Government Recovery: Federal Medical Care Recovery Act, Automobile Insurance and Workmen's Compensation

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GOVERNMENT RECOVERY: FEDERAL MEDICAL CARE RECOVERY ACT, AUTOMOBILE INSURANCE AND WORKMEN'S COMPENSATION

INTRODUCTION

The Federal Medical Care Recovery Act\(^1\) allows the government the right to reimbursement from negligent third parties for the cost of medical care furnished to injured beneficiaries at government expense. Since the FMCRA's inception in 1963, the Act has been the government's most potent weapon for initiating personal injury claims against third party tortfeasors. Within the last decade, claims asserted against such parties by the United States have risen tenfold.\(^2\) The effectiveness of the Act is best demonstrated by the millions of dollars recovered annually under its provisions by governmental agencies.\(^3\)

However, the Recovery Act is not an all encompassing legislative mandate to the government for personal injury claims against any conceivable party. A significant restriction on the government's use of the FMCRA is that actions can be directed only at negligent third parties.\(^4\) Yet recovery from the liable tortfeasor is but one source, albeit a major one, of potential recovery by the government for the free medical care it renders its employees, dependents, and veterans.\(^5\) Accidents involving no

\(^1\) 42 U.S.C. §§ 2651-53 (1970) [hereinafter referred to as FMCRA].

\(^2\) Based on statistics provided by the Department of the Army, agency collections under the Federal Medical Care Recovery Act for calendar year 1971 were as follows:

- Army $2,388,877.79
- Navy 2,348,954.67
- Air Force 1,859,488.00
- Veterans Administration 1,775,666.36
- Health, Education, and Welfare 206,838.72
- Total $8,579,825.54

The Army, as the agency with the largest dollar recovery, asserted 4,035 claims with a dollar value of $4,057,245.71 and collected on 3,393 claims for a total of $2,388,877.79. This can be contrasted with the same agency's efforts in 1964 when 464 claims were asserted, 119 collected for a total of $37,714.39. Vol. 2, No. 6 THE ARMY LAWYER 8 (1972) and Letter from Chief, Tort Branch, Department of the Army on December 22, 1972, on file in the office of the SANTA CLARA LAWYER.

\(^3\) See note 2, supra. Army recovery for calendar year 1972 was slightly higher at $2,728,478.98, D.A. Pamphlet 27-50-3, THE ARMY LAWYER 18 (March 1973).

\(^4\) The FMCRA limits governmental recovery to "circumstances creating a tort liability upon some third person" and only allows recovery from "said third person." 42 U.S.C. § 2651(a) (1970).

\(^5\) American forces personnel and their dependents are guaranteed free medical care by 10 U.S.C. §§ 1071-78 (Supp. 1, 1971). Other laws providing
third party liability frequently occur during normal employment, and single car accidents are not uncommon. Although the government in these situations is still obligated to render prompt treatment to an injured beneficiary, the employer's workmen's compensation carrier or the injured party's automobile insurer may be primarily liable for the hospital treatment. Government agencies, cognizant of the potential for reimbursement of medical expenses, have extended actions beyond only negligent third party suits into the realm of private insurance contracts and state employment compensation laws. This often means that automobile insurers, employment compensation carriers, and the government will jockey for position in an attempt to avoid ultimate liability for payment of medical expenses. The following sections will briefly summarize the present status of statutory recovery under the FMCRA, and then will explore in greater detail other sources available to the United States for reimbursement of medical expenses and the theories and limitations surrounding these actions.

I. PRESENT STATUS OF RECOVERY UNDER THE FMCRA

United States v. Standard Oil: Events Precipitating the Act

Although there was no statutory authority, the United States experienced some limited success prior to 1944 in pursuing administrative claims against third party tortfeasors for medical expenses which the government incurred. In that year, the United States brought suit against the Standard Oil Company of California to recover $123.45 in medical expenses which the government had furnished when a Standard Oil truck negligently struck a member of the military. The government asserted that the common law action per quod consortium et servitium amisit, which allocated a cause of action to a master for injury to his servant, should be extended to include the United States as an employer. In a landmark decision, United States v. Standard Oil of


6. Army Regulation 25-520 (1943) allowed recovery for the cost of medical care and transportation of injured military personnel, the compensation paid to them during periods of disability, and damages to government property. The regulation cited no legal authority as establishing the military's right to collect these claims, even administratively. This collection procedure was retained until the revision of Army Regulation 25-220 on Sept. 15, 1947, when collection for medical and transportation costs of injured servicemen and the compensation paid them during disability were deleted as cognizable claims.

7. For an excellent discussion of the four traditional theories used to justify government recovery—assignment, quasi-contract, equitable subrogation, and per
California, the Supreme Court rejected the government's claim on the grounds that it could not create a new basis for suit without statutory authority, noting:

Congress, not this Court or the other Federal Courts, is the custodian of the national purse. . . . When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive actions to that end. We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes. (emphasis added)

Despite the Court's suggestion in Standard Oil that legislation be enacted, Congress made no real attempt during the next sixteen years to formulate a method for allowing the government to recover the value of medical care furnished to persons who had been injured by third party tortfeasors. Finally, in 1960 the Comptroller General submitted a report to Congress indicating that the lack of statutory authority prevented the government from recovering several million dollars each year for the cost of medical care furnished to government beneficiaries. In this report, the Comptroller General recommended that Congress fill the legal void which resulted in windfall savings either to tortfeasors or to their insurance carriers at the expense of the federal treasury.

As a consequence of the 1960 Comptroller General report, Congress enacted the Federal Medical Care Recovery Act which became effective January 1, 1963. As custodian of the national purse, Congress provided that:

In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured . . . under circumstances creating a tort liability . . . the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished and shall, as to this right be subrogated to any right or claim

9. Id. at 314-16.
12. Id. at 16.
that the injured or diseased person . . . has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. (emphasis added)\(^{13}\)

Essentially, FMCRA allows the government to recoup costs incurred while providing hospitalization to an individual injured by the tortious conduct of a third party. The right of the United States accrues simultaneously with the injured party's right to recover damages from the prospective defendant.\(^{14}\) The United States may intervene in the injured party's suit or may, within six months of the completion of treatment, institute a separate suit against the tortfeasor.\(^{15}\) Recovery is allowed only if the injury or disease results from circumstances creating a tort liability under the law of the state where the injury occurs.\(^{16}\)

### Advantages Conferred on the Government by the FMCRA

Extensive litigation has been necessary to clarify the application of the FMCRA.\(^{17}\) Generally, courts interpret the FMCRA as legislation embodying a federal fiscal policy that is to be liberally construed in favor of the government.\(^{18}\)

14. See 28 C.F.R. § 43.2 (1972) for the obligations of a federal beneficiary receiving care and treatment to cooperate with the government in the prosecution of related actions.
15. 42 U.S.C. § 2651(b) (1970), Attorney General Regulations, 28 C.F.R. §§ 43.1-.4 (1969) outlines the procedural implementation of the government's claim under the FMCRA. Once notified of a potential third party claim, the government agency advises the injured party and his attorney of the government's claim and requests that it be included as part of the patient's special damages. Although the United States cannot pay counsel fees for the attorney's services (5 U.S.C. § 3106 (Supp. II, 1965-66)), the majority of the plaintiffs' lawyers have cooperated in asserting the government's claim as the agency promises its assistance in producing official records and expert testimony. If the injured party rejects the government's request, the agency negotiates directly with the tortfeasor and, if necessary, refers the claim to the Department of Justice for suit. For an overall analysis of the procedures used by various government agencies see Long, *Administration of the Federal Medical Care Recovery Act*, 46 NOTRE DAME LAW. 253 (1971).
18. See generally Annot., 7 A.L.R.F. 289 (1971). The 6th Circuit in United States v. York, 398 F.2d 582 (6th Cir. 1968) expressed the accepted view that when a specific interest and right has been conferred upon the United States by statute, the remedies and procedures for enforcing the right should not be so narrowly construed as to prevent the effectuation of the policy de-
Greene articulated the general proposition that the FMCRA creates an independent right of the United States subject only to substantive state laws which create the cause of action for tortious conduct. This proposition has the effect of conferring on the government an independent cause of action and freeing its rights of enforcement from conflicting and restrictive state laws which would otherwise severely inhibit federal recovery. A number of advantages derive from the government's right to a cause of action totally independent of the injured party:

1. The government need not obtain an assignment from the injured party.


2. A state statute of limitations does not defeat the federal claim.\textsuperscript{24}

3. A release by the victim to the tortfeasor does not affect the cause of action.\textsuperscript{25}

4. A state rule against splitting the cause of action constitutes no defense.\textsuperscript{26}

5. The government need not notify the tortfeasor or his insured of its third party claim.\textsuperscript{27}

6. The various remedies of the Act provided to the government are not mandatory but permissive.\textsuperscript{28}

7. The government's failure to intervene in the injured party's suit does not bar a subsequent independent action by the government.\textsuperscript{29}

8. The contributory negligence of persons other than the tort victim is not a defense against the government's third party action.\textsuperscript{30}

9. The United States is not barred by state intrafamily immunity laws.\textsuperscript{31}

\textsuperscript{24} United States v. Gera, 409 F.2d 117 (3d Cir. 1969); United States v. Fort Benning Rifle & Pistol Club, 387 F.2d 884 (5th Cir. 1967); United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967). Moreover, a three year federal statute of limitations has been enacted and held applicable to claims asserted by the United States under the FMCRA. 28 U.S.C. § 2415(b) (Supp. II, 1965-66). But see United States v. Hartford Accident and Indemnity Co., 460 F.2d 17 (9th Cir. 1972).


\textsuperscript{31} United States v. Haynes, 445 F.2d 907 (5th Cir. 1971) and United States v. Moore, 469 F.2d 788 (3d Cir. 1972). The Third Circuit in the Moore decision initially applied the Maine intrafamilial immunity law against the United States in agreement with the lower court ruling, 311 F. Supp. 984
Because these procedural advantages significantly amplify the United States’ right of recovery, the government seeks to bring each personal injury suit within the auspices of the Act. However, the FMCRA’s limitation to only third party tortfeasors prohibits use of the Act in many instances. The following discussion will explore the success of the United States in extending recovery attempts beyond the present limits of the FMCRA into the areas of automobile insurance contracts and workmen’s compensation laws.

II. AUTOMOBILE ACCIDENT INSURANCE

Vehicular liability insurance indemnifies the insured against loss sustained through payments made by reason of his legal liability to a third person. Uninsured motorist and medical payments coverage, on the other hand, requires payments to be made directly to the injured insured. Medical payments coverage obligates the insurer to pay any expenses the insured incurs without any question of fault. Uninsured motorist coverage protects the insured against his inability to collect a valid claim or judgment against an insolvent and uninsured motorist. As a general rule the coverage of an insurance policy protects not only the named insured, but also the persons or classes of persons specifically listed in the policy’s omnibus clause.

Shortly after the passage of the FMCRA, Eli P. Bernzweig in his article, Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act, suggested

(M.D. Pa. 1970), that 42 U.S.C. § 2651(a) (1970) mandated the application of state law. Civil No. 19,070 (Apr. 27, 1972), rev’d on resubmission, 469 F.2d 788 (3d Cir. 1972). Upon review, the court relied on the Haynes decision, that state law should not govern:

We are of the opinion that the Medical Care Recovery Act confers on the United States an independent right of recovery which is unimpaired by the vagaries of state family immunity laws. 469 F.2d at 790.


33. See generally, R. LONG, THE LAW OF LIABILITY INSURANCE § 1.06 (1972) [hereinafter cited as LONG].

34. See generally, G. COUCH, INSURANCE §§ 45:619 - 45:657, 82.1:1 - 82.1:26 (2d ed. 1964) [hereinafter cited as COUCH].

35. Id.


37. The omnibus clause extends protection of the insurance policy beyond the premium-paying insured to any person or persons within a defined group, see text accompanying note 42 infra, and may be either within the policy or as a separate rider or endorsement attached thereto. See generally, 7 AM. JUR. 2d 420 Automobile Insurance §§ 109 et seq. (1963).

38. 64 COLUM. L. REV. 1257 (1964). Bernzweig is an attorney with the office of the General Counsel, Department of Health, Education and Labor.
that the United States could have a claim under the FMCRA against specific provisions of the injured party's automobile insurance contract. The insurance industry quickly pointed out that the victim's insurance carrier is not representing a negligent third party, and, therefore, is not within the scope of the FMCRA.39

Since the purpose of the Medical Care Recovery Act was to fill the statutory void created by the Standard Oil decision, and that case involved only recovery from a negligent tortfeasor,40 the insurance industry's position is sound. However, the government's initial success in utilizing the FMCRA, consonant with the liberal interpretation recognized by the courts, has encouraged federal attorneys to attempt extending the Recovery Act, particularly where the injured party has uninsured motorist or medical payments coverage as part of his insurance contract. Although the government has not been successful in applying the FMCRA to these actions, other theories have emerged allowing federal recovery. The following analysis of standard insurance policies and representative court decisions will indicate the theories used by the government and foreseeable problem areas for federal recovery.

Uninsured Motorist Coverage—The Government as a "Person"

The standard uninsured motorist clause provides that the insurer will pay the insured the amount of damages to which he is legally entitled and which he would have recovered from the tortfeasor if the tortfeasor were not financially irresponsible.41 "Insured" is normally defined as:

(a) the named insured and any relative; (b) any other per-

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39. Groce, Public Law 87-693: The Federal Medical Care Recovery Act—A Partial Dissent, 509 Ins. L.J. 337 (1965). Groce's article was a rebuttal to Bernzweig's analysis, and argued that the FMCRA only allows recovery from a negligent third party and not the injured party's insurance carrier.
40. See text accompanying notes 7-9, supra.
41. LONG, § 24.02. All but four states (Maryland, North Dakota, New Jersey, and Wyoming) have enacted statutes requiring that uninsured motorist coverage be included in all automobile liability insurance policies. Of the four states, only Wyoming has failed to establish an unsatisfied claim or judgment fund in lieu of statutory requirements. The terms "uninsured motorist coverage," "family protection insurance," and "innocent victim coverage" are used interchangeably and denote this type of coverage. The purpose of this provision is to close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation. It is intended, within the limits of liability, to afford financial recompense to persons who receive injuries or the dependents of those who are killed, solely through the negligence of motorists who, because they are uninsured and not financially responsible, cannot be made to satisfy a judgment. Id. at § 24.01.
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son while occupying an insured automobile; and (c) any person, with respect to damages he is entitled to recover because of bodily injury which this part applies sustained by an insured under (a) or (b) above. (emphasis added)\(^4\)

The construction of this type of clause regarding governmental recovery action has been crystallized to a great degree by the decision in Government Employees Insurance Company v. United States.\(^4\) In GEICO, a federal beneficiary was injured by an uninsured motorist and the United States sought recovery from the tort victim's insurer under the uninsured motorist provision of the insurer's policy. The insurance company presented the standard argument that the United States should be limited by the FMCRA to recover only from third party tortfeasors and not against the injured party's insurance carrier. The Fourth Circuit, however, looked beyond the limits of the FMCRA to the terms of the insurance contract and held that the government fell within the policy's definition of an insured "person." The court noted that the government's cause of action only collaterally depended on the FMCRA and "[ultimately . . . depends upon the express terms of appellants' [GEICO] contract."\(^4\)

Although the GEICO holding may seem a rather liberal application of the FMCRA and a questionable intrusion into the area of private insurance contracts,\(^4\) subsequent courts have uniformly found the United States sufficiently within the policy's definition of "insured" or "person" to qualify for recovery.\(^4\) The GEICO decision's significance is that it allowed


\(^{43}\) 376 F.2d 836 (4th Cir. 1967) Government Employees Insurance Company [hereinafter referred to as GEICO] has been the insurance company most frequently in litigation against the United States. Other major cases bearing their names are at notes 64 (medical payments clause) and 75 (express exclusion of the government in the insurance policy) infra.

\(^{44}\) Id. at 837.

\(^{45}\) Compare the federal cases allowing recovery to a recent analogous state action, California State Auto. Assn. Inter-Insurance Bureau v. Jackson, 9 Cal. 3d 859, 512 P.2d 1201, 109 Cal. Rptr. 297 (1973), where a passenger in an insured automobile was injured as a result of a collision with an uninsured motorist. Medical expenses were paid by the California Department of Health Care Services under their Medi-Cal program. The state agency then asserted a statutory claim against the driver's insurer for reimbursement of Medi-Cal outlays under the state mandated uninsured motorist coverage. The California Supreme Court upheld the Medi-Cal claim and rejected the argument that the lien statutes limited recovery to only third party tortfeasors. However, an amendment to the state insurance code which the court alluded to, but which was not effective until after the accident in question, apparently eliminates state recovery by disallowing coverage where recovery would inure "directly to the benefit of the United States, or any state or political subdivision thereof." Cal. INS. CODE § 11580.2(c)(4) (West Supp. 1973).

\(^{46}\) United States v. Government Employees Insurance Corp., 440 F.2d 1338 (5th Cir. 1971); United States v. United Services Automobile Assoc., 312
the extension of government recovery actions beyond the express limits of the FMCRA. The question, as yet unanswered, is whether the previously enumerated advantages of the Recovery Act carry over into this primarily contractual recovery theory which denominates the United States as "a person."

Contractual Recovery—Forfeiture of FMCRA Advantages?

The impact of contractual rather than statutory recovery is best exemplified by the recent Ninth Circuit decision in United States v. Hartford Accident and Indemnity Co. In Hartford, a military dependent was injured and subsequently treated at government expense. Sixteen months after the accident, the government sued the injured party's insurer under the provisions of Hartford's uninsured motorist clause claiming that it qualified as an "insured" under the policy. The court agreed that the government's claim under the contract was valid, but that such an action was barred by the state's one year statute of limitations.

Government writers have attacked this decision asserting that it subjects governmental claims under the FMCRA to state laws, thereby contravening two previous Court of Appeals cases which held that state statutes of limitations do not bar the United States' independent cause of action arising under the FMCRA. However, despite the apparently contradictory court decisions, the decision is sound. The advantages available to the government when acting pursuant to the FMCRA, such as avoiding state statutes of limitations, are limited to the scope of


47. 460 F.2d 17 (9th Cir. 1972), cert. denied 409 U.S. 979 (1972).

48. Id. at 18.

49. CAL. INS. CODE § 11580.2(i) (West Supp. 1972). California is the only state thus far that has passed a specific (one year) statute for these claims. It provides that no cause of action shall accrue under uninsured motorist coverage within one year from the date of accident unless: "(1) suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction, or (2) an agreement as to the amount due under the policy has been concluded, or (3) the insured has formally instituted arbitration proceedings." It is interesting to note that in 1971 California added § 11580.2(k) requiring that the insurer notify the insured 30 days before expiration of the statute of limitations; failure to notify will toll the statute. Presumably, since the Hartford decision allowed the United States to claim as a "person," the insurer will be required to notify not only the policy holder but also the government when applicable.

50. Letter from Chief of Tort Branch, Office of the Staff Judge Advocate, Department of the Army, dated December 22, 1972, on file in the office of the SANTA CLARA LAWYER.

the Act. Therefore, contractual actions against the injured party's insurer rather than a third party tortfeasor should be subject to normal state contract laws. Cases in other federal circuits holding the United States immune from state statutes of limitations when acting pursuant to the FMCRA are not applicable to the *Hartford* situation. As was explained in *GEICO*, the right of the government against private insurers is contractual and therefore independent of the FMCRA. Since private contracts are regulated by state law, and the government is claiming a contractual right as a "person," the limitations of state laws apply. By sounding its claim in contract rather than under the FMCRA, the government may forfeit the procedural advantages which accrue to it under the Act. Thus, when the government is proceeding strictly within the parameters of the FMCRA, it appears to retain its sovereign status and the federal law will almost invariably prevail over conflicting state interpretations. Absent such express authority in recovery actions outside the FMCRA, the government may be relegated to the position of a private litigant and bound by applicable state procedural laws, whether or not they define, create, or extinguish the claim.

**Medical Payment Coverage: Third Party Beneficiary Theory**

The preceding discussion concerning uninsured motorist provisions sets the stage for an analysis of the second source of government recovery in the field of automobile insurance—medical payments coverage. Medical insurance payments, unlike uninsured motorist coverage, is completely non-fault and accrues at the time of the accident regardless of liability. The standard medical payments clause in an insurance contract obligates

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52. *Id.*

53. 376 F.2d at 837. *But see* the recent California Supreme Court decision that allowed a statutory rather than contractual recovery by a state agency against the uninsured motorist coverage of an insured's policy. In Calif. State Auto. Assn. Inter-Ins. Bureau v. Jackson, 9 Cal. 3d 589, — P.2d —, — Cal. Rptr. — (1973) the court reviewed the statutory language governing claims which, similar to the FMCRA's prohibition, limited recovery to "the third party who is liable for the injury" and rejected the argument that such language denied recovery against an insurance company. "Recovery by the injured party under uninsured motorist coverage," the court reasoned, "is a recovery from the uninsured tortfeasor of damages for the bodily injuries negligently caused by the latter... In short, the insurer's liability under uninsured motorist coverage stands in the place of the third party tortfeasor's liability..." 9 Cal. 3d at 867, — P.2d at —, — Cal. Rptr. at — (1973).

54. *See generally,* *LONG* §§ 8.01, 8.03. Medical expense coverage offered under a liability insurance policy is usually purchased with liability coverage for bodily injury. It affords payment for all reasonable expenses incurred within one year of the date of accident. Unlike uninsured motorist provisions, such coverage is optional; no financial responsibility law makes its purchase mandatory.
the insurer to pay all the medical expenses "incurred" within one year "to or for the named insured" or his relatives who sustain bodily injuries resulting from an accident involving the insured's car or one that he was driving. If the injury occurs within the terms of the policy, the insurer is obligated to pay.

Professor Joseph Long in his article, Government Recovery Beyond the Federal Medical Recovery Act, set the stage for current case law allowing the United States to recover under the medical payments provision of an insurance contract. After thoroughly analyzing the wording of such clauses, Professor Long concluded that the government should be allowed to recover under these express provisions as it was permitted recovery under uninsured motorist clauses. However, recovery against the in-

55. The requirement that the injured party "incurred" expenses was the major obstacle to government recovery prior to the widespread acceptance of the third party beneficiary theory. The leading decision, United States v. St. Paul Mercury Indemnity Co., 238 F.2d 594 (8th Cir. 1956), and its progeny denied federal recovery under the contract on the basis that the insured could not incur any expenses because he is entitled to free medical care at federal expense. See Note, Insurance—The Word Incurred as Used in the Medical Coverage Clauses of Standard Automobile Insurance Policies does not Cover Anticipated Medical Costs, 20 Drake L. Rev. 195 (1970); Annot., 10 A.L.R.3d 468 (1966); and Meyer, Health and Life Insurance Law § 17.19 (1972).

56. Government Employees Insurance Company, Family Automobile Policy, Part II, Coverage C obligates the insurer:

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", caused by accident, (a) while occupying the owned automobile, (b) while occupying a non-owned automobile, but only if such person has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or (c) through being struck by an automobile or by a trailer of any type;

Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying (a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or (b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant, or (2) its operation or occupancy by a relative, provided it is a private passenger automobile or trailer, but only if such operator or occupant has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission. (emphasis added)


59. Id. at 33-48. However, at the time of Long's article, government agencies were not pursuing recovery in this area due to the FMCRA's limitation to
sured's medical payments provision was not actually effectuated until 1970 when the "third party beneficiary" theory was introduced to circumvent the FMCRA.\textsuperscript{60}

The third party beneficiary theory of recovery is predicated on the express wording of the medical payments clause which obligates the insurer to "pay the injured person or any person or organization rendering the services."\textsuperscript{61} This provision was construed in both \textit{United States v. United Services Automobile Association}\textsuperscript{62} and \textit{United States v. State Farm Mutual}\textsuperscript{63} as authorizing the government to recover as a third party beneficiary for medical services rendered by the United States to an insured's dependent. The Fourth Circuit justified the theory in \textit{United States v. Government Employees Insurance Company}\textsuperscript{64} by noting:

\begin{quote}
[i]t must be assumed that the insurer knew that its insured in this case was entitled to obtain medical services at the expense of the United States, as provided under Section 1074 (b), 10 U.S.C. It had included as a separate part of its contract of insurance, for which it unquestionably charged a portion of its premium, this provision obligating itself to pay the medical expenses incurred as a result of an accident on behalf of the insured.\textsuperscript{65}
\end{quote}

only third party liability actions. For example, Army Regulation 27-38 (Sept. 29, 1967) made no mention of medical payments recovery. This regulation was superseded on 15 January 1969 with later amendments in March 1969 and April 1970. A new regulation, AR 27-40, is due in late 1973 and includes "assertion of medical care claims based on the Federal Claims Collection Act, State workmen's compensation laws, State hospital lien laws, and control rights under terms of insurance policies, as well as the Federal Medical Care Recovery Act, are authorized." DA Pamphlet 27-50-6, \textsc{The Army Lawyer} 26-27 (June 1973).

\begin{itemize}
\item \textsuperscript{60} \textit{United States v. United Services Automobile Association}, 431 F.2d 735 (5th Cir. 1970), \textit{cert. denied}, 400 U.S. 992 (1971).
\item \textsuperscript{61} \textit{State Farm Mutual Automobile Insurance Company, Coverage C, Division 7} \textit{cited in United States v. State Farm}, 455 F.2d 789, 790 (10th Cir. 1972).
\item \textsuperscript{62} 431 F.2d 735 (5th Cir. 1970), \textit{cert. denied}, 400 U.S. 992 (1971).
\item \textsuperscript{63} 455 F.2d 789 (10th Cir. 1972).
\item \textsuperscript{64} 461 F.2d 58 (4th Cir. 1972).
\item \textsuperscript{65} \textit{Id.} at 60. In response to the insurer's claim that a serviceman does not "incur" expense as required by the contract clause, the court cited a government commentator who argued that the serviceman's right to free medical care is part of his pay. His medical expenses, therefore, are in effect prepaid, and prepayment is an "incurred" expense. Gotting, \textit{Recovery of Medical Expenses and the Medical Care Recovery Act}, 20 JAG 75, 77 (December, 1965-January, 1966). This reasoning is faulty as there is no correlation between private insurance obligations and required medical care. Free medical treatment provided by statute, 10 U.S.C. §§ 1071-78 (1971), is not voluntary and, therefore, not prepayment. Moreover, if Gotting is correct then the United States is a primary insurer and subject to exclusion by contract liability provisions denying contribution to primary insurers. See J. \textsc{Appleman, Insurance Law and Practice}, §§ 4911-14 (Supp. 1972). Better reasoning is suggested in American Indemnity Company v. Olesijuk, 355 S.W.2d 71 (Texas Civ. App. 1961); the serviceman "incurs" costs when he is billed for treatment even though the government ultimately pays the expense.
\end{itemize}
Therefore, the court reasoned that since a serviceman was entitled to free medical care and the insurer was aware of this fact, both parties must have intended that the government be able to recover any expenses incurred on the insured's behalf.

As in the case of uninsured motorist provisions, government successes under the medical payments provisions have been greatly assisted by liberal decisions. The FMCRA, although not directly applicable, established the fiscal policy which has been apparent in subsequent court decisions.

Express Exclusions in Insurance Policies

The preceding sections demonstrate that federal recovery may be expanded beyond the limitations of the FMCRA by applying contract theory with the government assuming the role of "a person" or "third party beneficiary" in insurance contracts. The Hartford decision indicated that the procedural protection afforded by the FMCRA may disappear when contractual recoveries are being sought by the government. However, the area of real vulnerability for the government lies in the possibility that insurance companies may expressly exclude the United States in a policy. Since the government has been allowed to recover under the insurance contract only by liberally interpreting definitions of "person" and "organization," an express federal exclusion could prohibit governmental actions.

The insurance industry has long been aware of the government's vulnerability to policy wording and its writers have suggested amending insurance policies to eliminate federal recovery either by express exclusion of the United States or by a narrow definition of parties covered by the contract. A Florida federal

66. See text accompanying notes 47-53, supra.

67. Another potential impairment for government recovery is the advent of state and federal no fault insurance plans. The present administration's strong support of no fault recovery (U.S. News and World Report, March 12, 1973, at 38-41) may ultimately lead to the passage of a federal no fault plan similar to the Hart-Magnuson Bill, § 945, 92 Cong., 2d Sess. (1972) or amending 28 U.S.C. § 1346 (1972) to allow federal participation in state plans. Vol. 2, No. 6 The Army Lawyer 7-8 (1972). Either of these alternatives requires compensation without fault up to some maximum amount. Eliminating any determination of liability will certainly encumber government actions utilizing the fault based FMCRA. However, the government is apparently willing to accept the loss in cases falling below the threshold amount to insure passage of a national no fault plan. Letter from Chief, Tort Branch, Office of the Judge Advocate General, December 22, 1972, copy on file in the office of the Santa Clara Lawyer. In fact, there has been some suggestion that the FMCRA might be an acceptable casualty in favor of a national plan. Id.

court decision, *United States v. Allstate Insurance Co.*, 69 illustrates the impact on government recovery under a narrowly worded contract provision. Allstate's policy limited medical payments coverage to the "named insured and his relatives and residents of his household, and other persons while in or upon, entering into or alighting from the owned vehicle." 70 The court held that the government did not fall within the limits of the contract and could not recover from the otherwise liable insurer. The court's interpretation that the government is excluded is not surprising, but the decision is a clear suggestion to other companies of an effective way to eliminate claims by the United States. 71

While Allstate only indirectly eliminated the government, by narrowly defining the parties, Government Employees Insurance Company attempted expressly to exclude federal recovery by adding the following endorsement to their liability policy:

> It is agreed that the policy does not apply under the Liability Coverage for Bodily Injury or Property Damage to the following as insureds:
> 1. The United States of America or any of its Agencies.
> 2. Any person, including the named insured, if protection is afforded such person under the provisions of the Federal Tort Claims Act. 72

Prior to the endorsement the GEICO policy contained the standard omnibus clause extending coverage to "anyone responsible for the operation of the vehicle." 73 A Colorado federal district court found this contract modification void for lack of consideration and mutuality of assent. 74 On appeal the Tenth Circuit 75 reversed the lower court, holding that the exclusion of the United States as an omnibus insured was properly incorporated into the renewal contract and characterized the government as a "third party who is seeking a gratuitous benefit." 76

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70. Id. at 1215.
71. But see Preferred Risk Mutual Insurance Company v. Manchester Insurance and Indemnity Company, 467 F.2d 1230 (7th Cir. 1972) and notes 83 and 87 infra.
72. Government Employees Insurance Company v. United States, 400 F.2d 172, 175 (10th Cir. 1968).
73. Id. at 173. See also notes 89-90, infra.
74. Courtright v. United States, 276 F. Supp. 489 (D.C. Colo. 1967), rev'd sub nom., Government Employees Insurance Company v. United States, 400 F.2d 172 (10th Cir. 1968). However, the lower court did concede that "[i]f the endorsement [excluding the government as an insured] is valid [i.e., mutuality of understanding between parties and adequate consideration], there can be no recovery by the United States." 276 F. Supp. at 492.
75. Government Employees Insurance Company v. United States, 400 F.2d 172 (10th Cir. 1968).
76. Id. at 175. But see United States v. Government Employees Insurance
The impetus provided by the decisions regarding the Allstate and GEICO policies has led to the next logical step, the exclusion of the United States under medical payments coverage. Following a 1971 decision holding the United States an intended beneficiary under the medical payments provision of a GEICO policy, GEICO issued the following amendment effective July, 1971:

This policy does not apply under part II [Expenses for Medical Services] to: The United States of America or any of its agencies as an insured, a third party beneficiary, or otherwise.

Since each of the decisions holding in favor of the government under medical payments coverage specifically relied on the express wording of the contract, this exclusion completely eliminated federal recovery. In 1972 a government branch requested that the Department of Justice file suit against GEICO for the medical payments exclusion. The Justice Department replied:

In view of the express endorsement excluding the United States from coverage pursuant to the medical payment portion of the policy we do not believe litigation is warranted. The courts have held that exclusions as to the United States are valid when contained in the liability portion of the policy.

Company, 461 F.2d 58 (4th Cir. 1972) where the court stated:

... the United States was not a volunteer; it, in rendering the service, was discharging a statutory obligation, little different from the common-law obligation of a parent to a minor child, and like the parent, it is entitled to recover for its expenses incurred by reason of its statutory obligation to the insured. 461 F.2d at 60.

This wording suggests the possibility of a quasi-contract recovery by the government for services rendered. See notes 170-180 and accompanying text, infra. If this restitution theory was accepted, an insurance company's express exclusion of the United States in the policy would not be effective.


78. Family Automobile Policy Amendment, Government Employees Insurance Company, Part II, Expenses for Medical Services, effective July, 1971. United Services Automobile Association has also recently excluded the government by stating:

Insurance afforded under Coverage C-1 of this endorsement to any person designated under Division One of "Persons Insured" shall be reduced by any similar benefits paid or payable by any Government or Government agency unless the insured is legally obligated to pay therefore.

USAA Policy, Extended Medical, Death, and Disability Benefits, cited in Letter from Pacific Claims Officer, United States Automobile Association, dated June 19, 1973, filed in the office of the SANTA CLARA LAWYER.

79. See text accompanying notes 42 and 61, supra. GEICO is now denying all claims by the government against the medical payments clause of their policies. Phone conversation June 10, 1973 with Senior Claims Representative, Government Employees Insurance Company, California.

We can perceive of no factor which would convince a court that the medical payments clause cannot contain a valid exclusion.81

Although the decisions upholding the Allstate and GEICO exclusions may support this rejection by the Justice Department, the refusal to contest any exclusions is conceding too much. Any modification of an existing contract must meet contractual requirements of consideration and assent which may not be present in an exclusion amendment.82 Moreover, state laws governing insurance contracts have been used successfully to prohibit unjustified exclusions of a normal omnibus insured.83

One of the first states to experience mass requests by insurance companies for contract modifications was Wyoming.84 In order to avoid the effect of the first medical payments decision85 permitting the government to recover as a third party beneficiary, several insurance companies petitioned the Wyoming Insurance Commission to amend their policies to specifically exclude the United States. One company argued that the USAA decision "provides a windfall to the United States at the expense of the premium paying policy holder and without benefit to him."86 The Commissioner rejected each petition relying on a section of the Wyoming Insurance Code which forbids "exceptions and conditions

81. Id.
82. See United States v. National Insurance Underwriters, 266 F. Supp. 636 (D.C. Minn. 1967) where the contract defined "insured" as including any person or organization legally responsible for use of the vehicle. The insurance company attempted to exclude federal recovery by sending endorsements stating that the policy did not apply to the United States or any of its agencies. In considering the validity of the endorsement, the court ruled:
Where there has been no reduction in premium as consideration for the "exclusion" clause that reduces the coverage contracted for in the original policy, the said "exclusion" clause modifying the original policy is invalid for lack of adequate consideration.


83. The leading decision in the area is Wildman v. Government Employees Insurance Company, 48 Cal. 2d 31, 307 P.2d 359 (1957) in which the California Supreme Court held that the requirements of automobile liability insurance coverage set out in the applicable Vehicle Code sections were to be incorporated into every automobile policy as a matter of law. Therefore, the insurer does not have the right to limit its coverage in a liability policy to a narrow definition of "insured" because such a limitation is contrary to public policy.

86. Letter from Regional Director, United Services Automobile Association to Commissioner, Wyoming Insurance Commission, November 1, 1971, filed in the office of the Santa Clara Lawyer.
which deceptively affect the risk purported to be assumed in the
general coverage of the contract.\(^8^7\)

The denial by the Wyoming Commissioner is commendable
as it places the burden on the insurance companies to pay the cost
of medical treatment their insured receives regardless of the
source. Despite the decisions upholding the Allstate and GEICO
exclusions and the reluctance of the Justice Department to con-
test them, the Wyoming experience should induce other states to
also reject petitions for policy modification.\(^8^8\) To hold other-
wise would allow the insurer unilaterally to reduce coverage
without affecting the premium charge. If the insurance com-
pany expressly excludes the government as a claimant it should
then work a \textit{pro tanto} reduction of the premium paid by the serv-
ice beneficiary \textit{vis à vis} other insurance applicants.\(^8^9\) Moreover,
the strong wording of the most recent decision granting the gov-
ernment reimbursement from the medical payments clause of an
insurance contract indicates that some courts may look askance

Stat. ch. 73, § 755(2) (Smith-Hurd 1965).

\(^{88}\) See Preferred Risk Mutual Insurance Company v. Manchester Insurance
and Indemnity Company, 467 F.2d 1230 (7th Cir. 1972). The court upheld the
Illinois Insurance Director's decision that a liability policy endorsement restrict-
ing the definition of “insured” was unacceptable under state law that forbids
conditions which would unreasonably or deceptively affect risks purported to be
assumed by the policy. But see Oregon Rev. Stat. §§ 743.800-810 (1972)
which makes medical payments coverage mandatory in all automobile insurance
policies but excludes the government as a claimant unless expressly provided for.

\(^{89}\) Courts have uniformly rejected attempts by insurance companies to ex-
clude the government from a current policy without adequate consideration.
Southern Farm Bureau Casualty Ins. Co. v. United States, 395 F.2d 176 (8th
Cir. 1968); United States v. National Ins. Underwriters, 266 F. Supp. 636 (D.C.
Minn. 1967); Engle v. United States, 261 F. Supp. 93 (W.D. Ark. 1966). In
Southern Farm the insurer issued an automobile policy to a rural mail carrier
for a six month period with provisions for renewal at six month intervals. At
time of issue the policy contained the normal omnibus clause extending coverage
to anyone responsible for the operation of the vehicle. While the policy was in
effect, the insurer issued and transmitted an indorsement seeking to exclude the
United States from any coverage under the policy. In ruling on the indorsement,
the court noted that although the language of the amendment was clear and
unambiguous, at the time the indorsement was executed there was no reduction
in premium; neither was there evidence that the insurer intended to cancel the
policy if the indorsement was not accepted. The court concluded that the pol-
icy exclusion was not supported by adequate consideration and was therefore
void.

Unfortunately for the government, the decision upholding the GEICO ex-
clusion, note 75 supra, places a large loophole in the normal requirement of
consideration to modify a contract. The GEICO decision allowed the exclusion
when the contract was \textit{renewed}, thus distinguishing the previous cases on the
grounds that the insurer's attempted modification had been to an existing con-
tact. Therefore, the insurance company need only wait until the current policy
lapses to eliminate the government as an omnibus insured or third party bene-
ciciary. Alternatively, the insurer need only rebate a reasonable portion of the
premium as consideration for the modification.
at policies eliminating federal recovery without some consideration flowing from insurer to insured:

To allow it [insurer] to eliminate from its obligation under this provision, any expenses incurred by the United States under the latter's statutory obligation to the insured would mean that the insurer actually would have been incurring no liability, or at least a most limited one, under this part of its policy. . . . It would be unconscionable to so limit it.90

III. WORKMEN'S COMPENSATION

Industrial compensation laws, unlike the FMCRA, stand on the principal of liability without fault, whereby an employer is assessed the compensable cost of job-connected injuries as a matter of social policy.91 Prior to these statutes, work-injured employees had little chance of success in court against such common law defenses as assumption of the risk, contributory negligence, and the fellow servant doctrine.92 Under employment compensation statutes, the employee receives a guarantee for at least partial recovery of wage loss, medical expenses, and restora-

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90. United States v. Government Employees Insurance Company, 461 F.2d 58, 60 (4th Cir. 1972). Even if the courts are not persuaded to allow insurance companies to expressly exclude the United States, the government may still be able to recover a portion of its expenses. The Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), 10 U.S.C. §§ 1071-85 (1966), is a cost-sharing health benefits program designed to reduce reliance on federal medical facilities by encouraging the use of participating civilian physicians and hospitals. An injured federal beneficiary may elect to receive civilian care for which he pays a deductible and 20-25% of the remainder of the costs, depending on his status. Therefore, a government beneficiary may incur substantial civilian expenses in lieu of, or in addition to, federal treatment. Clearly the injured party "incurs" expenses and the government suffers out of pocket loss, see note 55 supra. If there is medical payments coverage, the insurer will be obligated to reimburse the government for both civilian and medical treatment. However, if the insured's policy contains an express government exclusion, then the United States should still be allowed to recover its payments to civilian hospitals. The clause excluding the government, supra note 78, does not apply when the insured is legally obligated to pay. Since the government beneficiary is obligated to pay civilian bills absent CHAMPUS reimbursement, the insured must pay that portion of the expenses to the government. Claims representatives of the major insurance company excluding the government have accepted this rationale and are paying the government its expenses attributable to civilian care. Phone conversation with Senior Claims Representative, Government Employees Insurance Company, California, June 10, 1973.


92. 1 W. Schneider, Workmen's Compensation Text § 1 (1960) [hereinafter cited as SCHNEIDER] estimates that under the common law system, between 70 and 94 per cent of all labor casualties who sought to recover for their physical losses received nothing.
tive damages in exchange for the right to bring suit for full indemnification.\(^9\)

The workmen’s compensation area represents a potential source of government reimbursement for expenses incurred by the United States on behalf of federal beneficiaries injured during non-government employment. Each time a military veteran, dependent, or federal retiree receives treatment at federal expense for injuries sustained in work covered by compensation laws, the government loses money.\(^9^4\) Since the United States receives no benefit when its beneficiary works for a private employer, the government should not bear the burden of medical treatment for work-related injuries.

Despite the obvious rationale for government recovery in non-federal employment accidents, the United States has brought few actions in this area.\(^9^5\) One major reason why federal agencies have been reluctant to file workmen’s compensation claims is the lack of express recovery authority. Courts\(^9^6\) and commentators\(^9^7\) agree that the FMCRA’s tortious conduct limi-

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\(^94\) There are two primary exceptions. The Veteran’s Administration, 38 C.F.R. § 17.48(d)(2) (Supp. 1972) and the Bureau of Employees’ Compensation, Department of Labor, 5 U.S.C. § 8131 (1970) have existing recovery programs whereby the injured employee assigns his claim to the government. See notes 149-50, infra. For the right of city, Veteran, and charitable hospitals to recover for services rendered although no actual charges were made directly to the injured workman, see Stansburg v. National Automobile and Casualty Ins. Co., 52 So. 2d 94 (La. App. 1951); Thrust v. Schlumberg Well Surveying Corp., 131 So. 2d 94 (La. App. 1961); Kocko v. Harris Coal Co., 262 N.Y. 535, 188 N.E. 53 (1933); Trustees of State Hospital v. Lehigh Valley Coal Co., 71 Pa. Super. 545 (1919) in which the court said “it [free medical care] was never intended for the relief of the employer and refusal to pay the hospital would cast the expense directly on the state, instead of upon the employer whose industry causes the injuries.”

\(^95\) With the exception of cases brought under the assignment authority of the Veteran’s Administration, note 150 infra, there has been a paucity of reported cases in this area. See Treasurer of the United States Army Service Forces v. Atwell, 10 Cal. Comp. Cases 75 (1945) and Sickler v. Johnson, 10 Cal. Comp. Cases 216 (1945). Government attorneys have indicated that workmen’s compensation carriers are becoming increasingly willing to settle cases rather than risk a major court decision, phone conversation with Recovery Judge Advocate, Ford Ord, California, on December 19, 1972. More cases should be expected in the future as the General Accounting Office has encouraged the armed services to make special efforts in this area. Vol. 1, No. 4 The Army Lawyer 17 (1971).


tation makes that statute inapplicable to this area. However, this does not mean, as one authority implies, that there can be no recovery by the government. Enabling legislation, the Federal Claims Collection Act, specifically allows heads of all governmental agencies to "attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency." Although this legislation lacks the specificity of the FMCRA, government attorneys have interpreted the statute as authority to pursue all claims where state law creates a favorable cause of action. Federal claims are cognizable, but the United States must approach compensation claims as an ordinary lien claimant for services rendered. The procedural advantages accruing to the United States under the FMCRA are not applicable and the government must comply with the laws of the jurisdiction to obtain reimbursement for medical expenses. Federal agencies must be aware of specific state requirements that can impede or eliminate federal recovery and the procedural conditions for asserting a claim.

State Compensation Laws—Threshold Requirements

In order to consider workmen's compensation as a potential source of government recovery, certain general precepts must be understood. Three basic threshold requirements must be satisfied before workmen's compensation laws apply. First, to be eligible for benefits, an injured worker must satisfy the definition of "employee" and his occupation must be "covered employment." The question of whether or not a person is an "em-

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L. REV. 20, 48 (1969) noted that cases involving employer or other employee negligence will fall within the FMCRA although the defenses of assumption of the risk and the fellow service doctrine may well bar federal recovery.

100. Id. § 952. The Act is limited to claims not exceeding $20,000.00 and is general authority for federal agencies to attempt collection of any possible claim.
102. See CAL. LABOR CODE §§ 4600-05, 4903(b) and text accompanying note 144, infra.
103. See text accompanying notes 23-31, supra.
104. See generally, LARSON, LAW OF WORKMEN'S COMPENSATION §§ 50.40-56.35 (1967) [hereinafter cited as LARSON] and HANNA, supra note 91, at c. 5.
105. SCHNEIDER §§ 279-658 and LARSON §§ 50.40-56.35. An exception to the general coverage of workmen's compensation laws are the numerical exemptions of about one-third of the states under which small employers are not covered by law. This numerical exemption ranges from two employees to 15.
ployee” turns on the degree of control and direction the employer has over the individual. Problems of definition arise for the government under such circumstances as when a serviceman is involved in gratuitous on-the-job training in a civilian establishment, or a federal dependent has part time unsupervised work. Normally, “covered employment” includes all private and public work a federal beneficiary may be involved in except agricultural laborers, casual workers, and hazardous jobs. Second, the disability must be compensable in nature. Most injuries are covered by this definition; however, about one third of the states have some limitation on recovery for diseases. The third requirement is that there be a causal link between job and injury. Causation is usually expressed in the statute as an injury “arising out of and in the course of employment” and is the most difficult of the three conditions to meet. Once these initial conditions are satisfied, the injured employee is eligible for employment compensation benefits, and payment is administered according to the jurisdiction. Consider the following hypothetical

107. Farm workers are excluded from workmen’s compensation benefits in many states although the employers of such workers may elect to cover them. See generally BLAIR, WORKMEN’S COMPENSATION LAW, § 4:04 (1972) and SCHNEIDER §§ 626-78. This omission is likely to be corrected in the near future due to extensive work by national and local unions.
108. Casual employment is irregular work of an impermanent nature. See generally SCHNEIDER §§ 279-320 and Annot., 107 A.L.R. 934 (1937). A common example applicable to federal recovery is a government dependent working part time as a domestic servant.
109. Fewer than a dozen states have workmen’s compensation statutes which limit their applicability to a list of “hazardous” or especially dangerous employments—that is, business, industries, occupations or activities inherently and constantly risky. Ordinarily, the only trade, business, or activity which brings the parties under a hazardous employment statute are those which are specifically set out in the applicable state statute. See generally, LARSON § 37.00-40.60; SCHNEIDER §§ 396-592.
112. The words “arising out of” refer to the causal relationship between employment and injury, while the words “in the course of” have reference to the time, place and circumstances of an accident. BLAIR, REFERENCE GUIDE TO WORKMEN’S COMPENSATION §§ 9:00 et seq. and HOROVITZ ON WORKMEN’S COMPENSATION 83-181 (1944). The Pennsylvania case of Henry v. Lit Brothers, 165 A.2d 406 (Pa. 1960) illustrates the importance of the particular wording to the government’s claim. In Henry the employee-veteran was injured while playing touch football on his lunch break. The employer denied payment and the government subsequently furnished treatment. Later, the injury was found to be “in the course of employment,” and the lien of the United States allowed.
which, although based on California procedures, is reasonably representative of most other states.\textsuperscript{118}

An operator feeding lumber into a circular saw cut his hand on the revolving blade. He was sawing a small piece of wood, pushing it by hand, instead of using a pusher stick. The accident occurred when his attention was diverted for a moment by a foreman who called to him.\textsuperscript{114}

The injured man received immediate medical attention and later treatment from a physician designated by the employer's insurance carrier. The treating physician also sent a report to the insurance carrier and to the employer, estimating the duration of disability at three weeks. Twelve days after the employer's first report of injury was submitted, the injured worker received his first benefit check from the insurance carrier.\textsuperscript{115}

At this point, if the worker suffers no permanent disability, and there is no disagreement about the adjustment of the claim proposed by the insurance carrier, the administrative machinery will have run its course. Otherwise, the injured employee may submit an additional claim to a hearing officer.\textsuperscript{118} Appeals from decisions of the hearing officer are heard by a full tribunal, the Industrial Accident Commission.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{113} The hypothetical situation is summarized from a study by Professor Cheit of the Institute of Industrial Relations in Cheit, Injury and Recovery in the Course of Employment 246 (1961). California procedure is detailed in California Continuing Education of the Bar, How to Handle Workmen's Compensation Cases (1962) and Bancroft, California: Some Procedural Aspects of the State Act, 40 Calif. L. Rev. 378 (1952).
\item The following sections of this Comment will emphasize California law and workmen's compensation cases as examples of procedures particularly applicable to government liens.
\item This type of injury is an excellent illustration of workmen's compensation benefits as opposed to common law actions. Recovery would have been denied to the employee at common law since he assumed the risk of the hazardous employment (saw operator), was contributorily negligent (pushed the wood by hand), and the accident was due to the actions of a fellow servant (foreman). See generally W. Prosser, The Law of Torts § 80 (4th ed. 1971).
\item California, as opposed to the national average of about one month from the date of disability to date of first payment, pays the first payment in 90\% of all cases within 12 days of the receipt of the employer's first report of accident (which must be filed within 5 days). E. Cheit, Injury and Recovery in the Course of Employment, 263 (1961).
\item Contested claims for benefits are heard initially by a hearing officer, such as a referee, arbitrator, or commissioner, who acts as an agent for the administrative tribunal created by statute to administer the provisions of the compensation act. See generally Blair, Workmen's Compensation Law § 17.00 et. seq. (1968).
\item In some states appeals taken from a hearing officer to an industrial board, court or commission are limited to a determination of only those issues properly raised at the hearing, as with appeals to courts. In others, the boards may review the entire record, not only those portions by which the appellant claims to have been aggrieved. Blair, supra note 112, at § 17.00.
\end{itemize}
The hypothetical illustrates workmen's compensation procedure in its most uncomplicated form. An employee suffers a compensable disability arising out of and in the course of employment, receives immediate and satisfactory medical attention, and is promptly paid. However, if the hypothetical employee is treated in a government hospital, the entrance of the United States as an additional claimant greatly complicates the compensation procedure. The following section will define the general duty of employer and employee concerning employment injuries and the particular state laws with which the government must be concerned to preserve the federal lien.

Preserving the Government's Compensation Claim

Assuming the government beneficiary satisfies the threshold requirements for compensation, the obligation of the employer vis à vis the employee is defined as follows: When the employer has sufficient knowledge of an injury to be aware that medical treatment is necessary, he has an affirmative and continuing duty to supply prompt medical treatment in compliance with the statutory prescription on choice of doctors. Should the employer fail to perform his duty adequately, an injured federal beneficiary may make suitable independent arrangements at the employer's expense, including government medical facilities. However, to preserve the government's claim, the responsible federal agency must comply with all applicable state procedures, particularly laws pertaining to notice, choice of doctors, and time limits for filing.

1. Notice to the Employer of Injury

To preserve a claim by the United States, the government


119. Larson § 61.12. The California Supreme Court clearly stated in McCoy v. Industrial Acc. Comm'n, 64 Cal. 2d 82, 410 P.2d 362, 48 Cal. Rptr. 858 (1966) that:

the employer should not, without good cause, be relieved of the duty to furnish medical care. The duty of the employer to furnish treatment in the first instance has been viewed strictly. It is settled that the employee is entitled to reimbursement for self-procured care when the employer has notice of the injury but fails to tender treatment promptly (citations omitted). 64 Cal. 2d at 86, 410 P.2d at 365, 48 Cal. Rptr. at 861.

Accord, Stafford v. Fabco Products, Inc., 147 A.2d 286 (N.J. 1958) which held that when the employer neglects or refuses treatment and the injured veteran obtains treatment without charge from the government, the United States is entitled to reimbursement.
must ensure that the injured federal beneficiary complies with the requirement of notice.120 This condition is fundamental, as it is necessary to allow the employer sufficient time to act within his own resources before the employee elects independent medical treatment at the employer's expense.121 Failure to insure proper notification may bar the injured party's claim for expenses and, ultimately, the government's lien.122 Once the employer receives knowledge of the injury and fails or refuses to furnish the necessary medical care, most states expressly allow the injured party to procure privately the necessary assistance at the employer's expense.123 Should an injured federal beneficiary select a government medical facility for treatment after the employer fails to act, the subsequent rights of the United States as a lien claimant are not firmly established.124 However, since the primary party has not fulfilled its legal obligation of adequate medical treatment, a non-volunteer secondary source such as the government should be reimbursed for incurred expenses.125

120. See generally, SCHNEIDER §§ 2386-2438 and HANNA, note 91 supra, at c.19(3).

121. The requirement for notice of the government's claim in workmen's compensation should be contrasted with federal actions pursuant to the FMCRA where the United States is not required to notify the tortfeasor or his insured of its third party claim. See note 25, supra.


If the employer shall refuse or neglect to comply with the foregoing provisions of this section the employee may secure such treatment and services as may be necessary and as may come within the terms of this section, and the employer shall be liable to pay therefor.

See also McCoy v. Industrial Acc. Comm'n, 64 Cal. 2d 82, 410 P.2d 362, 48 Cal. Rptr. 858 (1966).


125. Government recovery as a non-volunteer secondary source is analogous to cases allowing a State Employment Department recovery against workmen's compensation carriers for the cost of unemployment payments made by the state to the injured employee during the period of recovery. Aetna Life Ins. Co. v. Industrial Acc. Comm'n, 38 Cal. 2d 599, 241 P.2d 530 (1952); State Dept. of Employment v. Industrial Acc. Comm'n, 227 Cal. App. 2d 532, 38 Cal. Rptr. 739 (1964). The California Appeals Board stated in McIntyre v. Excelsior Enterprises, 33 Cal. Comp. Cases 510 (1968), "The medical expense is clearly the liability of the employer or its carrier from which it should not be relieved by the fact that applicant happened to receive reimbursement from another source." 33 Cal. Comp. Cases at 511.

In Marshall v. Rebert's Poultry Ranch, 150 S.E.2d 423 (1966), the employee-veteran suffered a job related injury but the employer failed to provide
Even if the federal beneficiary has not given timely notice, the government may still be able to assert a claim for medical expenses. For a number of humanitarian reasons, workmen's compensation statutes and court decisions provide various avenues of relief for injured employees who do not comply with the notice prerequisite. A tardy notice, however, must be excused before a hearing may proceed. A common exception particularly applicable to federal recovery is treatment rendered on an emergency basis. Consequently, the government may have a compensable claim when emergency care is given to a civilian workman injured on a military post, as the notice requirement is dispensed with in favor of prompt treatment.

2. Compliance with Statutory Choice of Doctor Rules

Even assuming that the government meets the initial notice requirement, the United States may not have a cognizable claim in jurisdictions with restrictive "choice of doctor" laws. State laws concerning employee selection of doctors vary from allowing the injured employee absolute freedom in choosing a physician to restricting the option to doctors stipulated by the employer. The court upheld the government's claim, noting that while the Congress intended to provide free medical treatment for indigent servicemen it did not intend to relieve the employer of his statutory obligation to provide medical treatment for his employees.

126. See generally, SCHNEIDER §§ 2355 et seq. and LARSON §§ 78.00 et seq. The majority of courts have been liberal in their interpretation of the notice prerequisite and usually consider the following as adequate justification for honoring a claim despite delay: 1) No prejudice to the employer or his insured, 2) mistake of fact regarding the seriousness of the injury, 3) actual knowledge by the employer although no formal notification given, and 4) waiver of time by employer or insurer. HOROWITZ ON WORKMEN'S COMPENSATION § 247 (1944).


129. Most of the early workmen's compensation laws placed responsibility for selecting the doctor upon the employer or the insurance carrier. The trend in current legislation is toward selection of the physician by the injured worker. The United States Department of Labor, Division of Workmen's Compensation Standards, recommends initial selection of physician by the injured worker and that process is presently allowed by statute in 22 states. State Workmen's Compensation Laws: A Comparison of Major Provisions with Recommended Standards, Bulletin Department of Labor (1971). See also CHEIT AND GORDON, OCCUPATIONAL DISABILITY AND PUBLIC POLICY 39 (1963).

130. See, e.g., N.Y. WORK. COMP. LAWS § 13 (McKinney 1965). The recent Texas statute abolishing that state's restrictive doctor selection require-
ployer.\textsuperscript{181} In states allowing total freedom of choice, a government medical facility is usually appropriate and gives rise to a compensable federal claim for all services rendered.\textsuperscript{182} However, California and other states with narrow choice of doctor rules create a serious obstacle in the path of federal recovery. Once the employer provides a satisfactory physician, it is very difficult for the employee to elect government treatment subsequently at the employer's expense. Personal preferences\textsuperscript{183} and dissatisfaction\textsuperscript{184} have been held insufficient justification to allow a change from the company-provided doctor to another medical treatment source.

Despite the limitations imposed on government recovery by narrow state "choice of doctor" laws, the United States may still have a compensable claim under certain situations. Treatment obtained on an emergency basis is normally an exception to the general rule regarding employee selection of doctors.\textsuperscript{185} Moreover, an employer's consent to alternative medical care will bar his subsequent objection and may be inferred from inaction.\textsuperscript{186} A final possibility is for the injured employee to establish the inadequacy of the employer-provided treatment.\textsuperscript{187} Although the

\begin{itemize}
\item The employee shall have the sole right to select or choose the persons or facilities to furnish medical aid, chiropractic services, and nursing and the association shall be obliged for same or, alternatively, at the employee's option, the association shall furnish such medical care, hospital services, nursing, chiropractic services, and medicines as may reasonably be required at the time of the injury and at any time thereafter to cure and relieve from the effects naturally resulting from the injury. \textit{TEXAS SESS. LAWS ch. 88, § 73-10 (1973) amending TEXAS ANN. ST. ART. 8306 § 7.}
\item But see Atkins v. DeBree, 24 App. Div. 2d 251, 265 N.Y.S.2d 307 (1965) and note 144, infra.
\item See note 124, supra.
\item Myers v. Industrial Acc. Comm'n, 191 Cal. 673, 679-80, 218 P. 11, 18 (1923).
\item McCoy v. Industrial Acc. Comm'n, 64 Cal. 2d 82, 48 Cal. Rptr. 858, 410 P.2d 362 (1966) and Draney v. Industrial Acc. Comm'n, 95 Cal. App. 2d 64, 212 P.2d 49 (1949). Some states impose additional penalties on an em-
\end{itemize}
burden of proof for establishing unsatisfactory treatment is rigid, courts will tend to look more favorably on federal claims if the employee's condition substantially improves while in the government facility.\(^{138}\)

One method for alleviating problems of government recovery in states with restrictions on employee selection of medical treatment would be for the United States to encourage employers to identify federal facilities as permissible centers for employee treatment. Since present federal rates are substantially lower than comparable civilian prices for medical care,\(^{139}\) employers and compensation carriers may well be amenable to such a suggestion. Designating government hospitals as permissible sources would simplify federal claims procedure and decrease employer costs for medical services.

3. \textit{Timely Filing of Government Claims}

An employer cannot, as a general rule, be held liable for medical services rendered after the expiration of a statutory time limit.\(^{140}\) State limitations on the period of time allowed to file claims for damages are designed to protect the employer from stale claims. It is, therefore, incumbent upon the government employer who acts unreasonably in denying or inadequately providing medical treatment to an injured employee. \textit{See} HANNA, \textit{supra} note 91, at § 17.06(1) and General Motors Corp. v. Work. Comp. Appeals Bd., 37 Cal. Comp. Cases 817 (1973).


139. The government charges an all inclusive per diem rate for hospital care regardless of the amount of treatment rendered. The present rate is $61.00 per day for federal general and tuberculosis hospitals and $13.00 per day for outpatient medical and dental treatment. 36 Fed. Reg. 11327 (1971). The Director, Bureau of the Budget, has authority to establish reasonable medical charges pursuant to Exec. Order No. 11060, 3 C.F.R. 651 (1963). Since the rates are established under authority delegated by Congress, they cannot be challenged. Tolliver v. Shumate, 151 W. Va. 105, 150 S.E.2d 579 (1966); United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967). However, the defendant may contest the necessity for the treatment. \textit{Id.}

POSTSCRIPT: Director, Office of Budget and Management, has just announced that the rates of recovery for care rendered on or after July 1, 1973 are $126.00 per day for inpatient treatment and $16.00 per visit for outpatient care. 38 C.F.R. 16806. This 100\% increase makes government charges commensurable with civilian rates for normal treatment. The substantial raise in rates will undoubtedly place even greater emphasis on all forms of federal recovery.

140. Compensation statutes provide for the filing of a claim for compensation with the proper authority, e.g., the Industrial Accident Board or the Workmen's Compensation Board. Claims must be filed within the statutory period, usually one year. This is comparable to the statute of limitations in other types of cases, and the failure by the claimant to assert a claim by filing the claim for compensation with the proper authority within the proper time limit bars the claim. \textit{See generally} BLAIR, \textit{WORKMEN'S COMPENSATION LAW} § 18.00 (1968), Annot., 11 A.L.R.2d 777 (1950) and Annot., 108 A.L.R. 316 (1937).
to ensure that the injured party promptly files for medical services provided at federal facilities. Most states allow only the employee or employer to file the action. In California, however, Labor Code Section 5501 allows the party in interest, his attorney, or any other representative authorized in writing, to file a claimant's application. Since the applicant carries the burden of proving a compensable case, it is probably a better policy for the government to have the injured party file the action.

4. Lien Procedure

An example of a specific state lien procedure which includes government compensation claims is outlined in California Labor Code Section 4903. In California, medical care and hospitalization furnished by the Veterans Administration or by a private hospital to an injured employee are the proper subject of a lien. Valid liens may attach to compensation paid pursuant to an award to the Commission or paid voluntarily by the employer or its insurance carrier. New York, on the other hand, virtually eliminates federal recovery since hospitals supported by public taxation cannot provide treatment except under emergency conditions. Other states make no particular statutory allowances for private or government medical claims and, therefore, common law methods of recovery must be utilized.

Absent express Congressional authority, federal agencies have attempted to establish a lien procedure by promulgating agency regulations conditioning gratuitous medical care on sub-

141. Failure to meet time limitations will void the claim absent mitigating circumstances. See generally Annot., 145 A.L.R. 1263 (1943).
144. CAL. LABOR CODE § 4903 (West 1971). See also Mo. Rev. STAT. § 287.140 (1965), which specifically provides that where treatment is rendered to an injured workmen by a public hospital, payment therefor under the Workmen's Compensation statute will be made to the appropriate public official.
146. CAL. LABOR CODE § 4903 (West 1971).
148. See Higley v. Schlessman, 292 P.2d 411 (Okla. 1956) which held that when the employer was on notice and failed to provide benefits, the Veterans Administration was authorized to make a reasonable charge for medical treatment to the same extent as any other private hospital or physician. See generally LARSON, supra note 101, at § 61.12.
rogation of the government to the injured employee’s claim or by requiring an assignment to the government. The Veterans Administration has been the most successful in obtaining reimbursement, because its statute allows recovery from “[w]orkmen’s compensation’ or ‘employer liability’ statutes, state or federal. . . .”

Beyond internal agency regulations, no authority is directly applicable to workmen’s compensation as the FMCRRA is limited to actions against third party tortfeasors. The lack of express authority for workmen’s compensation recovery is analogous to pre-FMCRRA years where the government was prohibited from demanding reimbursement from liable tortfeasors in the absence of applicable legislation. The few cases in this area indicate the courts have adopted the pre-FMCRRA philosophy and narrowly examine government recovery suits.

A recent Fifth Circuit decision illustrates the reluctance of courts to allow government recovery beyond its express authority. A military veteran sustained a compensable injury in the course


150. The Veterans Administration has a specific recovery statute for compensation claims in 38 C.F.R. § 17.48(d) (Supp. 1964):

Persons . . . who it is believed may be entitled to hospital care or medical or surgical treatment or to reimbursement for all or part of the cost therefor by reason of any one or more of the following:

(1)(iii) ‘Workmen’s Compensation’ or ‘employment liability’ statutes, State or Federal;

(2) . . . will not be furnished hospital care, medical or surgical treatment, without charge therefore to the extent of the amount for which such parties, referred to in subparagraph (1) . . . will become liable. Such patients will be requested to execute an appropriate assignment.


152. 38 C.F.R. 17.48(d) (1964). Professor Long, supra note 7, explains this section as an extension of an earlier ruling by the Solicitor of the Veterans Administration that a veteran cannot claim to be unable to defray the costs of medical treatment when he is entitled to have the care paid for by some third party. Veterans Administration Solicitor’s Opinion No. 74-53, referred to in Drearr v. Connecticut Gen. Life Ins. Co., 119 So. 2d 149, 150 (La. App. 1960). The authority for this regulation is drawn from 38 U.S.C. § 621 (1964) which authorizes the Administrator to prescribe rules and regulations governing the furnishing of care and any limitations thereon. But see United States v. St. Paul Mercury Indem. Co., 238 F.2d 594, 598 which criticizes the assignment provision as lacking adequate authority.

153. See text accompanying notes 6-12, supra.

of his employment as a painter. As a veteran without means of procuring medical treatment, he was entitled to free medical care in a Veterans Administration hospital. Upon completion of the treatment, the government asserted a demand for reimbursement against the employer's compensation carrier for the value of hospitalization rendered by the federal facility. The state Industrial Accident Board and federal district court held for the government despite the government's failure to obtain the required assignment from their injured beneficiary. The Court of Appeals reversed the lower court in Pennsylvania National Mutual Casualty Ins. Co. v. Barnett, holding that the absence of express federal authority and the government's failure to procure the required assignment prohibited recovery. Moreover, the court cited the pre-FMCRA case of United States v. Standard Oil for the proposition that the federal courts could not rely on state law for government claims of reimbursement.

Barnett is particularly important to the government since the Fifth Circuit has in the past treated federal uninsured motorist and medical payment insurance claims liberally. The warning to the government is clear: the fiscal policy underlying the promulgation of the FMCRA may be liberally extended to accident insurance suits, but in workmen's compensation the United States will be limited to its express authority. The Barnett decision effectively narrows government recovery against workmen's compensation carriers in federal courts to Veterans Administration (VA) hospitals which fulfill all conditions precedent to securing a compensable lien as well as obtain an assignment.

If Barnett is followed in other jurisdictions, employers and their compensation carriers will receive a windfall gain each time an employee receives government treatment, despite the employer's primary liability, when suit is brought in a federal court or in

158. 445 F.2d 573 (5th Cir. 1971).
159. 332 U.S. 301 (1947). See text accompanying notes 6-9, supra.
162. However, the Federal Claims Collection Act, 31 U.S.C. §§ 951-53 (1966), gives a federal agency a compensable lien any time a cause of action is created by state law.
a state whose narrow lien procedure prohibits recovery by the
United States. Perhaps the loss of money to the United States
Treasury resulting from Barnett will encourage Congress to pro-
vide for federal recovery in this area, just as the Standard Oil de-
cision contributed to the passage of the FMCRA. 168

Workmen's Compensation Recovery—An Alternate Method

The preceding discussion emphasizes the different state laws
that must be complied with to preserve a government compensa-
tion claim. Even obviously cognizable claims are encumbered
by procedural roadblocks inhibiting recovery by the United States.
The ultimate result is a windfall to the employer who would have
to pay for the employee's medical care but for laws requiring the
government to treat federal beneficiaries without charge. This
unwarranted benefit is reminiscent of the pre-FMCRA era when
third party tortfeasors were immune from suit. 164 Although the
FMCRA is not applicable to workmen's compensation statutes, the
spirit of that fiscal legislation should control cases in which the
government provides medical care but another party is primarily
responsible.

Amending the FMCRA to cover both automobile insurance
and workmen's compensation claims is, of course, one solution. 165
However, courts also have the ability to carry out goals of Con-
gress without requiring specific enabling legislation. 166 Certainly
public policy is in favor of shifting the burden of employment in-
jury from public funds and taxpayers at large to the appropriate
private employer. In this regard, industrial compensation laws
are analogous to a growing field of consumer protection, products
liability. Products liability theoretically accomplishes by judi-
cial edict a form of strict liability similar to that which legislatures
have promulgated by compulsory compensation statutes. 167 Un-

163. See text accompanying notes 6-12, supra.
164. See notes and accompanying text 6-13, supra.
165. Amending the FMCRA may occur if a national no-fault insurance plan
is passed, supra note 67. Congress could take that opportunity to include
automobile insurance and workmen's compensation as sources for federal recovery.
166. Textile Worker's Union v. Lincoln Mills, 353 U.S. 448 (1957) estab-
lished the proposition that federal courts can create federal common law in
areas where Congress has initially acted. For an overall analysis of the Lincoln
Mills doctrine see Judge Friendly's article, In Praise of Erie—And the New
of a decision in this area is the recent California Supreme Court decision, which
held that the statutory lien language limiting claims to only third party tort-
fereors was not intended to prohibit recovery from insurance companies in un-
insured motorist cases. Calif. State Auto Assn. Inter-Ins. Bureau v. Jackson,
note 53, supra.
1971).
derlying both products liability and workmen's compensation is the theory that "the cost of the product should bear the blood of the workman."\textsuperscript{168} This sound social policy should not evaporate when the government is the financially injured party. Once again the burden should be on the superior risk bearer, the party best able to control and prevent the accident.\textsuperscript{169} Since the United States is not in a position to prevent private employment injuries, the burden of all medical treatment should be on the employer in order to encourage the elimination of hazardous conditions. However, despite the justification for government recovery under workmen's compensation, the existing contractual and statutory requirements will continue to present procedural roadblocks which will impede or even eliminate federal reimbursement. A possible solution exists in the application of the restitutionary methods of implied-in-law or quasi-contract recovery.

When one person confers a benefit upon another without donative intent, the recipient of the benefit may be required to make restitution of the benefit or its value to avoid being unjustly enriched.\textsuperscript{170} A common example is the physician who renders emergency treatment in an automobile accident. Since the doctor is neither an intermeddler nor a mere volunteer, he may recover in quantum meruit for the reasonable value of his services.\textsuperscript{171} Similarly, the United States should be reimbursed for the treatment rendered by federal hospitals when the injured party is covered by workmen's compensation. Government hospitals do not volunteer their services nor is their treatment rendered officiously. Indeed, treatment is obligated by law and given only under certain specified conditions.\textsuperscript{172} Therefore, the United States should be reimbursed for its expenses just as the doctor is allowed quasi-contractual recovery for his or her emergency treatment.

Although the government may have an action in quasi-contract for restitution, several unique defenses to this type of recovery would appear on their face to bar federal compensation.\textsuperscript{173} A close examination of the defenses, however, will indicate that the government's cause of action survives. The "gift principal"\textsuperscript{174} eliminates quasi-contractual compensation when the person who confers the gift does so without expectation of pay-

\textsuperscript{168} Id. at § 80.
\textsuperscript{169} See generally, C. Morris, \textit{Morris on Torts} c. ix § 4 (1953).
\textsuperscript{172} \textit{See} note 5, supra.
\textsuperscript{173} D. Dobbs, \textit{The Law of Remedies} § 4.9 (1973).
\textsuperscript{174} \textit{Id.}
ment. Since Congress has mandated free medical care, the treatment would appear to be a gratuitous offering by the United States. However, other statutes make it clear that the government's free care should not be interpreted as a gift. The Federal Claims Collection Act is an all encompassing legislative authority for recovery by federal agencies in any situation where a cause of action is created by state law. Moreover, if third party negligence is involved, the FMCRA entitles the government to reimbursement regardless of state compensation laws. Therefore, the United States does not have a donative intent in rendering free care but does so with an expectation of repayment from sources other than the injured party. The second defense, the "choice principle," requires that the recipient of the benefit have an opportunity to reject the benefit. Arguably, the United States does not allow an employer freedom of choice when it provides medical care in a federal facility. On the other hand, employers hiring servicemen should be on actual or constructive notice of the laws of the United States, including the military member's right to free treatment. Hiring a government beneficiary should be treated as a waiver by the employer of any subsequent right to refuse government treatment on behalf of his or her employee.

At least one decision, a pre-FMCRA California compensation case, has adopted the quasi-contract theory suggested by this comment as an alternate approach. In Sickler v. Fraser & Johnson Co., a navy Seabee was injured while working for the defendant company on a four day leave. After treating the injured serviceman the government asserted a claim for medical services against the employer. Sickler & Johnson Co. denied the claim contending that it stood ready and willing to furnish any necessary medical care but was never afforded an opportunity to do so by the military. The Commissioner rejected this contention and found that the employer had impliedly agreed to reimburse the government for medical expenses when it hired the serviceman.

175. 31 U.S.C. §§ 951-53 (1966). See notes 99-100, supra, and 42 U.S.C. § 1396a(25) (1968) which is a federal requirement that a state or agency administering a medical assistance plan must, as a condition of approval, "... take all reasonable measures to ascertain the legal liability of third parties to pay for care and services... and (C) that in any case where such legal liability is found to exist after medical assistance has been made available on behalf of the individual, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability."

176. See notes and accompanying text 23-31, supra.

177. See Dobbs, supra note 173, at § 4.9.


179. Id. See also Treasurer of the U.S. Army Service Forces v. Atwell, 10 Cal. Comp. Cases 75 (1945) holding that the United States was entitled to a
Although the Sickler decision may have little precedential effect, the conclusion is sound. To hold otherwise would result in an abrogation of employer responsibility in many instances. As expressed by a North Carolina court on the issue of whether a federal hospital could recover against an employer for a veteran's treatment:

This [free medical care to veterans] provision was made in consideration of the veteran's previous service to his country. It does not, and was not intended to relieve an employer of his statutory duty to provide medical treatment for his injured employees. Sickler's underlying rationale has obvious merit since the employer should be liable for employee treatment regardless of the source of care. State laws should be complied with by the government when pursuing compensation claims, but if the federal lien is not recognized by local law, then quasi-contract recovery may be utilized.

CONCLUSION

The Federal Medical Care Recovery Act remains the principal method by which the United States may recover from negligent third parties the reasonable cost of medical care rendered to federal beneficiaries. Courts and commentators have stressed the independent nature of the FMCRA and have viewed government recovery attempts against tortfeasors liberally. Results have been laudatory, preventing unwarranted gains to third parties at the expense of taxpayers at large.

The limitation of the FMCRA to recovery only in cases involving third party liability has not obviated governmental actions in other areas. Automobile insurance and workmen's compensation are two alternative sources which the government has utilized for recovery of medical expenses. However, future federal recovery appears endangered by insurance companies' contract revisions and detailed state compensation laws. Excluding the government as an insured "person" under the applicable lien against the amount to be paid as compensation to a soldier who was injured during free time while employed in private industry.

180. United States v. Standard Oil of California, 332 U.S. 301 (1947) was decided two years later and eliminated federal recovery against tortfeasors without explicit Congressional authority. However, the FMCRA was enacted in response to the Standard Oil decision and indicates the intent of the legislature to insure maximum recovery. Moreover, the success of the United States in the medical payments and uninsured motorist insurance cases, supra notes 46, 62-4, suggests that courts are now looking beyond the limitations set by the Standard Oil decision.

insurance policy may effectively eliminate federal recovery in all automobile accidents where there is not a solvent tortfeasor. Moreover, detailed employment compensation laws make government attempts to file as a lien claimant burdensome or virtually impossible.

The party legally responsible for an accident should bear the subsequent cost of related medical treatment. In the absence of a liable third party, the insurer—whether private or workmen's compensation—is duty bound to pay medical expenses. The existence of laws allowing gratuitous treatment at government expense for certain federal beneficiaries should not eradicate the more primary responsibility of the insurer/employer. It is unconscionable to burden taxpayers at large for injuries that would be compensated from private sources but for federal medical treatment provisions.

The underlying intent of the FMCRA to prevent windfall gains to tortfeasors and their insurance companies will be circumvented if the government cannot recover against the primary insurer. Although the FMCRA is not directly applicable to recovery against other than third party tortfeasors, courts should closely examine attempts to avoid or eliminate reimbursing the United States in light of the FMCRA rationale. Finally, consideration should be given to amending the FMCRA to clarify the Congressional attitude toward government recovery efforts in all possible areas.

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