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Handling Medical Care Recovery Act claims for reimbursement

A LOOK AT THE GOVERNMENT'S MICRA LIENS FOR MEDICAL CARE IT PAID, MOST COMMONLY ON BEHALF OF MILITARY MEMBERS, TRI-CARE/CHAMPUS OR V.A.

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.) These claims will be comprised primarily of military, Tri-Care/Champus or V.A. benefits. Section 2651(a) provides the U.S. with an independent right of action for the "reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for" 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 that it would be likely to provide to the plaintiff. Section 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 or her normal military duties and is not assigned to other military duties.

The MCRA repeatedly refers to "tort liability of some third person" or "an insurer of such third person" in identifying the entity liable for the U.S. claim. Although § 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. This section references a state law acting as a "substitute or alternative for compensation for damages through tort liability" that sounds more descriptive of no-fault or PIP coverage rather than UM/UIM. The case law is conflicting in regard to whether the MCRA entitles the U.S. to seek recovery from first-party insurance benefits. Cases holding no rights created against first-party coverage include *U.S. v. Allstate*, 306 F.Supp.1214 (ND FL 1969); *U.S. v. Jackson*, 572 F.Supp 181 (WD MI 1983); *Geico v. Andujar,* 773 F.Supp. 282 (DC Kan. 1991. Cases holding U.S. can recover from UM include *Transnational Ins. Co. v Simmons*, 19 AZ App 354, 507 P.2d 693; *U.S. v. Hartford*, 320 F.Supp. 648 (ED CA 1970), affd. 460 F.2d 17 (9th Cir. 1972). 32 CFR 220.12 purports to define "Automobile liability insurance" to include both UM and UIM coverage. 32 Code of Federal Regulations part 757.14 is notable in confirming the U.S.'s desire to participate in UM/UIM recoveries as well as the conflict among the states. Notably, in California, in 1972, the Legislature, in response to the *U.S. v. Hartford, supra,* decision, amended Insurance Code section 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; *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.

Section 1095 of Title 10 of the U.S. Code 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 section 1095(e)(1) that the U.S. may institute legal proceedings against third-party payers to enforce its rights. It is generally duplicative of the MCRA and specifically defers in section 1095(i)(2) to the MCRA in "cases in which a tort liability is created upon some third person..." The relevant Code of Federal Regulations asserts that the U.S. claim is exclusive. 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. (32 CFR 220.2(c).)

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 including a hold-harmless in the release. This procedure could be especially attractive where 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, where 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 an implied-in-fact or law contract. (See 28 U.S.C. § 2415(a), *Cockerham v. Garvin*, 768 F.2d 784 (6th Cir. 1985). 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

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UM statute's time limits as a condition precedent of bringing the UM claim. (See *U.S. v Hartford*, 460 F.2d 17, 19 (9th Cir. 1972); 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 United States. Part 199.12 of title 32 of the Code of Federal Regulations, 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 C.F.R. § 199.12 concerning TriCare claims, it is an open question whether there is a duty to report the claim in the usual case where the claims have already been processed. The safer course would appear to be to report.

The government'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." This agreement 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*. (Emphasis supplied.)

This portion of the agreement is highly misleading for several reasons. First and foremost, 5 USC § 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 obligated to use its own counsel to assert its interests. It expressly forbids the employment of outside counsel 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, the U.S. could argue that 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 C.F.R. § 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.'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 clearly preserve the right to a common-fund credit against the government-provided benefits. It seems that 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 it. 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; *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*

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(TX App. 1968), 427 S.W.2d 643, the court held that 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 or waiver of the U.S. claim

Reduction

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 the MCRA, which provides in pertinent part:

> (c) Damages recoverable for personal injury unaffected. No action taken by the United States in connection with the rights afforded under this legislation [42 U.S.C. § 2651 et seq.] shall operate to deny to the injured person the recovery for that portion of his damage not covered hereunder.

This statute has been interpreted as a "make-whole" rule in favor of the injured plaintiff in *Allen v. U.S.*, 668 F.Supp.1242 (WD WI 1987), where the court held as follows:

> There is another flaw in the government's contention. The FMCRA itself speaks to the priority issue. Section 2652(c) of the Act provides as follows: Damages recoverable for personal injury unaffected:
>
> 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. [emphasis added.] Subsection (c) was not part of the original bill. 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 (government's right shall not impair right of injured person to recover damages other than cost of medical care furnished by government).
>
> *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. n32 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 tort-feasor 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 tort-feasor.

(668 F.Supp at 1257-1258 (Emphasis supplied).)

The *Allen* case is interesting in that, despite being a published decision, it does not even appear in the Lexis annotation to the MCRA.

The leading authority interpreting section 2652 of the MCRA that the author has found is *Commercial Union Ins. Co. v. Scott*, 999 F.2d 581 (D.C. Cir. 1993). There, the government's claim to an MCRA priority to 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."

(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 circuit court decision. 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), where the court addressed the U.S.'s attempt to recover its MCRA claim out of a veteran's settlement. The court's holding there is instructive:

> ...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*.

(768 F.2d at 786 (emphasis supplied).)

Because section 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*, 64 F.3d 1389, 1395 (9th Cir. 1995)) in cases where it is not expressly waived. However, *Allen v. U.S.*, *supra*, is the only case located applying the make whole rule as a complete defense.

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

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Although, there is limited authority regarding common fund discounts to the government's claim, see *Mosey v. U.S.*, 3 F.Supp.2d 1133 (D.C. NV 1998), where the court held that a 25% common fund, matching the plaintiff's attorney's fee, was warranted. (*Id*. at 1137.) The *Mosey* court also ruled in favor of the equities being balanced between the government and the victim where the victim sought a share of the disputed fund. (*Id*. at 1136. See also *Poche v Joubran*, 2010 US Dist. Lexis 14994 (DC WY 2010).)

Waiver

Section 757.19 of 32 of C.F.R. provides for requests for waivers where the MCRA claim would "cause undue hardship to the injured person." In assessing undue hardship, the Code of Federal Regulations 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. With amounts 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.

Donald de Camara is a sole practitioner in Carlsbad, specializing in lien litigation and resolution. He has lectured at over 100 trial lawyers' seminars throughout California about liens and has presented three nationwide webinars on liens. He has had more than 20 articles on liens published in trial bar magazines.