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**The Perfect Storm: Final Warnings from CMS About LMSAs**

The *Andrea Gail* never had a chance. The Gloucester, MA fishing boat was old and rickety. Its grizzled crew experienced but vastly overmatched. And the storm it faced was simply perfect. Even the magic of Hollywood could not change the *Andrea Gail*'s fate when 'The Perfect Storm' was released in 2000. Spoiler alert: The Perfect Storm won.

One fateful decision doomed the *Andrea Gail*. Instead of heeding warnings about the powerful storm, it ignored all warnings and tried to push through the storm unprepared. Getting home before its cargo of swordfish spoiled was more important than protecting themselves. The crew thought it could take the best the storm would deal out. But the storm wasn't just any storm; it was the Perfect Storm.

The atmospheric environment was just right. Warm air from the Gulf of Mexico slamming into cold air from the Arctic, then combining with the power of late season Hurricane Grace. The Perfect Storm was one hailed by weather experts in 1991 as rare and extraordinary, wreaking havoc with all in its path.

The third-party liability insurance settlement community stares today at its Perfect Storm. The combination of rapidly rising Medicare enrollment rates, a longer American life expectancy and the pending repeal/replacement of the Patient Protection and Affordable Care Act (ACA aka Obamacare) leaves government officials seeking alternate means to maintain the solvency of the Medicare Trust Funds.

Meanwhile, the Medicare Secondary Payer (MSP) Act sits by, ready and waiting. While Medicare has considered active enforcement of the MSP Act's future medical provisions previously for liability insurance settlements, no final indication has been given to that occurring until now. Late in 2017, Medicare will begin rejecting certain repayment requests from medical providers, advising providers to seek repayment from the patient's Liability Medicare Set-aside Arrangement (LMSA) or No Fault Medicare Set-aside Arrangement (NFMSA).

The Perfect Storm is set to hit third-party liability insurance settlements. Parties settling these cases need to heed the warnings and be prepared. Addressing LMSA exposure on all cases involving future medicals is now your best chance to ride out the Perfect Storm.

**The Storm Brewing: How We Got Here**.

After World War II, birth rates in the United States skyrocketed. The resulting Baby Boomer generation came of age in the 1970s. Understanding the potential strain this generation may later place on a Medicare program in its infancy, Congress passed and President Carter signed into law the MSP Act on December 5, 1980.

The MSP Act provides a broad prohibition on Medicare paying certain medical expenses. In part (and relevant to our discussion), is the following provision: Medicare will not pay for a beneficiary's medical expenses where payment has been made under a liability insurance plan (including self-insurance). *42 U.S.C. § 1395y(b)(2)(A)(ii)*. To the extent that a liability insurance carrier or a self-insured pays a claimant for future medical expenses related to the settlement, the federal government (and the American taxpayer) will not pay those bills but for one exception.

Conditional payments represent the only exception to this broad statutory prohibition. Medicare may make a conditional payment on behalf of its beneficiary when an entity has not yet accepted responsibility to make payment. *42 U.S.C. § 1395y(b)(2)(B)(i)*. Medicare pays on the condition that it will be reimbursed when an entity accepts responsibility for that payment and that responsibility is evidenced in a judgment, a compromise for release or other means. *42 U.S.C. § 1395y(b)(2)(B)(ii)*.

For years, these future medical statutory provisions seemed to be ignored by all stakeholders in the liability insurance settlement community. Settling parties rarely addressed them and Medicare never said one word about them. Only after the Centers for Medicare & Medicaid Services (CMS) provided guidance about future medicals for the workers' compensation community did parties in the liability insurance community begin asking questions.

Slowly, CMS began to address the LMSA issue publicly. In 2011, CMS released its only LMSA policy memorandum addressing use of a treating physician's letter to conclude that no LMSA was needed. In 2012, CMS released an Advanced Notice of Proposed Rulemaking (ANPRM) about LMSAs. In 2013, CMS issued a Notice of Proposed Rulemaking (NPRM), though that was never released publicly. In 2014, CMS voluntarily withdrew the NPRM.

Many lobbying groups took the opportunity to congratulate each other when CMS withdrew the NPRM. "Mission accomplished," they said. The LMSA issue was dead according to them. It leads the author to wonder how they missed the storm brewing on the horizon from their perch on the aircraft carrier making the "Mission Accomplished" announcement.

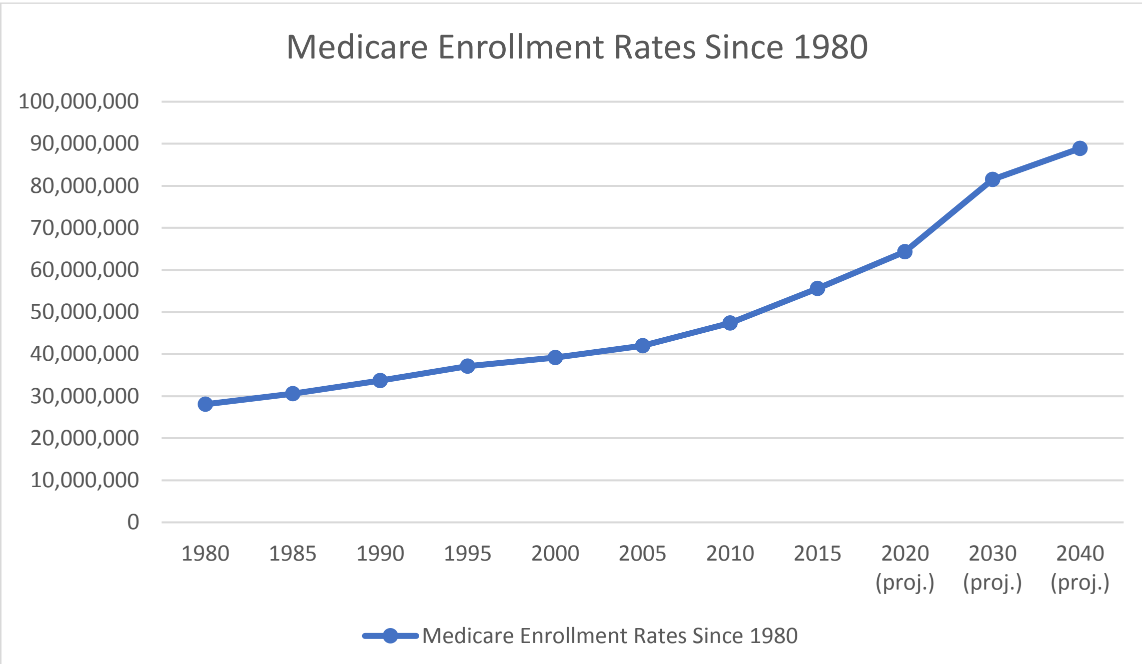
**The Weather Map: Why Now**?

I see three primary factors driving the LMSA issue at this point: 1) rapidly rising Medicare enrollment rates short term; 2) longer life expectancies; and 3) the repeal/replacement of the ACA. This combination will rapidly deplete the Medicare Trust Funds over the next ten (10) years. Something must be done to preserve the integrity of the Medicare program, and CMS knows that.

News about rising Medicare enrollment rates cannot be considered "Breaking News." For years, government officials have been tracking how Baby Boomers age and at what point they enroll in Medicare. Until recently, Medicare enrollment for Baby Boomers happened not due to age, but after receiving Social Security Disability Income (SSDI) benefits, having End Stage Renal Disease (ESRD) or being afflicted with amyotrophic laterals sclerosis (ALS aka Lou Gehrig's Disease). Now, Baby Boomers are aging into Medicare enrollment status, driving enrollment rates higher.

The statistics are striking. When the MSP Act was enacted, just over 28 million Americans were Medicare enrolled. https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareEnrpts/Downloads/SMI2013.pdf. That number grew to 41 million over the next 25 years. Around 2005, the numbers began to rise more rapidly. As of 2015, approximately 55 million

Americans were Medicare enrolled. Officials predict that figure will exceed 80 million by 2030. https://kaiserfamilyfoundation.files.wordpress.com/2013/06/projected-change-in-enrollment-2000-2050-medicare.png. After that, the growth projects to ease.




Every one of those individuals will need healthcare, whether related to a liability insurance settlement or otherwise. You may not be one of those individuals today. If not, chances are good you will be within twenty-five (25) years or less. Funds deposited to the Medicare Trust Funds going forward need to exceed funds withdrawn from the Medicare Trust Funds to ensure the long-term solvency of the Medicare program.

Longer life expectancies exacerbate this problem. Americans live longer lives in 2017 than they have historically. American life expectancies have increased 5.1 years from 1980 to 2017. https://www.cdc.gov/nchs/fastats/life-expectancy.htm. That translates into a larger elderly population using Medicare as the primary insurance provider. The elderly see the doctor more, need more medical procedures and take more prescription medications. Living longer is good news, but only if the elderly has Medicare to pay for healthcare in their 70s, 80s and beyond.

The third ingredient to the Perfect Storm is the anticipated repeal and replacement of the ACA. The ACA extended the life of the Medicare program. By moving more uninsured individuals to private health plans, less strain was placed on Medicare. According to Medicare, studies show that the ACA contributed to the life of the Medicare Trust Funds being extended by approximately twelve (12) years. https://www.medicare.gov/about-us/affordable-care-act/affordable-care-act.html.

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The November 2016 general election rocked the healthcare landscape. With Republicans now in control of the White House and both chambers of Congress, repealing/replacing the ACA became job #1. Since the debate was at full-throat at the time this article was written, we simply don't know the final effect it will have on the life of the Medicare Trust Funds. Believe me, though, that life will be shorter, not longer, by repealing/replacing Obamacare, believe me.

**Today's Forecast: CMS Moves to Announce LMSAs**.

In 2017, we have more people in the Medicare system living longer lives, and incurring more medical expenses. At the same time, we are removing a tool which had extended the life of the Medicare Trust Funds. Understanding these volatile atmospheric conditions, CMS officials have no choice but to act.

They know that it has future medical provisions of the MSP Act which has been in effect for thirty-six (36) years sitting on the shelf. They know the law already exists for CMS to deny payment appropriately where payment has already been made under a liability insurance plan. *42 U.S.C. § 1395y(b)(2)(A)(ii)*. They know that responsibility is evidenced by a primary plan or payer as part of a settlement of a liability insurance claim. *42 U.S.C. § 1395y(b)(2)(B)(ii)*. They know that responsibility is transferred from defendant/insurer to the claimant as part of settling the case. https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/WCMSA-Reference-Guide-Version-2_5.pdf. They know that the plaintiff is then responsible for future medical expenses related to the compensable claim going forward as the primary payer under the terms of most settlement agreements. They know it's right of recovery is not linked to the actual establishment of an LMSA, but rather when CMS is presented a bill prematurely which CMS then pays in error. CMS officials understand all this. They also understand the high level of non-compliance and complete ignorance settling parties in the liability insurance settlement community have had on this issue for decades now.

Knowing that the liability insurance settlement community would need time to board up their windows and find the storm evacuation route, CMS has issued several warnings recently. On June 8, 2016, CMS announced that it was considering expanding its formal MSA review process to include LMSAs and NFMSAs. I observed that the announcement fell mainly on deaf ears in the liability insurance settlement community.

Late in 2016, CMS released a Request for Proposal (RFP) to find a new Workers' Compensation Medicare Set-aside Arrangement (WCMSA) review contractor. Contained in the RFP was work flow for LMSA and NFMSA review. At CMS' discretion, it would ask the new WCMSA review contractor to review upwards of 51,000 LMSAs and NFMSAs per year in addition to the 19,700 WCMSAs it anticipates reviewing annually. While CMS did not announce this formally, it was information made available to the public when it solicited bids for the new WCMSA review contractor.

Now, CMS has told the medical community about LMSAs. https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/MM9893.pdf. In a Change Request dated February 2, 2017, CR 9893 advised the medical community to expect certain reimbursement claims to be denied starting later this year. CMS tells the medical community instead to seek reimbursement from the beneficiary's LMSA since Medicare is prohibited from paying for that same expense for which its beneficiary got paid as part of a prior liability insurance settlement. CMS issued a similar Change Request for WCMSAs back in 2007. https://www.cms.gov/outreach-and-education/medicare-learning-network-mln/mlnmattersarticles/downloads/MM5371.pdf. By providing specific rejection codes and direction to the medical community to seek repayment from the LMSA or NFMSA, CMS gives us one last warning about the Perfect Storm on the horizon.

**Will the Storm Break: What About Enforcement**?

Storms sometime dissipate. A Category 5 hurricane in the middle of the Caribbean may only make landfall in the US as a tropical depression. Maybe the Perfect Storm won't be as bad as it appears. So, while CMS makes these moves and gives us warnings to prepare, you may be asking, "How can CMS enforce this? What gives it the right?"

From the statutory perspective, CMS already has enforcement tools in hand. It's true that the MSP Act does not require MSAs of any kind (WC, liability or otherwise). The MSP Act, however, does clearly provide rights of repayment when another entity has responsibility to pay that same item, service or expense. *42 U.S.C. § 1395y(b)(2)(A)(ii)*.

The MSP Act also provides CMS with a stiffer enforcement penalty. CMS has the statutory right to collect not only the amount of the overpayment made in error, but the right to collect twice that amount or double damages. *42 U.S.C. § 1395y(b)(2)(B)(iii)*. The United States also has subrogation rights under the MSP Act. *42 U.S.C. § 1395y(b)(2)(B)(iv).*

Even more potent, CMS also has the option to tap the federal False Claims Act. *31 U.S.C. §§ 3729, et seq*. If CMS believes actors are committing fraud against the Medicare program by billing Medicare for services rendered instead of paying for those out of settlement proceeds received for that specific purpose, the potential penalties are steep. Fines between $10,781 and $21,563 per occurrence plus three times (3x) the amount of financial harm caused to the Medicare program can be levied by the U.S. Department of Justice (DOJ). *31 U.S.C. §§ 3729(a).*

These various penalty provisions are the "Hurricane Grace" of the Perfect Storm scenario. They provide the devastating force behind any enforcement in this area. Nothing else needs to develop or be enacted for these penalty provisions to be used. Enforcement tools are in place, and ready for CMS and/or the DOJ to use immediately if desired. No notice or warning from CMS about choosing to use the penalty provisions is needed.

"But how will Medicare find out about the LMSA?" A reasonable question to ask today though one that sounds in policing/enforcement as opposed to understanding/following the current law. No formal review process currently exists for LMSAs when this article is being written. Expect that to change in 2018 when CMS exercises its option to have its new WCMSA review contractor (currently being selected at the time of this article) also review LMSAs.

I also expect CMS to add new data points to the MMSEA Section 111 report. Those new data points could ask if an LMSA was funded and if so, for how much. When CMS does this, every liability insurance carrier or self-insured in the U.S. will need to change the way they report to Medicare to take this issue into account. A change in reporting will lead to changes in how the issue is addressed. Simply put, too much is at stake for CMS to wait any longer, especially when the fix can be so simple to implement. Conditions are now right for the Perfect Storm to hit liability insurance settlements nationwide.

**Conclusion**.

The sirens are screaming. Lifeguards have posted the red “No Swimming” flags. The liability insurance settlement community has received plenty of warning about the Perfect Storm. Nothing needs to be changed in the law or the regulations for CMS to begin denying payments for future medical expenses. Expect that to happen starting in October 2017. Expect it because CMS just told us that’s when it would start.

Directing medical providers to seek reimbursement from LMSAs will be the warning heard loud and clear for many. Some, though, will ignore the warnings. They’ll sail bow first into the Perfect Storm. Whether its ego, ignorance or incompetence, their fate is sure to be the same as the *Andrea Gail*. The crew of the *Andrea Gail* faced a fateful decision. Push through the storm or seek shelter and safe harbor? The *Andrea Gail* took a risk, pushed forward unprepared and lost everything.

The time for your fateful decision is at hand. Time to heed the multiple storm warnings. Seek shelter and safe harbor. Take the time to become informed on LMSA issues and how they may affect your case or claim. If not that, then work with someone knowledgeable about LMSA issues that can provide you protection in the storm. Don’t take a risk and potentially lose everything like the crew of the *Andrea Gail*.