FTCA),¹ the government then insists that a substantial amount of the settlement be held in these restrictive trusts. A reversionary trust is supposed to pay a victim’s future expenses, but if that victim dies prematurely, the money reverts to the U.S. government.


For decades, the U.S. Department of Justice (DOJ) used reversionary trusts in some settlements, but in 2000 it instituted a new policy to use reversionary trusts when settling most FTCA cases involving serious injury.² The policy coldly states that a reversionary trust is “financially beneficial to the government,” predominantly depending on the plaintiff’s survival, the victim of the government’s negligence.³ The FTCA does not require this type of trust in settlements, nor does it expressly grant the DOJ authority to implement the agency’s settlement policy. Some attorneys have challenged this policy as an abuse of power.⁴

“When a lawyer takes an FTCA case for the first time, he or she may be surprised by the reversionary trust issue,” explained Austin, Texas, attorney Jamal Alsaffar, who has dealt with reversionary trusts when representing military families and veterans. “We used to see these trusts primarily in cases where babies suffered brain damage, but the government is now asking about the use of these trusts in most serious injury FTCA cases.”

A Burden on Military Families

Most plaintiff attorneys are familiar with the use of special needs or supplemental needs trusts to help pay for the plaintiff’s future expenses. These trusts are carefully crafted to serve the plaintiff’s best interests and safeguard eligibility for government programs, such as Medicare and Supplemental Security Income.⁵ However, a reversionary trust is a major roadblock for military families hoping to participate in these and other government programs, particularly if they want to keep their disabled children or relatives





Settling with the federal government may force you to confront the reversionary trust, which ensures that funds will revert to the government if your client dies and disproportionately affects military families. You need to be aware of the harm it could cause, and be prepared to aggressively negotiate the settlement.

REVERSIONARY TRUSTS By || JENNIE RASMUSSEN

in their home rather than institutionalized. While military families are the most obvious litigant under the FTCA, the DOJ's policy applies to anyone injured by the government's negligence, including patients injured at federally supported health centers or litigants under the National Childhood Vaccine Injury Act of 1986.⁶

A reversionary trust, unlike a special or supplemental needs trust, will almost always make someone ineligible for government benefits. Many families later discover a harsh reality—most FTCA cases settle for lower amounts than what the plaintiffs will need for future care, and the reversionary trust is inadequate to provide the services they require, such as community or home-based care. Since the settlement includes a reversionary trust, these families cannot rely on government assistance programs to help fulfill the needs of their children or adult relatives with disabilities. Yet, similarly situated private citizens, including those with special needs trusts, can take full advantage of government programs, since those trusts do not affect government-program eligibility, a gross and unfair insult to military families and other families injured by the government's negligence. "Over the years, I have received phone calls and emails from several parents who had settled claims on behalf of their catastrophically injured child and later realized how unfairly the DOJ had treated them," said attorney Richard Risk of South Pasadena, Fla., who has formally challenged the DOJ's policy.⁷

The policy, which expressly rejects plaintiff attorneys' requests to use special needs trusts in settling FTCA cases, ensures "that other government programs are not tapped unnecessarily," implying that plaintiffs are "double-dipping" by using both government benefits and reversionary trust payments to fulfill their needs.⁸

Also, the DOJ has placed restrictive terms in its standard reversionary trust agreement, making it

extraordinarily difficult for families to get certain payments from the trust, such as reimbursements for transportation, housing, and community or home-based services. These types of services are critical to ensure that children with disabilities stay out of institutions.

"To put those kinds of limits in a standardized trust agreement is discriminatory," said Jeremy Hilton, an activist for military families with disabled children. "The reversionary part is unfair, but the stipulations the DOJ insists on in its standardized trusts are, ironically, unjust. Military families just want to take care of their kids, many of whom are very young when these cases are settled. These families may not fully understand the significance of what they are signing or the long-term implications of no longer being eligible for any government assistance."

Settlement Considerations

Many lawyers who litigate FTCA cases agree that there are "rather narrow circumstances" where a reversionary trust best serves their clients' needs. The consequences of a reversionary trust should weigh heavily in your decision to settle or litigate an FTCA case, but ultimately, it is a client-driven decision. "The bottom line is this: What is in the best interest of the client in this particular situation?" said Atlanta attorney Susan Cremer, who handles FTCA cases.

Attorneys may quickly find that the reversionary interest is an absolute condition of the DOJ's willingness to settle, but if you decide to settle, Cremer advises focusing on maximizing the settlement proceeds payable to your client outside of the reversionary trust and making the trust payout as expansive as possible—aggressively negotiate the terms of the entire settlement. "In my past cases, I have negotiated to broaden the trust terms for maximum payout from the trust to the claimants for medical and

life care needs; and in addition, I have negotiated substantial payments outside of the trust to compensate for other elements of damages, such as lost earning capacity, as well as pain and suffering damages,” she said.

At trial, courts will consider the best interests of the plaintiff to determine whether to impose a reversionary trust, rather than a special needs trust, on the plaintiff. Attorneys should become familiar with their jurisdiction’s case law regarding a court’s consideration of whether a reversionary trust

veterans from government programs, as well as home and community-based services, ultimately leading victims to be “needlessly institutionalized.” They also assert that the policy violates President Barack Obama’s policies on the rights of Americans with disabilities, §504 of the Rehabilitation Act, and the Supreme Court’s decision in *Olmstead v. L.C.*,¹¹ which established the right of people with disabilities to receive community-based services. At press time, the DOJ had not responded, even after receiving a follow-up letter in May 2013.¹² Heather

BECAUSE OF THE DETRIMENTAL AND DISPROPORTIONATE IMPACT ON MILITARY FAMILIES, MANY GROUPS HAVE UNITED TO CONFRONT THE DOJ POLICY ON REVERSIONARY TRUSTS.


serves the plaintiff’s best interests, as some courts may be more prone to completely reject reversionary trusts. “The DOJ does not have as much leverage at trial, because the court will consider the best interests of the plaintiff, which a reversionary trust almost never serves,” noted Alsaffar. However, he warns that attorneys also must consider whether their state has an applicable mandatory periodic payment law, or other similar law mandating the form of damage payments in malpractice cases, because “such laws may give the DOJ a small foothold for requesting a reversionary trust at trial.”

Confronting the DOJ Policy

Because of the detrimental and disproportionate impact on military families, many groups have united to confront the DOJ policy on reversionary trusts. In August 2012, disability rights, military, and veteran groups, such as the National Disability Rights Network and Vietnam Veterans of America, wrote a letter requesting that the DOJ revisit its policy.¹⁰ They contend that the policy disqualifies military families and

Ansley, Vice President of VetsFirst, one of the letter’s signatory groups, summed up the wishes of many who are anxiously waiting for a response from the agency: “We hope that the Department of Justice will act on our concerns to ensure that people with disabilities are able to receive the services they need in their communities.”

The DOJ policy on reversionary trusts harms families already injured by the government’s negligence and also makes it almost impossible to properly care for injured children or adult relatives at home, often forcing institutionalization. The policy’s only beneficiary is the U.S. government, which caused the injury in the first place.

AAJ Public Affairs closely monitors activity in this area, including any judicial, administrative, or congressional challenges. If you have any questions, please contact Sue Steinman, AAJ’s senior director of policy, at susan.steinman@justice.org. 

Jennie Rasmussen is AAJ’s assistant general counsel. She can be reached at jennie.rasmussen@justice.org.

MORE ON REPRESENTING SERVICEMEMBERS

 Visit the Web pages below for additional information.

AAJ SECTION

Federal Tort Liability and Military Advocacy
www.justice.org/sections

AAJ LITIGATION GROUP

Federal Tort
www.justice.org/litgroups

LITIGATION PACKET

Life Care Plans
www.justice.org/litigationpackets

AAJ EDUCATION PROGRAM

2013 Annual Convention: Federal Tort Liability and Military Advocacy Section CLE Program
www.PlaybackAAJ.com

NOTES

1. 28 U.S.C. §§1346(b), 2671–80 (2013).
2. Memo. from Jeffrey Axelrad, Director, Torts Branch, Civil Div., U.S. Dept. of Justice, to DOJ Federal Tort Claims Act staff, assistant attorneys general, and agency counsel, *Federal Tort Claims Act Settlements 2* (May 10, 2000) (copy on file with author).
3. *Id.*
4. See Richard Risk Jr., Risk Law Firm, *Complaint Alleges Justice Department Creating Unfair Social Policy* (2006), www.risklawfirm.com/articles.html.
5. See Annie K.T. Warner, *Settlement Proceeds and Special Needs Trusts for the Disabled*, Trial 52 (Feb. 2014) (“Because a client with disabilities may rely on government benefits for vital health insurance coverage and other essential needs, a settlement plan should protect your client’s government-program eligibility and the corpus of the settlement award from being drained by private health care costs.”)
6. 42 U.S.C. §§300aa-1-34 (2013).
7. Risk, *supra* n. 4.
8. Axelrad, *supra* n. 2, at 3.
9. Susan M. Cremer, *Federal Tort Claims Act Settlements*, 6 Fed. Tort Liab. & Mil. Advoc. (newsltr. of AAJ’s Fed. Tort Liab. & Mil. Advoc. Sec.) (Spring 2001).
10. Ltr. from the American Congress of Community Support and Employment Services (ACCSES) et al., to Eric Holder, U.S. Atty. Gen. (Aug. 6, 2012) (copy on file with author).
11. 527 U.S. 581 (1999).
12. Ltr. from Consortium for Citizens With Disabilities Veterans and Military Families Task Force and the Rights Task Force, to Eric Holder, U.S. Atty. Gen. (May 8, 2013) (copy on file with author).