

# The MSA Today

*MSA News/Updates from the Legal Perspective*

## Welcome to the MSA Today!

The MSA Today is our law firm's periodic newsletter. It provides readers with updates about Medicare Set-Asides (MSAs) and the issues related to MSAs. It's one of the only places to get MSA updates and practice tips from the legal perspective.

**"This [MSA] program is caused by a legal requirement for Medicare to not make payment where another entity has responsibility. This can be found in 42 CFR 411, and the Social Security Act 1862(b)."** Anonymous CMS Official

The obligation to determine if Medicare has a right to not pay certain future medical expenses related to a settlement/judgment/award is a legal obligation. While the law does not "require" MSAs, it does require that Medicare not pay when payment has been made under a workers' compensation plan, an automobile plan, a liability insurance plan (including self-insurance) or a no-fault plan.

Too often, folks miss the forest for the trees on MSA issues. They seek a black/white MSA requirement in the liability insurance context, or they strictly follow informal policy memos or reference guides from Medicare in the workers' compensation insurance context. Instead, following what the law says and the regulations say about future medicals leads you to a more compliant (and often cheaper) conclusion. Claims are resolved faster, settlements are approved faster and injured workers get out of the workers' compensation system faster.

The goal here is to be educational and informative. While nothing here is intended to provide you legal advice about a current or previous case, I'd be happy to weigh in on those as well if you engage Cattie, P.L.L.C. for that purpose.

Your feedback is critical to a successful newsletter. Please reach out with your comments, suggestions and constructive criticism. Send that to us in an email at [jcattie@cattielaw.com](mailto:jcattie@cattielaw.com), via Twitter @MSALawyer or by phone at (844) 546-3500. With that, please keep reading to get the latest scoop about MSAs and related issues.

## Our Most Recent Articles



## MSAs and FELA Settlements: Has the Train Left the Station?

### Executive Summary –

Parties resolving claims asserted by railroad employees under the [Federal Employers Liability Act](#) ("FELA") may neglect to address future medical exposure under the [Medicare Secondary Payer](#) ("MSP") Act. Though Medicare treats FELA akin to liability insurance under the MSP Act, some parties fail to identify, verify and discharge a client's MSP future medical exposure. Federal law prohibits Medicare from paying for a beneficiary's medical expenses where payment has been made under a liability insurance plan (but for one exception). While funding a Medicare Set-aside Arrangement ("MSA") could be one way to negate that exposure, federal law does not require MSAs today. Too many practitioners make the mistake of waiting for Medicare to enact some liability MSA "requirement", leaving clients uninformed and exposed to potential

## MSAs and Structured Settlement Brokers: The Quick Profit or the Long Game?

Here's a question for the structured settlement brokers out there. Would you agree to help a client reduce a Medicare Set-aside Arrangement (MSA) by twenty percent (20%) or more if it meant securing a larger number of MSAs to structure going forward?

Here's the hypothetical. A client is trying to settle a sizable workers' compensation (WC) claim. The client has a MSA allocation report from a MSA vendor. Maybe it's a five figure MSA. Maybe it's more. The client is asking you if there is a way to reduce the MSA. The client thinks it's too high and is reluctant to take on that much MSA exposure going forward. Thus, the client hopes you can reduce the MSA by about 20%. At a glance, you may choose to pass. Getting the MSA reduced 20% will directly affect your fee and not in a good way. Why would you work to find a way to get the MSA

## The MSA Blind Spot

Driving a car can be dangerous. Driving a tractor trailer can be even more dangerous. Vehicles have blind spots, those areas around the vehicle as you drive where you fail to see other vehicles, bikers or pedestrians because your view is obstructed. The larger the vehicle, the larger the blind spots. Mirrors can only go so far to remedy the blind spots. In the end, a driver must be aware that the blind spot exists and take precautions against danger originating from the blind spot.

The Workers' Compensation (WC) industry has a Medicare Set-Aside (MSA) blind spot. The mirrors provided by MSA vendors to protect their clients fail to account for the MSA blind spot. Current WC industry practices do not align with CMS expectations. CMS clearly discusses its expectations in its [WCMSA Reference Guide](#). Until the danger posed by the MSA blind spot is remedied, parties

reimbursement claims from Medicare post-settlement. With respect to current clients, silence could amount to a 'material error' as set forth in the American Bar Association's recently issued [Formal Opinion 481](#) (A Lawyers' Duty to Inform a Current or Former Client of the Lawyer's Material Error). This article describes steps parties resolving FELA claims should take to comply with the future medical provisions of the MSP Act. Certainly, a client should not be penalized for an attorney's mistaken understanding about how MSAs could apply to FELA settlements.

To read the article in full, click [here](#).

reduced 20% when that means your fee evaporates? Here's why you should agree to work and work tirelessly to get the MSA reduced by 20%: the client won't forget it. You just solved their problem. Just like there are many MSA options in the marketplace, the client has countless potential structured settlement options for their MSA needs. When they have a choice of who to use, they evaluate many criteria in making that choice. Or, they don't, and they pick the broker they like best. Most likely, that will be the broker that solved a problem for them last time.

To read the article in full, click [here](#):

resolving WC claims will continue to possess an exposure for future medicals which it fails to account for today. The MSA blind spot should be remedied by a lawyer well-versed in MSA obligations under the Medicare Secondary Payer (MSP) Act.

To read the article in full, click [here](#).

## **ABA Issues Formal Opinion 481 (A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error)**

The American Bar Association (ABA) has issued Formal Opinion 481 (A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error). Of note, "Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation."



To read the full opinion from the ABA, click [here](#).

How does this relate to MSAs? Well, all attorneys working a workers' compensation, auto, liability or no-fault case for a client involving future medicals now must ask themselves a question. "**When it comes to the MSA issue in my case, have I made a material error in interpreting the law?**" If you're a plaintiff's attorney, does your current interpretation of the MSP Act on the MSA issue reflect the best interests of your client? If you're in-house counsel

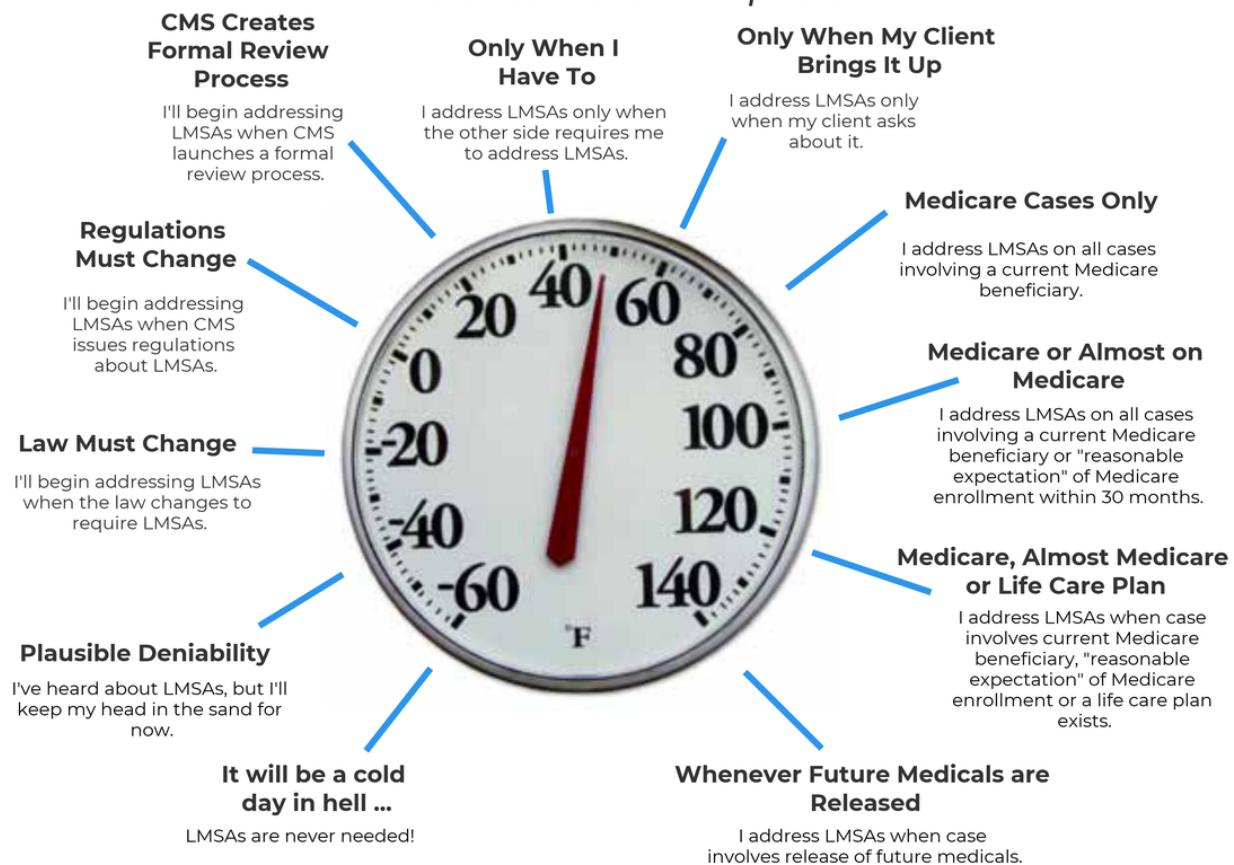
for a self-insured entity, does your company's MSP protocols reflect the most current MSA guidance available (or have your protocols been stagnant for 3+ years)? If you're outside counsel, are you providing your client accurate legal advice about MSA issues, no matter whether you believe the client's established MSA protocols are accurate?

You've read here many times that MSAs are not required (and they are not). But what is mandated under federal law is that Medicare will not pay for a beneficiary's medical expenses where payment has been made under a worker's comp plan, an auto plan, a liability insurance plan (including self-insurance) or a no-fault plan. Therefore, where a settlement resolving 1 of those 4 types of insurance claims occurs, an attorney should determine whether the settlement is funding future medicals (in whole or in part) and if so, that specific dollar amount being funded. Then, you can advise your client as to their specific exposures under federal law. Funding an MSA is ONE POSSIBLE WAY to manage that exposure, but it's far from the only possible solution. Until you have grasped that concept, you may be making a material error and not even realize it.

Cattie can help reverse those material errors. We provide our clients with MSA legal advice in the form of a legal opinion. Think MSA Allocation but from the legal angle, not the medical angle. We apply the facts of your case to the current statutory and regulatory environment to advise what obligations exist (if any) and what steps should be taken to address those obligations compliantly. If you'd like more information about how a MSA legal opinion may apply in your case, please call us at (844) 546-3500 or email us at [jcattie@cattielaw.com](mailto:jcattie@cattielaw.com)

## The Liability Medicare Set-Aside (LMSA) Meter

What's Your Current Temperature?



# CATTIE, P.L.L.C.

A HIGHER STANDARD IN MSA COMPLIANCE

## MSP Burden Shifting: You Can't Shift a Burden That Never Existed

One of the ties that bind in the Medicare Secondary Payer (MSP) context is that of burden shifting. While you might not understand the subtle intricacies of MSP compliance, you understand this: you can't shift the burden to Medicare. How many times have you heard that? I want to spend a few minutes addressing the concept of burden shifting as it relates to workers' compensation (WC).

In a way, WC claims are very basic. A WC claim can either be accepted or denied by the employer/carrier. Sure, you have cases where a body part/condition is accepted while others are denied, but let's stick with the most basic fact pattern.

When an employer/carrier accepts a WC claim, it is accepting responsibility for the claimant's medical expenses. It will pay for medical expenses related to the compensable claim, but not for medicals which are unrelated. At some point, the parties will wish to settle the claim and close future medicals (called a "clincher" in our part of the country). When parties decide on a clincher agreement, responsibility for medicals is being passed from the employer/carrier to the claimant going forward in exchange for a lump sum award. Under certain circumstances, that lump sum will include an amount to be funded into an MSA. The parties

understand, since the burden to pay future medicals is moving from the employer/carrier to the claimant under the terms of the clincher agreement, that they cannot allow that burden to pay certain future medical expenses to shift to Medicare. When clinching an accepted claim, there is a burden shift that must be addressed by the settling parties.

But what about a denied claim? Here's the facts. Worker who is Medicare enrolled is hurt on the job. She files a WC claim with her employer. Employer denies the claim as non-compensable. Since she is treating for her injuries and the Employer will not pay those bills, she instructs her doctor to bill Medicare. Medicare receives those bills and pays them. Time passes and the parties wish to clinch the case, closing future medicals. Is there a potential burden shift to Medicare under these facts?

Under these facts, there is no burden shift. Medicare's right of recovery under the MSP Act has never ripened. Why? Because there is no primary plan or payer who accepted responsibility for the claimant's medicals. Without that, there is no burden being shifted. While it is true that Medicare will be asked to pay medical bills post-settlement, Medicare was asked to pay medical bills pre-settlement as well. It's not like the case of the accepted claim (above) where the employer was paying medical pre-settlement.

In order to shift a burden, there must be a burden to shift in the first place. In the case of the denied claim, no burden ever exists since the employer/carrier never accepts responsibility for medicals. Medicare's rights of recovery under the MSP Act never ripen. Thus, it has no right of recovery for conditional payments made from date of loss to date of settlement and it has no right to any MSA or other vehicle for future medicals. The fact that it issues a conditional payment letter stating it has a right of recovery DOES NOT automatically make it so.

Parties settling WC claims on a doubtful and disputed basis continue to worry about burden shifting. In reality, if a claim is truly being settled on a doubtful and disputed basis, there should be no worries about burden shifting since there is no burden to shift. Medicare has no right of recovery under those circumstances, and the claimant (and medical provider) have the ability to submit bills to Medicare without worrying about burden shifting.

If you have concerns about whether Medicare's rights have ripened under a particular fact pattern, Cattie can help. Call or email us today!



## CMS Issues Version 4.1 of its MSPRP User Guide

Earlier this year, CMS Published Version 4.1 of the Medicare Secondary Payer Recovery Portal (MSPRP) User Guide. It was revised effective April 2, 2018. The MSPRP User Guide is a document to review and follow if you use Medicare's web portal to address conditional payment reimbursement obligations. Note that the MSPRP User Guide IS NOT the same thing as the WCMSA Reference Guide or the MMSEA Section 111 User Guide.

Version 4.1 presents the following changes:

- The Medicare ID field has been updated to accept either the Health Insurance Claim Number (HICN) or the Medicare

Beneficiary Identifier (MBI) in order to comply with Section 501 of the Medicare Access and CHIP (Children's Health Insurance Program) Reauthorization Act ("MACRA") of 2015 (global change);

- The Payment Summary Form now includes Medicare Part A Diagnosis Related Group (DRG) codes and Medicare Part B Current Procedural Terminology/Healthcare Common Procedure Coding System (CPT/HCPCS) codes (see Section 13.1.5);
- The Claims Listing page has also been updated to display the DRG code and CPT/HCPCS (see Section 13.1.7); and
- CMS clarified the criteria for submitting case redeterminations to prevent users from requesting a redetermination for a case before the Final Demand has been issued. Users may only submit a redetermination if a Final Demand letter has been sent (see Section 15.1.2).

Thanks to Rafael Gonzalez of Flagship Services Group for putting this on our radar.

## DRI MSP Task Force Presents MSP: You Think You Have It Figured Out, But What About Parts C & D? What You Don't Know Will Hurt You.

When

*Thursday, June 28th, 2-3:30pm*

Where

*This is an online event.*

More information

If you still think addressing Medicare conditional payments means only asking Medicare for its lien figure, then your Medicare compliance protocols are sadly outdated. Start the process of revising those by tuning into this webcast. Join Re Knack, former Chair of DRI's MSP Task Force, and Brian Bargender, internal consultant at Humana, as they detail why MSP Compliance must include Medicare Advantage Organizations (MAOs) in 2018. Gain critical insight into the heightened litigation nationwide involving MAOs and parties seeking to profit from the link between MAOs and the MSP Act. If you handle claims involving claimants who are (or might have been) enrolled in a Medicare Advantage plan during the course of your claim, consider this webcast mandatory viewing.

Session begins at 2PM EDT, 1PM CDT on June 28th. For more details, please click [here](#).

## PAID Act Introduced in Congress

On May 18, 2018, Reps. Gus Bilirakis (R-FL) and Ron Kind (D-WI) officially introduced the Provide Accurate Information Directly Act ("PAID Act") (H.R. 5881). This bill is a bipartisan measure to improve the Medicare Secondary Payer (MSP) and Medicaid Third Party Liability (TPL) statute.

While the text of the PAID Act has yet been released as of the date of this newsletter, proponents contend that the bill would fix a major issue in the MSP world as it relates to Medicare Advantage Organizations (MAOs) under Medicare Part C and prescriptions drug plans under Medicare Part D. As it stands today, primary plans are able to obtain conditional payment figures from Medicare for reimbursement obligations related to Medicare Fee-for-Service Parts A and/or B. They cannot, however, obtain that information from MAOs or prescription drug plans. Meanwhile, litigation is heightening nationwide about the link between the MSP Act, MAOs and prescription drug plans. What has been conveyed to us is that bill would provide primary plans with transparency about potential reimbursement obligations with MAOs and prescription drug plans.

In a vacuum, this seems like a good idea. However, we will not be providing a thumbs up or thumbs down until we have read the legislation in its entirety. Besides, other issues exist in the MSP world (such as who Medicare can really pursue for future medicals under the MSP Act) which may be as important. Seems like a really good idea for us to address all ailments at the same time in a consolidated bill which provides the true clarity parties resolving cases/claims involving Medicare beneficiaries truly deserve in 2018.

# CATTIE, P.L.L.C.

A HIGHER STANDARD IN MSA COMPLIANCE

## New MSP Compliance Solution Coming Soon!!

Presumably, one of the main reasons why you read The MSA Today is that you are concerned about the federal government pursuing you for repayment. No matter whether that repayment is for past conditional payments or future conditional payments related to an MSA issue. No matter whether Medicare seeks 1x, 1x plus interest, 2x (double damages), 2x plus interest, or 3x+ (treble damages plus penalties under the federal False Claims Act). You want to make sure that Medicare cannot pursue you or your client for repayment under the MSP Act.

Cattie fully appreciates that and is almost ready to roll out a simple, elegant solution for that problem. The full solution will be revealed in a later edition of the MSA Today. Until then, we are happy to speak with those interested to share our thoughts and solution to this issue which concerns everyone settling workers' compensation, auto, liability insurance or no-fault insurance claims. Call us at (844) 546-3500 or email us at [jcattie@cattielaw.com](mailto:jcattie@cattielaw.com). Medicare conditional payments and MSA issues only concern those who allow it to concern them. Take control of the issue today by giving us a call!



## Extinguish MSP Exposure with Cattie

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Due to growth, we've moved!!! Please see our new address and phone number below.

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