

Note from the Field

A Question of Priority: Issues Impacting Priority of Payment under the Federal Medical Care Recovery Act

Captain David P. Lewen, Jr.¹

*In FY 06, the US Army asserted \$32 Million in FMCRA claims, but recovered \$16 Million.*²

Introduction

You are the new medical affirmative claims (MAC) attorney assigned to a large military treatment facility (MTF). As such, you are charged with implementing a vigorous and robust MAC recovery operation, and you know that any such operation depends on a solid understanding of the statutory cornerstone upon which the authority for government recovery rests—the Federal Medical Care Recovery Act (FMCRA).³

As you read the statute, you understand that the FMCRA provides the government with an independent right to recover medical expenses furnished to an injured federal beneficiary if the injury occurred under circumstances creating tort liability upon some third person.⁴ You also note that, in the case of a tortiously injured service member, the government may recover lost pay for the duration that the service member is unable to perform their regular military duties.⁵ Using this statutory authority, you begin asserting government claims against tortfeasors and, more commonly, the tortfeasors' liability insurance carriers.⁶

After sending out a few demand letters, you begin to see a trend in the type of responses you receive from the insurance companies. The general theme of the responses essentially state the following: "We are in receipt of the federal government's notice of claim for medical expenses in this case; however, we are currently negotiating with the plaintiff's attorney, the government's claim will be addressed after settlement has been reached with the plaintiff's attorney."⁷

This raises concerns as to the priority of payment. Not happy being told, essentially, to sit on the sidelines and wait until a settlement is first reached with the plaintiff's attorney (and hope there is money left over to satisfy the government's claim), you immediately start researching the law to find ways to strengthen your argument that the government's claim should be paid first. In many cases, the question of priority of payment can have a direct and substantial impact on the nature and extent of recovery available to the government.

Priority under the FMCRA

You start your research by returning to the FMCRA to see if it sheds any light on the order and prioritization of claims made against the tortfeasor and his insurance company after a tort has been committed. After scrutinizing the statute, you

¹ Judge Advocate, U.S. Army. Presently assigned as a Special Assistant United States Attorney, Civil Division, Eastern District of North Carolina, Womack Army Medical Center, Fort Bragg, NC. J.D., 2002, Georgia State University College of Law; B.A., 1999, Norwich University. Previous judge advocate assignments include Assistant Center Judge Advocate, Tripler Army Medical Center, Honolulu, HI, 2005-2006; Trial Counsel, 19th TSC, United States Forces Korea, 2003-2005.

² For FY 06, the total value of claims made was \$32,457,982.59 with a total recovery of \$16,214,647.09. Fiscal Year 2006 claims collection data provided by US Army Claims Service, Fort Meade, Md. (Feb. 26, 2007) (on file with author).

³ 42 U.S.C. § 2651-2653 (2000).

⁴ *Id.* § 2651(a).

⁵ *Id.* § 2651(b).

⁶ Sending a written demand to the tortfeasor and his insurance carrier is one way of asserting the government's right to recovery. There are a number of other procedural mechanisms by which the Recovery Judge Advocate (RJA) may assert the government's right. *See id.* § 2651(d). *See also* Captain Dominique Dillenseger & Captain Milo H. Hawley, *Sources of Medical Care Recovery in Automobile Accident Cases*, ARMY LAW., Oct. 1991, at 51-56. *See generally* Major Bruce E. Kasold, *Medical Care Recovery—An Analysis of the Government's Right to Recover its Medical Expenses*, 108 MIL. L. REV. 161, 167 (1985).

⁷ This article assumes that no "attorney-representation agreement" is in effect, and that the RJA is personally pursuing the government's claim.

find that it is conspicuously silent on the issue of priority. This omission is puzzling because the issue of priority is so important in the world of liability insurance, where there is a finite source of recovery, yet there can be seemingly infinite claims made against that finite source of recovery.⁸

A few years after the FMCRA became law, a federal district court examined the FMCRA's legislative history to see if Congress had addressed the issue of priority of payment. In *United States v. Ammon*⁹ the court looked specifically to a letter written by then Comptroller General of the United States, the Honorable Joseph Campbell, to the Chairman of the House Committee on the Judiciary, the Honorable Emanuel Celler.¹⁰ The court observed:

In Mr. Campbell's letter . . . , Mr. Campbell called to the Committee's attention that the bill did not specifically require an injured person who recovers damages from a third party tortfeasor through his own action, by suit or otherwise, to pay the United States out of such recovery, nor did the proposed bill *specify priorities* for distributing the proceeds thus obtained. Mr. Campbell stated that he had been informally advised that this matter would be covered by regulations to be issued by the President. However, it was his view that the inclusion of this matter in the bill itself would carry more weight and be less subject to possible further questions or attack than the same subject matter appearing solely in regulations.¹¹

The court further noted that, despite the Comptroller General's recommendation to include a priority provision within the statute, Congress elected to refrain from including any specific priority language within the statute.¹² Instead, Congress delegated to the President the authority to prescribe the regulations to implement the law; the President then delegated to the Attorney General the authority to implement the regulations necessary to implement the law.¹³ The Department of Justice¹⁴ and the Department of Defense¹⁵ both promulgated regulations which implement the FMCRA; however, neither set of regulations address the issue of priority of payment under the FMCRA.

Priority under FMCRA Addressed in Case Law

Despite the statutory and regulatory silence on the issue, some federal district courts and circuit courts of appeal have attempted to resolve issues related to priority of payment under the FMCRA.¹⁶ As will be shown, it appears that the federal courts have determined that the federal government does not enjoy a priority of payment under FMCRA.

In *Commercial Union Insurance Company v. United States*,¹⁷ the United States Court of Appeals for the District of Columbia Circuit directly addressed the issue of priority of payment under the FMCRA. In this case, Commercial Union issued a \$25,000 policy to Samir Mohamed Said Ahmed.¹⁸ Mr. Ahmed negligently injured a federal healthcare beneficiary, William Scott,¹⁹ who, along with the federal government, claimed the proceeds of the Commercial Union policy.²⁰

⁸ These claims include special damages such as medical expenses, as well as general damages such as pain and suffering, in addition to the attorney's fees and costs.

⁹ 242 F. Supp. 461 (N.D. Fla. 1966).

¹⁰ *Id.* at 463.

¹¹ *Id.* (emphasis added).

¹² *Id.* at 464.

¹³ *Id.*

¹⁴ 28 C.F.R. §§ 43.1- 43.4 (2006).

¹⁵ 32 C.F.R. §§ 537.21- 537.24 (2006).

¹⁶ See, e.g., *Holbrook v. Andersen Corporation, et al.*, 996 F.2d 1339 (1st Cir. 1993) (holding that the government may not collect out of a previously negotiated settlement between the injured person and the tortfeasor, the government must invoke the FMCRA and proceed against the tortfeasor and seek to establish the tortfeasor's tort liability); *Allen v. United States, et al.*, 668 F. Supp. 1242 (W.D. Wisc. 1987) (observing, in dicta, that the injured party be made whole before the government may be reimbursed under the FMCRA).

¹⁷ 999 F.2d 581 (D.C. Cir. 1993).

¹⁸ *Id.* at 583.

¹⁹ The government's medical bills for Mr. Scott totaled \$18,586. *Id.* at 584.

²⁰ *Id.* at 583.

Commercial Union offered policy limits to Mr. Scott; however, the government continued to demand payment for its medical expenses.²¹ Consequently, Commercial Union filed a complaint for interpleader in the district court, asking the court to declare the disposition of the fund.²²

The district court ruled that the government's claim had priority over the injured beneficiary, Mr. Scott.²³ However, the appellate court disagreed and reversed.²⁴ The case was then remanded so that the district court could divide the fund on a pro rata basis.²⁵ The court arrived at this decision by first finding that the FMCRA does not give priority to the government. The court, turning to the equitable principles governing interpleader, then addressed the question as to how to divide the insurance policy.²⁶

In its analysis, the court first took up a detailed examination of the statutory language contained in the FMCRA. The court initially observed "that the Act does not speak to the issue of priority."²⁷ However, the court did find that § 2651(a) distinguishes two types of damages: "the medical expenses incurred by the Government on behalf of the injured employee and the damages the employee is entitled to receive, net of those expenses."²⁸ The court maintained that the statute grants to the United States the right to recover its medical expenses; however, "there is nothing in its language to suggest that the Government's claim has a *priority* over the employee's."²⁹ Indeed, the statute itself says the government's claim is subrogated to the injured employee's claim,³⁰ and as subrogee the government "does not secure rights superior to those of its employee."³¹

Finding that § 2651(a) provided no support for the government's contention that it has priority, the court turned its attention to § 2652(c), and further dismantled the government's priority argument. Section 2652(c) provides that, "No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his damage not covered hereunder." Government counsel asserted that this section served to protect the injured person's right to recover damages.³² However, the court found that the government could not reconcile its position that § 2652(c) protects the injured employee's right to recover damages, and simultaneously argue that the statute grants the government priority over its injured employee.³³ The court averred that since the government's construction of the FMCRA "would render § 2652(c) useless, and our reading gives it meaning, the Government's version cannot stand."³⁴ *Department of Army Pamphlet 27-162*, provides additional guidance as to how § 2652(c) impacts government recovery.³⁵

²¹ *Id.* at 584.

²² *Id.* at 583 (citing *Commercial Union Ins. Co. v. United States*, No. 89-1108, mem. op. at 5, 1991 U.S. Dist. LEXIS 14409 (D.D.C. Oct. 10, 1991)).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 586.

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ § 2651(a).

³¹ *Commercial Union*, 999 F.2d at 587.

³² *Id.*

³³ *Id.*

³⁴ *Id.* See *In re Surface Mining Regulation Litg.*, 201 U.S. App. D.C. 360, 627 F.2d 1346, 1362 (D.C. Cir. 1980) ("Effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.") (quoting 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973)) (internal quotation marks omitted).

³⁵ U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 14-11d (8 Aug. 2003) states:

[§ 2652(c)] precludes a defendant from using an agency's administrative determination of nonliability or agreed percentage-of-damages compromise against the injured party. When the defendant's assets and insurance are insufficient to satisfy all claims, reference must be made to the Government's statutory authority to compromise or waive claims on grounds of hardship to the injured party.

Id. para 14-11d.

Finally, the government invoked § 2652(b)(2) to support its priority position.³⁶ The government argued that this section of the statute would be unnecessary if the government's claim did not enjoy priority over the injured employee, because the government could essentially waive its claim by deciding not to bring suit.³⁷ The court did not find this argument persuasive stating "a Government waiver is not the same as a decision not to sue."³⁸ The court further stated that, "because the FMCRA creates the possibility of multiple litigation, the waiver is necessary to encourage and/or allow settlements."³⁹ Consequently, the court held, this section of the FMCRA is necessary and serves a purpose, notwithstanding the fact that the FMCRA is silent as to priority.

Despite the holding that the FMCRA does not grant the government priority over the injured party/plaintiff, the court also found that, "As we read the statute, it does not grant priority to *either* claimant"⁴⁰ Therefore, plaintiffs' attorneys nor insurance companies may rely on *Commercial Union*⁴¹ as support for the proposition that the FMCRA grants the injured party a priority over the government's claim.

Commercial Union serves as a definitive case on the issue of priority of payment under the FMCRA. Despite the result in *Commercial Union*, the RJA can and should work to find ways to leverage government claims so that a maximum recovery may be achieved. Below are ways the RJA can accomplish this endeavor.

Become a Special Assistant U.S. Attorney

At the outset, the RJA should follow the Army's guidance and seek an appointment as a Special Assistant United States Attorney (SAUSA).⁴² Establishing a good working relationship with the civil division of your district's U.S. Attorney's Office is a crucial element in any successful MAC operation, as the U.S. Attorney's Office is ultimately responsible for enforcing compliance with federal statutes, such as the FMCRA.

A SAUSA appointment will provide the RJA with the necessary authority and clout to negotiate, settle, and collect federal medical claims quickly and efficiently. Additionally, a SAUSA appointment will have the added effect of increasing recoveries due to increased litigation or the credible threat of litigation.

Assert FMCRA Claims Personally

Once appointed as a SAUSA, there should be very few instances when an "Attorney-Representation Agreement"⁴³ is utilized. It is imperative that the SAUSA ensure that the injured party's attorney is not attempting to assert, negotiate, or settle the government's claim with the tortfeasor or the tortfeasor's insurance company, unless the attorney has received prior written authorization from the government.⁴⁴

³⁶ This section authorizes the head of the relevant agency to waive any claim for the convenience of the government, or if he determines that collection would result in undue hardship upon the injured party.

³⁷ *Commercial Union*, 999 F.2d at 587.

³⁸ *Id.*

³⁹ *Id.* See generally *United States v. Housing Authority of Bremerton*, 415 F.2d 239, 241 (9th Cir. 1969) (identifying the possibility of multiple litigation under the FMCRA); *United States v. York*, 398 F.2d 582, 585-87 (6th Cir. 1968) (recognizing that the FMCRA does not bar government from exercising its independent right of recovery, despite the fact that the injured beneficiary had settled within six months of treatment).

⁴⁰ *Commercial Union*, 999 F.2d at 589.

⁴¹ It is noteworthy that the *Commercial Union* opinion did not discuss, or even cite *Allen*. *Allen v. United States, et al.*, 668 F. Supp. 1242 (W.D. Wisc. 1987). It is reasonable to infer from this omission that *Allen* has limited precedential or persuasive value.

⁴² U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 14-18a (1 July 2003).

⁴³ 32 C.F.R. § 537.24(a)(2) (2006) authorizes agreements that allow the injured party's attorney to assert, on behalf of the government, the government's claim for medical expenses.

⁴⁴ *Id.*

The beginning of this article referenced a “typical” response received from the tortfeasor’s insurance carrier.⁴⁵ Upon receiving this type of response, the SAUSA should immediately call the insurance carrier and draft a letter stating that, per 32 C.F.R. § 537.24, neither the injured party nor the injured party’s attorney has authorization to assert, negotiate, or settle the government’s FMCRA claim, and any settlement reached with the injured party and/or his attorney will not be binding on the government. This fact should also be communicated to the injured party’s attorney. The SAUSA, not the plaintiff’s lawyer, should personally and zealously assert the government’s FMCRA claims on behalf of the government.

Case law further strengthens the SAUSA’s ability to assert government FMCRA claims. The case of *McCotter v. Smithfield Packing Co.*⁴⁶ addressed the issue of whether an injured party may present evidence of government-furnished medical expenses, or whether the claim belonged solely to the United States pursuant to the FMCRA. Plaintiff McCotter, a Department of Agriculture food inspector, was injured when a hog carcass fell on her while she was inspecting defendant Smithfield’s meat packing plant.⁴⁷ Ms. McCotter subsequently sued the defendant for, among other things, the cost of the medical treatment provided to her by the government as a result of her injuries caused by the falling hog.⁴⁸ The court, *sua sponte*, raised the question of whether, since the United States was not a party to the action nor had the United States authorized plaintiff to proceed on its behalf, the plaintiff could even present evidence of and recover for her government-furnished medical expenses.⁴⁹

The court held that the FMCRA claim for medical expenses, along with the ability to put on evidence of said expenses, belonged solely to the United States.⁵⁰ The court unequivocally declared: “The *individual plaintiff has no claim whatsoever for these damages*, and should not be permitted to put on evidence of these damages unless the United States will recover those monies.”⁵¹ *McCotter* makes clear that FMCRA claims belong to the United States, and may be pursued only by the government.⁵²

The case of *United States v. Guinn*⁵³ provides additional authority for the SAUSA when negotiating with insurance adjusters or counsel for the insurance company. *Guinn* is an excellent case because it articulates a principle that resonates within the insurance industry: double payment.

Defendant Guinn negligently caused a motor vehicle accident in which a service member was killed and his dependents injured.⁵⁴ Guinn’s insurance company settled with and executed a release to the injured dependents, who were federal beneficiaries and received their accident-related medical care at Walson Army Hospital, Fort Dix.⁵⁵ The government initiated suit against Guinn after the injured beneficiary failed to pay the United States for the medical care furnished to her and her family as a result of the accident.⁵⁶

The court ultimately held that Guinn and his insurance carrier were liable to the government under the FMCRA, despite the prior payment to the injured party.⁵⁷ In arriving at its decision, the court made several observations. First, the court found that insurance carriers are presumed to know about the FMCRA.⁵⁸ Second, the court stated that:

⁴⁵ See *supra* note 7 and accompanying text.

⁴⁶ 868 F. Supp. 160 (E.D. Va. 1994).

⁴⁷ *Id.* at 161.

⁴⁸ *Id.*

⁴⁹ *Id.* at 162.

⁵⁰ *Id.* at 163.

⁵¹ *Id.* (emphasis added).

⁵² The court stated that the plaintiff’s attorney may present the Government’s claims for medical damages *if* the Government gives express permission to the plaintiff’s attorney. *Id.*

⁵³ 259 F. Supp. 771 (D. N.J. 1966).

⁵⁴ *Id.* at 772.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 774.

⁵⁸ *Id.* at 773.

Generally, insurance carriers investigate all the facets of a claimed injury prior to entering into settlement agreements. They know the length of time a claimant has spent in the hospital, the degree of injury, and the extent of treatment accorded claimant. In particular, in the instant case, it would seem of necessity that defendant's carrier knew of the fact of decedent's military status and his family's service dependency, and of the medical services rendered at the Fort Dix hospital.⁵⁹

Finally, the court found that *federally-funded medical expenses are non-compensable* to tortiously injured government beneficiaries, and any payments to the injured party for these expenses are rendered at the insurance carrier's peril.⁶⁰ Consequently, the insurance carrier in *Guinn* was compelled to pay for the same medical expenses twice.

Conclusion

Even though *Commercial Union* held that the government does not enjoy the right to be paid first out of any insurance proceeds, the RJA can still aggressively assert FMCRA claims and achieve substantial recoveries for the government. First, the RJA should seek appointment as a SAUSA and, once appointed, assert claims personally on behalf of the government against tortfeasors and their insurance companies. Next, the SAUSA should take advantage of the FMCRA, the applicable CFRs and ARs discussed in this article, and the principles discussed in *McCotter* and *Guinn*, when negotiating the government's claim with insurance companies.

Utilizing these steps will have an end result of increasing government recoveries collected under the FMCRA—and these recoveries ultimately help to improve military healthcare for all military healthcare beneficiaries.⁶¹

⁵⁹ *Id.*

⁶⁰ *Id.* at 774.

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