FEATURE ARTICLE

Handling Medical Care Recovery Act Claims for Reimbursement

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Statutory Background. In any personal injury case in which the U.S. is authorized or required to furnish medical or dental care to the plaintiff, the plaintiff's attorney must come to grips with the Medical Care Recovery Act ("MCRA", 42 U.S.C. §2651, *et seq*.). Locally, these claims will be comprised primarily of military, Tri-Care/Champus or V.A. benefits. Under 42 U.S.C.§2651(a), the U.S. has an independent right of action for the "reasonable value of the care and treatments furnished, [and] to be furnished" and shall be subrogated to any right or claim that the injured person has against "such third party." This clearly suggests that the federal claim could include charges for future medical care that the U.S. could prove it would likely provide to the plaintiff. Subsection 2651(b) provides that the U.S. may also pursue a claim for lost wages for the period that a military service member is unable to perform his normal military duties and is not assigned to other military duties.

MCRA repeatedly identifies the entity liable for the U.S. claim as "tort liability of some third person" or "an insurer of such third person." Although subsection 2651(c)(1) appears to apply liability to no fault insurance of the beneficiary, it does not appear to reach other first party coverage such as UM or UIM. The section references that State law may act as a "substitute or alternative for compensation for damages through tort liability" that sounds more descriptive of no-fault or PIP coverage (Personal Injury Protection, the most common form of no fault) than UM or UIM coverage. The case law is conflicting about whether MCRA entitles the U.S. to seek recovery from first party insurance benefits. Cases which hold the statute creates no rights against first party coverage include *U.S. v. Allstate* (ND FL 1969) 306 F.Supp.1214, *U.S. v. Jackson* (WD MI 1983) 572 F.Supp 181, *Geico v. Andujar* (DC Kan. 1991) 773 F.Supp. 282. Cases which hold the U.S. can recover from UM include *Transnational Ins. Co. v. Simmons* (1973) 19 Az. App. 354, 507 P.2d 693, and *U.S. v. Hartford* (ED CA 1970) 320 F.Supp. 648, affd. 460 F.2d 17 (9th Cir. 1972).

"Automobile liability insurance" is defined in 32 CFR 220.12 and purports to include both UM and UIM coverage. Regulation 32 CFR 757.14 is notable in confirming both the U.S. desire to participate in UM/UIM recoveries as well as the conflict among the states. Notably, in 1972, the California Legislature, in response to the *U.S. v. Hartford, supra,* decision, amended Insurance Code §11580.2 to provide that UM coverage was **not applicable** "in any instance where it would inure ... directly to the benefit of the United States..." See *Tara v. Cal. State Auto Assn.* (1979) 93 Cal.App.3d 227, 232, fn. 1 and *Cal. State Auto Assn. v. Jackson* (1973) 9 Cal.3d 859, 869 , fn. 12. The author has not located any cases addressing the issue of whether this revision to the UM statute would survive federal preemption.

10 U.S.C. §1095 also provides that the U.S. has the right to collect from a “third-party payer” the reasonable costs of health care services provided to covered beneficiaries. This statute clarifies at subsection 1095(e)(1) that the U.S. may institute legal proceedings against third-party payers to enforce its rights. It is generally duplicative of MCRA and specifically defers in subsection 1095(i)(2) to MCRA in “cases in which a tort liability is created upon some third person...” 32 CFR 220.2(c) asserts that the U.S. claim is exclusive and that the only way for the third party payer to satisfy its obligation is to pay the U.S. directly; payment to the beneficiary does not satisfy the claim.

Although the statutes only authorize claims against the tortfeasor, the injured plaintiff could be dragged back into an MCRA action by the U.S. against the tortfeasor by virtue of signing a release with a hold harmless provision. It would be possible to settle around an MCRA claim as long as the tortfeasor’s carrier agreed to remain liable for the U.S. claim instead of requiring a hold harmless in the release. This procedure could be especially attractive when the statute of limitations has expired.

The statute of limitations for the U.S., or the injured person on behalf of the U.S., to file suit is three years. 28 U.S.C. 2415(b). However, when the claim is against the beneficiary who has settled the government’s claim for expenses, the limitations period may well be six years, based upon a contract implied in fact or law. See 28 U.S.C. §2415(a), *Cockerham v. Garvin* (6^{th} Cir. 1985) 768 F.2d 784. See also, 32 C.F.R. 757.17. Although the U.S. claim is not subject to state statutes of limitation, uninsured motorist claims may be subject to the state’s UM statute’s time limits as a condition precedent of bringing the UM claim. See *U.S. v Hartford* (9^{th} Cir. 1972) 460 F.2d 17, 19; 32 C.F.R. 757.17(b).

Finally, section 2651(a) provides that the head of the agency furnishing the care “may also require the Injured ... person, his guardian, personal representative, estate, dependents, or survivors...to assign his claim” to the U.S. Regulation 32 CFR 199.12, pertaining to TriCare payments, requires the beneficiary to: (1) provide information regarding coverage by a third-party payer plan and/or the circumstances of the injury as a “condition precedent” to the processing of the TriCare claim; (2) to furnish such additional information as is requested concerning the claim and any action initiated thereon, and; (3) to cooperate in the prosecution of all claims by the U.S. against the third person.

Presentation of Claim

The information concerning the claim may be reported to the appropriate government agency on DD Form 2527. The form calls for the identifying information concerning the beneficiary and his attorney, the alleged tortfeasor and the details of the incident. It can be signed by the beneficiary or his attorney. Based upon the language of 32 CFR 199.12 concerning TriCare claims, it is an open question whether there is a duty to report the claim in the usual case when the claims have already been processed. The safer course would appear to be to report.

The U.S. first notice, or response to the DD 2527, is a standard form letter advising of the above authorities and enclosing an “Agreement to Protect Government’s Interest” which contains the following language:

I understand that 5 USC §3106, prohibits the payment of a fee for assertion or collection of the Government's claim. Further, as the claim of the Government is an independent cause of action rather than a lien on any settlement or judgment obtained by the injured party, any contingent fee arrangement I have with the injured party applies only to the injured party's claim and not to the Government's portion of the recovery. In return for assistance furnished, however, the Navy will assist me in obtaining available medical records from United States Government medical facilities and provide access to locally available Navy medical officers who have treated or are treating the injured party, without costs.

This portion of the agreement is highly misleading for several reasons. First and foremost, 5 U.S.C. §3106 does not prohibit the payment of a fee. Rather, it prohibits the U.S. from employing outside counsel. In other words, the U.S. is supposed to use its own attorney to assert its interests. It expressly does not authorize employment of outside attorneys who are willing to work for free. Consequently, it appears that the U.S. is routinely violating this provision of law simply to save money**. If the plaintiff's attorney signs this agreement as drafted, he or she has just agreed to waive fees or a common fund credit on the recovery.** Also, it should be apparent that there is an obvious conflict of interest presented by signing this agreement. If you sign it, you have just agreed to represent two conflicting claimants to what is almost certain to be a limited fund. This would require a written waiver of conflict from both clients.

Moreover, the promise to assist in obtaining the medical records is illusory. Such records must be made available on request by the third party payer pursuant to 10 U.S.C. §1095(c) and 32 CFR 220-5. Obviously, therefore, production of such records must be made by the U.S. on request by the defendant. In all likelihood, an authorization or subpoena from the plaintiff would accomplish the same production. It is highly doubtful that the U.S. is going to attempt to charge for copies of medical records and bills necessary to support its claim. The implied promise of making local physicians available for consultation has little value. Typically, they have been transferred to some distant base long before such a consultation is needed. Moreover, due to the perceived lack of cooperation from the overworked military physicians, most attorneys are likely to engage a civilian medical doctor to review the records and testify at trial. It is much safer to reject the conflict, represent only the plaintiff and thereby preserve your right to seek a common fund reduction for your client and full attorney's fees for your work on the file, in addition to seeking a reduction of the U.S. claim.

A prudent course would appear to be to acknowledge the U.S.' right to a claim, invite the filing of a lien or take any other reasonable steps to assure the U.S. that it has a legitimate claim which will be addressed at the end of the case. This protects the attorney's right to take an adversarial position to the U.S. claim at the conclusion of the case. It also should preserve the right to a common fund credit against the government-provided benefits. Clearly, the U.S. does not have legal staffing to appear and prove up all of the cases in which it has provided medical benefits. The objective should be to keep the government out of the case without agreeing to represent them. This preserves all of the actual client's rights as well as the attorney's right to fees for all amounts recovered.

Although the U.S. has a clear statutory basis for its claim for medical expenses and lost services provided to its beneficiary, this would not appear to preclude the plaintiff from seeking recovery of those expenses in his personal injury case due to the collateral source rule. California law permits a plaintiff whose special damages have been paid or given gratuitously by another to seek recovery of same. See *Arambula v. Wells* (1999) 72 Cal.App.4th 1006, 1014 and *Rodriguez v. McDonnell Douglas* (1979) 87 Cal.App.3d 626. While no California cases directly on point involving MCRA have been found, in *Arvin v. Patterson* (TX App. 1968) 427 S.W.2d 643, the court held that a plaintiff who had received MCRA benefits could recover them in his injury action despite the fact that they were provided gratuitously and the U.S. had not joined in the action.

Reduction of the U.S. Claim

It is interesting to note that the U.S. standard letter seeking to have the plaintiff's attorney represent it for free nowhere discloses section 2652(c) of MCRA, which expressly provides that no action by the U.S. "shall operate to deny to the injured person the recovery for that portion of his damage not covered" under the statute. This has been interpreted as a "make-whole" rule in favor of the injured plaintiff. In *Allen v. U.S.* (WD WI 1987) 668 F.Supp.1242, the court cited the legislative notes to Subsection §2652 and held:

The purpose of adding the provision, according to the House Committee Report, was to make clear Congress' intent that the government's right under the Act "would be exercised without affecting the rights of that individual [the victim] to recover for losses and damages peculiar to him and in which the Government has no direct interests." H.R.Rep. No.1534, 87th Cong., 2d Sess. 2 (1962). See also S. Rep. No. 1945, 87th Cong., 2d Sess., reprinted in 1962 U.S. Code Cong. & Admin. News 2637, 2642.

The court thus reasoned:

In light of the language of the statute and its legislative history, I am persuaded that §2652(c) requires that the injured party be made whole before the government may be reimbursed under the Act. n.32. The language of the statute is unequivocal: "No action . . . shall operate to deny . . . recovery . . ." It is difficult to see how the recognition of a government priority, or even a pro rata participation, can be considered anything other than the denial of recovery. Thus, under my reading, the statute appears to afford the injured person priority should the tortfeasor be unable to satisfy both of their claims. This construction of §2652(a) also conforms to the prevailing subrogation rule, recognized in Wisconsin, that the subrogee is entitled to no recovery until the subrogor has been made whole; *i.e.* compensated in full by the tortfeasor.

Allen v. U.S., supra, 668 F.Supp. at 1257-1258. The *Allen* case is interesting in that, despite being a published decision, it does not even appear in the Lexis annotation to MCRA.

The leading authority interpreting section 2652 of MCRA that the author has found is *Commercial Union Ins. Co.. v. Scott* (D.C. Cir. 1993) 999 F.2d 581 in which the government's claim to MCRA priority in a limited settlement fund was flatly rejected by the court in favor of a pro-rata distribution, as follows:

As the FMCRA is silent on the question of priority, and as "equity is equality," we find that the proper course here is to distribute the limited fund on a ratable basis, such that each claimant receives "a share of the fund proportionate to their share of the total judgment figure."

Commercial Union Ins. Co., supra, 999 F.2d at 589, quoting Dobbs, The Law of Remedies §2.12 at 130.

The *Commercial Union* case has far more precedential value than *Allen, supra*, because it is a federal circuit court case. Interestingly, the *Commercial Union* court does not even cite the *Allen* case in its discussion. Another useful case is *Cockerham v Garvin*, 768 F.2d 784 (6th Cir. 1985), in which the court addressed the U.S.' attempt to recover its MCRA claim out of a veteran's settlement, reasoning:

...it is clear that the government should not be reimbursed for the full amount of its claim in this case because it has passively allowed the veteran to bear all the risks and costs of pursuing litigation. ... Further, the veteran asserts on appeal that he had to settle for an amount much less than his own actual losses. ... It seeks recovery only as a beneficiary of the fund, and therefore equitable considerations apply. ... If Cockerham establishes on remand that his settlement was discounted, the government's portion should be reduced accordingly.

Cockerham, supra, 768 F.2d at 786.
Because 42 U.S.C. §2651(a) expressly creates a subrogation right, and subrogation is generally subject to the make-whole rule, it is an open question whether the make whole rule would be available as a complete defense to an MCRA claim against a limited fund. Attorneys should note that the make-whole rule is the default rule in subrogation claims under both California law (*Progressive West v. Yolo County Superior Court* (2005) 135 Cal.App.4th 263) and ERISA claims in the Ninth Circuit (*Barnes v. Independent Auto Dealers Assn. of CA H&B Plan* (9th Cir. 1995) 64 F.3d 1389, 1395) in cases in which it is not expressly waived.

Thus, the three MCRA cases cited above provide powerful arguments for either elimination (make-whole) or reduction (pro-rata apportionment) of the federal MCRA lien in cases in which the available fund is limited, as well as for a common fund discount when the U.S. has not participated in the action.

Waiver of U.S. Claims
32 CFR 757.19 provides for requests for waivers when the MCRA claim would "cause undue hardship to the injured person." In assessing undue hardship, the CFR states that the following should be considered: (1) permanent disability or disfigurement; (2) lost earning capacity; (3) out of pocket expenses; (4) financial status; (5) disability, pension and similar benefits available; (6) amount of settlement or award from third-party tortfeasor; and (7) any other factors which objectively indicate fairness requires a waiver.

Local JAG offices have authority to waive claims up to $40,000. From $40,000 to $100,000, authority rests in the regional office. Above $100,000 requires the approval of the Department of Justice in Washington, D.C.