

Professional Malpractice Liability Insurance Coverage for Recalled Reservists in the Health Care and Legal Professions²

By Colonel John S. Odom, Jr., USAF (Ret.)³ and
Captain Samuel F. Wright, JAGC, USN (Ret.)⁴

[About Sam Wright](#)

4.3—SCRA right to a continuance and protection from default judgment

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14.0—Tort claims involving service members and military families.

¹ We invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

² This article is essentially a reprint of Law Review 147, published in 2004. Nothing has changed except the numbering of sections of the Servicemembers Civil Relief Act (SCRA) and the address of the Air Force website that one can use to find a nearby military legal assistance office. We are republishing this article now because almost 20 years have passed since the article was originally published and because a new generation of Reserve Component physicians are now being called to active duty, this time in response to the COVID-19 pandemic.

³ **JOHN S. ODOM, JR.**, a partner in Jones & Odom, LLP of Shreveport, has been in private practice in Shreveport since 1978. A graduate of Baylor University and LSU Law School, he served 37 years of active and Reserve duty in the U.S. Air Force, retiring the first time in 2005 as a Colonel. He was recalled to active duty in 2010 to author a report to Congress on the Servicemembers Civil Relief Act. He is a life member of the Reserve Officers Association, now doing business as the Reserve Organization of America (ROA).

He is recognized as the country's foremost authority on the SCRA and represents servicemembers throughout the country in litigation arising out of SCRA violations. He has been recognized by the ABA with both a Distinguished Service Award and the Grassroots Award in connection with his advocacy before Congress for revisions to the SCRA. He is the author of "[A Judge's Benchbook for the Servicemembers Civil Relief Act](#)", published by ABA Publishing in 2011.

John S. Odom is a member of the Bar of the State of Louisiana, admitted to practice before the U.S. Supreme Court, the Court of Appeals of the Armed Forces, the U.S. Courts of Appeal for the Fifth, Sixth, and Seventh Circuits, and numerous state and federal district courts throughout the country. Member of the Shreveport, Louisiana, and American Bar Associations and Harry Booth-Henry Politz Chapter of American Inns of Court.

He is also a member of the American Bar Association Standing Committee on Legal Assistance for Military Personnel, 2006–09. Recipient of the American Bar Association Distinguished Service Award in 2002, the ABA Family Law Section Compass Award in 2010 for his work with the Servicemembers Civil Relief Act (SCRA), and the ABA Grassroots Advocacy Award in 2011 in recognition of his work with the 111th Congress on SCRA matters. He was recalled to active duty from retirement in 2010 and assigned to the Office of Legal Policy, Undersecretary of Defense for Personnel & Readiness, The Pentagon, to author reports to the U.S. Congress on child custody matters related to the SCRA and international intra-familial abductions of children of members of the Armed Forces.

⁴ **Samuel F. Wright** is a graduate of Northwestern University, the University of Houston Law School (law degree) and the Georgetown University Law Center (advanced law degree). He served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. Wright is a life member and current national officer of ROA, and he has authored the majority of the "Law Review" articles published so far.

Q: I am a Commander (O-5) in the Navy Reserve Medical Corps and a life member of the Reserve Organization of America (ROA).⁵ I have read with great interest many of the “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and other laws that are especially pertinent to those of us who serve our country in uniform, especially in the Reserve and National Guard.

On the civilian side, I am a physician in private practice, specifically an obstetrician-gynecologist (OB-GYN). I expect that the Navy will soon call me to active duty as part of the response to the COVID-19 pandemic. I am concerned about how I will pay my enormous medical malpractice liability insurance bill if I am called to active duty for several months. That annual insurance bill exceeds my annual salary while I am on active duty.

Medical malpractice insurance is written in a “claims made” way. Thus, even if I stop practicing for whatever reason, I still need to keep the insurance in effect, to cover the possibility that a claim could be made months or even years after the date of the alleged malpractice. Even if I perform no deliveries while I am on active duty, I could easily be sued about a delivery or other medical care that I provided in the months before my return to active duty. I am losing sleep over this. Help!

A: Do not worry, because Congress solved this problem in 1991 with an amendment to the Soldiers’ and Sailors’ Civil Relief Act (SSCRA). On 12/19/2003, President Bush signed into law the Servicemembers Civil Relief Act (SCRA), as a long-overdue update and rewrite of the SSCRA, which was originally enacted during World War I and reenacted on the eve of World War II. The provision that we have in mind is section 4023 of title 50 of the United States Code.⁶

Under this provision, you can safely suspend your medical malpractice insurance during the period of your 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.⁷

Q: What happens if somebody tries to sue me while I am on active duty for alleged malpractice that occurred before I returned to active duty?

⁵ At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

⁶ 50 U.S.C. § 4023. This section is part of the SCRA.

⁷ The protections of section 4023 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 4023, no professions other than health-care and legal services have been so designated.

A: If someone sues you (or files a claim, in those states requiring medical review panels before suit can be filed) for alleged malpractice that occurred before you returned to active duty, that suit or claim will be stayed (held in abeyance) until you leave active duty.⁸

Q: What do I need to do to protect my rights under section 4023?

A: You need to notify your insurance company now of the fact that you are entering active duty, and the notice must be in writing. We suggest that you do so by certified mail and retain a copy of the letter and of the United States Postal Service (USPS) return receipt, showing that the company received your letter. You can get a military legal assistance attorney⁹ to assist you in drafting your notice to the insurance company. The Air Force operates a website that will help you find a nearby military legal assistance office.¹⁰

Q: In December 2021, I paid my medical malpractice liability insurance premium for calendar year 2022. I will likely be recalled to active duty in February 2022, and my mobilization will likely last through the end of 2022. Can I get a refund from the insurance company for the last ten months of calendar year 2022?

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 and apply it to any premium becoming due when you leave active duty and reinstate your insurance coverage.¹¹

Q: What do I need to do when I am released from active duty?

A: Within 30 days after you leave active duty, you must notify the insurance company *in writing* that you have left active duty and that you want to reinstate your insurance coverage. We suggest that you send the notice by certified mail and retain a copy of the notice and of the USPS delivery receipt.

Q: While I am on active duty, I will be providing medical care. Do I need liability insurance to cover the possibility of a medical malpractice claim arising out of medical care that I provide in my U.S. Navy capacity?

⁸ See 50 U.S.C. § 4023(f). We have posted the entire text of section 4023 at the end of this article.

⁹ A military legal assistance attorney is an active-duty judge advocate or civilian lawyer employed by one of the services who is specifically assigned to the task of helping military personnel and family members with civilian legal problems. We are not referring to any judge advocate.

¹⁰ Go to <https://legalassistance.law.af.mil>. You put in your zip code, and the website will provide the contact information for nearby military legal assistance offices. You need to make an appointment and visit the office in person because, under long-standing military policies, legal assistance attorneys are not permitted to provide legal advice by telephone or e-mail. Although this website was established and is operated by the Air Force, it shows legal assistance offices for all the services, not just the Air Force. If the closest legal assistance office is on an Army base, you can make an appointment at that office.

¹¹ See 50 U.S.C. § 4023(b)(2)(B).

A: No. Under the Federal Tort Claims Act, the Federal Government is responsible for compensating persons who suffer wrongful death, personal injury, or property damage as a result of the negligence of a federal employee, military or civilian, in the course of his or her employment. A claim against the Federal Government, under the FTCA, is the exclusive remedy for any such alleged negligence.¹²

Q: What if I “moonlight” while I am on active duty, like working weekend shifts in the emergency room of a civilian hospital. Will I need medical malpractice insurance for that?

A: Yes, most definitely. You will also 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 must not interfere with the performance of military duties. Your commanding officer has the authority to permit or deny permission for outside employment.¹³

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 Reserve Component members who have been called to active duty for a national emergency.

One of the great lines of 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 National Guard and Reserve personnel 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.¹⁴

Q: My brother is a Navy Reserve Judge Advocate General’s Corps officer, and like me he expects to return to active duty soon. He is in private practice as a lawyer, and he has legal malpractice liability insurance. Like my medical malpractice insurance, his legal malpractice insurance is written on a “claims made” basis. Can he suspend his malpractice insurance coverage just like the physicians?

A: 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.).

Q: My good friend Mary Jones is also a physician and a member of the Navy Reserve Medical Corps. Like me, she expects to be called to active duty for several months, starting early in 2022. Mary was recently served with a summons and complaint—a lawyer is suing her for alleged medical

¹² See 28 U.S.C. § 2679(b)(1). See also Law Review 21022 (April 2021), concerning the individual immunity of service members and federal civilian employees for alleged torts committed in the course of their employment.

¹³ See 5 C.F.R. § 2635.802; DOD 5500.7.

¹⁴ See also Law Review 106 (December 2003) and Law Review 19016 (February 2019).

malpractice during a recent surgery that she performed. Mary promptly notified her insurance company, and the company retained an attorney to represent Mary on the claim. Mary has not yet heard from that attorney, and she and the attorney have not started the process of consulting about how she should respond to this lawsuit. How does the SCRA protect Mary's interests in this situation?

A: Under another provision of the SCRA, Mary's attorney can request a stay of those proceedings (whether a lawsuit or an administrative claim that is a prerequisite to a lawsuit) if Mary's military duties prevent her from being present and assisting in the defense of the claim.¹⁵

Mary should ask her commanding officer to sign a statement to the effect that Mary's military duties preclude her from being available to assist her attorney in the defense of the malpractice claim. The Staff Judge Advocate of the military medical treatment facility can assist the commanding officer in drafting that statement.

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight¹⁶ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the

¹⁵ See 50 U.S.C. § 3932.

¹⁶ Congress recently established the United States Space Force as the 8th uniformed service.

Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is the entire text of section 4023 of title 50 of the United States Code:

(a)APPLICABILITY

This section applies to a servicemember who—

(1)

After July 31, 1990, is ordered to duty (other than for training) pursuant to sections 688, 12301(a), 12301(g), 12302, 12304, 12306, or 12307 of title 10 or who is ordered to under section 12301(d) of such title during a period when members are on pursuant to any of the preceding sections; and

(2)

immediately before receiving the order to **active duty**—

(A)

was engaged in the furnishing of health-care or legal services or other services determined by the Secretary of Defense to be services; and

(B)

had in effect a **professional** liability insurance policy that does not continue to cover claims filed with respect to the during the period of the servicemember's service unless the premiums are paid for such coverage for such period.

(b)SUSPENSION OF COVERAGE

(1)SUSPENSION

Coverage of a servicemember referred to in subsection (a) by a professional liability insurance policy shall be suspended by the insurance carrier in accordance with this subsection upon receipt of a written request from the servicemember by the insurance carrier.

(2)PREMIUMS FOR SUSPENDED CONTRACTS

A **professional** liability insurance carrier—

(A)

may not require that premiums be paid by or on behalf of a servicemember for any professional liability insurance coverage suspended pursuant to paragraph (1); and

(B)

shall refund any amount paid for coverage for the period of such suspension or, upon the election of such [servicemember](#), apply such amount for the payment of any premium becoming due upon the reinstatement of such coverage.

(3) NONLIABILITY OF CARRIER DURING SUSPENSION

A professional liability insurance carrier shall not be liable with respect to any claim that is based on professional conduct (including any failure to take any action in a professional capacity) of a that occurs during a period of suspension of that servicemember's professional liability insurance under this subsection.

(4) CERTAIN CLAIMS CONSIDERED TO ARISE BEFORE SUSPENSION

For the purposes of paragraph (3), a claim based upon the failure of a professional to make adequate provision for a patient, client, or other person to receive professional services or other assistance during the period of the professional's active duty service shall be considered to be based on an action or failure to take action before the beginning of the period of the suspension of professional liability insurance under this subsection, except in a case in which professional services were provided after the date of the beginning of such period.

(c) REINSTATEMENT OF COVERAGE

(1) REINSTATEMENT REQUIRED

Professional liability insurance coverage suspended in the case of any servicemember pursuant to subsection (b) shall be reinstated by the insurance carrier on the date on which that servicemember transmits to the insurance carrier a written request for reinstatement.

(2) TIME AND PREMIUM FOR REINSTATEMENT

The request of a servicemember for reinstatement shall be effective only if the servicemember transmits the request to the insurance carrier within 30 days after the date on which the servicemember is released from active duty. The insurance carrier shall notify the servicemember of the due date for payment of the premium of such insurance. Such premium shall be paid by the servicemember within 30 days after receipt of that notice.

(3) PERIOD OF REINSTATED COVERAGE

The period for which professional liability insurance coverage shall be reinstated for a servicemember under this subsection may not be less than the balance of the period for which coverage would have continued under the insurance policy if the coverage had not been suspended.

(d) INCREASE IN PREMIUM

(1) LIMITATION ON PREMIUM INCREASES

An insurance carrier may not increase the amount of the premium charged for professional liability insurance coverage of any servicemember for the minimum period of the reinstatement of such coverage required under subsection (c)(3) to an amount greater than the amount chargeable for such coverage for such period before the suspension.

(2)EXCEPTION

Paragraph (1) does not prevent an increase in premium to the extent of any general increase in the premiums charged by that carrier for the same professional liability coverage for persons similarly covered by such insurance during the period of the suspension.

(e)CONTINUATION OF COVERAGE OF UNAFFECTED PERSONS

This section does not—

(1)

require a suspension of professional liability insurance protection for any person who is not a person referred to in subsection (a) and who is covered by the same professional liability insurance as a person referred to in such subsection; or

(2)

relieve any person of the obligation to pay premiums for the coverage not required to be suspended.

(f)STAY OF CIVIL OR ADMINISTRATIVE ACTIONS

(1)STAY OF ACTIONS

A civil or administrative action for damages on the basis of the alleged professional negligence or other professional liability of a service-member whose professional liability insurance coverage has been suspended under subsection (b) shall be stayed until the end of the period of the suspension if—

(A)

the action was commenced during the period of the suspension;

(B)

the action is based on an act or omission that occurred before the date on which the suspension became effective; and

(C)

the suspended professional liability insurance would, except for the suspension, on its face cover the alleged professional negligence or other professional liability negligence or other professional liability of the [servicemember](#).

(2)DATE OF COMMENCEMENT OF ACTION

Whenever a civil or administrative action for damages is stayed under paragraph (1) in the case of any servicemember, the action shall have been deemed to have been filed on the date on which the professional liability insurance coverage of the servicemember is reinstated under subsection (c).

(g)EFFECT OF SUSPENSION UPON LIMITATIONS PERIOD

In the case of a civil or administrative action for which a stay could have been granted under subsection (f) by reason of the suspension of professional liability insurance coverage of the defendant under this section, the period of the suspension of the coverage shall be excluded from the computation of any statutory period of limitation on the commencement of such action.

(h)DEATH DURING PERIOD OF SUSPENSION

If a servicemember whose professional liability insurance coverage is suspended under subsection (b) dies during the period of the suspension—

(1)

the requirement for the grant or continuance of a stay in any civil or administrative action against such servicemember under subsection (f)(1) shall terminate on the date of the death of such servicemember; and

(2)

the carrier of the professional liability insurance so suspended shall be liable for any claim for damages for professional negligence or other professional liability of the deceased servicemember in the same manner and to the same extent as such carrier would be liable if the servicemember had died while covered by such insurance but before the claim was filed.

(i) DEFINITIONS

For purposes of this section:

(1) ACTIVE DUTY

The term “active duty” has the meaning given that term in section 101(d)(1) of title 10.

(2) PROFESSION

The term “profession” includes occupation.

(3) PROFESSIONAL

The term “professional” includes occupational.

(Oct. 17, 1940, ch. 888, title VII, § 703, as added by Public Law 108-189, section 1, Dec. 19, 2003, 117 Stat. 2862.)