

The MSA Today

Medicare Set-Aside News/Updates from Cattie - @MSALawyer

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 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.

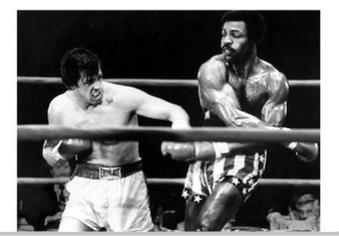
Too often, folks miss the forest for the trees on MSA issues. They seek a black/white MSA requirement in the liability context, or they strictly follow informal policy memos or reference guides from Medicare in the workers' compensation context. Instead, of that, following what the law says and the regulations 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, via Twitter @MSALawyer or by phone at (704) 232-7297. With that, please keep reading to get the latest scoop about MSAs and related issues.

WCMSA Review Contractor Protest Resolved

On December 12, 2017, the U.S. Government Accountability Office (GAO) resolved the protest involving its WCMSA review contractor award decision. Recall that the Centers for Medicare and



Medicaid Services (CMS) awarded the contract to Capital Bridge, LLC of Arlington, VA on September 1, 2017 for \$60,759,236. Arch Systems, LLC and KEN Consulting, Inc. protested the award, citing that CMS did not allow bidders to make oral presentations in support of their bids and challenged CMS' evaluation of the realism of the awardee's proposed price. After careful review, the GAO denied both protests.

With the protest concluded, this opens the door to the very real possibility that CMS expands its formal MSA review process later this year to include liability MSAs and no-fault MSAs. Recall that the RFP itself contained a provision that gave CMS the discretion to direct its review contractor to begin reviewing certain LMSAs and NFMSAs starting July 1, 2018. This protest seems to be the final hurdle to jump as CMS has previously given technical direction to its Medicare Administrative Contractors (MACs) and began beta testing a new system late in 2017.

In an item that (perhaps) only interests @MSALawyer, the winning bid of \$60,759,236 was the lowest bid of the 3 entities involved in the protest. KEN Consulting, Inc. had bid \$85,248,393 and Arch Systems, LLC bid \$111,998,693. All 3 bids represent massive increases as compared to the Provider Resources bid in 2012 to win the previous WCMSA review contract. Wonder why the substantial increase this time around? Is it because the review contractor is about to get substantially busier?

Cattie is Now Hiring!

Do you have a background in Medicare Secondary Payer (MSP) or Medicare Set-Asides (MSAs)? Are you seeking a new challenge? I challenge you to join the law firm that is revolutionizing how clients extinguish medical reimbursement obligations! Cattie, P.L.L.C. is now hiring! Attorneys, paralegals, risk managers, claims examiners and legal assistants should submit your CV, resume and salary requirements to jcattie@cattielaw.com today. Competitive compensation, attractive benefits package and flexible work environment are just some of the reasons to accept our challenge. Don't wait! Accept the challenge now before your position is filled.

Cattie, P.L.L.C. – A Higher Standard in MSA Compliance

CMS Holds Town Hall Call to Introduce New CRC Contractor

Starting February 8, 2018, there's a new sheriff in town for CMS on the workers' compensation and no-fault side of the house. In a town hall call held January 18, 2018, CMS introduced Performant as its new contractor to handle conditional payment reimbursement for workers' compensation and no-fault claims. Ted Doyle from Performant outlined the goals of the transition of conditional payment work to Performant, among them making transition as seamless as possible. Mr. Doyle noted Performant's long history of working with CMS and the U.S. Dept. of Treasury.



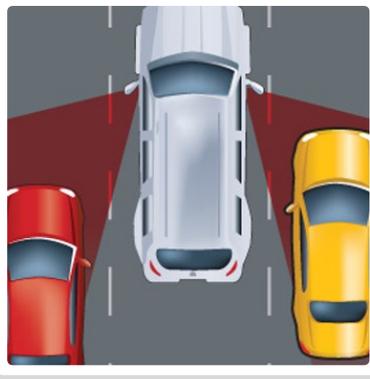
What's Changing? As of 2/12/18, everyone should use the Performant contact info (found in the materials) to reach out to the CRC. Both address and fax number will change as a result of the transition. He noted there will be a "dark period" while the work moves over to

Performant starting 2/8/18 until 2/12/18 8AM EST. Hard copy or paper info received before 2/12 will be held but not processed until Performant goes live on 2/12/18.

What Stays the Same? All current info at the current CRC will be transitioned to Performant. CMS' recovery processes will remain the same once Performant assumes control. Those policies in place will be replicated by Performant (a notion that will likely dismay some who are frustrated with CPLs and CPNs being sent to Treasury too quickly). The same self-service options will continue to be available to stakeholders.

Remember that CRC involvement in MSP conditional payment efforts is less than 3 years old. Time will tell if Performant is up to the task and will cure many of the ills stakeholders see in the present system.

To access the info and slides shared during the presentation, please look to the CMS website in the near future at www.cms.gov/medicare.



The MSA Blind Spot

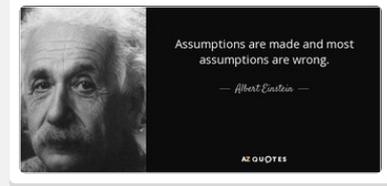
The Workers' Compensation (WC) industry has a Medicare Set-Aside (MSA) blind spot. The mirrors provided by MSA vendors to protect their clients fail to account for the MSA blind spot. Current WC industry practices do not align with CMS expectations. CMS clearly discusses its expectations in its [WCMSA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



Medicare Madness, One Year Later

One year ago, we made some predictions about how a Trump White House might address MSP issues. With a new WCMSA (and LMSA!?) review contractor coming, a new contractor manning the CRC and more MAO case law in the books, we weren't too far off. Read more [here](#) and think about what else might be coming.



Assumptions and Insanity About MSAs in Denied Workers' Compensation Claims

The purpose of this article is to separate fact from fiction when it comes to MSAs in denied workers' compensation claims. In short, MSAs are not needed when an employer or an insurance carrier has not accepted and does not accept responsibility for a claimant's future medical expenses as a part of resolving a claim. Asking the Centers for Medicare & Medicaid Services (CMS) to review and approve your zero-dollar MSA, though, is problematic. As 2018 approaches, now is the right time to find an alternate risk transfer solution that creates efficiencies for your clients' claim-handling processes.

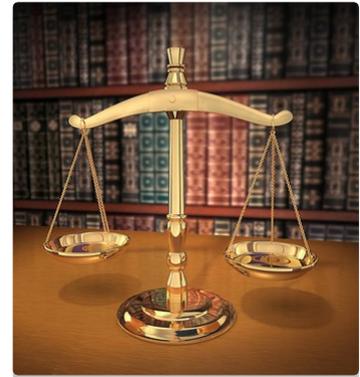
To read the article in full, click [here](#).

CATTIE, P.L.L.C.

A HIGHER STANDARD IN MSA COMPLIANCE

MSA Legal Opinions > MSA Reports

When you say "I need an MSA", what you mean to say is "I need to know what I need to do to avoid the federal gov't from recovering more money from us than is absolutely necessary." Enter the MSA Legal Opinion.



Much like you go to a tax lawyer to answer tax questions or a real estate lawyer to provide legal advice about a parcel of land you are thinking about purchasing, parties hire Cattie and @MSALawyer to give them legal advice of MSAs. "Are they required, yes or no?" "Are there compliant options to MSAs, yes or no?" "What happens if I resolve a claim without funding an MSA?" "What happens if I don't ask Medicare to review and approve it?" These are some of the questions that might be in your mind thinking about one of your current cases.

Working with a law firm on your MSA issues provides superior protection for you as compared to working with a MSA vendor. Hiring a law firm to address your MSA issue means establishing an attorney/client relationship. A law firm is able to give you legal advice; a MSA vendor cannot do that. For all those email blasts you get from them about the MSP Act and steps you must take to comply, none of that is legal advice because those vendors are not law firms.

Ultimately, it's the work product produced that provides you superior protection. When was the last time your MSA vendor guaranteed its conclusion for you? Traditional MSAs just don't provide that protection. At best, the MSA figure is a guess. And if CMS reviews the MSA and disagrees with it, the vendor will not stand behind the conclusion. Law firms giving legal advice is a completely different thing. Law firms stand behind the legal advice they provide. All professionals should stand behind their conclusions.

That's why the MSA Legal Opinion is a superior work product for addressing MSA exposure. Fact patterns are reviewed by lawyers on behalf of their law firm. Legal opinions are drafted and signed by lawyers on behalf of their law firm. Lawyers protect their clients. When they can't and clients rely on legal advice to their detriment, it comes back on the firm, not the client.

For your next MSA fact pattern, consider a MSA Legal Opinion instead of the traditional MSA report. You might find the solution to all of your MSA concerns.

False Claims Act **FCA**

Case Law Update: Progressive Insurance Settles MSP False Claims Act matter for \$2.4m

On November 14, 2017, Progressive Insurance (Insurer) and Relator Elizabeth Negron (Relator) agreed to resolve a False Claims Act claim via settlement for \$2,392,700. As background, Relator alleged in 2014 that Insurer violated the False Claims Act by allowing Medicare beneficiaries to unknowingly present claims to those agencies for repayment that were not the agencies' responsibility. Specifically, the Insurer offered a certain auto policy that allowed medical providers treating beneficiaries to submit reimbursement claims to the agencies in violation of the MSP Act.

The federal False Claims Act carries some pretty stiff penalties, even compared to the MSP Act. Instead of the potential for double damages under the MSP Act, the False Claims Act allows for recovery of treble damages in addition to a one time penalty of approximately \$10,000 to \$21,000 per occurrence. In the MSP context, that could mean a one time penalty may be imposed for every single reimbursement claim submitted to CMS for repayment. Depending on a beneficiary's course of treatment, those could add up fast.

Expect to see more False Claims Act litigation in the next 5 years as parties begin using the MSP Act more aggressively and in more creative ways to seek recoveries. For a primer on how the MSP Act and the False Claims Act intersect, please see this article written by Bruce Cranner and John Cattie [here](#).

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A HIGHER STANDARD IN MSA COMPLIANCE

Cattie Introduces the MSA Legal Opinion

Protect the Client
Protect Your Firm
Protect Medicare

The MSA Legal Opinion stands in the shoes of a CMS-approved MSA, allowing you to extinguish your future medical exposure faster and easier than the traditional medically-based MSA report at a cost that comparable. Close the file with certainty without involving the federal government. See www.cattielaw.com for more details.





False Claims Act
FCA

Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017

The \$2.4 million Progressive Insurance paid above is significant, but a mere drop in the bucket compared to the whole picture. Of the \$3.7 Billion recovered in fiscal year 2017, \$2.4 Billion came as a result of health care fraud. The department investigates and resolves matters involving a wide array of health care providers, goods and services. "The department's health care fraud recoveries restore valuable assets to federally funded programs, such as Medicare, Medicaid and TRICARE. But just as important, the department's vigorous pursuit of health care fraud prevents billions more in losses by deterring others who might otherwise try to cheat the system for their own gain." To learn more, click [here](#).

New MSP Grand Bargain Bill to Clarify MSP Reimbursement Responsibilities

Do Medicare reimbursement issues frustrate you? Tired of worrying about Medicare's past interest AND future interest on every case or claim? If so, the following might interest you. A bill has been drafted to address Medicare reimbursement obligations, and it makes all the sense in the world. It directs Medicare to pursue one side and one side only depending on whether the issue is conditional payments for past medicals or MSAs/future medical exposure post-settlement.



In short, if enacted as is, Medicare would be barred by statute from pursuing insurance carriers and self-insureds for future medical expenses paid by Medicare post-settlement. The trade-off (or Grand Bargain) part of the deal is that Medicare would look only to the insurance carrier or self-insured entity to repay Medicare conditional payments for past medicals (a/k/a the Medicare "lien"). A Grand Bargain indeed.

The goal of the legislation is to clarify what parties have reimbursement responsibilities and exposure during certain points of a case or claim. Think about never having to worry about another MSA issue (if you're an insurance carrier or self-insured) or never needing to worry about another Medicare "lien" (if you're a plaintiff attorney). Defense handles all past medical issues with Medicare (date of loss to date of claim resolution); plaintiffs handle all future medical issues with Medicare (date of claim resolution going forward). And Medicare can only pursue the appropriate party at the appropriate time.

To read a full version of the bill, click below. After that, let us know if the bill makes sense to you by emailing us at jcattie@cattielaw.com. If you like it enough, you should let your representative or senator know about it. Sure seems like we could use a Grand Bargain and some good old-fashioned compromise in Washington these days.



MSP Grand Bargain - Proposed Federal Legislation

Medicare can only pursue defense on past medical payments and plaintiffs for future medical payments. It's as simple as that.

[Download](#)

38.5 KB

CMS Issues New MMSEA Section 111 Reference Guide Version 5.3

On December 15, 2017, CMS released version 5.3 of its NGHP [MMSEA Section 111 Reference Guide](#). Changes introduced in version 5.3 include clarification about ORM termination and direction for those entities who utilize direct data entry (DDE) as its means of reporting. To review a summary of all changes in version 5.3, please click [here](#).



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