

VERDICTS AND SETTLEMENTS

No Verdicts and Settlements reported in this issue.

PRACTICE TIPS

THE STRONG ARM OF MILITARY SUBROGATION

In recent years, international events have resulted in the mobilization of more service members (including National Guard and Reserve units). This increase in troop levels has resulted in a corresponding increase of service families traveling to visit their loved ones. With additional travel, it follows that accidents involving active duty service members or their dependent family members have increased. For those handling liability claims that include injured service members or their families, an understanding of the Federal Medical Care Recovery Act and the Third Party Medical Care Recovery Act is necessary.

The Federal Medical Care Recovery Act (FMCRA) is set forth at 42 USC 2651-53. It provides for the recovery of the reasonable value of medical care furnished by the United States on account of injury or disease incurred under circumstances creating tort liability upon some third person. Under the FMCRA, the United States also has the right to recover the costs of pay provided to a service member who is tortiously injured by another.

Congress has also enacted the Third Party Medical Care

Recovery Act (TPMCRA) (10 USC 1095) as a corollary to the FMCRA. The TPMCRA provides authority for military treatment facilities (MTF) to collect the reasonable cost of inpatient health care provided at government expense to injured retirees and family members from those individuals' private health insurance carriers and Medicare supplemental policies.

A military treatment facility may collect outpatient medical care costs in addition to inpatient care costs. Additionally, an MTF may collect medical care costs from any third party insurer. Significantly, this act directs that monies recovered pursuant to its provisions be deposited directly into the local MTF treasury, thereby providing a substantial budgetary source of income and an incentive for an MTF to aggressively pursue these affirmative claims.

The Medical Treatment Facility Third Party Collection Program

Department of Defense (DOD) claims offices and MTFs manage complementary programs to recover for medical care furnished at DOD expense. DOD claims offices will recover from automobile and other insurers, while MTFs will recover from health benefits and Medicare supplemental insurance. If care was wholly or partly provided in a MTF, recovery is possible from both a health benefits insurer and an automobile insurer. The MTF will first attempt to collect from the health insurer. If the MTF cannot recover the full value of the government's claim from the health insurer, the MTF will

forward the claim file to the claims office for collection from the automobile insurer. If the tortfeasor is an uninsured motorist and collection from the tortfeasor is not feasible, claims personnel will pursue recovery from any state uninsured motorist's fund or from the injured party's uninsured motorist's coverage, personal injury protection, or medical payments coverage.

Alternate Theories of Government Recovery

Often, recovery under the FMCRA is not possible because no third-party tort liability exists. State law, including insurance, workers' compensation, and uninsured motorist coverage provisions, determines the government's right to recover in situations not covered by the FMCRA. If, under the law where the injury occurred, the injured party is entitled to compensation for medical care received, usually the federal government may recover. The two most common alternate theories are described below.

a. Recovery may be possible under the injured party's automobile insurance policy. In most cases, the federal government will seek recovery as a third-party beneficiary under the medical payments provision or underinsured/uninsured portion of the injured party's policy. The ability of the federal government to recover as a third-party beneficiary has been upheld in some states, while other states have taken the contrary position.²² With

²² Cases in which the government has been successful in pursuing claims under the

the enactment of 10 USC § 1095, the importance of this theory of recovery has diminished. However, there may be cases where this theory provides the only source of recovery such as cases where the injured party was at fault and CHAMPUS/TRICARE paid for the medical care.²³ Since there is no legally recognized tortfeasor, the FMCRA will not apply, and 10 USC § 1095 will not apply because the care is not provided by, or through, an MTF. In this situation, one obstacle for the government is that the government must comply with state procedural law when asserting a claim as a third-party beneficiary.²⁴ Since the government's right to recovery hinges on the particular wording of an insurance contract, insurance companies have successfully thwarted government recovery by specifically excluding the United States from the terms of the contract.²⁵ However, the government has often been successful in voiding such exclusionary amendments to

third-party beneficiary theory include: United States v. Gov't Employees Ins. Corp., 440 F.2d 1338 (5th Cir. 1971); *Gov't Employees Ins. Co. v. United States*, 376 F.2d 836 (4th Cir. 1967).

²³ CHAMPUS is the Civilian Health and Medical Program for the Uniformed Services. Since its establishment on October 1, 1966, Congress and the DOD have made numerous changes to the CHAMPUS program. CHAMPUS officially became known as TRICARE in 1993; however, many persons including several official Armed Forces Regulations and Pamphlets still refer to TRICARE as CHAMPUS.

²⁴ *United States v. Hartford Accident & Indem. Co.*, 460 F.2d 17 (9th Cir. 1972), cert. denied 409 U.S. 979 (1972).

²⁵ *Gov't Employees Ins. Co. v. United States*, 400 F.2d 172 (10th Cir. 1968); *United States v. Allstate Ins. Co.*, 606 F. Supp. 588 (D. Haw. 1985); *United States v. Allstate Ins. Co.*, 306 F. Supp. 1214 (N.D. Fla. 1969).

insurance policies.²⁶ Additionally, in states that have adopted no-fault automobile insurance laws, the government has often succeeded in recovering as a third-party beneficiary under the terms of either the insurance contract or the state no-fault statute itself.²⁷

b. Recovery may also be possible under state workers' compensation laws. Case law in this area is still emerging, but in most jurisdictions, the United States stands in the position of a lien claimant for services rendered. The existence of a remedy under this theory may hinge upon the particular wording of a state workers' compensation statute. Some courts have denied recovery on the lienor theory finding no statutory basis for the government's claim.²⁸

Recovery Rights Under the FMCRA

Pursuant to the FMCRA, the government may pursue recovery of medical costs and the costs of pay under any of the following tactics:

a. Subrogation. The United States is subrogated to any rights or claims held by a person to whom the government has provided medical care and wages (during periods of incapacitation) against the tortfeasor who caused him or her to be injured. As subrogee, the United States can recover from

²⁶ *United States v. Nationwide Mut. Ins. Co.*, 499 F.2d 1355 (9th Cir. 1974); *United States v. Gov't Employees Ins. Co.*, 461 F.2d 58 (4th Cir. 1972); *Southern Farm Bureau Casualty Ins. Co. v. United States*, 395 F.2d 176 (8th Cir. 1968).

²⁷ *United States v. Gov't Employees Ins. Co.*, 605 F.2d 669 (2nd Cir. 1979); *Gov't Employees Ins. Co. v. United States*, 376 F.2d 836 (4th Cir. 1967).

²⁸ *Nat'l. Mut. Casualty Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971).

the wrongdoer the reasonable value of the medical care and the amount of pay the United States has furnished or will furnish the injured party.

b. Intervention. The United States can intervene in an injured party's suit against a tortfeasor or bring suit as the assignee of an injured party's right of action.

c. Independent cause of action. The FMCRA creates an independent cause of action for the United States. The government's right is independent of the rights of the person receiving medical care. The United States can administratively assert and litigate a medical care claim in its own name and for its own benefit. A failure of the injured person to properly file and/or serve a complaint on the third party may prevent the injured person from recovering, but does not prevent the United States from pursuing its own action to recover. The right arises directly from the statute; the statutory reference to subrogation pertains only to one mode of enforcement. In creating an independent right in the government, the Act prevents a release given by the injured person to a third party from affecting the government's claim.

d. Item of special damages. The injured party's attorney can assert the government's claim as an item of special damages in an injured party's suit against the tortfeasor.²⁹

²⁹ *In this case, the government is not allowed to pay any portion of the injured party's attorney's fees, and the injured party's attorney is not allowed to compute his or her fee based on the government's portion of any recovery. The agreement between the govern-*

Notice of Claim

The claims office will assert appropriate FMCRA claims by mailing, certified mail, returned receipt requested, a notice of claim to identified third-party tortfeasors and their insurers, if known. Many insured tortfeasors fail to notify their insurance companies of incidents. This failure may be a breach of the cooperation clause in the policy and may be grounds for the insurer to refuse to defend the insured or be responsible for any liability. However, the United States, as a claimant, may preclude such an invocation by giving the requisite notification itself. The purpose of the insurance clause is satisfied if the insurer receives actual notice of the incident, regardless of the informant. After receiving a notice of claim, the insurer must ensure that the government is named on any settlement draft. If the United States is not so named, and the claim has been asserted, the insurer settles at its own risk.

Determination of the Amount Asserted

a. Medical Treatment Facility Costs. Recovery for MTF care is based on diagnostic related group rates, and a single per-visit outpatient rate established by the Office of Management and Budget (OMB) and/or the Department of Defense (DOD).³⁰

ment and the injured party's attorney will state that the government must be consulted regarding any potential compromise and must agree to any settlement.

³⁰ Insurers and firms handling this type claim should review this claim carefully to insure that the billings do not include inpatient days where the injured party was retained in the MTF for administrative purposes rather than medical needs.

b. TRICARE costs. Recovery for inpatient care provided in civilian hospitals and paid through TRICARE is based on the TRICARE diagnostic related group rates, regardless of the actual costs. Rates for outpatient care are based on the TRICARE allowable charge for that medical service.³¹

c. Costs of pay. When a third party tortiously injures a soldier, that soldier is often unable to perform any military duties for a period of time because of the injuries. Citing the FMCRA, claims offices will assert a demand against the tortfeasor to recover the "cost of pay" for the period in which the injured soldier is unable to perform military duties.³²

d. Ambulance services. Ambulance and air ambulance services provided to soldiers, family members, and retirees are medical costs within the meaning of the FMCRA and 10 USC § 1095, but they are not included in the OMB or DOD rates. Claims offices will obtain a breakdown of the costs for these services from the MTF or the unit providing the services and include this amount in the amount asserted.

e. Burial expenses. If the service member dies from injuries received and is buried at government expense, the government may, in some

³¹ Claims offices will assert a claim for the amount that TRICARE paid even though that amount may sometimes exceed the amount that the civilian hospital billed.

³² Insurers and firms faced with a cost of pay claim should carefully review the assertions. The military has several steps for dealing with injured service members. Service members may be placed on convalescent leave during which time they will be performing no military duties. After, or in lieu of, convalescent leave, service members may be given a temporary profile during which time their duty is restricted; however, they are performing military duties.

cases, assert a claim for these expenses. While burial expenses are not medical care within the meaning of the FMCRA or 10 USC § 1095, many insurance policies provide for the payment of such expenses. Claims offices may assert a demand for burial expenses incurred by the government if the insurance contract provides for payment of such expenses and state law recognizes the United States as a third party beneficiary of the contract.³³

Settling Claims

a. Payment in full. The government may settle a medical care or property damage claim by recovering the full amount of the government's claim as a lump sum, through installment payments, or as a repair in kind on a property damage claim. An offer for the full amount of available insurance would not pay in full a claim asserted for a greater amount, and the recovery attorney would have to follow compromise procedures.

b. Compromise. When there are difficulties in recovering on a claim (as defined in the Federal Claims Collection Standards, 4 CFR 103), a settlement authority may accept less than the amount asserted from a tortfeasor or insurer for the convenience of the government. Acceptable bases for compromise for the convenience of the government include inability of the tortfeasor to pay, insufficient insurance,

³³ Claims personnel are sensitive to the possibility that the insurance proceeds might be inadequate and will consider waiving or compromising the government's claim for burial expenses to avoid undue hardship to the next of kin.

probability that the government will be unable to prove its case, or collection costs that are not commensurate with the amount compromised.

c. Litigation. When a tortfeasor or insurer refuses to settle, the recovery attorney will consider litigation to protect the interests of the United States. Litigation will be routinely sought if a particular insurer consistently refuses to settle claims, or if the government's interests are not adequately represented on a large claim.

Basic Considerations

Medical care claims asserted under the FMCRA or against a liability insurer under 10 USC § 1095 are founded in tort and must be brought within three years after the action "first accrues" (28 USC § 2415b). Claims asserted under 10 USC § 1095 against a no-fault or personal injury protection insurer are presumably founded in a contract "implied in law" and must be brought within six years (28 USC § 2415a).

Normally, a medical care claim "first accrues" on the initial date of treatment. However, in computing the statute of limitation, 28 USC § 2416(c) excludes the period of time before a U.S. official charged with the responsibility to act in the circumstances knows or should know that there is a basis for a claim.³⁴

³⁴ *United States v. Hunter*, 645 F. Supp. 758, 760 (N.D.N.Y. 1986). For example: the three year SOL would begin to run on most medical care claims paid by Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) no earlier than the date on which CHAMPUS received the bill from the

Claims asserted against an insurer on a third party beneficiary theory or against a state workers' compensation fund must be brought with the applicable state statute of limitations which can range from one to six years. Normally, the SOL would begin to run when the injury occurred, rather than on the date of initial treatment.

Federal law does not define what constitutes a tort. The law of the state where an incident occurred is used in determining whether the government has a cause of action founded in tort.

Claims for damage to government property and claims for medical care may arise from the same incident.³⁵ This article focuses on claims for medical care; however, insurers and firms should be aware of potential claims for property damage and the potential problem of when concurrent claims arise. The government will process concurrent claims under the section applicable to each. However, efforts are made to include all medical care and property damage claims in a single demand against the third party or insurance company. If you are faced with a concurrent claims demand you must be aware that the government typically drafts its settlement agreements so that the settlement and release of one claim will not prejudice settlement of the remaining claim.

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³⁵ *The Federal Claims Collection Act (FCCA)* is set forth at 31 USC § 3711. It states that Federal agencies will try to collect all claims of the United States for money or property. Among other things, it provides a basis for agencies to recover for damage to government property. Claims asserted under the FCCA for damage to government property are founded in tort and must be brought within three years after the action "first accrues" (28 USC § 2415b).

Summary

Government claims offices assert claims against tortfeasors and insurers for medical and dental care that is furnished to a member of the U.S. Armed Forces (including a reserve component member), a family member, or retiree at government expense to treat an injury or disease resulting from tortious conduct. Claims offices also assert claims against tortfeasors and insurers for any basic, special, or incentive pay provided to the soldier. The "costs of pay" are recoverable when the soldier is unable to perform any military duties due to injuries caused by the wrongful conduct of a third party tortfeasor. Claims offices also assert claims against insurers other than health benefits insurers, such as automobile insurance companies that provide no-fault and medical payments coverage and workers' compensation funds. With added incentives, such as getting to keep the monies recovered, MTFs are now aggressively pursuing all possible claims. Insurers and firms faced with a claim by the government, or considering settlement with a claimant who is a member of the Armed Forces, must be aware of the statutes and various theories of recovery that the government may assert. An insurer who settles a claim with a service member or other beneficiary without first ensuring the government claims officer is involved does so at its own risk.



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ARTICLES

THE CRITICAL STATE OF SELF-CRITICAL ANALYSIS: IS THE PRIVILEGE STILL VIABLE?

I. INTRODUCTION

Motor carriers regularly investigate accidents in which their drivers are involved. During these investigations, company employees are often called upon to make critical self-evaluations in an effort to improve overall safety. If the motor carrier is sued by a third-party, can the third-party obtain any or all of the company's internal investigation and self-analysis?

Recognizing the need to protect certain self-analyses from discovery, as well as the potential chilling effect disclosure would potentially promote, a privilege of self-critical analysis has developed.

This article will discuss the current state of the federal law dealing with the self-critical analysis privilege. As noted more fully below, a majority of the Circuit Courts of Appeal has refused either to recognize the privilege or to apply the self-critical analysis privilege.

II. HISTORICAL DEVELOPMENT OF THE PRIVILEGE

The privilege was first recognized in Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.C. 1970). Bredice was a medical malpractice case. In her discovery, plaintiff sought, *inter alia*, the minutes and reports of any board or committee of the defendant hospital or its staff concerning the death of the decedent. The

defendant hospital had boards or committees which acted pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals. According to the Bredice opinion, the Commission was organized to standardize hospital practices throughout the nation. Though the Commission lacked legal licensing authority, it was considered a prestigious organization and accreditation by the Commission could only be gained by following the recommendations of the Commission.

The Commission's recommendations included those designed to improve hospital and medical standards through the use of committee review proceedings. These proceedings involved the professional staff of the hospital who participated in the care and treatment of patients. According to the Commission, the sole objective of these staff meetings was improvement in the available care and treatment of patients. Moreover, the meetings were conducted with the understanding that all communications were to be confidential.

The Bredice Court upheld the recommendations of the pretrial examiner that plaintiff's motion to compel the production of the minutes of staff meetings be denied. In so holding, the Court noted:

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques.