

# Client Alert

Environmental, Health &amp; Safety Practice Group

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## **CMS Issues Alert Updating and Clarifying Mandatory Reporting Thresholds for Certain Liability Insurance Settlements, Judgments, Awards or Other Payments**

On December 12, 2016, CMS issued a Technical [Alert](#)<sup>1</sup> that announced a change in reporting requirements for several different types of settlements with total payment obligation to claimant (TPOC) dates on or after January 1, 2017 and no ongoing responsibility for medicals (ORM). In the Technical Alert, CMS lowered the mandatory reporting threshold for all liability insurance settlements, including mass tort settlements (those involving ingestion, implantation or exposure), from \$1000 to \$750. The Technical Alert resolves issues that arose following CMS's November 15, 2016 [Alert](#)<sup>2</sup> in which CMS announced that, beginning January 1, 2017, the single threshold recovery amount for physical trauma-based liability insurance settlements would be reduced from \$1000 to \$750. To that end, CMS announced that the thresholds in the Technical Alert supersede, "the applicable language in the Section 111 Medicare Secondary Payer Mandatory Reporting Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation [User Guide](#)<sup>3</sup> (Version 5.1)," dated October 10, 2016. The October NGHP User Guide instructions had set the mandatory reporting threshold for liability insurance (including self-insurance) settlements at \$1000.

### *SMART Act Single Threshold Amount*

When a Medicare beneficiary receives a liability insurance (including self-insurance) settlement, the Medicare Trust Fund may, by statute recover conditional payments it made for medical care related to the settlement. In addition, Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) requires that these settlements be reported to Medicare so that it can recover any conditional payments for treatment related to the settlement. The amount that Medicare recovers from a settlement for conditional payments related to that settlement is reduced by attorney fees and costs associated with the settlement.

Section 202 of the Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012 (the SMART Act) requires CMS to calculate and publish, no later than November 15 each year, a single threshold amount for settlements, judgments, awards, or other payments for obligations arising from liability insurance (including self-insurance) and for alleged physical trauma-based incidents. The SMART Act also required CMS to

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report to Congress similar calculations for workers compensation, no-fault, and mass tort claims (even though the Agency was not required by the statute to implement those thresholds).

The single threshold amount calculation represents an effort to determine the amount of a liability insurance settlement involving alleged physical trauma-based injury that CMS may recover without having to spend more on the recovery effort than the amount recovered. Responsible reporting entities are not required to report, and CMS will not seek recovery on liability insurance settlements involving physical trauma-based incidents that are below the single threshold amount. However, as noted above, the SMART Act did not include liability insurance settlements involving mass tort claims in the single threshold amount calculation. There was no single threshold amount for settlements involving resolution of alleged ingestion, implantation and exposure. In light of this, CMS could pursue recovery against settlements in these mass tort cases, regardless of amount.

The November 15, 2016 Alert reduced the single threshold amount from \$1000 to \$750 for liability insurance (including self-insurance) settlements involving alleged physical trauma-based incidents with TPOC dates on or after January 1, 2017. This reduction of the threshold amount for reporting physical trauma-based incidents meant that two different reporting threshold amounts would apply to liability insurance settlements - \$750 for physical trauma-based incidents and \$1000 for mass tort settlements. Also, in light of Medicare's right to pursue recovery against mass tort settlements of any amount, the November 15, 2016 Alert caused several clients to seek confirmation that there is a reporting threshold for mass tort settlements.

### *MMSEA Section 111 Mandatory Reporting Thresholds for Liability Insurance Settlements*

The December 12, 2016 Technical Alert solved the discrepancy between the threshold for reporting liability insurance settlements involving physical trauma-based incidents and those involving ingestion, implantation or exposure allegations. It also provided additional confirmation that CMS, through the reporting requirements detailed in the NGHP User Guide (and other user guides regarding liability insurance settlements), has established a reporting threshold for mass tort claims, despite exclusion of these claims from the single threshold amount calculation established by the SMART Act.

Section 111 of the MMSEA does not qualify or limit the requirement that settlements with Medicare beneficiaries be reported. However, pursuant to its direction in In 42 U.S. Code § 1395y(b)(8)(H), added by the SMART Act, to develop a method to implement the requirements of the MMSEA, "notwithstanding any other provision of law," CMS established Mandatory Reporting Thresholds for various types of settlements, including liability insurance settlements. These Mandatory Reporting Thresholds are explained in detail in Chapter III of the NGHP User Guide at pp. 6-14 (*e.g.*, Table 6-4, which verifies that a reporting threshold applies to liability insurance settlements), and p. 6-16 (*e.g.*, Table 6-5, which provides a range of TPOC amounts for which reporting is "optional"). The Mandatory Reporting Thresholds were initially termed, "Interim Reporting Thresholds," because CMS established them in connection with implementing Section 111 of the MMSEA to address initial concerns about reporting claims. RREs were instructed to report settlements with amounts greater than the interim threshold, and could report settlements with amounts below the threshold.

In addition, according to the NGHP User Guide, if an RRE were to report a mass tort, or any other liability insurance, settlement of less than \$1000 with no ORM and a TPOC before 1/1/2017, the CMS system would reject that claim and assign a CJ07 error code to it. This error code demonstrates that CMS recognizes a threshold for reporting mass tort claims, because it has provided no mechanism for reporting settlements involving amounts less than \$1000. As reflected in the Technical Alert, the reduction of the single threshold amount for reporting physical trauma-based claims would cause a problem with current CMS reporting system error logic. Therefore, CMS reduced the reporting threshold

for all other liability insurance claims, and removed the error code designed to reject reported settlements based on amount.

## Conclusion

Based on the December 12, 2016 Technical Alert, mass tort liability insurance settlements with Medicare beneficiaries and a TPOC date on or after 1/1/2017 that are greater than \$750 must be reported to Medicare. The current \$1000 Mandatory Reporting Threshold for mass tort liability insurance settlements, established on 10/1/2014, continues to apply to settlements with TPOC dates before 1/1/2017.

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<sup>1</sup> CMS, Technical Alert: Change in Reporting Thresholds for Certain Liability Insurance, No-Fault Insurance, and Workers Compensation Settlements, Judgments, Awards or Other Payments, December 12, 2016,

<https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Mandatory-Insurer-Reporting-For-Non-Group-Health-Plans/Downloads/New-Downloads/Technical-Alert-Change-in-TPOC-Reportinng-Threshold-Change.pdf>.

<sup>2</sup> CMS, Alert: 2017 Recovery Thresholds for Certain Liability Insurance, No-Fault Insurance, and Workers' Compensation Settlements, Judgments, Awards or Other Payments, November 15, 2016, <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Non-Group-Health-Plan-Recovery/Downloads/Alert-2017-Smart-Act-Threshold-.pdf>.

<sup>3</sup> CMS, MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting, Liability Insurance (Including Self-Insurance), No Fault Insurance, and Workers' Compensation User Guide, Chapter III: Policy Guidance, version 5.1, Rev. October 10, 2016,