



Office of Financial Management/Financial Services Group

September 30, 2011

Liability Insurance (Including Self-Insurance):
Exposure, Ingestion, and Implantation Issues and December 5, 1980 (12/5/1980)

The Centers for Medicare & Medicaid Services has consistently applied the Medicare Secondary Payer (MSP) provision for liability insurance (including self-insurance) effective 12/5/1980. As a matter of policy, Medicare does not assert a MSP liability insurance based recovery claim against settlements, judgments, awards, or other payments, where the date of incident (DOI) occurred before 12/5/1980.

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 12/5/1980. 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 12/5/1980 is claimed, released, or effectively released.
- A specified length of exposure or ingestion is required in order 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 12/5/1980. This also applies to implanted medical devices.
- A requirement of the settlement, judgment, award, or other payment is that the claimant was exposed to, or ingested, a substance on or after 12/5/1980. 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 12/5/1980.

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 in order 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 12/5/1980; and
- Exposure, ingestion, or an implant on or after 12/5/1980 has not been claimed and/or specifically released; and,
- There is either no release for the exposure, ingestion, or an implant on or after 12/5/1980; 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 12/5/1980. The rule also applies if the broad general release involves an implant.

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 12/5/80 Policy
The claimant was exposed to a toxic substance in his house. He moved on 12/4/1980. The claimant did not return to the house.	Exposure ended on 12/5/1980.
The claimant was exposed to a toxic substance in his house. He moved on 12/4/1980. The claimant makes monthly visits to the house because his mother continues to live in the house.	Exposure did not end on 12/5/1980.
The claimant was exposed to a toxic substance while he worked in Building A. He was transferred to Building B on 12/4/1980, and did not return to Building A.	Exposure ended on 12/5/1980.
The claimant was exposed to a toxic substance while he worked in Building A. He was transferred to Building B on 12/4/1980, but routinely goes to Building A for meetings.	Exposure did not end on 12/5/1980.
The claimant had a defective implant removed on 12/4/1980. The implant had not ruptured.	Exposure ended on 12/5/1980.
The claimant had a defective implant that was never removed.	Exposure did not end on 12/5/1980.

REPORTING REMINDER:

Information related to the MMSEA Section 111 MSP reporting requirements can be found at www.cms.hhs.gov/MandatoryInsRep. 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 the Centers for Medicare & Medicaid Services' Coordination of Benefits Contractor, as well as for MMSEA Section 111 reporting.