

Claims Report
U.S. Army Claims Service

Affirmative Claims Note

2009 Agreement with TRICARE

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In January 2009, the Office of the Judge Advocate General (OTJAG), TRICARE Management Activity (TRICARE),¹ and the Army Medical Command (MEDCOM) entered into an agreement² to establish how TRICARE will reimburse MEDCOM for a portion of the costs associated with recovering TRICARE claims from tortfeasors, insurers, and workman's compensation programs under the Army's Medical Affirmative Claims program. This article will explain the purpose of the agreement, its provisions, history, implementation, and the opportunities it presents to Army Medical Affirmative Claims offices wishing to establish or expand agreements with Military Treatment Facilities (MTFs).

Background

The Army Medical Affirmative Claims program allows the Army to recover costs of medical care provided to Soldiers, retirees, and their Family members by MTFs and civilian hospitals. Reimbursement for this care from tortfeasors and their insurers is authorized under the Federal Medical Claims Recovery Act (FMCRA).³ It is also permitted by 10 U.S.C. § 1095. The latter statute allows recovery against an injured party's insurer when medical care is provided or funded by the Army, even though that insurer is designated by law as the "primary payer." The

FMCRA authorizes recovery in states requiring tortious conduct as the proximate cause of injury, as well as in states that have a "no fault" system of insurance. Title 10 U.S.C. § 1095 provides a remedy against the providers of the injured party's automobile insurance, workers' compensation, and common carrier coverage.⁴ Claims for medical care provided at MTFs frequently involve TRICARE, tortfeasors, and insurers. To economize resources, OTJAG agreed to assert TRICARE claims for medical expenses arising under the FMCRA as well as under 10 U.S.C. § 1095b⁵ for claims involving automobile insurance, workers' compensation, and common carrier coverage.

The memorandum of agreement (MOA) is the most recent effort to encourage the recovery of medical affirmative claims and facilitate cooperation between the Army legal community and the health providers (military and civilian) on whose behalf claims are asserted and collected.

Title 10 U.S.C. § 1095 has profoundly affected medical care recovery procedures. Money recovered under this statute must be credited to the appropriation supporting the operation and maintenance (O&M) account of the facility that provided the care. Funds recovered under this statute can be used to support the local hospital commander's mission. Before this, recovered funds were deposited in the miscellaneous receipts fund of the General Treasury. Once they were authorized to deposit recovered funds into their own accounts, many MTFs entered into agreements with claims field offices to fund additional personnel to support medical affirmative claims recovery efforts. The results were tangible and immediate: by fiscal year (FY) 1995, more than \$7 million in medical care recoveries were deposited into MTF O&M accounts.⁶

In 1996, the FMCRA was revised to authorize recovery of injured Soldiers' lost pay⁷ and to mirror the language in

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¹ For simplicity, both the TRICARE program and the TRICARE Management Activity (TMA), which oversees that program, will be referred to in this article as "TRICARE." The TMA is a field activity of the Undersecretary of Defense for Personnel and Readiness, and was formally established under Department of Defense Directive (DoD) 5136.12, *TRICARE Management Activity (TMA)* on 31 May 2001. Since February 1998, TMA leadership has managed the TRICARE health care program for active duty members and their Families, retired servicemembers and their Families, National Guard/Reserve members and their Families, survivors and others entitled to DoD medical care. TMA is the preferred acronym for the agency formerly known as "CHAMPUS" and operates under the authority of the Assistant Secretary of Defense for Health Affairs. *About TMA*, TRICARE MGMT.ACTIVITY PORTAL, <http://tricare.mil/tma/AboutTMA.aspx> (last visited Oct. 24, 2011).

² The signatories to the Memorandum of Agreement (MOA) were The Judge Advocate General (TJAG); Commander, U.S. Army Medical Command (MEDCOM); General Counsel, TRICARE Management Activity; and the (Acting Commander) Department of the Army Secretary of Defense (A)DASD, Health Budgets and Financial Policy, TRICARE Management Activity.

³ 42 U.S.C. §§ 2651–2653 (2006).

⁴ Excluded for purposes of this discussion are third-party health benefits claims for health insurance and Medicare supplemental made under title U.S.C § 1095, as these claims are processed separately within Medical Treatment Facilities and medical centers under the aegis of the "Third Party Collection Program" (TCPC).

⁵ 10 U.S.C. § 1095(b) (2006).

⁶ Kristi Jedlinski, *1995 Affirmative Claims Report*, ARMY LAW., Aug. 1996, at 37.

⁷ Congress for the first time authorized the recovery of the Soldier's pay from the tortfeasor, and deposit of that pay in the local operation and

10 U.S.C. § 1095, which allows deposit of recovered funds in an MTF's account.⁸ Before these separate pieces of legislation were brought into harmony, Army claims office personnel took pains to distinguish funds recovered under the FMCRA from recoveries under section 1095,⁹ as only the latter were authorized for deposit into MTF O&M accounts.

In FY 2002, the Department of Defense required that monies recovered in TRICARE Medical Affirmative Claims be credited to TRICARE's fund-cite, known as a Defense Health Program (DHP) account, rather than the General Treasury Account.¹⁰ Although private sector care costs were paid by TRICARE and gave rise to affirmative claims which could be collected by OTJAG, no agreement existed between TRICARE and OTJAG through which TRICARE contributed to OTJAG's recovery effort.

As shown in Table 1 of the Appendix, TRICARE collections have increased steadily since regulations authorized crediting deposits back to TRICARE. In 2002, TRICARE accounted for approximately one-third of all medical affirmative claims-related deposits. In 2010, it accounted for about 65% of such deposits.

Notwithstanding the emergence of TRICARE as a major source of recovered funds, Army hospitals remained the sole source of additional funding for medical affirmative claims operations and personnel. As medical affirmative claims personnel divide their attention between military hospital and TRICARE collections, that is, between the collection of funds expended by MTFs for the care of patients and by TRICARE for treatments provided at civilian hospitals, MEDCOM has long expressed interest in establishing a means of sharing these costs with TRICARE.

In discussions leading to the final version of the MOA, the parties looked at ways to reimburse each of the organizations that fund Medical Affirmative Claims personnel.¹¹ Arguably, TRICARE should reimburse all

maintenance (O&M) account that supports "the command, activity, or other unit to which the soldier was assigned at the time of the injury." This legislation, as integral as any other to the Medical Affirmative Claims program, has contributed relatively modest sums to the overall military affirmative claims effort. According to the Affirmative Claims Management Program, the database that records all Army Medical Affirmative Claims activity, claims offices have recovered approximately \$290,000 in Soldier pay annually since the legislation became effective in FY02. "Recovered lost pay" will likely remain the third and shortest leg of the Medical Affirmative Claims tripod for some time to come.

⁸ See 42 U.S.C. § 2651(b); Pub. L. No. 104-201, § 1075, 110 Stat. 2422, 2661-62 (1996).

⁹ Colonel Jack F. Lane, Jr., *Policy Memorandum—Recovery of Medical Care Costs*, ARMY LAW., Aug. 1991, at 48.

¹⁰ 32 C.F.R. § 537.14 (c) (2) (2011).

¹¹ Information Management Command (IMCOM) and Forces Command (FORSCOM), in addition to MEDCOM, also pay salaries of select civilian and military Medical Affirmative Claims employees.

Army agencies for their expenditures on TRICARE collections. However, the attempt to establish a means to reimburse "all" Medical Affirmative Claims costs was determined to be impracticable¹² and not cost effective. The parties agreed that the most direct and workable option available was for TRICARE to reimburse MEDCOM for its outlay of funds to provide additional Medical Affirmative Claims personnel.

Another issue involved the manner in which reimbursements were made. The parties decided that the most sensible approach was for TRICARE to reimburse MEDCOM, and then have MEDCOM apportion payment to its MTFs and Army Medical Centers (AMCs). Because the MOA requires TRICARE to reimburse incremental direct costs (that is, costs associated with additional outlays of funds to assert and process Medical Affirmative Claims), MTFs may receive reimbursement only if they execute MOUs with their servicing Staff Judge Advocate Offices (OSJAs).

Some thought was given to deducting TRICARE's share of Medical Affirmative Claims costs directly from each recovered claim before completing the deposit of funds. However, such additional administrative computations would violate Federal law.¹³ Moreover, these computations, if compounded over thousands of claims at dozens of offices, would inevitably lead to erroneous calculations and wasted time. Using data from the Affirmative Claims Management Program, the Army Claims Service can perform these calculations more efficiently.

The Memorandum of Agreement

The MOA became effective on 14 January 2009. It will remain in effect indefinitely and may be modified upon the approval of all parties. The MOA establishes the method by which TRICARE will reimburse the Army for the incremental direct costs assumed by MTFs and medical centers for recovering claims on behalf of TRICARE. This is not a fixed-rate payment for services rendered.¹⁴ It is a reimbursement to the Army for the estimated costs incurred by Medical Affirmative Claims personnel in asserting claims on behalf of TRICARE. "Incremental direct costs" are

¹² The costs of military personnel, for example, are not reimbursable under the MOA because those costs are centrally funded. Medical Affirmative Claims-related military labor constitutes less than ten percent of the total Medical Affirmative Claims program costs.

¹³ Monies recovered for TRICARE claims must be deposited to TRICARE's account under title 10 U.S.C. § 1079a ("All refunds and other amounts collected in the administration of the Civilian Health and Medical Program of the Uniformed Services shall be credited to the appropriation available for that program for the fiscal year in which the refund or amount is collected.")

¹⁴ Fixed rate agreements potentially violate the Economy Act which requires that payments be made "on the basis of the actual cost of goods or services provided." 31 U.S.C. § 1535 (2006).

simply those costs that have been incurred in addition to the costs that already exist with respect to administering a military affirmative claims program. They are the costs assumed by MTFs and medical centers to supplement efforts to recover Medical Affirmative Claims, such as the cost of specific additional personnel from an OSJA who otherwise would not be engaged in Medical Affirmative Claims collection activities. The salaries of additionally-assigned noncommissioned or commissioned officers are not eligible for reimbursement. MEDCOM shall not be asked to pay for them via a MOU, and TRICARE shall not be asked to reimburse such costs.

TRICARE's reimbursement to a medical center in the current year is subject to its Medical Affirmative Claims staff having deposited sums on behalf of TRICARE in the previous year. For TRICARE to reimburse MTFs other than AMCs for work performed by employees it funded, the reimbursement formula—described in detail below—is the same, but a MOU between the MTF and OSJA must be in effect as of 31 January in the year in which reimbursement is calculated and must identify the positions to be funded as well as any fixed costs. An "Installation Support Agreement" between the MTF and Army installation may substitute for a MOU, but must be similarly precise in identifying the funded positions and other fixed costs to be funded by the MTF.

The calculation begins by determining the total cost of legal support services that are provided by the AMC or MTF to the Medical Affirmative Claims program during the current fiscal year. Costs include the salaries and "locality pay" of the civilian positions assigned to process medical affirmative claims, salaries of contract claims personnel, and fixed costs related to supplies, training, postage, and equipment associated with supporting the Medical Affirmative Claims mission. Not included in this figure are the salaries of military claims personnel or of civilian or contract claims personnel that are not paid out of AMC or MTF funds. Costs of any billing clerks or other positions that have only a tangential relation to the Medical Affirmative Claims process are also not included.¹⁵

The salaries of the attorney, paralegal, and claims assistant who work Medical Affirmative Claims at (hypothetical) Fort Courage are shown in Table 2 of the Appendix. To determine what share of these costs (if any) should be reimbursed by the TRICARE Management Activity, look at the following:

¹⁵ The funding decision respecting whether a position is reimbursable will be made by Army Claims Service, after consultation with the medical center or MTF. Because TRICARE provides its own bills, the cost of Army medical centers (AMC) or MTF billing clerks will not be reimbursed by TRICARE unless a substantial portion of that employee's daily activity is devoted to asserting Medical Affirmative Claims on behalf of TRICARE as well as the hospital.

- Determine the employee's base salary. For FY11, the Army Claims Service surveyed field offices by asking for each Medical Affirmative Claims employee's GS or NSPS pay grade.¹⁶
- Include the benefits associated with the employee's salary. An employee's benefits package is estimated to be 36.25% of his salary,¹⁷ a percentage that accounts for social security, health coverage, and other costs. This figure is added to the employee's salary to obtain a "Total Personnel Cost."
- The total personnel cost is then multiplied by the amount of time that employee spends processing Medical Affirmative Claims actions, expressed as a percentage of that employee's work week.
- If the MTF agrees to fund a position under the terms of a MOU or Interagency Service Agreement, then a portion of that employee's salary and benefits is eligible for reimbursement by TRICARE. If the position is not addressed in the memorandum, then that employee's salary is not reimbursable, even if the employee's time is devoted exclusively to the Medical Affirmative Claims program.
- The sum of all eligible employees' salaries and benefits, adjusted for the time they dedicate to Medical Affirmative Claims work, is considered the Total Army Medical Command Medical Affirmative Claims cost; that is, it is the total Medical Affirmative Claims cost borne by MEDCOM through its MTF or AMC.

Once the AMC's or MTF's Medical Affirmative Claims-related costs in the current year are determined, the next step is to calculate—at that location—the percentage of recoveries deposited on behalf of TRICARE in the previous year. Once the "TRICARE Management Activity Share of Collections" is calculated, multiply this percentage by the AMC's or MTF's Medical Affirmative Claims-related costs in the current year. The product equals the incremental direct cost to that AMC or MTF to provide medical care recovery services to TRICARE.

¹⁶ In the past, some offices provided the employee's YA, YB, YC, or GS designation, while others supplied specific dollar figures. When specific figures were not provided, the salary was determined to be at the "step-5" level of the GS-equivalent rate, even when the employee was rated under the NSPS system. In subsequent years, specific salary figures will be requested of all offices.

¹⁷ This percentage was provided by the Civilian Personnel Office at Fort Meade.

Based on the data in Table 2, the local MTF/OSJA MOU addresses only the attorney and claims assistant positions, so the costs associated with funding these employees are eligible for partial reimbursement by TRICARE. The attorney's total personnel cost is \$120,000. She devotes one-quarter of her work week to Medical Affirmative Claims. Thus, her "Medical Affirmative Claims personnel cost" is \$30,000. Of all the funds recovered during the previous year, TRICARE received 60%. Therefore, TRICARE will reimburse MEDCOM in the amount of:

$$[\$30,000 \times 60\%] = \$18,000$$

MEDCOM will then deposit these funds in the O&M account of the Fort Courage MTF.

Similarly, the claims assistant's total personnel cost is \$50,000. He spends 90% of his time working Medical Affirmative Claims, so his Medical Affirmative Claims personnel cost is \$45,000. Because TRICARE received 60% of all recovered funds the previous year, TRICARE will reimburse MEDCOM in the amount of:

$$[\$45,000 \times 60\%] = \$27,000$$

TRICARE will therefore reimburse MEDCOM for both positions in the amount of:

$$[\$18,000 + \$27,000] = \$45,000$$

As explained above, TRICARE may be required to reimburse MEDCOM if either an AMC or MTF incurred additional administrative costs (supplies, training, equipment, etc.) associated with the Medical Affirmative Claims program. In the case of MTFs, a fixed amount¹⁸ must be stipulated in the Installation Support Agreement or MOU between the MTF and OSJA. These administrative costs are then added to the MEDCOM Medical Affirmative Claims costs to arrive at the total amount due from TRICARE.

The Army Claims Service will calculate Medical Affirmative Claims costs in January of each year and submit the figure to TRICARE. Field claims offices must provide these costs to the Army Claims Service by 15 January. Field offices are cautioned to adhere to this January deadline, as the MOA does not permit end-of-year reconciliations. TRICARE will execute a funds transfer via a funding authorization document to MEDCOM no later than 30 April.¹⁹ This is intended to provide MEDCOM

¹⁸ A "fixed" amount is a sum certain, not a percentage or other variable. OSJAs are urged to review the particulars of their local memoranda of understanding with MTFs to ensure that any fixed amounts for equipment, supplies, training, etc. are set forth in actual dollars.

¹⁹ Subject to the availability of funds, this MOA obliges TRICARE to transfer appropriated funds for each fiscal year the MOA is in effect.

sufficient time to redistribute funds to its hospitals (in apportioned amounts based on the Army Claims Service's earlier calculations), enabling hospitals to obligate the funds before the funds expire at the end of the year. Payment for medical care recovery for legal support services must be made using funds from the fiscal year in which the services are performed. Judge Advocates are reminded that one method of obligating funds is to hire Medical Affirmative Claims employees, whenever the addition of such employees is expected to add value to the Medical Affirmative Claims program.

Field claims offices are urged to review their current MOU with their MTFs to ensure these agreements address their current personnel needs in the context of a vigorous Medical Affirmative Claims program. Field claims offices that have not yet negotiated agreements are urged to consider doing so. These agreements are a prerequisite to participation in this reimbursement program. In certain limited instances, however, such as when both TRICARE and MTF recoveries are minimal and the funds that might be recovered by hiring an additional employee are unlikely to exceed his salary, agreements may not be advantageous either to your office or your local MTF. Review your office's recovery history, current performance, and future trends before electing whether to pursue reimbursement through this program. OSJAs wishing to initiate or revise agreements with MTFs must do so before 31 January of the year in which they contemplate TRICARE reimbursement.

Making the MOA Work for Your Office: Three Scenarios

The new MOA affords offices considerable leeway with respect to the kind of agreement an OSJA forges with a local Army hospital. The Staff Judge Advocate must determine the state of the Medical Affirmative Claims program in his or her office. Review your office's historical data in the affirmative claims management program. Look at whether you have a persistent backlog of actions and whether your office is taking on more TRICARE (or MTF) claims than ever before. Consider whether you have sufficient personnel to process claims at their current or expected rates over the next several years. The MOA provides additional incentive to MTFs to fund positions in your Medical Affirmative Claims program. Exploit your knowledge of your program to persuade the MTF to invest, or invest more generously, in the Medical Affirmative Claims recovery mission.

Scenario 1

Table 3 of the Appendix shows an office with Medical Affirmative Claims activity weighted entirely toward TRICARE. The absence of MTF deposits suggests that this field office is remotely located from any MTF or co-located with a clinic that is not equipped to address traumatic injuries. The trend-lines from FY05 through FY08 suggest

that TRICARE is in a continuing growth phase at this location. The OSJA should consider hiring an additional employee. Before the advent of the TRICARE MOA, crafting a MOU with any hospital, remote or otherwise, would have been impossible because the hospital would have had no incentive to invest in personnel whose activities are exclusively devoted to asserting TRICARE claims.

Now, however, the OSJA should pursue the funding of additional positions through a MOU with any hospital or clinic that agrees to underwrite these positions. Even if an OSJA is unlikely ever to recover funds for a remotely-located MTF or co-located Army clinic, the MOA ensures that whichever entity agrees to fund additional Medical Affirmative Claims positions will be reimbursed for virtually the entire cost of the additional hire. The “selling point” to the MTF/clinic is not that the OSJA will recover more funds for the hospital, but that, in the course of assisting the Army recovery effort on behalf of TRICARE, the MTF will be reimbursed in full and will have effectively paid “nothing” while furthering the overall Medical Affirmative Claims program. The data in Table 3 suggests very limited recoveries on behalf of the MTF related to TRICARE, so TRICARE will pay for most of the MTF’s costs: the high ratio of TRICARE to MTF recoveries indicates the MTF will be reimbursed approximately 85 cents for every dollar it invests in the local Medical Affirmative Claims recovery program.

Scenario 2

Table 4 of the Appendix shows an office in which MTF recoveries are gradually diminishing, while TRICARE—after five years of modest activity—has become the predominant area of activity. If this MTF already has an agreement with the local OSJA, it might seriously consider withdrawing participation and discontinuing funding of Medical Affirmative Claims positions, given the diminishing returns on its investment. But under the new MOA, the surge in TRICARE recoveries is good news for the field office,

which can negotiate either a continuation of its current MOU with the local hospital or an expanded agreement in light of the significant upswing in TRICARE activity. The argument to make to the MTF is that it will be reimbursed by TRICARE in proportion to TRICARE’s percentage of overall deposits. At this office, TRICARE accounted for about 90% of all FY10 Medical Affirmative Claims activity; therefore, TRICARE will reimburse MEDCOM (which in turn will reimburse this MTF) for 90% of the Medical Affirmative Claims costs shouldered in FY11 by the MTF.

Scenario 3

Table 5 of the Appendix shows an office in which TRICARE is not a significant player. The hospital will receive only a small reimbursement from the TRICARE Management Activity because so few deposits are made on behalf of TRICARE. While this state of affairs means that the new MOA will not help this office, the continuing strength in MTF deposits should prompt the OSJA to obtain a MOU with the hospital or revise the existing agreement to ensure the OSJA is adequately staffed to process the steady volume of claims.

Conclusion

In virtually all instances, whether TRICARE and MTF deposits are diminishing or at historic highs, the new TRICARE MOA provides an opportunity to revitalize or expand your office’s Medical Affirmative Claims program. Claims attorneys and Judge Advocates are urged to review their office’s current and historical performance and assess for themselves the benefits that might accrue from obtaining additional Medical Affirmative Claims personnel funded by their local military hospitals. The Army Claims Service stands ready to assist.

Appendix

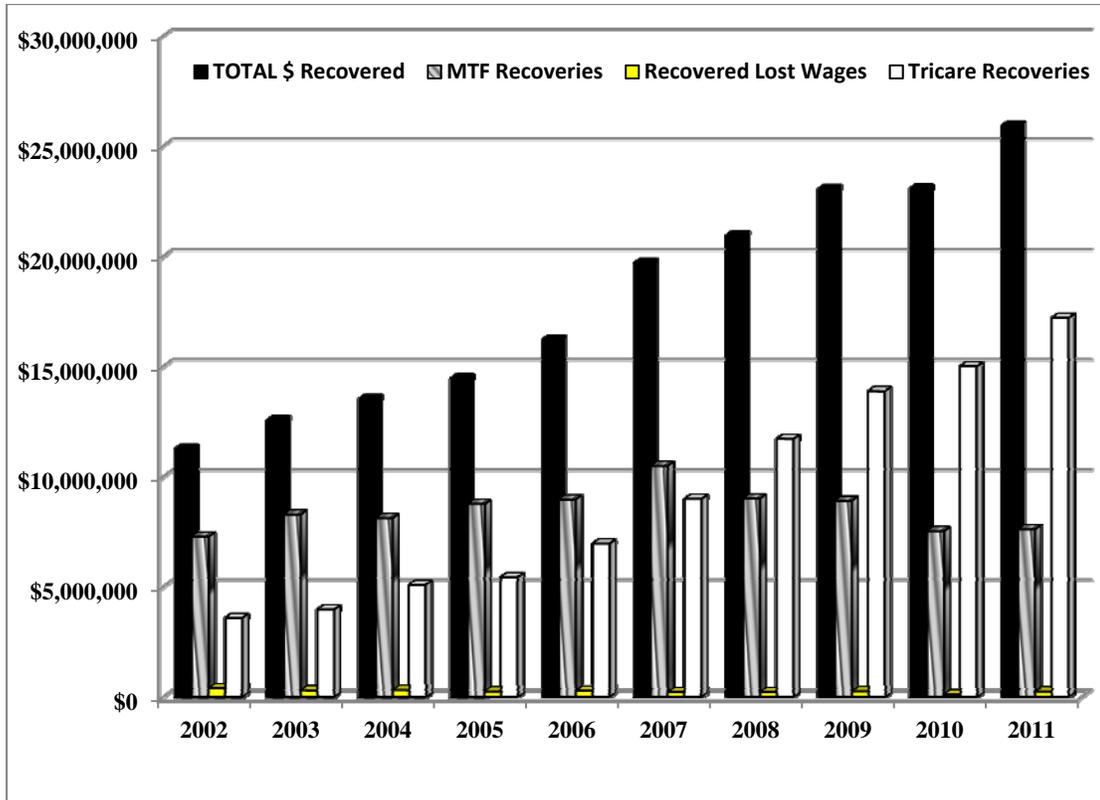


Table 1: Army-Wide Medical Affirmative Claims Deposits, FY 2002 thru FY 2011 (Actual)

Grade	Position	Salary with locality	Benefits	Total Personnel cost	% Effort devoted to Medical Affirmative Claims	Total Medical Affirmative Claims Personnel Cost	MOU with OSJA?	Total Army MEDCOM Medical Affirmative Claims Cost	TRICARE Mgmt Activity % share of collections	TRICARE Mgmt Activity share of Medical Affirmative Claims costs
FORT COURAGE CLAIMS OFFICE				\$250,000		\$115,000		\$75,000		\$45,000
GS-13	Attorney	\$88,074	\$31,926	\$120,000	25	\$30,000	Y	\$30,000	60%	\$18,000
GS-10	Paralegal	\$58,716	\$21,284	\$80,000	50	\$40,000	N	\$0	60%	\$0
GS-6	Claims Assistant	\$36,697	\$13,303	\$50,000	90	\$45,000	Y	\$45,000	60%	\$27,000

Table 2: Fort Courage Medical Affirmative Claims Personnel Costs

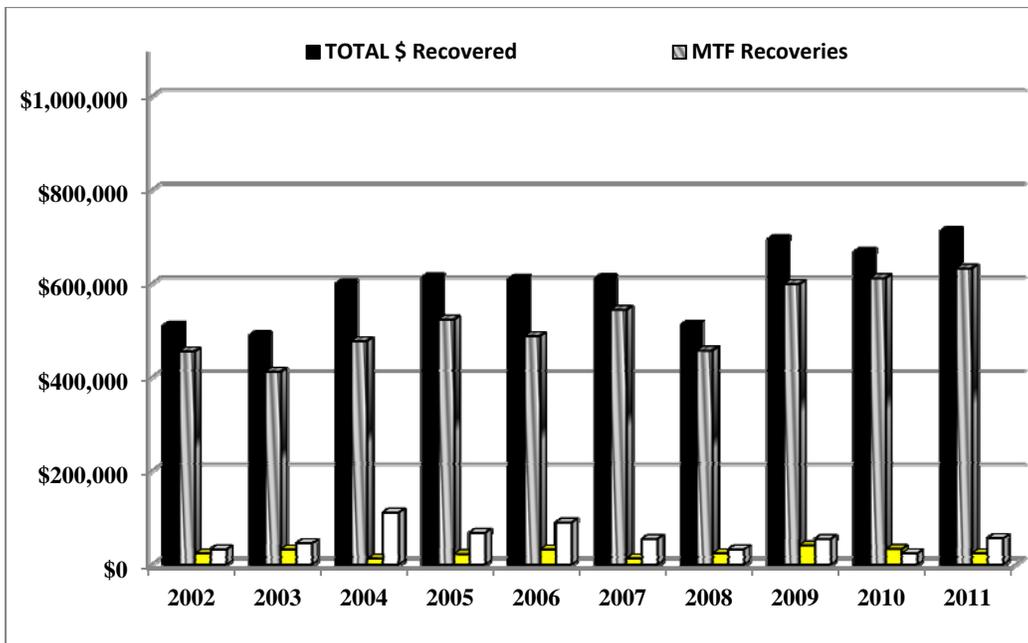


Table 3: TRICARE-Centric Activity (Example)

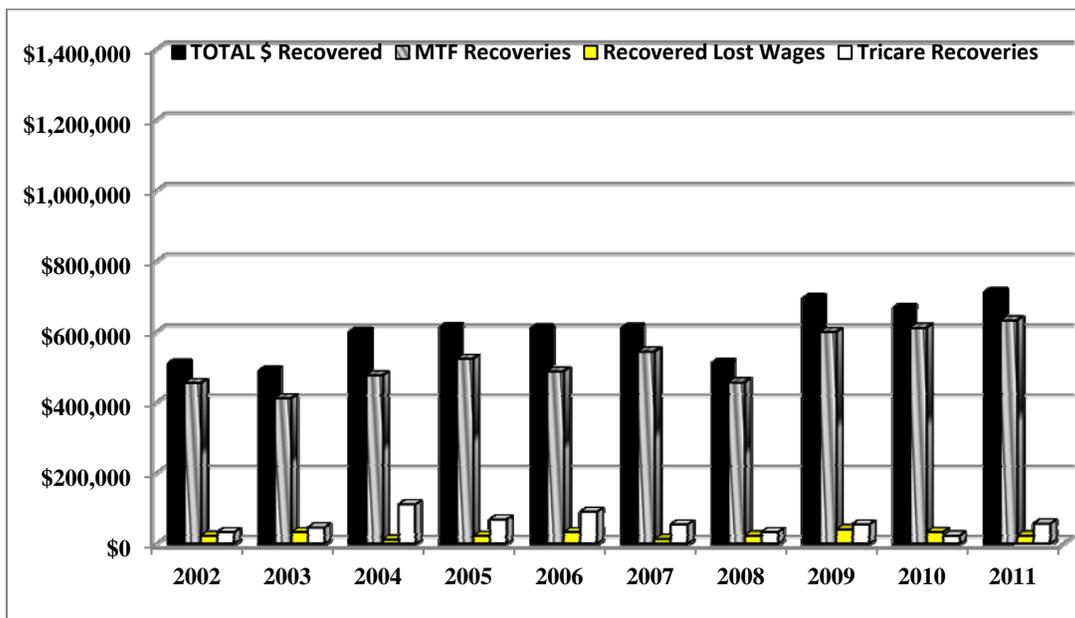


Table 4: Increasing TRICARE and Declining MTF Deposits (Example)

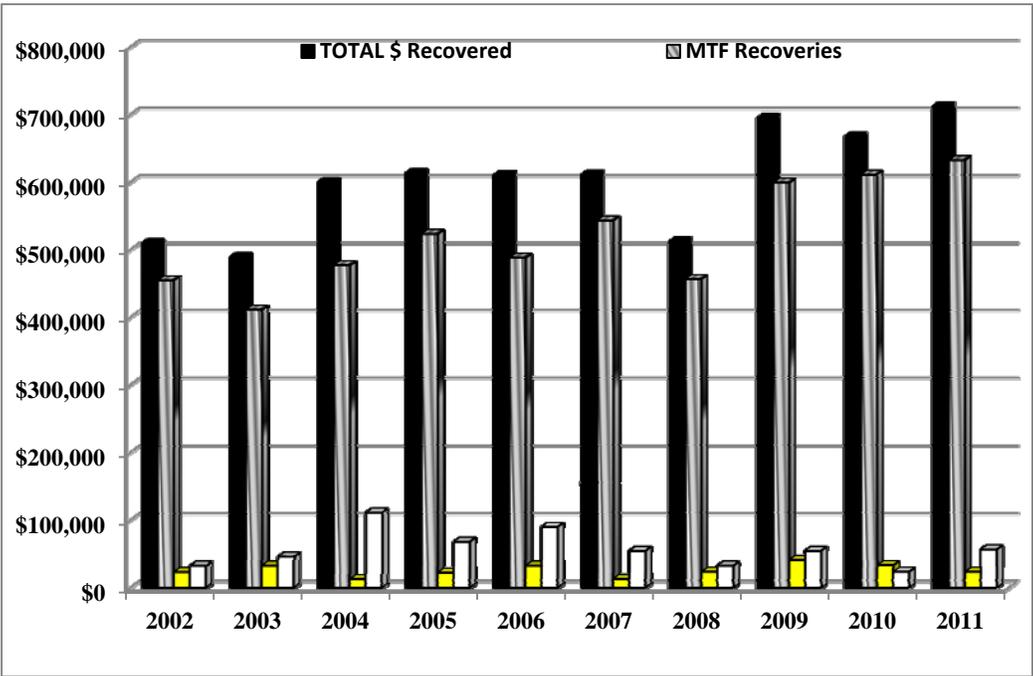


Table 5: Robust MTF and Declining/Static TRICARE Deposits (Example)