MILITARY-VA-TRICARE LIENS AND LITIGATION CONSIDERATIONS

By Nathaniel Fick

Complete resolution of a personal injury claim may be thought of in two distinct steps. The first step is, of course, recovery of compensation from the at-fault party or parties.

The second step involves disbursement of the recovered compensation to the various parties who may have a claim to reimbursement. Many people do not realize that a personal injury claimant’s attorney may be obligated to disburse settlement proceeds to health care providers, health insurance companies, EMS providers, among others. For retired or active duty military, their claim is likely subject to a TRICARE lien. TRICARE describes itself as “the health care program serving uniformed service members, retirees and their families worldwide.” The Military Heath System administers military healthcare coverage for uniformed soldiers and their dependent families. Tricare beneficiaries include active duty, National Guard, Reserve, and retirees (Tricare for Life for those with Medicare benefits). Further, TRICARE allows beneficiaries to receive care and services through civilian providers and facilities.

There are over 17 million active duty, veterans, retirees and dependents eligible for or receiving some form of military health benefit. Even though medical care is free for uniformed service members and retirees as well as their families, the actual cost of such medical care can be a lien if the medical care resulted from an injury where there is third-party liability. The resolution of military liens is as necessary as any other, though not as widely discussed.

If your client is service member, or a family member of a service member, and is injured due to the fault of a negligent party, the chances are that your client will either receive medical treatment directly from a Veterans Administration hospital, or bills for private health providers will be paid for by TRICARE. In that
instance, TRICARE is subrogated by virtue of federal law, to any recovery from the at-fault party, to the extent of the value of that care.

Thus, when representing someone on active duty, in the military reserves, or retired military under age 65, TRICARE may be implicated (additionally the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) may also be implicated). “Whenever a member of the uniformed services is injured or contracts a disease, under circumstances creating a tort liability upon a third person” the federal government rights kick in, granting them the right not only of recovery from the third person, but from their insurer. 42 U.S.C. §265.

Pursuant to the Federal Medical Care Recovery Act (FMCRA), the federal government is entitled to reimbursement for the value of medical services provided by VA hospitals or amounts paid to private health care providers. Additionally, TRICARE liens are not limited by state law. So state statutes of limitations may not have an effect on a FMCRA lien. See, e.g. United States v. Gera, 409 F.2d 117 (3rd Cir. 1969); United States v. Studivant, 529 F.2d 673 (3rd Cir. 1976); United States v. Ft. Benning Rifle & Pistol Club, 387 F. 2d 884 (5th Cir. 1967). Generally, the three-year statute of limitations found in 28 U.S.C. §2415, governs the federal government when it attempts to assert a FMCRA lien. The FMCRA claim by the United States is a private right of action, technically the United States is not merely subrogated to the injured party’s claim. Although cast in the role of a subrogee, the United States “stands in the role” of a subrogee only to the extent that its independent right to recover depends upon the determination under state law as to when the circumstances create a tort liability in some third person.

As previously stated, a similar right of recovery is granted to the United States under 38 U.S.C. 1729 for those who have served during wartime and qualify for benefits from the Department of Veterans Affairs (VA).
In having carried a claim to the point of a recovery from another party, the statute (and regulations) does contemplate offsets, or reduction in their anticipated recovery. As in all cases, it is helpful to familiarize yourself with the statute and pertinent regulations, and revisit them with each case.

A. Statutory Basis

TRICARE derives the authority to assert a subrogation claim under the Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. §§ 2651-2653, which authorizes recovery of the reasonable value of medical care furnished or paid for by the United States under circumstances creating tort liability for such medical care in a third party. Pursuant to the FMCRA, the federal government is entitled to reimbursement for the value of medical services provided by VA hospitals or amounts paid to private health care providers.

This is described in §2651(a): "In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease...under circumstances creating a tort liability upon some third person [other than the United States], the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person [[or his or her guardian or estate or dependents or survivors]] has against such third person to the extent of the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for." Also, §2651(b) describes a similar subrogation right if the injured person is unable to perform his or her duties by virtue of the injury.

Further under §2651(d) the United States "may intervene or join in any action or proceeding brought by the injured or diseased person [or his or her guardian, estate, dependents, or survivors] against the third person
who is liable for the injury or disease or the insurance carrier or other entity responsible for the payment or reimbursement of medical expenses or lost pay." Alternatively, if such an action is not brought within six months from the injury, the United States is authorized to bring its own action against the third person who is liable for the injury or disease or the insurance carrier or other entity responsible for reimbursing the United States for medical care to the injured party. This action may be brought in any State or federal court [with jurisdiction over the case] either alone or in conjunction with the injured party person [or his or her guardian, estate, dependents, or survivors].

There is also a similar statute, 10 U.S.C. §§1095-1095c, alternatively describing the TRICARE lien. 10 U.S.C. §1095(i)(2) states that "In cases in which a tort liability is created upon some third person, collection from a third-party payer that is an automobile liability insurance carrier shall be governed by the [FMCRA]" recognizing that these sections interlock.

TRICARE and its contractors' subrogation rights are further affirmed by 10 U.S.C. §1095b. Especially, 10 U.S.C. §1095b(b), which states that the United States "shall have the same right to collect charges related to claims" described in an earlier subsection of §1095b "as charges for claims under section 1095 of this title." The earlier subsection (a) describes contractors providing medical care under any one of several contractual relations with the Department of Defense.

Also, §1095(h)(1) defines the term "third-party payer" for the relevant purposes: a third-party payer "means an entity that provides an insurance, medical service, or health plan by contract or agreement, including an automobile liability insurance or no fault insurance carrier, and any other plan or program that is designed to provide compensation or coverage for expenses incurred by a beneficiary for health care services or products." Further, §1095(i) (1) notes: "In the case of a third-party payer that is an automobile liability insurance or no fault insurance carrier, the right of the United State to collect under this section shall extend to health care services
provided to a person entitled to health care" under Defense Department statutes and regulations. Similar language is provided by §1095(i) (2), "In cases in which a tort liability is created upon some third person, collection from a third-party payer that is an automobile liability insurance company shall be governed by" the FMCRA.

B. Relevant Regulations

The governing regulations of the FMCRA are found at 28 C.F.R. §§43.1 – 43.4. These are general regulations describing the obligations of persons receiving care and treatment to settlement and waiver of claims. Attention should be paid to these regulations.

TRICARE subrogation rights are governed by 32 C.F.R. §199.12 (Third Party Recoveries). The FMCRA is noted in these regulations, 32 C.F.R. §199.12(a)(2)(i0): "In many cases covered by this section, the United States has a right to collect under both 10 U.S.C. 1095b and the Federal Medical Care Recovery Act (FMCRA)... In such cases, the authority is concurrent and the United States may pursue collection under both statutory authorities." (Italics added).

State law is recognized in these regulations when it comes to deciding third party liability. §199.12(a)(2)(ii) states: "In cases in which the right of the United States to collect from an automobile liability insurance carrier is premised on establishing some tort liability on some third person, matters regarding the determination of such tort liability shall be governed by the same substantive standards as would be applied under the FMCRA including reliance on state law for determinations regarding tort liability." (Italics added).

Also, a payment to the beneficiary by a third party or the third party's insurer DOES NOT satisfy the United States lien, §199.12(d)(3): "The only way for a third-party payer to satisfy its obligation under 10 U.S.C.
1095b is to pay the United States or authorized representative of the United States. *Payment by a third-party payer to the beneficiary does not satisfy 10 U.S.C. 1095b.*" (Italics added).

Attention should be paid as well to §199.12(h) (Obligations of Beneficiaries): "To insure the expeditious and efficient processing of third-party payer claims, any person furnished care and treatment under TRICARE, his or her guardian, personal representative, *counsel*, estate, dependents or survivors shall be required:

(1) To provide information regarding coverage by a third-party payer plan and/or the circumstances surrounding an injury to the patient as a conditional precedent of the processing of a TRICARE claim involving possible third-party payer coverage.

(2) To furnish such additional information as may be requested concerning the circumstances giving rise to the injury or disease for which care and treatment are being given and concerning any action instituted or to be instituted by or against a third person; and,

(3) To cooperate in the prosecution of all claims and actions by the United States against such third person." (Italics and boldface added).

Familiarity with the regulation governing TRICARE liens --the sections quoted are not the whole regulation-- is recommended before filing a claim with any third party who may be responsible for your client's injury.

C. **Medicare and TRICARE**

For TRICARE and VA enrollees with Medicare, coordination of benefits can become a complicated issue. In some cases, Medicare will act as the primary payer, and in others, as the secondary. Miscommunication about coverage can result in the rejection of claims or confusion about which insurer is supposed to pay. TriCare and
VA benefits have separate and unique terms when coordinating with Medicare. TriCare beneficiaries who have Medicare Part A and B are enrolled in TRICARE for Life, which pays secondary to Medicare. However, for some services that are not covered by Medicare, TRICARE will pay as primary, leaving the beneficiary responsible for any deductibles or other costs.

If a VA beneficiary has Medicare they cannot use their VA benefits in conjunction with Medicare and cannot receive benefits when using a “civilian” provider or facility, only VA medical centers and hospitals. While Medicare allows a veteran to use civilian facilities and providers it will not pay for claims incurred in a military or VA Medical Center.

[It is important for Medicare beneficiaries to report any other health insurance carriers or third party payers to the Coordination of Benefits Contractor (COBC) to avoid errors in the processing of claims by calling 1-800-999-1118.]

D. Other Regulations

The Medicare allowances and computations are described as follows, 42 C.F.R. §411.37 (Amount of Medicare recovery when a primary payment is made as a result of a judgment or settlement) ["CMS" stands for Centers for Medicare & Medicaid Services, their website is "cms.gov"]:  

(a) Recovery against the party that received payment —

(1) General rule. Medicare reduces its recovery to take account of the cost of procuring the judgment or settlement, as provided in this section, if—

(i) Procurement costs are incurred because the claim is disputed; and
(ii) Those costs are borne by the party against which CMS seeks to recover.

(2) Special rule. If CMS must file suit because the party that received payment opposes CMS's recovery, the recovery amount is as set forth in paragraph (e) of this section.

(b) Recovery against the primary payer. If CMS seeks recovery from the primary payer, in accordance with §411.24(i), the recovery amount will be no greater than the amount determined under paragraph (c) or (d) or (e) of this section.

(c) Medicare payments are less than the judgment or settlement amount. If Medicare payments are less than the judgment or settlement amount, the recovery is computed as follows:

(1) Determine the ratio of the procurement costs to the total judgment or settlement payment.

(2) Apply the ratio to the Medicare payment. The product is the Medicare share of procurement costs.

(3) Subtract the Medicare share of procurement costs from the Medicare payments. The remainder is the Medicare recovery amount.

(d) Medicare payments equal or exceed the judgment or settlement amount. If Medicare payments equal or exceed the judgment or settlement amount, the recovery amount is the total judgment or settlement payment minus the total procurement costs.

(e) CMS incurs procurement costs because of opposition to its recovery. If CMS must bring suit against the party that received payment because that party opposes CMS's recovery, the recovery amount is the lower of the following:

(1) Medicare payment.
(2) The total judgment or settlement amount, minus the party’s total procurement cost.

E. Selected Cases


The United States’ right to recover as a third party beneficiary is governed by the language of the relevant insurance policy and by state law. *United States v. Trammel*, 899 F.2d 1483 (6th Cir. 1990); *United States v. State Farm Mutual Automobile Insurance Co.*, 455 F.2d 789 (10th Cir. 1972); *United States v. Dairyland Insurance Co.*, 485 F. Supp. 539 (D. N.D. 1980), aff’d 674 F.2d 750 (8th Cir. 1982).

Also, a FMCRA lien cannot be brought as a direct tort action against the liability insurer of an alleged tortfeasor without prior judgment against the tortfeasor as a result of state law. *United States v. Farm Bureau Insurance Co.*, 527 F.2d 564 (8th Cir. 1975).

In *GEICO v. United States*, 376 F.2d 836 (4th Cir. 1967), the court allowed a FMCRA lien for the uninsured motorist clause of the victim’s insurance policy. The portion of the policy obligating GEICO to pay under the uninsured motorist provision defined “insured” to include "(a) the named insured and any relative; (b) any other person while occupying an insured automobile; and (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this Part applies sustained by an insured under (a) or (b) above."
However, in *Government Employees Insurance Company (GEICO) v. Andujar*, 773 F. Supp. 282 (D. Kan. 1991), involving a fatal automobile collision, the court held that the government *could not* assert a FMCRA lien claim to uninsured motorist benefits payable to the injured party under *that party's* insurance contract, because neither the victim of the accident nor his insurer was liable in tort. The uninsured motorist driving the other vehicle was the only party to assert a FMCRA lien against. Disagreeing with other cases cited by the government, the court noted the language in 42 U.S.C. §2651(a) specifically the language that the FRCRA lien is predicated on "circumstances creating tort liability upon some third person."

The court noted that this statute "creates no substantive law of negligence, and the courts must look to the applicable state law to determine whether the injured party has any rights or claims to which the government may be subrogated." *United States v. Jackson*, 572 F. Supp. 181 (W.D. Mich. 1983) (*Jackson* court noted as well that government cannot recover in action under the FMCRA against insurer of serviceman who was severely injured in an automobile accident, since insurer of serviceman is neither tortfeasor nor insurer of one).

It is also worth noting that in a case where the injured party pursued the tort claim and the government passively waited for reimbursement, courts have required an equitable reduction in the government’s claim. *Mosey v. United States*, 3 F.Supp.2d 113 (D.Nev.1998). As a general matter, the government is willing to take such matters into consideration and may adjust accordingly so the injured party receives some compensation. (*But no statute or regulation requires this.*)

F. "Made Whole" Rule
Allen v United States, 668 F.Supp. 1242 (W.D. Wis. 1987), the court concludes that 42 U.S.C. § 2652(c) gives priority to the injured person and that he or she must be "made whole" before the government can recover its medicals. However this case needs to be taken with a grain of salt.

It is important to note this case was not decided solely on the made whole issue. The fact that the liable party was the husband of the injured party and it was the husband who qualified for government care is significant. Before addressing the made whole issue the court had already determined that FMCRA did not give the government the right to seek reimbursement. It is also worth noting that this is the only case found, which has interpreted 2652(c) as a made whole rule. Furthermore, the government has not accepted the made whole argument in dealing with other statutory rights of reimbursement (Medicare, Medicaid, etc.).

Commercial Union Ins. Co. v. United States, 999 F.2d 581 (C.A.D.C 1993). The Court here stated that FMCRA is silent as to priority of government's right to recover from tortfeasor medical expenses it incurred on behalf of injured employee over injured employee's right to recover nonmedical damages from tortfeasor. The Court also pointed out that 42 USC 2652(c) allows the injured party to recover damages for those damages not covered under FMCRA and giving the government priority would essentially render this section useless. Ultimately the Court held the interpled fund would be distributed on ratable basis, such that each claimant received share of fund proportionate to their share of total judgment figure, since FMCRA was silent on question of priority of claimants' rights and since "equity is equality." While the circumstances of this case may vary from your question, the case certainly provides some guidance.

G. Other Considerations

While, there is no direct right under FMCRA there MAY be a right under the express terms of the insurance policy and applicable state law. This second prong of the analysis requires an evaluation of the policy
itself. If the government can qualify as an "insured" or "third party beneficiary" under the terms of the policy then they will have a right to these proceeds. Be sure you have carefully examined your client's insurance policy to determine if a FMCRA claim or lien can be brought (generally this is the case).

As mentioned when reviewing the pertinent regulations, especially 32 C.F.R. §199.12(h), the attorney or injured party should assist TRICARE in recovery of its lien by filling out a Defense Department Form 2527, entitled “Statement of Personal Injury – Possible Third Party Liability.” The Form 2527 should be provided to the Affirmative Claims Recoveries Branch of the Federal Medical Case Recovery Section in the Office of the Staff Judge Advocate for the claimant’s particular branch of the service.

Depending upon the particular facts of your case, TRICARE may choose to accept less than the full amount of its lien. For instance, if you have $50,000.00 worth of medical treatment but the at-fault party only has $30,000.00 of insurance coverage, TRICARE may choose to accept less than the entire $50,000.00 such that you are able to recoup something for pain and suffering.

Unlike many liens, such as health care providers' liens, there is no cap on the amount of TRICARE’s recovery. Also, there is no reduction on the TRICARE lien for reasonable attorney's fees.

Under federal law where TRICARE has paid amounts that the attorney is reimbursing TRICARE, the attorney is not allowed to collect a fee from the portion paid to TRICARE. The attorney can only collect a fee from the balance after the TRICARE lien is paid.

H. References

For more information, look to:

7A Am.Jur.2d, Automobile Insurance §530

Biography

Nathaniel Fick (Fick & May) enjoys the variety of civil litigation including brain injury, spinal cord injury, as well as other personal injury, wrongful death, civil fraud, business and insurance litigation. Certified Civil Trial Specialist, National Board of Trial Advocacy. Lifetime Fellow, Roscoe Pound American Trial Lawyers Foundation. Founding Member, Trial Lawyers for Public Justice. Founding Member, Civil Justice Foundation. University of Baltimore School of Law, JD, 1975. Delegate, First World Congress on Brain Injury, (Copenhagen, 1995), Second World Congress on Brain Injury (Sevilla, 1997). President of the Brain Injury Association of Maryland (1997-2000).