

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action
v.)	No. 99-CV-02496 (GK)
)	
PHILIP MORRIS INCORPORATED, et al.)	Next scheduled court appearance:
)	November 2, 2000
Defendants.)	
)	

**UNITED STATES' MOTION TO LIMIT COURT'S ORDER DISMISSING
COUNT ONE OF COMPLAINT TO CLAIMS FOR PAYMENTS
UNDER MEDICARE AND FEHBA, AND INCORPORATED
STATEMENT OF POINTS AND AUTHORITIES**

MOTION

The United States hereby moves this Court for an Order amending that portion of its Memorandum Opinion and Order, filed September 28, 2000, that dismissed Count 1 of the Complaint in its entirety. The government asks the Court to reinstate Count 1 except to the extent that it seeks recovery under the Medical Care Recovery Act ("MCRA"), 42 U.S.C. § 2651 *et seq.*, for health care payments under Medicare and the Federal Employees Health Benefits Act ("FEHBA"). The United States makes this motion pursuant to Rule 60 of the Federal Rules of Civil Procedure, on the grounds that such relief is required to conform the Court's Order of dismissal with the rationale of the Court's Memorandum Opinion, which acknowledged that other agencies, such as the Department of Defense and the Department of Veterans Affairs, "have, and have always had, an undisputed and established right to recovery under MCRA" Memorandum Opinion ("Opinion") at 22-23.

This motion is based upon the Statement of Points and Authorities, incorporated herein,

and upon all of the pleadings, records, and files in the above-captioned proceeding.

WHEREFORE, the United States requests that the Court enter an Order limiting the Court's dismissal of Count 1 of the Complaint to the government's claims for payments under Medicare and FEHBA, and that the Court reinstate Count 1 to the extent it seeks recovery under MCRA for medical payments made under DOD, VA, and programs other than Medicare or FEHBA. Plaintiff is submitting a proposed order with this motion.

STATEMENT OF POINTS AND AUTHORITIES

A. Introduction

In Count 1 of its Complaint, the United States seeks recovery pursuant to MCRA of its expenditures under several healthcare programs. See Complaint ¶ 128 (seeking, inter alia, expenditures under DOD and VA programs, Medicare and FEHBA). The defendants moved to dismiss the Complaint, and, as to Count 1, argued that the government could not recover its Medicare and FEHBA expenditures under MCRA. Although the defendants challenged recovery for non-Medicare and non-FEHBA recovery insofar as the government did not name individuals who suffered smoking related injuries, they did not dispute that MCRA provides for the recovery of other, non-Medicare and non-FEHBA, health care costs. See Certain Defendants' Memorandum of Law in Support of Motion to Dismiss ("Defendants' Memorandum") at 8-9. In its Opinion, the Court noted that the government's expenditures under these other health care programs are properly recovered under MCRA. Opinion at 20, 21, 22-23. Nonetheless, the Court dismissed Count 1 of the government's Complaint in its entirety, even to the extent the government sought recovery of its non-Medicare and non-FEHBA expenditures.

See Opinion at 28, 55; September 28, 2000 Order.

In this motion, the government requests only that the Court amend its Order and Opinion to conform to the legal conclusion that, in addition to Medicare and FEHBA, there are expenditures alleged in the government's Complaint that are recoverable under MCRA. The government is not here challenging the Court's determination that Medicare and FEHBA expenditures may not be recovered pursuant to MCRA.

B. Discussion

The Court may amend its order dismissing Count 1 in its entirety pursuant to Fed. R. Civ. P. 60. See Howard Sober, Inc. v. I.C.C., 628 F.2d 36, 41 (D.C. Cir. 1980). In seeking recovery under MCRA, the United States explicitly alleged that:

[e]ach year, the United States, pursuant to various statutory entitlement programs, furnishes and pays for hospital, medical, surgical, and dental care . . . for numerous current and former consumers of the Cigarette Companies' products. The statutes pursuant to which the United States furnishes and pays for such health care costs include, but are not limited to, . . . the Medicare statute . . . [; statutes] pursuant to which the Department of Veterans . . . provides and pays for . . . health care services for veterans . . . [; statutes] pursuant to which the Department of Defense . . . provides and pays for health care services . . . for millions of current members and certain former members of the uniformed services [;] . . . the Federal Employees Health Benefits Act

Complaint ¶ 128.

Indeed, in its September 28, 2000 Opinion, the Court recognized that CHAMPUS, the Air Force, the Navy, and the Coast Guard "have, and have always had, an undisputed and established right to recovery under MCRA" Opinion at 22-23; see also Opinion at 20 (MCRA enables government to recover expenses under DOD, Public Health Service, and VA); 20-21 (recovery under the Federal Employees' Compensation Act ("FECA")); 21 (FECA is covered by MCRA).

Even the defendants repeatedly acknowledged in their motion to dismiss that the government may, pursuant to MCRA, recover its expenditures under the other programs asserted in the Complaint. See Defendants' Memorandum at 13-14 ("Both the 1962 House and Senate Reports go on to state explicitly that MCRA is to apply to recovery of costs under '[s]tatutes providing for care by the Department of Defense to military personnel and their dependents, the Public Health Service to Coast Guard personnel and other classes of persons, and the Veteran's Administration to veterans.'").^{1/}

Thus, despite the Court's conclusion that, besides Medicare and FEHBA, there are damages sought by the United States' Complaint for which the governmental agencies "have, and have always had, an undisputed and established right to recovery under MCRA," (Opinion at 22-23), the Court dismissed the MCRA count in its entirety. Pursuant to Rule 60, the government respectfully requests that the Court amend its Opinion and Order and conform it to the legal conclusions reached in the Court's Opinion.^{2/}

^{1/}See also Defendants' Memorandum at 14 ("The courts have repeatedly ruled that MCRA is directed toward these separate direct-care programs for military personnel, veterans and other limited classes of Government personnel."); 17 (various Armed Forces "healthcare expenditures actually are covered by MCRA," and citing regulations in footnote) (emphasis in original); 20-21 (same); 30 ("Each of the regulations issued after the enactment of the 1996 [MCRA] amendment states that the rates pertain to recovery 'through three separate Federal agencies,' which the regulations then specify as the 'Department of Defense,' the 'Department of Health and Human Services, Indian Health Service,' and the 'Department of Veterans Affairs.'").

^{2/}The government notes that neither the Complaint's recitation of some of the statutes pursuant to which the United States furnishes and pays for health care (Complaint at ¶ 128), nor the Court's enumeration of agencies that have a right to recover under MCRA (Opinion at 23) is exhaustive. As defendants' motion to dismiss notes, there are other programs, such as the Indian Health Service, through which the United States furnishes and pays for medical care and for which the government seeks recovery of its damages under MCRA. Defendants' Memorandum at 30.

C. Conclusion

For the foregoing reasons, the United States respectfully requests that the Court amend its September 28, 2000 Opinion and Order dismissing Count 1 of the Government's Complaint in its entirety, and limit the dismissal to claims for payments under Medicare (Complaint ¶ 128(1)) and FEHBA (Complaint ¶ 128(4)).

Respectfully submitted,

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Dated: October 13, 2000

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ORDER

UPON CONSIDERATION OF United States' Motion to Limit Court's Order Dismissing Count One of Complaint to Claims for Payments Under Medicare and FEHBA, any opposition thereto, and the entire record herein, it is this ____ day of _____, 2000,

ORDERED that the United States' Motion is GRANTED; and it is further

ORDERED that the Court's September 28, 2000, Opinion and Order dismissing Count 1 of the Government's Complaint in its entirety, is amended. Only subsections (1) and (4) of ¶ 128 are dismissed.

Gladys Kessler,
U.S. District Judge

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 13th day of October, 2000, I caused to be served by First Class mail, postage prepaid, a copy of "United States' Motion to Limit Court's Order Dismissing Count One of Complaint to Claims for Payments Under Medicare and FEHBA, and Incorporated Statement of Points and Authorities" to the following:

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