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APPENDIX A

FILED: June 13, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2268
(4:21-cv-02307-RBH)

JOANN FORD, on behalf of herself and all others similarly situated

Plaintiff - Appellant

and

UNITED STATES OF AMERICA

Defendant - Appellee

v.

SANDHILLS MEDICAL FOUNDATION, INC.

Defendant - Appellee

MANDATE

The judgment of this court, entered March 29, 2024, takes effect today.

This constitutes the formal mandate of this court

issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Nwamaka Anowi, Clerk

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2268

JOANN FORD, on behalf of herself and all others similarly situated,

Plaintiff - Appellant,

and

UNITED STATES OF AMERICA,

Defendant - Appellee,

v.

SANDHILLS MEDICAL FOUNDATION, INC.,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, Chief District Judge. (4:21-cv-02307-RBH)

Argued: December 7, 2023 Decided: March 29, 2024

Before THACKER, HARRIS, and RICHARDSON,

Circuit Judges.

Vacated and remanded by published opinion. Judge Thacker wrote the opinion in which Judge Harris and Judge Richardson joined.

ARGUED: John A. Yanchunis, MORGAN & MORGAN, P.A., Tampa, Florida, for Appellant. Kevin Joseph Kennedy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. Matthew Sidney Freedus, FELDESMAN TUCKER LEIFER & FIDELL, LLP, Washington, D.C., for Appellee. **ON BRIEF:** Kenya J. Reddy, MORGAN & MORGAN, P.A., Tampa, Florida, for Appellant. Brian M. Boynton, Principal Deputy Assistant Attorney General, Mark B. Stern, Dana L. Kaersvang, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Samuel R. Bagenstos, General Counsel, Michael I. Goulding, Associate General Counsel, Robert H. Murphy, Sean M. Flaim, General Law Division, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Washington, D.C.; Adair F. Boroughs, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee United States. Rosie Dawn Griffin, FELDESMAN TUCKER LEIFER FIDELL, LLP, Washington, D.C.; Michael D. Wright, SAVAGE, ROYALL & SHEEHAN, LLP, Camden, South Carolina; Jessica L. Fickling, STROM LAW OFFICE, Columbia, South Carolina, for Appellee Sandhills Medical Foundation, Inc.

THACKER, Circuit Judge:

Joann Ford ("Appellant"), on behalf of herself and all others similarly situated, filed a complaint in South Carolina state court, alleging claims for negligence, breach of implied contract, invasion of privacy, and breach of confidentiality against Sandhills Medical Foundation, Inc. ("Sandhills") for failure to properly maintain her personally identifying information ("PII") and protected health information ("PHI"). Appellant provided this information to Sandhills as a condition of her treatment when she was a patient in 2018. After Appellant ceased being a patient at Sandhills, Appellant's PII was stolen from Sandhills' third party computer system in a cyberattack in late 2020. Appellant's PHI was not affected by the cyberattack.

Sandhills removed the case to federal court for a determination as to whether a federal immunity defense shielded it from liability. In order for Sandhills to be immune from suit, it had to demonstrate that Appellant's alleged damages resulted "from the performance of medical, surgical, dental, or related functions." 42 U.S.C. § 233(a). If § 233(a) applies, then the case is treated as one brought pursuant to the Federal Tort Claims Act ("FTCA"), Sandhills is afforded immunity, and the United States is substituted for Sandhills as the defendant.

The district court concluded that Sandhills was immune from suit and the United States was substituted for Sandhills as the defendant pursuant to § 233(a). In coming to this conclusion, the district court reasoned that because Appellant was required to provide her PII to Sandhills in order to receive treatment, the theft of her PII arose out of Sandhills'

performance of "medical, surgical, dental, or related functions."

But as explained below, we conclude that § 233(a) does not apply to Appellant's claims because Sandhills was not performing a related function when an unnamed third party hacked and stole Appellant's PII.

Therefore, we vacate and remand.

I.

A.

Sandhills is a South Carolina nonprofit health center that receives federal funding pursuant to the Public Health Service Act, 42 U.S.C. § 254b *et seq.*, (the "PHS Act") to provide primary health care and related services to medically underserved communities in South Carolina. This case arises from a cyberattack in late 2020, during which unknown bad actors stole the electronically stored PII of Sandhills' patients, including Appellant.

Appellant was a Sandhills patient from approximately 2018 to 2019. In order to provide her treatment, Sandhills requested, collected, and stored Appellant's PII. At the time, Sandhills did not store its patients' PII locally, but instead hired a third party vendor and utilized the vendor's online data storage platform to store the information.

In late 2020, the third party vendor's computer system was hacked, resulting in the disclosure of

Appellant's PII. Sandhills did not learn of the breach until January 8, 2021. And on or about March 5, 2021, Sandhills announced the security breach to its current and former patients. Thereafter, in a public notice to its patients, Sandhills shared that it had "determined that patient medical records, lab results, medications, credit card numbers, and bank account numbers were NOT affected." J.A. 34 (emphasis in original).[1] Rather, the impacted data included patient names, dates of birth, mailing and email addresses, driver's licenses and state identification cards, social security numbers, and insurance claims information that could be used to identify medical conditions.

On April 2, 2021, an unknown and unauthorized individual used Appellant's PII to apply for a $500 loan. Appellant asserts that she spent time dealing with this fraudulent use of her PII and remains concerned about the potential for further loss of privacy and fraud from unauthorized individuals using her stolen information. She also alleges that she suffered lost time, annoyance, interference, and inconvenience as a result of the data breach. Appellant claims she suffered "imminent and impending injury arising from the substantially increased risk of fraud, identity theft, and misuse" resulting from unauthorized persons possessing her PII. J.A. 41.

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[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

B.

On June 18, 2021, Appellant filed a Complaint in the Court of Common Pleas for Chesterfield County, South Carolina, alleging that Sandhills failed to safeguard her PII, which resulted in a fraudulent loan application in her name. Appellant styled her Complaint as a proposed nationwide class action, to include those current and former patients "whose PII or PHI was exposed to an unauthorized party." J.A. 42. Appellant alleged claims for negligence, breach of implied contract, invasion of privacy, and breach of confidentiality based on Sandhills' failure to: (1) adequately protect the PII and PHI of Appellant and the class; (2) warn Appellant and the class of its inadequate information security practices; and (3) avoid sharing the PII and PHI of Appellant and the class without adequate safeguards.

After Sandhills was served the complaint, it notified the United States Attorney General, claiming that it was "entitled to absolute immunity from this civil action, as it resulted from Sandhills' performance of medical or related functions."[2] J.A. 65. After the

[2] If a suit covered by § 233(a) is brought in state court, the PHS defendant may notify the Attorney General. 42 U.S.C. § 233(l)(1). The Attorney General then has fifteen days to make an appearance in the state court and advise the court whether the defendant "is deemed to be an employee of the Public Health Services for purposes of this section with respect to the actions or omissions that are the subject of" the action. *Id.* This operates as the Attorney General certifying that the PHS defendant was acting in scope of employment. *Id.*; § 233(c). If fifteen days pass

time elapsed for the United States to make an appearance, Sandhills removed the action to the United States District Court for the District of South Carolina. In its removal, Sandhills argued the district court had subject matter jurisdiction over the case for three reasons.

First, Sandhills relied on 42 U.S.C. § 233(l)(2), a federal removal statute that permits a community health center recipient of federal grant funds to remove a case to federal court to determine the applicability of 42 U.S.C. § 233(a) – a federal immunity defense for qualifying private health centers that receive federal grant money. Section 233(a) shields qualifying health centers from damages arising "from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation." Sandhills argued that § 233(a) should apply to its data security functions, making it immune from suit, because it collects patient PII as a condition of providing treatment. Therefore, Sandhills contended that its maintenance of patient PII was inextricably woven into its provision of health care and thus qualified its data security as a "related" function of medical care.

Second, in support of removal, Sandhills cited 28

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with no response from the Attorney General, "the civil action or proceeding shall be removed to the appropriate United States district court." § 233(l)(2). Once removed to federal court, the merits of the action "shall be stayed in such court until such court conducts a hearing, and makes a determination, as to" whether the claim falls within § 233(a). *Id.*

U.S.C. § 1442(a)(1), which permits any officer of the United States or of any federal agency – or any person acting under that officer – to remove a case against them in their official or individual capacity to federal court, even when the underlying federal question arises only as a defense to a state law claim. *See Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). Sandhills argued that, as "an officer, or a person acting under a federal officer" as a Public Health Service ("PHS") employee, it had a right to remove the case pursuant to § 1442(a)(1). J.A. 9.

And finally, Sandhills argued that federal question jurisdiction existed pursuant to 42 U.S.C. § 1331 because the substance of Appellant's action hinges on § 233(a).

Sandhills also requested that the district court substitute the United States for Sandhills as the defendant pursuant to § 233(a). *Agyin v. Razmzan*, 986 F.3d 168, 184 (2d Cir. 2021) (citing 42 U.S.C. § 233(a)) (stating that a defendant "is entitled to immunity from suit and to substitution of the United States as the defendant if this suit concerns actions [a federal employee] took within the scope of his employment as a deemed federal employee").

Pursuant to § 233(1)(2), the case was automatically stayed until the district court could resolve the removal issue. And the district court ordered Sandhills to file a motion to substitute the United States and to "confer with government counsel regarding whether Sandhills is entitled to immunity from suit and to substitution of the United States as the defendant."

J.A. 4. Sandhills filed the motion to substitute, arguing that it should be immune from suit and the United States must be substituted for it as the defendant pursuant to 42 U.S.C. § 233(a). Thereafter, the United States filed a statement of interest expressing its position that Sandhills was not entitled to immunity because collecting and storing its patients' PII was not inextricably woven into the performance of medical, surgical, or dental functions such that Sandhills' data security should qualify as a "related" function within the meaning of § 233(a). The district court held a hearing on the motion, at which Sandhills, the United States, and Appellant were all heard.

Ultimately, the district court concluded that Sandhills was entitled to remove the case to federal court and to immunity and substitution of the United States. The district court reasoned that because Sandhills required Appellant to provide her PII as a condition of being a patient and receiving medical services, the breach of its systems containing such information arose out of Sandhills' performance of medical or "related functions" within the meaning of § 233(a). And the district court supported this conclusion by pointing to Sandhills' "statutory requirement of confidentiality," which the district court believed was "inextricably woven" into Sandhills' provision of health care such that it amounts to a "related" function. J.A. 267.

Once substituted as the defendant, the United States filed a motion to dismiss for lack of subject matter jurisdiction asserting that Appellant had failed to exhaust her administrative remedies with Health

and Human Services before filing suit as required by the FTCA. Appellant conceded that she had not exhausted her administrative remedies, but she maintained that § 233(a) did not shield Sandhills from suit as the storage of her PII with a third party vendor was not a not a "medical, surgical, dental, or related function[]." Therefore, in Appellant's view, substituting the United States was improper as the claims did not fall within the purview of § 233(a) and therefore the FTCA did not apply. And if the FTCA did not apply, then Appellant was not required to exhaust her administrative remedies prior to suit.

The district court, finding no grounds to overturn its prior decision, granted the motion to dismiss for lack of subject matter jurisdiction. This appeal followed.

On appeal, Appellant argues that Sandhill's data storage practice, including the maintenance of her PII, is too removed from the provision of health care to amount to a "related" function such that Sandhills cannot receive § 233(a) immunity and, therefore, the case should not be treated as one brought pursuant to the FTCA. We agree with Appellant.

II.

Because the application of § 233(a) is a question of law, we review de novo the district court's conclusion that § 233(a) shields Sandhills from suit, as well as the substitution of the United States. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) ("[T]he existence of sovereign immunity is a question of law

that we review de novo." (alterations in original) (internal quotation marks omitted)); *Gutierrez de Martinez v. Drug Enf't Admin.*, 111 F.3d 1148, 1152 (4th Cir. 1997). And we also review de novo the district court's dismissal of Appellant's claims. *Pledger v. Lynch*, 5 F.4th 511, 517 (4th Cir. 2021).

III.
Whether Data Security Amounts to a "Related" Function Within the Purview of § 233(a)

A.
The Federally Supported Health Centers Assistance Act

Pursuant to the Federally Supported Health Centers Assistance Act ("FSHCAA"), private health centers that receive federal funds may be considered PHS employees if certain conditions are met. *Friedenberg v. Lane Cnty.*, 68 F.4th 1113, 1118 (9th Cir. 2023) (citing 42 U.S.C. § 233(g)). Appellant does not challenge Sandhills' status as a PHS employee. If an entity receives PHS employee status, then § 233(a) provides the entity immunity from "damage for personal injury, including death, *resulting from the performance of medical, surgical, dental, or related functions*, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment." 42 U.S.C. § 233(a) (emphasis supplied).

If a claim is subject to § 233(a), then the claim is treated as one brought against the United States

within the purview of the FTCA. *Hui v. Castaneda*, 559 U.S. 799, 802 (2010) ("Section 233(a) makes the FTCA remedy against the United States exclusive of any other civil action or proceeding for any personal injury caused by a PHS officer or employee performing a medical or related function while acting within the scope of his office or employment." (internal quotation marks omitted)). If the FTCA applies, the United States is substituted as a defendant. *See* 42 U.S.C. § 233(a); *Hui*, 559 U.S. at 801–02 ("When federal employees are sued for damages for harms caused in the course of their employment, the . . . FTCA . . . generally authorizes substitution of the United States as the defendant."); *see also Agyin v. Razmzan*, 986 F.3d 168, 184 (2d Cir. 2021) ("[A PHS employee] is entitled to immunity from suit and to substitution of the United States as the defendant if this suit concerns actions he took within the scope of his employment as a deemed federal employee.").

Thus, the FSHCAA "essentially makes the U.S. government the medical malpractice insurer for qualifying . . . health centers, their officers, employees, and contractors, allowing these 'deemed' health centers to forgo obtaining private malpractice insurance." *Dedrick v. Youngblood*, 200 F.3d 744, 745 (11th Cir. 2000). "This designation enables centers caring for underserved populations to spend their money on patient care rather than malpractice premiums." *Chronis v. United States*, 932 F.3d 544, 546 n.1 (7th Cir. 2019).

B.

Data Security Does Not Amount to a "Related" Function Within § 233(a)

We now turn to whether § 233(a) shields Sandhills from Appellant's suit, which arose out of Sandhills' allegedly negligent storage of her PII with a third party vendor. In this regard, the question we face is whether data security is a "medical, surgical, dental, or related function[]" that qualifies for § 233(a) immunity. In this instance, it is not.

1.

Based on the plain language of § 233(a), data security is not a related function within the meaning of the statute

Clearly, the storage of patient PII is not in and of itself a medical, surgical, or dental function. Therefore, to fall within the purview of § 233(a), it must be a "related" function.

In assessing what may be a "related" function, we first look to the plain language of the statute. *See Lynch v. Jackson*, 853 F.3d 116, 121 (4th Cir. 2017) ("We start as we must with the plain language of the statute because when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal quotation marks omitted)).

Appellant contends that the plain language of the statute supports that a general term like "related

functions" must be construed to embrace only the words that come before it–medical, surgical, and dental. Appellant therefore argues that the collection and storage of PII does not amount to a "related" function of medical, surgical, or dental services where "[c]ollecting such information does not depend on a medical, surgical, or dental professional's skill, knowledge, or judgment." Appellant's Opening Br. at 17–18. In response, Sandhills argues that the word "related" must be broadly interpreted such that the statute covers "ancillary functions" to medical services. Sandhills Resp. at 15. We agree with Appellant that a more limited interpretation of "related functions" is proper.

We begin with the meaning of the words "related" and "function." Related is defined as "connected by relation," "having close harmonic connection." *Webster's Seventh New Collegiate Dictionary* 723 (1969), and "having mutual . . . connection," *Oxford English Dictionary* (compact ed. 1971).[3] And "function" is defined not as any given activity, but as "the action for which one is particularly fitted or employed," *Webster's*, *supra* at 338, and "[t]he nature and proper action of anything; activity appropriate to any business or profession," *Black's Law Dictionary* (4th ed. 1968).

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[3] Because § 233(a) was originally added to the PHS Act in 1970, *see* PL 91-623, 84 Stat. 1868 (1970), we employ definitions from that time to interpret Congress' intent. *Wisc. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) ("[O]our job is to interpret the words consistent with their ordinary meaning . . . at the time Congress enacted the statute." (internal quotation marks omitted)).

Thus, a "related function[]" is an activity particularly fitted to whatever is connected to whatever proceeds the phrase. In other words, its meaning depends on the words that come before it.

Within § 233(a), the language "related functions" acts as a general catchall for specific functions – "the performance of medical, surgical, [or] dental" functions. 42 U.S.C. § 233(a). "[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (internal quotation marks omitted); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). We therefore construe a general term like "related" as sharing the attributes of the specific words in the list. *See Yates v. United States*, 574 U.S. 528, 544 (2015) (applying the principle of noscitur a sociis to limit "tangible object" to those items similar to "record" or "document" as opposed to the fish at issue in the investigation). As a matter of plain meaning, medical, surgical, and dental all fit into one category – they are adjectives that describe various fields of health care.[4] Staying true to Congress'

[4] One might jump to the thought that surgery is merely a subset of medicine. And in some sense that is true. But this generalization misses the long-standing distinctions between

intent, we read a "related" function as fitting within that category, or in other words, a field of health care outside of medicine, surgery, or dentistry. *See Wikimedia Found. v. Nat'l Sec. Agency*, 14 F.4th 276, 297 (4th Cir. 2021) (applying noscitur a sociis as limiting the phrase "such other material" to the two preceding conditions in a list).

The words immediately following "related functions" also cabin its contextual meaning. The statute exemplifies "related functions" as "including the conduct of clinical studies or investigation." 42 U.S.C. § 233(a). This provides further support for the position that "related functions" explicitly

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medicine and surgery. Surgery involves bodily invasion while medicine is generally non-invasive. *See* Ankur Aggarwal, *The Evolving Relationship Between Surgery and Medicine*, 12 AMA J Ethics 119, 119 (2010) ("Medicine's two branches—the less invasive medical methods and the more invasive surgical methods—have been around since before the existence of written language. Surgery, however, was not viewed as belonging to the same sphere as medical treatments until relatively recently, and, even now, a sharp distinction exists between surgeons and other medical doctors. Analyzing the history of surgery can help explain the separation between medical and surgical treatments and why the two fields, although viewed quite differently, fit under the umbrella of medicine."); Connor T.A. Brenna & Sunit Das, *Divides of Identity in Medicine and Surgery: A Review of the Duty-Hour Policy Preference*, 57 Annals of Medicine and Surgery 1, 2 (2020) (noting the known and intuitive differences between Medicine and Surgery, including their historical origins); Fitzhugh Mullan, *Big Doctoring in America* 36 (2002) ("The philosophical difference between 'medicine' and 'surgery' is a time-honored one."); *Dorland's Illustrated Medical Dictionary* 785 (26th ed. 1985) (defining "medical" in part as "pertaining to medicine as opposed to surgery").

encompasses only the provision of health care. Both the Supreme Court and this court have held that the word "including" "connotes simply an illustrative application of [a] general principle." *United States v. Hawley*, 919 F.3d 252, 256 (4th Cir. 2019) (quoting *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)). Insofar as "related functions" include providing treatment or diagnoses in a clinical study, there is little support for the notion that data security, which is more akin to an administrative function, should be included within the meaning of § 233(a).

Defining § 233(a)'s scope to extend only to the provision of health care also makes sense because the subsection provides that the United States will be substituted as defendant solely for claims "for damage for personal injury, including death." Misfeasance in the provision of health care would most likely lead to personal injury or death. A wider definition of "related functions" may improperly broaden § 233(a) to encompass misfeasance that results in other types of damages, such as contract damages.

When employing the canons of construction and considering the plain meaning of the words in § 233(a), we discern no ambiguity in the phrase "related functions." As such, in order to trigger immunity, alleged damages giving rise to a lawsuit must arise from the provision of health care. *See* 42 U.S.C. § 233(a). As explained below, Appellant's alleged damages do not.

2.

Appellant's alleged damages did not occur because of the provision of health care

Appellant's claims arose when unknown bad actors hacked Sandhills' third party vendor's computer system and stole Appellant's PII at least a year after she had ended her treatment at Sandhills. Here, Appellant's PII was not released as a result of the provision of health care. Appellant's PII was not inappropriately divulged as a result of Sandhills providing health care to Appellant. In comparison, in *Mele v. Hill Health Center*, which Sandhills argues supports its position, the alleged injury arose when the patient's sensitive information was "improperly disclosed" to another provider at the direction of a medical professional in relation to the patient's treatment. *See* 2008 WL 160226, at *3 (D. Conn. Jan. 8, 2008). The plaintiff's injury in *Mele*, unlike Appellant's, "concern[ed] the medical functions of providing treatment." *Id.*

But here, the allegedly improper release of Appellant's PII did not occur because of Sandhills' performance of the provision of health care. Therefore, Appellant's damages did not arise from any action taken by Sandhills "in [its] capacity as a doctor responsible for, [or] in the course of rendering medical treatment for" Appellant. *See Cuoco*, 222 F.3d at 109 (applying § 233(a) immunity to constitutional violation claim arising out of denial of gender affirming care for pre-trial detainee). This is especially true in this case where, at the time of the unexpected cyberattack, Appellant was no longer receiving any treatment at

Sandhills and had not been a Sandhills patient for at least a year.

Nonetheless, Sandhills argues that its storage and maintenance of Appellant's PII was "related" to her health care treatment because Appellant was required to provide this information in order to receive treatment from Sandhills. Sandhills' interpretation misses the mark. Sandhills is shielded only from those damages that arise from its *performance* of "related functions" within the meaning of § 233(a). Data protection is not an activity the medical field in which Sandhills operates is "particularly fitted to" execute, nor is any "related" field of health care. *Webster's*, *supra* at 338. This is highlighted by the fact that Appellant alleges that Sandhills retains the relevant data "*even after the [patient] relationship ends*." J.A. 30 (emphasis added). Therefore, the fact that Appellant was required to provide her billing information prior to receiving treatment cannot shield Sandhills when the injury did not occur because of any provision of health care.

There is no limiting principle to Sandhills' position. If § 233(a) applied to any action that a patient must take in order to receive health care, it would shield Sandhills from any and all claims despite their lack of relation to their treatment. Consider a scenario where, in anticipation of receiving health care, Appellant provided her PII and billing information to Sandhills but never showed up for her appointment. In that instance, Appellant would have suffered the same injury she alleges here from the data breach without ever even receiving treatment. Similarly, Appellant's

alleged injury could have resulted from a data breach at a host of businesses to which she likely discloses her PII, none of which are involved in the provision of health care, including an employer, an entity involved in a banking, financial, or real estate transaction, or an insurance company. In sum, the focus is on the function that caused the injury, and, here, Appellant was not injured by any health care provided by Sandhills.

3.

Sandhills' statutory duty to maintain patient confidentiality cannot override § 233(a)'s mandate that alleged damages arise during the performance of a medical or "related" function

Sandhills also argues that based on its statutory and ethical duty to maintain the confidentiality of patient information, it should be accorded immunity pursuant to § 233(a). Sandhills relies on its statutory duty pursuant to the FSHCAA to "have an ongoing quality improvement system . . . that maintains the confidentiality of patient records" to argue that its patient record systems should qualify as "related functions." *See* 42 U.S.C. § 254b(k)(3)(C). Sandhills posits that because it must show that it maintains these systems in order to receive grant money, then data security is included in the provision of health care.

But the requirements to receive federal grant money on which Sandhills relies are separate and apart from § 233(a) immunity. In fact, a health center that qualifies to receive federal grant money need not

even apply to be considered a PHS employee. *See* 42 U.S.C. § 233(g)(1)(D) (the Secretary may not "deem an entity . . . to be an employee of the Public Health Service for purposes of this section, . . . unless the entity has submitted an application"); *id.* § 233(g)(1)(G)(ii) (allowing federal grant recipients "that ha[ve] not submitted an application . . . to purchase medical malpractice liability insurance coverage with Federal funds"). And as previously discussed, without PHS employee status, § 233(a) does not apply. Of note, there is no mention of data security or systems in § 233. Therefore, Sandhills' argument that Congress intended data security to be a "related" function lacks credence.

Nor does Sandhills' duty to keep patient information confidential mean that Appellant's claims arose from a "medical, surgical, dental, or related functions." 42 U.S.C. § 233(a). Sandhills points to *Krandle v. Refuah Health Center, Inc.* to support its argument that its duty to protect patient information makes data security a "function . . . essential to the practice of medicine." *See* No. 22cv4977, 2024 WL 1075359, at *9 (S.D.N.Y. Mar. 12, 2024). Not only is *Krandle* not binding precedent on this court, but it fails to focus on whether the alleged damages arose as a result of the provision of health care to the injured party. *See id.* In the case of this data breach, they did not.[5] Simply because Sandhills has a duty to keep

[5] Similarly, *Hale v. ARcare, Inc.*, also provided by Sandhills, is not binding on this court. *See* No. 3:22cv117, 2024 WL 1016361, at *3 (E.D. Ark. Mar. 8, 2024). But *Hale*'s conclusion that damages

Appellant's information confidential does not mean that the release of her PII resulted from Sandhills' provision of health care.

The same applies to Sandhills' maintenance of any medical billing codes. In her complaint, Appellant alleges that Sandhills failed to properly secure its billing codes which could reveal her medical diagnoses. But again, § 233(a) requires that cause of Appellant's injury be the provision of health care. And even so, the development and protection of the codes is not part of the provision of health care. Instead, medical coding is typically a byproduct, separate and apart from the provision of heath care, performed by coders who review documentation of a patient's visit to assign it the appropriate billing code. These are not categories within the provision of health care. Rather, they are administrative operations.

Again, to determine whether § 233(a) immunity applies, the focus is on the function–not the duty. *See Cuoco*, 222 F.3d at 109 (emphasizing that it is the conduct, not the style of the claim, that determines whether § 233(a) immunity applies). Appellant does not allege that Sandhills provided deficient health care or improperly collected her information as a part of her treatment. Indeed, Appellant's alleged damages arose from a data security breach that occurred at least a year after she ceased being a patient at Sandhills.

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arising from a data security breach do not "occur[] during the course of medical treatment within the context of the provider-patient relationship" more closely aligns with the language of § 233(a).

Because Appellant's injury did not arise from Sandhills' provision of health care, § 233(a) does not shield Sandhills from Appellant's claims. *Id.*

And because § 233(a) does not apply, the United States cannot be substituted for Sandhills as the defendant. Section 233(a) allows the United States to be substituted only if the action falls within the scope of immunity. *Hui*, 559 U.S. at 801. Because § 233(a) does not apply, Appellant's claims cannot be treated as ones brought pursuant to the FTCA, and thus, the substitution of the United States for Sandhills was in error. It then necessarily follows that the district court erred when it required Appellant to have exhausted her administrative remedies pursuant to the FTCA in order to maintain her suit.

IV.

For these reasons, the district court's order applying immunity pursuant to § 233(a) and substituting the United States for Sandhills as the defendant is vacated. We remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joann Ford, *on behalf of herself and all others similarly situated*,

Plaintiff,

v.

Sandhills Medical Foundation, Inc.,

Defendant.

Civil Action No.: 4:21-cv-02307-RBH

ORDER

This case involves an electronic data breach of records containing confidential personal and health information of patients of Defendant Sandhills Medical Foundation, Inc. ("Sandhills"), a federally funded community health center. Plaintiff Joann Ford, a former patient of Sandhills, filed a proposed class action in state court, and Sandhills removed the action to this Court seeking substitution of the United States as the defendant. The Court grants Sandhills's Motion to Substitute for the reasons herein.

Background and Procedural History

Plaintiff was a patient of Sandhills,[1] a federally deemed community health center under the Federally Supported Health Centers Assistance Act ("FSHCAA"), 42 U.S.C. § 233(g)–(n), that receives federal grant funds under Section 330 of the Public Health Service Act, 42 U.S.C. § 254b. The FSHCAA authorizes the Secretary of the Department of Health and Human Services ("HHS") to deem an entity that receives federal funds to be an employee of the Public Health Service ("PHS") for purposes of 42 U.S.C. § 233. Once the Secretary deems the entity a PHS employee, that "determination shall be final and binding upon the Secretary and the Attorney General and other parties to any civil action or proceeding." 42 U.S.C. § 233(g)(1)(F). PHS employees are eligible for coverage under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), including "absolute immunity . . . for actions arising out of the performance of medical or related functions within the scope of their employment." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010) (citing 42 U.S.C. § 233(a)). Sandhills was a deemed PHS employee for the time periods relevant to this lawsuit. *See* ECF No. 1-2 (deeming notices).

If a civil action is filed in state court against a health center for damage for personal injury resulting from the performance of medical or related functions, the Attorney General must appear in state court

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[1] Plaintiff was a patient of Sandhills from 2018 to 2019. Complaint [ECF No. 1-1] at ¶ 51.

within fifteen days of being notified of the filing and advise the court whether the Secretary has deemed the entity a PHS employee "with respect to the actions or omissions that are the subject of such civil action." 42 U.S.C. § 233(a), (g)(4), (*l*)(1). "If the Attorney General does so, the civil action or proceeding 'shall be removed without bond at any time before trial . . . to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States.'" *Agyin v. Razmzan*, 986 F.3d 168, 173 (2d Cir. 2021) (ellipsis in original) (quoting 42 U.S.C. § 233(c)). However, if the Attorney General fails to appear in state court within fifteen days, "upon petition of any entity . . . , the civil action or proceeding shall be removed to the appropriate United States district court." 42 U.S.C. § 233(*l*)(2). Upon removal under § 233(*l*)(2), the civil action or proceeding is stayed until the district court "conducts a hearing, and makes a determination, as to the appropriate forum or procedure." *Id*.

As alleged in the complaint, Sandhills contracted with a third party vendor ("the vendor")[2] to electronically store patient personally identifiable information ("PII") and protected health information ("PHI") in an online data storage platform. Complaint [ECF No. 1-1] at ¶ 23. In March 2021, Sandhills filed a "Notice of Data Breach," indicating that on or before December 3, 2020, the vendor's system was unlawfully hacked and the hackers took Sandhills's data. *Id*..

[2] The vendor is not named as a defendant in this action.

Such data included "demographic information such as names, dates of birth, mailing and email addresses, driver's licenses and state identification cards, . . . Social Security numbers . . . [and] claims information which could be used to determine diagnoses/conditions." *Id*. Plaintiff contends that as a result of the data breach, her PII and PHI was "taken by hackers to engage in identity theft . . . and or to sell it to other criminals who will purchase the PII and PHI for that purpose." *Id*. at ¶ 44. After the vendor paid a ransom, the hackers returned the data and informed Sandhills the data was deleted and no copies were retained. *Id*. at ¶ 23. Following the data breach, Sandhills offered to provide patients with one year of "single bureau" credit monitoring and identity theft protection, which Plaintiff claims is inadequate. *Id*. at ¶¶ 23 & 49. On April 2, 2021, Plaintiff received a Fair Credit Reporting and Equal Credit Opportunity Act Notice informing her that an unknown and unauthorized individual used her PII to apply for a $500 loan with Security Finance Corporation of South Carolina. *Id*. at ¶ 53.

On June 18, 2021, Plaintiff filed a proposed class-action complaint in state court asserting four claims: negligence, breach of implied contract, invasion of privacy, and breach of confidence. *See* Compl. Plaintiff cites injuries including the following:

> (i) lost or diminished value of PII and PHI; (ii) out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft, tax fraud, and/or unauthorized use of their PII and PHI; (iii) lost opportunity

> costs associated with attempting to mitigate the actual consequences of the Data Breach, including but not limited to lost time, and significantly (iv) the continued and certainly an increased risk to their PII and PHI, which: (a) remains unencrypted and available for unauthorized third parties to access and abuse; and (b) may remain backed up in Defendant's possession and is subject to further unauthorized disclosures so long as Defendant fails to undertake appropriate and adequate measures to protect the PII and PHI.

Id. at ¶ 10. Plaintiff further alleges she suffers from anxiety, emotional distress, loss of privacy, and other non-economic losses. *Id*. at ¶¶ 58, 109, 117, & 143.

Sandhills accepted service of Plaintiff's summons and complaint on July 7, 2021, and delivered copies to HHS and the United States Attorney for this district via letters dated July 7, 2021, and July 9, 2021. ECF Nos. 1-3, 1-4 & 1-5.

The Attorney General did not appear within fifteen days after being notified of the filing, and on July 26, 2021, Sandhills removed the case to this Court invoking, *inter alia*, both 42 U.S.C. § 233(*l*)(2) and 28 U.S.C. § 1442(a)(1) seeking substitution of the United States as the defendant. ECF No. 1. On August 12, 2022, HHS informed Sandhills that its request for representation by the United States under § 233 was denied. ECF No. 22-1.

At the direction of this court, Plaintiff and

Sandhills each submitted briefing regarding whether the United States should be substituted as a party defendant and this action deemed as one brought under the FTCA. *See* ECF Nos. 13, 15, & 16. As there was not a formal motion for substitution for this Court's consideration, by text order dated February 23, 2022, this Court indicated that to the extent Sandhills sought substitution, Sandhills should file a motion to substitute and the United States should file a statement of interest in response to any such motion. *See* ECF No. 20. Sandhills subsequently filed the instant motion to substitute, the United States filed a statement of interest in opposition to substitution, and Sandhills filed a response to the statement of interest.[3] ECF Nos. 22, 25, & 28. The Court held a hearing on the motion to substitute on April 26, 2022, and counsel for Plaintiff, Sandhills, and the Government were present. ECF No. 33.

Discussion

I. Removal and the Court's Ability to Substitute

Initially, the Court notes that the Government contends Sandhills cannot move for substitution under the FSHCAA. ECF No. 25 at pp. 4–12. This Court disagrees.

In this case, the Attorney General did not appear

[3] Plaintiff did not file a response in opposition to the motion to substitute. However, Plaintiff previously filed a brief arguing the United States should not be substituted, so this Court refers to that brief for Plaintiff's position on the matter. *See* ECF No. 16.

in state court within fifteen days of receiving notice of the state court action against Sandhills. Thus, Sandhills properly removed this action pursuant to § 233(*l*)(2) for this Court to make a "determination, as to the appropriate forum or procedure." *See* 42 U.S.C. § 233(*l*). Section 233(*l*)(2) provides the district court with jurisdiction to "decide whether to remand the case or to substitute the United States as a party and deem the action as one brought under the FTCA. [Because] [f]or section 233(*l*)(2) to have any effect, a district court must at least have jurisdiction to substitute the United States when it is appropriate to do so." *Est. of Campbell by Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113, 117 (3d Cir. 2018).

Although the Government contends that upon removal substitution is premised on the Attorney General's advice, once an action is properly removed, § 233(a) is the substantive provision providing for Sandhills's immunity, and by implication, substitution of the United States. *See Agyin*, 986 F.3d at 184 (citing § 233(a) and stating a defendant "is entitled to immunity from suit and to substitution of the United States as the defendant if this suit concerns actions he took within the scope of his employment as a deemed federal employee"); *see also Hui*, 559 U.S. at 811 (explaining that "to effect substitution of the United States," "PHS personnel [can] invoke the official immunity provided by § 233(a)"); *id.* (explaining scope certification by the Attorney General is not a prerequisite to immunity under § 233(a), and it is "not necessary *to effect substitution of the United States*.") (emphasis added); *id.* ("[I]mmunity under § 233(a) . . . is contingent upon the alleged misconduct having

occurred in the course of the PHS defendant's duties, [and] a defendant may make that proof pursuant to the ordinary rules of evidence and procedure.");[4] *C. K. v. United States*, 2020 WL 6684921, at *4 (S.D. Cal. Nov. 12, 2020) ("find[ing] *Hui* to be controlling on the issue of the [c]ourt's ability to determine the applicability of Section 233(a)'s immunity protections and, if necessary, to 'effect substitution of the United States.' 559 U.S. at 811."). Thus, because § 233(*l*)(2) properly provides for removal to this Court, Sandhills can properly seek substitution of the United States as the defendant pursuant to § 233(a).[5]

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[4] The alleged misconduct in this case is outlined in Plaintiff's complaint. Sandhills represents in its motion to substitute that the material facts pertaining to the immunity determination are not in dispute. ECF No. 22 at p. 19.

[5] On August 12, 2021, HHS informed Sandhills, via e-mail, that its request for representation by the United States under 42 U.S.C. § 233 was denied. *See* ECF No. 22-1. As that notice occurred more than fifteen days after the Attorney General received notice of the filing, and there is no indication that either HHS or the Attorney General ever appeared in state court, this Court finds § 233(*l*)(2) was properly invoked to remove this action to this Court for a determination of the appropriate forum or procedure.

However, even if HHS's e-mail would have affected Sandhills's ability to remove this action under § 233(*l*)(2), the federal officer removal statute, 28 U.S.C. § 1442(a)(1), would provide a vehicle for removal of this action. Section 1442(a)(1) authorizes the "United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof" to remove a civil action from state court "for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1) (emphasis added). The Supreme Court has held that the phrase "acting under" is broad—though not limitless—and that a court

must liberally construe the statute. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007). "Under the statute, private actors can remove a case to federal court when they show that they: (1) acted under the direction of a federal officer; (2) possess a colorable federal defense; and (3) engaged in government-directed conduct that was causally related to the plaintiff's claims." *Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 247 (4th Cir. 2021). "In imposing these requirements, the statute aims to protect the Federal Government from interference with its operations, primarily by providing a federal forum for a federal defense." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017) (cleaned up).

Sandhills satisfies these three requirements. First, it was a "person acting under" the Public Health Service when the alleged data breach occurred. *See W. Virginia State Univ. Bd. of Governors v. Dow Chem. Co.*, 23 F.4th 288, 298, 304 (4th Cir. 2022) ("clarify[ing] what it means for a private actor to 'act under' the control and guidance of a federal officer" and recognizing the "archetype case" includes "providing community medical health centers."); *id.* at 300 n. 8 (citing *Agyin*, *supra*, wherein the Second Circuit pointed out "a federally supported community health center . . . is subject to detailed requirements and oversight by the federal government," 986 F.3d at 177). Second, Sandhills has asserted a colorable federal defense—immunity under 42 U.S.C. § 233(a)—as detailed below. Finally, Sandhills engaged in government-directed conduct—"maintain[ing] the confidentiality of patient records," 42 U.S.C. § 254b(k)(3)(C)—causally related to Plaintiff's data breach claim. Sandhills was therefore entitled to remove this case under § 1442(a)(1).

The Court rejects the Government's argument that "[r]emoval under 28 U.S.C. § 1442 was improper because 42 U.S.C. § 233(*l*)(2) specifically governs removal by entities or individuals covered by the FSHCAA." ECF No. 25 at p. 22. Although § 1442 and § 233(*l*)(2) substantially overlap, they are distinct and provide different rights to the removing party. *Agyin*, 986 F.3d at 179–80; *cf. Jamison v. Wiley*, 14 F.3d 222, 237–38 (4th Cir. 1994) (recognizing there can be "two separate and alternative removal statutes," "though often overlapping, [but] not identical," "both of

II. Immunity and Substitution

A. Sandhills's Motion

Sandhills argues it is entitled to absolute immunity and substitution of the United States. ECF No. 22 at pp. 1–2. The Court agrees.

Sandhills "is entitled to immunity from suit and to substitution of the United States as the defendant if this suit concerns actions [or omissions] within the scope of [its] employment as a deemed federal employee. *See* 42 U.S.C. § 233(a)." *Agyin*, 986 F.3d at 184. Section 233(a) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 . . . for damage for personal injury, including death, resulting from the

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which authorize removal of cases to federal court even though they could not have been brought there originally").

Finally, the Government argues the Court should reject Defendant's purported removal under the Westfall Act, 28 U.S.C. § 2679(d). ECF No. 25 at p. 25. The Court agrees removal under § 2679(d) is improper because § 2679(d) provides for removal by the Attorney General, not the defendant. *See Osborn v. Haley*, 549 U.S. 225, 252 n.17 ("[T]he Westfall Act gives the named defendant no right to remove an uncertified case. That right is accorded to the Attorney General only.") (internal citation omitted). However, this case was properly removed under 42 U.S.C. § 233(*l*)(2) and 28 U.S.C. § 1442(a)(1), and "the procedure authorized by § 2679(d) is not necessary to effect substitution of the United States." *Hui*, 559 U.S. at 811.

> performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. § 233(a). "Section 233(a) grants absolute immunity to PHS officers and employees for actions arising out of the performance of medical or related functions within the scope of their employment by barring all actions against them for such conduct." *Hui*, 559 U.S. at 806. "By its terms, § 233(a) limits recovery for such conduct to suits against the United States." *Id.* "To determine a defendant's amenability to suit, [a court] consider[s] whether he or she may claim the benefits of official immunity for the alleged misconduct." *Id.* at 808.

Turning to "the alleged misconduct," *id.*, Plaintiff alleges that Sandhills "fail[ed] to properly secure and safeguard personally identifiable information," which Sandhills required Plaintiff and the Nationwide Class Members "to provide and entrust . . . *as a condition of being patients* of [Sandhills]." Compl. at ¶¶ 1, 113 (emphasis added). Plaintiff contends Sandhills "had a duty to exercise reasonable care in safeguarding, securing, and protecting such information from being compromised, lost, stolen, misused, and/or disclosed to unauthorized parties," and that as a result of

Sandhills's failure to "use reasonable security procedures and practices appropriate to the nature of the sensitive, unencrypted information it was maintaining for Plaintiff and Class Members . . . their PII and PHI [were] exposed," and were taken by hackers. *Id.* at ¶¶ 27, 44, 82. Thus, patients like Plaintiff had to provide Sandhills with their personal information to receive medical services, and patients expected Sandhills to maintain the confidentiality of that information. The alleged data breach of such information arose out of Sandhills's performance of medical or related functions within the scope of its employment as a deemed PHS employee. *Cf.*, *e.g.*, *Cuoco v. Moritsugu*, 222 F.3d 99, 107 (2d Cir. 2000) (evaluating the plaintiff's allegations and concluding "[t]he complained of behavior of these defendants thus occurred within the scope of their offices or employment and during the course of their 'performance of medical . . . or related functions,' 42 U.S.C. § 233(a)"). Under § 233(a), Plaintiff's exclusive remedy for her alleged damage lies against the United States, and Sandhills is entitled to immunity.

The applicability of substitution of the United States and § 233(a) immunity is strengthened by Sandhills's statutory duty to maintain the confidentiality of patient records. To be eligible for deemed status and receive federal funds, Sandhills must show it "will have an ongoing quality improvement system that includes clinical services and management, and *that maintains the confidentiality of patient records*." 42 U.S.C. § 254b(k)(3)(C) (emphasis added); *see* 42 U.S.C. § 233(g)(1), (4) (providing that to be a deemed PHS

employee, a health center must be a "public or non-profit entity receiving Federal funds under section 254b").[6] Thus, Sandhills's federally deemed status hinges in part on maintaining the confidentiality of patient records, such as those of Plaintiff.

Courts have found § 233(a) immunity where "job functions . . . are 'interwoven' with providing medical care." *Goss v. United States*, 353 F. Supp. 3d 878, 886 (D. Ariz. 2018) (collecting cases). This is particularly true where a statutory duty exists. *See, e.g.*, *Houck v. United States*, 2020 WL 7769772, at *3 (D.S.C. Dec. 30, 2020) (finding a health center's statutory duty under

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[6] Similarly, an implementing regulation for Section 330 of the Public Health Service Act mandates confidentiality of patient records. *See* 42 C.F.R. § 51c.110 (entitled "Confidentiality" and providing "[a]ll information as to personal facts and circumstances obtained by the project staff about recipients of services shall be held confidential, and shall not be divulged without the individual's consent except as may be required by law or as may be necessary to provide service to the individual or to provide for medical audits by the Secretary or his designee with appropriate safeguards for confidentiality of patient records. Otherwise, information may be disclosed only in summary, statistical, or other form which does not identify particular individuals."). Also, the deeming application submitted to the HHS Secretary requires an "attest[ation] that [the] health center has implemented systems and procedures for protecting the confidentiality of patient information and safeguarding this information against loss, destruction, or unauthorized use, consistent with federal and state requirements." Application for Health Center Program Award Recipients for Deemed Public Health Service Employment with Liability Protections Under the Federal Tort Claims Act, *available at* https://bphc.hrsa.gov/sites/default/files/bphc/ftca/pdf/pal-2021-01.pdf.

§ 233(h) "of continually vetting its physicians is 'inextricably woven' into [the] provision of medical care"); *Brignac v. United States*, 239 F. Supp. 3d 1367, 1377 (N.D. Ga. 2017) (same); *Teresa T. v. Ragaglia*, 154 F. Supp. 2d 290, 300 (D. Conn. 2001) (concluding the statutory duty under Connecticut law for doctors to report suspected child abuse was a "related function" under § 233(a)). Likewise, § 254b(k)(3)(C) imposes a statutory requirement of confidentiality that is "interwoven" with the provision of medical services at Sandhills. *See, e.g.*, *Brignac*, 239 F. Supp. 3d at 1377 ("42 U.S.C. § 233(h) . . . can be viewed as 'adding a required element' to the provision of medical care by Family Health Centers." (brackets omitted) (quoting *Teresa T.*, 154 F. Supp. 2d at 300)).[7]

Finally, other courts have recognized the failure to

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[7] The Government contends Congress attaching conditions, such as requiring health centers to maintain the confidentiality of patient records, to the receipt of federal funds does not mean actions related to such conditions are covered under § 233(a). ECF No. 25 at pp. 18–19. Although not all requirements for receiving federal funds may be covered under § 233(a), this case concerns the maintenance of the confidentiality of patient records, which is "inextricably woven" into the provision of medical care such that it is a medical or related function. Importantly, South Carolina substantive law recognizes the duty of confidentiality. *See* 28 U.S.C. § 1346(b) (providing the Government's liability under the FTCA is determined "in accordance with the law of the place where the act or omission occurred."); S.C. Code Ann. Regs. 81-60(D) ("A physician shall . . . safeguard patient confidence within the constraints of the law."); *McCormick v. England*, 494 S.E.2d 431, 436, 439 (S.C. Ct. App. 1997) (finding South Carolina "recognize[s] the common law tort of breach of a physician's duty of confidentiality.").

maintain the confidentiality of patient information is a medical or related function under § 233(a). In *Mele v. Hill Health Center*, the court found § 233(a) applied where a nurse "improperly disclosed [the plaintiff's] medical information to a hospital and a substance abuse foundation" because the claim concerned "the related function of ensuring the privacy of patient medical information." 2008 WL 160226, at *3 (D. Conn. Jan. 8, 2008). In *Kezer v. Penobscot Community Health Center*, the court found § 233(a) applied where various clinic employees "gained access to [the plaintiff's] confidential counseling records" and "improperly accessed" them "without her authorization." No. 1:15-cv-00225-JAW, 2019 BL 141566, at *2 (D. Me. Mar. 21, 2019).[8, 9]

Based on the foregoing, the alleged data breach arose out of Sandhills's performance of medical or related functions within the scope of its employment as a deemed PHS employee. Thus, the Court will grant Sandhills's motion to substitute.

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[8] Notably, the Government in *Kezer* "conced[ed] . . . that the 'maintenance of the confidentiality of [the plaintiff's] mental health medical records constituted a covered medical or related function' under the language of § 233(a)." 2019 BL 141566, at *6 (quoting the Government's brief).

[9] As the Government points out, both *Mele* and *Kezer* dealt with a failure to maintain confidentiality premised on conduct of health center employees, not that of a third-party hacker as in this case. ECF No. 25 at p. 25, n 8. However, the duty of *the health center* remains the same—to ensure confidential patient information is not disclosed, regardless of the method or mechanism causing the unauthorized disclosure.

B. The Government's and Plaintiff's Arguments in Opposition to Substitution

1. Personal Injury

Plaintiff and the Government argue Plaintiff's alleged damages are not for "personal injury, including death" within the meaning of § 233(a). ECF No. 16 at pp. 5–6 ; ECF No. 25 at pp. 12–14. "Under the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed[.]" *Hatahley v. United States*, 351 U.S. 173, 182 (1956) (citing 28 U.S.C. § 1346(b)); 42 U.S.C. § 233(a) (incorporating "[t]he remedy against the United States provided by section[] 1346(b)"). South Carolina law defines "personal injury" as "injuries to the person including, but not limited to, bodily injuries, mental distress or suffering, loss of wages, loss of services, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages." S.C. Code Ann. § 15–32–210(11).[10] Plaintiff alleges

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[10] *See* S.C. Code Ann. § 15–32–210(9) ("'Noneconomic damages' means nonpecuniary damages arising from pain, suffering, *inconvenience*, physical impairment, disfigurement, mental anguish, *emotional distress*, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory of damages including, but not limited to, *fear of loss*, illness, or injury." (emphases added)); *id.* § 15–32–210(3) ("'Economic damages' means pecuniary damages arising from medical expenses and medical care, rehabilitation services, costs associated with education, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic

damages/injuries from anxiety, loss of privacy, emotional distress, and other noneconomic and economic losses (including the inconvenience of taking steps to mitigate her identity theft). *See, e.g.,* Compl. at ¶¶ 58, 109, 117, & 143. Certainly some of the alleged damages/injuries fall within the meaning of "damage for personal injury" under § 233(a).[11]

2. Scope of 42 U.S.C. § 233(a) Immunity

The Government asserts that the FSHCAA affords protection only for medical malpractice claims and that Sandhills's claim to immunity misinterprets § 233(a). ECF No. 25 at pp. 14–20. These assertions directly contradict *Hui*, where the Supreme Court held "§ 233(a) plainly precludes a *Bivens*[12] action" against PHS personnel. 559 U.S. at 813. Just as § 233(a) precludes an action or claim for constitutional violations, it bars other claims such as those asserted

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services, a claim for loss of spousal services, loss of employment, loss of business or employment opportunities, loss of retirement income, and other monetary losses.").

[11] The Government contends Plaintiff's briefing declared that her claims were not for personal injury. ECF No. 25 at pp. 12–14. However, the Government misreads Plaintiff's brief. Plaintiff alleges multiple types of damages/injuries, and Plaintiff's argument was that § 233(a) does not cover the claims for damages that are not for personal injury. ECF No. 16 at pp. 4–6. Regardless, as explained below, "the remedy against the United States . . . shall be exclusive of any other civil action or proceeding by reason of the same subject-matter." 42 U.S.C. § 233(a).

[12] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

by Plaintiff. *See id.* at 806 ("Section 233(a) grants absolute immunity to PHS officers and employees for actions arising out of the performance of medical or related functions within the scope of their employment by *barring* ***all*** *actions* against them for such conduct." (emphasis added)); *id.* ("Language that broad easily accommodates both known and unknown causes of action."). Other courts have likewise rejected the notion that § 233(a) is limited to medical malpractice claims. *See, e.g.*, *Cuoco*, 222 F.3d at 108; *Pomeroy v. United States*, 2018 WL 1093501, at *3 (D. Mass. Feb. 27, 2018); *Mele*, 2008 WL 160226, at *3; *Logan v. St. Charles Health Council, Inc.*, 2006 WL 1149214, at *2 (W.D. Va. May 1, 2006); *Teresa T*, 154 F. Supp. 2d at 299.

In any event, § 233(a) makes the FTCA the exclusive remedy for harms resulting from medical or related functions; "the FTCA permits the United States to be held liable in tort only to the extent that a private party defendant would be liable under state law," *Pledger v. Lynch*, 5 F.4th 511, 522 (4th Cir. 2021) (citing 28 U.S.C. § 1346(b)(1)); and South Carolina "recognize[s] the common law tort of breach of a physician's duty of confidentiality," *McCormick*, 494 S.E.2d 431, 440 (S.C. Ct. App. 1997);[13] *see id.* at 436

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[13] *Cf., e.g.*, *Simms v. United States*, 839 F.3d 364, 367 (4th Cir. 2016) ("Because Valley Health is a federally-supported health center, Simms sought relief under the FTCA. Because this case arises under the FTCA, the law of West Virginia—the state where Valley Health's negligent act took place—governs. We therefore apply the law of West Virginia in evaluating the . . . claims." (internal citations omitted)). Notably, *Simms* involved a cause of

("The jurisdictions that recognize the duty of confidentiality have relied on various theories for the cause of action, including invasion of privacy, breach of implied contract, ***medical malpractice***, and breach of a fiduciary duty or a duty of confidentiality.") (emphasis added).[14]

3. Plaintiff's Alternative Position

Plaintiff alternatively argues the United States should not be substituted as to her claim for breach of implied contract. However, that claim arises out of the same subject matter—the alleged data breach—and therefore cannot be maintained against Sandhills. *See Hui*, 559 U.S. at 806 ("The breadth of the words 'exclusive' and 'any' supports this reading [of § 233(a)], as does the provision's inclusive reference to all civil proceedings arising out of 'the same subject-matter.' ... Language that broad easily accommodates both known and unknown causes of action."); *Jarrett v. United States*, 874 F.2d 201, 203 (4th Cir. 1989) (noting "the remedy under FTCA shall be exclusive of any other action or proceeding" under § 233(a)); *Robles v. Beaufort Mem'l Hosp.*, 482 F. Supp. 2d 700, 703 (D.S.C. 2007) ("[O]nce the community health center is deemed a Public Health Service employee, it enjoys immunity

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action for wrongful birth—not medical malpractice—and the Government did not challenge the district court's liability determination on appeal. *Id.* at 367–68.

[14] As mentioned above, Plaintiff asserts claims for breach of implied contract and invasion of privacy. Compl. at ¶¶ 112–118, 119–131.

from those acts that relate to its employment, and *any actions* against it are treated as actions against the United States." (internal quotation marks omitted) (emphasis added)); *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 289 F. Supp. 2d 392, 395 (S.D.N.Y. 2003) ("Once deemed a PHS employee, a community health center enjoys immunity from those acts that relate to its employment, and *any* actions against it are treated as actions against the United States." (emphasis added)); *see, e.g.*, *Hui*, 559 U.S. at 812 (holding "the immunity provided by § 233(a) precludes *Bivens* actions against individual PHS officers or employees for harms arising out of conduct described in that section"); *Cuoco*, 222 F.3d at 107–09 (same).

In sum, none of the Government's or Plaintiff's arguments alter the Court's conclusion regarding the substitution of the United States and the resulting immunity of Sandhills.

Conclusion

Sandhills was entitled to remove this case, and it is entitled to immunity from suit and substitution of the United States as the proper defendant. The Court **GRANTS** Sandhills's motion to substitute [ECF No. 22] and **SUBSTITUTES** the United States as the defendant in this action.

IT IS SO ORDERED.

Florence, South Carolina
June 2, 2022

s/ R. Bryan Harwell
R. Bryan Harwell
Chief United States District Judge

APPENDIX D

FILED: May 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2268
(4:21-cv-02307-RBH)

JOANN FORD, on behalf of herself and all others similarly situated

Plaintiff - Appellant

and

UNITED STATES OF AMERICA

Defendant - Appellee

v.

SANDHILLS MEDICAL FOUNDATION, INC.
Defendant - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Thacker, Judge Harris, and Judge Richardson.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX E

42 U.S.C. § 233

§ 233. Civil actions or proceedings against commissioned officers or employees

(a) Exclusiveness of remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

(b) Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of pleading and process to United States attorney, Attorney General, and Secretary

The Attorney General shall defend any civil action or proceeding brought in any court against any person

referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court or dismissal

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so

removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court: *Provided*, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) Compromise or settlement of claim by Attorney General

The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

(e) Assault or battery

For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

(f) Authority of Secretary or designee to hold harmless or provide liability insurance for assigned or detailed employees

The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury.

(g) Exclusivity of remedy against United States for entities deemed Public Health Service employees; coverage for services furnished to individuals other than center patients; application process; subrogation of medical malpractice claims; applicable period; entity and contractor defined

(1)

(A) For purposes of this section and subject to the approval by the Secretary of an application under subparagraph (D), an entity described in paragraph (4), and any officer, governing board member, or employee of such an entity, and any contractor of such an entity who is a physician or other licensed or certified health

care practitioner (subject to paragraph (5)), shall be deemed to be an employee of the Public Health Service for a calendar year that begins during a fiscal year for which a transfer was made under subsection (k)(3) (subject to paragraph (3)). The remedy against the United States for an entity described in paragraph (4) and any officer, governing board member, employee, or contractor (subject to paragraph (5)) of such an entity who is deemed to be an employee of the Public Health Service pursuant to this paragraph shall be exclusive of any other civil action or proceeding to the same extent as the remedy against the United States is exclusive pursuant to subsection (a).

(B) The deeming of any entity or officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section shall apply with respect to services provided–

(i) to all patients of the entity, and

(ii) subject to subparagraph (C), to individuals who are not patients of the entity.

(C) Subparagraph (B)(ii) applies to services provided to individuals who are not patients of an entity if the Secretary determines, after reviewing an application submitted under subparagraph (D), that the provision of the

services to such individuals–

(i) benefits patients of the entity and general populations that could be served by the entity through community-wide intervention efforts within the communities served by such entity;

(ii) facilitates the provision of services to patients of the entity; or

(iii) are otherwise required under an employment contract (or similar arrangement) between the entity and an officer, governing board member, employee, or contractor of the entity.

(D) The Secretary may not under subparagraph (A) deem an entity or an officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section, and may not apply such deeming to services described in subparagraph (B)(ii), unless the entity has submitted an application for such deeming to the Secretary in such form and such manner as the Secretary shall prescribe. The application shall contain detailed information, along with supporting documentation, to verify that the entity, and the officer, governing board member, employee, or contractor of the entity, as the case may be, meets the requirements of subparagraphs (B) and (C) of this paragraph and that the entity

meets the requirements of paragraphs (1) through (4) of subsection (h).

(E) The Secretary shall make a determination of whether an entity or an officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section within 30 days after the receipt of an application under subparagraph (D). The determination of the Secretary that an entity or an officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section shall apply for the period specified by the Secretary under subparagraph (A).

(F) Once the Secretary makes a determination that an entity or an officer, governing board member, employee, or contractor of an entity is deemed to be an employee of the Public Health Service for purposes of this section, the determination shall be final and binding upon the Secretary and the Attorney General and other parties to any civil action or proceeding. Except as provided in subsection (i), the Secretary and the Attorney General may not determine that the provision of services which are the subject of such a determination are not covered under this section.

(G) In the case of an entity described in paragraph (4) that has not submitted an

application under subparagraph (D):

(i) The Secretary may not consider the entity in making estimates under subsection (k)(1).

(ii) This section does not affect any authority of the entity to purchase medical malpractice liability insurance coverage with Federal funds provided to the entity under section 254b, 254b, or 256a of this title.

(H) In the case of an entity described in paragraph (4) for which an application under subparagraph (D) is in effect, the entity may, through notifying the Secretary in writing, elect to terminate the applicability of this subsection to the entity. With respect to such election by the entity:

(i) The election is effective upon the expiration of the 30-day period beginning on the date on which the entity submits such notification.

(ii) Upon taking effect, the election terminates the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity.

(iii) Upon the effective date for the election, clauses (i) and (ii) of subparagraph (G)

apply to the entity to the same extent and in the same manner as such clauses apply to an entity that has not submitted an application under subparagraph (D).

(iv) If after making the election the entity submits an application under subparagraph (D), the election does not preclude the Secretary from approving the application (and thereby restoring the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity, subject to the provisions of this subsection and the subsequent provisions of this section).

(2) If, with respect to an entity or person deemed to be an employee for purposes of paragraph (1), a cause of action is instituted against the United States pursuant to this section, any claim of the entity or person for benefits under an insurance policy with respect to medical malpractice relating to such cause of action shall be subrogated to the United States.

(3) This subsection shall apply with respect to a cause of action arising from an act or omission which occurs on or after January 1, 1993.

(4) An entity described in this paragraph is a public or non-profit private entity receiving Federal funds under section 254b of this title.

(5) For purposes of paragraph (1), an individual

may be considered a contractor of an entity described in paragraph (4) only if–

(A) the individual normally performs on average at least 32 ½ hours of service per week for the entity for the period of the contract; or

(B) in the case of an individual who normally performs an average of less than 32 ½ hours of services per week for the entity for the period of the contract, the individual is a licensed or certified provider of services in the fields of family practice, general internal medicine, general pediatrics, or obstetrics and gynecology.

(h) Qualifications for designation as Public Health Service employee

The Secretary may not approve an application under subsection (g)(1)(D) unless the Secretary determines that the entity–

(1) has implemented appropriate policies and procedures to reduce the risk of malpractice and the risk of lawsuits arising out of any health or health-related functions performed by the entity;

(2) has reviewed and verified the professional credentials, references, claims history, fitness, professional review organization findings, and license status of its physicians and other licensed or certified health care practitioners, and, where necessary, has obtained the permission from these

individuals to gain access to this information;

(3) has no history of claims having been filed against the United States as a result of the application of this section to the entity or its officers, employees, or contractors as provided for under this section, or, if such a history exists, has fully cooperated with the Attorney General in defending against any such claims and either has taken, or will take, any necessary corrective steps to assure against such claims in the future; and

(4) will fully cooperate with the Attorney General in providing information relating to an estimate described under subsection (k).

(i) Authority of Attorney General to exclude health care professionals from coverage

(1) Notwithstanding subsection (g)(1), the Attorney General, in consultation with the Secretary, may on the record determine, after notice and opportunity for a full and fair hearing, that an individual physician or other licensed or certified health care practitioner who is an officer, employee, or contractor of an entity described in subsection (g)(4) shall not be deemed to be an employee of the Public Health Service for purposes of this section, if treating such individual as such an employee would expose the Government to an unreasonably high degree of risk of loss because such individual–

(A) does not comply with the policies and

procedures that the entity has implemented pursuant to subsection (h)(1);

(B) has a history of claims filed against him or her as provided for under this section that is outside the norm for licensed or certified health care practitioners within the same specialty;

(C) refused to reasonably cooperate with the Attorney General in defending against any such claim;

(D) provided false information relevant to the individual's performance of his or her duties to the Secretary, the Attorney General, or an applicant for or recipient of funds under this chapter; or

(E) was the subject of disciplinary action taken by a State medical licensing authority or a State or national professional society.

(2) A final determination by the Attorney General under this subsection that an individual physician or other licensed or certified health care professional shall not be deemed to be an employee of the Public Health Service shall be effective upon receipt by the entity employing such individual of notice of such determination, and shall apply only to acts or omissions occurring after the date such notice is received.

(j) Remedy for denial of hospital admitting privileges to certain health care providers

In the case of a health care provider who is an officer, employee, or contractor of an entity described in subsection (g)(4), section 254h(e) of this title shall apply with respect to the provider to the same extent and in the same manner as such section applies to any member of the National Health Service Corps.

(k) Estimate of annual claims by Attorney General; criteria; establishment of fund; transfer of funds to Treasury accounts

(1)

(A) For each fiscal year, the Attorney General, in consultation with the Secretary, shall estimate by the beginning of the year the amount of all claims which are expected to arise under this section (together with related fees and expenses of witnesses) for which payment is expected to be made in accordance with section 1346 and chapter 171 of Title 28 from the acts or omissions, during the calendar year that begins during that fiscal year, of entities described in subsection (g)(4) and of officers, employees, or contractors (subject to subsection (g)(5)) of such entities.

(B) The estimate under subparagraph (A) shall take into account–

(i) the value and frequency of all claims for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related

functions by entities described in subsection (g)(4) or by officers, employees, or contractors (subject to subsection (g)(5)) of such entities who are deemed to be employees of the Public Health Service under subsection (g)(1) that, during the preceding 5-year period, are filed under this section or, with respect to years occurring before this subsection takes effect, are filed against persons other than the United States,

(ii) the amounts paid during that 5-year period on all claims described in clause (i), regardless of when such claims were filed, adjusted to reflect payments which would not be permitted under section 1346 and chapter 171 of Title 28, and

(iii) amounts in the fund established under paragraph (2) but unspent from prior fiscal years.

(2) Subject to appropriations, for each fiscal year, the Secretary shall establish a fund of an amount equal to the amount estimated under paragraph (1) that is attributable to entities receiving funds under each of the grant programs described in paragraph (4) of subsection (g), but not to exceed a total of $10,000,000 for each such fiscal year. Appropriations for purposes of this paragraph shall be made separate from appropriations made for purposes of sections 254b, 254b and 256a[1] of this title.

(3) In order for payments to be made for judgments against the United States (together with related fees and expenses of witnesses) pursuant to this section arising from the acts or omissions of entities described in subsection (g)(4) and of officers, governing board members, employees, or contractors (subject to subsection (g)(5)) of such entities, the total amount contained within the fund established by the Secretary under paragraph (2) for a fiscal year shall be transferred not later than the December 31 that occurs during the fiscal year to the appropriate accounts in the Treasury.

(l) Timely response to filing of action or proceeding

(1) If a civil action or proceeding is filed in a State court against any entity described in subsection (g)(4) or any officer, governing board member, employee, or any contractor of such an entity for damages described in subsection (a), the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsections (g) and (h), that such entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding. Such advice shall be deemed to satisfy the provisions of subsection (c) that the Attorney General certify that an entity,

officer, governing board member, employee, or contractor of the entity was acting within the scope of their employment or responsibility.

(2) If the Attorney General fails to appear in State court within the time period prescribed under paragraph (1), upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding shall be removed to the appropriate United States district court. The civil action or proceeding shall be stayed in such court until such court conducts a hearing, and makes a determination, as to the appropriate forum or procedure for the assertion of the claim for damages described in subsection (a) and issues an order consistent with such determination.

(m) Application of coverage to managed care plans

(1) An entity or officer, governing board member, employee, or contractor of an entity described in subsection (g)(1) shall, for purposes of this section, be deemed to be an employee of the Public Health Service with respect to services provided to individuals who are enrollees of a managed care plan if the entity contracts with such managed care plan for the provision of services.

(2) Each managed care plan which enters into a contract with an entity described in subsection (g)(4) shall deem the entity and any officer, governing board member, employee, or contractor

of the entity as meeting whatever malpractice coverage requirements such plan may require of contracting providers for a calendar year if such entity or officer, governing board member, employee, or contractor of the entity has been deemed to be an employee of the Public Health Service for purposes of this section for such calendar year. Any plan which is found by the Secretary on the record, after notice and an opportunity for a full and fair hearing, to have violated this subsection shall upon such finding cease, for a period to be determined by the Secretary, to receive and to be eligible to receive any Federal funds under titles XVIII or XIX of the Social Security Act.

(3) For purposes of this subsection, the term "managed care plan" shall mean health maintenance organizations and similar entities that contract at-risk with payors for the provision of health services or plan enrollees and which contract with providers (such as entities described in subsection (g)(4)) for the delivery of such services to plan enrollees.

(n) Report on risk exposure of covered entities

(1) Not later than one year after December 26, 1995, the Comptroller General of the United States shall submit to the Congress a report on the following:

(A) The medical malpractice liability claims experience of entities that have been deemed to

be employees for purposes of this section.

(B) The risk exposure of such entities.

(C) The value of private sector risk-management services, and the value of risk-management services and procedures required as a condition of receiving a grant under section 254b, 254b, or 256a of this title.

(D) A comparison of the costs and the benefits to taxpayers of maintaining medical malpractice liability coverage for such entities pursuant to this section, taking into account–

(i) a comparison of the costs of premiums paid by such entities for private medical malpractice liability insurance with the cost of coverage pursuant to this section; and

(ii) an analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of such entities.

(2) The report under paragraph (1) shall include the following:

(A) A comparison of–

(i) an estimate of the aggregate amounts that such entities (together with the officers, governing board members, employees, and

contractors of such entities who have been deemed to be employees for purposes of this section) would have directly or indirectly paid in premiums to obtain medical malpractice liability insurance coverage if this section were not in effect; with

(ii) the aggregate amounts by which the grants received by such entities under this chapter were reduced pursuant to subsection (k)(2).

(B) A comparison of–

(i) an estimate of the amount of privately offered such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) purchased during the three-year period beginning on January 1, 1993; with

(ii) an estimate of the amount of such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) will purchase after December 26, 1995.

(C) An estimate of the medical malpractice liability loss history of such entities for the 10-year period preceding October 1, 1996,

including but not limited to the following:

(i) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by the Federal Government pursuant to deeming entities as employees for purposes of this section.

(ii) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by private medical malpractice liability insurance.

(D) An analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of entities that have been deemed as employees for purposes of this section.

(3) In preparing the report under paragraph (1), the Comptroller General of the United States shall consult with public and private entities with expertise on the matters with which the report is concerned.