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Military Medical Malpractice and the *Feres* Doctrine

The Department of Defense (DOD) employs physicians and other medical personnel to administer health care to servicemembers, military retirees, and their family members. If these providers commit medical malpractice, they may cause injury or death. This In Focus discusses the standards and procedures governing medical malpractice claims that servicemembers and non-servicemembers may assert against the United States, as well as pertinent considerations for Congress.

Servicemembers' Malpractice Claims

Outside the military context, a victim of medical malpractice may potentially obtain recourse by suing the negligent provider or the provider's employer. However, a servicemember injured by a military health care provider's malpractice may encounter significant obstacles if he or she attempts to sue the United States. Although the Federal Tort Claims Act (FTCA) renders the United States amenable to certain tort lawsuits, the U.S. Supreme Court has interpreted the FTCA to preserve the government's immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." According to the Court, "suits brought by service members against the Government for injuries incurred incident to service" would undesirably embroil "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." This exception to liability is known as the *Feres* doctrine, after the 1950 Supreme Court decision that first articulated the rule. Many lower federal courts have concluded that *Feres* generally prohibits military servicemembers from suing the United States for medical malpractice committed by military health care providers. (However, the *Feres* doctrine does not necessarily apply to medical malpractice lawsuits against *independent contractors* hired to provide health care to servicemembers.)

During the 116th Congress, the House passed a version of the Fiscal Year (FY) 2020 National Defense Authorization Act (NDAA; H.R. 2500) that proposed to modify the *Feres* doctrine to let servicemembers sue the United States for military health care providers' malpractice. The enacted version of the FY2020 NDAA (P.L. 116-92), however, does not authorize such lawsuits. Instead, the FY2020 NDAA creates an administrative procedure by which such servicemembers may request compensation from the Secretary of Defense. Subject to various prerequisites and limitations, 10 U.S.C. § 2733a authorizes the Secretary to "allow, settle, and pay a claim against the United States for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a [DOD] health care provider."

Injured servicemembers or their families may potentially obtain compensation through other avenues as well. For instance, the Servicemembers' Group Life Insurance (SGLI), administered by the Department of Veterans Affairs (VA), "automatically insure[s] . . . any member of a uniformed service on active duty" up to \$400,000 "against death" unless the servicemember "elect[s] in writing not to be insured." Federal law also entitles any "member of an armed force . . . who dies while on active duty" to a \$100,000 "death gratuity paid to or for the [servicemember's] survivor." An injured servicemember who is no longer fit for duty may also be eligible for a disability rating and accompanying compensation through the Integrated Disability Evaluation System. Injured servicemembers may be entitled to other benefits as well. For instance, servicemembers may continue to receive free health care while they remain in the military. VA may also continue to provide free or low-cost health care to former servicemembers after they are discharged from the military, as well as other benefits.

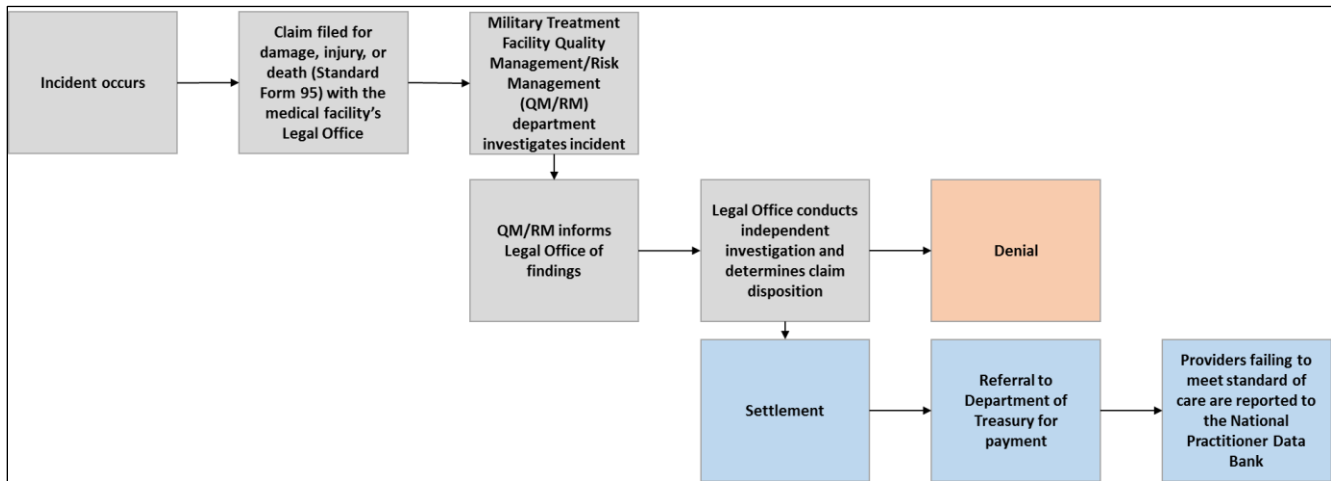
Non-Servicemembers' Malpractice Claims

Depending on the circumstances, non-servicemember victims of military medical malpractice (such as military retirees, spouses, and children of servicemembers) may sue the United States under the FTCA notwithstanding *Feres*. However, the FTCA's statute of limitations and administrative exhaustion requirement generally require the claimant to first file a claim with the responsible agency within two years of the date on which the claimant knows of the factual basis for his or her injury and its cause. Figure 1 illustrates the administrative process for settling a medical malpractice claim against the United States.

Under 28 U.S.C. § 2672, federal agencies have authority to settle certain claims for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment" and pay compensatory damages. Although there are no statutory caps on compensatory damages paid by or on behalf of DOD, the Attorney General or his or her designee must approve in writing settlements over \$200,000.

If enrolled, certain non-servicemembers may also be eligible for compensation through term life insurance benefits upon death. For example, the VA-administered Family Servicemembers' Group Life Insurance (FSGLI) offers up to \$100,000 of coverage for military spouses and up to \$10,000 for military dependents. Military retirees enrolled in the Veterans Group Life Insurance (VGLI) may be eligible for up to \$400,000 of coverage.

Figure 1. Adjudicating Malpractice Claims for Non-Servicemembers Through the Administrative Process



Source: CRS graphic adapted from DOD, *Overview of DOD Medical Malpractice and the Role of the Department of Legal Medicine*, June 2010, p. 3, <https://www.qmo.amedd.army.mil/riskmgt/2010Conf/MedicalMalpractice.pdf>.

Considerations for Congress

Congress may consider addressing other factors that could contribute to medical malpractice incidents or affect the quality of care in DOD health care facilities.

Standardization of DOD’s Patient Safety Program

Currently, DOD uses “sentinel event” data (i.e., adverse medical events that are likely to cause patient injury or death) to “inform system-wide patient safety improvement initiatives.” However, each DOD entity that administers military treatment facilities (i.e., Defense Health Agency, Army, Navy, and Air Force) has different procedures for reporting and tracking sentinel events. A 2018 Government Accountability Office (GAO) review of DOD’s patient safety program and adverse medical event reporting identified numerous inconsistencies in policies and processes. GAO also found that the “fragmented process” for tracking led to missing or incomplete reports and duplicative reporting. DOD plans to initiate program standardization as part of congressionally directed Military Health System reform that transfers the administration of military hospitals and clinics to the Defense Health Agency. Congress could conduct further oversight activities (e.g., hearings, congressionally directed reports, site visits) of DOD’s implementation of these efforts or direct additional study on the relationship between adverse medical events, patient safety initiatives, and malpractice trends.

Defensive Medicine Practices

DOD providers could use “tests and treatments that may be unnecessary” in order to avoid potential malpractice. Numerous medical professional societies refer to this practice as *defensive medicine*. Recent civilian health care delivery studies have associated the use of defensive medicine practices with increased health care costs, reduced quality of care, and reduced patient satisfaction. Congress could direct further study on the prevalence of defensive medicine practices in DOD and direct measures to improve health care quality, maintain data transparency, and curb health care costs.

Relevant Statutes, Regulations, and Policies

- 10 U.S.C. §§ 1071-1110b—Military Medical Care
- 10 U.S.C. §§ 1475-1491—Benefits for Deceased Personnel
- 10 U.S.C. § 2733a—Medical Malpractice Claims by Members of the Uniformed Services
- 28 U.S.C. §§ 1346(b)(1), 2401(b), 2671-80—Federal Tort Claims Act
- 38 U.S.C. §§ 1965-1980a—Servicemembers’ Group Life Insurance
- 28 C.F.R. §§ 14.1-14.11—Administrative Claims Under the Federal Tort Claims Act
- 32 C.F.R. § 536.80—Payment of costs, settlements, and judgments related to certain medical malpractice claims
- DOD Manual 6025.13, *Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS)*, updated July 23, 2020

CRS Products

- CRS In Focus IF10530, *Defense Primer: Military Health System*, by Bryce H. P. Mendez
- CRS Report R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview*, by Kevin M. Lewis
- CRS Legal Sidebar LSB10305, *The Feres Doctrine: Congress, the Courts, and Military Servicemember Lawsuits Against the United States*, by Kevin M. Lewis

Other Resources

- Feres v. United States, 340 U.S. 135 (1950)
- United States v. Johnson, 481 U.S. 681 (1987)
- Government Accountability Office, *Defense Health Agency Should Improve Tracking of Serious Adverse Medical Events and Monitoring of Required Follow-up*, GAO-18-378, April 2018

Bryce H. P. Mendez, Analyst in Defense Health Care Policy
Kevin M. Lewis, Legislative Attorney

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