

**CATTIE, P.L.L.C.
226 S. LAUREL AVENUE
CHARLOTTE, NC 28207**

**“Consider and Protect” Medicare’s Interests:
Fake News MSP Style**

“There are people who take rumors and embellish them in a way that can be devastating. And this pollution has to be eradicated by people in our business as best we can.” Bob Woodward

As an attorney whose legal practice focuses on the Medicare Secondary Payer (MSP) Act, I’m always interested in what others say about that law. I’m blessed to have the opportunity to speak about MSP compliance issues around the country. But I’m also interested to hear what others have to say about those same topics. One thing I keep hearing from MSP experts around the country in speeches and seeing in their written articles is that the MSP Act requires you to “consider and protect” Medicare’s interests. I’m sorry, but I can’t keep quiet about this anymore.

I hate to be the messenger here. But, you deserve to know the truth. The MSP Act does not require you to “consider and protect” Medicare’s interest. You can look for yourself. Check out 42 U.S.C. § 1395y(b)(2). Read it word for word. Go ahead, I’ll wait. In fact, conduct a word search seeking the term ‘consider and protect’ in case you think your eyes might deceive you. “Consider and protect” is not there, is it?

Maybe you should cast a wider net to look for it. Broaden your search outside the MSP Act to 42 U.S.C. § 1395y (which some erroneously refer to as the MSP Act, but is really titled ‘Exclusions from Coverage and Medicare as Secondary Payer’) and search for the term “consider and protect.” Go ahead, I’ll wait again. The statute has over 10,000 words. But none of them are the term “consider and protect.” Couldn’t find it there either, could you?

Maybe if you searched just for the term ‘consider’. Is that the problem? Try it. Conduct a word search on 42 U.S.C. § 1395y for the term ‘consider.’ OK, that yields 10 results. But the problem is that none of those results are in the context of imposing affirmative obligations or action steps to take with respect to addressing MSP compliance issues under the law.

What about the term ‘protect’? The same search will yield only 3 results. Again, those results have nothing to do with imposing affirmative obligations or action steps to take with respect to reporting obligations, conditional payment reimbursement obligations or future medical/Medicare Set-Aside obligations under the law.

“Wait, it must be in the regulations,” you might say. If you’ve read my articles in the past, you know it’s the regulations promulgated by CMS about the MSP Act (and only those regulations) that provide CMS’ official statutory interpretation about the MSP Act. The term “consider and protect” must be there.

OK, do the same word search on 42 C.F.R. § 411 from the start through 42 C.F.R. § 411.100. You’ll find the regulations as of June 8, 2017 have 13,227 words. None of those are the term “consider and protect”. You’ll find the word “consider” in the regulations 13 times. None of those, however, are the term ‘consider’. Instead, you find it part of words such as ‘considered’, ‘considering’ or ‘considers’. Plus,

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none of those 13 occur in the context of actions steps to take with respect to addressing MSP compliance issues under the law.

Likewise, you'll find the word "protect" in the regulations 2 times. But both of those occur within the term 'protection' and are not found on their own. Further, neither of those occurrences refer to protecting Medicare's interest as you might have heard a speaker say at a conference. As the messenger here, it's my duty to tell you that neither the law or the regulations require you to "consider and protect" Medicare's interests.

To summarize, here's a table showing how many times the term "consider and protect" appears in the MSP law and the regulations:

	42 U.S.C. § 1395y(b)(2)	42 U.S.C. § 1395y	42 C.F.R. § 411
"consider and protect"	0	0	0

For years, you've been told by "experts" that the law requires you to "consider and protect" Medicare's interests. You've heard it multiple times, even from lawyers working for MSA vendors experienced in this area. If you Google the term "consider and protect Medicare's interests, it provides almost 30 million results. 30 MILLION RESULTS! If there is one thing you know about Medicare, it's that you have to "consider and protect" Medicare's interest when resolving an insurance claim. Right? If the term "consider and protect" is not in the law and not in the regulations, where did it come from and why do speakers keep saying that the law requires it? How did we get here?

You should ask your MSP expert why you have to "consider and protect" Medicare's interest. I won't speculate and guess about this, but I think I know how they would answer. But the answer itself would not create a legal obligation or requirement all alone. I know this because as a lawyer whose legal practice focuses on the MSP Act, I have scrutinized the statute and the regulations word-for-word. Now, you have looked at it too. You and I have come to the same conclusion: the law and the regulations do not require you to "consider and protect" Medicare's interest when resolving a workers' compensation, automobile, liability or no fault insurance claim. It cannot require it because it's not there.

This article is not intended to discuss your obligations under the MSP Act. There's plenty of articles out there discussing that. Many of those will refer to the fact that you are required to "consider and protect" Medicare's interests. Some will not. Instead, this article is intended to dispel what might be the most repeated rumor in the MSP compliance world. Consider it fake news, MSP style.

You don't have to "consider and protect" Medicare's interests under the law when resolving an insurance claim. For those of you who take advice from vendors who tell you that the law requires you to "consider and protect" Medicare's interests, I'm sorry. You have been duped, unwittingly creating a relationship based on a factually false premise long ago. How has that decision to trust the non-legal MSP vendor impacted your business operations, both on the micro claim-by-claim basis as well as on the macro effect on your bottom line? I dare say it has cost you millions if you are on the employer/carrier side of the table.

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The MSP Act contains several things you should be thinking about and doing pre-and post-settlement. Unfortunately, too many times, people don't ask the question "Why?" and simply nod their head when hearing from an "expert" that the MSP Act requires you to "consider and protect" Medicare's interests. Look for yourself, conduct your own due diligence and think for yourself. After thinking about how this law affects you, it might make sense to ask a lawyer whose practice focuses on the MSP Act. Stop accepting MSP fake news at face value, and start asking why you're being told that the law requires you to "consider and protect" Medicare's interest when it does not require that at all.