California Western Law Review

Volume 22 | Number 1 Article 2

1985

The Medical Care Recovery Act -- Time for a Checkup

David L. Abney

CALIFORNIA WESTERN LAW REVIEW

VOLUME 22 1985 NUMBER 1

The Medical Care Recovery Act—Time for a Checkup

DAVID L. ABNEY*

INTRODUCTION

When the federal government furnishes medical, surgical, or hospital care and treatment to a person injured through the fault of a third person, the federal government is statutorily entitled to subrogation. Under the Medical Care Recovery Act [hereinafter referred to as MCRA],[1] the injured person or survivor is required to assign his claim or cause of action against the tortious third party, to the extent necessary to enable the federal government to recover the reasonable value of treatment rendered. The Act only applies "under circumstances creating a tort liability upon some third person."[2] The purposes of the Act are to provide a statutory basis for recovering medical expenses from the person who wrongfully caused the initial injury and to provide the government with an alternative source to pay its expenses.

However, in the past twenty years, state and federal court decisions have construed the Act in a disparate fashion, generating uncertainty and confusion. Insurance companies have modified their vehicular medical payments clauses and uninsured motorist coverage to preclude recovery under the statute. State legislatures have shifted to no-fault automobile insurance schemes which remove tort liability and, therefore, the substantive basis of any MCRA tort claim. Defendants have diligently discovered and exploited the var-

* Lieutenant David L. Abney is a Claims Attorney with the United States Navy in San Diego, California. He has been admitted to practice in Arizona, California, and the District of Columbia. B.A., University of Arizona (With Distinction), 1980; J.D., University of Arizona (With High Distinction), 1983; LL.M. Candidate, University of San Diego.

1. 42 U.S.C. §§ 2651-53 (1982). For a general introduction to the Act, *see* Annot., 7 A.L.R. FED. 289 (1971). The complete text of the MCRA is set out in the Appendix.

2. 42 U.S.C. § 2651(a) (1982).

ious weaknesses and loopholes in the MCRA, highlighting the problem areas.

This Article argues that Congress should clarify the extent of the federal right under the MCRA and thereby eliminate exploitation of the Act under existing state substantive and procedural doctrines. The purpose, construction and nature of the MCRA are discussed. An analysis is made of methods of recovery and defenses available to a MCRA claim. Guidelines for congressional revision are also offered.

I. LEGISLATIVE BACKGROUND

Congress passed the MCRA in 1962 as a belated response to the 1947 Supreme Court decision of *United States v. Standard Oil Co.*[3] In that case, the Court denied the federal government the right to sue a tortfeasor for the cost of medical care which the government was statutorily required to provide an injured person.[4] Stressing national fiscal and military policy, Justice Rutledge declined to fashion a federal common law remedy.[5] However, the Court did recommend legislative action.[6]

The original draft of the Act allowed only a derivative right of recovery,[7] whereby the United States could proceed by subrogation to the rights of the victim, or under an assignment of his or her rights against the tortfeasor.[8] Amendments added the ability to prosecute the claim independently.[9] The MCRA expressly permits the United States to enforce its recovery rights by direct legal ac-

3. 332 U.S. 301 (1947). "It took Congress fifteen years to fill the gap occasioned by United States v. Standard Oil Co." United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967) (constitutionality of MCRA upheld).

4. 332 U.S. at 313. *See, e.g.*, 10 U.S.C. § 1074 (1982) (care for active duty military); and 10 U.S.C. §§ 1079-86 (1982) (care for military retirees and their dependents).

5. 332 U.S. at 313.

6. *Id.* at 314.

7. For the history of the Act, *see* Bernzweig, *Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 COLUM. L. REV. 1257 (1964); Paskoff, *Tort Law and the Medical Care Recovery Act (Public Law 87-693)*, 15 NEB. ST. B.J. (1966). The official history is scanty and somewhat confused, but it may be found at 1962 U.S. CODE CONG. & AD. NEWS 2637.

8. *See generally* Long, *Government Recovery Beyond the Federal Medical Recovery Act*, 14 S. DAK. L. REV. 20 (1969); Noone, *Federal Medical Care Recovery Act*, 55 A.B.A. J. 259 (1969); Dingfelder, *The Federal Medical Care Recovery Act—Today*, 550 INS. L.J. 853 (1968); Note, *The Medical Care Recovery Act*, 23 RUTGERS L. REV. 141 (1968); Townsend, *Some Comments on Federal Medical Recovery Act Decisions*, 10 A.F. JAG L. REV. 44 (July-Aug. 1968). The insurance industry has taken a somewhat less than enthusiastic view of the MCRA. *See* Groce, *The Federal Medical Care Recovery Act and Its Side Effects*, 36 INS. COUNS. J. 259 (April 1969); and Groce, *Public Law 87-693: The Federal Medical Care Recovery Act—A Partial Dissent*, 509 INS. L.J. 337 (1965). *See also* Mog, *Hospital Recovery Claims—Claims Under $100*, 7 A.F. JAG L. REV. 19 (Mar.-Apr. 1965).

9. *See, e.g.*, Maddux v. Cox, 382 F.2d 119, 123 (8th Cir. 1967) (MCRA primarily

tion, or by intervention or joinder in a lawsuit brought by the injured party.[10] A majority of courts also allow the injured person to assert a MCRA claim on behalf of the government against the tortfeasor for the reasonable value of medical expenses incurred by the government, as long as the claim is explicitly authorized by appropriate government officials.[11]

"The legislative history of the MCRA reflects that foremost among Congress' concerns was the annual loss which the government sustained in the absence of a statute enabling it to recover against responsible third parties."[12] Also, the Act was intended to prevent the victim from benefiting from free medical care as a result of the collateral source rule in addition to suing for the reasonable value[13] of services rendered. Furthermore, the Act was aimed at preventing unjust enrichment of third party tortfeasors and their insurance companies, since the injured person normally could not recover from them for medical expenses which had not been incurred personally.[14] Functionally, the MCRA "operates to eliminate bonus recoveries to injured federal beneficiaries or windfall savings to tortfeasors or their insurance carriers, and to return vast sums of money to the federal coffers."[15]

II. NATURE OF THE MCRA RIGHT

The Act creates an "independent substantive federal right, enacted by Congress pursuant to its constitutional powers in matters of military affairs and federal fiscal policy."[16] Although the

---

a fiscal measure). *See also* Comment, *The Right and Remedies of the United States Under the Federal Medical Care Recovery Act*, 74 DICK. L. REV. 115 (1970).

10. *See* Long, *Administration of the Federal Medical Care Recovery Act*, 46 NOTRE DAME LAW. 253 (Winter 1971).

11. Noone, *May Plaintiffs Include the United States' Claim Under the Federal Medical Care Recovery Act Without Government Intervention?*, 10 A.F. JAG L. REV. 20 (Sept.-Oct. 1968).

12. United States v. Allstate Ins. Co., 573 F. Supp. 142, 145 (W.D. Mich. 1983) (court concludes that Michigan no-fault automobile insurance law bars MCRA recovery).

13. One federal district court judge seems to have overestimated the influence of this problem on Congress when he stated that:

> The primary purpose of the Act was to enable the United States, for the benefit of its taxpayers, to recover the fair and reasonable value of expenditures required by law which, prior to the passage of the Medical Care Recovery Act, had operated as a "windfall" to the injured party under the expanded decisions permitting recoveries pursuant to the collateral source doctrine.

United States v. Jones, 264 F. Supp. 11, 15 (E.D. Va. 1967), *see supra* note 3.

14. United States v. Leonard, 448 F. Supp. 99, 101 (W.D.N.Y. 1978) (United States held to be direct beneficiary of New York no-fault policy).

15. United States v. Thomas Jefferson Corp., 309 F. Supp. 1246, 1247 (W.D. Va. 1970) (government free to conduct MCRA suit in federal court despite parallel suit in state court).

16. United States v. Moore, 469 F.2d 788, 793 (3d Cir. 1972) (MCRA overrides

MCRA gives the government a right not cognizable at common law, it should be interpreted generously.[17] "When a specific interest and right has been conferred upon the United States by statute, the remedies and procedures for enforcing that right are not to be narrowly construed so as to prevent the effectuation of the policy declared by Congress."[18] In light of the remedial and fiscal nature of the statute, courts should not place unnecessary roadblocks to recovery by the government.[19]

Although the statute entitles the United States to subrogation of "any right or claim" which the victim may have against the third-party tortfeasor,[20] the exact meaning of the subrogation right is uncertain. One court suggested that by employing the term "subrogated," Congress indicated that the independent federal recoupment right was to be subject to *any* state substantive tort defenses. This is definitely a minority position.[21] Another court has styled the government's right as "an independent statutory right of subrogation," which is actually a contradiction in terms,[22] since subrogation is inherently a dependent right.

Subrogation was the only method and right of recovery in the original version of the MCRA. However,

> [t]he bill was amended to confer on the government an independent right of action and to free its right of subrogation from the vagaries of state law. . . . The right of recovery was thus conferred on the government and subrogation was made one of the remedial consequences of the government's right, a subsidiary equitable remedy, which did not limit the primary right.[23]

---

state family immunity laws), *rem'd per curiam*, 444 F.2d 475 (3d Cir. 1971), *cert. denied*, 411 U.S. 905 (1973).

17. United States v. Wittrock, 268 F. Supp. 325, 327 (E.D. Pa. 1967) (settlement by victim will not bar an MCRA suit by the United States).

18. United States v. York, 398 F.2d 582, 586 (6th Cir. 1968) (United States must neither give notice of its MCRA claim nor notice of an assignment from the injured person in order to preserve its rights).

19. United States v. Housing Auth. of City of Bremerton, 415 F.2d 239, 241-42 (9th Cir. 1969) (United States not barred by failure to intervene in lawsuit brought by victim). *See also* Abston v. Aetna Cas. & Sur. Co., 131 Mich. App. 26, 29, 346 N.W.2d 63, 66 (1983) (dictum) (MCRA right is independent and does not rest on subrogation).

20. 42 U.S.C. § 2651(a) (1982).

21. United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884, 887 (5th Cir. 1967), *see infra* note 39 and accompanying text. *See also* Katz v. Greig, 234 Pa. Super. 126, 131, 339 A.2d 115, 120 (1975) (concurring opinion) (MCRA not subject to Pennsylvania statute of limitations), in which Judge Van der Voort declared: "What the Recovery Act does is to create an independent right of action in the United States and subjects it to the substantive right of the injured Plaintiff to recovery for his injuries. The Act does not subject the United States to state procedural limitations."

22. United States v. Angel, 470 F. Supp. 934, 935 (E.D. Tenn. 1979) (MCRA not controlled by Tennessee statute of limitations).

23. United States v. Merrigan, 389 F.2d 21, 24 (3d Cir. 1968) (remedies under the MCRA are not limited to joinder or intervention despite prompt independent suit by the victim). *See also* United States v. Bender Welding & Mach. Co., 558 F.2d 761 (5th

In *United States v. York*, Circuit Judge Celebrezze concluded that the independent MCRA right was "subrogated only in the sense that the person sued by the Government must be liable to the injured person in tort."[24] Considering the apparent legislative concern with collateral-source windfalls to tort victims, Congress probably only intended to ensure subrogation to any collateral-source rights, denying them to the victim, since the government collected through its independent right.[25] The end result could be two separate bases of recovery, but subrogation of whatever nature was not by any means the focus of the MCRA.[26]

Although a MCRA case may be heard in either state or federal court, the right of recovery hinges upon the substantive tort law of the appropriate state.[27] Therefore, when suit is in federal court, and jurisdiction is based on diversity of citizenship, the choice of law will be determined under state law.[28] However, if the injury is not a recognized tort under state law, then the United States is prevented from seeking compensation under the MCRA.[29] "The language of the Act is clear and unambiguous. It authorizes the Government to institute legal proceedings only against a person liable in *tort*."[30]

Cir. 1977) (federal government has standing to seek review of MCRA claim denied by a state agency).

24. United States v. York, 398 F.2d 582, 584 (6th Cir. 1968), *see supra* note 18 and accompanying text.

25. This would seem to be the point of Chief Judge Hoffman's comments that, strictly speaking, the victim in MCRA cases has nothing to which the government can be subrogated because the victim paid nothing for the medical care. United States v. Jones, 264 F. Supp. 11, 15 (E.D. Va. 1967), *see supra* note 3 and accompanying text.

26. While the legislative history of the Recovery Act is not clear, the emphasis on the independent nature of the government's remedy under the amended statute is apparent throughout. Despite the unfortunate language used in the law as enacted, the legislative history tends to suggest an intention to create more than one basis for recovery.

United States v. Neal, 443 F. Supp. 1307, 1310 (D. Neb. 1978) (state conflict of law rules determine whether a guest statute bars MCRA recovery).

27. *See supra* note 1 and Appendix. *See also* United States v. Allstate Ins. Co., 573 F. Supp. 142, 145 (W.D. Mich. 1983) (court concludes that Michigan no-fault law abolishes tort liability, and hence MCRA claim).

28. The choice of law analysis may turn on the fundamental federal interests and constitutional sources involved. Colden v. Asmus, 322 F. Supp. 1163, 1164-65 (S.D. Cal. 1971) (dictum) (military habeas corpus action); *but see* United States v. Neal, 443 F. Supp. 1307, 1314 (D. Neb. 1978), in which Judge Denney maintained that the proper conflicts of law rules for MCRA cases should be state rules, not federal rules.

29. The United States might claim against any applicable insurance contract as a third-party beneficiary or as an additional insured. *See, e.g.*, United States v. Criterion Ins. Co., 596 P.2d 1203 (Colo. 1979) (en banc) (court holds United States is a third-party beneficiary under Colorado no-fault automobile insurance law), *answering questions certified in*, United States v. Criterion Ins. Co., 587 F.2d 39 (10th Cir. 1978); *see also* 608 F.2d 827 (10th Cir. 1979) (*same case subsequently remanded to District Court*).

30. United States v. Farm Bureau Ins. Co., 527 F.2d 564, 566 (8th Cir. 1976) (refusing to create a direct action against the liability insurer for the insured MCRA tortfeasor) (emphasis in original).

If the facts evidence tort liability, then courts have generally concluded that the federal claim defeats procedural state defenses, unless the defense meritoriously negates the tort itself.[31] For instance, a MCRA claim is not defeated by state statutes of limitations,[32] interspousal immunity,[33] or automobile guest statutes.[34] Indeed, the United States might be able to proceed despite circumstances which would bar an action by the actual tort victim.[35] In those states which have abolished certain tort liabilities, such as under workmen's compensation plans[36] or no-fault automobile insurance schemes,[37] the courts have generally denied the propriety of a MCRA action.[38]

Under the MCRA, the United States may recover only the reasonable value of medical and dental treatment which it is authorized or required by law to provide the tort victim.[39] The Act empowers the President of the United States to prescribe regulations establishing the value of medical care provided directly or indirectly by the federal government.[40] In turn, the President has authorized the Director of the Office of Management and Budget [hereinafter referred to as OMB], to set the amount recoverable for

31. The United States is not subject to the "vagaries and inconsistencies of the laws of the various states," once tort liability is initially established. Government Employees Ins. Co. v. Bates, 414 F. Supp. 658, 659 (E.D. Ark. 1975) (state guest statute not a bar to MCRA claim).

32. United States v. Jackson, 572 F. Supp. 181, 184 (W.D. Mich. 1983) (federal statute of limitations controls in MCRA case), *motion for reconsideration denied*, 577 F. Supp. 901 (W.D. Mich. 1984).

33. United States v. Haynes, 445 F.2d 907 (5th Cir. 1971) (Louisiana spousal community property immunity overridden by the MCRA).

34. United States v. Forte, 427 F. Supp. 340, 342 (D. Del. 1977) (Delaware guest statute is substantive law, but the United States is not subject to the statute since it "does not operate to purge an automobile owner or operator of any and all tort liability.") *Contra* United States v. Oliveira, 489 F. Supp. 981 (D.S.D. 1980) (state guest statute will bar a MCRA claim since the law is substantive).

35. United States v. Greene, 266 F. Supp. 976, 978 (N.D. Ill. 1967) (the release of the tort victim and an expired state statute of limitations would not bar the United States). Once the United States passes the appropriate tort threshold, it has "an unchallenged right to recover for medical expenses against the tort-feasor." Hildebrandt v. Kalteux, 98 Misc. 2d 1062, 1064, 415 N.Y.S.2d 383, 385 (Sup. Ct. Spec. Term 1979) (MCRA claim valid despite fact New York no-fault law precluded any recovery for medical expenses made by the tort victim personally).

36. United States v. Gusto Distrib. Co., 329 F. Supp. 578 (D. Mont. 1971) (court found state workmen's compensation act denied tort liability).

37. Heusle v. National Mut. Ins. Co., 628 F.2d 833 (3d Cir. 1980) (Pennsylvania no-fault law barred MCRA claim).

38. *See, e.g.*, United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1967) (United States not amenable to Georgia statute of limitations); and Lorenzetti v. United States, 710 F.2d 982, 986-87 (3d Cir. 1983), *rev'd*, 104 S. Ct. 2284 (1984) (dictum) (must be tort liability for the MCRA to apply).

39. 42 U.S.C. § 2651(a) (1982). *See also supra* note 4.

40. 42 U.S.C. § 2652(a) (1982).

medical services by means of the MCRA.[41] For care given at government facilities, the OMB establishes per diem figures which are quite conservative in comparison with civilian charges for similar treatment.[42] However, when the government pays for medical services rendered at a facility not operated by the United States, the amount recoverable under the MCRA is the actual civilian bill, normally a figure significantly higher than the governmental rate.[43]

Courts have been divided on what effect to give the statutory MCRA recovery rates. Some courts have given the statutory fees conclusive effect,[44] while other courts have been more flexible.[45] However, the consensus appears to be that the rates established by regulation, pursuant to Executive order and the MCRA, are not subject to attack for being unreasonable and arbitrary.[46] A rebuttable presumption exists that OMB rates are proper in comparison with prevailing local civilian charges.[47] But in order to create the presumption of propriety, the federal government has the burden of proving the rate-setting regulations are consistent with the MCRA, are within the authority of the promulgating officer, and are not arbitrarily and capriciously made.[48] The rates will be upheld if the OMB based its decision on a consideration of relevant factors without the injection of any clear errors of judgment.[49] However, on occasion defendants have proven the rates charged were inappropri-

41. Exec. Order No. 11,541, 35 Fed. Reg. 10,737 (1970).

42. There are three general sets of rates for the facilities of the three major federal health care providers: the Department of Defense, the Department of Health and Human Services, and the Veterans' Administration. The per diem rates are based on average expenditures and historical costs, and are modest. For instance, a day of inpatient care at an Army hospital would be $452, even if the patient was in surgery all day. The outpatient rate would only be $56, no matter how long the visit or the type of treatment. 49 Fed. Reg. 45,280 (Nov. 15, 1984). Comparable civilian costs are much higher. For instance, the average United States daily cost of a nongovernmental short-term general hospital stay was already $325 in 1981. The rate in California was $500 by then. The rates have gone much higher since then. United States Bureau of the Census, *Statistical Abstract of the United States: 1984*, at 114 (104th ed. 1983).

43. *See supra* note 42.

44. *See, e.g.*, Phillips v. Trame, 252 F. Supp. 948, 951 (E.D. Ill. 1966) (court decided rates not challengeable on grounds they are unreasonable or arbitrary if determined as a result of action by direction of Bureau of Budget pursuant to Executive order); and Petersen v. Head Constr. Co., 367 F. Supp. 1072, 1080 (D.D.C. 1973) (value of treatment was "conclusively measured by the rates" established by the predecessor agency to the OMB).

45. *See, e.g.*, Murphy v. Smith, 243 F. Supp. 1006, 1015-17 (E.D.S.C. 1965) (United States allowed to intervene in primary case to pursue MCRA claim); and Tolliver v. Shumate, 151 W.Va. 105, 109, 150 S.E.2d 579, 583 (1966) (court concludes that MCRA recovery rates may not always constitute sufficient proof standing alone).

46. United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967), *see supra* note 3.

47. United States v. Wall, 670 F.2d 469, 470 (4th Cir. 1982) (appellate court concluded that summary judgment based solely on the OMB rates was improper).

48. *Id.* at 471.

49. *Id.*

ate by arguing that servicemen are frequently kept in a military hospital for longer periods of time than a civilian in a civilian hospital would be, since servicemen cannot return to duty and they cannot be sent home for rehabilitation.[50]

The government normally submits a MCRA "bill" in the form of a summarization or statement of charges.[51] A government statement of charges listing medical expenses and prepared in accordance with the MCRA by the appropriate claims official, comes within the business records exception to the hearsay rule and is, therefore, admissible evidence in court.[52] The preparing official or an outside expert may also testify directly concerning the method of preparation and the comparable civilian charges.[53]

The MCRA claim is often incorrectly referred to as a "lien" against the tortfeasor or his insurance carrier.[54] One of the major problems with the present MCRA is that it does not give the government a claim against the property of the wrongdoer or of anyone else, as a lien would do.[55] The Act ony provides for a "cause of action against the tortfeasor."[56] There is no lien in the legal sense, but simply an independent right of the government to sue on its own behalf.[57]

III. METHODS OF RECOVERY

By joinder or intervention, the United States may become a party to any action brought by the victim "six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved."[58] During the first six months, the injured person may sue without any fear of governmental intervention or joinder. However, after the six-month period, the United States can sue the tortfeasor directly, either alone

50. United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967), *see supra* note 3.

51. *See, e.g.*, Criterion Ins. Co. v. Starkes, 249 Md. 694, 695, 241 A.2d 707, 708 (1968) (private plaintiff held to "incur" medical expense; therefore, suit for MCRA recovery allowed); Aspuria v. Mello, 255 Or. 128, 131, 464 P.2d 680, 681 (1970).

52. Thomas v. Owens, 28 Md. App. 442, 445-46, 346 A.2d 662, 665-66 (Ct. Spec. App. 1975) (court admits Department of Health, Education and Welfare letter itemizing the government's MCRA claim).

53. *Id.*

54. *See, e.g.*, Jaffee v. United States, 663 F.2d 1226, 1264 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982) (dictum) (Gibbons, J., dissenting) (soldier denied right to sue his superior officers for alleged constitutional torts). "Indeed the United States has provided itself by law with a subrogation lien on claims against third parties for injury to servicemen for those expenses it has incurred." *Id.*

55. Thomas v. Shelton, 740 F.2d 478, 482 (7th Cir. 1984) (court refused to allow the United States to remove a state court action to federal court).

56. *Id.*

57. *Id.*

58. 42 U.S.C. § 2651(b) (1982). *See supra* note 1 and Appendix.

or in conjunction with the victim.[59] The suit may be brought in the name of the federal government or in the name of the injured person.[60]

At first glance, the MCRA remedies appear very limited. Indeed, by its language, the Act would appear to bar any governmental action if the victim files suit within the first six months after care is initially given.[61] Yet, overwhelmingly, the courts have striven to read some flexibility into the Act's various procedural devices.[62] "[The] independent right of action should be construed as permitting the government to assert its claim in any of a wide variety of possible procedural alternatives."[63] Construction of the procedural provisions should be "in aid of the substantive right which the statute has created."[64] "Despite the unfortunate language used in the law as enacted, the legislative history tends to suggest an intention to create more than one basis for recovery," and more than one method.[65]

Some early lower court decisions interpreted the six-month provision in the Act quite literally. If the tort victim sued within those first six months after the start of government treatment, and the United States failed to join or intervene in the private action, then the MCRA claim was permanently lost.[66] There was general disagreement on the propriety of this approach,[67] until the federal appellate courts concluded in 1969 that the statutory method of recovery was permissive and not mandatory.[68] "The truth of the matter is that the six months provision is an incongruous residue left in the statute from the earlier intention to provide the government no more than a derivative right of subrogation."[69] As it stands now, the government must merely wait six months after care

59. *Id.*
60. *Id.*
61. *Id.*
62. *See, e.g.*, Katz v. Greig, 234 Pa. Super. 126, 129, 339 A.2d 115, 118 (1975), *see supra* note 21 and accompanying text.
63. Leatherman v. Pollard Trucking Co., 482 F. Supp. 351, 353 (E.D. Okla. 1978) (court refused to order joinder of the United States).
64. United States v. Merrigan, 389 F.2d 21, 24 (3d Cir. 1968), *see supra* note 23.
65. United States v. Neal, 443 F. Supp. 1307, 1310 (D. Neb. 1978), *see supra* note 26.
66. *See, e.g.*, United States v. York, 261 F. Supp. 713, 714 (W.D. Tenn. 1966) (trial court strictly construed MCRA to deny federal government the right to sue), *rev'd*, 398 F.2d 582 (6th Cir. 1968); United States v. Housing Auth. of City of Bremerton, 276 F. Supp. 966, 969 (W.D. Wash. 1967) (United States prevented from instituting independent MCRA action when victim brought speedy suit), *rev'd*, 415 F.2d 239 (9th Cir. 1969).
67. *See, e.g.*, United States v. Wittrock, 268 F. Supp. 325, 326-27 (E.D. Pa. 1967), *see supra* note 17.
68. *See supra* note 66.
69. United States v. Merrigan, 389 F.2d 21, 25 (3d Cir. 1968), *see supra* note 23.

is first given and then it can sue, even if the victim has already brought suit.[70]

When asserting its claim directly, the United States may proceed either administratively or through litigation. The head of the department or agency responsible for recovering on a particular MCRA claim has discretion, in conformity with regulatory guidelines, to initiate, compromise, settle and release claims, or to waive any claim, in whole or in part, "for the convenience of the Government" or when collection would cause "undue hardship" to the injured person.[71] To assist in the collection of its claim, the United States may force the victim to assign to it any cause of action against the tortfeasor, to furnish information regarding the injury, to notify the government of any settlement offers, and to cooperate generally.[72] Once enough data are available, the appropriate agency will send a notice of claim to the tortfeasor and the tortfeasor's insurance company.[73]

A. Effect of Notice

The notice of claim has no legal effect.[74] Indeed, the government need not give any notice at all to potential defendants and their insurers as to its claim or intentions concerning a possible MCRA assertion.[75] Tort liability need not be first established in order for the United States to submit its claim, although it would be a predicate to any claim enforcement proceedings.[76] The United States may claim directly from the tortfeasor, from that person's liability insurer, and sometimes from the victim's own insurer, if the proper insurance coverage is present.[77] Although the government is free to

70. *Id.*

71. 42 U.S.C. § 2652(b) (1982). The general Department of Justice guidelines may be found at 28 C.F.R. § 43.2 (1984).

72. 28 C.F.R. § 43.2 (1984). *See also* United States v. Ammons, 242 F. Supp. 461, 463 (N.D. Fla. 1965) (government precluded from suing the victim).

73. *See, e.g.*, 32 C.F.R. §§ 537.21-537.24 (1984) (Army regulations); and 32 C.F.R. § 757 (Navy regulations).

74. There is no provision at all in the statute for the giving of notice or prescribing any legal ramifications of notice. *See supra* note 1 and Appendix.

75. *See, e.g.*, United States v. Bartholomew, 266 F. Supp. 213, 215 (W.D. Okla. 1967) (government delayed suit until after the victim had given releases to the tortfeasor); United States v. York, 398 F.2d 582, 584 (6th Cir. 1968), *see supra* note 18.

76. United States v. Gera, 279 F. Supp. 731, 733 (W.D. Pa. 1968) (MCRA not bound by state statute of limitations), *rev'd on other grounds*, 409 F.2d 117 (3d Cir. 1969).

77. *See, e.g.*, Government Employees Ins. Co. v. Rozmyslowicz, 449 F. Supp. 68 (E.D.N.Y. 1978) (direct claim against tortfeasor's insurance company), *aff'd sub nom.*, United States v. Government Employees Ins. Co., 605 F.2d 669 (2d Cir. 1979); Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967) (claim against victim's uninsured motorist coverage); United States v. Government Employees Ins. Co., 330 F. Supp. 1097 (E.D.N.C. 1971) (claim against victim's automobile insurance medical payments coverage), *aff'd*, 461 F.2d 58 (4th Cir. 1972); and United States v.

claim against an insurance company, the MCRA does not allow any direct action against the tortfeasor's liability insurer, only against the tortfeasor.[78]

B. Intervention or Joinder

If the notice of claim induces no payment, the United States may intervene or join in any court action brought against the tortfeasor by the victim.[79] Once the federal government intervenes in a state court action, it may not remove the case to federal court merely because it is prosecuting a MCRA claim.[80] The United States has the choice of starting a separate action in federal court in the first place, and is generally prevented from litigating a state court action in federal court without an independent jurisdictional basis.[81] Similarly, if the government is joined on defendant's motion in a state court proceeding, the United States may not remove to federal court based solely on its MCRA rights.[82] When necessary, the courts will order the joinder of the United States to allow a complete and swift resolution of the case.[83]

C. Direct Legal Action

After observing the six-month statutory waiting period, the United States may sue on its own in either state or federal court.[84] Since the Act specifically preserves the injured party's right to seek any damages not recoverable by the government under the

---

Haynes, 445 F.2d 907 (5th Cir. 1971) (direct action against tortfeasor and other defendants).

78. United States v. Farm Bureau Ins. Co., 527 F.2d 564, 565 (8th Cir. 1976) (court held MCRA does not authorize suit based on insurance contract, only one based in tort).

79. 42 U.S.C. § 2651(b)(2) (1982). *See also* Rexrode v. American Laundry Press Co., 674 F.2d 826, 827 n.1 (10th Cir. 1982), *cert. denied*, 459 U.S. 862 (1982) (after intervention by the government, the value of the MCRA award was deducted from the total value of the private plaintiff's recovery). The MCRA gives the United States the "absolute right" to intervene in any applicable state or federal court action. Heffernan v. Hertz Corp., 34 A.D.2d 552, 553, 309 N.Y.S.2d 706, 707 (App. Div. 1970) (appellate court reversed trial court denial of motion by the United States for leave to intervene as a party plaintiff to recover medical expenses under the MCRA). *See also* Gumenick v. United States, 213 Va. 510, 193 S.E.2d 788 (1973) (joint action brought by the tort victim and the United States).

80. Smith v. Saint Luke's Hosp., 480 F. Supp. 58, 60-61 (D.S.D. 1979) (district court granted defendant's motion for an order remanding the cause to state court).

81. *Id.*

82. Thomas v. Shelton, 740 F.2d 478, 486-88 (7th Cir. 1984), *see supra* note 55.

83. *See, e.g.*, Heusle v. National Mut. Ins. Co., 479 F. Supp. 274 (M.D. Pa. 1979), *see supra* note 37; and Babcock v. Maple Leaf, Inc., 424 F. Supp. 428, 431 (E.D. Tenn. 1976) (court allowed government an opportunity to intervene in products liability suit before joinder will be mandated in order to conclude all issues of MCRA-related liability).

84. 42 U.S.C. § 2651(b)(2) (1982).

MCRA,[85] concurrent actions by the victim and the federal government will occur.[86] Hence, the Act does not hinder parallel actions against the tortfeasor; that is, one by the government for medical treatment costs and one by the victim for other damages.[87]

In pursuing its direct action, the government may implead other parties as needed for a full adjudication of the MCRA claim.[88] Once the parties are impleaded, the United States may assert its MCRA and related claims.[89] The federal government may not implead or sue the tort victim under the Act.[90] However, since the United States may sue in the name of the injured person,[91] the jury "will not be inclined to reduce the verdict as it otherwise might were it aware that the medical expenses were borne by the Government, which many people regard as an infinite source of giveaways of every kind and character."[92]

D. Action by the Private Plaintiff

By far, the most popular and productive method of recovery is one not even mentioned in the MCRA.[93] Under this approach, a private attorney hired by the tort victim agrees to include the government's statutory MCRA claim in the private complaint against the tortfeasor.[94] However, an appropriate government agency must give express authorization and consent that the private attorney may prosecute the recovery on behalf of the United States.[95] If the

85. 42 U.S.C. § 2652(c) (1982).

86. *See, e.g.*, Seneca v. Mohawk, 52 A.D.2d 1056, 384 N.Y.S.2d 564 (App. Div. 1976) (United States started separate action to recover MCRA costs).

87. United States v. Merrigan, 389 F.2d 21, 25 (3d Cir. 1968), *see supra* note 23. *See also* United States v. Thomas Jefferson Corp., 309 F. Supp. 1246, 1248 (W.D. Va. 1970), *see supra* note 15.

88. Hipp v. United States, 313 F. Supp. 1152, 1156 (E.D.N.Y. 1970) (in a suit arising under the Federal Tort Claims Act, court allowed the United States to serve and file MCRA-related cross-claims). The United States may pursue any counterclaims, cross-claims and other normal trial remedies as necessary. *See, e.g.*, Magno v. Corros, 439 F. Supp. 592, 595 (D.S.C. 1977), *rev'd*, 630 F.2d 224 (1980), *cert. denied*, 451 U.S. 970 (1981) (United States asserted a MCRA counterclaim in a Federal Tort Claims Act action).

89. *Id.*

90. "Nowhere in the law is the United States permitted to bring an action against the serviceman, as they are seeking to do in this case." United States v. Ammons, 242 F. Supp. 461, 463 (N.D. Fla. 1965), *see supra* note 72.

91. 42 U.S.C. § 2651(b)(2) (1982).

92. United States v. Farm Bureau Ins. Co., 527 F.2d 564, 567 (8th Cir. 1976), *see supra* note 78.

93. Long, *supra* note 10, at 276-94.

94. *See, e.g.*, Sandoval v. Valdez, 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978) (private plaintiff sued tortfeasor under the MCRA and his own insurance company under the uninsured motorist coverage); Smartt v. Fleming, 481 S.W.2d 774 (Tenn. Ct. App. 1972) (private plaintiff asserting MCRA claim lost on the merits).

95. *See, e.g.*, Cook v. Stuples, 74 F.R.D. 370, 371 (W.D. Okla. 1976) (defendant's motion to force joinder of the United States denied); Palmer v. Sterling Drugs, Inc., 343

complaint has already been filed, the plaintiff may normally amend the complaint to include an allegation for the reasonable cost of the medical care and treatment furnished to the victim by the federal government.[96] Of course, the private plaintiff need not assert a MCRA claim if that is deemed somehow harmful or inappropriate to the tort victim's interests.[97]

Once the victim's attorney agrees to assert the government's claim, proof of proper governmental consent and authorization must be made part of the official record of the case.[98] Once given authority, the victim's attorney may pursue the full MCRA claim arising from the tortious injury to the victim.[99] Although the private lawyer is acting on behalf of the United States, assertion of a MCRA claim is not an independent jurisdictional basis for a civil suit in federal district court.[100] However, since the private party does represent the government's claim, both he and the United States are bound by the judgment or settlement, thus precluding any double payment by the tortfeasor of the MCRA assertion.[101]

Agreeing to assert the MCRA claim for the United States has some important consequences. First, no portion of the MCRA award may be used for private attorney fees.[102] The Act simply makes no provision for attorney fees, and the courts have unani-

---

F. Supp. 692, 696 (E.D. Pa. 1972) (defendant's motion to strike or dismiss denied where private plaintiff allowed to prosecute government's MCRA claim).

96. *See, e.g.*, Matney v. Evans, 93 N.M. 182, 186, 598 P.2d 644, 648 (Ct. App. 1979) (dismissal not warranted since the United States was not an indispensable party where the private plaintiff asserted MCRA claim on the government's behalf).

97. United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967), *see supra* note 3.

98. *See, e.g.*, Kenneally v. Thurn, 653 S.W.2d 69, 72 (Tex. Civ. App. 1983) (without authorization private plaintiff lacked power to sue on behalf of the United States); Cushman v. Fireman's Fund Ins. Co., 401 So. 2d 477 (La. Ct. App. 1981) (plaintiff's failure to show authorization defeated MCRA claim); and Sabino v. Independent Life & Accident Ins. Co., 292 So. 2d 662, 667 (Ala. Civ. App. 1974) (absent proper consent and authorization, private plaintiff's MCRA award by the trial court was unsupportable).

99. Standefer v. United States, 511 F.2d 101, 106-07 (5th Cir. 1975) (dictum) (Federal Tort Claims Act suit based on negligent treatment at a Veterans' Administration Hospital).

100. *See, e.g.*, Becote v. South Carolina Highway Dept., 308 F. Supp. 1266, 1267 (D.S.C. 1970) (defendant's motion to dismiss private suit containing MCRA claim granted for lack of federal jurisdiction). It is doubtful that the plaintiff can include the total of the MCRA claim to reach the federal diversity amount. Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341, 350 (W.D. Pa. 1972) (wrongful death claim against the City of Pittsburgh and others), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

101. Leatherman v. Pollard Trucking Co., 482 F. Supp. 351, 354 (E.D. Okla. 1978), *see supra* note 63.

102. *See, e.g.*, Hedgebeth v. Medford, 139 N.J. Super. 41, 44, 352 A.2d 267, 270 (App. Div. 1976) (dictum) (in recovery under the New Jersey Medicaid Program, court refused to reduce the state's award by a pro rata share of attorney fees for the benefit of the private plaintiff's counsel).

mously refused to award them under any theory.[103] Second, when the private attorney undertakes prosecution of the MCRA claim, the attorney also assumes a personal and professional obligation to act in the best interests of the United States.[104] The applicable standard is that of a fiduciary.[105]

The attorney is bound to promptly pay the government any money received in payment of the MCRA claim.[106] The responsibility to pay, however, is upon the private counsel, not the injured party.[107] Even if the private attorney has not agreed to cooperate with the United States in asserting the MCRA claim, any funds received by the attorney in satisfaction of a MCRA claim must be held in trust for later distribution to the federal government.[108] In short, any private attorney who receives money earmarked as a MCRA claim payment must place the money in trust, with any improper disposal of the money constituting a breach of fiduciary duty.[109]

There may appear to be little incentive for a plaintiff's attorney to cooperate with the government in pursuing recovery on a MCRA claim. However, in actuality, the benefits of prosecuting the government's MCRA claim so far outweigh any disadvantages that it may well be malpractice to refuse to assist the United States in obtaining its MCRA recovery.[110]

To aid in establishing the plaintiff's case, the government will fur-

---

103. *See, e.g.*, United States v. Nation, 299 F. Supp. 266, 267 (N.D. Okla. 1969) (United States not obligated to pay private attorney any money out of a MCRA recovery despite "created fund" and private attorney general theories).

104. *See, e.g., In re* Minor, 681 P.2d 1347 (Alaska 1983) (Attorney who had agreed to represent the government in a MCRA claim, failed to disburse the settlement to the United States and to keep the government apprised of settlement negotiations. Finding her conduct dishonest, the Alaska Supreme Court ordered a 90-day suspension with reinstatement conditioned on restitution to the United States.).

105. *Id.*

106. *See, e.g.*, Brackens v. Allstate Ins. Co., 339 So.2d 486, 487 (La. Ct. App. 1976) (no recovery allowed under the medical payments coverage); Hanley v. Condrey, 467 F.2d 697, 699 (2d Cir. 1972) (plaintiff's attorney reprimanded for wrongfully holding on to government checks); and United States v. Bates, 360 F. Supp. 1195, 1196 (M.D. Fla. 1973) (private attorneys must pay MCRA proceeds over to the United States according to the terms of the agreement with the government).

107. *See, e.g.*, Irby v. Government Employees Ins. Co., 175 So.2d 9, 11 (La. Ct. App. 1965) (victim not personally responsible to pay MCRA recovery to the United States).

108. *See, e.g., In re* Burns, 139 Ariz. 487, 679 P.2d 510 (1984) (en banc) (private attorney suspended from legal practice for one year for failure to protect the government's MCRA interest in a payment made by the tortfeasor's insurer).

109. *See, e.g., In re* Minor, 681 P.2d 1347, 1350 (Alaska 1983), *see supra* note 104.

110. Effective cooperation with the government will maximize the client's recovery and speed the successful resolution of the case. The attainment of these goals is the essence of zealous client representation. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

nish official medical records covering the treatment of the tort victim.[111] When reasonably available, expert witnesses will also be provided; testifying with regards to the medical care given, the medical causes of the bodily injury, and the overall prognosis.[112] Often the appropriate claims officer will prepare a statement of the reasonable value of the treatment costs, which may then be asserted as an item of special damages.[113] Such special damages provide a concrete basis for valuing and alleging the general damages in the case. Without an official "bill," often the injured person cannot realistically assert special damages, since most MCRA victims are given governmental care at no personal charge.[114] The greatest incentive may well be that plaintiff's attorney pays nothing for these services.[115]

Cooperation with the government actually gives plaintiff's counsel greater control over the case than proceeding alone. The United States will completely refrain from any separate negotiations with the tortfeasor or any insurance carrier.[116] The United States will neither begin an independent collection action nor join in plaintiff's lawsuit.[117] Nonintervention is an important benefit, since then the jury will not be "distracted from the main issues of liability and damages by the fact that the United States is a party because it furnished hospital and medical services free of charge to the plaintiff."[118] Moreover, the defendant is denied the right to join the United States when the plaintiff is already asserting the government's claim.[119]

By suing on behalf of the government, the victim/client gains a direct pecuniary benefit. The government may waive or compromise part or all of its MCRA claim when collection would result in undue hardship to the injured person or when it would be disadvan-

111. *See, e.g., In re* Burns, 139 Ariz. 487, 488, 679 P.2d 510, 511 (1984), *see supra* note 108 and accompanying text.

112. *Id.*

113. *See, e.g.*, 32 C.F.R. § 537.24 (1984) (Army regulations); and 32 C.F.R. § 757.5 (1984) (Navy regulations).

114. *See supra* note 51 and accompanying text. *See also* Brooks v. Plumbers & Steamfitters Local 106 Health & Welfare Fund, 464 So. 2d 26, 27-28 (La. Ct. App. 1985) (victim paid Veterans' Administration according to its MCRA subrogation rights, but victim was still not personally liable).

115. *See* Annot., 7 A.L.R. FED. 289, 298 (1971).

116. *In re* Burns, 139 Ariz. 487, 488, 679 P.2d 510, 511 (1984), *see supra* note 108.

117. *See, e.g.*, Leatherman v. Pollard Trucking Co., 482 F. Supp. 351, 354 (E.D. Okla. 1978), *see supra* note 63.

118. Conley v. Maattala, 303 F. Supp. 484, 485 (D.N.H. 1969) (private plaintiff permitted to pursue MCRA claim).

119. *See, e.g.*, Palmer v. Sterling Drugs, Inc., 343 F. Supp. 692, 696 (E.D. Pa. 1972), *see supra* note 95. In *Palmer*, the court also concluded there was no prejudice to the defendant if a private plaintiff was allowed to assert a claim on behalf of the federal government. *Id.*

tageous for the United States to pursue the full MCRA claim.[120] Some factors which may be relevant to this determination are: (1) the "degree and permanency of any disability;" (2) whether the victim is entitled to future government medical care; (3) the amount of out-of-pocket medical and legal expenses; (4) the victim's future economic prospects; and, (5) the "anticipated amount of the gross recovery."[121] If the United States releases or waives part of the proceeds, which the private plaintiff has received in settlement or judgment, the tortfeasor must still provide full payment.[122] The waiver by the United States of its right to recoup the total medical expenses under the MCRA is a "matter of grace exercised in the discretion of the Sovereign," and inures to the sole benefit of the injured person.[123] Thus, monetarily there is nothing to lose and everything to gain from cooperating with the federal government.

The conflict of interest problem is a chimera. In most cases, the client has no right at all to recover the MCRA expenses also being sought by the United States. This is because most courts hold that the victim who was given free medical care by the government has "incurred" no compensable expense.[124] In those jurisdictions in which the victim could assert some sort of collateral source theory of recovery, there is also no conflict in choosing to aid the federal government.[125] The government may merely force the victim to assign all collateral source or other reimbursement rights to the United States, and then proceed independently.[126] By cooperating, the private attorney gains many practical benefits for the injured party and, clearly, makes the best of a situation in which the government really does hold the winning hand.[127]

Authorizing private attorneys to prosecute MCRA claims works very well, except that it is "not within the clearly defined method granted the United States in enforcing the recovery of these

120. 42 U.S.C. § 2652(b) (1982).

121. *See, e.g.*, 32 C.F.R. § 757.5 (1984) (Navy regulations).

122. Hughes v. Sanders, 287 F. Supp. 332, 334 (E.D. Okla. 1968) (defendant denied relief from the judgment because of partial waiver of MCRA claim by the United States).

123. *Id.*

124. *See, e.g.*, Mayor & Aldermen of the City of Savannah v. George, 161 Ga. App. 69, 288 S.E.2d 830 (1982) (dictum) (person who neither paid directly for services nor could be required to pay was not entitled to claim).

125. On the collateral source rule in this context, *see generally* Annot., 77 A.L.R.3D 366 (1977).

126. 42 U.S.C. § 2651(a) (1982).

127. The situation is not nearly as confused and gloomy as that portrayed by some commentators. *See, e.g.*, Peterson, *Agreeing to Protect the Interests of the United States Under the Medical Care Recovery Act: Some Ethical Problems for the Attorney*, 30 JAG J. 203 (1978).

funds."[128] "There is no provision in the Statute for the United States to enforce its rights under any common law subrogation theory wherein the accommodated person would simply include the government's claim as his own."[129] A persistent minority of courts have maintained that if the government seeks a MCRA recovery, then it must become a party in the appropriate action.[130] The great weight of authority supports the private enforcement concept; however, uncertainty would be decreased and collections increased if Congress were to amend the MCRA to explicitly sanction the private attorney approach.[131]

IV. DEFENSES

Since the MCRA depends on state substantive tort law to determine liability,[132] numerous state-law defenses have been raised to block recovery.[133] Some courts have tended to regard procedural defenses as ineffective, while giving effect to substantive defenses.[134] The distinction between valid and invalid defenses does not really "fall along the traditional but uncertain line" between substance and procedure.[135] Only if a state law purges the third party of "any and all tort liability," will a legitimate defense to a MCRA claim be

128. Katz v. Greig, 234 Pa. Super. 126, 134, 339 A.2d 115, 123 (1975) (Price, J., concurring and dissenting), *see supra* note 21.

129. Carrington v. Vanlinder, 58 Misc.2d 80, 83-84, 294 N.Y.S.2d 412, 415-16 (Sup. Ct. 1968) (court denied plaintiff leave to amend complaint to include MCRA claim on behalf of the United States).

130. *See, e.g.*, Michael v. Sylvester, 102 F.R.D. 229, 230 (D. Conn. 1984) (court denied private plaintiff leave to amend complaint to allege a cause of action under the MCRA on behalf of the United States); Joyce v. Winkler, 71 A.D.2d 28, 30, 421 N.Y.S.2d 480, 482 (App. Div. 1979) (dictum) (in a Federal Employment Compensation action, court held recovery of Postal Service claim is not part of the plaintiff's suit); and Smith v. Foucha, 172 So. 2d 318, 322 (La. Ct. App.), *writ refused*, 247 La. 678, 173 So. 2d 542 (1965) (court denied to private plaintiff the right to pursue MCRA claim on behalf of the federal government).

131. Tort victims across the nation have routinely been allowed to assert the interests of the United States, resulting in large recoveries. Leatherman v. Pollard Trucking Co., 482 F. Supp. 351, 353-54 (E.D. Okla. 1978), *see supra* note 63.

132. *See, e.g.*, Heusle v. National Mut. Ins. Co., 628 F.2d 833, 837 (3d Cir. 1980), *supra* note 37; and Howard v. Lockheed-Georgia Co., 372 F. Supp. 854, 858 (N.D. Ga. 1974) (court concluded that civil rights employment discrimination action does not sound in tort).

133. *See supra* notes 32-35 and accompanying text; *see also infra* notes 141-67 and accompanying text.

134. "The right held by the United States under § 2651 is also a separate federal right which, when asserted, is not subject to procedural or contractual infirmities which might bar an action by the tort victim." United States v. Greene, 266 F. Supp. 976, 978 (N.D. Ill. 1967). *See supra* note 35. *See also* United States v. Stinnett, 318 F. Supp. 1337, 1338 (W.D. Okla. 1970) (state rules against splitting a cause of action were inapplicable since the MCRA cause of action was independent).

135. United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884, 887 (5th Cir. 1967), *see supra* note 21.

recognized.[136] Because the MCRA creates an independent federal right and cause of action, arguably, "recovery can be barred only by a federal statute or federal decisional law."[137] However, courts have definitely not gone that far.

"The cases which have sought to apply the Act demonstrate that those defenses which have nothing to do with whether the circumstances surrounding the injury create a tort, cannot defeat the independent right of the United States to recover."[138] As long as tort liability exists, any barriers to the right of a victim to recover are not binding on the federal government.[139] Cases construing the MCRA reflect the courts' difficulty in distinguishing situations which "bar the entire cause of action against the tortfeasor rather than merely limit some of the elements of recovery."[140]

A. Tort Liability Present

The following six sections cover different substantive and procedural state-law defenses which generally have been held ineffective against the MCRA. The common thread in these defenses is the continuing presence of at least some tort liability. When tort liability is not negated, only defenses which are specifically directed against the United States will succeed. For example, if the federal government violates its own statute of limitations, or commits contributory negligence through its agents, a MCRA claim could logically be denied even if the third party were liable in tort.

1. Statute of Limitations.—There is general agreement that state personal injury statutes of limitations are not applicable in MCRA cases.[141] The appropriate federal statute of limitations is

136. United States v. Forte, 427 F. Supp. 340, 343 (D. Del. 1977), *see supra* note 34.

137. United States v. Studivant, 529 F.2d 673, 677 (3d Cir. 1976) (Biggs, J., dissenting) (court denied the United States the right to assert claim against the New Jersey Unsatisfied Claim and Judgment Fund).

138. United States v. Haynes, 445 F.2d 907, 909 (5th Cir. 1971), *see supra* note 33. The *Haynes* case is discussed in Dombrink, *Medical Care Recovery Act; Defenses; Immunity of Husband Tortfeasor From Suit by Injured Wife:* United States v. Haynes, 445 F.2d 907 (5th Cir. 1971), 26 JAG J. 138 (Fall 1971).

139. United States v. Neal, 443 F. Supp. 1307, 1312 (D. Neb. 1978), *see supra* note 26.

140. Hildebrandt v. Kalteux, 98 Misc. 2d 1062, 1064, 415 N.Y.S.2d 383, 385 (Sup. Ct. Spec. Term 1979), *see supra* note 35.

141. *See, e.g.*, United States v. Angel, 470 F. Supp. 934, 935 (E.D. Tenn. 1979), *see supra* note 22; Card v. American Brands Corp., 401 F. Supp. 1186, 1188 (S.D.N.Y. 1975) (when private plaintiff asserts MCRA claim, the court should follow the federal statute of limitations); Katz v. Greig, 234 Pa. Super. 126, 130, 339 A.2d 115, 119 (1975), *see supra* note 21; United States v. Housing Auth. of City of Bremerton, 415 F.2d 239, 242 (9th Cir. 1969), *see supra* note 19; United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967), *see supra* note 35; and, United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967), *see supra* note 3.

the three-year statute covering tort actions for money damages.[142] In a tort action, the statute normally begins to run when the tort occurs.[143]

> Under the Medical Care Recovery Act, the statute of limitations does not begin to run against the Government until it has notice of the debt or it has paid the debt. Any other ruling could conceivably allow the Government's right of action to be lost before it had notice of the obligations.[144]

However, some statutory time limits will create a bar to MCRA recovery. If the tort plaintiff must file before a certain deadline in order to allege a cognizable claim, then tort liability is not recognized before statutory compliance.[145] If the claim is not brought in a timely fashion, then the MCRA does not apply since no recognizable tortfeasor will exist under the statute.[146] When recovery is denied under the MCRA, on the grounds that the statute of limitations has expired, the underlying policy of permitting the government to recover for medical services against the tortfeasor is frustrated.

2. Settlement and Release.—The principle is well established that any settlement and release by the injured person will not bar a MCRA claim for recovery.[147] Since the Act confers an independent recoupment right on the United States, resolution of the victim's claims does not concern the government's cause of action.[148] Even if the MCRA were based solely on subrogation, any "general release obtained by a tortfeasor who has knowledge or reason to know of a subrogated interest does not cut off the subrogated interest."[149]

---

142. 28 U.S.C. § 2415(b) (Supp. 1984). *See also* United States v. Jackson, 572 F. Supp. 181, 184 (W.D. Mich. 1983) (federal law controls), *motion for reconsideration denied*, 577 F. Supp. 901 (W.D. Mich. 1984); United States v. Limbs, 356 F. Supp. 1004, 1008-09 (D. Ariz. 1973), *modified*, 524 F.2d 799 (1975) (federal statute of limitations controls although the government waited too long to enforce its rights); Forrester v. United States, 308 F. Supp. 1157 (W.D. Pa. 1970) (government action timely under federal statute); and United States v. Gera, 409 F.2d 117 (3d Cir. 1969), *see supra* note 76.

143. United States v. Angel, 470 F. Supp. 934, 935 (E.D. Tenn. 1979), *see supra* note 22.

144. *Id.*

145. *See, e.g.*, United States v. Hartford Accident & Indem. Co., 460 F.2d 17 (9th Cir. 1972), *cert. denied*, 409 U.S. 979 (1972) (uninsured motorist claim not perfected unless claim is filed within the one-year limit of California Insurance Code section 11580.2).

146. United States v. Studivant, 529 F.2d 673, 675 (3d Cir. 1976), *see supra* note 137.

147. United States v. Wittrock, 268 F. Supp. 325, 327 (E.D. Pa. 1967), *see supra* note 17.

148. United States v. Jones, 264 F. Supp. 11, 13 (E.D. Va. 1967), *see supra* note 3.

149. United States v. Guinn, 259 F. Supp. 771, 773 (D.N.J. 1966) (any insurance company was presumed to have knowledge of the MCRA, since the insurance industry heavily lobbied when the law was enacted).

Irrespective of the theoretical basis of the law, the injured person could not logically have been settling for medical expenses which were provided without personal charge.[150] As one court has noted, the tort victim does not have "the power to contract away the right of the government."[151] A release by the injured party would also be an ineffective method of denying the government any contractual benefits arising from the original injury.[152] In short, any MCRA-related settlement or release in which the United States does not participate is done at the peril of the tortfeasor and that individual's insurer.[153]

3. Comparative and Contributory Negligence.—Depending upon whether the particular state embraces contributory or comparative negligence concepts, negligence of the United States may bar recovery completely or cause a proportionate reduction in any award.[154] If the United States has caused the injury, then the MCRA is inapplicable, since the Act is predicated only on third-party liability.[155] Whether the contributory negligence of the victim bars MCRA recovery is much more doubtful, because the Act is not predicated solely on subrogation to the right of the injured party.[156] In any event, if the federal government is only passively negligent it can still assert an indemnity claim against the actively negligent tortfeasor.[157]

---

150. United States v. Winter, 275 F. Supp. 895, 896 (E.D. Pa. 1967) (United States allowed to proceed despite settlement and general releases).

151. United States v. Greene, 266 F. Supp. 976, 980 (N.D. Ill. 1967), *see supra* note 35.

152. Blackburn v. Government Employees Ins. Co., 264 S.C. 535, 537, 216 S.E.2d 192, 194 (1975) (release by the victim still permits the government to collect under the insurance policy).

153. United States v. Bartholomew, 266 F. Supp, 213, 215 (W.D. Okla. 1967), *see supra* note 75.

154. California-Pacific Util. Co. v. United States, 194 Ct. Cl. 703, 731 (1971) (by negligently sending military personnel into an unsafe place without minimal precautions the United States was barred from any MCRA recovery). Where the contributory negligence falls under a comparative negligence system, the recovery will be reduced accordingly. *See generally* Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal Rptr. 858 (1975) (California Supreme Court adopted comparative negligence). *See also* Nikiforow v. Rittenhouse, 319 F. Supp. 697, 701 (E.D. Pa. 1970) (United States barred from MCRA recovery by its own negligence).

155. 42 U.S.C. § 2651(a) (1982).

156. *See, e.g.*, United States v. Housing Auth. of City of Bremerton, 415 F.2d 239, 242 (9th Cir. 1969), *see supra* note 19; Cox v. Maddux, 255 F. Supp. 517, 524 (E.D. Ark. 1966) (MCRA claim unaffected by accident participant's negligence), *see supra* note 9.

157. Hipp v. United States, 313 F. Supp. 1152, 1155 (E.D.N.Y. 1970) (Navy ambulance collided with civilian defendant's automobile). The government may also be entitled to set-off when sued under the Federal Tort Claims Act and a MCRA claim is outstanding. Hale v. United States, 416 F.2d 355, 360-61 (6th Cir. 1969) (line of duty problem arose in Federal Tort Claims Act).

4. Interspousal or Intrafamilial Immunity.—Immunity between various family members is regarded as a state procedural impediment not affecting the necessity to allege tort liability in a MCRA action.[158] As Circuit Judge Kalodner eloquently remarked in *United States v. Moore*:

> [T]he 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; otherwise stated, enforcement of the Act is free of the impact of right-to-sue limitations imposed by a state's family immunity laws. . . . The holding that enforcement of the Act is subject to the vagaries of state family immunity laws is grievous error, in utter disregard of the Congressional intent in enacting the Medical Care Recovery Act. Subjection of enforcement of the Act to vagaries of state law would make a shambles of the Act.[159]

5. Guest Statutes.—There is a split of opinion concerning the effect of automobile guest statutes on the MCRA. In general:

> [A] guest statute neither destroys the driver's basic tort liability nor deprives a third person of his right to recover for the driver's ordinary negligence. . . . Therefore, the essential element of a suit by the United States to recover medical expenses—"circumstances creating tort liability"—is present, and a state created limited defense without purgative effect is inapplicable.[160]

However, several courts have wandered into the procedural/substantive thicket instead of focusing on the presence or absence of tort liability.[161] Still, whether or not guest statutes affect the "substantive rights of litigants and cannot be waived" is essentially irrelevant.[162] The Act creates an independent right of recovery against the tortfeasor that side-steps the legal obstacles placed in the path of the automobile guest victim.[163]

6. Collateral Source Rule.—The collateral source rule has been an occasional cause of confusion under the Act. The tortfeasor defendant is frustrated because the victim is entitled to recover from a collateral source even after the federal government has successfully

158. United States v. Haynes, 445 F.2d 907, 910 (5th Cir. 1971), *see supra* note 33.
159. United States v. Moore, 469 F.2d 788, 790-92 (3d Cir. 1972), *see supra* note 16.
160. United States v. Forte, 427 F. Supp. 340, 342 (D. Del. 1977), *see supra* note 34.
161. *See, e.g.*, United States v. Oliveira, 489 F. Supp. 981, 982 (D.S.D. 1980) (South Dakota guest statute prevents MCRA recovery). In *Oliveira*, the court noted that "where the substantive law of the state bars the victim from recovery, the United States is also barred." *Id.*
162. United States v. Neal, 443 F. Supp. 1307, 1312 (D. Neb. 1978), *see supra* note 26.
163. The independent cause of action under the Act is "not subject to the vagaries and inconsistencies of the laws of the various states." Government Employees Ins. Co. v. Bates, 414 F. Supp. 658, 659 (E.D. Ark. 1975), *see supra* note 31.

prosecuted a claim for the same medical costs.[164] Defendants have unsuccessfully argued that the right to recover from a collateral source is lost since government medical expenses were given gratuitously.[165] On the other hand, a good argument could be made that anyone given medical care has earned those benefits in one fashion or another.[166] Yet, under the Act, any danger of a double recovery is precluded, since the United States can require the tort victim to assign all collateral source rights to the federal government.[167]

B. Recovery Irrespective of Tort Liability

In two areas, the United States has sought recovery under the MCRA irrespective of tort liability. The first situation concerns state laws which generally negate any tort responsibility for medical expenses; for example, workers' compensation statutes and no-fault automobile insurance plans. Here, the overall judicial consensus has been to deny MCRA recovery under these laws.

The second situation involves federal government claims to the contractual rights of the victim under the medical payments clause of an automobile insurance policy, or to the contractual rights of the tortfeasors under uninsured or underinsured motorist coverage. On a numerical basis, the United States has attained a recovery in a fair number of these cases. However, recovery has been granted on the grounds that the government is a third-party beneficiary or an additional insured under the policy. The MCRA plainly does not apply under such an approach. Fortuitous government recovery could easily be cut off if insurance companies simply drafted their policies to prevent government recovery where tort liability is not established.

1. State Laws.

a) Workers' Compensation.—The MCRA "only applies in tort situations and does not apply where the source of the claim is work-

164. Whitaker v. Talbot, 122 Ga. App. 493, 496, 177 S.E.2d 381, 384 (1970) (nonaction by the United States permitted the private plaintiff to assert a collateral source claim for the value of government medical expenses).

165. Arvin v. Patterson, 427 S.W.2d 643, 644 (Tex. Civ. App. 1968) (failure of the federal government to pursue its claim gave the tort victim free rein to seek collateral source recovery); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 201 N.W.2d 745 (1972) (plaintiff entitled to recover for medical expenses despite MCRA). *See generally* Annot., 77 A.L.R.3D 366 (1977).

166. *See* Bennett v. Haley, 132 Ga. App. 512, 208 S.E.2d 302 (1974) (defendant not entitled to show the government's evidence was aimed at reducing the victim's collateral source claim); Whitaker v. Talbot, 122 Ga. App. 493, 496, 177 S.E.2d 381, 384 (1970), *see supra* note 164.

167. 42 U.S.C. § 2651(a) (1982).

men's compensation."[168] A workers' compensation action is a statutory administrative proceeding arising exclusively out of contract.[169] Indeed, any assignment of the injured worker's rights to the federal government is generally held to have no effect.[170] Since the right to the benefits under most workers' compensation acts is by statute exercised exclusively against the employer, the tort law concepts of the MCRA are truly irrelevant.[171]

b) No-Fault Automobile Insurance.—Many cases have discussed the relationship between no-fault automobile insurance and the MCRA.[172] The right of governmental recovery turns on the specific wording of the particular state's no-fault law in issue. More precisely, recovery hinges on the judicial interpretation of the particular statute. If the court concludes that the statute negates tort liability for medical expenses, then there will be no MCRA recovery.[173] If the statutory language is construed to sanction at least a

168. Pennsylvania Nat'l Mut. Cas. Co. v. Barnett, 445 F.2d 573, 575 (5th Cir. 1971) (absence of statutory liability in tort defeats the MCRA claim). *See also* Wojtkowski v. Hartford Acc. & Indem. Co., 27 Ariz. App. 497, 499, 556 P.2d 798, 800 (1976) (the fact that Medicaid is not involved in MCRA recovery indicates the government does not consider itself to be an insurer); Department of Employment Dev. v. Workers' Comp. Appeals Bd., 62 Cal. App. 3d 500, 503, 133 Cal. Rptr. 236, 239 (3d Dist. 1976) (workers' compensation claim not possible under MCRA because tort liability did not exist).

169. *See, e.g.*, Sabino v. Independent Life & Accident Ins. Co., 52 Ala. App. 368, 373, 292 So. 2d 662, 667 (1974) (under state law an employer need not pay when the employee was entitled to receive medical services under federal law).

170. *See, e.g.*, Texas Employers Ins. Ass'n v. United States, 390 F. Supp. 142, 150 (N.D. Tex. 1975) (anti-assignment rule an integral part of state law); Highlands Ins. Co. v. Daniel, 410 S.W.2d 491 (Tex. Civ. App. 1967) (state statute voided an assignment of compensation benefits by an employee).

171. *Compare* United States v. Gusto Distrib. Co., 329 F. Supp. 578, 579 (D. Mont. 1971) (exclusivity of state law precluded MCRA recovery), *with* United States v. Kirkland, 405 F. Supp. 1024, 1028-29 (E.D. Tenn. 1975) (assignment permissible because the party entitled to be reimbursed was merely shifted and no double liability was created).

172. *See* Note, *The Federal Medical Care Recovery Act in No-Fault Automobile Insurance Jurisdictions: Extension of the Federal Right of Reimbursement Against No-Fault Insurers*, 21 B.C.L. REV. 623 (1980).

173. In that fashion, at least six states have terminated MCRA recovery in automobile insurance cases. Georgia: United States v. Travelers Indem. Co., 253 Ga. 328, 320 S.E.2d 164 (1984), *answering question certified in*, 729 F.2d 735 (11th Cir. 1984) (court concluded Georgia legislature did not intend to make no-fault insurance companies liable to the federal government). Kentucky: United States v. Allstate, 754 F.2d 662 (6th Cir. 1985) (allowing the United States to recover would make it a beneficiary of insurance coverage it did not purchase and would deplete the recovery pool for actual victims). Michigan: Despite one holdout federal district court, the clear rule in Michigan is to deny MCRA recovery under the state no-fault law. United States v. Jackson, 572 F. Supp. 181 (W.D. Mich. 1983), *motion for reconsideration denied*, 577 F. Supp. 901 (W.D. Mich. 1984) (no tort liability under state law meant no MCRA recovery), *see supra* note 142; United States v. Allstate Ins. Co., 573 F. Supp. 142 (W.D. Mich. 1983) (court constrained by congressional choice of recovery based on tort liability); Bagley v. State Farm Mut. Auto. Ins. Co., 101 Mich. App. 733, 300 N.W.2d 322 (1980) (Michigan legislature intended the no-fault act to prevent federal recoupment of medical ex-

remnant of tort fault, then a claim may be successfully prosecuted under the Act.[174]

The consequences of judicial decisions which bar MCRA recovery under state no-fault laws are enormous costs. The bulk of MCRA recoupment comes from automobile liability insurance policies.[175] The MCRA loss of such no-fault states as Georgia, Kentucky, Michigan, New Jersey, North Dakota and Pennsylvania has hurt the MCRA collection effort tremendously.[176] If the recovery of resources expended due to the actual fault of a third party is truly the goal of the MCRA, then Congress should rework the Act to create an exception for MCRA recovery under state no-fault automobile insurance plans.[177]

2. Contractual Rights.

a) Medical Payments Clause.—Medical payments coverage is a common feature of automobile insurance policies. The coverage

---

pense from insurer); and O'Donnell v. State Farm Mut. Auto. Ins. Co., 404 Mich. 514, 273 N.W.2d 829 (1979) (same basic holding). *Contra* United States v. Spencley, 589 F. Supp. 103 (W.D. Mich. 1984) (federal government interest supreme and should override state no-fault law). New Jersey: New Jersey has apparently settled on an interpretation of its law that denies a recovery against no-fault benefits. Sanner v. Government Employees Ins. Co., 150 N.J. Super. 488, 376 A.2d 180 (App. Div. 1977) (per curiam) (federal government blocked by no-fault law from recovery against insurance company), *reversal aff'd per curiam*, 75 N.J. 460, 383 A.2d 429 (1977). *But see* Lapidula v. Government Employees Ins. Co., 146 N.J. Super. 463, 370 A.2d 50 (App. Div. 1977) (medical expenses were incurred because the injured person might be required to pay; therefore, the United States should recover based on subrogation). North Dakota: United States v. Dairyland Ins. Co., 674 F.2d 750 (8th Cir. 1982) (United States not a beneficiary of the North Dakota no-fault law). Pennsylvania: Heusle v. National Mut. Ins. Co., 628 F.2d 833 (3d Cir. 1980), *see supra* note 37; Hohman v. United States, 470 F. Supp. 769 (E.D. Pa. 1979), *aff'd*, 628 F.2d 832 (3d Cir. 1980) (absence of tort liability prevented MCRA claim).

174. This is clearly the minority position, although maintained in several important jurisdictions. Colorado: United States v. Criterion Ins. Co., 596 P.2d 1203 (Colo. 1979) (en banc), *see supra* note 29. Florida: United Services Auto. Ass'n v. Holland, 283 So. 2d 381 (Fla. Dist. Ct. App. 1973) (court concluded Florida no-fault law substitutes the insurer in place of the tortfeasor). New York: The New York no-fault law apparently allows the United States to sue for medical expenses while the victim would be limited in the possible recovery to basically non-economic items. United States v. Government Employees Ins. Co., 605 F.2d 669 (2d Cir. 1979) (United States is a person entitled to recover under New York law); Hildebrandt v. Kalteux, 98 Misc. 2d 1062, 415 N.Y.S.2d 383 (Sup. Ct. Spec. Term 1979), *see supra* note 35; United States v. Leonard, 448 F. Supp. 99 (W.D.N.Y. 1978) (federal government is a direct beneficiary under New York no-fault law).

175. *See, e.g.*, Long, *The Federal Medical Care Recovery Act: A Case Study in the Creation of Federal Common Law*, 18 VILL. L. REV. 353 (1973); and Gotting, *Recovery of Medical Expenses and the Medical Care Recovery Act*, 20 JAG J. 75, 77 (1965-66).

176. "The absence of a tortfeasor in no-fault states has severely curtailed the ability of the United States to recover under the Act." United States v. Dairyland Ins. Co., 674 F.2d 750, 751 (8th Cir. 1982), *see supra* note 173.

177. *See generally* Note, *supra* note 172. *See also* Kasold, *Medical Care Recovery—Analysis of the Government's Right to Recover Its Medical Expenses*, 108 MIL. L. REV. 161 (Spring 1985).

normally provides that the insurer will pay all of the reasonable expenses incurred within a set time from the date of any automobile accident up to certain monetary limits.[178] Payments may be made to the named insured or to the health care provider, and are not based on who was at fault in causing the accident.[179] Most courts considering the matter have allowed the United States to recover under a medical payments clause for the value of the medical expenses caused by a third-party tortfeasor.[180]

However, since an automobile "insurer is not a third person liable in tort within the meaning of the federal statute,"[181] recovery is not based on the MCRA,[182] but on the insurance policy language. If the United States fits into the policy terms as a third-party beneficiary,[183] or as an additional insured,[184] it will attain a recovery. Recovery is made more likely by the general rule that insurance policies are strictly construed against the issuing company and in favor of potential insureds and beneficiaries.[185] There is also the notion that an insurer has reaped some sort of windfall when an insured receives medical care at government expense and the government is prevented from recouping at least some of the medical costs from the medical payments clause.[186]

Several courts have balked at allowing the United States to re-

178. *See, e.g.*, Blackburn v. Government Employees Ins. Co., 264 S.C. 535, 536, 216 S.E.2d 192, 193 (1975) (United States allowed to claim under the medical payments clause).

179. *Id.*

180. *See infra* notes 181 and 183-84.

181. Lefebvre v. Government Employees Ins. Co., 110 N.H. 23, 25, 259 A.2d 133, 135 (1969) (no recovery allowed against medical payments coverage under the MCRA). *See also* Bailey, *Hospital Recovery Claims—Problems in the Fringe Areas*, 7 A.F. JAG L. REV. 7 (Mar.-Apr. 1965).

182. *See, e.g.*, United States v. Government Employees Ins. Co., 330 F. Supp. 1097, 1099 (E.D.N.C. 1971) (recovery allowed under third-party beneficiary theory), *aff'd*, 461 F.2d 58 (4th Cir. 1972).

183. *See, e.g.*, United States v. Automobile Club Ins. Co., 522 F.2d 1, 4 (5th Cir. 1975) (statutory obligation of federal government to provide medical care made it a third-party beneficiary); United States v. State Farm Mut. Auto. Ins. Co., 455 F.2d 789, 791-92 (10th Cir. 1972) (United States qualified as an organization that may be paid under medical payments coverage); United States v. Government Employees Ins. Co., 330 F. Supp. 1097, 1099 (E.D.N.C. 1971), *see supra* note 182; and United States v. United Serv. Auto. Ass'n, 431 F.2d 735 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) (court concluded the federal government is a third-party beneficiary).

184. United States v. California State Auto. Ass'n, 530 F.2d 850, 851 (9th Cir. 1976) (incurring of expense by government made it an insured under the policy); Blackburn v. Government Employees Ins. Co., 264 S.C. 535, 537, 216 S.E.2d 192, 194 (1975), *see supra* note 152.

185. United States v. Nationwide Mut. Ins. Co., 499 F.2d 1355, 1358 (9th Cir. 1974) (court remanded for a determination of whether the United States fits within the policy).

186. It is unclear why the government should attempt to take away an advantageous contract from the insurance company. United States v. State Farm Mut. Ins. Co., 455 F.2d 789 (10th Cir. 1972), *see supra* note 183.

cover from the medical payments clause. Since the insured personally incurred no medical expenses, these courts see no reason to allow the United States to benefit from the independent contract between the victim and the insurance company.[187] Defendants have argued that an insured who works for the government indirectly incurs the specific medical costs in issue. However, courts have not so interpreted the policy language.[188] Whatever the merits of the controversy, there is nothing to prevent insurance companies from drafting policy clauses which prevent the United States from recovering under medical payments coverage.[189] Indeed, some have apparently already done so.[190]

b) Uninsured Motorist Coverage.—Uninsured motorist coverage gives the victim the right to claim from his or her own insurance company when an automobile accident is caused by another person who does not have liability insurance.[191] In the past, the United States could recover, under most policies, as an additional insured[192] by virtue of the loose and general policy language.[193] At

187. *See, e.g.*, Brackens v. Allstate Ins. Co., 339 So. 2d 486, 487 (La. Ct. App. 1976) (since the victim had no obligation to pay, neither the injured person nor the government can collect); Hollister v. Government Employees Ins. Co., 192 Neb. 687, 688, 224 N.W.2d 164, 165 (1974) (general case law is that no expenses are incurred); and Gordon v. Fidelity & Casualty Co., 238 S.C. 438, 120 S.E.2d 509 (1961) (pre-MCRA compilation of cases describing when medical costs are incurred).

188. *See, e.g.*, Government Employees Ins. Co. v. Vail, 623 S.W.2d 170, 171-72 (Tex. Civ. App. 1981) (medical services given as part of an employment package held to be incurred by the patient); Smith v. United Serv. Auto. Ass'n, 52 Wis. 2d 672, 190 N.W.2d 873 (1971) (medical care is a benefit of employment accrued by the federal employee).

189. *See* United States v. Nationwide Mut. Ins. Co., 499 F.2d 1355, 1360 (9th Cir. 1974) (Duniway, J., dissenting), *see supra* note 185.

190. Documents on file at the Claims Division of the Naval Legal Service Office, San Diego, California. *See also* United States v. Allstate, 606 F. Supp. 588 (D. Hawaii 1985) (under standard Hawaii no-fault policy, United States was neither an insured nor a third-party beneficiary entitled to reimbursement for medical expenses rendered following a solo motorcycle accident).

191. *See, e.g.*, United States v. Commercial Union Ins. Group, 294 F. Supp. 768 (S.D.N.Y 1969) (uninsured motorist clause language allowed MCRA recovery by the United States).

192. *See, e.g.*, Cushman v. Fireman's Fund Ins. Co., 401 So. 2d 477 (La. Ct. App. 1981) (dictum) (lack of authorization to assert MCRA claim defeated otherwise valid United States recovery from uninsured motorist coverage); Transnational Ins. Co. v. Simmons, 19 Ariz. App. 354, 507 P.2d 693 (1973) (under policy language, the United States entitled to recover as an insured); United States v. Government Employees Ins. Co., 440 F.2d 1338 (5th Cir. 1971) (definition of insured allowed United States recovery); and United States v. United Serv. Auto. Ass'n, 312 F. Supp. 1314 (D. Conn. 1970) (United States was an insured under uninsured motorist coverage). *See generally* Fleishman, *Hospital Recovery Claims and Uninsured Motorists in the State of New York*, 9 A.F. JAG L. REV. 30 (July-Aug. 1967); and Grossman, *Hospital Recovery Claims—Under Uninsured Motorist Laws*, 7 A.F. JAG L. REV. 15 (Mar.-Apr. 1965).

193. *See, e.g.*, Government Employees Ins. Co. v. United States, 376 F.2d 836, 837 (4th Cir. 1967) (United States within the definition of a person entitled to recover).

one point, California actually required uninsured motorist policy language which mandated a MCRA recovery,[194] but the California Legislature amended the law to deny future MCRA uninsured motorist claims unless permitted by the insurance company for some reason.[195] Since any recovery in this area is possible only because of generous policy provisions, both states and insurance companies can tighten policy language to curtail MCRA uninsured motorist payouts without fear of federal government barriers.[196]

V. RECOMMENDATIONS

The Medical Care Recovery Act stands at a crucial point. State no-fault laws are removing the major source of recoupment under the Act. Insurance companies are tightening the language in medical payments and uninsured motorist clauses, denying another recovery fund. The ambiguous wording of the MCRA itself generates uncertainty and confusion in the courts. The time has come for Congress to revamp the Act in light of over two decades of experience.

First, Congress needs to clarify that the MCRA overrides all state defenses, whether procedural, substantive, or contractual. That should put an end to the procedural versus substantive debate in its various manifestations.

Second, the Act should give the federal government explicit and absolute flexibility with respect to intervention, joinder, or independent action. This procedural flexibility should also include the right to remove any state action into federal court as necessary, and be based solely on the MCRA itself.

Third, Congress must deal with the workers' compensation and automobile no-fault laws. A provision that the MCRA allows recovery despite any contrary workers' compensation or automobile no-fault statutes is essential to an effective MCRA.

Fourth, any contractual blocks to recoupment from uninsured motorist and medical payments coverage must be overcome. Congress has a very difficult choice here, because this proposal is sure to generate opposition from the insurance industry. However, if the

194. *See* United States v. Hartford Accident & Indem. Co., 460 F.2d 17 (9th Cir. 1972), *see supra* note 145.

195. In response to the *Hartford* decision mentioned in the preceding note, the California Legislature amended section 11580.2(c)(4) of the California Insurance Code to preclude any MCRA recovery based on an uninsured motorist clause. *See* Tara v. California State Auto. Ass'n, 93 Cal. App. 3d 227, 155 Cal. Rptr. 497 (1979) (brief discussion of the response to the *Hartford* case).

196. *See, e.g.*, United States v. Allstate Ins. Co., 306 F. Supp. 1214, 1215 (N.D. Fla. 1969) (uninsured motorist policy language sufficiently precise to deny any MCRA recovery as an additional or named insured).

idea is to increase MCRA recovery, this would be a very productive change.

Fifth, as an aid to collection, the statute should specify that private attorneys are empowered to seek recovery under the MCRA for the use and benefit of the United States. In order to provide a more persuasive incentive for the attorney to cooperate, a portion of any recovery should be reserved for the client-victim and for the private counsel. For example, a reservation of one-fourth for the client and one-fourth for the attorney would provide an incentive, while still leaving a significant recovery for the United States.[197]

Sixth, statutory recovery rates must be made more realistic and equivalent to comparable civilian treatment. The Office of Management and Budget rates are far too low.

Seventh, the MCRA "claim" needs to be turned into a strong "lien" on the assets of the tortfeasor, and possibly on the insurance company. That would give the government some leverage which is now lacking to force quick settlement of a MCRA assertion.

CONCLUSION

The Medical Care Recovery Act fairly requires tortfeasors to pay the federal government when their acts result in government expenditures provided to an injured party for medical care. Unfortunately, changing concepts of liability for fault under state statutes and insurance contracts have limited the effectiveness of the Act. In fact, "[t]he present puzzling condition of the law does little justice to the United States or to the States."[198] The time has come for Congress to perform a checkup. Based on the suggestions in this Article, the Act can become a more effective tool for recovering sums rightfully belonging to the government.

197. Providing for attorney fees for private counsel who expend effort on the government's behalf is only equitable. "Thou shalt not muzzle the ox when he treadeth out the corn." *Deuteronomy* 25:4 (King James). *See also* Cockerham v. Garvin, 768 F.2d 784, 787 (6th Cir. 1985) (trial court directed to divide tort recovery fund equitably between victim and government for care generated under the MCRA).

198. United States v. Studivant, 529 F.2d 673, 679 (3d Cir. 1976) (Biggs, J., dissenting) (federal noncompliance with the New Jersey Unsatisfied Claim and Judgment Fund bars a MCRA action) *see supra* note 137.

APPENDIX

TITLE 42 UNITED STATES CODE
§ 2651. Recovery by United States

(a) Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment

In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

(b) Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings

The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors.

(c) Veterans' exception

The provisions of this section shall not apply with respect to hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished by the Veterans' Administration to an eligible veteran for a service-connected disability under the provisions of chapter 17 of title 38.

§ 2652. Regulations

(a) Determination and establishment of reasonable value of care and treatment

The President may prescribe regulations to carry out this chapter, including regulations with respect to the determination and establishment of the reasonable value of the hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished or to be furnished.

(b) Settlement, release and waiver of claims

To the extent prescribed by regulations under subsection (a) of this section, the head of the department or agency of the United States concerned may (1) compromise, or settle and execute a release of, any claim which the United States has by virtue of the right established by section 2651 of this title; or (2) waive any such claim, in whole or in part, for the convenience of the Government, or if he determines that collection would result in undue hardship upon the person who suffered the injury or disease resulting in care or treatment described in section 2651 of this title.

(c) Damages recoverable for personal injury unaffected

No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his damage not covered hereunder.

§ 2653. Limitation or repeal of other provisions for recovery of hospital and medical care costs

This chapter does not limit or repeal any other provision of law providing for recovery by the United States of the cost of care and treatment described in section 2651 of this title.