You've Heard of Medicare and ERISA Liens, but What About the Federal Medical Care Recovery Act? The Federal Law Controlling the Veterans Administration and Tricare's Subrogation Rights to Personal Injury Settlements

Joseph P. Moriarty

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Claims adjusters are frequently warned to identify and resolve Medicare and Employee Retirement Income Security Act ("ERISA") liens before finalizing settlements in personal injury claims. But there is another federal law creating reimbursement and subrogation rights against third-party claims of which you should be equally aware—the Federal Medical Care Recovery Act ("FMCRA") under 42 U.S.C. §§ 2651-2653. Under FMCRA, the Veterans Administration ("VA") and Tricare (which covers military personnel and their family members) have the right to seek reimbursement against tortfeasors and their insures.

The FMCRA states that when the federal government provides treatment or pays for the treatment of an individual who is injured or suffers a disease, the government is authorized to recover the reasonable value of that treatment from any third party who is legally liable for the injury or disease. Title 10 U.S.C. 1095 provides for the collection from third-party payers for the value of health care services incurred by the government on behalf of covered beneficiaries. Likewise, the FMCRA authorizes the recovery of the cost of pay for members of the uniformed services unable to perform duties. The government has both an independent right of recovery against liable third parties and a right of subrogation and assignment, as well as the ability to intervene or join a beneficiary's claim. Most importantly, the FMCRA has a process to request reductions, compromise, and even waiver under certain circumstances. This article will explain several steps you can take to deal with the FMCRA in personal injury claims.

The FMCRA's Potential Roadblock to Settlement

I recently handled an automobile accident case in which the plaintiff – a Navy veteran – had asserted a claim for aggravation of a pre-existing back injury. The plaintiff's lower back pain flared up in the months before the accident, which resulted in a medical consult and administered epidural steroid injection. After the accident, the plaintiff continued to treat at the VA hospital, including for radiating pain to his lower extremities that developed almost a year post-accident. Initially, the VA asserted that all post-accident medical care totaling almost $100,000 was related to the accident, and thus my client's responsibility to satisfy. The VA's position, if not compromised, would result in a trial of a claim that the parties otherwise wished to settle. Based on the plaintiff's military service history and documented proof of pre-existing back issues, the VA reduced its subrogation claim by *over 75%*. This was a win for the plaintiff, who was able to keep more of the settlement proceeds, and a win for the defense in resolving a claim for only the medical charges related to the aggravation claim. The VA also recovered its fair share in reimbursement.

The Government's Notice of Claim

To start the process, the plaintiff or their attorney may report information on their claim using the "Statement of Personal Injury – Possible Third Party Liability Defense Health Agency (DD Form 2527)," which is available online. If the government is not sent this notification, then the VA may not send its notice to the plaintiff until after the parties send a *Touhy* request, pursuant to 38 C.F.R. § 14.800 *et seq.,* seeking a VA doctor's deposition testimony in

the case. In response, the government will notify the plaintiff and their attorney of the VA's interest in the value of the medical care provided or paid for by the government. This notice will advise the plaintiff that the government may be entitled to recover the reasonable value of medical care furnished or paid for by the government and that the plaintiff is required to cooperate in the government's efforts to recover from third parties. The VA does not want to refer the matter to the Department of Justice but has the right to do so if the plaintiff does not cooperate. The VA may also assert its claim by sending a notice of claim to identified third-party tortfeasors and their insurers. If the VA is not included in the settlement, and the claim has been asserted, the insurer settles at its own risk.

Importantly, as explained below, the plaintiff and their attorney should preserve the right to challenge the subrogation and reimbursement sought by the government, including the right to seek compromise or waiver of the amount based on undue hardship, equitable defenses, and other grounds.

Challenging the Medical Charges

The VA's administratively fixed billing rates are not subject to challenge for unreasonableness or arbitrariness. For example, the VA's asserted "reasonable charges" are not compared to prevailing rates at local civilian facilities. Instead, federal regulation contains formulas to determine the charge for the care that consider the type of care and other variables, such as the geographic area where the service was provided. All rates are published in the Federal Register. 38 C.F.R. § 17.101(a)(2). The VA's billing rates "shall be" judicially noticed in federal cases. 44 U.S.C. § 1507. Similarly, state courts are subject to and bound by judicial notice of federal laws and regulations.

The only avenue to challenge the VA's charges is by showing specific charges are unrelated to the personal injury claim. The plaintiff or their attorney can request specific charges be removed from the reimbursement amount by submitting a written request supporting their position directly to the Revenue Law Group team member identified in the VA's notice of claim. The defense expert's report often lays out the position for the plaintiff to use as proof for why specific charges are not medically related to the subject personal injury claim.

Requesting Compromise or Waiver

Additionally, the plaintiff or their attorney may request a compromise or waiver of a VA subrogation claim. The VA may waive its FMCRA's interest when a responsible third-party tortfeasor cannot be located, is judgment proof, or has refused to pay and litigation is not feasible. Waiver or compromise is also appropriate when collecting the full claim amount would cause the plaintiff undue hardship. While the FMRCA does not specifically adopt the made-whole doctrine or common fund doctrine – and there is mixed case law on whether these doctrines apply to the FMCRA – these equitable doctrines may be used to argue for a compromise or waiver. The made-whole doctrine is an equitable defense to a subrogation or reimbursement right, requiring that before the insurer (or in this case, the government) is permitted to take any money from the settlement, the injured party must be made whole for all of their damages. The adoption of the made-whole doctrine and its application to subrogation claims is interpreted separately by each state, which allows for different outcomes depending on the choice of law. The common fund doctrine allows the plaintiff's attorney to recover their attorney's fees and costs from the subrogation recovery. These equitable defenses are generally applicable to most subrogation claims and should be pursued under the FMRCA.

In assessing undue hardship for a complete waiver, the federal regulation 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 or contract insurer; and
7. Any other factors which objectively indicate fairness requires waiver.

The request for a compromise or waiver is sent to the Revenue Law Group team member identified in the VA's notice of claim. The Department of Justice must approve all requests for compromise or waiver on claims between $300,000 and $1,000,000. The Office of the Attorney General must approve all requests for compromise or waiver greater than $1,000,000. The VA's designee will execute and deliver an appropriate release to third parties who have made full or agreed upon compromise payments.

Takeaways

While most of this process is handled directly by the plaintiff or their attorney, it is important for the claims adjuster and defense attorney to fully understand the FMCRA to avoid uncertainty on the eve of trial. This could be as simple as requesting that the plaintiff or their attorney start the process of identifying and negotiating the VA's subrogation claim early in litigation. The VA states that it may take up to 60 days from the date of the initial request to provide the billing information for care rendered or paid for by the government. The plaintiff can request an expedited process for an upcoming mediation or trial date. However, it is best for all parties to fully understand the VA's position as early as possible so arguments for compromise or waiver can be made in advance of settlement talks between the parties to the case.

Joseph P. Moriarty
Willcox Savage
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
jmoriarty@wilsav.com
(757) 628-5502