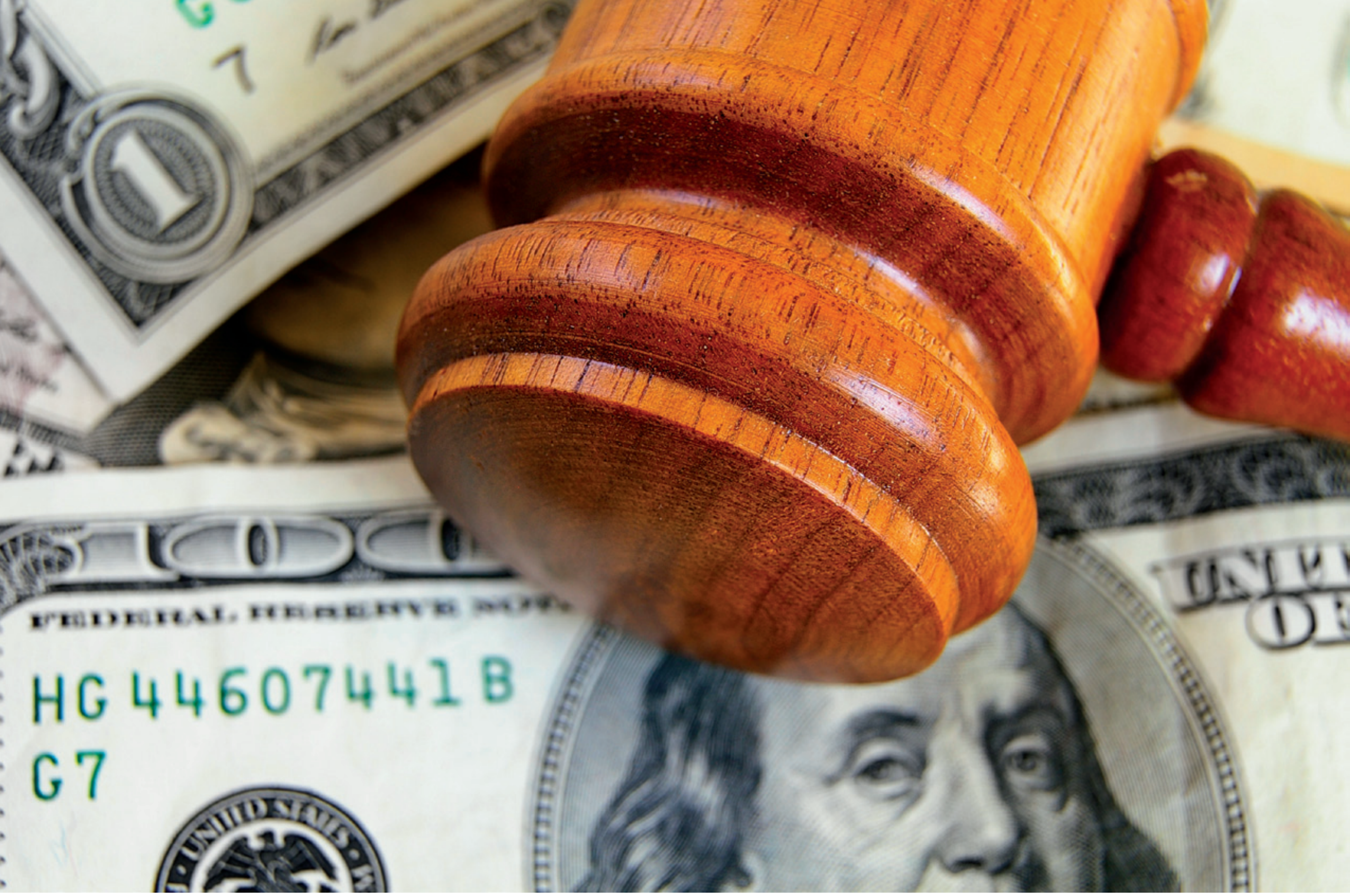


A Structured Settlement Annuity Almost Always Saves Money When Funding a Medicare Set-Aside

by Cindy L. Chanley

Since the late 1990s, attorneys and claims handlers have taken caution when settling workers' compensation claims that involve someone who is either a Medicare beneficiary, or will become a beneficiary in the foreseeable future. A Medicare Set-Aside (MSA) allocation is a tool one can use to prevent the burden of future medical care from being shifted to Medicare. Given the issues an MSA presents, more claims professionals and attorneys are looking at a structured settlement as a way to fully fund an MSA and avoid potential problems for the parties post settlement.

What is an MSA?

The Centers for Medicare and Medicaid Services (CMS) defines a Medicare Set-Aside Arrangement (MSA) for workers' compensation purposes (WCMSA) as a "financial agreement that allocates a portion of a workers' compensation settlement to pay for future medical services related to the workers' compensation injury, illness, or disease" (cms.gov). Although not required by The Medicare Secondary Payer Act, 42 U.S.C. §1395y(b)(2), and federal regulations 42 C.F.R. §411.20 et. seq., most employers and insurers use an MSA as a tool to determine and fund future medical expenses otherwise reimbursable by Medicare for a workers' compensation settlement.

CMS has published guidelines for determining an appropriate MSA amount for workers compensation cases. An MSA can be prepared by the employer or its insurer, an attorney, or by a company that specializes in providing this service. A typical MSA report includes a projection of future Medicare related medical and prescriptions determined by a comprehensive review of medical and prescription records and payment histories, physician recommendations and standard of care. The medical projection will be based on a workers' compensation fee schedule or "usual and customary", depending on the state of jurisdiction. The prescription drugs are priced based on Redbook Average Wholesale Price (AWP). Many insurers have established procedures and/or approved vendors for developing MSA reports and submissions to CMS, in addition to specific claim handling procedures and required language for settlement agreements when resolving claims involving future medicals to ensure Medicare's interests are protected.

How is an MSA Funded?

The Centers for Medicare and Medicaid Services (CMS) guidelines allow parties some latitude when funding an MSA. Under current CMS guidelines, an MSA can be funded in one of two ways:

- Lump Sum for the entire MSA amount; or
- Structured Settlement Annuity (includes cash and an annuity) to pay the MSA over the injured party's life expectancy

Funding an MSA with a structured settlement annuity almost always saves money over the lump sum option. Research suggests that structured settlement funding of MSAs saves an average of 37% as opposed to cash funding.

CMS Guidelines When Funding with an Annuity

CMS guidelines require that when a structured settlement annuity is used, the MSA be funded as follows:

- Seed – an initial deposit, or lump sum, to cover two years' worth of medical and prescription payments, a first surgery, procedure, or replacement.
- Annuity – MSA less the seed amount is distributed evenly, payable annually, over the injured party's life expectancy through the purchase of a structured settlement annuity contract

Detailed information regarding these guidelines is spelled out in the Workers' Compensation Medicare Set-aside Reference Guide, which is accessible on the CMS website.

An important note: CMS must be notified of the employer/insurer's intention to fund the MSA with an annuity during the submission process.

Types of Annuities to consider when funding an MSA

The combination of cash and an annuity to fund an MSA almost always saves money over funding it as a lump sum. There are a number of different types of annuities an employer or its insurer can purchase to meet CMS requirements in spreading out the annuity over an injured party's life expectancy, or lifetime.

- A *Temporary Life Annuity* provides an annual MSA payment for the injured party's life expectancy, only if the injured party is living. This is usually the least expensive annuity used in funding an MSA annual payment. The disadvantage of this type of annuity is that the payments stop at the death of the injured party and there is no residual value or payment that can pass to an injured party's beneficiary or as a refund to the employer or its insurer. For example, if an employer pays $100,000 to provide $1,000/year for 30 years and the injured party dies after one year, the employer has paid $100,000 for a $1,000 payment. This type of annuity is attractive for small MSA amounts.
- A *Life Only Annuity* will provide an annual MSA payment for the injured party's lifetime. All payments cease on the death of the injured party/annuitant. This annuity is usually slightly more expensive than a Temporary Life Annuity. As with a Temporary Life Annuity, all payments cease on the death of the injured party. There is no opportunity for recovery of any funds by the employer or the possibility of the injured party's beneficiary receiving anything on the death of the injured party.
- A *Life with Cash Refund Annuity* will provide an annual payment for the life of the injured party, but provides a refund of the unused portion of the annuity premium in the event of the death of the injured party. For example, if the employer spends $100,000 for the annuity and the injured party dies after $50,000 of payments have been paid out, the injured party's beneficiary or the employer will receive $50,000 on the injured party's death.
- A *Period Certain Annuity* will provide an annual payment for the injured party's life expectancy, whether or not the injured party is living. This payment is guaranteed to be paid to the injured party's beneficiary or the employer on the injured party's death. On death, the payments will continue to be paid to the beneficiary (injured party's family member or the employer's insurer). As an alternative, many life insurance companies that offer structured settlement annuities provide a commutation product that allows the beneficiary or the employer to receive a lump sum of the commuted value of any remaining payments on the death of the injured party/annuitant.

Pros and Cons of Annuity Types

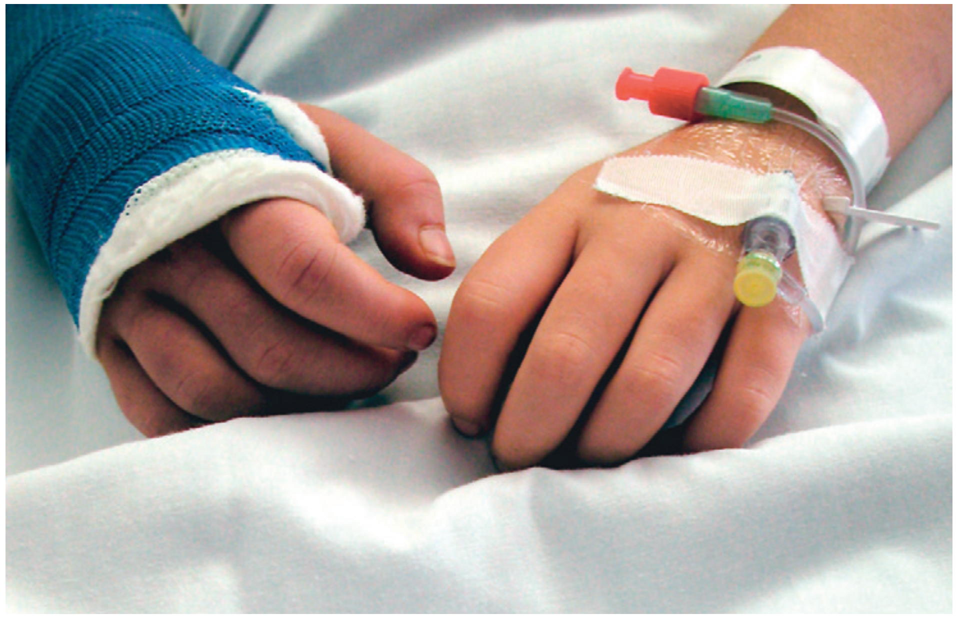
There are advantages and disadvantages to each of the annuity types used to fund the MSA annual payments or to fund the annual fee to pay for professional administrative services for the MSA. It is important to discuss these options with a structured settlement consultant to ensure the injured party and/or employer's interests are handled appropriately.

Using annuities to fund an MSA annual payment and/or MSA professional administrative fees provides advantages to the injured party and the employer.

From the injured party's perspective, whether or not the injured party is a Medicare beneficiary, settlement dollars provided for Medicare related medical expenses are restricted and must be used exclusively for that purpose. With a lump-sum MSA, a Medicare beneficiary must spend the entire amount of the MSA before Medicare will cover Medicare expenses relating to the work injury. With the annuity option, Medicare will cover any expenses over and above the injured party's current MSA balance each year.

From the employer's perspective, the annuity option is almost ALWAYS less expensive than paying the MSA in a lump sum, providing the possibility for saving claims dollars and/or having an opportunity to have extra dollars for negotiation purposes. In addition, the employer or its insurer can negotiate the settlement to receive the possibility of a refund or the commuted value of remaining payments, in the event the injured party dies before the end of the injured party's life expectancy.

The parties should involve a structured settlement consultant that is knowledgeable about the issues relating to the current liability and/or workers' compensation issues relating to Medicare Set-Aside Allocations. A knowledgeable structured settlement consultant is a valuable asset to all the parties, from the negotiation stage to CMS approval.



Administration of an MSA Funded By an Annuity

An MSA funded via an annuity can be administered either by a third party or by the injured party. It is important to note that regardless of how it is administered, the injured party is ultimately responsible to ensure MSA funds are properly paid from the account to cover Medicare reimbursable services and are related to the injury.

If the MSA is funded with an annuity, it is essential to be aware of the CMS guidelines related to the account, whether it is self-administered by the injured party or professionally administered by a third party.

- The MSA administrator must be competent to administer the account.
- The MSA should be established within thirty (30) days of the disbursal of settlement funds. Information regarding the establishment of the MSA should be sent to CMS if the MSA has been reviewed and approved.
- The MSA administrator must also deposit the total sum of the MSA funds into an interest bearing account for which the injured party is the sole beneficiary. This would include all funds from the seed money and subsequent feed money funds.
- All funds from the MSA should be properly exhausted before Medicare resumes payment of medical expenses related to the medical claims covered under the settlement. In cases of an annuity, this may result in periodic depletion and notice to CMS. It is also required that the administrator notify CMS when annuity money is deposited into the account. At that point, the MSA should resume payment for reimbursable medical care and treatment.
- The administrator must maintain accurate records of the distributions and expenditures from the MSA account.

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- The only allowable "non-medical" expenses that are reimbursable from the MSA are for associated taxes, banking fees, mailing fees or document-copying charges related to the MSA. The funds in the MSA may not be used to pay premiums for Medicare supplemental insurance (e.g. – "Medigap") for the beneficiary.
- The administrator must make every effort to obtain and pay for medical care and treatment for their injuries covered herein from medical providers that will accept payment pursuant to the funding methodology used in the development of the MSA (Workers' Compensation Medical Fee Schedule or "usual and customary").
- If a provider, physician or other supplier refuses to accept payment under the applicable funding methodology or a claim is denied, he/she agrees to consult the Medicare Regional Office in order to determine whether Medicare should pay the claim. If a determination to deny the claim is made by the Medicare Regional Office, then Medicare's regular administrative appeals process for claim denials would apply to the claim.
- The administrator of the MSA is required to submit an annual accounting to CMS. This accounting is required to take place and be submitted within thirty (30) days after the close of the annual accounting period, which is the anniversary of the funding of the MSA. A final accounting is required to take place within sixty (60) days of the MSA funds being completely depleted. These accountings shall include, but not be limited to, the retention of receipts for medical care and treatment received and paid with funds from the MSA.

Conclusions

Using an annuity with some cash is a cost effective way to fund an MSA or future medicals, whether or not the parties decide to seek a CMS recommendation. A knowledgeable structured settlement consultant can provide proposals to fund the MSA by utilizing annuities that work best for the parties during the negotiations. Funding an MSA with an annuity almost always saves money over a lump sum option, saving significant claim dollars or freeing up money for settlement negotiations. As a result, claim best practices are being developed across the insurance, self-insurance and TPA marketplace. ■

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