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# ADMINISTRATION OF THE FEDERAL MEDICAL CARE RECOVERY ACT

Joseph C. Long\*

## I. Introduction

In response to the Supreme Court's decision in *United States v. Standard Oil*<sup>1</sup> and a report of the Comptroller General,<sup>2</sup> Congress, in 1962, enacted the Federal Medical Care Recovery Act<sup>3</sup> [hereinafter referred to as the Act]. It provides that the federal government shall have the right to recover from third-party tortfeasors the cost of medical care furnished, by the government or at government expense, to persons injured as the result of such third-party's negligence.<sup>4</sup> Initially, this rather obscure legislation would not seem to have any significant impact upon the practice of most personal injury lawyers. A closer inspection, however, reveals that it may, in the not too distant future, appreciably affect the profession. This is especially true since the group of people entitled to medical treatment at government expense is now quite large and steadily growing.<sup>5</sup>

As is the case with many federal statutes, the Act was not accompanied by an immediate impact on the bar. This was primarily because the government enforcement agencies were inadequately staffed and ineffectively organized. Also, due to the draftsmanship of the original statute, the nature and extent of the government's right were left in question. In many cases, the government was neither aware of nor actively sought to enforce its rights.

During the past four years, the picture has changed radically. The enforcement agencies still remain woefully understaffed, but as a result of experience

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1 332 U.S. 301 (1947). In this case, a soldier on active duty was injured in an automobile accident. The United States brought suit against the owner and driver of the truck which caused the accident to recover the amounts that the Army had expended for hospitalization, medical care, and the pay of the soldier during the period of his incapacitation. The Court held that since Congress had not acted in the area, this indicated a Congressional intent that there should not be a cause of action for the government, and that until Congress acted, through statutory enactment, there would be no recovery under federal common law.

2 COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF THE GOVERNMENT'S RIGHTS AND PRACTICES CONCERNING RECOVERY OF THE COST OF HOSPITALIZATION AND MEDICAL SERVICES IN NEGLIGENT THIRD-PARTY CASES (1960). The Report recommended that "the Congress enact legislation to provide the Government with the right of action to recover its costs of furnishing hospital and medical care to injured persons in all negligent third-party cases." *Id.* at 16.

3 42 U.S.C. §§ 2651-53 (1966).

4 The money collected under the Act is credited to the medical care account of the agency furnishing the care. Each year, Congress reduces the medical appropriation for each agency from the budget submitted to it by an amount estimated to be collected by the agency under the Act. All administrative costs for collection and enforcement are borne by the agencies out of their regular appropriations and are not deducted from the amounts recovered. See 45 OFF THE RECORD 10 (1970).

5 For a comprehensive listing of those eligible for medical treatment at government expense, see 10 U.S.C. §§ 1071-87 (Supp. II, 1966); 38 U.S.C. § 610(a) (Supp. II, 1966); 42 U.S.C. §§ 249-53(a) (Supp. II, 1966); 42 U.S.C. §§ 2001-5 (1964).

and a follow-up study by the Comptroller General,<sup>6</sup> they are now much better organized and are aggressively seeking to enforce the government's interest. Likewise, many of the ambiguities in the statute which hampered earlier enforcement have been settled by litigation.<sup>7</sup> As a result of the changes, the ordinary practitioner can no longer continue to ignore the Act, for to do so will almost surely result in a great disservice to his client. At the minimum, his client will be called on to participate in the government's enforcement proceedings;<sup>8</sup> and at the maximum, he may find that he is required to return a sizable portion of any settlement or judgment he has recovered.<sup>9</sup>

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<sup>6</sup> Letter Report B-133142, Defense Division, United States General Accounting Office to the Secretary of Defense, Dec. 2, 1968, on file with the NOTRE DAME LAWYER.

<sup>7</sup> The first case involving the Act did not reach the courts until 1965. Since then there have been roughly twenty-five cases interpreting various portions of the Act. For discussions of these cases, see: Noone, *Federal Medical Care Recovery Act*, 55 A.B.A.J. 259 (1969); Townsend, *Some Comments on Federal Medical Recovery Act Decisions*, 10 AF JAG L. REV. 44 (1968); Comment, 23 RUTGERS L. REV. 141 (1968).

<sup>8</sup> The Attorney General's implementing regulations under the Act provide that one of the obligations incurred by acceptance of care is the duty to cooperate with the government in the prosecution of any action that the government might take against the third party. 28 C.F.R. § 43.2 (1968).

<sup>9</sup> One of the very early cases under the Act, *United States v. Ammons*, 242 F.Supp. 461 (N.D. Fla. 1965), held that the government could not sue the injured party directly for the costs of his care unless he had made an assignment on its behalf. The validity of this decision is open to question, not so much for its interpretation of the Act as for its failure to recognize that the Act provides two distinct procedures for the government to satisfy its claim. The court denied recovery from the injured party on the basis that the Act creates an independent statutory right against the third party tortfeasor, not against the injured person. In this respect it is consistent with the government's position under the Act and with a vast majority of the other courts which have subsequently considered the question. See, e.g., *United States v. York*, 398 F.2d 582 (6th Cir. 1968); *United States v. Merrigan*, 389 F.2d 21 (3d Cir. 1968). It follows then, if the right is separate and distinct from that of the injured party, that he cannot affect the government's right by suit or release. See, e.g., *United States v. Winter*, 275 F.Supp. 895 (E.D. Pa. 1967); *United States v. Greene*, 266 F.Supp. 976 (N.D. Ill. 1967). The tortfeasor that settles with the injured party for his medical expenses, therefore, does so at his own risk as the government may still sue to collect its claim. *Id.* Thus, to protect himself, he should insist that the injured party sign an agreement that he will handle and settle any claim which the government may subsequently assert. Cf. *United States v. Nation*, 299 F.Supp. 266 (N.D. Okla. 1969). However, the court failed to realize that the Act also provides for the enforcement of the right created by means of subrogation as well as by independent suit. 42 U.S.C. § 2651(a) (1964). It is elementary that subrogation rights do not depend upon assignment from the subrogor. Further, in most states it has been clearly established that the subrogor may represent any subrogated interests as well as his own without the subrogee being named as a party plaintiff. See, e.g., Noone, *May Plaintiffs Induce the United States' Claim under the Federal Medical Care Recovery Act Without Government Intervention?* 10 AF JAG L. REV. 20 (1968). Therefore, when the injured party includes and collects the expenses of his medical treatment, this money because of the statutory subrogation provision belongs to the United States, and it should be able to sue to force the injured party to disgorge it. In doing so the government is not asserting a primary claim under the Act against the injured party, but merely forcing the injured party to surrender a portion of his judgment, which he is entitled to claim from the tortfeasor in the absence of direct action by the government, but which he should not be allowed to retain in the face of the government's superior claim.

As a result, when the injured party has collected for his medical expenses, the government should have its choice either to enforce its primary right under the Act against the tortfeasor or to collect its subrogated interest from the injured party who holds his settlement or judgment subject to the government's superior claim. The net effect will be the same in either case, if the tortfeasor has insisted that the injured party furnish an agreement to handle and settle the government's claim. See *United States v. Nation*, 299 F. Supp. 266 (N.D. Okla. 1969). This approach was taken by the Comptroller General in an unpublished opinion allowing the government to withhold the amount of the government's claim from the injured party's pay where he had received a settlement or a judgment which purportedly included the government's claim. COMP. GEN. DEC. B-15093 (Jan. 26, 1966), on file with the NOTRE DAME LAWYER.

In the past, many lawyers whose clients have accepted government medical treatment and thereby brought the Act into operation have been frustrated in their efforts to deal with the government by a complete lack of readily available information concerning the organization of the governmental recovery program or the policies used in the administration of the Act. It is to help these lawyers and those who are faced with the Act for the first time that this article is written.

The Act will be discussed from two points of view. The first section will deal with the *official* recovery program. It will attempt to provide a guide to the organization of the various government agencies<sup>10</sup> and will discuss the government's position on the important questions of waiver and compromise. Information on these important points is essential to the personal injury attorney attempting to secure the best possible recovery for his client. Unfortunately for the practicing bar, the Act and the implementing regulations promulgated by the Attorney General<sup>11</sup> leave the administrative heads of the enforcement agencies with wide discretion in the granting of compromises and waivers. Experience has shown that not all the agencies have exercised this discretion in the same manner. The various tenable positions on compromise and waiver will, therefore, be outlined; and some indication will be given as to the position taken by the individual agencies.

The second portion of the article deals with the *unofficial* collection procedure which has emerged alongside the official program. Under this procedure the private attorney representing the injured party is asked to handle the government's claim along with the claim of his client. The government instituted this system without statutory authority because of the shortage of trained claims personnel within the enforcement agencies and the heavy case load carried by the various United States Attorneys. At the present time, this unofficial procedure vastly overshadows the official one.<sup>12</sup> Recent increases in enforcement agency personnel and the authorization for enforcement personnel to aid the United States Attorneys in litigation involving the Act<sup>13</sup> may lead to a decline in the role of the unofficial program, but it appears that it will be a considerable time, if ever, before the unofficial procedure is completely abandoned. Obviously, this

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10 Summaries of the various regulations can be found in either the Code of Federal Regulations or the Federal Register. See 32 C.F.R. §§ 537.21-24 (1969) (Army); 32 C.F.R. §§ 842.140-146 (1968) (Air Force); 32 C.F.R. §§ 757.1-14 (1969) (Navy); 38 C.F.R. §§ 2.6(e) (1969) (Veterans Administration); Statement of Organization and Delegations of Authority of the Office of the Secretary of Health, Education, and Welfare, §§ 2-300.50 and 2-300.50-1, 32 Fed. Reg. 5813 (1967) as amended 33 Fed. Reg. 5174 (1968) and § 2-300.50-2, 33 Fed. Reg. 5694 (1968).

11 28 C.F.R. §§ 43.1-.4 (1969).

12 While no government-wide figures are available, the Navy Department estimates that seventy percent of its administrative collections are handled by private attorneys under such arrangements. Cassady, *The Federal Medical Care Recovery Act and Private Attorneys*, April, 1968 (unpublished thesis in the Judge Advocate General's School Library). If this figure is typical, and there is no indication that it is not, of the 10,037 recoveries made during the calendar year 1969, roughly 7,000 were handled by private attorneys. 1969 statistics furnished by the Department of Justice.

13 The Justice Department has authorized enforcement agency attorneys to aid the various United States Attorneys. The extent of the aid is up to the individual United States Attorney. Letter from William D. Ruckelshaus, Assistant Attorney General, Civil Division, to Torts Branch, Litigation Division, Office of the Judge Advocate General, Department of the Army, July 9, 1969, on file with the NOTRE DAME LAWYER.

unofficial program, because of its pervasiveness, presents problems to the practicing lawyer, his client, and the government.

Before beginning a detailed agency by agency description of the administration of the Act, however, several general comments and some definitions are in order.

### A. *Agency Responsibility*

First, it should be noted that five agencies handle the bulk of the claims under the Act at the initial processing stage — the Army, Navy,<sup>14</sup> Air Force, Veterans Administration, and Department of Health, Education, and Welfare.<sup>15</sup> The primary responsibility for processing claims under the Act is tied to an agency's obligation to furnish the injured party with medical care.<sup>16</sup> In many cases such a link causes no great confusion because the treatment will be rendered in facilities maintained by the agency having the responsibility of processing the claim. But this is not always the case. The care may be given in a hospital run by another agency or by a non-government-connected organization. In such event, the agency with the responsibility of providing the care will pay the non-federal hospital or reimburse the other federal agency and process the claim.<sup>17</sup>

In addition to its primary responsibility, each agency has a secondary obligation to process those claims for treatment rendered in its facilities for which no reimbursement is received from another agency. The most significant cases in this category are those involving the treatment of civilian employees at the Public Health Service hospitals.<sup>18</sup> Normally the claims for the care of civilian employees are handled exclusively under the Federal Employees Compensation Act.<sup>19</sup> The Public Health Service, however, has special statutory authority to provide this care<sup>20</sup> and, when it provides it, no reimbursement is sought from the Employees Compensation Fund.<sup>21</sup> Instead, the cost is borne by the Service out of its

14 Presently the Navy is handling those claims involving Marine personnel and their dependents. There are indications that this may change in the future. The Marine Corps has a number of legally trained officers who have been serving in the Navy Judge Advocate Offices. There is some talk that these officers will be withdrawn, and the Marine Corps will assume responsibility for providing its own legal support, including the processing of claims. Letter from E. Perry Johnson, Litigation and Claims Division Office of the Judge Advocate General, Department of the Navy to Joseph Long, Oct. 1, 1970, on file with the NOTRE DAME LAWYER.

15 The few claims generated by the Coast Guard are handled by the Department of Health, Education, and Welfare through the Public Health Services. See 42 C.F.R., Part 31 (1968).

16 Cf. 10 U.S.C. § 1085 (Supp. II, 1966).

17 This practice is confusing for both the lawyer who is trying to find out which agency to deal with and to the agencies themselves. Reimbursement is handled on the departmental level on an annual basis, rather than on a case-by-case accounting. On the other hand, notification of potential claims is handled on the local level between field offices of the different agencies. The result is that in a large number of cases, the notices are delayed or not forthcoming to the agency charged with collection of the claims. See 10 U.S.C. § 1085 (Supp. II, 1966); see also Army Reg. 40-121 ¶ 54 (Feb. 13, 1967).

18 These cases make up by far the largest number of cases handled by the Department of Health, Education, and Welfare in terms of amount recovered.

19 5 U.S.C. §§ 8131-32 (1964).

20 42 U.S.C. § 251 (1964).

21 The fund was authorized in 5 U.S.C. § 1847 (1964). In the case of reimbursement among the military services and the Department of Health, Education, and Welfare specific authority is given by 10 U.S.C. § 1085 (Supp. II, 1966). The VA recovers from the Department of Defense for the treatment of active duty and retired military personnel under 38 C.F.R. § 17.62(c) (1969).

annual budget, and the Service seeks to recoup under the Act.<sup>22</sup>

## B. Definitions

Throughout the article, the terms "compromise," "waiver for the convenience of the government," and "waiver for undue hardship on the injured party," will be extensively used. These are words of art which apply to the powers of various officers under the Act, and it is important to be conversant with their specific implications.

### 1. COMPROMISE

Probably the easiest of the three to explain is "compromise." The Army, by way of guidance for its personnel on the question of compromise, has incorporated<sup>23</sup> the Standards for Compromise of Claim,<sup>24</sup> established under the Federal Claims Collection Act.<sup>25</sup> These standards indicate that there are a variety of factors to be considered when a compromise decision is made. The first factor is the tortfeasor's ability to pay the entire amount of the claim, as well as the government's capacity to enforce payment within a reasonable time.<sup>26</sup> In determining the tortfeasor's ability to pay, the age and health of the tortfeasor and his present and potential income are considered as well as the amount of his insurance coverage. Next, the amount which could reasonably be acceptable as a compromise amount must bear a reasonable relationship to that figure. Other factors considered are the strength of the government's case,<sup>27</sup> the collection cost which would be incurred if suit is necessary,<sup>28</sup> and finally, the impact of the case on the overall recovery program — whether compromise in this case will jeopardize collection in other cases.<sup>29</sup>

The Air Force, on the other hand, takes a more practical approach. It points out that in a vast majority of cases the only assets which are reasonably available will be the tortfeasor's insurance policy.<sup>30</sup> In reaching a realistic evaluation of the amount that can be recovered, the Air Force places great stress on the amount of this coverage. Further, the Air Force indicates that it is the policy of the Department of Justice that the government's claim, under normal circumstances, should not exceed one-third of the gross collection.<sup>31</sup> In situations

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22 Likewise, there is no inter-agency reimbursement for out-patient care furnished. As a result it is possible in a given case for two government agencies to have separate claims under the Act.

23 Army Reg. 27-38, ¶ 4-3(a) (Jan. 15, 1969).

24 4 C.F.R. §§ 103.1-9 (1969). These standards are not binding on recoveries under the Act. They can, however, be used as guidelines, as the Army has done. *Id.* § 101.4.

25 31 U.S.C. §§ 951-53 (Supp. II, 1966).

26 4 C.F.R. § 103.2 (1969).

27 *Id.* § 103.3. In this regard the clearness of the liability, the availability of witnesses, and the necessity for the medical treatment should be considered. Not infrequently military hospitals hold a patient beyond the time when he would have been released by a civilian hospital. In this case, the government should adjust its claim to eliminate the hospitalization not medically required.

28 *Id.* § 103.4.

29 *Id.* § 103.5.

30 Air Force Manual 112-1, ¶ 15-18 (Oct. 29, 1969).

31 *Id.* ¶ 15-18(c).

where the government's interest constitutes a substantial portion of the free assets reasonably available for settlement, in order to encourage cooperation on the part of the injured party's attorney, the Air Force will agree, prior to negotiations with the tortfeasor, to accept a given percentage of the gross settlement, whatever it may turn out to be.<sup>32</sup>

Likewise, the Air Force respects the professional judgment of the injured party's counsel. It realizes that for a number of reasons, he may feel that the case warrants the acceptance of a settlement below the policy limits of the tortfeasor's insurance coverage or the total assets reasonably available. Under such circumstances, if the injured party for a legitimate reason<sup>33</sup> is willing to accept such a reduced settlement, the Air Force will likewise scale down its demand, but normally *only* by the same *percentage* the injured party does.<sup>34</sup>

## 2.. WAIVER FOR THE CONVENIENCE OF THE GOVERNMENT

Both the Army and the Air Force are in agreement that "waiver for the convenience of the government" has a very limited place in the collection program.<sup>35</sup> The phrase generally means that under the considered judgment of the government, it will, for a multitude of reasons, be more convenient not to press the claim. It is appropriate in three situations: (1) where, after assertion, further investigation reveals that the tortfeasor is essentially judgment-proof;<sup>36</sup> (2) where, after diligent search,<sup>37</sup> the tortfeasor cannot be located; and (3) where the alleged tortfeasor and his insurance company adamantly refuse to pay, and liability is sufficiently questionable so that the time and money involved do not warrant suit by the United States Attorney.

## 3. WAIVER FOR UNDUE HARDSHIP ON THE INJURED PARTY

"Waiver for undue hardship on the injured party" is by far the most difficult of these three powers to define and administer. It is, however, probably

32 Requests for such agreements must be approved by the staff judge advocate having the necessary monetary settlement authority prior to formal agreement with the injured party's attorney, *Id.* ¶ 15-18(d).

33 The Air Force indicates it considers questionable liability, difficulty of proof, long delay before trial, and undue expense of trial as legitimate reasons for settlement. *Id.* ¶ 15-18(a).

34 Thus, for example, if there was \$20,000 coverage and the injured party's claim was worth \$12,000, and if the injured party wanted to settle for \$8,000, the Air Force would reduce its claim also by one-third. *Id.* ¶ 15-18(b). It is possible for the private attorney to get the agency to agree to accept a certain percentage of the gross settlement prior to entering into negotiations where the government's medical represents a substantial part of the insurance coverage available. *Id.* ¶ 15-18(d).

35 Army Reg. 27-38, ¶ 4-4(c)(1) (Jan. 15, 1969) incorporating by reference 4 C.F.R. § 104.3 (1969) and Air Force Manual 112-1 ¶ 15-17(a) (Oct. 29, 1969).

36 In determining whether a tortfeasor is judgment-proof, more should be considered than whether he is covered by liability insurance. His age and health should be taken into account, along with his present income and future earning capacity, as well as any known assets. An attempt should be made to determine whether he has secreted any assets or made a fraudulent transfer to avoid liability. When a file is closed under this provision, no release is given and the file can be re-opened at a later date should conditions change. Army Reg. 27-38, ¶ 5-2(b) (Jan. 15, 1969).

37 Often the absent tortfeasor can be traced through the automobile license tags even after he moves, since most states maintain a continuous record for each vehicle registered.

the one power most susceptible to abuse.<sup>38</sup> The phrase is generally understood to mean that in some cases the government will waive its claim since assertion would cause undue hardship on an innocent party or produce inequitable results. The problem which faces the recovery agencies is to define the appropriate scope of the waiver and to provide their claims personnel with sufficient guidelines to avoid abuse of the waiver power and its use as an unreasoned substitute for one of the other settlement authorities. The Act, as well as writings about the Act,<sup>39</sup> offers little to help the agencies in the solution of this problem. Some of the agencies themselves have not come to grips with the question and have attempted to deal with it on an *ad hoc* basis at the highest administrative level.<sup>40</sup> The result is that these agency regulations lend little to solution of the problem beyond the statement, rather obvious to all, that the hardship must be real, rather than imagined or potential.<sup>41</sup>

The Air Force is the only agency which has attempted to provide its personnel with any written guidance.<sup>42</sup> The obvious first step is to determine whether a hardship in fact exists. To do this the Air Force instructs its personnel to make an accurate evaluation of the injured party's claim, considering: (1) any permanent injuries incurred; (2) pain and suffering; (3) decreased earning power; (4) any medical expenses which the injured party has borne or will bear in the future.<sup>43</sup> When an adequate money value for each of these items has been reached through the use of available civilian damage authorities,<sup>44</sup> the total claim is adjusted by two further items. An adjustment is made for the value of any government pension rights that may have accrued to the injured party as a result of his injuries, and an allowance is made for attorney's fees and the out-of-pocket costs in bringing a recovery action. If, after these adjustments, the remaining total is more than the assets reasonably available,<sup>45</sup> an acknowledged financial hardship will be suffered if the government collects its medical costs.

The second step is much more difficult. Acknowledging that the collection of the medical costs will create a hardship for the injured party because it will prevent him from receiving full compensation for his claim, the question, then, is whether this hardship is an *undue* hardship and what action, if any, should the government take to alleviate the situation. There are four possible answers,

38 The claims officer is much more apt to grant this type of waiver out of a feeling of unreasoned sympathy for the injured party than he is to grant one of the other reductions since they are based on more rational, unemotional grounds.

39 Only one author, Noone, *Federal Medical Care Recovery Act*, 55 A.B.A.J. 259, 260 (1969) mentions this problem and even then he mentions it only in passing.

40 See Army Reg. 27-38, ¶ 4-3(d) (Jan. 15, 1969). Only two agencies have delegated this authority to the field. See Air Force Manual 112-1, Table 15-8 (Oct. 29, 1969); Re-delegation within the Department of Health, Education, and Welfare, 33 Fed. Reg. 5694, § 2-300.50-2 (1968).

41 See e.g., Air Force Manual 112-1, ¶ 15-17(b) (Oct. 29, 1969).

42 32 C.F.R. § 842.144 (1968). See also note 41, *supra*.

43 32 C.F.R. § 842.144(a) (1968).

44 See e.g., BELLI, *MODERN TRIALS* (1960); JURY VERDICTS RESEARCH, INC., *PERSONAL INJURY VALUATION HANDBOOKS* (1969). In using these books, it should be remembered that juries often award astronomical judgments which are never completely satisfied. Evaluation of injuries based upon reported jury verdicts may, therefore, render a distorted picture of what an injury is worth in terms of money actually recovered.

45 Again, in determining what assets are reasonably available, other things should be considered beyond insurance coverage. See note 36, *supra*.



each of which has some support among the government enforcement personnel. The alternatives are best illustrated through the use of a hypothetical case. Assume the injured party has a claim which, under the standards of the previous paragraph, is acknowledged to be worth \$20,000, but that the only reasonably available means to recover is from the tortfeasor's \$10,000 liability insurance policy. Assume further that the government has a medical claim for \$5,000. The first alternative is obvious. The government could demand its full \$5,000 and leave the injured party and his attorney to divide the remainder. Assuming that the attorney charges the usual one-third contingent fee and calculates it on the basis of the gross recovery,<sup>46</sup> his fee will be roughly \$3,300, not including expenses. This leaves the injured party with a recovery of \$1,700 for an injury acknowledged to be worth \$20,000. Second, the government could settle for a pro rata share based on the limited assets available. In our example, this would amount to only fifty percent of the value of the injury; the government would claim \$2,500. The resulting gross recovery of \$7,500 would be further reduced by attorney's fees and expenses, leaving the injured party with a recovery approximating \$4,200. Still another approach would be to apply the Department of Justice standard that the government's recovery should not exceed one-third of the gross settlement.<sup>47</sup> Applying this to the example, the government's claim would be reduced from \$5,000 to a little more than \$3,300. Subtracting attorney's fees and expenses, the injured party would net about \$3,300. Finally, the government could waive its claim entirely. Even then the injured party must still pay the attorney and would receive approximately \$6,700 for his injuries.

In actual practice the question of waiver is often complicated by the absence of any clearly recognizable damages, e.g., the injured party's claim may be based almost entirely upon pain and suffering. The key to this problem would seem to lie in the basic policy behind the Act. The whole tenor of the General Accounting Office's report<sup>48</sup> reviving the idea of collection, was that the government was spending vast sums of money for medical treatment which, because of an unfortunate decision of the Supreme Court,<sup>49</sup> it was unable to recover. As a result, in those cases where the tortfeasor has sufficient assets to satisfy a judgment for both personal injuries and medical expenses, there was an undeserved windfall. Either the tortfeasor was escaping liability through the injured party's inability to claim these damages or the injured party may have been recovering expenses he had not incurred. Where the tortfeasor is paying the maximum amount that he can be forced to provide, but this does not fully compensate the victim, the injured party receives no windfall because he is not being adequately

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46 For a discussion of the propriety of fees based on gross amounts of recovery, and other related considerations, see text accompanying notes 223-33, *infra*.

The Air Force takes the position that the fee charged is a matter purely between the attorney and injured party. Air Force Manual 112-1, Annotation to ¶ 15-14(e) (Oct. 29, 1969).

47 Air Force Manual 112-1, ¶ 15-18(c) (Oct. 29, 1969).

48 COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF THE GOVERNMENT'S RIGHTS AND PRACTICES CONCERNING RECOVERY OF THE COST OF HOSPITAL AND MEDICAL SERVICES IN NEGLIGENT THIRD-PARTY CASES (1960).

49 United States v. Standard Oil, 332 U.S. 301 (1947).

recompensed for his injuries.<sup>50</sup> Any recovery by the government under those facts would be at the expense of full compensation to the injured party.

Congressional intent is not clearly evident from either the language of the statute or the Congressional reports.<sup>51</sup> It is possible to *infer* that it was not the Congressional intent to enrich the United States at the expense of the injured party from the following statutory language:

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 damages not covered hereunder.<sup>52</sup>

This provision was added to the Act by the House Judiciary Committee. In making its report on the Act, the Committee said of the addition:

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50 Some would dispute this statement claiming that the windfall to the injured party was the government's payment for the treatment in the first instance. They would argue that had the government not paid for the care, the injured party would have had to do so regardless of whether the settlement was adequate or not, since the doctors and hospitals will not reduce their claims. Certainly this is true in the case of the attorney's fee which must be paid regardless of whether the settlement is adequate to compensate the injured party. People taking this position will say that if the hospital, doctors, and lawyers are not willing to adjust their claims to provide the injured party with full compensation why should the government be expected to? There would seem to be two answers to this argument. First, it can be rather persuasively argued that the injured party is entitled to this care as a part of the compensation for services performed for the government by himself or his sponsor. Therefore, such treatment is similar to that provided by a pre-paid health plan such as Blue Cross-Blue Shield furnished by any civilian employer. Thus, there is no windfall. *United States v. Freese*, Civil No. 66C69(2) (E.D. Mo., Dec. 30, 1966); *accord*, *Kickham v. Carter*, 335 S.W.2d 83 (1960); *State Farm Mut. Auto. Ins. Co. v. Fuller*, 232 Ark. 329, 336 S.W.2d 60 (1960); *contra*, *United States v. Greene*, 266 F. Supp. 976 (N.D. Ill. 1967). *See also*, Long, *Government Recovery Beyond the Federal Medical Recovery Act*, 14 S. DAKOTA L. REV. 20, 41-42 (1969). Second, the government is not in the same position as the lawyer or doctor who must earn his living by handling this type of case. As the sovereign, it must maintain a reputation for magnanimity, willing to forego its legal rights when to enforce them would result in an oppressive hardship to one of its citizens.

There is some question whether an injured party should be allowed to continue including the costs of his medical care as an item of damages under the collateral source rule. To date only one case has considered the matter. In *Arvin v. Patterson*, 427 S.W.2d 643 (Tex. Civ. App. 1968), the court allowed the injured party to recover these costs. This has led one commentator to conclude that the injured party's rights under the collateral source rule have not changed under the Act. *See* Comment, 23 RUTGERS L. REV. 141 (1968). However, a careful reading of the case will reveal such a conclusion is not warranted. The court merely held that these damages should be allowed where the government, for any reason, is barred from recovery. Such a result is consistent with the purpose of the collateral source rule of preventing an undeserved windfall to the tortfeasor because someone other than the injured party has borne the expense of his treatment. Where the government's interest is not barred, the problem is not unlike that where the husband furnishes the medical care to his wife or minor child. Case law has established that government's interest is a separate and distinct statutory right, independent of any interest of the injured party. *See, e.g.*, *United States v. York*, 398 F.2d 582 (6th Cir. 1968); *United States v. Merrigan*, 389 F.2d 21 (3d Cir. 1968). The doctrine, therefore, would seem equally inappropriate here as in the case of the husband and wife or minor child maintaining separate suits. In either case, application of the collateral source rule would subject the tortfeasor to double liability in order to provide the injured party with an unjustified windfall.

Yet, because the government often does not seek to enforce its rights, it would seem appropriate under the rationale of *Arvin* to allow the injured party initially to recover these costs in a suit where the government takes no part, as long as he provides the tortfeasor with some type of agreement that he will be responsible for handling and paying any claim that the government may later assert. *See* *United States v. Nation*, 299 F. Supp. 266 (N.D. Okla. 1969).

51 S. REP. No. 1945, 87th Cong., 2d Sess. (1962); H.R. REP. No. 1534, 87th Cong., 2d Sess. (1962).

52 42 U.S.C. § 2652(c) (1970).

It is intended that this right would be exercised without affecting the rights of that individual to recover for losses and damages peculiar to him and in which the Government has no direct interest.<sup>53</sup>

How much greater effect can the government have on the rights of the injured party than to prevent him from securing them to the fullest extent possible? It is therefore submitted that the only legitimate question to be considered in the granting of a hardship waiver is whether a financial hardship on the injured party will in fact exist. If such a situation is found to exist by the application of the standards outlined above, regardless of whether the claim is based upon permanent injuries or pain and suffering, the agency should waive all or any portion of the government's claim necessary to assure the injured party's recovery to the extent of his injuries.

To date, only the Air Force has been willing to state its position in writing. It has adopted a position substantially similar to the one just outlined. If the tortfeasor makes an offer of settlement which includes all his assets reasonably recoverable, and this offer is less than the acknowledged value of the injury claim, the Air Force stands ready, at the request of the injured party's attorney, to waive any or all of the government's claim.<sup>54</sup> The difficulty with the Air Force's approach is that it is not broad enough to cover many cases where a partial waiver would be appropriate. In a substantial number of cases the settlement offer will be larger than the injury claim, but less than the combined injury and medical claim. In such cases it would seem that the government should grant a partial waiver only, reducing the government's claim so that the combined total equals the settlement offer.<sup>55</sup>

#### 4. JUDICIAL REVIEW

One further point concerning the powers of waiver and compromise merits brief comment. These powers are granted by the Act itself to the heads of the various recovery agencies to be used in their discretion.<sup>56</sup> If a request for either

<sup>53</sup> S. REP. NO. 1945, 87th Cong., 2d Sess. (1962); H.R. REP. NO. 1534, 87th Cong., 2d Sess. (1962). The Senate, in its report, said:

In the Committee's opinion, it is not intended that this legislation should be used to recover Federal hospital and medical costs when the total recovery possible is insufficient, under all the circumstances, to provide fair and adequate compensation to the injured party for his own losses. S. REP. NO. 1945, 87th Cong., 2d Sess. 5 (1962).

The Senate went specifically about this section:

This section makes it clear that the right of recovery granted to the Government by the bill shall not impair the right of the injured person to recover for himself damages other than the cost of hospital and medical care furnished by the Government, and no action taken by the Government in connection with its right of recovery shall have that effect. *Id.*

<sup>54</sup> Air Force Manual 112-1, ¶ 15-17(b) (Oct. 29, 1969).

<sup>55</sup> The Air Force, unfortunately, creates confusion between the various settlement authorities by treating the partial waiver problem under the compromise settlement authority. *Id.* The Army also allows its field offices to treat a request for a waiver for undue hardship as a compromise and handle it as such to the extent of their compromise authority. Army Reg. 27-38, ¶ 4-4(b)(2) (Jan. 15, 1969).

<sup>56</sup> 42 U.S.C. § 2652(b) (Supp. II, 1966).

a compromise or waiver is refused by the agency head,<sup>57</sup> this decision may be subject to judicial review for abuse of discretion. This question has been raised in only one unreported case, *State Farm Mutual Automobile Ins. Co. v. Alston*.<sup>58</sup>

On the basis of this case, one author seems to conclude that the agency decision is not subject to judicial review.<sup>59</sup> A careful reading of the case, however, indicates that this conclusion is unjustified. The facts of the case were undisputed. Four servicemen were injured and each sought to recover. The tortfeasor's only available assets consisted of two separate insurance policies with a total liability limit of \$15,000. All parties concerned<sup>60</sup> acknowledged that the injuries to one of the men alone justified a judgment in his favor for the entire amount of the policies. The court subsequently found that the value of the other men's claims amounted to a total of \$11,400. When the government refused to waive its medical claim of \$4,578, the injured parties sought to review its decision.

The court acknowledged that the facts would have supported a waiver had the government seen fit to grant one. It was unwilling, however, to reverse the decision as an abuse of the statutory discretion.<sup>61</sup> There were a number of factors,<sup>62</sup> including the fact that the government would have to pay the permanently disabled servicemen a pension for the remainder of their lives, which the court felt could have led the government to refuse the request in good faith. Therefore, instead of holding that there is no review, the court indicated that review would be appropriate, albeit the standard for abuse would seem to be extremely high. It remains to be seen whether this case will be followed and whether the burden of proof for reversal will remain as high.

With these general observations in mind a more detailed consideration of each specific agency is in order.

## II. The Military Services

### A. *The Army*

While the Army, like all agencies, has both a primary and secondary responsibility under the Act,<sup>63</sup> by far the vast majority of its claims arise out of

57 If the request is first refused by one of the lower levels within the agency, it would seem that the injured party would have to exhaust his administrative remedies by appeal up the agency chain of authority to the head of the agency before seeking a judicial review of the decision. See generally, *Abbott Laboratories v. Gardner*, 387 U.S. 139 (1967); 5 U.S.C. § 1009(c) (1964).

58 Civil No. 11,072 (W.D. La., Jan. 17, 1967).

59 Noone, *Federal Medical Care Recovery Act*, 55 A.B.A.J. 259, 261 (1969).

60 One insurance company disagreed claiming that all injuries to all four servicemen could be paid out of the primary coverage of \$10,000 and that its excess coverage of \$5,000 would not have to be touched. This appears to be a rather unrealistic position.

61 "We do not believe that the discretionary power of the agency head has been abused." *State Farm Mut. Auto. Ins. Co. v. Alston*, Civil No. 11,072 at 10 (W.D. La., Jan. 17, 1967).

62 The court did not enumerate the various factors which it felt prompted the government's decision not to grant the waiver other than the pension rights of the disabled servicemen.

63 The secondary responsibility of the military is limited to the occasional case involving treatment of government, non-military personnel who are authorized treatment at military facilities. See Army Reg. 40-3 ¶¶ 9-37.5 (Mar. 26, 1962). See, e.g., Department of Health, Education and Welfare Manual for Processing Hospital and Medical Care Claims, Part A § 5(c) (Jan., 1965).

the medical treatment of military personnel, either active or retired, and their dependents.<sup>64</sup> The Army recovery organization reflects this fact in its three-stage composition. The first stage is the Recovery Judge Advocate (RJA). Because of the notification requirements, which will be discussed below, the RJA is normally the judge advocate charged with providing legal support to a major military hospital.<sup>65</sup> He is assigned a geographical area of responsibility and processes any claims which result from medical treatment first being given the injured party within his area.<sup>66</sup> This is true regardless of whether the injured party was a dependant or service member, whether the care was furnished by a military or civilian hospital, or whether the injured party was subsequently transferred to another hospital outside the area. The key, then, to which RJA is to assume responsibility for processing a claim is the geographic location where medical treatment was first rendered.<sup>67</sup> Usually the geographic area assigned to the RJA coincides with that of the military hospital he serves.<sup>68</sup>

The next level above the RJA is the Staff Judge Advocate for the Army-area.<sup>69</sup> This officer is charged with the appointment and general supervision of the Recovery Judge Advocates within his Army-area.<sup>70</sup> Finally, there is the Litigation Division, Office of the Judge Advocate General, in Washington.<sup>71</sup> As its name suggests, this office, in addition to formulating general policy for the program, attempts to settle all claims which cannot be disposed of by the lower two elements and it coordinates actions with the Department of Justice should suit be necessary to collect the claim.

Quite obviously the starting point in the recovery process is when the RJA learns that a person has received medical care within his area for injuries suffered under circumstances which might give rise to a claim under the Act. While Army regulations require service personnel to give notice when they or any member of their family are injured, as a practical matter under the present system, the RJA must rely almost exclusively upon the medical service personnel who administer the military hospitals or pay for the civilian care for this vital

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64 Under various statutes these beneficiaries are entitled to care in military hospitals if the facilities and personnel are available. If care cannot be provided by the military hospitals, then they are entitled to care at Army expense in civilian hospitals. In addition to the groups mentioned in the text, the dependents of deceased military personnel are also entitled to medical care. See 10 U.S.C. §§ 1071-87 (Supp. II, 1966).

65 Army Reg. 27-38, ¶ 5-1(a)(1) (Jan. 15, 1969). A summary of the Army Regulation may be found in 32 C.F.R. §§ 537.21-24 (1969). Between revisions of the Army Regulation, the Judge Advocate General forwards to the various RJAs new information or changes in policy by way of Federal Medical Care Recovery Act Letters. Each of these letters bears the year of issue and the number of the letter in the series for that year, e.g., 469 was the fourth such letter issued in 1969.

66 Army Reg. 27-38 ¶ 3-1 (Jan. 15, 1969).

67 There are provisions for the transfer of a claim from one Recovery Judge Advocate to another under certain conditions. *Id.* ¶ 3-3.

68 *Id.* ¶ 5-1(a)(2).

69 *Id.* ¶ 5-1. The United States is divided into five Army-areas. The First Army is located at Fort Meade, Md.; the Third at Fort McPherson, Ga.; the Fourth at Fort Sam Houston, Tex.; the Fifth at Fort Sheridan, Ill.; and the Sixth at The Presidio of San Francisco, Calif. The First Army, formerly at Governors Island, N. Y., has been consolidated with the Second Army-area.

70 *Id.* ¶ 5-1(b).

71 *Id.*

information.<sup>72</sup> The administrative procedure for handling hospitalization varies according to whether the care is furnished in a military or civilian hospital, or whether the injured party is an active service member or is a dependant or retired member. As a result, the RJA receives his information from a number of sources and in widely differing forms.

Where the care is furnished in an Army hospital, the hospital commander is required<sup>73</sup> to notify the RJA of the treatment of *any person* suffering from an *injury*<sup>74</sup> and to give all available information concerning the injury received within twenty-four hours after the patient's admission.<sup>75</sup> If the treatment is performed in a hospital run by one of the other services, normally the commander of that installation will supply the same information to the Army RJA under the provisions of his own service regulations.<sup>76</sup>

Should an active member of the Army receive civilian care, the commander of the Army-area in which the treatment was rendered is responsible for paying civilian hospital and doctor bills. This responsibility is normally delegated to the various military hospitals within the Army-area on a geographical basis and is handled by a special medical claims section within the hospital.<sup>77</sup> This medical claims section is required to give the RJA the same type of information the hospital commander would have given had the treatment been furnished directly by the military hospital.<sup>78</sup>

The major problem in the present notice system is collection of information concerning the treatment of the dependents and retired personnel at civilian facilities. The availability of this care is standardized throughout the uniformed

72 Army Reg. 40-121 (Feb. 13, 1967). This notification system has been subjected to a great deal of criticism for being slow and for failing to provide the necessary notice in many cases. See, Letter Report B-133142 from Defense Division, General Accounting Office, to Secretary of Defense, Dec. 2, 1968, on file with the NOTRE DAME LAWYER. The Army has suggested that its Recovery Judge Advocate set up unofficial notification systems by the use of other types of Army reports. See Army Reg. 27-38, ¶ 3-1(d) (Jan. 15, 1969); Department of Army Pamphlet No. 27-162, Claims, ¶ 11.4(b) at 156 (Jan. 1968).

73 Army Reg. 40-16, ¶ 3 (Mar. 24, 1969).

74 As opposed to those cases involving disease. No distinction is made in regard to whether or not the injured party is an active or retired member or dependent. Likewise, the hospital is not to attempt to screen the cases to eliminate those cases where no claim exists. In the past, the hospitals have tried to do this with the result that some potential claims were lost since the hospital personnel are not legally trained. See Letter Report B-133142 from Defense Division, General Accounting Office, to Secretary of Defense, Dec. 2, 1968, on file with the NOTRE DAME LAWYER.

75 This information is to be transmitted on DA Form 2985, Admissions and Dispositions Sheet, Absent Sick Work sheet. If the RJA feels that the tortfeasor could be liable, he notifies the medical facility. The facility then submits DA Form 2631-R, indicating the length of the hospitalization and the cost. See, Army Reg. 40-16, ¶ 3 (Mar. 24, 1969).

76 In most cases, the Army maintains a Medical Detachment at the major hospitals of the other uniformed services. See Army Reg. 40-3, ¶ 70 (Mar. 26, 1962). Normally, this information will be transmitted to the Army Recovery Judge Advocate through the Commander of this Medical Detachment. Multi-service regulations, Army Reg. 40-121, ¶ 54 (Feb. 13, 1967), impose a duty on the injured member and the commander of the hospital facility to notify the appropriate judge advocate of the injury.

77 Army Reg. 40-16, ¶ 4 (Mar. 24, 1969); Army Reg. 40-3, ¶ 88 (Sept. 13, 1967).

78 Army Reg. 40-16 ¶ 4(a) (March 24, 1969). According to this section, the Recovery Judge Advocate receives copies of the paid vouchers, DA forms 8-9 or 8-17, for the civilian care. Since the insurance companies want a more detailed indication of the treatment which was rendered than these vouchers contain, the medical claims section should also enclose a copy of the detailed hospital and doctor's bill. See Address by Edward S. Ring, Vice President, Government Employees Insurance Company, to 30th Annual NAIIA Convention, Portland, Oregon, May, 1967, on file with the NOTRE DAME LAWYER, admonishing insurance claims personnel to demand and study the entire hospital record including nurse's notes.

services and controlled by a single multi-service regulation;<sup>79</sup> the program is administered as a unit. No distinction is made as to the parent branch of the retiree or dependent's sponsor. The government has contracted with various civilian firms<sup>80</sup> to act as the government's agent to process and pay bills arising under such treatment. Each of these contract agents is responsible for a specific geographical area.<sup>81</sup> As a result of this uniform bill paying system, the contract agents make no attempt to sort them according to the service of the sponsor or to determine whether a claim under the Act might be involved. The paid bills are funneled into the office of Civilian Health and Medical Program of the Uniformed Services, located in Denver, Colorado, by the various contract agents. Here, the bills are sorted according to the sponsor's service. An attempt is also made to determine if there is a potential claim under the Act.<sup>82</sup> Cases involving potential claims are then turned over to the various services.<sup>83</sup> They eventually filter back to the RJA in the geographical area where the treatment was first rendered for his action.<sup>84</sup>

Once the RJA has received these notices, he makes an initial screening on the basis of the accompanying information and decides if, in his opinion, a potential claim exists.<sup>85</sup> If so, he immediately notifies the prospective defendant, his lawyer, and the defendant's insurance company of the government's tentative

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79 This regulation is Army Reg. 40-121 (Feb. 13, 1967); Air Force Reg. 168-9; Navy SECNAV Instruction 6320.8C; Public Health Service General Circular No. 6, and Coast Guard Instruction No. 6320.2A (Feb. 13, 1967).

80 Usually these firms are the local Blue Cross-Blue Shield agencies or a health insurance company. See 10 U.S.C. § 1082 (1954) which establishes an advisory committee for the administration of the civilian health care program. See also 32 C.F.R. § 70.507 (1970), 32 C.F.R. § 577.60(c) (1) (1970), and 32 C.F.R. Subpart A (1970).

81 The name, address, and area of responsibility of each of these contract agents is listed in Appendix A of the multi-service regulation, note 79, *supra*.

82 Unlike the commander of the military hospital or the medical claims sections which exercise no discretion and report all injury cases, this office screens out those cases where the injury was suffered in such a way that no claim could arise under the Act. It is admonished, however, to transmit all doubtful cases, Army Reg. 40-16, ¶ 5(b) (Mar. 24, 1969).

83 Under the former regulation, 27-38 (Sept. 29, 1967), the Executive Director gave vouchers DA Forms 1863-1 and 1863-2, along with DA Form 3154, to the Adjutant General who in turn forwarded them to the Judge Advocate General for distribution down the chain of command through the Army-area Staff Judge Advocate to the Recovery Judge Advocate. This system meant that it was often more than a year after the injury before the Recovery Judge Advocate first learned of the potential claim and could act upon it. In order to eliminate this delay, the system has been changed. The new regulation 27-38, ¶ 5-1(b) (Jan. 15, 1969) requires the name and area of responsibility of each Recovery Judge Advocate to be furnished to the Judge Advocate on the staff of the Executive Director. Army Regulation 40-16 ¶ 5 (Mar. 24, 1969) requires the Executive Director to furnish notice directly to the Recovery Judge Advocate. This regulatory scheme has been altered slightly by the Judge Advocate General in Federal Medical Recovery Act Letter No. 469, Aug. 20, 1969. The regulatory scheme is to be followed if a single recovery judge advocate has the recovery responsibility for the entire state where the first hospitalization was rendered. If, however, the state is divided between two or more Recovery Judge Advocates, due to the lack of personnel in the Executive Director's office, no attempt is made to sort the potential claims by geographical area within the state and the claims are forwarded to the Army-area Staff Judge Advocate for sorting and distribution.

84 There are provisions where a service member may pay for his own care or the care of his dependents and then recover this from the Army. See Army Reg. 40-3, ¶ 92(f) (Sept. 13, 1967) and Army Reg. 40-121, ¶ 32(g) (Feb. 13, 1967). In these cases the officer approving the reimbursement has an obligation to inform the Recovery Judge Advocate of a potential claim on Standard Form 1034. See Army Reg. 27-38, ¶ 3-1(c) (Jan. 15, 1969).

85 Army Reg. 27-38, ¶ 3-2(b) (Jan. 15, 1969). If he feels that a particular injury does not involve liability under the Act, he will make a notation to this effect on the notification sheet and return it to the person giving him the notice.

interest in the case.<sup>86</sup> At the same time the RJA contacts the injured party and advises him of the government's rights under the Act, pointing out the injured party's duty to cooperate with the government. He also attempts to obtain a statement from the injured party concerning the accident.<sup>87</sup> The injured party is advised that he should not settle or release his claim without first contacting the RJA. The RJA also requests the name and address of the injured party's attorney.<sup>88</sup>

Next, the RJA investigates the case and assembles information as to how the injury occurred.<sup>89</sup> On the basis of this investigation, he will evaluate the grounds for the legal liability of the prospective defendant. If his investigation shows no liability, he informs the office which gave him the initial notice of potential claim of this fact and closes his file.<sup>90</sup> If, on the other hand, his investigation indicates liability on the part of the tortfeasor, he then determines the cost of the care rendered by the government. If this amount is less than \$100, he may let the matter drop.<sup>91</sup> If, however, the claim exceeds \$100, he makes a formal payment demand upon the tortfeasor and his insurance company, if known.<sup>92</sup> At the same time, if the facts indicate, the RJA will take steps to protect the government's rights under any uninsured motorist coverage, state unsatisfied judgment act, workmen's compensation statute or the like.<sup>93</sup>

If voluntary payment is received from the tortfeasor in the full amount of the demand, no further action is necessary and the file is closed.<sup>94</sup> If, however, full payment is refused, the RJA may enter into settlement negotiations, unless

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<sup>86</sup> *Id.* ¶ 3-2(d)(3).

<sup>87</sup> At this time the injured party will be informed that a failure to cooperate with the government or to furnish the requested statement concerning the facts surrounding the accident will result in the government medical records dealing with the diagnoses and treatment of the injured party being withheld. It is specifically indicated, however, that the refusal on the part of the injured party's attorney to protect or assert the government's claim is *not* grounds for withholding medical records. *Id.* ¶ 3-5(b). In the past it was also customary for the Recovery Judge Advocate to take an assignment of the government's claim from the injured party on Standard Form 96-A. The Justice Department has maintained from the beginning that the Act gives the government both an independent statutory right and statutory subrogation to the rights of the injured party. In either case no formal assignment would be necessary, and the practice of taking such an assignment has almost disappeared. It may still be done, however, in a particular case if the Judge Advocate feels some benefit is gained.

<sup>88</sup> *Id.* ¶ 3-5.

<sup>89</sup> In securing information in this investigation, the Recovery Judge Advocate can request the assistance of any other federal agency. *Id.* ¶ 3-3. *See also* 28 C.F.R. § 43.1(a) (1969).

<sup>90</sup> *Id.* ¶ 3-6(a). If, at a later date, an offer is received from the tortfeasor, the file will be reopened.

<sup>91</sup> *Id.* ¶ 2-4. For an article pointing out that a large number of these claims can be successfully collected at minimal expense to the government, *see* Mog, Hospital Recovery Claims—Claims Under \$100. 7 AF JAG L. REV. 19 (1965).

<sup>92</sup> Army Reg. 27-38, ¶ 3-6(d)(4) (Jan. 15, 1969). This is done on Standard Form 96. There are some exceptions where no claims will be asserted. No claims will be asserted against another federal government agency, government employee, service member, or his dependent unless he is covered by liability insurance or is guilty of gross negligence or willful misconduct. Likewise, no claim will be asserted against a foreign government or government contractors without prior approval of the Litigation Division. *Id.* ¶ 2-2.

<sup>93</sup> *Id.* ¶ 4.2.

<sup>94</sup> A release of the government's claim will be given. *Id.* ¶ 5-2(b). Such a release will not contain an indemnity agreement or purport to release the injured party's claim. The suggested release form is found in Appendix C of the regulation. No release will be given where a claim has been waived. The tortfeasor will also be given a receipt for payment. *See* Appendix D to Army Reg. 27-38 (Jan. 15, 1969).



he has already arranged for the injured party's attorney to handle the government's interest along with that of his client's.<sup>95</sup>

In the negotiation process, the RJA has certain limitations placed upon his authority to act in the government's behalf.<sup>96</sup> If the original amount of the claim exceeds \$20,000,<sup>97</sup> he can make no settlement short of full recovery without specific case-by-case authorization from the Department of Justice.<sup>98</sup> Where the original amount of the claim is less than \$20,000, he may not settle the claim by compromise where such action will reduce the claim more than \$3,500.<sup>99</sup> He may not waive any amount exceeding \$1,000.<sup>100</sup> He also has no authority to waive any claim because of undue hardship on the injured party.<sup>101</sup>

When an offer of compromise or waiver which exceeds his authority is received, he forwards the claim, with his recommendation, to the Army-area Staff Judge Advocate.<sup>102</sup> This office can accept the compromise or waiver of a claim so long as the compromise or waiver does not reduce it by more than \$5,000.<sup>103</sup> If the request exceeds this figure, the claim must be forwarded to the Litigation Division, Office of the Judge Advocate General, in Washington. This office has the authority to accept any waiver or compromise in a claim of less than \$20,000.<sup>104</sup>

If the RJA receives a request for a waiver of the government's claim based upon an undue hardship to the injured party, he will forward this request, with his recommendations and any other pertinent information, through the Army-area Judge Advocate to the Litigation Division. Only this office has the authority to grant an undue hardship waiver, in whole or in part.<sup>105</sup>

In the event the tortfeasor or his insurance company, after reasonable negotiations, refuses to acknowledge liability or make an offer of settlement acceptable to the government, the RJA has two alternatives. He may either

95 Such agreements make up the unofficial collection procedure. See text following note 173, *infra*.

96 It should be remembered that the Recovery Judge Advocate's authority results from a delegation by the President through the Attorney-General to the Department of the Army and from there down the chain of command. Each delegator has reserved some control for himself. See Army Reg. 27-38, ¶ 4-3 (Jan. 15, 1969).

97 *Id.* For determination of the amount of the claim, the treatment costs for all injuries arising out of the same incident are totalled. For example, if three servicemen were riding in a car struck by the prospective defendant and each soldier received \$10,000 worth of medical care, the Recovery Judge Advocate could not compromise or waive any part of the claim since it would be treated as a single claim for \$30,000 rather than three separate claims for \$10,000 each. *Id.* ¶ 4-4.

98 28 C.F.R. § 43.3 (1969).

99 Army Reg. 27-38, ¶ 4-3(a)(1) (Jan. 15, 1969).

100 *Id.* ¶ 4-3(a)(2).

101 *Id.* This statement should be qualified because ¶ 4-4(b)(2) indicates that the RJA can treat a request for a hardship waiver as a suggestion for compromise and grant the waiver as a compromise within his compromise authority.

102 It is possible for the Army-area Judge Advocate to delegate his settlement authority by telephone to the Recovery Judge Advocate on a case-by-case basis. Likewise, it is possible to get prior approval to settle a case for a certain percentage of the total recovery. See *id.* ¶ 4-4(b)(3).

103 *Id.* ¶ 4-3(b).

104 *Id.* ¶ 4-3(d).

105 *Id.* As indicated in note 101, *supra*, however, both the RJA and the Army-area Staff Judge Advocate can treat a request for a waiver as an offer to compromise and handle the waiver on this basis within their respective compromise authority. A more detailed analysis of the difference between waiver for the convenience of the government, waiver for undue hardship upon the injured, and compromise is undertaken in text accompanying notes 23-55, *supra*.

forward the claim to the Army-area Staff Judge Advocate for further negotiations, should such appear warranted or, if he feels that further negotiations would be to no avail, and the claim is for less than \$5,000 or does not involve a new point of law, he can turn the case over to the United States Attorney for the District in which the defendant resides for legal recourse.<sup>106</sup> If the claim is for more than \$5,000, involves a new point of law, or involves collection from the injured party or his attorney,<sup>107</sup> the RJA forwards the claim through the Army-area Staff Judge Advocate to the Litigation Division. The Litigation Division will then present the case to the Department of Justice for action.<sup>108</sup>

### B. *The Air Force*

The Air Force recovery program in many ways parallels that of the Army.<sup>109</sup> Like the Army, it is geographically oriented to the place of initial treatment. The Air Force notice process and the handling of claims are essentially the same as those of the Army.<sup>110</sup> There are, however, three differences between these programs which are worth noting.

First, the Air Force divides the lowest level of its claims system into two parts. The first of these is the Base Judge Advocate, whose duties and responsibilities correspond to the Army Recovery Judge Advocate. The second part is the Staff Advocate of the major Air Command exercising general courts-martial jurisdiction. These two levels may often be combined since the Base Judge Advocate is often the Judge Advocate of the Command which exercises general courts-martial jurisdiction. This is not always the case, however, especially where the smaller Air Force bases and stations are concerned. The only significant difference between the Base Judge Advocate and the Staff Judge Advocate is the extent of their authority to compromise and waive claims.

Second, the two services differ in their approach to field settlement authority. The Army, as was seen earlier,<sup>111</sup> does not limit the size of the claim which can be handled by the RJA within the \$20,000 limitation placed on it by the Department of Justice.<sup>112</sup> Instead it limits the amount by which the RJA

106 *Id.* ¶ 4-5(c). Such a referral may take place at an earlier date if either the injury party or the alleged tortfeasor files suit based on the accident. *Id.* ¶ 4-5(a).

107 See note 9, *supra*, for a discussion of the problems involved in collection from the client. Problems with collection from the injured party's attorney will be discussed in the section dealing with the unofficial recovery program; see text following note 173, *infra*.

108 Army Reg. 27-38, ¶ 4-5(d) (Jan. 15, 1969).

109 The Air Force recovery program is governed by Chapter 15 of Air Force Manual 112-1 (Oct. 29, 1969). A summary of this program is found at 32 C.F.R. §§ 842.140-146 (1968).

110 There is one exception in the notification system. Under Army Reg. 27-38 (Jan. 15, 1969), notification of potential claims arising from the care of dependents and retired personnel will come directly from the Judge Advocate in the Office for the Civilian Health and Medical Program of the Uniform Services (OCHAMPUS). The Air Force continues to follow the former system of having such notice go first to the Litigation Division, Office of the Judge Advocate General, and then down through the general court-martial authority to the Base Judge Advocate. See, Air Force Manual 112-1, Ch. 15, Tables 15-6 and 15-8 (Oct. 29, 1969). Between revisions of the manual, the Judge Advocate General keeps the various field offices abreast of new developments and changes of policy by items in the Air Force Reporter, a publication containing legal information of general interest to Air Force JAG personnel. Each issue is identified by the year of its issue and the number within the series for that year, e.g., AFJAG REPR. 11 (1966).

111 See text at note 99, *supra*.

112 28 C.F.R. § 43.3 (1969).

can reduce a claim. The Air Force, on the other hand, has chosen to retain dollar limitations on the authority of each level to handle a claim.<sup>113</sup> As a result the RJA could compromise a \$15,000 claim for \$13,500 because he has the power to reduce the claim up to \$3,500.<sup>114</sup> The Air Force Base Judge Advocate could not do this because he cannot compromise or settle any claim where the amount compromised exceeds \$1,000.<sup>115</sup> The same distinction is found throughout the system. The Staff Judge Advocate of the Command exercising general court-martial jurisdiction can only compromise amounts up to \$2,500, while the Staff Judge Advocate for a major Command can only handle amounts not exceeding \$5,000.<sup>116</sup>

The final difference lies in the ability of the field offices to grant waiver for undue hardship to the injured party. In the case of the Army, none of the field offices can grant such a waiver.<sup>117</sup> They can, however, consider such request as an offer to compromise and handle it under that guise up to the amount of their compromise authority.<sup>118</sup> The Air Force does away with this fiction and allows its offices at all levels to grant these undue hardship waivers within the limits of their dollar authority.<sup>119</sup>

### C. *The Navy*

The Navy recovery program, unlike the other uniformed services, is characterized by a centralization of authority.<sup>120</sup> While the Army and Air Force use a three- or four-level organization, the Navy has reduced this to two, the field and the office of the Judge Advocate General in Washington.<sup>121</sup> The field level, called "JAG Designees," consists of the Commander and District Legal Officer of the various Naval Districts.<sup>122</sup> As a result of this centralization, and the fact that the Navy does not maintain a large number of installations throughout the country, the Navy is more apt to request the assistance from one of the other government agencies in the investigation or assertion of its claims.<sup>123</sup>

113 The Army had this system under former Army Reg. 27-38 (Sept. 29, 1967).

114 Army Reg. 27-38, ¶ 4-3(a) (Jan. 15, 1969).

115 Air Force Manual 112-1, Ch. 15, Table 15-8 (Oct. 29, 1969).

116 *Id.*

117 Army Reg. 27-38, ¶ 4-3(d) (Jan. 15, 1969).

118 *Id.* ¶ 4-4(b).

119 Air Force Manual 112-1, Ch. 15, Table 15-8 and ¶ 15-17(b) (Oct. 29, 1969).

120 The Navy recovery program is outlined in Navy JAG Instruction 5800.7, Ch. XXIV as amended by Change 22 (Oct. 1, 1970). A summary of this Chapter can be found in 32 C.F.R. §§ 757.1-14 (1969). Between revisions of the Navy JAG Instruction, the Judge Advocate keeps the various field offices abreast of new developments and changes of policy by items inserted in OFF THE RECORD, a publication from his office containing legal information of general interest to Navy JAG personnel. The publication is printed quarterly and numbered in continuous sequence.

121 Within the Office of the Judge Advocate General, however, there are three separate levels of authority, the Deputy Assistant Judge Advocate General for Litigation and Claims, the Assistant Judge Advocate Generals, and the Judge Advocate General and his deputy. The other services have similar staff organizations, but they do not attempt to fractionalize authority within the offices. Thus, the Army Chief of the Litigation Division, Office of the Judge Advocate General, exercises the full power of the Judge Advocate General as his designee. Compare Air Force Manual 112-1, ch. 15, tables 15-6 and 15-8 (Oct. 29, 1969) and Army Reg. 27-38, ¶ 4-31 (Jan. 15, 1969) with Navy JAG Instruction 5800.7, ¶ 2404(d).

122 Navy JAG Instruction 5800.7. ¶ 2401(b). There is also centralization for the payment of civilian medical bills in the District Medical Officer. *Id.* ¶ 2403(g).

123 *Id.* ¶ 2402(a). This practice is specifically authorized by the Attorney General's Regulations, 28 C.F.R. § 43.1(a) (1969).

There are two major differences between the Navy recovery program and those of the other services. Instead of basing responsibility on the location where medical care is *rendered*, the Navy bases it upon the geographical location of the *accident*.<sup>124</sup> The Naval Legal Officer in the District where the accident occurs and to whom the case is assigned is called the "Action JAG Designee";<sup>125</sup> his duties are, however, similar to the Army Recovery Judge Advocate and the Air Force Base Judge Advocate.<sup>126</sup>

There is also a notable variation in the delegation of the settlement authority. The Action JAG Designee may settle by compromise only those claims not exceeding \$5,000.<sup>127</sup> He has no authority to grant a waiver for the convenience of the government or for undue hardship. Within the Navy Office of the Navy Judge Advocate General, the Deputy Assistant Judge Advocate General for Litigation and Claims can compromise claims for not more than \$7,500,<sup>128</sup> and an Assistant Judge Advocate General may do the same up to \$10,000.<sup>129</sup> Again, these levels do not have the authority to waive a claim. Only the Judge Advocate General or his Deputy can settle any claim over \$10,000 or waive a claim in any amount, either for convenience of the government or for hardship.<sup>130</sup>

### III. The Veterans Administration

The Veterans Administration (VA) recovery program is by far the oldest agency recovery system within the federal government.<sup>131</sup> It also is the acknowledged model used in drafting the Act and many of the regulations under it.<sup>132</sup> The VA recovery program predates the Act by at least twenty years.<sup>133</sup> When the War Department was forced to give up its World War II recovery program as a result of *United States v. Standard Oil*,<sup>134</sup> the VA continued its system based upon its regulatory provisions<sup>135</sup> and voluntary assignments from injured veterans.<sup>136</sup> Much of this pre-Act program still remains in operation.<sup>137</sup> In the past

124 *Id.* 240.1(c). The Army and Air Force use the location for treatment. See text accompanying note 66, *supra*.

125 Navy JAG Instruction 5800.7, ¶ 2401(c) (Oct. 1, 1970).

126 As will be seen in the next paragraph, it might be more proper to say that he combines the duties of the Army Recovery Judge Advocate and Army-area Staff Judge Advocate or the Air Force Base Judge Advocate, Staff Judge Advocate of the general court-martial jurisdiction, and the Staff Judge Advocate of the major command.

127 Navy JAG Instruction 5800.7 ¶ 2402(d) (Oct. 1, 1970).

128 *Id.* ¶ 2402(b)(4).

129 *Id.* ¶ 2402(b)(3).

130 *Id.* ¶ 2402(b)(1) and ¶ 2402(d). The latter paragraph indicates that the Judge Advocate General or his deputy can specifically delegate the waiver power on a case-by-case basis to any one of the other levels. The delegation, however, must be personally done.

131 There are special provisions in other statutes allowing recovery by a specific fund which are as old or pre-date the VA program. See, e.g., The Federal Employees Compensation Act, 5 U.S.C. §§ 8131 (1964), which was enacted in 1916 by the Act of Sept. 7, 1916, 39 Stat. 750.

132 H.R. REP. No. 1534, 87th Cong., 2d Sess. 5 (1962); S. REP. No. 1945, 87th Cong., 2d Sess. (1962); COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF THE GOVERNMENT'S RIGHTS AND PRACTICES CONCERNING RECOVERY OF THE COST OF HOSPITAL AND MEDICAL SERVICES IN NEGLIGENT THIRD-PARTY CASES 16 (1960) (*Comptroller's Report*).

133 The recovery program appears to have first been started by the addition of a recovery provision in 38 C.F.R. § 25.6048(c) (1944) by 7 Fed. Reg. 2353 (Mar. 25, 1942).

134 332 U.S. 301 (1947).

135 38 C.F.R. § 17.48(e) (1969).

136 During fiscal year 1956, VA recovered \$3,100,000; during 1957, \$2,700,000; and during 1958, \$2,100,000. *Comptroller's Report* on 16.

137 38 C.F.R. § 17.48(e) (1969). See also Opinion of the General Counsel (Op.G.C.) 27-48 and V.A. Circular 10-63-2 (Jan. 23, 1963), on file with NOTRE DAME LAWYER.

it has actively asserted claims under the various state workmen's compensation statutes,<sup>138</sup> and continues to do so today.<sup>139</sup> Until recently it was the only government agency seeking recovery on a regular basis under both medical payments coverage and health and accident policies.<sup>140</sup>

VA has adopted a simple two-step recovery system not unlike that of the Navy. The first stage consists of the Chief Attorneys for the various VA regions throughout the country, while the second is the General Counsel's Office in Washington.<sup>141</sup> This simple organization is made possible, in part, by the fact that VA claims, unlike those of the uniformed services, arise in only one way — from the treatment of an individual in a VA hospital. VA has no obligation to provide any beneficiary with treatment outside its own facilities.<sup>142</sup> Normally, the beneficiary will be a veteran who is unable to pay for the treatment of his non-service-connected injury.<sup>143</sup>

The Act specifically excludes as a cognizable claim any treatment furnished a veteran for a *service-connected disability*.<sup>144</sup> As a result, there is a gap in the recovery pattern under the Act. Where a serviceman is so severely injured that he can no longer remain on active duty and will require extended hospitalization, he is given a medical discharge by the uniformed services and transferred to a VA hospital. His military service will have a claim for the care furnished prior to the medical discharge whether it was rendered by the VA or by the service.<sup>145</sup> However, VA will have no claim for care furnished after the discharge since this injury is classified as a service-connected disability.<sup>146</sup> Certainly it was not

138 See, e.g., Brauer v. White Concrete Co., 253 Iowa 1033, 115 N.W.2d 202 (1962); Stafford v. Pabco Products, Inc., 53 N.J. Super. 300, 147 A.2d 286 (1958); Higley v. Schlessman, 292 P.2d 411 (Okla. 1956); Henry v. Lit Bros., 193 Pa. Super. 543, 165 A.2d 401 (1960); Whittier v. C. C. Allen, 4 F.C.R. 69 (Fla. Ind. Comm. 1959).

139 See, e.g., Atkins v. DeBree, 24 App. Div.2d 251, 265 N.Y.S.2d 307 (1965); Marshall v. Rebert's Poultry Ranch & Egg Sales, 268 N.C. 223, 150 S.E.2d 423 (1966); Highlands Ins. Co. v. Daniel, 410 S.W.2d 491 (Tex. Civ. App. 1967).

140 More recently other agencies have been asserting claims with rather uniform success under the medical payments and uninsured motorist provisions. See Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967); United States v. United Services Automobile Assoc., 312 F. Supp. 1214 (D. Conn. 1970); United States v. Commercial Union Ins. Group, 294 F. Supp. 768 (S.D.N.Y. 1969); United States v. Government Employees Ins. Co., Civ. No. SA69CA214 (W.D. Tex. July 1, 1970); United States v. United Services Automobile Assoc., Civ. No. 1004 (M.D.Ga. June 4, 1969); United States v. Safeco Ins. Co. of America, Civ. No. 6997 (W.D.Wash. May 19, 1967) (uninsured motorist coverage); and United States v. United Services Automobile Assoc., Civ. No. 29031 (5th Cir., July 9, 1970) (cert. appl.) (medical payments). See generally, Long, *Government Recovery Beyond the Federal Medical Recovery Act*, 14 S. DAKOTA L. REV. 20 (1969); Groce, *The Federal Medical Care Recovery Act and Its Side Effects*, 36 INS. COUNSEL J. 259 (1969); Address by Edward S. Ring, Vice President, Government Employees Insurance Company, to 30th Annual NAIIA Convention, Portland, Oregon, May, 1967, on file with the NOTRE DAME LAWYER.

141 38 C.F.R. § 2.6(e) (1969). Unlike the Navy there are no differing levels of authority within the General Counsel's Office in regard to waivers or compromise.

142 While there is no obligation to do so, the Veterans Administration does provide care for non-service-connected injuries in other federal hospitals and in private hospitals under contract to it when regular Veterans' hospitals are not available. V.A. Circular 10-63-2, ¶ 12 (Jan. 7, 1963) indicates that these costs will be recovered on the same basis as the costs for treatment in the regular Veterans' hospitals.

143 Occasionally there is a claim for care furnished to an ineligible person admitted by mistake or for emergency care.

144 42 U.S.C. § 2651(c) (1964). See, *id.*, which provides that there will be no claim under the Act for treatment of veterans when the injury is service-connected.

145 If the treatment is furnished in the Veterans Administration hospital, the military service will have to reimburse the Veterans Administration. 38 C.F.R. § 17.62(c) (1969).

146 See note 144, *supra*.

the intent of Congress to allow the tortfeasor to escape full liability where the injury was so severe that it results in permanent disability requiring extended hospital care. This loophole in the present Act should be eliminated by legislation.

When the Registrar of one of the VA hospitals finds what he believes to be a case involving a claim under the Act, his procedure is to inform and forward all essential information to the Chief Attorney for his region.<sup>147</sup> The Chief Attorney will process the claim in a manner similar to that used by the military services and will assert the claim if he deems it appropriate. The Chief Attorney is limited, however, in handling the post-demand negotiations since he has no authority to waive or compromise any part of a claim.<sup>148</sup> This authority has been retained by the Chief Counsel's Office,<sup>149</sup> but can be delegated to the Chief Attorney on a case-by-case basis.<sup>150</sup>

#### IV. Department of Health, Education and Welfare

The Department of Health, Education and Welfare (HEW) has the smallest recovery program in terms of both the number of cases processed and amount collected.<sup>151</sup> Almost all the Department's claims arise out of the operation of the Public Health Service. This organization is charged with providing care to the largest and most varied group of beneficiaries of any of the federal agencies. Through its Indian Health Division, it provides both direct and contract medical care to millions of American Indians. The hospitals operated by its Hospital Division are open to injured American seamen and federal civilian employees. Finally, through the Office of the Surgeon General, the Public Health Service is responsible for providing its own members, those of the Coast Guard and Coast and Geodetic Survey, and their dependents with direct hospital care, as well as processing the bills for any treatment they receive in civilian facilities.<sup>152</sup> All of these activities generate claims under the Act.<sup>153</sup>

147 As was seen earlier, this screening by non-legal personnel has come into a great deal of criticism because a number of potential claims are lost. The loss can be held to a minimum by the non-legal personnel forwarding any case where there is any doubt whatsoever.

148 38 C.F.R. § 2.6(e)(4) (1969).

149 *Id.* § 2.6(e)(3).

150 *Id.* § 2.6(e)(4).

151 During 1968 the Department of Justice reports that the Department of Health, Education, and Welfare handled 752 claims and recovered \$169,578.22. During the same period, the Army asserted 3,153 claims and recovered \$1,806,466.21, while the Air Force had a net recovery of \$1,361,402.80 from 4,089 claims. *See*, 28 C.F.R. § 43.4 (1969) and letter from Joseph C. Long to Harry L. Henning, Aug. 3, 1970, on file with the NOTRE DAME LAWYER.

152 In addition, the Department of Health, Education, and Welfare operates the Freedman's Hospital in Washington, D.C. Public Health Service General Circular No. 6 and Coast Guard Instruction No. G320.2s (Feb. 13, 1967). 42 C.F.R. §§ 31.2, 32.6, 36.12 (1969).

153 The Act, 42 U.S.C. § 2651(a) (1964), specifically excludes a claim being made against the employers of seamen who receive treatment under 42 U.S.C. § 249 (1964). For the background of this exemption *see*, Letter from Joseph Campbell, Comptroller General, to Honorable Emanuel Celler, Chairman, Committee on the Judiciary, House of Representatives, Aug. 2, 1961, attached to H. REP. No. 1534, 87th Cong., 2d Sess. 15 (1962); 2 U.S. CODE CONG. & AD. NEWS 2651-54 (1962). Recovery can be made under the Act, however, where the injury was the result of the negligence of some third party such as a stevedoring company. As outlined earlier, *supra* note 4, normally the treatment given injured federal employees is paid for by the Employees Compensation Fund and recovery is under that Act. 5 U.S.C.A. § 8131-32 (1964). When care is rendered by the Public Health Service, however, there is no reimbursement by the Fund and the Health Service recovers under the Act. Dept. of Health, Education, and Welfare, Manual for Processing Hospital and Medical Care Claims, Part A, § 5(a) (Jan. 1965) (Hereinafter *Manual*).

To handle these claims, HEW uses a two-stage recovery organization very similar to that of the VA and the Navy. The first of these levels consists of regional counsels for the nine HEW regional offices,<sup>154</sup> while the second is the Business and Administrative Law Division of the General Counsel's Office.<sup>155</sup> As is the case with VA, this centralization of authority has forced HEW to depend heavily upon non-legal personnel to perform many of the tasks done by the judge advocates in the case of the military recovery programs. The attending physician has the responsibility of screening the cases and making the initial determination of whether a claim is cognizable under the Act.<sup>156</sup> Likewise, someone at the treatment center will interview the patient, advise him of the government's interest,<sup>157</sup> and take a detailed statement concerning the accident and any information known by the injured party about the alleged tortfeasor.<sup>158</sup>

When this procedure is completed, the statement is transmitted to the Regional Counsel. He will review the initial determinations, make any further investigations,<sup>159</sup> and assert the claim if he deems it to be appropriate. As in the case of the other agencies, the Regional Counsel has restricted authority to compromise or waive claims. He may compromise or waive, either for the convenience of the government or because of undue hardship on the injured party, any claim not exceeding \$2,500.<sup>160</sup>

## V. Department of Justice

The last agency meriting discussion is the Department of Justice. Under the Attorney General's Regulations,<sup>161</sup> the Department is charged with overall coordination of the recovery programs conducted by the various agencies. This function is handled through the Torts Branch of the Civil Division<sup>162</sup> which sets the general policy for the recovery program and has direct control over any claim involving more than \$20,000.<sup>163</sup> Until the Attorney General's Regulations were amended in 1967,<sup>164</sup> every case that was referred to a United States Attorney by one of the processing agencies passed through this office. Under the

154 33 Fed. Reg. 5694, § 2-300.50-2 (1968), amending 32 Fed. Reg. 5813 (1967).

155 *Id.* at 5714, § 2-300.50-1 (1968), amending 32 Fed. Reg. 5813 (1967).

156 In order to avoid some of the problems that the other agencies have had in allowing non-legal trained personnel to screen potential claims, the Department has published an excellent guide for use by its lay personnel, outlining examples of tort liability and when claims should and should not be reported. See *Manual*.

157 At this same time the interviewer will ask the patient to sign PHS Form 4686, Agreement to Assign Claim upon Request. See note 85, *supra*, for a discussion of assignments. If the patient refuses to sign, the Health Service will withhold his medical records. *Manual*, Part C, § 3 and Part D, § 1(a).

158 This statement will be recorded on PHS Form 4278, Third Party Report. Where the care is rendered by a contract hospital, this facility is furnished with a "third-party kit" and requested to perform the same duties as the attending physician and interviewer. *Manual*, Part C, § 7. Normally this only happens in the Division of Indian Health.

159 The interviewer is not required to make an extensive investigation beyond interviewing the injured party and members of his immediate family who might be present. *Manual*, Part C, § 3.

160 33 Fed. Reg. 5694, § 2-300.50-2 (1968), amending 32 Fed. Reg. 5813 (1967).

161 28 C.F.R. §§ 43.1-4 (1969).

162 See *id.* § 0.45(g).

163 *Id.* § 43.3(b).

164 *Id.* § 43.3 (1967), as amended 28 C.F.R. § 43.3 (1969).

present regulation, only those cases involving unusual circumstances, such as recovery from the injured party or his attorney, a new point of law, or a case involving substantial differences in policies between the agencies, need to be cleared.<sup>165</sup> The remaining cases can be sent by the processing agency directly to the appropriate United States Attorney.

The United States Attorneys are charged with supervising all litigation in which the United States is a party. The Department of Justice, however, recently authorized its Attorneys to accept assistance from the legal personnel of the various other enforcement agencies.<sup>166</sup> As a result, in a number of cases, Army Judge Advocates have prepared trial briefs and represented the United States Attorney in various negotiations and hearings.<sup>167</sup> The author, however, knows of only one decided case where the government was represented by an Army Judge Advocate officer. This case was *Marshall v. Cuttrel*,<sup>168</sup> which was handled by Captain Frank D. Hill, staff Judge Advocate's office, Ft. Sill, Oklahoma. Captain Hill further indicates that he has participated in one other case in which the decision is pending.<sup>169</sup>

The extent to which legal personnel from the other agencies will be used is up to the individual United States Attorney. The arrangement was made in an attempt to ease the burden imposed upon the Attorneys by the Act and to facilitate representation in cases to be tried at some distance from their main offices. It should be remembered, however, when enforcement agency personnel are acting in this manner, they are under the supervision and control of the United States Attorney.<sup>170</sup> Once a case has been turned over to an Attorney, the referring agency loses control over it. Any further negotiations would be under his supervision, and he is the proper recipient of settlement offers.

The United States Attorneys have limited settlement authority. They may compromise or waive for the convenience of the government any claim not in excess of \$5,000.<sup>171</sup> In claims above this amount they must receive prior approval from the Torts Branch. The United States Attorney has no power to grant a waiver for undue hardship to the injured party.<sup>172</sup>

165 *Id.* § 43.3(d) (1969).

166 28 U.S.C. § 547 (Supp. II, 1966). Whether the United States Attorney will have to make an appearance in a case brought by the injured party's attorney under the unofficial collection procedure is an open question which will be discussed in the last half of the article. See text following note 173, *infra*.

167 Letter from William D. Ruckelshaus, Assistant Attorney General, Civil Division to Torts Branch, Litigation Division, Office of the Judge Advocate General, Department of the Army, July 9, 1969, on file with the NOTRE DAME LAWYER.

168 Civil No. 70-254 (W.D. Okla., Aug. 4, 1970).

169 Such appearances by enforcement agency personnel, with or without an accompanying appearance by the United States Attorney, can be questioned in light of the Justice Department's interpretation of 5 U.S.C. § 3106 (Supp. II, 1966), limiting representation of the United States in court actions to the Attorney-General, members of his staff, or the United States Attorneys. See text accompanying note 179, *infra*. The propriety of the wide-spread practice of basing private attorney's fees on the gross amount of the settlement or judgment when the government's medical claim is included will be discussed in text at note 179, *infra*.

170 Judge Advocate General, U.S. Army, Federal Medical Care Recovery Act Letter No. 469, Aug. 20, 1969, on file with the NOTRE DAME LAWYER.

171 28 C.F.R. App. to Subpt. W, memo no. 374, § 3E(1) (1969). This authority is restricted where there is an objection by the agency initiating the claim. *Id.* §§ 4-5. The United States Attorney's authority to settle is further restricted to accepting settlements which fairly reflect the litigative probability of the case, regardless of the problems that might be involved. *Id.* § 6.

172 See *id.* §§ 4-6.



## VI. Unofficial Collection Procedure

Besides the official collection procedure outlined above, there has grown up a very important unofficial procedure. All of the government agencies are now including in their initial advice to persons whose injuries may result in third-party claims a request for the name and address of any counsel who is representing them in an attempt to recover for their injuries.<sup>173</sup> When this information is received, the agency will send counsel a contact letter requesting him in essence to include the government's claim along with that of his client's in any settlement negotiations or litigation that he may undertake.<sup>174</sup>

This practice is not recognized in the Act itself, nor does it seem to have been contemplated in the legislative history.<sup>175</sup> At least one author has questioned the propriety of its use.<sup>176</sup> The practice seems to have first begun about a year after the effective date of the Act, and probably as a result of the Armed Services

173 The injured party is advised of the government's interest and that he has a duty to cooperate with the government and to furnish a statement about the accident. He is also told that he should not sign any release of his claim or give the third party or his insurance company a statement without first notifying the claims officer. See e.g., Air Force Manual 112-1, ¶ 15-11(b)(2) (Oct. 29, 1969).

174 Air Force Manual 112-1, Ch. 15, fig. 15-3 (Oct. 29, 1969) offers the following sample:

Dear .....

This office has been advised that you represent ..... in a personal injury matter.

As you may know, under the Federal Medical Care Recovery Act (42 U.S.C. 2651-2653) the United States has the right to recover from any third party liable therefor, the reasonable value of medical care furnished or to be furnished. Although the United States is entitled to proceed separately and directly against a third-party tort-feasor for this purpose, it has proven to be mutually beneficial for the United States to assert its claim through the injured party's attorney. This procedure will permit you to retain control of settlement negotiations and litigation except that you may not settle the claim of the United States for less than the full amount demanded without the express approval of this office. Also, the Air Force will cooperate with you in obtaining essential Government medical records and available expert medical witnesses at no cost to you or your client. This Government support and cooperation will be provided in lieu of payment of counsel fees by the United States on that portion of your recovery which represents the United States' claim due to the prohibition contained in 5 U.S.C. 3106.

The present amount of the United States' claim, based on Bureau of Budget rates, is \$.....

It is requested, therefore, that on the terms and conditions stated above you agree to assert the claim of the United States, and that, should suit be initiated, you include in your demand as an item of special damages the amount of the United States' claim as stated above, subject to future medical care. The following allegation in your pleading will accomplish this purpose: "As a result of said injuries, the plaintiff has received (and in the future will continue to receive) medical and hospital care and treatment furnished by the United States of America. The plaintiff, for the sole use and benefit of the United States of America under the provisions of 42 U.S.C. 2651-2653, and with its express consent, asserts a claim for the reasonable value of said (past and future) care and treatment."

If this arrangement is acceptable to you and your client, I would appreciate your acknowledgment thereof by letter reply at your earliest convenience using the enclosed, self-addressed franked envelope.

Sincerely,

175 H. REP. NO. 1534, 87th Cong., 2d Sess. (1962); S. REP. NO. 1945, 87th Cong., 2d Sess. (1962); COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF THE GOVERNMENT'S RIGHTS AND PRACTICES CONCERNING RECOVERY OF THE COST OF HOSPITAL AND MEDICAL SERVICES IN NEGLIGENT THIRD-PARTY CASES (1960).

176 Cassady, *The Federal Medical Care Recovery Act and Private Attorneys* (April, 1968) (unpublished thesis in the Judge Advocate General's School Library) [hereinafter cited as Cassady].

failing to provide additional personnel to implement the collection program.<sup>177</sup> It has grown so common today that in terms of cases handled it vastly overshadows the official collection process.<sup>178</sup>

While the success of this unofficial procedure, in terms of the number of private lawyers willing to represent the government, has been great, there have been numerous problems.

#### A. *Payment of Fee*

The most frustrating problem to the practicing attorney is the government's insistence on an inability to reimburse counsel for representing its interests. The Act makes no provision for fee payment to civilian counsel. The various government agencies have uniformly taken the position that they are prevented from paying attorneys' fees by statute.<sup>179</sup> The authorities who have considered the question are in agreement with the government's position.<sup>180</sup> This position, however, does not withstand careful analysis.

The government's position rests on an interpretation of former section 314 of title 5 of the United States Code. That section provided, in part:

No compensation shall be allowed to any person, besides the respective United States attorneys and assistant United States attorneys for services as an attorney or counselor to the United States, or to any branch or department of the Government thereof, except on cases specially authorized by law.<sup>181</sup>

Coupling the language of this section with that of former section 306, the agencies conclude, on the basis of *Richter v. United States*,<sup>182</sup> that they are prohibited from paying a fee for representation by private counsel under any circumstances.

In *Richter*, the plaintiff, a lawyer, had been retained by a railroadman to recover for injuries sustained on the job. The attorney had been successful

177 See Letter, Robert C. Fable, Jr., General Counsel, Veterans Administration, to Chief Attorneys, Regional Offices, Mar. 23, 1964, on file with the NOTRE DAME LAWYER. Paragraph 9 states that the practice of collection through private attorneys was part of the Department of Justice's policy under the Act. See also AFJAG REPTR. 23, item I (1964) and AFJAG REPTR. 11 (1966) on file with the NOTRE DAME LAWYER.

178 While no government-wide figures are available, the Navy Department estimates that seventy percent of its administrative collections were made through negotiations handled by private attorneys. Cassady at 15.

179 5 U.S.C. § 3106 (Supp. II, 1966).

180 See e.g., Noone, *May Plaintiffs Include the United States' Claim Under the Federal Medical Care Recovery Act Without Government Intervention?* 10 AF JAG L. REV. 20, 21 (1968); Dingfelder, *The Federal Medical Care Recovery Act—Today*, 1968 INS. L. J. 853, 864.

181 An Act to Establish the Department of Justice, ch. 150, §§ 14, 17, 16 Stat. 164 (1870); as amended, ch. 1263, § 11, 68 STAT. 1229 (1944), as amended, ch. 646, § 1, 62 Stat. 909 (1948), as amended § 7(b), 72 Stat. 1555 (1958), as amended 5 U.S.C. § 3106 (Supp. II, 1966). The wording of this section was changed during the general revision of Title 5 in 1966, and the section was renumbered section 3106. It provides:

[T]he head of an executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice . . .

The agencies have treated the change in the language as insignificant as far as the prohibition is concerned.

182 *Richter v. United States*, 190 F.Supp. 159 (E.D. Pa. 1960), *aff'd* 296 F.2d 509 (3d Cir. 1961), *cert. denied* 369 U.S. 828 (1962).

in securing a substantial settlement; however, from the gross recovery, the government demanded and received reimbursement for the payments made to the injured party under the Railroad Unemployment Insurance Act.<sup>183</sup> The lawyer took a portion of his contingent fee from the remainder and filed suit under the Tucker Act,<sup>184</sup> claiming the remainder fee for representing the government's interests. He based his demand on those provisions of the Tucker Act which give the federal district courts jurisdiction over claims against the government arising out of an implied or express contract or based upon an act of Congress.<sup>185</sup> The court first concluded that the Railroad Unemployment Insurance Act (like the Federal Medical Care Recovery Act) makes no provision for the payment of legal fees and, therefore, jurisdiction could not be founded on that portion of the statute dealing with acts of Congress.<sup>186</sup> Noting the lack of any allegation of an express contract, the court considered the possibility of an implied contract. It first pointed out that the Tucker Act only encompasses contracts implied in fact and not those implied in law.<sup>187</sup> It then held that no such implied in fact contract was involved here because:

in the instant case, there are no facts alleged in the complaint from which assent can be inferred. In fact, the complaint alleges no direct relationship whatsoever between the plaintiffs and the United States or the Railroad Retirement Board.<sup>188</sup>

The court continued:

[A]n attorney cannot seek to have a contract implied in fact as against the Government when he has been representing a private client under a separate bilateral agreement and was acting solely in his behalf. Any benefit which might be received by the Government is purely incidental. . . . The rule generally is that each litigant must pay his own counsel fees and that an attorney cannot make another party — who receives an indirect benefit — his debtor by voluntarily rendering services in his behalf without his express or implied assent.<sup>189</sup>

Had the court stopped here, there would be little or no confusion over its holding, but the court went on by the way of dicta to examine former sections 306, 314 and 315 which dealt with the appointment of special attorneys. First, from its reading of section 306, the court concluded that "only the Attorney General or the United States Attorney could represent the government in an action in court."<sup>190</sup> Then, examining section 314, it noted that payment of legal fees was limited to these officers, except for special attorneys appointed under section 315, after certification by the Attorney General that the work had

183 45 U.S.C. §§ 351-67 (1964).

184 28 U.S.C. § 1346 (1964).

185 *Id.* § 1346 (a)(2).

186 190 F.Supp. at 161.

187 *Id.* This is still true. *See, e.g., Knight Newspapers, Inc. v. United States*, 395 F.2d 353 (6th Cir. 1968).

188 190 F. Supp. at 162.

189 *Id.* at 163.

190 *Id.*

actually been performed.<sup>191</sup> These two facts led the court to rule that there could be no implied in fact contract in this case because:

[O]nly the Attorney General has the authority to make a contract for the special employment of an attorney. Furthermore no attorney can receive counsel fees from the Government except on receipt of the certification of the Attorney General that such services were actually performed. There is no allegation in the complaint of the receipt of such a certificate.<sup>192</sup>

Without the confusing dicta, the import of *Richter* is quite clear and simple. It merely decides no matter how equitable the lawyer's claim to a fee may be, in the absence of an express contract or agreement between the lawyer and the government, the lawyer's claim is procedurally uncognizable under the Tucker Act.<sup>193</sup> Congress in passing the Tucker Act waived the government's sovereign immunity only in cases involving contracts implied in fact not those implied in law. Without prior agreement, any claim by the attorney would have to be based on equitable considerations with the courts creating the obligation as a matter of law. This the courts have no jurisdiction to do under the Tucker Act. *Richter* does not say, however, that such an implied in law contract is not possible if some other jurisdictional basis for suit against the government can be established. This procedural interpretation of the Tucker Act was recently upheld in *United States v. Nation*,<sup>194</sup> decided under the Federal Medical Care Recovery Act.

*Nation* goes far beyond *Richter's* procedural construction of the Tucker Act and seems to close all avenues to recovery where there has been no contact. In *Nation*, an action had been filed in a state court without prior co-ordination with the government. This suit was settled for \$8,000. The release given by the injured party specifically indicated this sum included a recovery of the government's medical costs. The government later sued the tortfeasor. The tortfeasor impleaded the injured party, relying on the terms of the release. The injured party deposited the disputed amount with the court. His attorney objected, arguing that he was entitled to a fee from the government for recovering the medical expenses. His demand was based on the same equitable concept used in *Richter* — that he had created the fund from which the government's recovery was derived. The *Richter* court characterized the government's rights under the Railroad Unemployment Act as a lien or subrogated claim.<sup>195</sup> The *Nation* court, however, identified the government's right under the Act as an independent statutory right, separate and apart from the injured party's claim.<sup>196</sup> If, therefore, the government does not consent to, or in any way participate in, the creation of the fund,

191 *Id.* at 164. Such appointment cannot be retroactive. *Lee v. United States*, 45 Ct. Cl. 57 (1910).

192 190 F.Supp. at 164.

193 28 U.S.C. § 1346 (1964).

194 *United States v. Nation*, 299 F.Supp 266 (N.D. Okla. 1969).

195 45 U.S.C. § 362(o) (1964). The provision reads in part:

Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim. . . .

196 *See e.g.*, *United States v. Merrigan*, 389 F.2d 21 (3d Cir. 1968); and *United States v. Fort Benning Rifle and Pistol Club*, 387 F.2d 884 (5th Cir. 1967).

as it did not in *Nation*, the attorney would be a volunteer and, as such, not entitled to any fee.

If *Richter* and *Nation* are controlling, the attorney will not be able to recover a fee *unless* he can establish a prior agreement between himself and the government. As was seen earlier, this is not the case.<sup>197</sup> The protection of the government's claim is normally the result of direct contact by an enforcement agency. The Army contact letter specifically requires the attorney to agree in writing on the bottom of the letter to represent the government's interest. The other agencies merely require an affirmative reply. Clearly then, there is an explicit agreement between the lawyer and the government. The agreement, however, has specific language which negates any payment of a fee.

The effect of a lawyer's self-help remedy of withholding his fee in the face of the agreement when transmitting the settlement was tested in *United States v. Kapelus*.<sup>198</sup> The Navy, in that case, had contacted Kapelus, who was representing an injured serviceman. Kapelus agreed in writing to include, and did include, the government's claim in his negotiations. When a settlement was reached, the government sent Kapelus a release in favor of the tortfeasor. Kapelus received the settlement check, deducted a portion of his fee and transmitted the remainder of the government's claim to the Navy.<sup>199</sup> The Navy demanded the remainder of the claim, and when Kapelus refused, it sued to recover the fee. The district court held that section 3106<sup>200</sup> prevents the payment of a fee and that the attorney had freely accepted this interpretation of the statute when he agreed to represent the government's interests under the conditions of the original contact letter.<sup>201</sup> He was therefore a volunteer and the government was allowed to recover.<sup>202</sup>

This brings us in a full circle and back to the original question. Does the language of the statutes really compel the agencies' position? A careful analysis of this question is essential, since *Kapelus* and *Nation* indicate that the attorney is at the mercy of the agencies as long as the agencies continue to include language specifically negating fee payment in their contact letters.

Upon hasty examination, it appears that *Kapelus* and *Richter* seem to

197 See text at note 193, *supra*.

198 *United States v. Kapelus*, Civil No. 68-141-F (C.D. Cal., Apr. 30, 1968).

199 *Id.* at 3. The entire problem in this case could have been avoided by the Navy insisting that separate checks be made out by the tortfeasor. In this case, as in many cases, however, such a procedure may not have been possible since there seems to have been a lump sum settlement. In such a case, the exact division between the government and the injured party is left to be worked out by the parties themselves. See text following note 223, *infra*, for a discussion of the problems involved in such a practice. Another case, *Hughes v. Sanders*, 287 F.Supp. 332 (E.D. Okla. 1968) indicates that the defendant has no right to object if a settlement is made or a judgment entered against him which includes the government's claim and the government upon request of the plaintiff waives all or part of its claim. In the case of a lump sum settlement, some protection can be afforded the government by requiring the check from the tortfeasor to be made out in the name of the government and the injured party jointly, and then have the injured party indorse the check first. If, at a later date, the government wishes to waive its claim, it can deposit the check and issue a government check in payment. See COMP. GEN. DEC. B-157663 (Oct. 12, 1965) (unpublished) on file with the NOTRE DAME LAWYER. Such a requirement might be distasteful to some judge advocates as it could be interpreted as a lack of faith by the government in the civilian attorney.

200 5 U.S.C. § 3106 (Supp. III, 1968).

201 Civil No. 68-141-F at 3 (C.D. Calif. Apr. 30, 1968).

202 *Id.*

support the government's position. *Kapelus*, however, does not carry the weight one might suppose and can quickly be discounted. It is a memorandum decision which cites no authority for its position and contains no discussion of the statutes involved. Further, while it clearly held that section 3106<sup>203</sup> prevented the payment of attorneys' fees, the court also held that *Kapelus* had accepted this interpretation of the statute by agreeing to the terms of the initial contact letter. It is submitted that the acceptance by *Kapelus* is a much stronger basis for the decision.

The dicta in *Richter* cannot be as quickly discounted. The key, however, is not what the court *said* but what it *assumed*. *Richter* said that only the Attorney General or a United States Attorney, either regular or special, could represent the United States in court and be paid for doing so. This is a fair interpretation of the intent of the former sections,<sup>204</sup> and this intent becomes quite clear upon reading the revised section.<sup>205</sup>

The extent of the prohibition against private counsel lies in the meaning of "conduct of, or securing evidence for litigation," used in both of the new sections. The government relies on *Richter* as authority for interpreting these words to be at least as broad as "representing the United States in court" as used in *Richter*. No one would question that the new sections and *Richter* both prohibit the use and payment of a private attorney in actual courtroom proceedings where the United States or one of its agencies or officers was a named party.<sup>206</sup> But does the prohibition extend beyond the actual conduct of litigation *in the courtroom*? The *Richter* court appears to make the assumption that it does, and the government has seized upon this conclusion as the basis for the language in the contact letters. The facts in *Richter* reveal that the attorney did not have to sue. The case was settled.<sup>207</sup> Therefore, the court, in barring the recovery by the attorney, equated the representation of the United States in negotiations toward settlement short of court action with representation of the United States in actual litigation and, in effect, held that these functions are reserved for the Attorney General or a United States Attorney, either regular or special. The invalidity of the assumption as to negotiations can quickly be seen from an

203 5 U.S.C. § 3106 (Supp. III, 1968).

204 See note 181, *supra*. Section 306 technically only prohibited such representation in the Supreme Court and Court of Claims. The statute reads:

[S]hall . . . conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims . . . .

If "shall" were taken in its imperative sense, representations in all other courts would be voluntary and could therefore give rise to a claim for compensation.

205 See note 181, *supra*.

206 Since the statutes go further and prohibit both the use and payment of private attorneys where the United States, its officers, or agencies, "is interested" in the litigation, there is a very difficult question as to whether or not a private attorney can represent the government's interest by the inclusion of the suggested allegation in the complaint of the injured party's suit. 5 U.S.C. § 3106 (Supp. III, 1968); 28 U.S.C. § 516 (Supp. II, 1966). See note 174, *supra*, for the suggested allegation.

207 The same is true in both *United States v. Kapelus*, Civil No. 68-141-F (C.D. Calif. Apr. 30, 1968) and *United States v. Nation*, 299 F. Supp. 266 (N.D. Okla. 1969), although, in both these cases, suit had been filed. Where suit has been filed, the problem arises as to whether from that point on the United States attorney must handle the case. This should not, however, be too great a problem since Roseberg and Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1116, 1124 (1959) report that 65% of all personal injury suits are settled prior to trial and Cassidy, at 6, reports that 90 to 95% of Medical Recovery claims are settled out of court.

examination of the organization of the various enforcement departments and agencies. These bodies employ literally hundreds of lawyers *both civilian and military* to represent them in direct *negotiations* with the tortfeasors and their insurance companies. For example, the Navy Department has estimated that thirty percent of the claims it collects under the Act are the result of direct negotiation by its personnel.<sup>208</sup> If the *Richter* assumption is correct, then it would appear that the agencies are constantly violating the statutory prohibition. If, as *Richter* seems to say, only the Attorney General or a United States Attorney can represent the government, then there is no room for agency exceptions.

Such a drastic interpretation of the statute might have been justified under the language of former section 306, which specifically required the various department heads to seek counsel from the Department of Justice on all legal matters.<sup>209</sup> Such a system may have been workable when the statute was originally enacted in 1871, but department heads have long since ceased to rely on the Department of Justice for legal advice and now retain their own staff counsel. This practice was well-known to Congress when the language requiring consultation was omitted when section 306 was rewritten and renumbered as section 516.<sup>210</sup>

The interpretation urged by the government would reduce the function of the various agencies under the Act to the securing and compiling of background data for claims. Conceivably, even this limited function might be a violation of the Act, since it prohibits the securing of evidence for litigation.<sup>211</sup> This would place the entire burden of investigating, negotiating, and suing on the claim, if necessary, upon the Department of Justice. Clearly such an interpretation was not contemplated by the Act<sup>212</sup> or regulations issued by the Attorney General,<sup>213</sup> nor could it have been contemplated by the various agencies when they promulgated regulations under the Act requiring the exhaustion of administrative collection procedures within the departments prior to the forwarding of any case to the Department of Justice.

The question, then, is not whether sections 3106 and 516 (formerly section 306) prohibit the use and payment of counsel other than the Attorney General or the United States Attorney in the negotiation stages prior to the filing of suit,<sup>214</sup> but it is whether other statutes prohibit the use of private attorneys on a part-time, case-by-case basis, rather than the use of full-time civil service or military counsel. One author has suggested that section 5502<sup>215</sup> is such a statute;<sup>216</sup> but a close reading of this section reveals that it merely prohibits payment to a person claiming to

208 Cassady, at 15.

209 This section reads in part:

The officers of the Department of Justice . . . shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable . . . heads of Departments . . . to discharge their respective duties. 5 U.S.C. § 306 (1964).

210 28 U.S.C.A. § 516 (1968) (Reviser's Explanatory Note).

211 Cf. Cassady.

212 42 U.S.C. § 2652(b) (1964) contemplates compromise and waiver by the various agency heads.

213 28 C.F.R. § 43.3 (1969) contains a specific delegation of waiver and compromise authority to the agency heads. These agency heads have further delegated the authority. See e.g., Army Reg. 27-38, ¶ 4-3 (Jan. 15, 1969).

214 *Id.* ¶ 4-5.

215 5 U.S.C. § 5502 (1964).

216 Noone, *May Plaintiffs Include the United States' Claim Under the Federal Medical*

hold an office or position which does not legally exist. It does not resolve the question whether such offices presently exist or can be legally created by the various department heads to which the private attorneys can be appointed. The problem does not seem too different from that presented by the use of non-government, part-time consultants, which seem to be used in profusion throughout the government and which are presumably paid.

While the government may still adhere to its official position and lament the woes of its "volunteer" attorneys,<sup>217</sup> the true test should be in seeking an opinion from the Comptroller General or in an attempt by an agency to secure counsel without the restrictive clause in the agreement letter, thereby opening the way for a court test.<sup>218</sup> Without a more definitive position by the government or the courts, the present structure can only continue to frustrate the profession.

### B. *Alternative Means of Obtaining Fee Payment*

#### 1. APPOINTMENT AS SPECIAL UNITED STATES ATTORNEY

Should the above approach fail, either as a result of an adverse decision as to the ability to hire legal counsel or because of a lack of authority to hire consultants, all is not lost. *Richter* suggests another approach to this problem. Section 314 of the former statutes<sup>219</sup> provides that the Attorney General is authorized to appoint special Assistant United States Attorneys "when the public interest so requires." There would seem to be no legal objection to the appointment of private counsel as special Assistant United States Attorneys on a case-by-case basis.<sup>220</sup>

While there is no legal reason why this cannot be done, there are a number of factors which make this method a definite second choice to direct employment by the agency affected. The most obvious problem is that these appointments must be made directly by the Attorney General. This would require the enforcement agency claims officer to promptly notify the Department of Justice. Since direct contact with the Department of Justice is not authorized from the field level, this would greatly increase the amount of administrative work at the agency staff level. Further, it is understood that it is the present policy of the Department of Justice not to make such a special appointment without a security clearance by the FBI. With the large number of claims that are being processed by private attorneys under the present administrative set-up, such appointments would create insurmountable problems.

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*Care Recovery Act Without Government Intervention?* 10 AF JAG L. REV. 20, 21 (1968) [hereinafter cited as Noone].

217 The use of experts and consultants is controlled by 5 U.S.C. § 3109 (Supp. II, 1966). *Boyle v. United States*, 309 F.2d 399 (Ct. Cl.1962) makes it clear that attorneys can be hired under this section. This provision is not, however, the final word as it only applies when the agency head is authorized by other statutes or appropriations to hire these consultants. The basic authority to hire consultants, therefore, must be found elsewhere. For example, the General Services Administration has such authority in 40 U.S.C. § 758 (Supp. II, 1966).

218 A sample of the letter may be found at note 174, *supra*.

219 This section is now 28 U.S.C. § 542 (Supp. II, 1966).

220 There cannot, however, be any retroactive appointment. *Lee v. United States*, 45 Ct. Cl. 57 (1910).



Even if these administrative difficulties could be overcome by a simplified process of appointment, there is one other major drawback from the practicing lawyer's point of view. As a special Assistant United States Attorney, the private counsel would be under the control and supervision of the Attorney General in the conduct of the case so far as the government's claim is concerned. Most private attorneys are not willing to surrender control over the practical aspects of the case. Avoidance of government interference and control is often one of the prime reasons for taking on the additional burden of representing the government's interest. To submit to this control as a special Assistant United States Attorney would be to lose any advantage gained by such representation.

Therefore, while appointment as a special Assistant United States Attorney remains as a legal means to pay counsel for representing the government's interest, its practical usefulness is greatly limited by the present administrative procedure. This device should be considered only if other suggested alternatives fail and the pressure for the payment of fees becomes unbearable.

## 2. STATUTORY AMENDMENT

The most obvious way to overcome the inequity of no fee payment would be to amend the Act to include a provision specifically authorizing such payments. At least one attempt to amend the statute has been made. On March 23, 1965, H.R. 6642 was introduced in the House of Representatives.<sup>221</sup> This bill would have amended the first section of the Act to include a clause allowing the employment of, and payment of a pro rata fee of up to twenty-five percent of the government's claim to the injured party's counsel for representing the government's interests in any case which the United States either joined or intervened.<sup>222</sup> This bill would not, however, help the lawyer in most situations — since most cases are settled by negotiation prior to suit. Any new proposed legislation should make provision for payment of a fee regardless of whether the suit goes to trial or is settled at any stage by negotiation. This fact should then be made clear to the lawyer at the time he agrees to handle the government's claim. Such a change would also preclude an ethical conflict between the government's desire to settle and the lawyer's interest in seeing that it go to trial so that he can collect his fee.

Likewise, future legislation should make it clear that the statute will apply regardless of the form in which the United States participates. H.R. 6642 was subject to the interpretation that payment is to be forthcoming only if the United States joins or intervenes as a party plaintiff. This should be clarified to include payment when the United States attempts to assert its claim *through* the injured party without being named as a party plaintiff.

## 3. PASSING THE FEE ON TO THE INJURED PARTY

Assuming that under the present circumstances no fee can be collected from the government, can the cost of handling the government's interest be

<sup>221</sup> 111 CONG. REC. 5719.

<sup>222</sup> 42 U.S.C. § 2651(b) (1954).

passed on to the injured party by basing the contingent fee upon the gross recovery before deducting the government's share? This practice is presently widespread,<sup>223</sup> but presents a difficult ethical problem.

The Act creates a separate and distinct cause of action on the part of the government, completely independent of the injured party's interest.<sup>224</sup> It can be argued that to charge the injured party for collection of the government's claim would be improper. It would be akin to charging one client the entire fee where the lawyer represented two separate clients in an action for injuries arising out of the same accident.

This analysis has led one author to conclude that such a fee arrangement is unethical.<sup>225</sup> But even if we assume that such an agreement is not unethical per se (on the theory that the client is free to contract as he pleases for fee payment), the lawyer owes his client a duty to fully and completely disclose his intention to base his fee on the gross recovery and to secure a specific and intelligently executed consent to such arrangement.<sup>226</sup> Mere knowledge on the part of the injured party may not be enough to protect him.

The injured party may, however, find that he is unable to secure representation of his interest *unless* he agrees to a fee calculated in this manner. Realizing the problems presented here, the Army, in order to protect its members from a situation not of their own making,<sup>227</sup> specifically requires<sup>228</sup> that the attorney agree in writing at the time he accepts the obligation of representing the government that his fee from the injured party will not be based on the amount of the government's claim.<sup>229</sup>

One good argument to the contrary is that the government's claim should be treated like any other medical expense. In the case of ordinary hospital or doctor bills, the client has incurred a contractual obligation to pay the bills, but he is entitled to pass these costs on to the tortfeasor in the form of special damages.<sup>230</sup> The calculation of attorney's fee under these circumstances involves no

223 Cassady, at 21, 48.

224 See note 196, *supra*. In *Irby v. Government Employees Ins. Co.*, 175 So.2d 9 (La. App. 1965) the court said:

Two distinct and separate claims were involved in the settlements made with the tort-feasor and his insurer. One was the government's claim for medical and hospital services; the other was plaintiff's claim for personal injuries. The understanding between the government and the plaintiff's attorney was that the latter would process the government's claim for the government, I.E., forward the government's release to the tort-feasor's insurer with directions to that insurer to issue a draft drawn to the order of the proper governmental department. Thus, in connection with the \$312 settlement for medical and hospital expenses, plaintiff's attorney was acting for the government and not for the plaintiff. *Id.* at 11.

225 Cassady at 47.

226 Cassady argues that to do otherwise is a breach of the fee contract. *Id.* at 48. In many cases this notice requirement may involve a renegotiation of the fee agreement at the time the government's interest becomes apparent since the original fee arrangement often will be made before the government's interest is known.

227 True, the problem arose as a result of their acceptance of government medical care, but they are entitled to this care in any event, and probably did not consider the consequences of such acceptance at the time the care was rendered.

228 Army Reg. 27-38, ¶ 4-1(b) (Jan. 15, 1969).

229 The Navy takes the same position but does not require a written agreement. See Navy contact letter, reprinted in Cassady at 16-19.

230 In some states the bills if unpaid are a lien upon the recovery. See e.g., TEX. REV. CIV. STAT. ANN. art. 5506(a). Fori, *Hospital Recovery — An Additional Tool*, 12 AF JAG L. REV. 158 (1970) suggests that Judge Advocates consider using these statutes to recover when, for some reason, recovery cannot be had under the Act.

deduction for these bills; the fee is based on the gross amount recovered. The Air Force seems to approve of this approach<sup>231</sup> when it states that the question of fee paid by the injured party is a matter of private contract between the injured party and private counsel and of no concern to the Air Force.

The obvious problem with this approach is that it ignores the separate, statutorily based, legal status of the government's claim. Under the ordinary case, the entire claim is the client's indivisible cause of action with the hospital or doctor at best having only a statutory lien upon the recovery. This is not true of the government's claim.<sup>232</sup> Should the technical legal description of the government's claim govern the practical method of calculating the attorney's fee? This is a great, unanswered question which can only be resolved by the good judgment of individual lawyer and the various local bar associations.

Fee payment will remain one of the most difficult areas in the relations between the attorney, his client, and the government. There is no question that the lawyer should be paid for the time and efforts he expends on the government's behalf. This is his stock-in-trade and he should not be forced to give it away; nor should the injured party have to bear the burden of the cost of collection of the government's claim. The government receives the benefit; the government should pay the costs. Steps should be taken now by the government to either pay the attorneys for their services or discontinue the use of private counsel.

The latter course may be the more desirable in the long run for a number of reasons; but a quick examination of the number of cases currently handled by private attorneys and the present workload of the existing agency and Department of Justice staffs will reveal that such a course is impossible without an enormous, overnight staff expansion. Since such staff expansion is not currently practical, efforts must be made to pay private counsel for his work. As outlined above,<sup>233</sup> this may not be as difficult as the agencies claim and may only require the reversal of an ill-considered government interpretation of section 3106.

### C. Representation by Private Counsel

The specific language of section 3106 clearly indicates that a private attorney cannot represent the government's claim in an action where the United States was a named party.<sup>234</sup> But the language of this section does not necessarily prevent the inclusion of the government's claim by use of an allegation in the injured party's complaint.<sup>235</sup> Two authors who have written about this problem,

231 Air Force Manual 112-1, Annotations to ¶ 15-14(e) (Oct. 29, 1969).

232 See note 196, *supra*.

233 See text accompanying notes 209-14, *supra*.

234 For the text of this section, see note 181, *supra*.

235 The suggested allegation reads:

As a result of said injuries the plaintiff has received (and in the future will receive) medical and hospital care and treatment furnished by the United States of America. The plaintiff, for the sole use and benefit of the United States of America under the provisions of 42 United States Code 2651-2653, and with its express consent, asserts a claim for the reasonable value of said (past and future) care and treatment. Air Force Manual 112-1, ¶ 15-14(d) (1969).

Cassady and Noone, disagree.<sup>236</sup> The disagreement centers around two points: the first is whether the language of section 3106 prevents any trial representation at all by a private attorney; the second is whether the United States is a real party in interest, thus requiring that it be named in the suit in order to be able to recover.

Cassady takes the position that the use of the word "employ" is the key to the meaning of section 3106.<sup>237</sup> He argues that "employ" means more than merely paying counsel. It means *use*.<sup>238</sup> It is possible to employ or use a counsel in a broad sense without promising to pay him anything. He therefore concludes that section 3106 prohibits the use of *any* attorney outside the Attorney General's office. There is some logic to this interpretation. The argument for its use here, however, seems to break down when the agency practice of hiring full-time, staff counsel is considered. Cassady fully recognizes this practice and merely treats it as an exception.<sup>239</sup>

Noone, on the other hand, claims that section 3106 has nothing to do with representation but is merely "intended to prevent the obligation of Government funds for attorney's fees . . ."<sup>240</sup> In this contention he is supported by *United States v. Denton*.<sup>241</sup> There, the court, speaking of this prohibition, said that "History shows that such requirements were a result of duplication of expenditure by the government in prosecution of causes and defense of claims."<sup>242</sup>

The problem with both approaches is that they fail to consider the whole problem. Cassady is right that the word "employ" has a broader meaning than merely a prohibition against *payment* for services performed. He fails, however, to consider the statute in its entirety, which prohibits the employment only "for the conduct of litigation in which the United States, an agency, or an employee thereof is a party, or is interested. . . ."<sup>243</sup> He does not attempt to answer the difficult question whether the inclusion of the government's claim in the injured party's complaint makes the suit "litigation in which the United States . . . is interested."<sup>244</sup>

Noone does not consider this problem either; he seems to tacitly accept that such inclusion would fall within the prohibition. He attempts to avoid its application by showing that it applies only to compensation.<sup>245</sup> In doing so, he fails to consider the entire legislative history of the section. It was originally the Act of June 22, 1870,<sup>246</sup> which created the Department of Justice. Noone and the *Denton* Court are quite correct in saying that one of the reasons for creating the Department of Justice and giving it responsibility for handling all litigation was to prevent the hiring of private counsel when the government had

236 Noone at 20; Cassady at 31.

237 See Cassady, at 19.

238 *Id.* at 20.

239 *Id.* at 4, n.11.

240 See, Noone, at 21.

241 307 F.2d 336 (6th Cir. 1962), *cert. denied* 371 U.S. 923 (1962).

242 *Id.* at 338.

243 5 U.S.C. § 3106 (Supp. III, 1968).

244 *Id.* As has already been seen, he does not need to consider this point because he maintains that the government cannot legally use private attorneys at any stage of the recovery program.

245 Cf. Noone at 10.

246 Ch. 150, 16 Stat. 162. See *United States v. Crosthwaite*, 168 U.S. 375 (1897).

full-time employees who could handle the cases. This was *not the only purpose*, however, in establishing the Department and charging it with this duty. Equally important were providing a uniform interpretation of the various statutes throughout the government agencies and development of a consistent position in government litigation.<sup>247</sup> The need for such consistency under the Act is indicated by the provision in all the agency regulations that all cases involving a new point of law will be referred to the Department of Justice.<sup>248</sup> Noone's analysis, therefore, is not convincing.

The problem remains as to whether or not this inclusion of the government claim in the injured party's suit makes the suit "litigation in which the United States is interested."<sup>249</sup> There has been no direct answer to this question; there is, however, some indication that it may be severable when one considers the arguments surrounding the second point of controversy — whether the United States is, in fact, a real party in interest.<sup>250</sup>

Cassady maintains that since the right of recovery under the Act is an independent right or cause of action,<sup>251</sup> the United States is a real party in interest and as such must be a named party in the suit.<sup>252</sup> Bernzweig<sup>253</sup> agrees that the United States is a real party in interest, but points out that the United States cannot be forced to intervene under a state "real party in interest" statute.<sup>254</sup> Where the government chooses to attempt to assert its rights in a state court through the inclusion of an allegation<sup>255</sup> in the injured party's complaint, the state court should, if Cassady is right, have the right to strike the allegation since the government is an indispensable party.<sup>256</sup> This would force the United States either to join as a named party or seek enforcement of its right elsewhere.<sup>257</sup>

Noone, the Department of Justice<sup>258</sup> and the Air Force<sup>259</sup> say no.<sup>260</sup> They claim that the Act<sup>261</sup> establishes the government's right as one of subrogation; therefore, the normal subrogation rules apply. In most states,<sup>262</sup> a subrogee or assignor can bring suit for the entire claim in his own name,<sup>263</sup> and the final

247 This intent is further evidenced by 28 U.S.C. § 516 (Supp. II, 1966) which reserves representation or conduct of litigation to the Department of Justice.

248 See, e.g., Army Reg. 27-38, ¶ 4-5(d) (Jan. 15, 1969).

249 See text accompanying note 234, *supra*.

250 See text following note 239, *supra*.

251 See Cassady at 31-32; See also note 196, *supra*.

252 FED. R. CIV. P. 18. See also *Louisiana v. Texas Co.*, 38 F.Supp. 860 (E.D. La. 1941) holds that a state is the real party in interest when the relief sought inures to its benefit alone and if a judgment for the plaintiff will effectively operate in the state's favor.

253 Bernzweig, *Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 COLUM. L. REV. 1257, 1270 n.82 (1964).

254 Citing *United States v. Sherwood*, 312 U.S. 584 (1941).

255 See note 235, *supra*.

256 *McWhirter v. Otis Elevator Co.*, 40 F. Supp. 11 (W.D. S.C. 1941) holds that a defendant has the right to be sued by the real party in interest so that the judgment will fully protect him against further suits.

257 The United States can always enforce its rights by independent suit in the federal courts.

258 U.S. Dep't of Justice Memo, Suggested Procedures for Collection of Claims For Value of Medical Care (Sept. 1, 1964), on file with the NOTRE DAME LAWYER.

259 AFJAG REPTR. 29, item IB (1964).

260 Noone at 20.

261 42 U.S.C. § 2651(b) (1964).

262 Annot., 157 A.L.R. 1242 (1945). Noone at 21-27 brings this annotation down to date.

263 In those states which do not recognize the collateral source rule or require the subrogee to sue separately in his own name, this theory will not work. Louisiana is such a state. See note 267, *infra*.

division of the judgment is a matter of no concern to the defendant.<sup>264</sup> Under this latter theory, recovery has been had in many cases brought by private counsel where the question of the propriety of the practice has not been examined.<sup>265</sup>

The courts are about evenly divided over whether the United States is a real party in interest or whether the government can enforce its rights by subrogation. The question was first raised in 1965 in *Smith v. Fouca*.<sup>266</sup> In that case the government's claim was dismissed on appeal. The court held that the government's claim was a subrogated claim and that under Louisiana law<sup>267</sup> the subrogee must sue in his own right to recover his interest.<sup>268</sup>

The problem again arose in 1968. Early in the year, the Chief of the Justice Department's Civil Division informed the various agencies<sup>269</sup> that three of the District of Columbia district court judges had held that private lawyers could not represent the government's interest and that the United States Attorney would have to intervene. Apparently this was an informal opinion, rendered in chambers, and the basis of the holding is not available.<sup>270</sup>

This problem was recently considered by a New York court in *Carrington v. Vanlander*.<sup>271</sup> Here the plaintiff's attorney wanted to amend the complaint to include the government's claim. The court denied the motion to amend, saying that the government could intervene as a party, but under the New York statute<sup>272</sup> could not sue the defendant in the guise of an amendment to the plaintiff's petition.

By way of contrast, three other recent cases, *Conley v. Maatala*,<sup>273</sup> *Kaplan v. Bella*,<sup>274</sup> and *Marshall v. Cuttrel*,<sup>275</sup> refused to dismiss the plaintiff's allegations incorporating the government's claim. In all three cases, the government had furnished the private attorney with a letter authorizing him to include the allegation in the injured party's suit and agreeing that the government would

264 See *Hughes v. Sanders*, 287 F. Supp. 332 (E.D. Okla. 1968), where a judgment was rendered against the defendant and the government later waived its claim. Upon learning this, the defendant petitioned to have the judgment reduced by the amount of the government's claim. The court refused to reduce the judgment on the basis that this was a matter of grace granted by the sovereign. *Id.* at 334.

265 *Id.* Earlier, another district court had said, in *United States v. Bartholomew*, 266 F. Supp. 213 (W.D. Okla. 1967), that the plaintiff must have incurred the expenses before he could bring suit under Oklahoma law. In other words, Oklahoma would not recognize the collateral source rule.

266 172 So.2d 318 (La. App. 1965). See also, *Avery v. Smith*, 216 So.2d 111, 114 (La. App. 1968).

267 2 LA. CIV. CODE art. 697 (West 1960).

268 A later case, *Irby v. Government Employees Ins. Co.*, 175 So.2d 9, 11 (La. App. 1965), quoted in part in note 224, *supra*, recognizes the right of a private attorney to represent the government in negotiations leading to a settlement.

269 The copy of the letter addressed to the Judge Advocate General of the Navy is reprinted in full in *Cassady*, at 34 n.56.

270 A personal interview between the author and members of the Department of Justice revealed that the present practice is for the United States Attorney to have one of his assistants appear, but the case is handled completely by the private attorney.

271 58 Misc.2d 80, 294 N.Y.S.2d 412 (Sup. Ct., Oswego Ct., 1968).

272 N.Y. CIV. PRAC. § 1004 (McKinney 1963). This statute indicates that joinder is unnecessary where an insured has given the insurance company a subrogation agreement. The insured can sue for the entire claim.

273 303 F. Supp. 484 (D. N.H. 1969).

274 Civil No. 68-229 (W.D. Tex. May 26, 1969).

275 Civil No. 70-254 (W.D. Okla., Aug. 4, 1970).

be bound by the outcome of the suit. None of the three cases discusses the question in detail, but *Conley* is clearly pitched on the right of the subrogor to recover the entire claim.

Since all of these decisions are subject to possible appeal, and since all placed the government's argument in its most favorable light, it cannot be said that the problem is finally resolved; it would, however, seem that both Noone and Cassady are right in their analysis. A careful reading of the first section of the Act will reveal that the government is granted an *independent* right;<sup>276</sup> but to enforce that right, the government is further *subrogated* to any rights of the injured party.<sup>277</sup> It would thus appear that the government can choose the method by which it will enforce its rights. If it chooses to enforce the right as an independent cause of action, then the Cassady analysis seems correct and the United States should not be able to enforce its rights through the suit of the private attorney.<sup>278</sup> On the other hand, the government could select to enforce its rights on a subrogated basis, in which case the Noone theory would seem proper. If, however, the government chooses this method, it should also suffer any other consequences of subrogation — such as having its suit barred by defenses which are good against the plaintiff but which would not have applied to the government if it had chosen to enforce its independent right by intervention or separate suit.<sup>279</sup>

#### D. *Ethical Problems*

The last problem which merits passing consideration is that of the ethical considerations arising when the practicing lawyer attempts to represent both the government's interest and that of the injured party. Because of the contact letter,<sup>280</sup> there is little question that an attorney-client relationship is created when the injured party's attorney agrees to protect the government's claim.<sup>281</sup> Certainly, the lack of a fee paid by the government will not preclude what would otherwise be such a relationship.

276 42 U.S.C. § 2651(a) (1954). That section provides:

In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover . . . the reasonable value of 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 . . . person . . . has . . . .

277 Does this mean that the injured party cannot sue for these costs under the collateral source rule? The defendant, in *Kaplin v. Bella*, Civil No. 68-229-SA (W.D. Tex., May 26, 1969), thought so. See Defendant's Memorandum Brief for Partial Summary Judgment, *Kaplin v. Bella*, *supra*, at 2-3, on file with the NOTRE DAME LAWYER. This question is also discussed in note 50, *supra*.

278 It is conceivable that an argument can be made that the practice of including the suggested allegation is supported by the language of 42 U.S.C. § 2651(b) which authorizes the United States to sue either in its own name or in the name of the injured party.

279 For a general discussion of the government as a subrogee under the Act, see Turner, *Hospital Claims*; 42 U.S.C. 2651: *The United States as Subrogee* 12 AF JAG L. REV. 44 (1970).

280 See note 174, *supra*.

281 The existence of this relationship was confirmed in *Irby v. Government Employees Ins. Co.*, 175 So.2d 9 (La. App. 1965).

The ethical problems that private counsel faces here are very similar to those with which he must contend when he attempts to represent both a tortfeasor and his insurance company.<sup>282</sup> There will definitely be some times when the interest of his two clients will conflict. For example, in most cases it is to the advantage of the government to reach a quick settlement<sup>283</sup> since its damages are readily ascertainable and not open to much question.<sup>284</sup> On the other hand, the injured party's case may not lend itself to early settlement. Should the lawyer recommend acceptance of an early settlement or the extended delay that a trial will bring? Either does not do justice to one of his clients.

The conflict becomes most obvious and potentially dangerous when the attorney attempts to apportion the proceeds of a proposed settlement offer or judgment between the government's claim and that of the injured party. It can be argued with some validity that the attorney's obligation to the government ceases when the settlement or judgment is received, and that he becomes solely an advocate for the injured party's interest with the government claims personnel. It is, however, unrealistic to say that the final distribution of the settlement or judgment is not one of the major factors in the mind of the lawyer when he conducts his negotiations or presents the case in court. Often the ethical problems are further complicated by the fact that it is to his financial interest to favor the injured party over the government since the government pays him no fee.

Presently, there are no clear-cut answers to this dilemma. The profession is just beginning to consider whether the general guidelines it has developed in the form of the Code of Professional Ethics<sup>285</sup> should prevent the lawyer representing both the insurance company and its policy-holder. Until some definite

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282 For a recent discussion of this problem in the case of injured parties and uninsured motorist insurance carriers, see Walsh, *Subrogation Under Uninsured Motorist Insurance*, 10 B.C. IND. & COM. L. REV. 77, 97 (1968).

283 It was the whole purpose of the Act to provide a system for quick administrative collections which would not involve frequent litigation. See, Letter from John M. Sprague, Deputy Assistant Secretary of Defense, to William A. Newman, Jr., Director, Defense Accounting and Auditing Division, General Accounting Office, Feb. 26, 1960, reproduced in the appendix to COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF THE GOVERNMENT'S RIGHTS AND PRACTICES CONCERNING RECOVERY OF THE COST OF HOSPITAL AND MEDICAL SERVICES IN NEGLIGENT THIRD-PARTY CASES at 21 (1960).

284 *Phillips v. Trame*, 252 F. Supp. 948 (E.D. Ill. 1966) holds that the rates established by the Bureau of the Budget are not subject to attack. Under 42 U.S.C. § 2652(a) (1964) the President may establish appropriate rates. He has in turn delegated this authority to the Bureau of the Budget. Exec. Order No. 11060, 3 C.F.R. 260 (Supp. 1962). Presidential Orders prescribing regulations under federal statutes are to be treated as if they were a part of the statute. *Mitchell v. Flintkote Co.*, 185 F.2d 1008 (2d Cir. 1951), cert. denied, 341 U.S. 931 (1951). Currently the rate is \$53 per in-patient day. 34 Fed. Reg. 14252 (1969). However, the medical necessity for the hospitalization can be challenged. *Murphy v. Smith*, 243 F. Supp. 1006 (E.D. S.C. 1965) and *Tolliver v. Shumate*, 150 S.E.2d 579 (W. Va. 1966). Address by Edward S. Ring, Vice President, Government Employees Insurance Company, to 30th Annual NAIIA Convention, Portland, Oregon, May, 1967, on file with the NOTRE DAME LAWYER, suggests that most military hospitals divide their patients into five categories: Class I, authorized to go on pass at any time; Class II, authorized to go on pass on Wednesdays and weekends only; Class III, ward patient authorized to work and walk around the hospital, but not to go on pass; Class IV, bed patient with bathroom privileges; Class V, strict bed patients. He argues that by civilian hospital standards Classes I and II would not be hospitalized and those in Classes III and IV are subject to question.

285 American Bar Association, Code of Professional Ethics, Canon 6, 33 ABA REPORT 61 (1908).



answer is formulated to that analogous problem, it will be up to each individual attorney to decide for himself whether he can ethically represent both the government and the injured party. The problem is, however, one which he should consider before rushing headlong into a relationship with the government.<sup>286</sup>

### E. *Advantages to the Lawyer*

Up to this point, the focus has been on the problems which the practicing attorney must contend with when he agrees to handle the government's claim. Even with these problems, in over seventy percent of the cases under the Act, private counsel has agreed to accept the additional burden of protecting the government's claim. Since the government does not pay a fee, there must be some benefit which will accrue to counsel. The main benefits the government offers are set out in the original contact letter to the attorney.<sup>287</sup> Basically the government agrees to: (1) give counsel complete control over the handling of the case<sup>288</sup> and (2) to furnish all medical records in its possession and, where possible, make available medical personnel to appear in court.<sup>289</sup>

There are a number of advantages that the practicing attorney receives by having complete control over both the government's claim and that of the injured party. This means that the tortfeasor and his insurance company deal with only one person. Further, the lawyer can control the release of information to the tortfeasor and the direction of the negotiations. At the same time, it prevents the tortfeasor from exploiting any difference of opinion as to whether to accept any particular settlement offer. If the case goes to trial, the injured party's attorney will be able to develop his case as a whole without interference from the United States Attorney and without suffering the prejudice in the eyes of the jury that might result if the United States was a party plaintiff.

As important as this right to control the government's claim and to be free of interference is, it is probably overshadowed by the promise to make medical records<sup>290</sup> and government medical personnel available to testify without fee.<sup>291</sup> The main advantage is that the government places no restrictions on the use of the medical witnesses. They will obviously testify to support the government's

286 The injured party should also be informed and given the chance of objecting to his attorney representing the government.

287 See note 174, *supra*.

288 It is possible to get the government to agree to a percentage settlement of the final recovery prior to negotiation. Cf. Air Force Manual 112-1, ¶ 15-18(e) (Oct. 29, 1969).

289 When the personnel who rendered the treatment have been transferred to remote duty stations or have been discharged, the government cannot make these witnesses available.

290 See Cassady at 43. He maintains that the government medical records are subject to *subpoena duces tecum*. This question is not as free from doubt as Cassady would have one believe. The services have extensive regulations concerning the handling of the receipt of such subpoenas and what actions will be taken. In the area of the Recovery Act, the Attorney General's regulations, 28 C.F.R. § 43.2(b) (1969), promulgated to implement the Act, specifically authorizes the withholding of such records for non-cooperation by the injured party. Whether the federal supremacy clause would protect records withheld under this regulation from disclosure under an order by a state court is an unanswered question.

291 Cassady at 43 also indicates that many private attorneys misunderstand and think that the government will foot the bill for civilian medical experts.

claim, but can also be used as the injured party's star witness as to the nature, treatment, and extent of the injured party's injuries.<sup>292</sup>

This promise has been a mixed blessing at best. If there is any one overwhelming criticism of the government's recovery program by the practicing attorneys, it is that the government has failed to live up to its promise to furnish these witnesses.<sup>293</sup> Problems in this area have led the Army to discontinue the offer of medical witnesses in its initial contact letter.<sup>294</sup> The other agencies which have continued to offer this inducement vary as to what they mean by making medical witnesses available. The Air Force has taken the broadest position and will send the attending physician on a temporary duty at government expense to a trial that is within a *reasonable distance* of his duty station.<sup>295</sup> The Department of Justice has taken the unofficial position that the government's obligation extends no further than providing some medical personnel — not necessarily the attending doctor — to testify based upon the medical records (with no examination of the injured party) that the treatment rendered was appropriate and necessary for injuries incurred. Further, it maintains that even this limited witness service does not have to be furnished unless there is an installation convenient to the place of trial where such personnel are assigned.<sup>296</sup>

## VII. Conclusion

In spite of the various problems in both the official and unofficial recovery programs outlined above, the system continues to work and the number and amount of the recoveries have grown steadily each year.<sup>297</sup> Likewise, private attorneys continue to represent the government in a large majority of the cases.

It is hoped that the foregoing discussion will furnish the practicing lawyer with a basic understanding of the government's operations under the Federal Medical Care Recovery Act. As is the case with all things new, there has been a tendency upon the part of many lawyers to ignore the Act. The increased effectiveness of the government's enforcement program, however, has made such an attitude one of professional irresponsibility. No longer can the attorney dis-

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292 Noone at 13 reports that three Air Force doctors and one therapist helped an injured party recover \$87,500 while the government recouped \$13,000. In another case, the injured pilot recovered \$110,000 and the government \$6,000 on the basis of government medical testimony.

293 Cassady at 43.

294 Letter, JAGL-T 1967, Administration of Affirmative Tort Claims (A.R.'s 27-37 and 27-38), (Nov. 2, 1967), on file with the NOTRE DAME LAWYER.

295 Air Force Manual 112-1, ¶ 15-23(d) (Oct. 29, 1969). Requests for these witnesses must be cleared through the Judge Advocate General in Washington if it involves temporary duty or travel. *Id.* Noone, note 268, *supra*, reports that the longest trip to date was from Keesler AFB, Miss., to Anchorage, Alaska. Quite obviously there is the problem that the treating physician has been transferred to a point halfway around the world or has been discharged from the service. In these cases the Air Force cannot make the personnel available.

296 Personal interview between the author and various Department personnel.

297 For example, Department of Justice figures show the growth in the amount of recoveries in 1967 over 1966 to be 14.3% and in 1968 to be 18.6%. The total number of claims asserted increased by 1,475 in 1968 while the number of recoveries increased by 1,777. Through December, 1969, the total government-wide collections since the beginning of the program amounted to \$26,015,377.23.

regard the government's interest and claim to be furnishing his client complete and competent legal representation. To do so would be analogous to advising a corporate client on a complicated financial arrangement without considering its income tax consequences.

While the bureaucratic maze exists in the administration of the Act, the discussion of the various agency procedures hopefully provides some familiarity for the average practitioner. It should be apparent to all that for the recovery system to work to the best advantage of both the government and the injured party, there must be a good working relationship between the active bar and the enforcement agencies. Such a relationship can only be built upon a mutual understanding of each other's problems and limitations.