

MSA Alternatives in 2018

“The pessimist complains about the wind; the optimist expects it to change; the realist adjusts the sails.”

William A. Ward

Introduction.

When asked to write an article about Medicare Set-Aside (MSA) alternatives in 2018, I had to pause. At a glance, it seems to be a very simple request. However, it's not as simple of a request as one might think as winds have been shifting in the MSA world.

The MSA issues are much more complex than a decade ago. Is the claim accepted or denied? Are we talking about workers' compensation (WC) or liability insurance? Did the MSA reviewer base the report on medical records or legal analysis? Do we ask Medicare to review/approve the MSA or steer clear of the federal government? The MSA winds have changed direction.

The term 'Medicare Set-Aside' or 'MSA' means different things to different people. For some, the MSA is the report indicating how much money needs to be set aside to comply with the Medicare Secondary Payer (MSP) Act. For others, the MSA is the account holding the amount of money being set aside, preventing Medicare from paying certain medical bills prematurely. To truly write an article discussing MSA alternatives, it needs to account for both MSA concepts: 1) the report identifying the proper dollar amount; and 2) the vehicle or method being chosen to ensure Medicare is not billed prematurely. Only then can we harness the MSA winds blowing in 2018.

Historically, there were no MSA alternatives. To figure out the MSA issue, you would hire an outside MSA vendor or nurse allocator to review medical records when a claim met workload review thresholds established by the Centers for Medicare & Medicaid Services (CMS). That review led to a calculation of what future medical expenses were anticipated to be incurred which were related to the compensable workers' compensation claim and typically covered by Medicare. Then, the settling parties instructed the claimant to open an interest-bearing checking account and manage the account themselves after CMS approved the MSA figure. It seemed like all MSAs went to CMS for review and approval back in the day.

For some cases, this remains a viable path forward in 2018. Often, though, this process yields undesired results. First, thousands of these MSAs each year will be overfunded or underfunded, a result often discovered only when CMS disagrees with the MSA amount. That leads to the second result: the vendor or nurse who calculated the MSA is not willing to stand behind its conclusion. With no assurance that the MSA is correct, parties relying on that vendor or nurse's professional opinion are left with the unsatisfying result of leaving the claim open. Claimants continue to treat with physicians they don't necessarily want to see. Employers/carriers continue to pay, leaking more medical and indemnity dollars than they wish. The process turns into a Gordian Knot, impossible to untie even if the parties wanted to untie it. All due to that improper MSA calculation.

The WC industry has become more sophisticated. It now knows there is no MSA requirement. It knows there is no requirement to have CMS review and approve an MSA figure. It now knows claims can be resolved without MSAs. It now knows that MSA alternatives exist.

MSA Calculations: Medical Records or Legal Analysis?

Let's discuss the options available to calculate the proper MSA figure. The traditional medical review remains the most popular option in 2018. This involves a human being reviewing medical records and

calculating a proper MSA. They create a report summarizing medical care received since the date of loss. They itemize the future costs of care which are related to the compensable claim and covered by Medicare. They break down the medical expenses by medical services versus prescription medications. They present the MSA report as a static document that will not change going forward.

An MSA non-submission push by some WC industry participants led innovative MSA vendors to create new services and products which hold some appeal. Some vendors now offer MSAs calculated with a data-based approach. They leverage technology and thousands of prior MSAs approved by CMS as the basis for determining what CMS would approve on this particular case. Proponents of this alternative approach cite the speed in which calculations can be done and the accuracy of those calculations without need to involve CMS for review/approval.

Instead of leveraging technology and prior MSA approved expenses, other vendors went a different direction. They now have a completely different calculation methodology and approach when they know the MSA will not be going to Medicare for review/approval. This two-tiered approach, whose path depends on the client's desire to involve CMS, may allow for an MSA that is more agreeable to client's settlement strategy.

In recent years, some MSA vendors have created an MSA insurance product as an alternative to the CMS MSA review/approval process. This insurance product essentially backs the amount of the MSA vendor report, guaranteeing that the final conclusion is correct. This approach makes sense for those accustomed to the medically based MSA report but desiring additional safeguards around the validity of the MSA report's conclusion. Purchasers of these insurance products gain that "guarantee" but it comes at a price. Sources tell the author that this type of "protection" can be bought for approximately \$20,000 per MSA. While cost-prohibitive for most, this solution still represents advancement from where the industry was a decade ago.

A process based on medical records is not the best fit for all claims though. It works best for an accepted WC claim where the claimant is not represented by counsel. Apart from that, the MSA calculation process based on medical records is flawed. What about denied claims where Medicare has no right of recovery? What about claims where the claimant is represented by counsel? Arguably, those situations lead to a compromise of benefits as opposed to a commutation of benefits under state law. Using a medically based MSA calculation process for those two situations will almost always result in an overfunded MSA. Some might like an overfunded MSA, but others will seek a better solution.

The alternative is an MSA review based on the law itself. An MSA based on legal principles is more flexible than its counterpart. Instead of medicals, it relies on legal interpretation of the current MSP statute and regulations to arrive at its conclusion. It can account for the difference between an accepted claim and a denied claim. It can account for the difference between a commutation and a compromise settlement. An MSA legal opinion, in some situations, provides a tighter fit with any obligation to consider and protect Medicare's future interest today. The following table summarizes what type of work product fits best for what type of claim:

	Accepted Claim	Denied Claim
Unrepresented Claimant	MSA Report by Vendor	MSA Legal Opinion by Law Firm
Claimant Represented by Counsel	MSA Legal Opinion by Law Firm	MSA Legal Opinion by Law Firm

The MSA legal opinion carries other advantages to the medically based MSA. Getting legal advice about your MSA issues means you are establishing an attorney/client relationship. With that comes the fact that all communications between you and the lawyer are privileged and the work product that lawyer provides you is privileged. You choose when to relinquish that privilege. MSA vendors cannot offer that same privilege.

Lawyers are also held to a higher ethical standard, adhering to their particular state's rules of professional conduct. Rules such as competence, diligence, communication and safekeeping client property are some of the ethics rules lawyers must be sure to abide by when representing a client. This ethical obligation to the client is not one mandated for the MSA vendor.

Further, like lawyers giving legal advice in any other area, the lawyer stands behind his legal conclusions. If the client relies on that advice to their detriment, the client has avenues of recourse such as pursuing a legal malpractice action or reporting that lawyer to his state bar. Vendors, historically, have not provided those same assurances to clients because they have no obligation to do so.

With this level of protection, the client can avoid seeking CMS review/approval of the MSA when obtaining an MSA legal opinion. Since the law firm providing the MSA legal opinion will be on the hook to the extent its legal advice is wrong, CMS approval of the MSA becomes superfluous. A complete risk transfer occurs by hiring an MSA lawyer, just like the complete risk transfer occurs when CMS approves the MSA.

Finally, the MSA legal opinion should be reasonably priced. While one might expect legal advice to cost more than advice provided by a non-lawyer, that's not the case here. A survey of national MSA lawyers reveals that the cost for legal advice in this area is less than the insurance-based protection described above. Ultimately, it might be the reasonably priced protection provided by the MSA legal opinion compared to its medically based counterpart which is its superior attribute.

MSA Vehicle Options in 2018: MSA Accounts vs. Alternatives.

Arriving at the proper MSA amount is only half the battle. Once calculated, you must make sure the claimant does not bill Medicare prematurely. Funding an MSA account, historically, has been the only option. In 2018, however, we have a number of alternatives available to us so long as we understand one thing: there is no requirement to fund an MSA.

Previously, we've written in depth about this fundamental concept. Understanding that neither CMS nor federal law requires parties to fund MSAs, your preconceived MSA notions erode and your mind opens to a new world of possibilities. What the MSP Act requires (but for one exception) is that Medicare not pay a beneficiary's medical bills where payment has been made under a WC plan. *42 U.S.C. § 1395y(b)(2)(A)(ii)*. Thus, putting measures in place to ensure Medicare is not billed prematurely should be your goal. While that may have always involved an MSA in the past, that's not the case in 2018.

- 1) Medical Savings Account – At a glance, a Medical Savings Account functions like an MSA account. For all intents and purposes, it is an MSA without the restrictions. The account is funded with a certain amount of money. That money is to be used to pay for future injury-related care otherwise covered by Medicare. The Medical Savings Account ensures that Medicare is not billed prematurely.

However, since there are no restrictions on a Medical Savings Account (such as there are for MSAs as verbalized by CMS in its WCMSA Reference Guide), the proceeds can be put to use for the claimant's benefit before being spent on future injury-related care. Proceeds may be deposited or withdrawn at any point. Nothing restricts that. The one caveat would be to ensure that when Medicare covered medicals arise in the future, those bills are being paid for out of the Medical Savings Account as opposed to sending those bills to Medicare for payment. A Medical Savings Account can be funded and administered in the same manner as MSAs. A Medical Savings Account, like an MSA, fully complies with the MSP Act so long as Medicare is not billed prematurely for future injury-related care otherwise covered by Medicare.

- 2) Use Insurance Other Than Medicare – While the MSP Act says that Medicare cannot pay certain future medicals, that same prohibition does not extend to other types of insurance. It does not apply to benefits paid under state Medicaid, the Veteran's Administration ("VA"), TriCare/CHAMPUS, Indian Health or private insurance (though it arguably does apply to benefits paid by Medicare Advantage).

As an example, suppose a claimant is running medical bills through a spouse's private health insurance that are related to the compensable claim. How does that violate the MSP Act (or adversely affect Medicare) in any way? Is Medicare getting billed prematurely? What about a military veteran of the Gulf War choosing to treat at a VA facility instead of a facility that would bill Medicare, so he can use his VA benefits? Does that violate the MSP Act? Under neither scenario is Medicare being asked to pay a bill for which it is not responsible. It is perfectly acceptable under the MSP Act to utilize other forms of insurance to pay medicals. So long as Medicare is not billed prematurely for future injury-related care otherwise covered by Medicare, no one violates the MSP Act.

- 3) Pay Out-of-Pocket – Obviously, this option is not for all. Only certain claimants have the means to pay injury-related medicals out-of-pocket. That should not, however, prevent this being considered by the settling parties and presented to the claimant as an option.

MSA Funding Options in 2018: Lump-Sum or Something Else?

MSA funding options have also grown more sophisticated. Generally speaking, two options exist. An MSA can be funded with lump-sum dollars up front. That would mean depositing a check for the full MSA amount in the chosen account. That's the way it was done a decade ago, and some parties continue to fund MSAs in this manner, no questions asked.

In the alternative, one can purchase an annuity or other type of financial product with which to fund the MSA. After the MSA is opened with an appropriate amount of seed money, that financial product pays a sum certain into the MSA at regular periods for a certain amount of years. An added benefit of funding an MSA with an annuity or similar financial product is that it creates a payment stream over time that will equal the MSA amount but can be purchased for less than the lump-sum MSA amount. This is a benefit that can accrue to the plaintiff, the employer/carrier or both sides. By funding the MSA in this

manner, you ensure that the claimant cannot squander all of the MSA proceeds and potentially bill Medicare prematurely. There is always another annual payment coming around the corner.

While a structured settlement likely remains the most popular financial product offering in the MSA space, you should look into alternatives. Today, a wide variety of financial products with different features are available, depending on the facts of your case. You should discuss those options with your structured settlement broker or preferred settlement planner.

MSA Administrative Options in 2018: Self-Administration Versus Professional Administration.

Like MSA funding options, MSA administrative options have evolved. The majority of MSAs are still self-administered by the claimant in 2018. They have control of the MSA proceeds, they determine when to use it to pay for medical treatment and they handle all correspondence with CMS going forward. A simplistic view would be that so long as the claimant could balance a checkbook, that claimant should also be able to handle administering the MSA themselves.

In fact, self-administering an MSA could be overwhelming for a claimant. Responsibilities include but are not limited to: 1) ensuring that the MSA proceeds are being spent properly; 2) negotiating rates with service providers; 3) instructing service providers to accept your check instead of billing Medicare; 4) handling correspondence to and from the federal government; and 5) knowing which medical expenses are Medicare covered versus non-Medicare covered. Depending on the extent of injuries as well as level of education/sophistication, asking a claimant to self-administer the MSA would not only be ill advised, but potentially unethical for a lawyer.

The second MSA administrative option means hiring a professional. In the past decade, the MSA administrative business has been booming. These companies administer MSAs on behalf of their clients. They offer turnkey solutions which provides certainty with respect to how the MSA is handled, spend down and ultimately exhausted. Most MSA administration companies offer solutions for a professionally administered MSA as well as a self-administered MSA.

While hiring a professional MSA administrator has its costs, those are nominal compared to the costs incurred on the MSA issue to this point of the case. Frankly, I'm shocked at the number of cases I see where parties settle, intend to fund an MSA and insist upon that being administered by the claimant themselves. For all the protection they sought via the MSA alternatives listed above, all of that could go by the wayside by allowing the claimant to self-administer the MSA. In 2018, there is no reason to expect a claimant to self-administer their own MSA.

Conclusion – Adjust Your Sails.

Unlike a decade ago, options exist in 2018 for parties who do not embrace traditional MSAs with open arms. MSAs can be calculated based on legal principles instead of medical records. MSA obligations can be satisfied with medical savings accounts, other forms of insurance or via out-of-pocket payments instead of an MSA account. Nothing in the MSP Act or its regulations prohibits these alternatives.

When it's all said and done, having the ability to use the right tool for the right case means everything. For the employer/carrier, your MSA panel should include at least one traditional MSA vendor (reviewing MSAs based on medical records) and one MSA law firm (capable of providing you MSA legal advice). Obviously, vendors that are not law firms cannot give you legal advice lest they be accused of the unauthorized practice of law. The flexibility afforded to those with a diverse MSA panel means they can employ the proper method for the proper claim, minimizing any MSA obligation on any claim.

For claimant's counsel, it's even more simple. That MSA you're holding from the other side likely over funds the MSA obligation. Choosing alternate means to address your client's MSA obligation could mean a lower MSA, higher net to your client and higher fees for you. While it is likely unethical to rely solely on the opposing party's MSA calculation as the means of protecting your client's future Medicare benefits, working with an MSA lawyer and employing other MSA alternatives described previously allows you to accomplish all of the above.

We can complain about the MSA wind being different than before. We can sit and expect the MSA wind to change to something that's more accommodating for us. Or, we can adjust our sails to capture today's prevailing MSA winds and capitalize on it. Knowing a) that MSA alternatives exist, and b) how those alternatives affect your case or claim allow parties the means to minimize MSA obligations, close files faster and move forward in the best way possible.