Volume 74
Issue 1 *Dickinson Law Review - Volume 74, 1969-1970*

10-1-1969

The Right and Remedies of the United States Under the Federal Medical Care Recovery Act

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A serviceman, accompanied by his wife, is driving along an interstate highway on his way home. Suddenly, a car in the opposite lane swerves to the left, crosses the medial strip, and crashes headon with the serviceman's automobile. The serviceman and his wife are both taken to the local hospital and receive treatment for a period of thirty days. The hospital and doctor bills for both the serviceman and his wife are then paid by the United States pursuant to the Dependent's Medical Care Act.[1] Prior to 1962 the tortfeasor would now receive a windfall in the amount of the hospital and doctor bills since neither the United States nor the serviceman[2] could recover these expenses from him. In 1962 Congress provided the means whereby the United States could now assert its right to collect these expenses by enacting the Federal Medical Care Recovery Act.[3]

This Comment will consider the nature of the right created in the United States under the FMCRA and the means by which the United States may enforce this right. Specifically, the Comment will focus on whether the FMCRA creates an independent right in the United States or a right based on equitable subrogation principles. Once the nature of the right has been established, the three recognized means of enforcing that right[4] will be ana-

1. 10 U.S.C. § 1071-87 (1964), *as amended*, (Supp. II, 1965-66).

2. The collateral source doctrine, followed by many states, is an exception to this rule of damages. Stated generally, the doctrine holds that the fact that a plaintiff receives payment from a collateral source which may serve to mitigate the consequences of his injury which he could otherwise recover from the defendant, may not be taken into consideration in assessing the damages which the defendant must pay. Annot., 75 A.L.R.2d 885 (1961). In Arvin v. Patterson, 427 S.W.2d 643 (Tex. Ct. App. 1968), the court extended the collateral source doctrine to a plaintiff who was furnished medical care gratuitously by the United States. *Id.* at 644.

3. 42 U.S.C. § 2651-53 (1964) [hereinafter referred to as the FMCRA]. The legislative history of this Act will only be discussed where pertinent to the specific area being covered. For an overall analysis of the legislative history of the FMCRA see Bernzweig, *Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 COLUM. L. REV. 1257 (1964).

4. Two of the three means of enforcement are found in 42 U.S.C. § 2651(b) (1964), namely intervention or joinder in the suit by the injured party, or institution of an independent action by the United States. The third means, subrogation, is found in 42 U.S.C. § 2651(a) (1964). As will be seen, the subrogation remedy does not enjoy the same recognition as the other two.

lyzed to determine if these means limit the right or merely provide procedural guidelines for its enforcement.

Since the provisions of the FMCRA which establish its rights and remedies are somewhat ambiguous, certain canons of statutory construction have been used to interpret these provisions. The canon most often sought to be applied to the FMCRA is the maxim of strict construction against a right given the United States which it did not have at common law. This narrow construction has been rejected by at least two courts which were faced with the argument.[5] *United States v. Wittrock*[6] held that a canon of strict construction will not be used to defeat the clear intention of Congress in passing the Act.[7] *United States v. York*[8] is in accord, stating that a canon of strict construction is opposed by another canon which holds that ambiguous language will justify the courts in looking to the legislative history of a statute.[9] *York* then concludes that this conflict indicates that canons are only a rough guide to aid the courts in reaching an interpretation that will effectuate the purpose of the statute under consideration.[10] Since the purpose of the statute is to effect a federal fiscal policy,[11] it is submitted that the FMCRA should be interpreted liberally in tune with this fiscal objective. Such a liberal construction will enable the United States to effect the legislative intention that it recoup the costs incurred for hospital and medical care which previously were characterized as a loss to the Government.[12]

I. Nature of the Right

Current litigation has established quite clearly that the FMCRA creates an independent right in the United States to recover for

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5. United States v. York, 398 F.2d 582 (6th Cir. 1968); United States v. Wittrock, 268 F. Supp. 325 (E.D. Pa. 1967).
6. 268 F. Supp. 325 (E.D. Pa. 1967).
7. *Id.* at 327.
8. 398 F.2d 582 (6th Cir. 1968).
9. *Id.* at 586 n.6.
10. *Id.*
11. In United States v. Standard Oil Co., 332 U.S. 301 (1947) the court rejected an attempt by the United States to recover its medical costs from a third party tortfeasor. The court stated that:

> the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established.

Id. at 314. "Congress . . . is the custodian of the national purse," the court continued; ". . . it is the primary and most often the exclusive arbiter of fiscal affairs." *Id.* Thus the court concluded that the right of the United States to recoup its losses was dependent on statute. Congress responded by enacting the FMCRA in 1962. In S. Rep. No. 1945, 87th Cong., 2d Sess. 7 (1962), the Senate Judiciary Committee stated that the figures concerning potential recovery of costs incurred by the United States demonstrate the relation of the Act to the fiscal policy of the United States.
12. S. Rep. No. 1945, 87th Cong., 2d Sess. 4 (1962).

the reasonable value of hospital and medical care furnished to an injured party.[13] The applicable section of the Act which creates this right reads as follows:

> 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* from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished.[14]

The independent right created in the United States is bottomed on the existence of a cause of action by the injured party against the tortfeasor. The substantive aspects of this cause of action rest on principles determined by local law.[15]

The legislative history which lead to the enactment of this provision supports the view that the right created in the United States is an independent one. The original statute adopted by the House Judiciary Committee stated that the United States shall be subrogated to any right or claim of the injured person.[16] A staff memorandum from the Comptroller General's Office criticized the proposed statute for failing to create an independent right in the United States to recover these medical expenses. The memorandum stated that the claim of the United States is not one for subrogation but rather for an independent liability owing directly to itself for losses caused in discharging its duty to care for the

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13. United States v. Gera, 409 F.2d 117 (3d Cir. 1969); United States v. York, 398 F.2d 582 (6th Cir. 1968); United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968); United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1967); Maddux v. Cox, 382 F.2d 119 (8th Cir. 1967); Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967); United States v. Nation, 299 F. Supp. 266 (N.D. Okla. 1969); United States v. Winter, 275 F. Supp. 895 (E.D. Pa. 1967); United States v. Wittrock, 268 F. Supp. 325 (E.D. Pa. 1967); United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967); United States v. Jones, 264 F. Supp. 11 (E.D. Va. 1967); Phillips v. Trame, 252 F. Supp. 948 (E.D. Ill. 1966); Tolliver v. Shumate, 151 W. Va. 105, 150 S.E.2d 579 (1966). *But cf.* United States v. Housing Authority of Bremerton, 276 F. Supp. 966 (W.D. Wash. 1967); United States v. Bartholomew, 266 F. Supp. 213 (W.D. Okla. 1967) (dictum).

14. 42 U.S.C. § 2651(a) (1964) (emphasis added).

15. *See* note 75 *infra.*

16. 108 Cong. Rec. 6669 (1961).

soldier.[17] The Comptroller General seemed to be recommending that the fiscal policy behind the Act dictated that it be amended to give the United States an independent cause of action.

Pursuant to the Comptroller General's memorandum the House Judiciary Committee amended the statute to its present form and stated:

> This amendment makes clear that the United States is granted a distinct right to recover its costs and that this right is to be effectuated through a partial subrogation to any right which the injured or diseased person may have to proceed against the negligent third party.[18]

It seems clear that the Legislature intended that the final version of the FMCRA create an independent cause of action in the United States to recover the medical care it has furnished to the injured party.[19]

A further argument in favor of an independent right in the United States stems from the basic distinction between an independent cause of action and a cause of action founded upon the equitable principles of subrogation.[20] As mentioned earlier, the original Act was critizied by the Comptroller General for not creating an independent cause of action. He argued that in those states which hold that an injured party may not recover for medical services provided without cost by the Government,[21] the United States, as a subrogee, would also be barred from recovery. If an injured party, subrogor, has no right to recover the medical costs furnished by the United States, the United States, as subrogee, has no cause of action to be subrogated to and hence cannot recover its expenses. The Comptroller General concluded that such a construction would defeat the fiscal objectives of the Act.[22]

The Comptroller General's argument has received support from several cases. In *United States v. Greene*[23] the tortfeasor sought to bar the cause of action by the United States on the grounds that, (1) the state statute of limitations had expired, and (2) the injured party had given a general release to the tortfeasor.[24] Both of these defenses would bar the United States if its claim were

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17. 2 U.S.C. Cong. and Admin. News 2646 (1962).
18. H. R. REP. No. 1534, 87th Cong., 2d Sess. 3 (1962).
19. United States v. York, 398 F.2d 582, 584 (6th Cir. 1968); United States v. Merrigan, 389 F.2d 21, 24 (3d Cir. 1968); United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884, 886 (5th Cir. 1967).
20. It must be stressed that at this point in the Comment subrogation is referred to as the basis of the *right* out of which a cause of action arises. See notes 64-84 *infra* and accompanying text for the discussion of subrogation as an additional equitable means of enforcing the Government's independent cause of action.
21. Those states which do not permit such a recovery do not follow the collateral source doctrine mentioned in note 2 *supra*.
22. 2 U.S.C. Cong. and Admin. News 2646 (1962).
23. 266 F. Supp. 976 (N.D. Ill. 1967).
24. *Id.* at 978.

merely derived from the subrogor, injured party. If the United States possessed an independent claim, however, the defenses would be struck down. The court first analyzed the legal nature of subrogation, stating that it is essentially a derivative right held by one (United States) who, pursuant to a legal or equitable obligation to another person (injured party), pays that person a debt owed by a third party (tortfeasor). The right of the payor (subrogee-United States) to seek reimbursement from the third party debtor is derived from, and generally dependent upon, the existence of a right in the payee (subrogor-injured party) against the third party debtor. If the payee collects from the debtor, the payor may get a refund from the payee. If the payee fails to demand satisfaction from the debtor, the payor may assert the right of the payee against the debtor. The payor's cause of action is subject to all the procedural and contractual defenses which the third party debtor has against the payee.[25]

Greene then applied these concepts to the third party liability created by the FMCRA. The injured person (payee) can only recover expenses which *he* has become liable to pay as a result of the tortious conduct of a third party. Since the injured person (payee) is not liable for these expenses when he receives free medical care, he cannot recover them from the third party debtor (tortfeasor). Hence no underlying obligation exists between the tort victim and the tortfeasor to which the United States could be subrogated. In a true subrogation situation it is the payor's (subrogee's) payment of this underlying obligation which subrogates the payor to the payee's rights.[26] The *Greene* court thus concluded that the cause of action of the United States is not founded upon subrogation principles and held that the expiration of the state statute of limitations and the general release given by the injured party did not cut off the independent claim of the United States.[27]

United States v. Fort Benning Rifle and Pistol Club[28] is in accord with *Greene*. In *Fort Benning* the court decided the right of the United tSates cannot be a subrogated right in the traditional sense, since the only time the FMCRA authorizes recovery is when the United States is required by law to give treatment and care. In these situations the court reasoned the injured party, not having himself furnished the medical care, has no right of recovery to

25. *Id.* at 979.
26. *Id.*
27. *Id.* at 980.
28. 387 F.2d 884 (5th Cir. 1967).

which the United States can be subrogated.[29] The court concluded that the United States stands in the role of a subrogee only to the extent of determination of third-party liability under local law. The independent right of the United States is subject only to substantive state laws which create or negate a cause of action for tortious conduct.[30] The state statute of limitations, which was the problem raised in *Fort Benning*, has nothing to do with whether the circumstances surrounding the injury create a tort liability and cannot be used to defeat the independent claim of the United States.[31]

The legislative history of the FMCRA as well as the cases interpreting its provisions clearly indicate that, under circumstances creating a tort liability on a third person under local law, the United States has an independent cause of action for medical care furnished as a result of that tortious conduct. What practical benefits exist in favor of the United States as an independent claimant?

A hypothetical case will illustrate how local law creates the cause of action, and, once created, how the independent cause of action works to the benefit of the United States. *A* asks *B* to drive him to the hospital in *A's* automobile. *A* is the owner of the vehicle and has insurance coverage which includes anyone who drives *A's* vehicle with his consent. Since *B* is driving *A's* vehicle with his consent, *B* becomes an insured under *A's* insurance coverage. On the way to the hospital *B* negligently strikes another vehicle and injures *A*. *A*, a serviceman, receives medical care from the United States pursuant to the Dependent's Medical Care Act.[32] The United States then claims this amount of care from *A's* insurance carrier. The insurance carrier denies liability on two grounds; first, *A's* insurance policy specifically precludes him from claiming against the liability portion of his own insurance coverage, and second, since *B* was driving the vehicle for the sole purpose, use, and benefit of *A*, in the absence of any gross negligence, *B* cannot be held liable. What now becomes of the Government's independent claim?

The independent claim of the United States is conditioned on circumstances creating a tort liability upon some third person.[33] This substantive determination of third party liability rests upon local law.[34] In our hypothetical case, there must be a cause of

29. *Id.* at 887.
30. *Id.*
31. *Id.*
32. 10 U.S.C. § 1071-87 (1964), *as amended*, (Supp. II, 1965-66).
33. 42 U.S.C. § 2651(a) (1964) reads in part:
In any case in which the United States is required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover from said third person the reasonable value of the care. . . .
34. *See* note 75 *infra*.

action under local law by *A* (owner-injured person) against *B* (driver-tortfeasor) for liability in tort. If *B* were merely *A's* agent, as the insurance company claims, and local law stated that in the absence of gross negligence an agent is not liable for torts committed upon his principal during the scope of his employment, then no third party liability would exist. If *B* were grossly negligent, however, *A* would have a cause of action against *B* under local law, which cause of action would give rise to the independent right of the United States to pursue its claim against *B* for medical care furnished to *A*.

Assuming that *A* has a cause of action for tort liability against *B*, what about the argument by the insurance company that *A* cannot claim against the liability portion of his insurance coverage? The existence of third-party (*B*) liability gives rise to an independent claim by the United States. As a result of *B's* grossly negligent act, the United States was *injured* in the amount of the medical care that it furnished to *A*. The United States, as an injured, independent party, becomes a claimant for this amount against the liability portion of the insurance coverage extended to *B*. The United States is *not* claiming as a subrogee to the rights of *A* under his own policy, but as an injured person under the liability portion of the insurance coverage extended to *B* as driver of *A's* vehicle. Thus the United States, not *A*, is claiming against the insurance company.

Another situation in which it becomes important for the United States to be an independent claimant arises when the insurance company pays the policy limit to the injured party. Since the United States claims as an injured, independent person under the insurance policy, the insurance company is prevented from denying liability to the United States on the ground that it has expended its liability coverage to the injured party. For instance, assume in the above hypothetical that *B* is the owner as well as the driver of the vehicle and *A* is the injured serviceman. If the liability portion of *B's* insurance coverage provides for $10,000 per person and $20,000 per accident, the fact that the insurance company has paid $10,000 to *A* does not preclude the Government's claim. The United States, as an injured, independent claimant, becomes a "person" under the policy and is entitled up to $10,000 for the medical care it has furnished to *A*.[35]

35. The insurance company may argue that for purposes of insurance coverage the United States is subrogated to the body of the injured party. However, in Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967), the court held that the United States qualifies as

Other benefits derived by the United States as an independent claimant stem from the fact that the right of the United States is subject to state substantive defenses only if these defenses indicate that the injury did not arise under circumstances creating tort liability upon a third person.[36] In our hypothetical case, the fact that the United States may have brought its action after the state statute of limitations had expired does not constitute a substantive defense to its cause of action.[37] Limitation has nothing to do with whether the circumstances surrounding the injury create a tort liability and hence the local statute cannot be used to defeat the claim.[38] Moreover, a three year federal statute of limitations[39] has been enacted and held applicable to claims asserted by the United States under the FMCRA.[40]

In addition, the insurance company may argue that *A* (injured party) executed a general release as to all claims arising out of the accident. Again, since the claim is independent, this contractual defense against the injured party is not available against the United States.[41] Only the United States is capable of releasing its independent rights.

Finally, the United States, being an independent claimant, is not required to give notice to the tortfeasor before instituting suit against him,[42] and the United States qualifies as an injured

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a "person" under the uninsured motorist clause of the injured party's insurance policy. *See* note 43 *infra*. The *Government Employees* case, as well as the independent nature of the Government's right and the fiscal objectives of the Act, indicate that the United States should also qualify as a "person" under the liability portion of the tortfeasor's insurance policy.

36. United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884, 886 (5th Cir. 1967); United States v. Greene, 266 F. Supp. 976, 980 (N.D. Ill. 1967); *see also* note 75 *infra*.

37. United States v. Gera, 409 F.2d 117 (3d Cir. 1969); United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1967); United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967).

38. Cases cited note 37 *supra*.

39. 28 U.S.C. § 2415(b) (Supp. II, 1965-66).

40. United States v. Gera, 409 F.2d 117 (3d Cir. 1969).

41. United States v. Winter, 275 F. Supp. 895 (E.D. Pa. 1967); United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967). *See also* United States v. Guinn, 259 F. Supp. 771 (D.N.J. 1966). In *Guinn* the court felt it was necessary to establish constructive knowledge of the Government's claim by the tortfeasor so that a general release by the injured party would not bar the United States from asserting its claim. The court improperly classified the claim of the United States as one of subrogation. Since a general release executed by a subrogor to the tortfeasor will bar the subrogee if the tortfeasor has no knowledge of his interest, the court held that the tortfeasor had constructive knowledge of the Government's rights. *Id.* at 773. Thus, the general release by the injured party did not serve as a bar to the United States. It is important to note that, since the claim of the United States is independent, actual or constructive knowledge of the Government's claim by the tortfeasor becomes irrelevant. The injured party simply cannot release the independent claim of the United States for the reasonable value of medical care furnished to him.

42. United States v. York, 398 F.2d 582, 584 (6th Cir. 1968); United States v. Bartholomew, 266 F. Supp. 213, 215 (W.D. Okla. 1967). *See also*

claimant under the uninsured motorist clause of the injured party's insurance coverage.[43] Therefore, if both the injured party and the United States may claim through an uninsured motorist clause in the injured party's insurance policy, the fact that the insurance company settles with the injured party (insured) without notice of the Government's rights should not then serve as a bar to the assertion of the Government's independent claim under the policy.[44]

II. Means Used to Enforce the Right

Having examined the fundamental nature of the cause of action which the FMCRA creates in the United States, it now becomes necessary to analyze the means with which this right may be enforced. Generally, there are three recognized means of enforcement:

> As the court reads 42 USC 2651, the United States Government has three ways of recovering for medical and hospital care furnished to a plaintiff claiming tort liability by a third person: (1) by subrogation; (2) by intervening or joining in any action brought by the injured person; and, (3) by instituting such an action itself or in conjunction with the injured or diseased person.[45]

The conflict centers on whether the three remedies are mandatory or permissive in nature. If construed as mandatory, they will severely limit the independent nature of the claim. If construed as permissive, however, the remedies merely provide procedural guidelines for the liberal enforcement of an independent right.

United States v. Guinn, 259 F. Supp. 771 (D.N.J. 1966). In *Guinn* the court inferred that no notice is required by holding that the tortfeasor has constructive knowledge of the Government's claim. *Id.* at 773. Taken together, these three cases seem to indicate that when the insurance company representing the tortfeasor expends the total amount of the coverage authorized for the accident by the policy, without considering the claim of the United States, it does so at its peril and will not be relieved of liability to the United States.

43. Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967); United States v. Commercial Union Ins. Group, 294 F. Supp. 768 (S.D.N.Y. 1969).

44. For example, suppose the policy coverage provides for up to $5,000 for each person entitled to claim under the uninsured motorist clause. The insurance company settles with its insured (injured party), paying him $5,000, without notice of any claim by the United States. The United States, as an independent, injured claimant under the policy, is still entitled up to $5,000 for medical care it has been required to pay as a result of the accident with the uninsured motorist. See note 42 *supra* for the result when the insurance company has expended the total amount of uninsured motorist coverage authorized for the *accident* without considering the claim of the United States.

45. Conley v. Maattala, 303 F. Supp. 484, 485 (D.N.H. 1969).

A. *Intervention, Joinder or Independent Action*[46]

The FMCRA has created enforcement procedures which deal with intervention, joinder, and independent action:

> The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person . . . against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within 6 months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a state or federal court, either alone . . . or in conjunction with the injured or diseased person. . . .[47]

The problem centers on whether the United States, by failing to intervene under clause (1) when the injured party brings suit within 6 months of the date of initial treatment, is thereafter barred from instituting an independent action after the 6 month period under clause (2).

A few jurisdictions have given the statute such a strict construction and barred the independent suit by the United States. In *United States v. Housing Authority of Bremerton*,[48] the injured party brought suit against the defendant within five months of the date of injury. The United States did not intervene but filed an independent suit against the defendant after the six month waiting period. The defendant contended that if the United States wishes to assert a claim, it *must* intervene if a suit is brought by the injured party within six months. The court upheld this contention, stating that the language of the statute is mandatory, requiring the United States to intervene in any suit brought by the injured party.[49] The statute prevents multiple litigation against the tortfeasor by authorizing independent action solely upon the failure of the injured party to bring his own cause of action within the six month period.[50] *United States v. Bartholomew*[51] arrived at the same result, holding in dictum that the United States *must* intervene in any suit brought by the injured party within six months of his initial treatment, to enforce its claim.[52]

The great majority of the courts have refused to apply such a strict construction to the FMCRA, however, and have found

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46. The subrogation remedy will be discussed separately since, unlike intervention, joinder, or an independent action, it is not clearly established by statute.
47. 42 U.S.C. § 2651(b) (1964).
48. 276 F. Supp. 966 (W.D. Wash. 1967).
49. *Id.* at 969.
50. *Id.*
51. 266 F. Supp. 213 (W.D. Okla. 1967) (dictum).
52. *Id.* at 214.

the language of the statute to be permissive rather than mandatory.[53] These courts advance several reasons in support of their position. First, the plain meaning of the statute seems to dictate the permissive interpretation, since if Congress had intended to make compliance with the enforcement section mandatory, the section would have begun, the United States *shall*, to enforce this right, as opposed to the actual statute which reads, "The United States *may*, to enforce this right. . . ."[54] Second, as mentioned earlier,[55] a canon of strict construction should not be used to defeat the intent and purpose of the statute. A liberal interpretation of the remedial provisions of the Act will enable the United States to recoup its losses in third-party liability cases, and hence achieve the fiscal objectives intended by the Act.[56] Finally, the legislative history behind the remedial provisions gives no indication that Congress, by providing certain procedures for enforcement, intended to exclude all other methods of enforcement that would normally be available to the United States.[57] The remedial provisions established by statute were necessary to carry out specific desires of Congress, namely to give the United States an absolute right to intervene, not subject to the discretion of the court, and to *delay* the exercise of independent action by the United States for six months to enable the injured person to bring his own action.[58] Nothing in the legislative history evinces a concern for the possibility that the tortfeasor will be subjected to multiple litigation.[59] Also, the legislative history does not seem to indicate that Congress intended to impose a partial statute of limitations on the independent right by requiring the United States to intervene when an injured party files suit within six months of his initial treatment, or be barred from recovery.[60]

These arguments provide a sound basis for holding that the

53. United States v. York, 398 F.2d 582 (6th Cir. 1968); United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968); United States v. Nation, 299 F. Supp. 266 (N.D. Okla. 1969); United States v. Wittrock, 268 F. Supp. 325 (E.D. Pa. 1967); United States v. Jones, 264 F. Supp. 11 (E.D. Va. 1967).

54. 42 U.S.C. § 2651(b) (1964) (emphasis added). United States v. Wittrock, 268 F. Supp. 325 (E.D. Pa. 1967) holds that, "if Congress had wished to make compliance with 42 U.S.C. § 2651(b) mandatory, it would have used a word such as 'shall' in place of 'may" in that subsection." *Id.* at 327 n.7.

55. *See* notes 5-12 *supra* and accompanying text.

56. S. REP. No. 1945, 87th Cong., 2d Sess. 4 (1962).

57. United States v. York, 398 F.2d at 585-86 (6th Cir. 1968).

58. *Id.* at 586.

59. *Id.*

60. *Id.* at 586-87; *accord,* United States v. Merrigan, 389 F.2d at 25 (6th Cir. 1968).

remedial provisions of section 2651(b) are permissive in nature and intended merely as procedural guidelines for the enforcement of the Government's right. Clause (1) of section 2651(b) states that when the injured party does sue, the United States *may* intervene at any time in that suit.[61] In the event the United States does not intervene, clause (2) of section 2651(b) does not now serve as a bar to the later exercise of the Government's right, but merely provides that it must wait six months to allow the injured party to assert its cause of action before this right may be exercised.[62] Thus, under section 2651(b), the United States *may*, (1) intervene in any suit brought by the injured party, (2) join with the injured party in any action he may file, *or* (3) file an independent action after six months from the first day in which the United States furnished care to the injured party.

B. *Subrogation*

This section will discuss the effect of the following language found in the FMCRA:

> . . . [The United States] shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third persons to the extent of the reasonable value of the care and treatment so furnished or to be furnished.[63]

The question centers on whether the United States may enforce its independent right through an equitable remedy of subrogation. This question is distinguished from the earlier discussion of whether the Government's cause of action is an independent one or one founded solely on equitable principles of subrogation.[64] If the cause of action were based solely on subrogation, the only available means of enforcing that right would be an equitable remedy of subrogation. Since the cause of action is an independent one, however, the question arises whether the United States can, among other means of enforcement, pursue its claim through a subrogation remedy.

Several courts have interpreted the above language as allowing the United States to resort to a subrogation remedy as an additional means of enforcing its independent right.[65] A few courts have denied the United States this subrogee status, however, holding that the language in the statute places the United States in the

61. 42 U.S.C. § 2651(b) (1964).
62. *See* note 60 *supra*.
63. 42 U.S.C. § 2651(a) (1964).
64. See note 20 *supra* and accompanying text.
65. United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968) (dictum); Maddux v. Cox, 382 F.2d 119 (8th Cir. 1967) (dictum); Conley v. Maattala, 303 F. Supp. 484 (D.N.H. 1969); United States v. Gera, 279 F. Supp. 731 (E.D. Pa. 1968) (dictum), *rev'd on other grounds*, United States v. Gera, 409 F.2d 117 (3d Cir. 1969); United States v. Winter, 275 F. Supp. 895 (E.D. Pa. 1967) (dictum).

role of a subrogee only to the extent of determination of third-party liability under state law.[66] While this question of statutory interpretation is important, it should be noted that the existence of a subrogation remedy is not dependent upon statute but rather upon equity.[67] Thus, it is first necessary to discuss the nature and purpose of an equitable remedy of subrogation, and whether the United States may enforce its rights as a subrogee without benefit of statute. Then, the subrogation language of the statute will be analyzed to determine if Congress believed that third-party liability under the FMCRA presented a fact situation within the equitable principles of a subrogation remedy.

Couch in his treatise on Insurance states that the doctrine of subrogation has its origin in general principles of equity and does not arise from statute, custom, or any terms of a contract.[68] Subrogation rests on principles of natural justice and is applied according to the dictates of equity and good conscience, and to the considerations of public policy that no one should be enriched by another's loss.[69] Couch states the purpose of this equitable remedy as follows:

> A sounder approach to the problem is that a wrongdoer who is legally responsible for the harm should not receive the windfall of being absolved from liability because the insured had had the foresight to obtain, and had paid the expense of procuring, insurance for his protection; since the insured has already been paid for his harm, the liability of the third person should now inure for the benefit of the insurer. Stated simply, subrogation is a creature of equity having for its purpose the working out of an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it.[70]

The tortfeasor in a third-party liability situation should not receive a windfall because the injured party has his medical bills paid by the United States. Indeed, Congress enacted the FMCRA to prevent such a windfall and enable the United States to recoup its losses.[71] It is submitted that the United States may now, to enforce its right, rely on this "creature of equity" to work out an equitable adjustment with the third party tortfeasor. Such an

66. United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1967) (dictum); Carrington v. Vanlinder, 58 Misc. 2d 80, 294 N.Y.S.2d 412 (Sup. Ct. 1968).
67. 16 G. COUCH, INSURANCE § 61:20, at 250 (2d ed. 1966).
68. *Id.*
69. *Id.*
70. 16 G. COUCH, INSURANCE § 61:18, at 248 (2d ed. 1966).
71. *See* S. REP. No. 1945, 87th Cong., 2d Sess. 4 (1962).

adjustment will secure "the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it."

By referring to subrogation in the statute,[72] did Congress believe that equitable principles should allow the United States to work out such an "equitable adjustment" with the tortfeasor as one means of enforcing its independent right? In *United States v. Fort Benning Rifle and Pistol Club*,[73] the court held that the plain meaning of the statute did not dictate this result. The language of the statute, instead of complementing the right created in the United States with an additional right of subrogation, refers directly to and modifies the primary right initially created by the statute.[74] Thus the United States is subrogated only to the extent of determination of third-party liability under state law.[75] The court also held that since the United States cannot have a subrogation right in the traditional sense, it also cannot have a subrogation remedy to enforce its independent right.[76]

United States v. Gera[77] interprets the statute differently. The applicable provision of the statute reads, "*and* shall, as to this right be subrogated." *Gera* holds that the word "and" must be given full effect as saying "furthermore" rather than "that is to say."[78] Hence the language following "and" merely provides that

> with respect to that portion of damage which the injured party might otherwise recover which compromises or duplicates that which the statute authorizes the Government to collect, the Government shall succeed to the rights of the injured party. . . .[79]

United States v. Merrigan[80] looks to the legislative history of the

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72. *See* note 63 *supra*.

73. 387 F.2d 884 (5th Cir. 1967) (dictum).

74. *Id.* at 887.

75. *Id.* Other courts [*see, e.g.*, United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967)], have relied on the mere fact that the statute does not require the application of federal substantive law in order to hold that local law applies. Bernzweig in his article on the FMCRA gives similar reasons for applying local law. He states first that the silence of the Act indicates that Congress intended local law to apply, for when Congress desires to depart from local law it usually makes that intention clear in the statute itself. Second, when Congress remains silent on the issue of governing tort law, the courts have consistently applied local law tort rules. And finally, the purpose of the Act, namely to recoup costs and not to regulate conduct of tortfeasors, indicates that local law should apply. Bernzweig, *Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 COLUM. L. REV. at 1262 (1964). It seems that the above reasoning presents a sounder basis for applying local law than the reliance on the subrogation language of the statute by the *Fort Benning* court.

76. United States v. Fort Benning Rifle and Pistol Club, 387 F.2d at 887 (5th Cir. 1967) (dictum).

77. 279 F. Supp. 731 (E.D. Pa. 1968) (dictum), *rev'd on other grounds*, United States v. Gera, 409 F.2d 117 (3d Cir. 1969).

78. *Id.* at 732.

79. *Id.*

80. 389 F.2d 21 (3d Cir. 1968) (dictum).

Act to reach the same result as *Gera*. By amending the statute to give the United States an independent right, Congress made subrogation "one of the remedial consequences of the Government's right, a subsidiary equitable remedy, which did not limit the primary right."[81] Congress could not have intended to limit the right for a grant of an equitable remedy of subrogation is not from its nature a limitation on a right of action.[82]

It is submitted that the result reached in *Gera* and *Merrigan* is in accord with both the plain meaning and legislative intention of the statutory provisions dealing with subrogation. Subrogation should be construed not as a limit upon the primary right but as an aid to that right.[83] Also, the mere fact that the Government's right is not founded upon a subrogation should not preclude its enforcement through equitable subrogation principles.[84] It has been held that "it was clearly the intention of Congress . . . to enable the government freely to assert this cause of action in any of a wide variety of possible procedural alternatives."[85] In considering the Act's fiscal objectives, along with Couch's purpose for the remedy, it seems that subrogation should be one of these procedural alternatives for enforcement. If so, two courses of action may now be available to the United States to enforce its right.

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81. *Id.* at 24. The court states that this amendment process indicates why the provision for subrogation appears in part (a) of the statute rather than in the remedial provisions in part (b). The amendment giving the United States an independent right was accomplished by adding immediately before the provision on subrogation a new provision that the United States "shall have a right to recover from said third person the reasonable value of the care and treatment so furnished." *Id.* The court concludes that by placing this new provision *before* the subrogation language, and not in place of it, "subrogation was made one of the remedial consequences of the Government's right." *Id.* The Judiciary Committee, in describing the purpose of the new provision, seems to agree with *Merrigan*:

> This amendment makes clear that the United States is granted a distinct right to recover its costs and that this right is to be effectuated through a partial subrogation to any right which the injured or diseased person may have to proceed against the negligent third party.

H. REP. No. 1534, 87th Cong., 2d Sess. 3 (1962).

82. United States v. Merrigan, 389 F.2d at 24 (3d Cir. 1968) (dictum).

83. For an additional argument against the limited construction of subrogation in *Fort Benning*, *see* note 75 *supra*.

84. United States v. Winter, 275 F. Supp. 895 (E.D. Pa. 1967), held that the subrogation language of the statute is not rendered meaningless by giving the United States an independent right. In some procedural contexts, a subrogee status may be significant. *Id.* at 896.

85. United States v. Winter, 275 F. Supp. at 896 (E.D. Pa. 1967).

1. *Enforcement through the Injured Party*

First, where the injured party has a cause of action for damages he suffered, he may bring an action in his own name, without the joinder of the United States, for his damages as well as the damages due the United States.[86] To arrive at this result it is necessary to place the United States in the same position as a subrogated insurer and the injured party in the same position as an insured. If the insured has suffered a partial loss, a majority of the jurisdictions, under real party in interest statutes,[87] treat both the insured and the insurer as "real parties in interest" and allow the insured to sue for the full amount of the loss.[88] The defendant, however, may compel or waive joinder of the insurer in those jurisdictions where the insurer is deemed a necessary party.[89] Finally, in jurisdictions which have no real party in interest statutes, the insured is the owner of the claim and an action to enforce the subrogation rights of the insurer must be brought in the name of the insured.[90]

The above general rules are subject to important exceptions in two jurisdictions. Pennsylvania's statute requiring the real party in interest to bring suit[91] was amended in 1941 to provide that the "rule shall not be mandatory where a subrogee is a real party in interest."[92] By virtue of this amendment, *Watson v. Hollacher Delivery Service, Inc.*,[93] held that an insurer which has paid part of an insured's loss and has been subrogated need not be joined as a party plaintiff with the insured in an action for the entire loss against the tortfeasor.[94] In New York, a statute on joinder of parties states that,

> [e]xcept where otherwise prescribed by order of the court, an . . . insured person who has executed to his insurer either a loan or subrogation receipt, trust agreement, or other similar agreement . . . may sue or be sued without joining with him the person for or against whose interest the action is brought.[95]

86. Conley v. Maattala, 303 F. Supp. 484 (D.N.H. 1969). *Contra*, Carrington v. Vanlinder, 58 Misc. 2d 80, 294 N.Y.S.2d 412 (Sup. Ct. 1968).

87. The normal wording of such a statute is as follows: ". . . [A]ll actions shall be prosecuted by and in the name of the real party in interest. . . ." PA. R. CIV. P. 2002(a).

88. Annot., 13 A.L.R.3d at 149 (1967). The federal courts are substantially in agreement with the majority of jurisdictions which allow the injured party to sue for the whole loss. *Id.* at 147. The federal courts are in conflict, however, as to whether the defendant can compel joinder of the insurer under FED. R. CIV. P. 19. For a discussion of this conflict see Annot., 13 A.L.R.3d at 156 (1967).

89. Annot., 13 A.L.R.3d at 149 (1967). See note 88 *supra* for the right to compel the joinder of the insurer in the federal courts.

90. 16 G. COUCH, INSURANCE § 61:27, at 255 (2d ed. 1966).

91. PA. R. CIV. P. 2002(a).

92. *Id.* 2002(d).

93. 43 Pa. D. & C. 120 (M.C. Phila. 1942).

94. *Id.* at 121; *accord*, 44 Pa. D. & C. 701 (C.P. Mif. 1942).

95. N.Y.R. CIV. PRAC. 1004.

Skinner v. Klein[96] interprets this statute as stating that where an insurer pays to the insured only a portion of the latter's claim for a loss occasioned by the wrongdoing of another, the insured remains the real party in interest entitled to prosecute in his name an action for the entire loss against the wrongdoer.[97]

In two cases the United States sought to have its claim enforced through a suit by the injured party for the whole loss. *Carrington v. Vanlinder*[98] relied on *United States v. Fort Benning Rifle and Pistol Club*,[99] holding that the FMCRA in no way provides that the United States can be subrogated as an insurance carrier might be. Therefore, the court refused to consider the New York statute which does not require joinder of the insurer[100] and held that the United States cannot recover unless it is made a party to the action by intervention or joinder.[101] *Conley v. Maattala*[102] reached a different result. The court recognized subrogation as one means of recovering the medical care furnished to the injured party. Therefore it saw no valid reason why the United States should be required to be made a party to the injured party's suit either by intervention or joinder.[103] Such a requirement might indeed prove prejudicial to the plaintiff:

> It is important . . . that the plaintiff be accorded a fair trial and that the attention of the jury not be distracted from the main issues of liability and damages by the fact that the United States is a party because it furnished hospital and medical services free of charge to the plaintiff.[104]

It is submitted that the result reached in *Conley* serves to carry out the fiscal objectives of the FMCRA. If the jurisdiction in which the injured party brings suit permits an action for the whole loss by an insured, and if the injured party is willing to assert a cause of action for the entire loss,[105] he should be per-

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96. 24 App. Div. 2d 433, 260 N.Y.S.2d 799 (1965).
97. *Id.* at 434, 260 N.Y.S.2d at 800.
98. 58 Misc. 2d 80, 294 N.Y.S.2d 412 (Sup. Ct. 1968).
99. 387 F.2d 884 (5th Cir. 1967).
100. N.Y.R. CIV. PRAC. 1004.
101. Carrington v. Vanlinder, 58 Misc. 2d 80, 294 N.Y.S.2d 412 (Sup. Ct. 1968).
102. 303 F. Supp. 484 (D.N.H. 1969).
103. *Id.* at 485.
104. *Id.*
105. United States v. Jones, 264 F. Supp. 11 (E.D. Va. 1967) has interpreted 42 U.S.C. § 2652(c) (1964) as indicating that an injured serviceman should not be required to institute an action which would include a claim for the medical care furnished by the United States. The agencies which collect funds under the FMCRA have acted in accordance with this

mitted to include the claim of the United States with his own. As a precautionary measure, the injured party should show to the court written consent by the United States that he may assert the Government's claim. Also, the complaint should read that the plaintiff seeks to recover the reasonable value of medical care furnished to him by the United States, for the sole use and benefit of the United States in accordance with the FMCRA. If the above precautions are taken, the determination by the court litigating the claim of the injured party will be binding on both the injured party and the United States. This course of action will prevent double recovery against the tortfeasor, eliminate multiple litigation against the tortfeasor, and remove any prejudice to the injured party's cause of action.

2. *Suit Against the Injured Party*

The second course of action available to the United States as a subrogee involves a right to sue the injured party for the medical care furnished by the United States which the injured party has recovered from the tortfeasor. Again, this right of action stems from treating the United States as a subrogated insurer and the injured party as an insured. It is generally accepted that a subrogated insurer has a right of action against its insured to recover the payments made under the policy where the insured has settled with or released the wrongdoer allegedly responsible for the loss.[106] Three distinct theories have been recognized which support this right of action.[107] First, the action of the insured in settling with or releasing the wrongdoer is a breach of the subrogation agreement between the insurer and the insured.[108] Second, since no one ought to unjustly enrich himself at the expense of another, there is an implied promise on the part of the insured to reimburse the insurer after he has settled with the tortfeasor.[109] Third, equitable considerations dictate that the insured reimburse the insurer in the amount over and above the insured's loss; therefore the insured recovers this amount in trust for the insurer.[110] Fi-

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interpretation by offering the attorney for the injured party the opportunity to represent the interests of the United States. Should the attorney choose not to do so, the United States will then pursue collection of its claim independently.

106. 44 AM. JUR. 2d Insurance § 1841 (1969).

107. See Annot., 51 A.L.R.2d 697 (1957) for a complete discussion of these three theories.

108. National Union Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 N.W.2d 152 (1967); Grisham v. Moore, 241 Miss. 802, 133 So. 2d 403 (1961); Allstate Ins. Co. v. Dye, 113 Ohio App. 90, 170 N.E.2d 862 (1960).

109. Egan v. British Ins. Co., 193 Ill. 295, 61 N.E. 1081 (1901); Farm Bureau Mut. Ins. Co. v. Anderson, 360 S.W.2d 314 (Mo. Ct. App. 1962); United Serv. Auto. Ass'n v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961).

110. Federal Ins. Co. v. Engelhorn, 141 N.J. Eq. 349, 57 A.2d 478 (1948); Fort Worth & D. Ry. v. Ferguson, 261 S.W.2d 874 (Tex. Civ. App. 1953); 16 G. COUCH, INSURANCE § 61:27, at 256 (2d ed. 1966).

nally, it should be noted that this right of recovery against the insured is subject to two conditions. First, the recovery by the insured must bar the insurer from asserting any action against the tortfeasor.[111] Second, the insured must have recovered an amount over and above his actual loss, thus limiting the insurer's recovery from its insured to the amount over that loss.[112]

Only one case, *United States v. Ammons*,[113] has dealt squarely with the right of the United States to sue the injured party. In *Ammons*, the court rejected any right of recovery by the United States against the injured party on two grounds. First, the express terms of the FMCRA in no way authorized such a suit, and second, the legislative history of the Act indicated that Congress had no desire to specify priorities for distributing the proceeds recovered by the injured party.[114] A later case, *United States v. Greene*,[115] interpreted *Ammons* to hold that the FMCRA does not authorize the subrogee, United States, to get a refund from the subrogor, injured party, where the latter has collected from the wrongdoer.[116]

In the *Ammons* case, the United States was still able to recover its loss from the tortfeasor after it had been barred from recovery against the injured party.[117] Since one of the two requirements necessary to permit suit by the insurer against its insured was lacking,[118] the decision seems justified. If the United States could no longer recover against the wrongdoer,[119] however, it seems that the same equitable theories which allow the insurer to recover its loss from its insured should apply here. And, according to *United States v. Gera*,[120] Congress intended this result, for the subrogation language of the statute provides that,

> with respect to that portion of damage which the injured party might otherwise recover which compromises or

111. Annot., 51 A.L.R.2d at 716 (1957).
112. *Id.* at 719.
113. 242 F. Supp. 461 (N.D. Fla. 1965).
114. *Id.* at 464.
115. 266 F. Supp. 976 (N.D. Ill. 1967).
116. *Id.* at 979.
117. United States v. Ammons, 242 F. Supp. at 464 (N.D. Fla. 1965).
118. That requirement, as mentioned in note 111 *supra*, is that the United States (insurer) must be barred from asserting any action against the wrongdoer.
119. A good illustration of this situation is when the injured party brings an action for the entire loss, with the consent of the United States. Such an action should be binding on the United States, thus precluding it from later asserting an independent action against the tortfeasor.
120. 279 F. Supp. 731 (E.D. Pa. 1968) (dictum), *rev'd on other grounds*, United States v. Gera, 409 F.2d 117 (3d Cir. 1969).

duplicates that which the statute authorizes the Government to collect, *the Government shall succeed to the rights of the injured party and shall be the beneficiary of such recovery to the exclusion of the injured party.*[121]

Conclusion

Interpreted in tune with the fiscal objectives of the Act, the FMCRA creates an independent cause of action in the United States to recover for medical care furnished to an injured party. This cause of action is dependent on circumstances which, under local law, create a tort liability upon some third person. Once created, the United States has several procedural alternatives with which to enforce its right. First, it may intervene or join in any action brought by the injured party. Second, it may assert an independent action any time after six months from the first day in which the United States furnished care to the injured party. And third, the United States may rely on an equitable remedy of subrogation, enforcing its right either through a suit by the injured party, or, if necessary, by a cause of action against the injured party.

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EPILOGUE

Subsequent to the completion of this comment the Ninth Circuit reversed the decision of the District Court in *United States v. Housing Authority of Bremerton*, referred to on p. 124, *supra*. The reversal, cited in 415 F.2d 239 (9th Cir. 1969), now establishes quite clearly that the remedies afforded the United States in 42 U.S.C. 2651b (1964) are permissive in nature and not mandatory.

The Ninth Circuit in *Bremerton* also held in a case of first impression that the negligence of the parents of the injured party cannot be imputed to the United States so as to bar its recovery, since under local law such negligence would not bar the child's right to recover from the tortfeasor. 415 F.2d at 242 (9th Cir. 1969). For a discussion of the applicability of local law to the cause of action created in the United States, see note 33 *supra* and accompanying text.

121. *Id.* at 732 (emphasis added).