

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

GENERAL ORDER REGARDING SUBROGATION

It is the experience of the Office of Special Masters that third parties to a vaccine injury claim asserted under the National Childhood Vaccine Injury Compensation Program (the “Vaccine Act” or “Program”),¹ such as private health care insurers, often express the intent to seek reimbursement of benefits (under a right of subrogation set forth in an insurance policy) already paid to Vaccine Act claimants against sums awarded to such claimants through the Program. This Order is issued to explain that Sections 15(g) and (h) of the Vaccine Act preclude such conduct.

In the Vaccine Program, a petitioner may recover actual and projected unreimbursable expenses, lost wages, pain and suffering, and an award of \$250,000 if the injury resulted in death. Section 15(a). But such compensation elements are limited by subsequent sections of the Act. Thus, punitive or exemplary damages are prohibited, and awards for unreimbursable expenses and/or pain and suffering may be provided only for the “health, education, or welfare of the person who suffered the vaccine-related injury.” Section 15(d).

In addition, total recoverable compensation for an established vaccine injury is offset by amounts paid or expected to be paid under an insurance policy and certain State or Federal programs. Section 15(g).² Thus, the Vaccine Act always and by its own terms functions as a *secondary payer* to a petitioner’s health care insurance – the “payor of last resort.” Indeed, the Act *prohibits* any “policy of health insurance” from “mak[ing] payment of benefits under the policy *secondary* to the payment of compensation under the Program,” and also prohibits an entity that “provides health services on a prepaid basis

¹ The National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 *et seq.* Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

² As Section 15(g) specifically states:

Payment of compensation under the Program shall not be made for any item or service to the extent that payment has been made, or can reasonably be expected to be made, with respect to such item or service (1) under any State compensation program, under an insurance policy, or under any Federal or State health benefits program (other than under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*)), or (2) by an entity which provides health services on a prepaid basis.

Section 15(g).

or provides health benefits” from “mak[ing] the provision of health services or health benefits secondary to the payment of compensation under the Program.” Section 15(h) (emphasis added).³

Because of the above, any damages sum awarded to a Vaccine Act petitioner *cannot* include amounts already paid, or expected to be paid, under his or her existing health care insurance policy. And the plain language of the Vaccine Act *does not authorize reimbursement* for benefits already paid (whether under existing insurance, Petitioner’s Medicare health care insurance policy, disability insurance, etc.).

This in turn means that the Act does not permit third parties with an otherwise-cognizable and enforceable interest in recovering funds associated with care and treatment provided to a Program petitioner to attach the proceeds of a Vaccine Act entitlement award to recover such sums (other than in the narrow exceptional cases set forth in the Act).

Petitioners shall so inform any entity that reports its intent to act contrary to the Act’s requirements as set forth herein. This General Order may be provided to a third party in any circumstance where this issue arises.

IT IS SO ORDERED.

s/Brian H. Corcoran

Brian H. Corcoran
Chief Special Master

³ Sections 15(g) and (h) set forth the sole exception – services or benefits provided under Title XIX of the Social Security Act (42 U.S.C.A. § 1396 et seq.), meaning Medicaid treatment. “Medicaid liens” *may* be asserted against Program awards.