

Department of Health & Human Services
Centers for Medicare & Medicaid Services
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Note: This document revises the October 11, 2011 document issued on this subject. The revised language is highlighted below.

Liability Insurance (Including Self-Insurance): Exposure, Ingestion, and Implantation Issues and December 5, 1980

The Centers for Medicare & Medicaid Services (CMS) has consistently applied the Medicare Secondary Payer (MSP) provision for liability insurance (including self-insurance) effective December 5, 1980. As a matter of policy, Medicare does not assert an MSP liability insurance-based recovery claim against settlements, judgments, awards, or other payments where the date of incident (DOI) occurred before December 5, 1980.

When a case involves continued exposure to an environmental hazard or continued ingestion of a particular substance, Medicare focuses on the date of last exposure or ingestion for purposes of determining whether the exposure or ingestion occurred on or after December 5, 1980. Similarly, in cases involving ruptured implants that allegedly led to a toxic exposure, the exposure guidance or date of last exposure is used. For non-ruptured implanted medical devices, Medicare focuses on the date the implant was removed. (**Note:** The term “exposure” refers to the claimant’s actual physical exposure to the alleged environmental toxin, not the defendant’s legal exposure to liability.)

In the following situations, Medicare will assert a recovery claim against settlements, judgments, awards, or other payments, and the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) Section 111 MSP mandatory reporting rules must be followed:

- Exposure, ingestion, or the alleged effects of an implant on or after December 5, 1980, is claimed, released, or effectively released in the most recently amended operative complaint or comparable supplemental pleading;
- A specified length of exposure or ingestion is required for the claimant to obtain the settlement, judgment, award, or other payment, and the claimant’s date of first exposure plus the specified length of time in the

settlement, judgment, award or other payment equals a date on or after December 5, 1980. This also applies to implanted medical devices; and

- A requirement of the settlement, judgment, award, or other payment is that the claimant was exposed to, or ingested, a substance on or after December 5, 1980. This rule also applies if the settlement, judgment, award, or other payment depends on an implant that was never removed or was removed on or after December 5, 1980.

When **ALL** of the following criteria are met, Medicare will not assert a recovery claim against a liability insurance (including self-insurance) settlement, judgment, award, or other payment; and MMSEA Section 111 MSP reporting is not required. (**Note:** Where multiple defendants are involved, the claimant must meet all of these criteria for each individual defendant for a settlement, judgment, award, or other payment from that defendant to be exempt from a potential MSP recovery claim and MMSEA Section 111 reporting):

- All exposure or ingestion ended or the implant was removed before December 5, 1980;
- Exposure, ingestion, or an implant on or after December 5, 1980, has not been claimed in the most recently amended operative complaint (or comparable supplemental pleading) and/or specifically released; and
- There is either no release for the exposure, ingestion, or an implant on or after December 5, 1980, or where there is such a release, it is a broad general release (rather than a specific release), which effectively releases exposure or ingestion on or after December 5, 1980. The rule also applies if the broad general release involves an implant.

Any operative amended complaint (or comparable supplemental pleading) must occur prior to the date of settlement, judgment, award, or other payment and must not have the effect of improperly shifting the burden to Medicare by amending the prior complaint(s) to remove any claim for medical damages, care, items and/or services, etc.

Where a complaint is amended by Court Order and that Order limits Medicare's recovery claim based on the criteria contained in this alert, CMS will defer to the Order. CMS will not defer to Orders that contradict governing MSP policy, law, or regulation.

EXAMPLES:

Below are some illustrative examples of how the policy related to December 5, 1980, should be applied to situations involving exposure, ingestion, and implantation. These examples are illustrative, as each situation must be evaluated individually on its merits. (**Note:** It is the parties' responsibility to make a determination regarding this policy).

Situation	Application of December 5, 1980, Policy
The claimant was exposed to a toxic substance in his house. He moved on December 4, 1980. The claimant did not return to the house.	Exposure ended before December 5, 1980.
The claimant was exposed to a toxic substance in his house. He moved on December 4, 1980. The claimant makes monthly visits to the house because his mother continues to live in the house.	Exposure did not end before December 5, 1980.
The claimant was exposed to a toxic substance while he worked in Building A. He was transferred to Building B on December 4, 1980, and did not return to Building A.	Exposure ended before December 5, 1980.
The claimant was exposed to a toxic substance while he worked in Building A. He was transferred to Building B on December 4, 1980, but routinely goes to Building A for meetings.	Exposure did not end before December 5, 1980.
The claimant had a defective implant removed on December 4, 1980. The implant had not ruptured.	Exposure ended before December 5, 1980.
The claimant had a defective implant that was never removed.	Exposure did not end before December 5, 1980.

REPORTING REMINDER:

Information related to the MMSEA Section 111 MSP reporting requirements can be found in the NGHP User Guide found on the CMS website. When reporting a potential settlement, judgment, award, or other payment related to exposure, ingestion, or implantation, **the date of first exposure/date of first ingestion/date of implantation is the date that MUST be reported as the DOI.** This is true for purposes of individual self-identification of a pending claim to CMS' Coordination of Benefits Contractor, as well as for MMSEA Section 111 reporting.