

Professional malpractice Liability for Recalled reservist in Health-Care and Legal Services Professions

By Col John S. Odom Jr., USAFR,² and Captain Samuel F. Wright, JAGC, USN (Ret.)³

4.8 Professional Malpractice Liability Insurance Suspension and Reinstatement
14.0—Tort claims involving service members and military families.

Q: I am a major in the Army Reserve Medical Corps and an obstetrician in private practice, and I am being called to active duty soon. I am concerned about paying my medical malpractice premiums while on active duty, because my annual premium is greater than my annual salary as a major. I cannot afford to pay the premium, but neither can I afford to be without the insurance. I have performed many deliveries in the weeks and months leading up to my entry on active duty. My medical malpractice insurance is written on a “claims made” basis: I need to have insurance in effect at the time a claim is made, not just at the time of the

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²Military title used for purposes of identification only. The views expressed in this article are personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government.

³BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

alleged malpractice. Even if I perform no more deliveries (in my private capacity) after I am mobilized, I could easily be sued while on active duty for a delivery that I performed before entering active duty. I am losing sleep over this. Help!

A: Don't worry, because Congress solved this problem in 1991, with an amendment to the Soldiers' and Sailors' Civil Relief Act (SSCRA). On December 19, 2003, President Bush signed the Servicemembers' Civil Relief Act (SCRA), a long-overdue comprehensive rewrite of the SSCRA, which was originally enacted in World War I and re-enacted on the eve of World War II. The provision we have in mind is codified in 50 United States Code Appendix, section 593 (50 U.S.C. App. 593).

Under this provision, you can safely suspend your medical malpractice insurance during the period of active duty. Upon your release from active duty, the insurance company is required to reinstate your coverage at the same premium *even if the company is aware that there is a claim pending against you*. The insurance company may not like this result, but it is the law. If someone sues you (or files a claim in those states requiring medical review panels before suit can be filed) while you are on active duty because of alleged malpractice that occurred before you entered active duty, that suit or claim will be stayed (held in abeyance) until you leave active duty. See Section 593(f).

Note: The protections of Section 593 apply not only to physicians but also to dentists, nurses, nurse anesthetists and other health-care providers, as well as attorneys and paralegals. While the SCRA authorizes the Secretary of Defense to designate other services to be professional services for purposes of Section 593, no professions other than health-care and legal services have been so designated.

You need to notify your insurance carrier now of the fact that you are entering active duty. You must do so in writing, and we suggest you do so by certified mail. A military legal assistance attorney can assist you with this critical step. You should either go to your Post or Base Legal Office or to <https://legalassistance.law.af.mil/>. That Web site will show you, from your ZIP code, the nearest military (not necessarily Air Force) legal assistance office. Call and make an appointment today.

Q: But what about possible medical malpractice liability as a result of medical care that I provide while on active duty, in the scope of my military service?

A: Congress solved that problem in 1975, when it enacted the Gonzalez Act. For almost 30 years now, military physicians, dentists, nurses, etc., have been individually immune from suit for alleged malpractice in their government capacities. It is conceivable that a suit could be filed against the U.S. government, and that the government could have to pay if you were negligent, but you personally are immune from individual liability. Congress later extended this individual immunity to federal employees generally, military and civilian, in the medical context and in every other context. See 28 U.S.C. 2679(b)(1).

Q: I thought that service members were precluded from suing the government under something called the *Feres* doctrine. What gives?

A: More than half a century ago, and just four years after the Federal Tort Claims Act (FTCA) was enacted, the Supreme Court determined that there is no cause of action under the FTCA for wrongful death of or personal injury to a member of the Armed Forces if the injury or death was “incident to service.” See *Feres v. United States*, 340 U.S. 135 (1950). The “incident to service” standard is very broad; it includes medical malpractice and many other potential causes of action. In *Feres*, the Supreme Court consolidated three cases for purposes of argument and decision, two medical malpractice cases and a third case about a barracks fire that resulted in the death of an Army officer, Lieutenant Feres.

The *Feres* doctrine does not preclude suits against the government by military retirees, dependents, and others *for their own injuries*. If, for example, you perform deliveries on military wives while you are on active duty, there could conceivably be an FTCA suit against the federal government alleging negligence on your part, brought on behalf of either the mother or the infant. But if a claim arises from the death of or injury to a service member, the claim is *Feres*-barred regardless of who (estate, widow, widower, etc.) brings the claim.

Q. What if I had just paid my entire year’s malpractice premiums when I got mobilized? Can I get a refund from the carrier for the unused portion of the policy year after I suspend the policy?

A: Yes, if you want a *pro rata* refund for the remainder of the policy year, you are entitled to one. You may also tell the insurer to keep the unearned premium to apply it to any unpaid premium becoming due upon the reinstatement of the coverage. See Section 593(b)(2)(B).

Q. What if someone had a malpractice action pending against me at the time I was mobilized? What happens to that action?

A: Under a separate provision of the SCRA (Section 522), your attorney will be able to request a stay of those proceedings (whether it is a suit or an administrative claim) if your military duties prevent you from being present and assisting in the defense. Provided you follow the requirements of the statute and your commanding officer is willing to sign a letter to the effect that you cannot be granted leave for the civil matter, the action is required to be stayed.

Q. How do I need to notify my malpractice insurer when I’m released from active duty? How long do I have to give notice that I want to reinstate my policy?

A: You must notify your carrier that you want to reinstate the policy within 30 days of your release from active duty. Do it in writing and send the notice via certified mail. The carrier then notifies you of the due date for payment of the premium and you must pay the premium within 30 days after receipt of that notice, or you may forfeit the right to force the carrier to reinstate your policy. See Section 593(c).

Q: What if I “moonlight” while I am on active duty? Will I need medical malpractice insurance for that?

A: Most definitely yes. Moreover, you will need the prior permission of your commanding officer to practice medicine outside your military duties. The Joint Ethics Regulation (applicable to all branches of the Armed Forces) provides that work outside of military duties cannot interfere with the performance of military duties. Your commanding officer has the authority to permit or deny permission for outside employment. *See* 5 C.F.R. 2635.802; DoD 5500.7-R. We strongly advise you not to try to practice your profession while on active duty, except in your military capacity. Our advice applies not just to physicians but also to all members of the armed forces, and particularly Reserve Component members who have been recalled to active duty for a national emergency. We invite your attention to Law Review 106, “Don’t Try to Work at Your Civilian Job While on Active Duty.”

One of the great lines in the 1954 classic film, *The Caine Mutiny*, came when Commander Queeg, played by Humphrey Bogart, told Lieutenant Keefer (Fred McMurray), “War is a 24-hour job. There will be no novel-writing on the USS *Caine*.” The same point can be made today for Reserve and Guard members called to active duty who may be tempted to continue practicing their civilian professions while in uniform: while you are on active duty you should be devoting your full time and attention to your military duties.

Q. I have a friend in the Reserve JAG Corps who has also been mobilized. I know he wants to do something to cut his expenses while he’s on active duty. Can he suspend his malpractice coverage just like the doctors?

A: Short answer: yes. Each of the answers given above with regard to medical malpractice liability insurance applies equally to policies of professional liability insurance covering providers of legal services (attorneys, paralegals, title examiners, etc.).

Update – March 2022⁴

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.⁵ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections.

The relevant sections cited throughout the article can be found at:

⁴Update by Second Lieutenant Lauren Walker, USMC.

⁵*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra> (last visited Mar. 10, 2022).

50 U.S.C. App. § 593 discussing professional liability protection can be found at 50 U.S.C. § 4023.

50 U.S.C. App. § 522 discussing stay of proceedings when a servicemember has notice can be found at 50 U.S.C. § 3932.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁶

⁶Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).