

CATTIE, P.L.L.C.
WWW.CATTIELAW.COM
CATTIELAWPLLC@GMAIL.COM

Medicare Madness:
How the 2016 Republican Revolution May Affect the MSP Compliance World

On the morning after the 2016 General Election, you either woke up elated or stunned by the news. Republicans have not only regained the White House, but now control both chambers of Congress. Presumably, a right leaning Supreme Court of the United States (SCOTUS) will follow. What's next for our country? More questions exist than answers. In my world specifically, how does the 2016 Republican Revolution affect Medicare Set-aside Arrangements (MSAs) and future medical exposure under the Medicare Secondary Payer (MSP) Act? Let's make some predictions.

As a starting point, understand the President-Elect has not publicly shared any opinions about MSAs specifically. Nor has he shared thoughts about using the MSP Act more generally to help offset the cost of the Medicare program. He is likely to look to the MSP Act, however, as the law is not firing on all cylinders as a tool to fund the Medicare program. While gains have been made recently with respect to greater conditional payment reimbursement for past medicals, the same cannot be said for ensuring Medicare is not paying for a beneficiary's future injury-related care after resolving a general liability insurance claim, auto insurance claim or a no fault insurance claim. There is too much at stake to expect the President-Elect to ignore the MSP Act as a tool to drive greater revenue streams for the Medicare program.

For those that don't follow MSP in detail, the relevant law is 42 U.S.C. § 1395y(b)(2). The MSP Act, in part, provides that Medicare will not pay for a beneficiary's medical expenses where payment has been made under a worker's compensation policy or plan, an auto plan, a liability insurance plan (including self-insurance) or a no fault plan. *42 U.S.C. § 1395y(b)(2)(A)(ii)*. To the extent that a claimant receives dollars for future medical care that is related to the compensable claim, Medicare should not be billed for that same care as the statute broadly prohibits Medicare paying those same bills.

The federal government stands to make the greatest gains in the short term by focusing on this provision of the statute. Right now, it cannot be said that the law is being followed by the vast majority of parties settling those specific types of insurance claims today. While compliance efforts are more robust in the WC industry than elsewhere, even those efforts could yield greater returns for the federal government in the future. For the millions of dollars that WCMSAs have (in theory) saved the American taxpayer, our country stands to save even more in the future with enhanced compliance efforts. These savings are a direct result of actions taken during our most recent Republican administration under President George W. Bush.

MSP Under President Bush and the Republicans.

Under Bush's administration, the Centers for Medicare and Medicaid Services (CMS) wrote the Patel Memo in 2001. There, CMS shared its belief for the first time publicly that it had a right to recover future medicals in WC cases, and that the MSA was its preferred vehicle for doing just that. Multiple policy memos followed to clarify CMS' unofficial position and address stakeholder concerns. CMS even established a formal review process for certain MSAs. By the time Bush left office in 2008, MSAs in WC were becoming standard operating procedure for claims professionals and WC attorneys.

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The country also saw significant MSP legislation signed into law during the Bush administration. In 2003, he signed the Medicare Modernization Act (MMA). *Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. 108-173, 117 Stat. 2066 (2003)*. Among other things, the MMA extended conditional payment reimbursement exposure to employers, insurance carriers and self-insureds. In 2007, Bush signed the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA). The MMSEA imposed a requirement on employers/carriers to report certain data to CMS when resolving an insurance claim with a Medicare beneficiary. Failure to report, according to the law, would result in a mandatory \$1,000 per day per claimant penalty to the employer/carrier. These seismic MSP initiatives created significant concerns for employers/carriers and all occurred under Republican watch.

MSP Under President Obama and the Democrats.

The election of President Barack Obama altered the MSP trajectory slightly. In January 2013, he signed the Strengthening Medicare and Repaying Taxpayers (SMART) Act into law. Among its achievements was a softening of the penalty language of the MMSEA. In short, a 'shall' become a 'may'. The SMART Act also provided an ability to obtain a final conditional payment figure from CMS pre-settlement. Most experts agree that the SMART Act was a positive step in the MSP compliance world for all stakeholders.

The SMART Act did not cure everything, though. Notably absent from the SMART Act was anything about MSAs or future medical expenses. While the SMART Act worked its way through Congress to the President's desk, CMS considered handling future medicals administratively. In June 2012, it released an Advanced Notice of Proposed Rulemaking (ANPRM) about future medicals under the MSP Act in liability claims. After receiving stakeholder feedback, it released a Notice of Proposed Rulemaking (NPRM) in August 2013, the text of which was never released publicly. In October 2014, CMS voluntarily withdrew the NPRM and no official action has been taken since by CMS publicly on the future medicals issue as it relates to liability insurance.

Expectations and Predictions.

Now, Republicans fully control Washington, D.C. again. What does the recent (2000 to 2016) MSP history teach us? Can we look to the past and use it as a predictor of future events in the MSP compliance world? If we can, what can we expect after Friday, January 20, 2017?

First, I would expect the new administration to address liability MSAs in some way, shape or form. Medicare today is dying a slow death, running budgetary deficits every year to cover the increasing number of enrollees. Absent some immediate cash influx, the baby boomer generation now reaching Medicare age will bankrupt the system. Medicare enrollment rates are expected to increase from approximately 55 million Americans today to approximately 80 million Americans by 2030. Simply put, this growth is unsustainable without increased revenue streams feeding the system.

Republicans must either figure out how to: 1) extend the life of the Medicare Trust Fund; or 2) create an alternate system to replace Medicare. The simple, elegant solution which would provide immediate relief is to utilize the MSP Act to its full potential.

For 36 years, the law has said that Medicare will not pay for a beneficiary's medical expenses when payment has been made under a liability insurance plan (including self-insurance). So, to the extent that a liability insurance settlement pays for a claimant's future medicals that are related to the compensable

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claim, Medicare (and the American taxpayer) should not pay those same costs. Non-compliance with this long-standing law is pervasive on both sides of the table (even in WC) and now threatens the very existence of the Medicare program.

Using the Bush administration as a guide, expect administrative action by the President-Elect as a starting point. Think about the number of liability insurance claims resolved annually in this country which involve future medicals. The potential revenue stream to Medicare created simply by releasing a memo styled after the Patel Memo about liability MSAs would be broad and deep. We're talking about over \$1 billion in costs (by my ultra conservative estimate) that Medicare would not have to pay when those same costs have already been paid by the party accepting responsibility for the beneficiary's medical expenses to the claimant. True, perhaps that's a drop in the bucket compared to the overall Medicare budget. But you can't fill the bucket without first turning on the hose and getting those initial drips.

Second, I would expect MSP reform legislation signed into law during the next Congress. The 2016 Republican Revolution gives Republicans a unique (and likely limited) carte blanche to push its agenda. Multiple MSP reform bills that have been introduced in the past will have new life. Most notably, the WCMSA reform bill (H.R. 4269 and S. 1514, 114th Cong. (2015)) and the newly introduced SPARC Act (H.R. 6120, 114th Cong. (2015)) top the list. But don't be surprised if other legislative reform attempts follow addressing liability MSAs, Medicare Advantage (MA) or other MSP-related issues.

Finally, the 2016 Republican Revolution may lead to some MSP-related decisions from SCOTUS. Absent a check on the system, we can expect a Republican friendly SCOTUS nominee to be confirmed in early 2017. Given the age of some other justices, it's highly likely that the President-Elect will have multiple bites at the SCOTUS apple during his administration. Our country will see a right leaning SCOTUS for the foreseeable future.

Some significant MSP questions exist in the judicial system today. Most notably, a circuit split exists on the question as to whether a Medicare Advantage Organization (MAO) possesses the same statutory rights of recovery as the federal government possesses under the MSP Act for its traditional Medicare Parts A & B fee-for-service programs. While unlikely that the current SCOTUS would grant certiorari on the issue, a SCOTUS injected with more Republican friendly tendencies may take a different approach.

Conclusion.

Our country wakes up with significant questions and concerns after the 2016 election. Healthcare touches every one of us. We all want to take advantage of the Medicare program when the time is right. In fact, we've paid for that right every two weeks during our professional careers.

The MSP Act hitting on all cylinders represents our best immediate chance to ensure Medicare's health long term until we figure out a better solution. Given the recent MSP history, we can expect the 2016 Republican Revolution to usher in some sweeping (and potentially uncomfortable) changes in the MSP world. Time will tell whether the changes provide the panacea for the Medicare program. I can tell you this though: change is upon us. Better hang on tight.