

# **MEDICARE PAYMENT FOR NEVER EVENTS**

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# THE PROBLEM

- **Medicare is in severe financial straits.**

**\$1 Billion vs \$440 Billion**

- **By 2019 Medicare is slated to run out of money.**
- **The pressures on the system are only going to get worse.**

# THE PROBLEM WILL WORSEN

- **We are rapidly becoming a “mass geriatric society.”**
- **Get ready for the coming Senior Tsunami!**
- **The over age 65 population will double in the next 30 years.**

## **BETWEEN NOW AND 2040**

**65-70 Year Olds      +91%**

**75-84 Year Olds      +91%**

**85+ Year Olds        +158%**

<http://www.census.gov/population/www/projections/summarytables.html>

**Nearly 70% of those who are 65 today will require long term care at some point.**

**1995 – 1.5 Million U.S. residents in nursing homes.**

**2030 – 3 Million U.S. residents in nursing homes.**

## 2002 – 2004

- **1.24 Million** total patient safety incidents among Medicare beneficiaries.
- **\$9.3 Billion** of excess costs.
- **304,702** deaths occurred among patients who developed one or more patient safety incidents. **250,246** were potentially preventable.

# **DRUG RELATED INJURIES**

**400,000 preventable drug-related injuries occur each year in hospitals resulting in at least \$3.5 Billion in extra medical costs.**

**800,000 occur in long term care settings.**

**530,000 occur just among Medicare recipients in outpatient clinics.**

Until October 1, Medicare has been paying for **Never** events.

# **“NEVER EVENTS”**

**Errors in medical care that are clearly identifiable, preventable, and serious in their consequences for patients, and that indicate a real problem for the safety and credibility of a health care facility.**

**Press release, Centers for Medicare  
& Medicaid Services, April 18, 2006**

# **“NEVER EVENTS”**

**The health care industry itself has identified these same incidents as evidence of negligence by the health care provider, and as events that do not occur in the absence of medical negligence.**

**See National Quality Forum, “Serious Events in Healthcare,” May 9, 2006**

“NEVER” events include, but are not limited to:

- Surgeries performed on the **wrong limb**.
- Surgeries performed on the **wrong patient**.
- **Foreign objects** left inside surgical patients.
- Preventable **falls** and injuries associated with falls.
- Preventable **pressure ulcers**, stage 3 and higher.
- Preventable **infections**.
- Preventable **dehydration** and **malnutrition**.

# UNJUST ENRICHMENT

**Hospitals and nursing homes are improperly charging Medicare for injuries they cause as a result of substandard care, thereby unfairly burdening taxpayers and jeopardizing the fiscal integrity of the Medicare system.**

**See CMS, “The Hospital Manual,” Sect. 301.2  
See also 42 C.F.R. 489.20(g)**

The extra revenues received by the providers for care caused by their own neglect constitute “**perverse payment incentives**” according to CMS chief Dr. Mark McClellan.\*

These payments not only represent added revenue to the negligent caregivers, they also provide “**windfall profits**” to their insurance companies.

\*See Testimony of Mark McClellan,  
Senate Finance Committee, May 2006

# **TAXPAYERS WERE GETTING SOAKED**

**Taxpayers should not bear the cost of care that patients need due to injuries caused by their own caregivers. By law, these costs should be borne by the providers of the substandard care and their insurance carriers.**

**See 42 C.F.R. 489.53(a)(4)**

# **Government Takes a Modest Step**

**Effective October 1, 2008, CMS will no longer spend Medicare dollars to pay for never events.**

**CMS estimates that it will save taxpayers \$21 Million per year.**

**But what about the  
monies already paid?**

# MSP ACT

Congress passed the **Medicare Secondary Payer Act**, which gives private citizens the power to protect taxpayers. **Private citizens** are encouraged to **act as “private attorneys general”** to take legal action on behalf of Medicare to recover payments made by Medicare when other parties should have paid.

See 42 U.S.C. 1395y(b)(3)(A)

# MSP ACT

Allows individual citizens, as well as the government, to sue in order to right an economic wrong done to the government.

Creates “private attorneys general” by authorizing private citizens to receive part of the recovery.

**Manning v. Utilities Ins. Co., Inc.,  
(2<sup>nd</sup> Circuit, 2001)**

“...one of the least expensive and most effective means of preventing frauds on the treasury is to make perpetrators of them liable to actions by private persons, if you please, under the strong stimulus of...the hope of gain.”

**Marcus v. Hess, 318 U.S. 799  
(1943)**

# BENEFITS OF MSP ACTIONS

- Inject needed **accountability** into the health care system.
- **Better quality care** for patients.
- **Lower costs** for medical care.
- **Improved solvency** for the Medicare system.

Patients win and so do the taxpayers.

## MAXIM

**The Medicare program should not be billed by health care providers to cover the costs of services caused by their own negligence. Such payments not only violate the Medicare Secondary Payer Act, but they also reward health care providers for harming Medicare beneficiaries. They may also give rise to other forms of liability.**

**Alas, the federal courts have  
emasculated the MSP Statute.**

**Where to from here?**

- **Congress can clarify the MSP Statute.**
- **The new administration can aggressively seek to recover Medicare monies that never should have been paid.**