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The Federal Medical Care Recovery Act in No-Fault Automobile Insurance Jurisdictions: Extension of the Federal Right of Reimbursement Against No-Fault Insurers

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NOTES

THE FEDERAL MEDICAL CARE RECOVERY ACT IN NO-FAULT AUTOMOBILE INSURANCE JURISDICTIONS: EXTENSION OF THE FEDERAL RIGHT OF REIMBURSEMENT AGAINST NO-FAULT INSURERS

Since Massachusetts enacted the first no-fault automobile insurance statute[1] in 1970, numerous states have adopted similar legislation.[2] Such statutes are intended to reduce the number of litigated cases which have burdened court systems in jurisdictions that rely upon a fault determination in tort before a party may receive compensation for injuries arising from an

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[1] MASS. GEN. LAWS ANN. ch. 90, §§ 34A-34*O* (West 1969 & Supp. 1979).

[2] Twenty-three states have now enacted some form of no-fault automobile insurance law. For a compilation of these statutes, see notes 51 & 58 *infra*. These laws fall into three general categories:

a. *Pure no-fault*—These statutory schemes theoretically would abolish all tort liability and rely solely on no-fault benefits to compensate injured persons. Although no state has gone as far as complete abrogation of tort liability for automobile drivers, the use of a highly restrictive threshold in Michigan has severely limited the right to sue in tort for automobile accident injuries. Michigan grants the right to sue in tort only if a narrative threshold is satisfied (a narrative threshold describes the type of injury that must be sustained before the right to sue arises): "noneconomic loss if the injured person suffered death, serious impairment of body function or permanent serious disfigurement." MICH. STAT. ANN. § 24.13135 (Supp. 1979). Along with such a severe limitation on the right to sue, the statute provides for unlimited no-fault benefits for medical expense. MICH. STAT. ANN. § 24.13107 (Supp. 1979). Severe or complete abrogation of tort liability and generous benefits are characteristic of a pure no-fault system.

b. *Modified no-fault*—These statutory schemes usually modify the right to sue in tort through the use of less restrictive thresholds. The statutory threshold is either a dollar threshold stating the minimum out-of-pocket loss necessary to sue in tort, a narrative threshold describing the types and extent of injury, or a combination of the two. Modified no-fault plans provide a range of medical benefits from $2,000 to unlimited liability for no-fault insurers.

c. *Add-on no-fault*—These statutory schemes typically provide no-fault benefits in addition to the usual liability insurance found in fault based jurisdictions. Such a scheme is not a no-fault system in the true sense because there is no limitation on the right to sue in tort. Instead, such systems are more like a fault based system with an expanded form of medical payments insurance. Medical payments insurance, operative in every fault based jurisdiction, pays medical expense of injured parties without regard to fault. Add-on plans typically result in higher insurance premiums since 1) they provide larger benefits for injured persons than medical payments insurance in fault based states, and 2) the insurer must continue to charge the usual premiums for liability insurance since there is no abrogation of tort liability.

For an exhaustive survey of no-fault insurance, see Note, *No-Fault Automobile Insurance: An Evaluative Survey*, 30 RUTGERS L. REV. 909 (1977).

accident.[3] The difficult inquiry into causation and fault required by the law in "tort liability" jurisdictions is replaced in no-fault jurisdictions by a system of insurance benefits that provides for prompt recompense to persons injured in automobile accidents.[4] The only determination to be made is one of contractual entitlement to the benefits.[5] Whatever the societal advantage created by no-fault automobile accident injury reparation systems, the recent adoption of such statutes in a number of states has caused difficulty regarding claims by the United States under the Federal Medical Care Recovery Act.[6]

The federal government is required by statute to provide free medical care to injured members of the United States armed forces.[7] Entitlement to such medical care arises not only when a servicemember is injured while on duty, but also arises from injuries that occur during off duty hours—in this case while driving or riding in an automobile.[8] Because the federal government is not an insurer of persons injured in automobile accidents,[9] it normally will seek recovery of the expense it incurs on behalf of the injured servicemember from any negligent third parties responsible for the injury or from any insurance company liable to pay medical benefits to the injured servicemember under a policy. To authorize recovery from negligent third parties, Congress enacted the Federal Medical Care Recovery Act in 1962.[10] The Act provides for a governmental right of reimbursement whenever the United States provides medical care to an injured person whose injuries arise out of "circumstances creating a tort liability upon some third person."[11] This language, which predates enactment of any no-fault insurance statute, limits the right of recovery to situations where state law imposes tort liability upon some negligent person.[12] Thus, the right of recovery granted in the literal language of the Federal Medical Care Recovery Act is not triggered when there is no tort liability imposed by state law.

The lack of a tortfeasor under no-fault reparation systems arguably has impaired the right of recovery under the Federal Medical Care Recovery stat-

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[3] *See, e.g.*, KY. REV. STAT. § 304.39-010 (Supp. 1978); *see also* PA. STAT. ANN. tit. 40, § 1009.102 (Purdon Supp. 1979). *See generally* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 2 (1965).

[4] *See, e.g.*, KY. REV. STAT. § 304.39-010 (Supp. 1978); *see also* PA. STAT. ANN. tit. 40, § 1009.102 (Purdon Supp. 1979).

[5] *See, e.g.*, MICH. STAT. ANN. § 24.13105 (Supp. 1979).

[6] 42 U.S.C. §§ 2651-2653 (1976).

[7] 10 U.S.C. §§ 1071-1087 (1976).

[8] Medical care is provided to all active duty servicemembers. See text accompanying notes 21 & 22 *infra*.

[9] 10 U.S.C. § 1071 (1976). The national defense purpose of providing free medical care to qualified individuals is found in this provision: "The purpose of sections 1071-1087 of this title is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents." *Id.*

[10] 42 U.S.C. §§ 2651-2653 (1976). Obviously, once a third party is adjudged liable under state law, his insurance company will be liable to the United States under the indemnification policy with the tortfeasor.

[11] 42 U.S.C. § 2651(a) (1976).

[12] *Id.*

ute. In addition to asserting a right of recovery under the Act, the federal government has pursued nonstatutory bases for reimbursement of the expense of medical care it has incurred on behalf of the injured servicemember.[13] The principal nonstatutory theory utilized by the government is a third party beneficiary contractual argument. Specifically, the United States claims to be an intended third party beneficiary of a no-fault insurance contract between the servicemember and the insurance carrier. This theory has had varied success. Many courts have held that the United States is a third party beneficiary of the state no-fault statute or the insurance contract entered pursuant to the statute, or both.[14] Thus, the United States has with some success preserved its right of recovery by basing its claim outside the Federal Medical Care Recovery Act in contract rather than inside the Act in tort.

There are, however, a number of courts in no-fault jurisdictions that have rejected attempts by the government to claim a right of reimbursement either under the Act or upon a nonstatutory third party beneficiary theory. One view is that the United States' right of recovery under the Federal Medical Care Recovery Act is extinguished in a state that has abolished tort liability pursuant to a modified no-fault insurance plan.[15] Another view seems to be that the United States has no right to be reimbursed unless the injured party receiving medical care from the government legally incurs the medical expense.[16] These conflicting judicial responses to varied fact patterns have confused and clouded the underlying governmental right to reimbursement. It is the thesis of this note that the United States government should be entitled to reimbursement for the expenses it has incurred on behalf of the insured under a no-fault automobile insurance contract. In order to carry out such a policy, it is submitted that courts should apply the underlying legislative intent of the Federal Medical Care Recovery Act and allow federal recovery of medical expense from no-fault insurers as a mandatory third party beneficiary of the no-fault insurance contract. Additionally, it is suggested that Congress, to make explicit its intent, should amend the Act to ensure reimbursement for the benefit of the federal treasury.

Thus, this note first will review the federal recovery of medical expense in fault based systems prior to the adoption of no-fault insurance statutes. Second, it will survey the impact of no-fault statutes upon the federal recovery right, focusing upon courts' treatment of both the Federal Medical Care Recovery Act and the third party beneficiary theory under no-fault insurance laws. Finally, the note will propose that judicial acceptance of the federal right

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[13] *See, e.g.*, Medical Care Claims, 32 C.F.R. § 757.2 (1979).

[14] *See* Government Employees Ins. Co. v. Rozmyslowicz, 449 F. Supp. 68 (E.D.N.Y. 1978), *aff'd sub nom.* United States v. Government Employees Ins. Co., 605 F.2d 669 (2d Cir. 1979); United States v. Leonard, 448 F. Supp. 99 (W.D.N.Y. 1978); United States v. Criterion Ins. Co.,—Colo.—, 596 P.2d 1203 (1979).

[15] Hohman v. United States, 470 F. Supp. 769, 771 (E.D. Pa. 1979). *Hohman* is discussed in text beginning at note 80 *infra*.

[16] *See* Sanner v. Government Employees Ins. Co., 150 N.J. Super. 488, 376 A.2d 180 (1977), *aff'd per curiam*, 75 N.J. 460, 383 A.2d 429 (1978). *Sanner* is discussed in text beginning at note 190 *infra*.

of recovery in no-fault jurisdictions is required by compelling public policy considerations and that an amendment to the Federal Medical Care Recovery Act would be appropriate.

I. Background: Medical Care Recovery Prior to the Adoption of No-Fault Insurance Laws

The operation of the federal recovery right was effectively and consistently applied in every state[17] until the enactment of no-fault insurance laws. In order to illustrate how federal medical recovery has been affected by no-fault legislation, it is necessary first to understand the basic federal recovery right as it is implemented in fault based jurisdictions. This section will examine the independent right of recovery granted to the government in the Federal Medical Care Recovery Act (FMCRA or Act).[18] Additionally, it will outline the various methods available to the United States to enforce the right of recovery under the Act as well as the third party beneficiary theory which is available as an alternative method of recovery outside the FMCRA.

The FMCRA enables the United States to recover from negligent third parties responsible for injuries to servicemembers the reasonable value of medical care[19] furnished to these beneficiaries of federal medical care statutes.[20] Under federal statutes, a servicemember who is on active duty is enti-

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[17] Bernzweig, *Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 Colum. L. Rev. 1257, 1262-63 (1964) [hereinafter cited as Bernzweig].

[18] 42 U.S.C. § 2651 (1976). Section 2651(a) provides in relevant extract:

> 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 or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished.

[19] 42 U.S.C. § 2652(a) (1976). "The President may prescribe regulations . . . with respect to the determination and establishment of the reasonable value of the hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished or to be furnished." *Id.*

President John F. Kennedy, through Executive Order, delegated authority to prescribe such regulations to the Bureau of the Budget (now the Office of Management and Budget). Exec. Order No. 11,060, 3 C.F.R. § 651 (1959-1963 Compilation), *reprinted in* 42 U.S.C. § 2652 (1976).

A third party tortfeasor may not challenge the medical, surgical and dental rates prescribed by the Office of Management and Budget on the grounds of unreasonableness. United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967); Phillips v. Trame, 252 F. Supp. 948, 951 (E.D. Ill. 1966).

[20] The need for the Federal Medical Care Recovery Act arose out of United States v. Standard Oil Co. of California, 332 U.S. 301 (1947), in which the United States Supreme Court denied that any right of the government to reimbursement existed in federal common law. *Id.* at 314. The Court went on to note that Congress

tled to receive medical and dental care in any facility of any of the uniformed services.[21] If an active duty servicemember is treated at a civilian medical facility, the cost of the medical care is paid directly by the United States.[22] Accordingly, when the United States incurs medical expense on behalf of one of these qualified individuals and the injury is caused by a negligent third party, the government may assert a claim against the tortfeasor for reimbursement for the value of the medical care furnished.

The FMCRA creates an independent cause of action in the United States for recovery of the expense of medical care.[23] This independent right is coexistent with the injured party's right of action against the tortfeasor for other elements of damage such as loss of earning capacity or pain and suffering.[24] The right of recovery under the FMCRA is implemented by a subrogation of the United States to the rights of the injured party to the extent of the value of the medical care.[25] The right of subrogation attaches to the substantive rights in tort which the injured party may have against the tortfeasor under state law.[26] Generally, however, the right of the United

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was certainly aware that injuries to soldiers caused by tortfeasors resulted in losses to the federal treasury when medical care was provided pursuant to federal statute. *Id.* at 315. The Court held that it was a matter of federal fiscal policy which lay entirely in the hands of Congress to whom the Constitution delegated financial responsibility for the United States. *Id.* at 316-17. The purpose of the Act was thus to provide an explicit right of recovery for the United States against persons liable under state law for injuries to beneficiaries of federal medical care statutes in order to restore such lost funds to the treasury. For the legislative history of the FMCRA, see S. REP. No. 1945, 87th Cong., 2d Sess. 1, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2637 [hereinafter cited as SENATE REPORT]. For an analysis of the FMCRA and the legislative intent of Congress, see Bernzweig, *supra* note 17, at 1259-61.

[21] 10 U.S.C. § 1074 (1976). Similar medical and dental care is authorized for retired armed forces personnel, as well as the dependents of both active duty and retired personnel if such space in a medical facility of the uniformed services is available. 10 U.S.C. §§ 1074 & 1076 (1976).

[22] Medical Care Claims, 32 C.F.R. § 757.3(h) (1979), authorizes direct payment of civilian medical expenses incurred by active duty naval personnel. The other military branches have similar regulations. Retired armed forces personnel and dependents of both active duty and retired personnel are entitled to have a portion of their medical expenses paid under the Civilian Health and Medical Program of the Uniformed Services if they are treated in a civilian medical facility. 10 U.S.C. §§ 1079-1086 (1976).

[23] 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. Thomas Jefferson Corp., 309 F. Supp. 1246 (W.D. Va. 1970); 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); Lefebvre v. Government Employees Ins. Co., 110 N.H. 23, 259 A.2d 133 (1969); Avery v. Scott, 216 So. 2d 111 (La. App. 1968).

See also Claims for the Reasonable Value of Medical Care Furnished by the Army, 32 C.F.R. § 537.22(a) (1979); *see generally* Bernzweig, *supra* note 17, at 1259-61.

[24] United States v. Greene, 266 F. Supp. 976, 980 (N.D. Ill. 1967). *See* Bernzweig, *supra* note 17, at 1261.

[25] United States v. Greene, 266 F. Supp. 976, 979 (N.D. Ill. 1967). *See* Bernzweig, *supra* note 17, at 1259.

[26] United States v. Studivant, 529 F.2d 673, 676 (3d Cir. 1976); United States v. Haynes, 445 F.2d 907, 909 (5th Cir. 1971); Lefebvre v. Government Employees Ins.

States to recompense is not frustrated by procedural aspects which could defeat the injured party's right of action under state law.[27] For example, although the injured party's claim for other damages may be barred by a state statute of limitations, the independent right of recovery would not be barred.[28]

The FMCRA protects the government's right of reimbursement against the injured party retaining medical expense damages from the tortfeasor. In an action against the tortfeasor in almost every fault based jurisdiction, the injured party may plead and receive damages under the collateral source doctrine for the value of medical care rendered, even when the medical services were furnished without charge from a third person.[29] If the injured servicemember were allowed to recover damages from the tortfeasor for the medical care, once the damages were paid over to the servicemember, the tortfeasor's obligation would be extinguished.[30] The collateral source rule thus would frustrate the government's right of recovery by relieving the tortfeasor of liability without placing the medical care damages in the United States' hands.[31] The FMCRA, however, takes the right of recovery which the plaintiff has against the tortfeasor and transfers it to the United States.[32] The injured party may not *himself* have a cause of action against the tortfeasor for damages relating to the medical care furnished by the United States.[33] The FMCRA, therefore, protects the United States' right of recovery by subrogating the government to the injured party's right of action for medical care damages, and the independent right ensures that the United States will recover those damages for the value of medical care which otherwise would fall into the hands of the injured party as a double recovery.[34]

Co., 110 N.H. 23, 25, 259 A.2d 133, 135 (1969). *See* Bernzweig, *supra* note 17, at 1262-63.

[27] United States v. Moore, 469 F.2d 788, 794 (3d Cir. 1972) (interspousal immunity); United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884, 887 (5th Cir. 1967) (statute of limitations). *See* Bernzweig, *supra* note 17, at 1263-64.

[28] United States v. Studivant, 529 F.2d 673, 675 (3d Cir. 1976); United States v. Gera, 409 F.2d 117, 119-20 (3d Cir. 1969); United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884, 887 (5th Cir. 1967).

[29] DEPT. OF HEALTH, EDUCATION, AND WELFARE REPORT ON H.R. 298, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2637, 2647. The collateral source doctrine allows an injured person to recover the full measure of damages from the wrongdoer regardless of any compensation recieved from a collateral source. "The reason for the rule is that the wrongdoer must compensate the injured party for the injury he has committed, without any reference to other compensation. In other words, if the defendant is liable in damages, the extent of his liability is not to be measured by deducting financial benefits received by plaintiff from collateral sources." Rayfield v. Lawrence, 253 F.2d 209, 213 (4th Cir. 1958).

[30] *See* United States v. Ammons, 242 F. Supp. 461 (N.D. Fla. 1965) (settlement and release by injured party barred recovery by United States under the Act).

[31] See note 29 *supra*.

[32] Lefebvre v. Government Employees Ins. Co., 110 N.H. 23, 25, 259 A.2d 133, 135 (1969).

[33] United States v. Greene, 266 F. Supp. 976, 980 (N.D. Ill. 1967).

[34] United States v. Leonard, 448 F. Supp. 99, 101 (W.D.N.Y. 1978); United States v. Jones, 264 F. Supp. 11, 15 (E.D. Va. 1967).

The statute provides a number of methods by which the government may pursue its independent cause of action. As one alternative, the United States can bring suit in its own name or in the name of the injured party.[35] The government may also intervene or join the suit of the injured party against the tortfeasor.[36] In addition, the United States may cause the injured party to assign his cause of action to it to the extent of the United States' right to recover medical expenses.[37] All of these methods, however, require that the United States Attorney use government resources to press the United States' claim. A less expensive method would be to allow the injured servicemember to represent not only his own claim for pain and suffering but also the government's medical care claim against the tortfeasor.[38] There is, however, a problem with this method. Once the damages from judgment or settlement for the medical care are paid over to a plaintiff representing the government's claim, the explicit provisions of the FMCRA provide no requirement that the injured party turn over those amounts to the government.[39] Since the government's subrogation right is enforceable against the tortfeasor or his insurance company but is not enforceable against the injured party,[40] the government requests the injured party's attorney to represent the United States' claim for medical expense and requires the attorney to sign an agreement letter to turn over any damages received in the suit.[41] If the injured party refuses to cooperate in representing the United States' claim, the United States must directly join or intervene as a named party in the injured party's action against the tortfeasor to protect its right to recovery.[42] All of these methods ensure recompense to the United States and prevent a double recovery by the injured party.

In fault based jurisdictions, the FMCRA is ineffective in obtaining governmental recovery when the tortfeasor is judgment proof or where there is

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[35] 42 U.S.C. § 2651(b) (1976).

[36] *Id.*

[37] 42 U.S.C. § 2651(a) (1976).

[38] Bernzweig, *supra* note 17, at 1270 & n.86. Defendants have argued that the statutory methods of enforcement are the only ones permissible. See, however, cases cited at note 41 *infra*.

[39] *See* COMPTROLLER GENERAL OF THE UNITED STATES REPORT ON H.R. 298, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2637, 2652.

[40] United States v. Ammons, 242 F. Supp. 461 (N.D. Fla. 1965). *See generally* RESTATEMENT OF RESTITUTION § 162 (1937).

[41] Most courts have construed the Act to permit the method of recovery described in the text. Cook v. Stuples, 74 F.R.D. 370, 371-72 (W.D. Okla. 1976); Palmer v. Sterling Drugs, Inc., 343 F. Supp. 692, 694-95 (E.D. Pa. 1972); Conley v. Maattalá, 303 F. Supp. 484, 485 (D.N.H. 1969).

The letter of agreement is enforceable by the United States against the attorney. Hanley v. Condrey, 467 F.2d 697, 699 (2d Cir. 1972).

Government regulations also provide for such a device. *See* 32 C.F.R. §§ 537.24(a), 757.5(e) (1979).

The attorney receives no compensation for this additional task of representation, 5 U.S.C. § 1306 (1976); the government, however, will assist the attorney in obtaining military medical reports and other information concerning treatment of the injured party.

[42] Bernzweig, *supra* note 17, at 1270 & n.86.

no tortfeasor. Thus when the tortfeasor has no liability insurance, or the servicemember is at fault, the United States has relied upon contractual theories to obtain reimbursement.[43] The most important theory is one in which the United States claims to be a third party beneficiary of the injured servicemember's insurance contract. The third party beneficiary theory has enabled the United States to obtain recompense under the injured servicemember's uninsured motorist coverage[44] where the government could not obtain reimbursement from a judgment proof, uninsured tortfeasor.[45] The theory also has enabled recovery under medical payments insurance[46] which is payable without regard to fault of the injured party.[47] Thus, if the injured party was at fault or involved in an accident in which fault could not be determined, the United States could not pursue a claim under the FMCRA, but could still recover under the servicemember's medical payments policy as a third party beneficiary. The use of this method has often enabled the federal treasury to obtain repayment in cases in which the government could not have pursued a claim under the FMCRA.

As long as states relied upon a fault based system to compensate parties injured in automobile accidents, the FMCRA provided a satisfactory method for the United States to recover medical expenses from third party wrongdoers. Consistent application of the federal recovery right was possible in every state because fault based jurisdictions imposed tort liability upon

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[43] *See* Army Regulations, 27-40 para. 5-1; 32 C.F.R. § 757.2(a) (1979); 32 C.F.R. §§ 842.141(a), 842.143(a) (1978).

[44] Uninsured motorist coverage is a type of insurance which provides benefits to an insured accident victim in the event he is struck by a motorist carrying no liability insurance. In this situation, since the tortfeasor has no insurance to pay for the injured servicemember's medical expenses, the government asserts a claim as a third party beneficiary of the insured servicemember's uninsured motorist coverage.

[45] Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967); United States v. Hartford Accident & Indemnity Co., 320 F. Supp. 648 (E.D. Cal. 1970) (recovery denied on other grounds); United States v. Commercial Union Ins. Group, 294 F. Supp. 768 (S.D.N.Y. 1969); Transnational Ins. Co. v. Simmons, 19 Ariz. App. 354, 507 P.2d 693 (1973). *Contra,* United States v. Allstate, 306 F. Supp. 1214 (N.D. Fla. 1969) (government not an intended beneficiary under language of the insurance policy).

It is crucial to note that this expansion of medical care recovery has not in the past depended upon the independent cause of action granted to the United States under the FMCRA, but rather has depended upon the insurance contract between the insurer and the injured servicemember.

[46] Medical payments insurance is an additional coverage available in fault based jurisdictions which provides medical benefits to the insured without regard to fault. Essentially, medical payments insurance is similar to a modest form of no-fault insurance utilized in states with add-on insurance plans. See note 2 *supra.*

[47] The first case to recognize the third party beneficiary theory for recovery by the United States was Government Employees Ins. Co. v. United States, 349 F.2d 83 (10th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966). The third party beneficiary theory has been widely approved by courts. United States v. California State Auto. Ass'n, 530 F.2d 850 (9th Cir. 1976); United States v. Auto. Club Ins. Co., 522 F.2d 1 (5th Cir. 1975); United States v. Government Employees Ins. Co., 461 F.2d 58 (4th Cir. 1972); United States v. State Farm Mut. Auto. Ins. Co., 455 F.2d 789 (10th Cir. 1972); United States v. United Services Auto. Ass'n, 431 F.2d 735 (5th Cir. 1970), *cert. denied,* 400 U.S. 992 (1971); Hollister v. Government Employees Ins. Co., 192 Neb. 687, 224 N.W.2d 164 (1974). *Accord,* United States v. Nationwide Mut. Ins. Co., 499 F.2d 1355

drivers involved in automobile accidents.[48] In addition, the third party beneficiary theory furthered the goals of medical care recovery in situations falling outside the provisions of the FMCRA. Armed with both the FMCRA and the third party beneficiary theory, the United States has returned millions of dollars to the federal treasury that otherwise would have been lost as a windfall to either the tortfeasor, his insurer or the injured party.[49] Nevertheless, with the enactment of no-fault insurance laws, the FMCRA has become less effective and perhaps inapplicable to government attempts to recover medical expense.

II. Effect of No-Fault Statutes on Governmental Medical Care Recovery

The impact of a particular state's no-fault insurance law upon the FMCRA right of reimbursement depends upon the language of the state statute. In states with add-on no-fault plans,[50] the statutes merely require a no-fault coverage in addition to the usual automobile liability insurance coverages.[51] These states do not

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(9th Cir. 1974) (remanded on question of whether United States was an intended third party beneficiary); United States v. Government Employees Ins. Co., 421 F. Supp. 1322 (N.D.N.Y. 1976) (right of recovery as assignee of injured party's claim).

This expansion of medical care recovery depends upon the insurance contract language rather than the independent right of recovery in the FMCRA. See note 45 *supra*. In this situation, there is no tortfeasor against whom recovery can be had under the FMCRA. Typically, the insured is at fault or was involved in a one car accident. The government asserts a claim as a third party beneficiary of the servicemember's medical payments insurance which is payable without regard to fault.

See generally Long, *Government Recovery Beyond the Federal Medical Recovery Act*, 14 S.D. L. Rev. 20 (1969).

[48] Bernzweig, *supra* note 17, at 1262.

[49] The combined collections of all government agencies during calendar year 1978 is summarized below:

	Claims Asserted	*Amount Asserted*	*Claims Collected*	*Amount Collected*
Army	4,443	$ 8,170,624.33	3,931	$ 3,911,010.97
Navy	3,269	5,436,075.59	3,649	3,736,411.13
Air Force	6,684	6,688,725.00	5,198	3,740,832.00
VA	3,843	11,291,251.00	2,312	3,879,088.00
HEW	572	970,215.75	305	560,536.91
Total	18,811	$32,556,891.67	15,395	$15,827,879.01

The total collections for the Medical Care Recovery Act since its inception in 1963 amount to $135,625,775.13. It is interesting to note that the program is based upon relatively small claims. The average claim asserted is $1,730.73, while the average claim collected is $1,021.11. Letter to the author from Lawrence A. Klinger, Assistant to the Directors Torts Branch, Civil Division, United States Department of Justice (March 10, 1980).

[50] See note 2 *supra*.

[51] Eight states have such statutory enactments: Ark. Stat. Ann. §§ 66-4014 to -4021 (Supp. 1979); Del. Code Ann. tit. 21, § 2118 (1979); Md. Ann. Code art. 48A, §§ 538-547 (1979); Or. Rev. Stat. §§ 743.800 to .835 (1977); S.C. Code §§ 56-11-110 to -250 (1977 & Supp. 1979); S.D. Compiled Laws Ann. §§ 58-23-6 to -8 (1978); Tex. Ins. Code Ann. art. 5.06-3 (Vernon Supp. 1978); Va. Code § 38.1-380.1 to -380.2 (Supp. 1979).

limit the injured person's right to sue the third party wrongdoer for reimbursement of medical expense.[52] The injured person immediately recovers first party benefits[53] from the no-fault insurer and, depending upon the statute, may have to turn over to the insurer any damages awarded for medical expenses in a subsequent lawsuit against the tortfeasor.[54] The FMCRA right of recompense fits easily into this type of no-fault system. The FMCRA bases its right of recovery upon "circumstances creating a tort liability upon some third person."[55] Since under the add-on no-fault plan there is no abrogation of tort liability in the negligent party, the United States can undoubtedly continue to pursue a claim for reimbursement under the FMCRA. Additionally, since add-on no-fault insurance is essentially a traditional fault based system with expanded medical payments insurance,[56] the United States can utilize the third party beneficiary theory to recover outside the FMCRA in cases where there is no tortfeasor.[57] The United States can therefore pursue its FMCRA right and a third party beneficiary theory of recovery in add-on no-fault states.

The situation, however, is different in modified or pure no-fault states. In modified no-fault states,[58] tort liability for economic harm such as medical expense is often abolished to the extent of no-fault benefits available to the

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[52] The Maryland statute is typical: MD. ANN. CODE art. 48A, § 540 (1979) provides in pertinent part:

> The benefits required under §539 of this article shall be payable without regard to the fault or nonfault of the named insured or the recipient in causing or contributing to the accident, and without regard to any collateral source of medical, hospital, or wage continuation benefits.

Section 542 provides:

> Nothing in this subtitle shall be deemed to affect the right of any person to claim and sue for damages or losses sustained by him as the result of a motor vehicle accident.

[53] "First party benefits" refers to whom the insurance company must pay the benefits. First party no-fault benefits are payable to the insured under the contract upon his or her injury in an automobile accident. These benefits are payable without regard to the insured's fault. In contrast, third party liability insurance is payable to parties outside the contractual relationship upon a showing that the insured is liable for their injuries.

[54] See statutes cited at note 51 *supra*.

[55] 42 U.S.C. § 2651(a) (1976). The Act was enacted by Congress at a time when no-fault insurance neither existed in the United States nor was contemplated. The legislative history of the FMCRA indicates that Congress conditioned the government's recovery right upon the third party's tort liability under substantive state law. SENATE REPORT, *supra* note 19, at 2640. It seems clear that Congress intended to require tort liability imposed upon a third person as a vehicle to bring the federal right of recovery against the person liable under state law for the injured person's medical expenses. *Id.* It would seem reasonable to conclude that Congress had assumed the continued existence of the fault based system of automobile accident reparations in the states. It is therefore doubtful that Congress intended to subject the federal right of recovery to a state law which completely extinguishes the right. See Part III *infra*.

[56] See note 2 *supra*.

[57] See notes 46 & 47 *supra*.

[58] See note 2 *supra*. Fifteen states have modified plans: COLO. REV. STAT. §§ 10-4-701 to -723 (1973 & Supp. 1978); CONN. GEN. STAT. ANN. §§ 38-319 to -351a (West Supp. 1979); FLA. STAT. ANN. §§ 627.730 to .741 (West 1972 & Supp. 1979), *repealed*, 1976 Fla. Laws ch. 76-168, § 3 (effective date of repeal July 1, 1982); GA.

injured party.[59] A party in these states, whose medical expenses for injury are less than the amount of no-fault benefits available under the statute, is precluded from suing the tortfeasor for economic harm.[60] In pure no-fault states,[61] tort liability for economic harm is completely abolished and the no-fault insurer is responsible for unlimited benefits.[62] Thus, in most cases in these states the injured party can claim recompense only from the no-fault insurer. The FMCRA still could be applicable in these states since the policy effectuated by the Act is paramount over state law under the supremacy clause of the Constitution.[63] The underlying intent of Congress was to extend the right of recovery against the person liable for the injuries under state law.[64] In fault based jurisdictions, that person has always been the tortfeasor, while in no-fault jurisdictions, that person is now the no-fault insurer. Logically, the FMCRA right of recovery should be extended in no-fault jurisdictions. The literal language of the statute, however, provides that the right of recovery is enforceable only against a third person liable in tort.[65] Because in a no-fault state the injured party usually has no rights in tort which can be

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CODE. ANN. §§ 56-3401b to -3413b, 56-9915.2 (1977 & Supp. 1979); HAW. REV. STAT. §§ 294-1 to -41 (1976 & Supp. 1978); KAN. STAT. §§ 40-3101 to -3121 (1973 & Supp. 1978); KY. REV. STAT. §§ 304.39-010 to -340, 304.99-050 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 90, §§ 34A-34*O* (West 1975 & Supp. 1979), ch. 231, § 6D (West 1975); MINN. STAT. ANN. §§ 65B.14, .41 to .71 (West Supp. 1979); NEV. REV. STAT. §§ 698-010-.510 (1977); N.J. STAT. ANN. §§ 39:6A-1 to -20 (West 1973 & Supp. 1979); N.Y. INS. LAW §§ 670-678 (McKinney Supp. 1979); N.D. CENT. CODE §§ 26-41-01 to -19 (1978 & Supp. 1979); PA. STAT. ANN. tit. 40, §§ 1009.101-.603 (Purdon Supp. 1979); UTAH CODE ANN. §§ 31-41-1 to -13.4 (1974 & Supp. 1979).

[59] Monetary thresholds abrogate the right to sue in tort until the threshold damages are exceeded. Narrative thresholds are based upon a description of the types of injuries that must occur before the injured person may sue in tort for noneconomic harm.

Kentucky is typical. Its statute provides both a monetary and narrative threshold:

> (a) Tort liability with respect to accidents occurring in this commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is "abolished" for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits provided in this subtitle are payable therefor, . . . except to the extent noneconomic detriment qualifies under subsection (2)(b) hereof.
>
> (b) . . . a plaintiff may recover damages in tort for pain, suffering, mental anguish and inconvenience . . . in the event . . . damages exceed one thousand dollars ($1,000), or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a weight-bearing bone, a compound, comminated, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death.

KY. REV. STAT. § 304.39-060(2).

[60] *See, e.g., id.* Some states set a minimum dollar amount less than the amount of benefits available to the injured party under the statute which must be exceeded to sue in tort. *See* N.J. STAT. ANN. § 39:6A-8 (West 1973).

[61] Michigan has essentially a pure no-fault insurance statute: MICH. STAT. ANN. § 24.13101 to -13179 (Supp. 1979). See note 2 *supra*.

[62] *See, e.g.*, MICH. STAT. ANN. § 24.13135 (Supp. 1979).

[63] See text beginning at note 68 *infra*.

[64] See note 55 *supra* and text beginning at note 229 *infra*.

[65] 42 U.S.C. § 2651(a) (1976).

transferred to the United States under this literal language, the recovery right is arguably extinguished.[66] The federal right of recovery could fail under such a system of no-fault automobile accident injury reparations. If courts refuse to make the United States a federally mandated third party beneficiary of the no-fault contract under the supremacy of the FMCRA theory, the government still might rely upon a straight third party beneficiary theory under the state no-fault law. Unlike the supremacy of the FMCRA theory, the success of a third party beneficiary theory would depend upon the language in the no-fault statute. An examination of both theories is important because unlike in the add-on no-fault states, whether the United States has any right of recovery in modified or pure no-fault states could depend *only* upon its status as a third party beneficiary of the no-fault contract.

The enactment of no-fault insurance laws has created substantial judicial confusion regarding the interplay between the FMCRA, no-fault insurance laws and the various methods available to the government for effectuating medical care recovery. If the courts misunderstand or reject these theories of recovery, the United States may be denied reimbursement in the very same situations where prior to enactment of state no-fault laws, it could have recovered.[67] This section will begin by examining the theory that the United States is a federally mandated third party beneficiary of all no-fault contracts under the supremacy of the FMCRA over state no-fault statutes. Next it will look at the utility of a third party beneficiary theory to enable governmental recovery under state no-fault statutes. Finally, the section will examine judicial confusion of the interplay between the FMCRA, state no-fault statutes and the recovery methods used by the United States.

A. *The Federally Mandated Third Party Beneficiary Theory Under the FMCRA*

1. United Services Automobile Association v. Holland.

The first court to deal with the question whether the FMCRA right of recovery is extinguished by abolition of tort liability by a no-fault statute was the District Court of Appeals of Florida in *United Services Automobile Association v. Holland*.[68] In that case, an injured serviceman who received free medical care brought suit against his no-fault insurer to recover benefits on behalf of the United States.[69] The no-fault insurer denied liability for the medical expenses on the basis that it was not required to pay no-fault benefits on behalf of its insured when a third party is required by law to pay for such expenses.[70]

The court held that the enactment of a no-fault insurance law in Florida would not frustrate the United States' right to reimbursement under the

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[66] Hohman v. United States, 470 F. Supp. 769, 771 (E.D. Pa. 1979).

[67] The public policy ramifications of permitting state law to cut off the federal right of recovery is discussed in Section III *infra*.

[68] 283 So. 2d 381 (Fla. Dist. Ct. App. 1973).

[69] *Id.* at 382.

[70] *Id.* at 384.

FMCRA.[71] The court reasoned that since the United States had a right of reimbursement against a tortfeasor under the FMCRA in a fault based state, it should, by analogy, have a right of reimbursement against the no-fault insurer under the FMCRA in a no-fault state.[72] That the no-fault insurance law extinguished liability in a tortfeasor and substituted the no-fault insurer as the person liable could not defeat the supreme federal right of recovery.[73] Essentially, the court reasoned that the right of reimbursement should follow the person liable under state law for the injured person's medical expenses.[74]

The *Holland* court's reasoning adapted the FMCRA and the legislative intent behind the Act to the no-fault reparations system. The court ignored the literal language of the FMCRA which limits the right of reimbursement to one against tortfeasors, and instead focused upon the underlying assumption of Congress that the Act would allow reimbursement from the person liable for the injured peron's expense under state law. By first declaring that the Florida no-fault law could not extinguish the FMCRA right of recovery[75] and then holding that the United States had a right to recover as a third party beneficiary of the serviceman's no-fault contract,[76] the *Holland* court adapted the reimbursement purpose of the FMCRA to the no-fault insurance system.

There is very little question that the United States is a third party beneficiary of an insurance contract in a no-fault state. As the *Holland* court noted, insurers are well aware when they issue policies to servicemembers that armed forces personnel and their dependents are eligible for medical care in a government hospital.[77] Insurers are also aware of Congress's intent to receive reimbursement as expressed in the FMCRA.[78] Since the insurance policy is issued to the servicemember with such knowledge, it would be inequitable and unconscionable for the insurer to avoid liability for medical expenses it would have paid out to or for the insured servicemember but for the government's provision of medical care.[79] The *Holland* case thus represents judicial recognition of the paramount federal interest in reimbursement over a state's no-fault insurance law.

2. Hohman v. United States.

All courts, however, have not approached this problem with the same insight. The court in *Hohman v. United States*[80] narrowly construed the FMCRA to allow the Pennsylvania no-fault statute[81] to extinguish the federal right of recovery. In that case, an active duty serviceman received extensive

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[71] *Id.* at 385.
[72] *Id.* at 385-86.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 385.
[76] *Id.* at 385-86.
[77] *Id.* at 385.
[78] *Id.*
[79] *Id.* at 386.
[80] 470 F. Supp. 769 (E.D. Pa. 1979).
[81] PA. STAT. ANN. tit. 40, §§ 1009.101 - .603 (Purdon Supp. 1980).

free medical care at an Air Force hospital.[82] Subsequently, he brought an action to recover from his no-fault insurer the value of the medical care he received and a declaratory judgment against the United States that it was not entitled to no-fault benefits under the FMCRA.[83] The United States District Court for the Eastern District of Pennsylvania quickly disposed of the serviceman's claim for no-fault benefits by finding that the serviceman had suffered no "net loss" as defined under the statute.[84]

With respect to the government's claim for no-fault benefits under the FMCRA, the court held that since Congress had used language which conditioned the right upon tort liability of a third person under state law, the FMCRA right of recovery could be extinguished by abolition of tort liability by a state.[85] By a narrow and literal reading of the FMCRA the court denied no-fault benefits to reimburse the government.

The *Hohman* decision fails to implement the congressional intent underlying the literal language of the FMCRA. It is submitted that the *Hohman* court was incorrect in rejecting the *Holland* court's reasoning as "[missing] the point of the FMCRA."[86] The point of the FMCRA is Congress's intent that the United States can look to whoever is liable for payment of the injured party's medical expenses under state law.[87] Although Congress could not foresee in 1962 that a significant change in some states' tort law would remove the third person liable in tort and substitute a "person" liable in contract, such a change should be irrelevant to whether the United States can enforce its right of recovery under the FMCRA. The independent subrogation of the United States to the injured party's rights in tort was merely a procedural device utilized by Congress to effectuate recovery; it was not intended "to alter or diminish the government's right of recovery."[88] The United States thus should be able to receive no-fault benefits from the no-fault insurer who is liable under state law. Thus it was the *Hohman* court that missed the point of

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[82] 470 F. Supp. at 770.

[83] *Id.*

[84] *Id.* at 770-71.

[85] *Id.* at 771-72. The court ignored the legislative intent behind the language of the Act:

> By using the language "under circumstances creating a tort liability" Congress, of its own free will, chose to impose upon the Government's right of reimbursement a contingency, that contingency being that a third person must be *liable in tort* for the Government to be entitled to reimbursement. By imposing that contingency, Congress rendered the Government's right to reimbursement subject to the tort law of the several states, and the changes therein. It logically follows that the right to reimbursement was therefore subject to possible abolitions of tort liability, such as that which has occurred in Pennsylvania.

Id.

[86] *Id.* at 771.

[87] *Contra,* Hohman v. United States, 470 F. Supp. 769. It is because of such a narrow reading of the FMCRA that Congress should act to clarify its policy of federal recovery from those responsible under state law for the injured party's medical expenses. See section III *infra.*

[88] Bernzweig, *supra* note 17, at 1259.

the FMCRA by ignoring the underlying legislative intent of Congress and construing the Act strictly and literally. Such a decision represents a failure by the court to recognize the paramount federal interest in reimbursement to the federal treasury.

B. *The Third Party Beneficiary Theory Under State No-Fault Insurance Laws*

As an alternative to the federally mandated third party beneficiary theory under the FMCRA, courts have allowed recovery of medical expenses paid on behalf of servicemembers under no-fault insurance policies by application of traditional third party beneficiary contract doctrines. The general contract theory of recovery for a third party beneficiary requires that the beneficiary be an intended beneficiary of the contract rather than an incidental beneficiary.[89] An examination of the facts and circumstances surrounding the formation of the contract must be made to determine whether the parties intended any third party beneficiaries.[90] The intended beneficiary need not be specifically named in the contract nor be identifiable at the time the contract is made; he need only be ascertainable.[91] Indications of an intent to make one a third party beneficiary include (1) provisions in the contract creating rights in the third party, (2) provisions allowing for direct performance by the promisor to the third party, and (3) the social and legal relationship between the promisee and the third party.[92]

The starting point in determining what rights the United States may have as a third party beneficiary is the insurance contract. The no-fault statute and the insurance contract must be examined together in order to determine whether the United States is a third party beneficiary.[93] If the United States falls within language in the statute or contract which grants a right of recovery to the government or allows direct payment by the insurer to the government, courts have permitted recovery by the United States.[94] This section will closely examine the third party beneficiary theory in the light of no-fault statutes. The section will first examine New York and Colorado where the courts have allowed third party beneficiary status for the government under the language of the state no-fault law. Second, it will look at a Pennsylvania case and statutes from Hawaii and Kansas that are likely to prevent governmental recovery under the third party beneficiary theory.

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[89] *See generally* RESTATEMENT (SECOND) OF CONTRACTS, § 133 and introductory note at 286-87 (Tent. Draft Nos. 1-7, 1973).

[90] *Id.*

[91] United States v. State Farm Mut. Ins. Co., 455 F.2d 789, 791 (10th Cir. 1972). *See generally* RESTATEMENT (SECOND) OF CONTRACTS, § 139 (Tent. Draft Nos. 1-7, 1973).

[92] J. CALAMARI & J. PERILLO, CONTRACTS § 17-2 (2d ed. 1977).

[93] *See* Government Employees Ins. Co. v. Rozmyslowicz, 449 F. Supp. 68, 70 (E.D.N.Y. 1978), *aff'd sub nom.* United States v. Government Employees Ins. Co., 605 F.2d 669 (2d Cir. 1979).

[94] See cases cited in notes 14, 45 & 47 *supra*.

1. New York and Colorado.

One case, arising in United States District Court for the Western District of New York, allowed recovery by the United States as a third party beneficiary of the bare language of the insurance policy. In *United States v. Leonard*,[95] a serviceman was injured when the automobile he was driving was struck by a negligent third party.[96] Leonard, a member of the Coast Guard, was furnished free medical care by the United States.[97] Leonard commenced arbitration proceedings under the New York Insurance Law when his no-fault insurer refused to pay benefits for his medical care.[98] The United States instituted an action requesting an injunction to prohibit Leonard from collecting the no-fault benefits and demanding that payment for the reasonable value of the care be made by the insurer to the United States under the FMCRA or as a third party beneficiary.[99] Leonard argued that the New York Insurance Law, by abolishing tort liability for economic loss up to $50,000,[100] had extinguished the basis for the federal right of recovery under the FMCRA.[101] The insurance carrier admitted liability for the medical expenses but had withheld payment pending a determination of the person entitled to the benefits.[102]

The district court avoided the question whether the government's FMCRA claim was extinguished under the New York no-fault law and relied instead upon a third party beneficiary theory.[103] The court found it undisputed that Leonard was an eligible injured person under the no-fault statute.[104] Further, the court felt it was clear that the United States was a person who had incurred medical expense within the statutory definition of "basic economic loss."[105] The sole question was whether the obligation of the no-fault insurer ran to the serviceman who suffered the physical injuries or to the United States who incurred the medical expense.[106] Taking a common

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[95] 448 F. Supp. 99 (W.D.N.Y. 1978).

[96] *Id.* at 100.

[97] *Id.*

[98] N.Y. INS. LAW § 675(2) (McKinney Supp. 1979).

[99] 448 F. Supp. at 101.

[100] N.Y. INS. LAW § 673(1) & (2) (McKinney Supp. 1979). New York is a modified no-fault state. See notes 2 & 58 *supra*.

[101] 448 F. Supp. at 101.

[102] *Id.* at 100.

[103] *Id.* at 101.

[104] *Id.* at 102. N.Y. INS. LAW § 671(2) (McKinney Supp. 1979) provides:

> "First party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less [deductions not applicable to the case].

[105] 448 F. Supp. at 102. N.Y. INS. LAW § 671(1)(a) (McKinney Supp. 1979) provides:

> "Basic economic loss" means, up to fifty thousand dollars per person:
>
> (a) all necessary expenses incurred for: (i) medical, hospital, surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services . . . .

[106] 448 F. Supp. at 102.

sense approach to the problem, the court reasoned that a fair interpretation of the insurance contract required that the insurer's obligation ran to whomever incurs the medical expense.[107] Although the injured person is usually the same person who incurs the medical expense, the court concluded that the statute did not require it.[108] Thus, the court in *Leonard* concluded that the United States could recover as a third party beneficiary of the insurance contract.

While the *Leonard* court based its holding that the United States was a third party beneficiary upon the insurance policy language, *Government Employees Insurance Co. v. Rozmyslowicz*,[109] a decision handed down by the United States District Court for the Eastern District of New York a month after the *Leonard* decision, came to a different conclusion. In construing an insurance policy identical to that construed in *Leonard*,[110] the *Rozmyslowicz* court held that (1) a third party beneficiary argument for the United States could not be sustained on the bare language of the policy,[111] but that (2) a third party beneficiary argument for the United States could be sustained by use of the New York Insurance Law as required to be incorporated into the insurance policy.[112]

The facts of the case are comparable to those in *Leonard*. Rozmyslowicz was injured in an automobile accident.[113] The United States provided the medical care, and Rozmyslowicz assigned his claim for medical expenses to the government.[114] The no-fault insurer brought action in New York state court asking for a declaratory judgment that neither Rozmyslowicz nor the United States was entitled to recover no-fault benefits.[115] The United States removed the action to federal court and counter-claimed against the insurer for reimbursement for medical expenses out of the no-fault coverage.[116]

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[107] *Id.*

[108] *Id.* The court stated:

> [t]he language of the policy does not limit the right to reimbursement to the person sustaining the injury. A fair and sensible interpretation is that the right to reimbursement extends to whomever incurs the expense on behalf of the eligible injured person. Although the injured person is normally the same as the one who incurs the expense, in some instances, as this case demonstrates, the two are different.

Id.

[109] 449 F. Supp. 68 (E.D.N.Y. 1978).

[110] *Id.* at 69. Leonard's no-fault policy provided:

> *Mandatory Personal Injury Protection*
> The Company will pay first party benefits to reimburse for basic economic loss sustained by an eligible injured person on account of personal injuries caused by an accident arising out of the use or operation of a motor vehicle.

448 F. Supp. at 102.

[111] 449 F. Supp. at 69.

[112] *Id.* at 70.

[113] *Id.* at 69.

[114] *Id.*

[115] *Id.*

[116] *Id.* The United States sought removal under 28 U.S.C. § 1441 (1976).

The court criticized the *Leonard* court for holding that the United States was a third party beneficiary of the insurance policy. The basis of the *Rozmyslowicz* court's criticism was that the insurance policy language required the basic economic loss to be sustained *by* the eligible insured person.[117] Since Rozmyslowicz, like Leonard, had himself incurred no basic economic loss, the court ruled that a third party beneficiary theory could not be maintained by the United States merely on the insurance contract.[118] Thus, under the serviceman's insurance contract, the United States could not recover no-fault benefits.

The court, however, did not limit its analysis of the third party beneficiary theory to the bare language of the insurance contract. The New York Insurance Law also provides that any policy issued to satisfy the requirements of the no-fault law will be construed as if the minimum provisions required by the no-fault law were embodied in the policy.[119] The *Rozmyslowicz* court then turned to section 672(1) of the no-fault law which requires that every insurance policy issued in the state contain a provision for payment of no-fault benefits to "(a) *persons,* other than occupants of another vehicle or a motorcycle, *for loss arising out of the use or operation* in this state of such motor vehicle . . . ."[120] Reasoning that the United States was a person other than an occupant of another motor vehicle who had sustained a loss arising out of the use or operation of the insured motor vehicle, the court held that "the United States may recover under the terms of the Insurance Law *which are to be read into the policy.*"[121]

Upon appeal from the district court decision in *Rozmyslowicz,* the insurer argued that even if section 672(1)(a) is read into the policy, the United States was precluded from recovery because (1) the New York legislature had intended only natural persons to recover no-fault benefits; and (2) the United States did not suffer the physical injury for which reimbursement of medical care is sought.[122] The Court of Appeals for the Second Circuit rejected both arguments as unduly narrow interpretations of the no-fault insurance statute.[123] The court observed that the no-fault insurance statute was intended to benefit a broad class of claimants from which the United States was not excluded by the statute.[124] In a manner similar to that of the *Leonard* court, the court of appeals concluded that the injured party need not be the same party who incurs the medical expense.[125] The court stated succinctly, "The broad language of section 672(1)(a) suggests that a third party claimant who incurs the medical costs of an accident victim may recover those expenses under this section."[126]

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[117] 449 F. Supp. at 69.

[118] *Id.* at 69-70.

[119] 449 F. Supp. at 70. 1973 N.Y. Laws ch. 13, § 11.

[120] N.Y. INS. LAW § 672(a) (McKinney Supp. 1979) (emphasis added).

[121] 449 F. Supp. at 70 (emphasis added).

[122] United States v. Government Employees Ins. Co., 605 F.2d 669, 670 (2d Cir. 1979) (case renamed on appeal).

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* at 671.

The *Rozmyslowicz* court's reasoning is supported by general concepts of third party beneficiary contract recovery.[127] The United States' right of recovery under the New York no-fault insurance law is based upon a provision in the contract creating rights in the third party. Such rights are read from the no-fault statute into the insurance policy as a matter of law under the *Rozmyslowicz* decision. Although the district court in *Rozmyslowicz* was correct to criticize the *Leonard* court's reasoning that the United States could recover as a third party beneficiary of the bare language in the insurance policy, the court of appeals in *Rozmyslowicz* agreed with the reasoning of the *Leonard* court that the injured person need not be the only person to incur medical expense under the no-fault statute.[128] These two cases have strongly established the government's right to recover no-fault benefits in New York.

In contrast to the decisions under New York no-fault law, which allowed recovery by the United States as a third party beneficiary of a statutory provision creating rights in the United States for no-fault benefits, a recent Colorado Supreme Court decision, *United States v. Criterion Insurance Co.*,[129] allowed recovery by the United States based upon a statutory provision permitting direct performance by the promisor insurance company to third party medical care providers, such as the United States.[130] In *Criterion*, the United States filed suit against Criterion Insurance Company in the United States District Court for the District of Colorado for reimbursement for medical care it provided Criterion's insured.[131] The district court ruled that the United States was not a third party beneficiary of the Colorado no-fault statute,[132] and therefore was not entitled to a cause of action against the insurer.[133] The United States appealed.[134]

The United States Court of Appeals for the Tenth Circuit, certified the question whether the United States was a third party beneficiary under Colorado statutes to the Supreme Court of Colorado.[135] The Supreme Court based its decision upon section 10-4-708(2) of the Colorado no-fault statute which permits direct payment by the insurer to a provider of medical services.[136] The third party beneficiary right was held to arise out of this section, which evidenced a "legislative intent that the provider be a third party beneficiary . . . ."[137] The court found *Rozmyslowicz*, which held that the

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[127] See notes 89-91 and accompanying text *supra*.

[128] *Compare* United States v. Leonard, 448 F. Supp. at 102 *with* United States v. Government Employees Ins. Co., 605 F.2d at 671.

[129] —Colo.—, 596 P.2d 1203 (1979).

[130] *Id.* at 1205 & n.1. For a discussion of general contract third party beneficiary theory, see notes 89-91 and accompanying text *supra*.

[131] *Id.* at 1204.

[132] The Colorado statute is compiled at COLO. REV. STAT. §§ 10-4-701 to -723 (1973 & Supp. 1978).

[133] 596 P.2d at 1205.

[134] *Id.*

[135] *Id.*

[136] *Id.* COLO. REV. STAT. § 10-4-708(2) (1973) provides:

> Benefits provided [for first party benefits] may be paid by the insurer directly to any person supplying necessary products, services, or accommodations to the person for whom benefits are required under [this law].

[137] 596 P.2d at 1205.

United States was a third party beneficiary of a no-fault statute, exactly on point and further cited the *Leonard* court's reasoning as analogous.[138] In addition, the court struck down a clause in the serviceman's insurance contract which stated: "This insurance does not apply: (j) to the United States of America or any of its agencies as an insured, a third-party beneficiary, or otherwise."[139] The court held that such a provision was unenforceable since the Colorado no-fault insurance law also provided: "Notwithstanding any of its other terms and conditions, every contract of liability insurance for injury . . . shall provide coverages at least as extensive as the minimum coverage required by this law."[140] Since the court had ruled that the no-fault law required the minimum coverage of first party benefits payable to providers of medical care as third party beneficiaries, the specific exclusion of the United States in the policy was read out of the contract as not only being directly contrary to the statutory language but also inapposite with legislative intent.[141]

This recent line of well-reasoned opinions indicates that a right of the United States to recover as a statutory third party beneficiary should be recognized under similar statutory schemes.[142] *Leonard, Rozmyslowicz* and *Criterion* represent judicial construction of no-fault statutes in only two jurisdictions. It remains uncertain whether the United States will be found to have a right of recovery in other jurisdictions with different statutory plans.

2. Pennsylvania, Hawaii and Kansas.

Some no-fault statutes have narrow classes of beneficiaries in comparison to the New York and Colorado statutes. The right to no-fault benefits under the Pennsylvania statute is available to "victims" of an automobile accident.[143] "Victim" is defined as "an individual who suffers injury arising out of the maintenance or use of a motor vehicle . . . ."[144] Such a statutory provision might suggest a legislative intent to pay benefits only to injured natural persons. This provision, however, must be read in conjunction with the provision on payment of no-fault benefits. That section provides that "[a]n obligation for basic loss benefits for an item of allowable expense may be discharged by [the insurer] by reimbursing the victim *or by making direct payment to the supplier or provider of products, services, or accommodations* . . . ."[145] In the *Criterion* case, discussed earlier,[146] such statutory language was held to provide a right of

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[138] *Id.* at 1205-06.

[139] *Id.* at 1206.

[140] *Id.* The quoted language is from COLO. REV. STAT. § 10-4-711(4)(a) (1973).

[141] 596 P.2d at 1206.

[142] Other state no-fault laws should allow recovery upon the third party beneficiary theory. *See* CONN. GEN. STAT. ANN. §§ 38-319(k), -320(a) to (c), -321(a), -328, -333 (West Supp. 1979); GA. CODE ANN. §§ 56-3406b(b) (1977); KY. REV. STAT. §§ 304.39-020(2), (5)(a), (10), -030(1), -040, -100, -110(d), -210 (Supp. 1978); MINN. STAT. ANN. §§ 65B.43(10), .44(1), (2), .46(1), .49(2), .50, .54(1) (West Supp. 1979); NEV. REV. STAT. §§ 698.040, .070(3), .200, .230, .250, .410 (1977); N.D. CENT. CODE §§ 26-41-03(2), (7), -07, *but see* 26-41-09(1).

[143] PA. STAT. ANN. tit. 40, § 1009.201 (Purdon Supp. 1979).

[144] *Id.* at § 1009.103.

[145] *Id.* at § 1009.106 (emphasis added).

[146] See text beginning at note 129 *supra.*

action by the United States as a third party provider of medical services. In *Heusle v. National Mutual Insurance Co.*,[147] however, the United States District Court for the Middle District of Pennsylvania refused to interpret the Pennsylvania No-Fault Insurance Law to allow recovery by the United States as a third party beneficiary of the statute.[148]

The court in *Heusle* apparently focused on what rights the injured servicemember had to the no-fault benefits, rather than on what rights the United States might have as a third party beneficiary under the statute.[149] The court attempted to distinguish *Rozmyslowicz* by claiming that the *Rozmyslowicz* court relied on the language in the insurance policy to justify its decision that the government was a third party beneficiary.[150]

The *Heusle* opinion evidences confusion between the right of the injured party and the right of the government to recover no-fault benefits. The United States' right does not, as the opinion implies, hinge upon whether the servicemember could collect no-fault benefits. *Rozmyslowicz* was directly on point. Contrary to the *Heusle* court's reading of *Rozmyslowicz*, that case *refused* to base a third party beneficiary theory on the insurance policy language but instead allowed the United States to recover as a third party beneficiary of the New York no-fault statute.[151] The *Heusle* court should have examined the Pennsylvania no-fault law to determine the government's rights, just as the court did in *Rozmyslowicz*. Thus, although it is not certain that the United States cannot recover as a third party beneficiary under the Pennsylvania no-fault statute, the *Heusle* opinion casts grave doubts on the ability of the United States to obtain reimbursement as a third party beneficiary in that state.

Although their statutes have not been construed by the courts, Hawaii and Kansas are examples of other states which have no-fault laws that narrowly draw the class of no-fault statutory beneficiaries. Hawaii's statute pro-

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[147] 479 F. Supp. 274 (M.D. Pa. 1979).

[148] *Id.* at 280.

[149] *Id.* The court denied the servicemember's claim for no-fault benefits upon PA. STAT. ANN. tit. 40, § 1009.206:

> *Net Loss* . . . benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government, unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act, shall be subtracted from loss in calculating net loss.

But in considering the United States' rights as a third party beneficiary, the court continued to focus upon the servicemember's rights:

> If Plaintiff's contention [that the government is a third party beneficiary] were correct, then there would be no purpose to §206 of the Pennsylvania No-Fault Insurance Act. Plaintiffs would have this Court construe the Travelers policy to provide payment in the same circumstances in which the legislature has determined that the no-fault insurer need not pay, namely when the insured receives government benefits.

479 F. Supp. at 280. It would thus seem that the court failed to consider the United States' rights under the appropriate subsections of the no-fault law and further, that the court confused the government's entitlement to benefits with the servicemember's. For a detailed discussion of this type of confusion, see text beginning at note 157 *infra*.

[150] 479 F. Supp. at 280.

[151] 449 F. Supp. 68, 69-70 (E.D.N.Y. 1978).

vides for payment of no-fault benefits to a person identified by name in the policy, a spouse, or other relative residing in the same household with the named insured.[152] Similarly, the Kansas statute provides for payment of benefits to the named insured, relatives in the same household, persons operating the insured vehicle or passengers in the vehicle.[153] Both statutes state that only the insured injured party may collect no-fault benefits. In the typical case, a servicemember incurs no medical expense in a government hospital. The servicemember would not receive no-fault benefits since he can only recover if the medical expenses are incurred personally.[154] The United States probably would not be a statutory beneficiary because the narrow class of beneficiaries in each statute does not include third persons who incur medical expense on behalf of or provide medical care to the injured person. Conceivably both the injured servicemember and the government could be denied no-fault benefits under such statutory schemes.

These statutory plans would not necessarily act as a bar to the recovery of no-fault benefits. If a court construing such statutes took the approach of the *Leonard* court that the statute and insurance policy do not *require* that the injured party be the same person who incurs the medical expense, then the United States might be successful in maintaining its right of recovery.[155] Also, narrow statutory language does not preclude a third party beneficiary claim by the United States under the servicemember's contract. If there is language in the contract upon which a third party beneficiary theory can be based, the government may still recover.[156]

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[152] HAW. REV. STAT. § 294-3 (1976) provides:

Right to no-fault benefits. (a) If the accident causing accidental harm occurs in this State, every person, insured under this chapter, and his survivors, suffering loss from accidental harm arising out of the operation, maintenance or use of a motor vehicle has a right to no-fault benefits . . . .

(d) "No-fault insured" means: (1) Person identified by name as an insured in a no-fault policy . . . and (2) . . . a spouse or other relative of a named insured . . . .

[153] KAN. STAT. § 40-3107 (1973) provides:

Every policy of motor vehicle liability insurance issued by an insurer to an owner residing in this state shall: . . . (f) include personal injury protection benefits to the named insured, relatives residing in the same household, persons operating the insured motor vehicle and other persons struck by such motor vehicle . . . .

[154] Courts, in construing language in medical payments policies, have interpreted the word "incurred" to mean "legally liable." Lefebvre v. Government Employees Ins. Co., 110 N.H. 23, 259 A.2d 133 (1969); Irby v. Government Employees Ins. Co., 175 So. 2d 9 (La. App. 1965); Gordon v. Fidelity & Cas. Co., 238 S.C. 438, 120 S.E.2d 509 (1961).

[155] See text at notes 107 & 108 *supra*.

[156] See text and note at note 217 *infra*. This method of recovery is not as secure as being found a third party beneficiary of the insurance statute for, of course, insurers, can attempt to write such favorable contract language out of the contract. See text at note 139 *supra*. A very recent case illustrates how a court can deny recovery under the supremacy of the FMCRA theory, deny recovery as a third party beneficiary of the no-fault statute, but then find a possible right of recovery for the United States as a

It is unlikely, however, that most courts will be as innovative as the *Leonard* court. Many courts are more comfortable in deciding cases upon the narrow, legalistic grounds advocated by insurance companies rather than upon broad public policy grounds. If the courts interpret such statutes narrowly, in modified no-fault jurisdictions like Hawaii and Kansas which abolish tort liability, the United States probably would have no recovery. The federal right under the FMCRA would be extinguished and the third party beneficiary theory would fail.

C. *Judicial Confusion of Recovery Methods Under State No-Fault Insurance Laws*

Previous subsections have shown how the United States has been allowed and denied recovery in some no-fault jurisdictions. The government's right of recovery has also been denied by courts when they confuse the United States' right of recovery with the servicemember's right. The principal cause of judicial confusion has been the courts' failure to distinguish between a case where the servicemember attempts to recover no-fault benefits for himself and when the servicemember attempts to recover no-fault benefits on behalf of the government. When the servicemember brings suit against his no-fault insurer to recover no-fault benefits for himself, he should be denied because it will result in a double recovery and quite possibly bar the United States from obtaining reimbursement from the insurer. If, on the other hand, the servicemember represents the claim for no-fault benefits on behalf of the government, he should be allowed to recover because the benefits will be turned over to the United States to reimburse the treasury.[157] A failure to distinguish between these two fact patterns could cause a failure of reimbursement to the United States for the medical care it has rendered. This section will examine the problem through a discussion of two New Jersey state court decisions. *Lapidula v. Government Employees Insurance Co.*,[158] and *Sanner v. Government Employees Insurance Co.*[159] illustrate how such confusion can result in anomalous outcomes.

Lapidula v. Government Employees Insurance Co. involved the claim of three plaintiff servicemembers for no-fault benefits from their insurance carrier.[160] Plaintiffs received free medical care for their injuries arising out of automobile accidents.[161] First, since their losses exceeded the statutory

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third party beneficiary of the insurance contract. It would appear that such a court goes through this legal gymnastic in order to effectuate the underlying intent of the FMCRA— a result more easily reached by acceptance of the supremacy of the FMCRA over state law theory. *See* United States v. Dairyland Ins. Co., 485 F. Supp. 539 (D.N.D. 1980).

[157] For analogous cases in the medical payments insurance area, see note 41 and cases cited in note 47 *supra*.

[158] 146 N.J. Super. 463, 370 A.2d 50 (1977).

[159] 143 N.J. Super. 462, 363 A.2d 397 (1976), *rev'd*, 150 N.J. Super. 488, 376 A.2d 180 (1977), *aff'd per curiam*, 75 N.J. 460, 383 A.2d 429 (1978).

[160] 146 N.J. Super. at 465-66, 370 A.2d at 51.

[161] *Id.* at 466, 370 A.2d at 52.

threshold for tort liability, each plaintiff brought claims against the third party tortfeasors.[162] Each plaintiffs' attorney represented the government's medical care claim under the FMCRA.[163] The claims were settled out of court for less than the full amount claimed and each plaintiff paid over to the United States the compromised value of the government's medical care claim.[164] Plaintiffs then brought a separate suit against their no-fault insurer for the value of their medical care.[165] The plaintiffs did not bring the action on behalf of the government.[166] The insurance company argued that it was not liable to pay first party benefits since the plaintiffs were not legally obligated to pay for the medical services rendered by the United States.[167] The plaintiffs argued that they "incurred" medical expenses within the meaning of the no-fault statute by paying the government out of the proceeds from the tort liability settlement with the negligent third parties.[168]

The Appellate Division-Part E of the Superior Court of New Jersey first looked to the New Jersey statute which provided for medical expense benefits. The statute provided for "[p]ayment of all reasonable medical expenses *incurred* as a result of personal injury sustained in an automobile accident."[169] The court rejected the insurer's argument that the plaintiffs had incurred no medical expense. The court stated:

> [The insurer's] thesis that medical expenses were not incurred by plaintiffs because they were not obligated to pay for the services is unrealistic and lacks substance. The medical services rendered by the Government were not gratuitous but were part of the compensation paid military personnel and their dependents for the services rendered to the armed forces [citations omitted]. In short, the medical expenses were "incurred" because plaintiffs were liable for such services even though someone else was responsible to pay for them. This approach is supported by the fact that the Government, by law, was subrogated to plaintiffs' right to recover such medical expenses from the third-party wrongdoers.[170]

The court also justified its holding on equitable principles.[171] The court reasoned that the insurer would receive an unwarrantable windfall if the

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[162] *Id.* Each plaintiff's damages exceeded the two hundred dollar threshold enabling them to bring an action in tort. Although New Jersey's monetary threshold is the lowest of all the states, hospital expenses, X-rays and other diagnostic medical expenses are excluded in calculating the threshold amount. *See* N.J. STAT. ANN. § 39:6A-8 (West 1973).

[163] *See* 146 N.J. Super. at 466, 370 A.2d at 52. See also notes 38 & 41 and accompanying text *supra.*

[164] *Id.* at 466, 370 A.2d at 52. The government is permitted to compromise the amount of its recovery under 42 U.S.C. § 2652(b) (1976).

[165] 146 N.J. Super. at 466, 370 A.2d at 52.

[166] *Id.* at 467, 370 A.2d at 52.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 466, 370 A.2d at 52. N.J. STAT. ANN. § 39:6A-4(a) (West 1973) (emphasis added).

[170] 146 N.J. Super. at 467, 370 A.2d at 52.

[171] *Id.*

plaintiffs were denied recovery of benefits for which they had paid a premium.[172]

The court in *Lapidula* apparently misunderstood the operation of the government recovery right. "Incurred" as used in the New Jersey no-fault statute and in no-fault policies refers to a legal liability owing to the provider of the medical care.[173] In this case, notwithstanding what the court found, there was no legal liability of the plaintiff servicemen and dependents to repay the United States for the medical care it furnished pursuant to statutory duty. The government never bills or otherwise seeks payment for medical expense from the eligible injured servicemember or their dependents.[174] Payment for the medical care rendered to beneficiaries of federal medical care statutes is sought by the United States from the tortfeasor or his insurer under the FMCRA or from the servicemember's insurance company under a third party beneficiary theory.

Furthermore, the court's conclusion that the plaintiffs had incurred medical expense under the no-fault policy was *not* "supported by the fact that the government, by law, was subrogated to plaintiffs' right to recover such medical expenses from the third-party wrongdoers."[175] In this case, the plaintiffs had no right *themselves* to plead and recover damages from their tortfeasors for the medical care because plaintiffs were not liable to the government for the treatment they received.[176] If the court in using the word "subrogated" meant that the United States "stepped into the shoes" of the injured plaintiffs, clearly the United States would have had no right to recover the medical expenses because the plaintiffs had no right of recovery against the tortfeasor for such medical expenses.[177] If the court in using the word "subrogated" meant that the United States was entitled to recovery of its medical expenses out of the injured party's damages received from the tortfeasor, the court was wrong. The United States has no right of action for reimbursement out of the injured party's recovery from the tortfeasor.[178] How then did the government in *Lapidula* protect and ensure its recovery of its medical expenses? Recall that the right of recovery under the FMCRA is an independent right.[179] When the United States provides free medical care to an eligible injured person, the United States' independent right of recovery accrues against the tortfeasor to the extent of the medical care rendered.[180] At the same time the injured party has a right of action for all other types of tort damages

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[172] *Id.*

[173] 150 N.J. Super. 488, 491-92, 376 A.2d 180, 182.

[174] *See, e.g.*, Claims for the Reasonable Value of Medical Care Furnished by the Army, 32 C.F.R. § 537.22(b)(2) (1979).

[175] 146 N.J. Super. 463, 467, 370 A.2d 50, 52.

[176] Lefebvre v. Government Employees Ins. Co., 110 N.H. 23, 25, 259 A.2d 133, 135.

[177] Government Employees Ins. Co. v. Rozmyslowicz, 449 F. Supp. at 69.

[178] See case cited and accompanying text at note 40 *supra*.

[179] See cases cited at note 23 *supra*.

[180] 42 U.S.C. § 2651(a) (1976). See also authorities cited and accompanying text at note 25 *supra*.

except for medical care.[181] As discussed in Part I, the United States can bring an action in its own name.[182]

The government, however, first requests the injured party's attorney to sign a letter of agreement to represent the FMCRA claim on behalf of the government.[183] Such an agreement amounts to a promise by the attorney to pay over to the government the damages recovered from the tortfeasor for the medical care.[184] In *Lapidula,* when the government received the settlement damages from the tortfeasors, it was the FMCRA's independent right of recovery which was asserted against the tortfeasors by the injured parties' attorneys on behalf of the United States. Since plaintiffs never had any right of recovery from the tortfeasors for the medical expenses, they never had any right to the settlement damages placed in their hands for the benefit of the United States. Therefore, plaintiffs in *Lapidula* "incurred" no expense when they turned over the settlement damages to the government.

Additionally, the denial of no-fault benefits did not amount to a windfall to the insurance company. The plaintiffs paid premiums under an insurance contract which obligated the insurer to pay benefits when the insured or other eligible person incurred medical expense. The plaintiffs in this case had incurred no liability for medical expense to the United States and therefore were not entitled to recover under the policy.

Finally, the plaintiffs in *Lapidula* received a windfall double recovery. The United States paid for the cost of their medical care. The reimbursement to the government by the tortfeasors pursuant to the FMCRA amounted to a direct payment by the tortfeasor to the plaintiffs for their injuries. In then claiming and recovering no-fault benefits for medical expenses they never legally incurred, the plaintiffs received a double recovery contrary to the policy of the no-fault act.[185]

As *Lapidula* illustrates, it is crucial for a court to determine whether the plaintiff servicemember is bringing an action for medical expenses under a no-fault insurance policy for himself or for the benefit of the United States. Clearly, if the action is brought in order for the servicemember himself to recover for medical care he was provided free of charge by the United States, recovery should be denied.[186] A claim brought against the no-fault insurer by a servicemember for himself would be a double recovery—possibly at the expense of the United States. On the other hand, if the action is brought in order for the servicemember to recover no-fault benefits for medical expense on behalf of the United States, recovery should be allowed if on a third party beneficiary theory or as a matter of public policy the United States would have been entitled to recover had it brought the action in its own name. The

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[181] See case cited and accompanying text at note 25 *supra.*

[182] 42 U.S.C. § 2651(b) (1976).

[183] See cases cited and accompanying text at note 41 *supra.*

[184] *See* Hanley v. Condrey, 467 F.2d 697, 699 (2d Cir. 1972).

[185] *See* N.J. STAT. ANN. § 39:6A-12 (West 1973). *See also* Cirelli v. Ohio Cas. Ins. Co., 72 N.J. 380, 387, 371 A.2d 17, 21 (1977).

[186] United States v. Leonard, 448 F. Supp. 99 (W.D.N.Y. 1978); Lefebvre v. Government Employees Ins. Co., 110 N.H. 23, 259 A.2d 133 (1969).

injured servicemember merely acts as an intermediary between the government and the no-fault insurer, pressing the United States' right of recovery against the insurer.

Allowing the servicemember to represent the government's medical care claim furthers a number of desirable goals. First, the private attorney is prohibited by federal law from charging a fee which saves the United States litigation costs normally expended by the United States Attorney to litigate the claim.[187] Also, such a method is consistent with the purposes of no-fault legislation which seeks to reduce the multiplicity of lawsuits which would occur if the servicemember's and the government's claims arising out of the same incident were litigated separately.[188] Those cases decided under the FMCRA which allowed the servicemember to represent the government's claim without the United States joining the action as a named party are equally applicable to the situation where a servicemember represents the government's claim against a no-fault insurer.[189] Thus, it is crucial for a court to distinguish whether the servicemember is bringing a no-fault claim for medical expenses on behalf of himself *or* on behalf of the United States.

Another example of a failure to make such a crucial distinction is *Sanner v. Government Employees Insurance Co.*[190] In that case, the serviceman, Sanner, was injured while on active duty for the National Guard.[191] Medical care was provided or paid by the United States.[192] Sanner brought an action against the alleged tortfeasors[193] and subsequently filed a claim with his no-fault insurer for the value of his medical expenses.[194] The insurance company denied the benefits principally for the same reason as the insurer in *Lapidula* — the serviceman had legally incurred no medical expense under the no-fault policy.[195] The trial court reasoned that there was no real difference between a medical insurance policy and the medical benefits provided to Sanner pursuant to federal statute.[196] The trial court then held that Sanner could recover benefits under a statutory provision stating that no-fault benefits are payable without regard to collateral sources such as medical insurance policies.[197] Additionally, the trial court relied on *Holland* which allowed a serviceman to recover no-fault benefits *on behalf of the government.*[198] At the end of the trial court opinion, the court observed in dicta:

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[187] Bernzweig, *supra* note 17, at 1270 & n.86.

[188] *See, e.g.,* KY. REV. STAT. § 304.39-010(5)(6) (Supp. 1979). *See also* MINN. STAT. ANN. § 65B.42(4) (West Supp. 1980).

[189] See cases cited at note 41 *supra.*

[190] 143 N.J. Super. 462, 363 A.2d 397 (1976), *rev'd,* 150 N.J. Super. 488, 376 A.2d 180 (1977), *aff'd per curiam,* 75 N.J. 460, 383 A.2d 429 (1978).

[191] 150 N.J. Super. at 490, 376 A.2d at 181.

[192] *Id.*

[193] *Id.* at 490-91, 376 A.2d 182. Sanner's injuries exceeded the statutory threshold for suing in tort under the New Jersey law. See note 162 *supra.*

[194] 150 N.J. Super. at 490, 376 A.2d at 181-82.

[195] *Id.*

[196] 143 N.J. Super. 462, 466-67, 363 A.2d 397, 400.

[197] *Id.* at 466, 363 A.2d at 399-400.

[198] *Id.* at 467, 363 A.2d at 400.

> While the issue is not specifically raised by the pleadings, plaintiff would be entitled to bring this suit for the benefit of the United States Government.
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> . . . .
>
> Clearly plaintiff in this action would be entitled to recover from the insurer for the benefit of the Government the reasonable value of medical services.[199]

Thus, the trial court apparently granted recovery of no-fault benefits to Sanner although he legally incurred no medical expenses and he brought the suit for no-fault benefits on his own behalf. The insurance company appealed.

The Appellate Division-Part B of the Superior Court of New Jersey reversed the lower court decision.[200] The appellate court based its decision upon Sanner having incurred no medical expense.[201] The court rejected the trial court's reliance on the statutory collateral source provision as completely irrelevant to the question of the insurer's initial liability under the no-fault statutes.[202] The court concluded the collateral source provision played no role in determining whether the plaintiff had incurred medical expense in the first place.[203] The court also wanted to avoid a double recovery by the serviceman. The court stated:

> Were the judgment by the trial court to be affirmed, plaintiff would be in possession of funds representing the value of the treatment afforded him although without liability to the federal government therefor. We cannot conceive of the public interest to be served by such a result.[204]

The court's opinion went on to discuss the interplay between the federal government's right of recovery under the FMCRA and the no-fault law as if Sanner had brought the action on the government's behalf.[205] The appellate court opinion was thus ambiguous on the crucial issue of whether Sanner brought the action for no-fault benefits on behalf of himself or on behalf of the government.[206] The ambiguity is apparent upon close examination of

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[199] *Id.* at 468, 363 A.2d at 401.

[200] 150 N.J. Super. 488, 376 A.2d 180 (1977).

[201] *Id.* at 491, 376 A.2d at 182. The court emphasized that:

> [t]he critical question here is whether plaintiff "incurred" expenses for medical treatment in light of the fact that he neither paid for them nor became liable to pay for them. . . . a "no fault" carrier's liability for medical expenses is triggered by the insured incurring them, that is, either paying them or becoming liable to pay for them. If he neither pays the expenses nor becomes liable to pay them, we fail to see how it can be said, with any degree of realism, that he has incurred such expenses.

Id.

[202] *Id.* at 493, 376 A.2d at 183.

[203] *Id.*

[204] *Id.* at 492-93, 376 A.2d at 183 (court's footnote omitted).

[205] *Id.* at 493-97, 376 A.2d at 183-85.

[206] United States v. Auto. Club Ins. Co., 522 F.2d 1 (5th Cir. 1975), illustrates why the issue is crucial to the outcome of a governmental recovery case. In that case, the United States District Court for the Eastern District of Louisiana granted summary

both the trial court and appellate court opinions in the *Sanner* case. The trial court opinion discusses in purely theoretical terms the possibility that Sanner could have brought the medical expense claim on behalf of the government.[207] In contrast, the appellate court decision casts doubts as to whether it considered the case as one brought by Sanner for himself. The appellate court stated: "Although the trial court opinion suggests that plaintiff's recovery of medical expenses is to be for the government's benefit . . . the final disposition places no such limitation on plaintiff's entitlement to the funds representing medical treatment . . . ."[208] Later in the opinion, the appellate court alludes again to the idea that it was dealing with the case as one involving a government claim for no-fault benefits through Sanner's representation of its claim. The court noted: "[i]n its essential elements this case involves a contest between an insurance carrier and the Federal Government . . . ."[209] Despite this confusing language in the appellate court opinion, it is likely that the action was brought by Sanner for himself.[210] The action apparently was not brought by Sanner on behalf of the United States.

The appellate court in the *Sanner* case was apparently correct in reversing the trial court. Like the *Lapidula* case, Sanner legally incurred no obligation to pay the United States for his medical care. The statutory collateral source provision[211] relied upon by the trial court had no relevance in determining whether Sanner was initially entitled to the no-fault benefits. Until Sanner could be found entitled to recover no-fault benefits, the collateral source provision would not come into play. Additionally, the appellate court was properly concerned with avoiding a double recovery by the plaintiff as had occurred in the *Lapidula* case. All of this reasoning provided an adequate basis for the appellate division to resolve the only proper question presented in the

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judgment in favor of a medical payments insurer who had been sued by the United States as a third party beneficiary of an insurance contract. *Id.* at 2. The United States Court of Appeals for the Fifth Circuit reversed the district court upon the basis that there is an important distinction between suits brought by the United States for reimbursement and suits brought by servicemembers for benefits:

> The Louisiana state court cases relied upon by the district court, *Irby v. Government Employees Insurance Co.*, 175 So.2d 9 (La.Ct. App. 1965), and *Drearr v. Connecticuit General Life Insurance Co.*, 119 So.2d 149 (La. Ct. App. 1960), are inapposite and clearly distinguishable. In each of these cases a serviceman, after receiving free medical care from the Government, *personally* sought recovery under the policy. The Louisiana courts held that the servicemen could not recover, apparently on the theory that recovery would be a "windfall" to the serviceman since he had not incurred the expenses. In the instant case, however, it is the United States who seeks recovery for expenses incurred, not the insured.

Id. at 3 (emphasis supplied).

[207] 143 N.J. Super. at 468, 363 A.2d at 401. See text at note 199 *supra.*

[208] 150 N.J. Super. at 492 n.1, 376 A.2d 183 n.1 (citation omitted).

[209] *Id.* at 496, 376 A.2d at 185.

[210] 143 N.J. Super. at 463-64, 363 A.2d at 398. "This matter comes before the court on a stipulated set of facts and, by consent of the parties, is being treated as a declaratory judgment action to determine *plaintiff's rights* under the [no-fault insurance contract]." *Id.* (emphasis added).

[211] N.J. STAT. ANN. § 39:6A-6 (West 1973).

case: whether the serviceman was entitled to recover for himself no-fault benefits for medical care he did not legally incur.

Despite the appellate court's decision to deny no-fault benefits to Sanner for himself, the extensive discussion of the government's right of recovery was unfortunate dicta. The opinion evidences the court's failure to perceive both the third party beneficiary theory and the mechanics of the FMCRA right of recovery. The appellate court, in its opinion, asserted that "if there was no tortfeasor, or if the serviceman's own negligent conduct produced his injuries, the Federal Government could not recover for the value of the treatment afforded."[212] The third party beneficiary theory, however, enables the United States to recover medical expense where there was no tortfeasor or the injured party was at fault.[213] The federal government recovers hundreds of thousands of dollars every year as a third party beneficiary of medical payments and no-fault insurance.[214] Such recovery is made in the absence of a tortfeasor and without regard to the fault of the servicemember.

Another indication that the court was not cognizant of the third party beneficiary theory was its assertion that the United States would have had no right to the no-fault benefits if Sanner asserted the claim on the government's behalf. The court was concerned that there was no limitation on Sanner's entitlement to keep the no-fault benefits for himself. Additionally, the court apparently believed that the United States was not entitled to no-fault benefits. The court stated:

> Moreover, we doubt the validity or wisdom of a limitation conferring on the Government a right to the funds *which it would not otherwise possess.* As noted ... we do not regard the insurer as a tortfeasor within the meaning of the Government's right to subrogation created by 42 U.S.C.A. §§ 2651-2653, and *fail to perceive the necessity for conferring upon the Government a right which it has not secured for itself.*[215]

Obviously, the government does "otherwise possess" a right to no fault benefits under a third party beneficiary theory. As discussed earlier, such a right arises out of the insurance statute, insurance contract or the FMCRA; it does not have to be independently "secured" by the government.

Had the court been aware of the third party beneficiary theory and had Sanner brought the no-fault claim on behalf of the government, the United States would have been entitled to recover under the insurance policy.[216] Sanner's no-fault policy contained a clause allowing direct performance of the contract by the insurer to the provider of medical care.[217] As discussed ear-

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[212] 150 N.J. Super. at 490, 376 A.2d at 182.

[213] See cases cited and accompanying text at note 47 *supra.*

[214] See note 49 *supra.*

[215] 150 N.J. Super. at 492-93 n.1, 376 A.2d at 183 n.1 (emphasis added).

[216] The appellate court opinion went to great lengths to criticize the *Holland* case relied upon by the trial court. Such criticism was unnecessary because *Sanner* could be distinguished from *Holland* on the facts. Holland brought his action against the no-fault insurer *on behalf of the United States.* Sanner did not.

[217] Sanner's no-fault policy provided:

Payment of Personal Injury Protection Benefits. Medical expense benefits and *essential services benefits* may be paid at the option of the Company to the

lier, in *United States v. Criterion Insurance Co.*[218] a provision entitling such direct performance to providers of medical care creates a right of action in such third parties.

Finally, the court's opinion implies that the government may obtain recompense only under its FMCRA right when the injured party could recover damages in an action against the tortfeasor.[219] This is simply untrue. The government's recovery right under the FMCRA is not one of subrogation to the injured party's *damages* received from the tortfeasor;[220] it is a subrogation to the injured party's *rights* against the tortfeasor under substantive state law.[221] The appellate court failed to recognize that when the injured party represents the government's claim, he is not pleading his own claim but a claim based upon the government's rights. In a tort suit brought by the injured party representing the government's claim, it is irrelevant whether the injured party could introduce the medical expense evidence. What is relevant is whether the United States could do so if it brought the suit as a named party. Since the United States could have introduced the evidence had it represented its claim before the court—it had received no no-fault benefits—the injured party representing the government's claim before the court could introduce the medical expense evidence in court on behalf of the government. The appellate court did not properly comprehend the mechanics of the FMCRA in conjunction with the state no-fault law.

The implication of the *Sanner* decision is that unless the servicemember incurs the medical expense, the government does not have a right to no-fault benefits. Such an interpretation is improper, however, since the government's entitlement to no-fault benefits does not depend upon whether the servicemember incurred medical expense. The government's entitlement depends upon whether it incurred medical expenses itself on behalf of the injured party. The only question properly before the court was whether the *serviceman* was entitled to recover no-fault benefits. The entire discussion of the government's rights of recovery, based upon apparent dicta in the trial court opinion, was entirely irrelevant to the decision. The *Sanner* court properly denied the serviceman no-fault benefits; anything beyond the reasoning necessary for that holding was clearly unfortunate and contrary to a proper interpretation of the government's right of recovery.

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eligible injured person or the person or organization furnishing the products or services for which such benefits are due.

Brief for Appellant, appendix 4, Sanner v. Government Employees Ins. Co., 150 N.J. Super. 488, 376 A.2d 180 (1977).

[218] —Colo.—, 596 P.2d 1203 (1979).

[219] 150 N.J. Super. at 495, 376 A.2d at 184. The court asserted that:

> [i]f, however, the insurer were to be held liable to pay its insured for medical expenses not incurred, then the insured may not introduce into evidence in the liability trial against the tortfeasor evidence of the amounts collected or collectible, N.J.S.A. 39:6A-12; no recovery can be had therefor and the Federal Government's right to subrogation will be, by those means, thwarted . . . .

Id.

[220] *See* United States v. Ammons, 242 F. Supp. 461 (N.D. Fla. 1965).

[221] See cases cited and accompanying text at note 25 *supra*.

D. *Federal Medical Care Recovery: An Uncertain Future*

The foregoing examples illustrate the varied impact of no-fault legislation upon the FMCRA and upon the government right of recovery under related doctrines. In some states the right of recovery under the FMCRA is arguably extinguished due to abrogation of tort liability for automobile accidents. In those states, whether the United States may successfully recover medical expenses is contingent upon courts' acceptance of either the supremacy of the FMCRA theory or a no-fault statutory third party beneficiary theory. Thus far, one court has adopted the supremacy of the FMCRA approach. But even if a court rejects this theory, the statutory third party beneficiary theory offers an alternative grounds for recovery as illustrated by cases based upon the New York and Colorado no-fault statutes. The statutory third party beneficiary theory is disadvantaged, however, in that its success is dependent upon the wording of each no-fault state's statute. Pennsylvania, Hawaii and Kansas offer examples of statutes that narrowly define the class of beneficiaries entitled to benefits which could foreclose governmental recovery of medical expense. Finally, judicial confusion regarding the operation of the various theories of government recovery as illustrated by the *Lapidula* and *Sanner* cases can lead to further impairment of the federal policy of reimbursement underlying the FMCRA.

Pennsylvania stands as an example of the anomaly created when courts fail to recognize the vitality of the FMCRA policy. As a result of the *Hohman* decision which rejected the supremacy of the FMCRA theory and the *Heusle* decision which apparently rejected the statutory third party beneficiary theory, the United States is unable to collect reimbursement in the very same situation where it could collect before enactment of the Pennsylvania no-fault law. The intent of Congress to be recompensed when beneficiaries of federal medical care statutes are injured in automobile accidents has been frustrated by state no-fault insurance laws.

III. The Clash of Government Recovery and No-Fault: Some Solutions

The clash of the governmental recovery right and no-fault insurance laws illustrated in Section II presents a serious conflict between federal and state law. When servicemembers are involved in automobile accidents, the competing interests of the federal government and the states must be balanced carefully. The federal interests in this situation were identified by the United States Supreme Court in *United States v. Standard Oil Co. of California.*[222] The Court held that the question of liability for reimbursement is one of federal fiscal policy rather than one of special or peculiar concern to the states.[223]

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[222] 332 U.S. 301 (1947).

[223] *Id.* at 311. The Court rejected the argument that the rights of federal reimbursement were subject to state law under the *Erie* decision. Instead, the Court held that the federal judicial power was still available to decide "essentially federal matters, even though Congress has not acted affirmatively about the specific question." *Id.* at 307-08.

This was especially true with respect to the special relationship that exists between a government and its soldiers.[224] Furthermore, the Court emphasized that national uniformity of such federal right of reimbursement was an important reason why the federal right should not be determined by various state laws.[225] Obviously, therefore, the federal interest in reimbursement weighs heavy in the balance.

States, on the other hand, have important interests in modifying the traditional tort liability system with a no-fault system of automobile accident injury reparations. States seek to use their no-fault statutes to insure a fast, uniform, comprehensive and low-cost system for compensating automobile accident victims and their survivors.[226] Thus, it is important that any solution to this problem consider not only the federal government's interest in reimbursement to the treasury and in the continued vitality of the FMCRA, but also the states' interest in a fast, comprehensive and fair system of automobile insurance. The following discussion will present a judicial and a legislative solution, either of which should enable a proper balancing of the federal and state interests. The first subsection will examine three possible judicial interpretations of the FMCRA, each considered in light of the federal and state interests at stake. The second subsection will propose an amendment to the FMCRA which would legislatively balance these interests.

A. *Judicial Extension of the FMCRA*

A court faced with construing the FMCRA in conjunction with a state no-fault law is faced with three possible interpretations: (1) that the FMCRA pre-empts the state no-fault law, (2) that the state no-fault law extinguishes the federal recovery right, or (3) that the FMCRA right of recovery is ex-

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[224] *Id.* at 305-06. The Court noted that:

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of the armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority . . . . Since also the Government's purse is affected, as well as its powers to protect the relationship, its powers, to the extent they are available to protect it against financial injury, add their weight to the military basis for excluding state intrusion.

Id.

[225] *Id.* at 310. The Court held that:

> [S]tate law should not be selected as the federal rule for governing [a governmental right to reimbursement]. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines.

Id.

[226] *E.g.*, PA. STAT. ANN. tit. 40, § 1009.102 (Purdon Supp. 1980).

tended against the person liable for the injuries under state law. Each interpretation strikes a different balance between the federal and state interests involved.

An interpretation that the FMCRA pre-empts the state no-fault law would violate the state's interest in maintaining the integrity of its automobile insurance reparations system. If pre-emption were allowed by a court, the state court system would be forced to litigate issues of fault in order to determine if the third party was a tortfeasor. After a determination of fault, the FMCRA recovery right would attach to the forced judicial determination of tort liability. Obviously, such an interpretation of the FMCRA would not be appropriate in accommodating the state interest in eliminating determination of fault prior to compensating automobile accident victims.

An interpretation that the state no-fault law extinguishes the federal recovery right would not only frustrate the paramount federal interest in obtaining reimbursement to the federal treasury, but would also frustrate uniform application of the federal right of recovery. For example, in Ohio, currently a fault based state, the United States could obtain reimbursement if a servicemember sustains injury in an automobile accident on the Ohio side of the border but if the same servicemember crossed the border to the Pennsylvania side the state no-fault law would preclude government recovery.[227] Uniform application of the FMCRA would be frustrated.

Furthermore, the denial of reimbursement to the United States would result in a forced subsidy to no-fault insurance companies and perhaps to their insureds. If the United States cannot enforce its recovery right against a no-fault insurer, the government will be forced to absorb the cost of medical care for which the no-fault insurer otherwise would have been liable. Such subsidization would occur randomly since the indirect "payment" to the insurance industry would occur each time a servicemember or dependent was involved in an automobile accident in a no-fault state and received government medical care. States with fault based systems would receive no such subsidization. The result would be that in fault based states drivers would pay premiums for the "true" cost of operating such a reparation system, but in no-fault states either drivers would pay premiums lower than the "true" cost of operating the system or the insurance companies would keep windfall profits.[228] The state's interest in operating a no-fault insurance system should not frustrate important federal interests. One of the arguments pressed in congressional hearings against the enactment of a national no-fault insurance system was that the states should be free to experiment with various no-fault plans.[229] Certainly, the state no-fault laws and the FMCRA should not be interpreted to allow experimentation which results in subsidization of some state no-fault systems and the insurance industry.

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[227] See note 225 *supra*.

[228] Such a subsidy would not be small. Each year the United States provides millions of dollars of medical care for injuries arising out of automobile accidents. See, *e.g.*, note 49 *supra*.

[229] *Proposed Federal No-Fault Statute: Hearings on S. 354 Before the Senate Judiciary Comm.*, 93d Cong., 1st & 2d Sess. 1434 (1973-1974) (letter of Nebraska Bar Ass'n).

The final interpretation of the FMCRA properly balances the federal and state interests and carries out the underlying congressional intent. Clearly, when Congress enacted the FMCRA in 1962, it intended to devise a method of recovery which would allow reimbursement from the person liable under state law for the injured party's medical expenses. Congress apparently conditioned this right in the FMCRA on tort liability in a third person because every state law at that time held tortfeasors liable for the injured party's injuries. Thus, until the enactment of no-fault legislation, the FMCRA was uniformly applied under the substantive tort law of each state to obtain reimbursement from the person liable for the medical expenses.

In order to judicially extend the right of recovery expressed in the FMCRA under a no-fault statute, courts should extend the FMCRA right against the person liable for the injured party's medical expenses under state no-fault law: the no-fault insurer. The main difference between the two systems of automobile accident injury reparations is that in a fault based system the injured person looks *in tort* to the wrongdoer for *damages* and in a no-fault system the injured person looks *in contract* to his insurer for *benefits*. A logical extension of the legislative intent embodied in the FMCRA would be to allow equitable subrogation of the United States to the injured party's rights against the no-fault insurer as a third party beneficiary.

The extension of a right of action by the United States against a no-fault insurer should not be precluded merely because Congress has failed to amend the FMCRA. The Supreme Court in 1949 in the *Standard Oil Co.* case ruled that no federal common law right of reimbursement existed against the tortfeasor. The Court noted that it was up to Congress to create legislatively such a right of action.[230] Today, that congressional mandate exists in the FMCRA: the United States should receive reimbursement from the person liable under state law. In fault based states, the government has a right of action against the third party wrongdoer; in no-fault states the government should have a comparable right of action against the third party insurer. Thus, the best accommodation of both federal and state interests is an interpretation of the FMCRA that judicially extends the federal right of recovery against a no-fault insurer.

B. *Amendment of the FMCRA*

Although an amendment to the FMCRA should not be necessary to extend the federal right of reimbursement in no-fault states, such an amendment would definitively establish the right of recovery in no-fault jurisdictions. Such an amendment should ensure government recovery with as little impact upon state law as possible, and should be designed to fit uniformly into states' no-fault systems. Like the independent right that attaches to the victim's tort right under the present Act, Congress will want to attach an independent right to the victim's contractual right against the insurer. It is proposed that an amendment to the Act should allow an independent right of subrogation by the United States in "circumstances creating a tort or contrac-

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[230] 332 U.S. 301 (1947).

tual liability upon some third person or insurer" to the injured party's rights in contract against the insurer. The Act should be amended to achieve these goals by providing:

> § 2651 (a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort *or contractual* liability upon some third person *or insurer* (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages *or benefits* therefor, the United States shall have a right to recover from said third person *or insurer* the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person *or insurer* to the extent of the reasonable value of the care and treatment so furnished or to be furnished.

This amendment would result once again in a uniform application of the federal right of recovery in both no-fault and fault based jurisdictions. In no-fault states, the government would recover as a federally mandated third party beneficiary of the no-fault contract. In fault based jurisdictions, in addition to its rights in tort, the government would recover as a federally mandated third party beneficiary of uninsured and medical payments policies.[231] The proposed amendment would merge the informal recovery technique of the third party beneficiary theory with the formal FMCRA right which has existed since enactment. It would balance the competing federal interests in reimbursement with only small impact upon state law. The greatest impact upon state law would be striking any restrictions which in the past have frustrated the third party beneficiary theory in some states.

CONCLUSION

The federal right of reimbursement has been jeopardized in recent years due to the enactment of no-fault insurance laws in some states. These enactments and the judicial confusion regarding the applicability of the FMCRA in no-fault states have caused a severe interference with the uniform application of the federal recovery right. With judicial innovation in the application of the present FMCRA or an amendment of the FMCRA, it is hoped that a more consistent reimbursement can be made to the federal treasury for the losses which result when servicemembers or their dependents are involved in automobile accidents.

DANIEL E. WRIGHT

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[231] See note 44 *supra*.