

<b>CMS Manual System</b>	<b>Department of Health &amp; Human Services (DHHS)</b>
<b>Pub 100-05 Medicare Secondary Payer</b>	<b>Centers for Medicare &amp; Medicaid Services (CMS)</b>
<b>Transmittal 12898</b>	<b>Date: October 24, 2024</b>
	<b>Change Request 13831</b>

**SUBJECT: Updating Internet Only Manual (IOM) 100-05, Chapter 7, Section 10.8 to Include Additional Policy for Wrongful Death Claims**

**I. SUMMARY OF CHANGES:** The purpose of this Change Request (CR) is to update the Medicare Secondary Payer manual to add language and clarify policy for wrong death claims where a settlement, judgment, award, or other payment was based entirely on the wrongful death theory of liability, as supported by appropriate documentation, and thus no medical expenses were claimed or released by the settlement procured or judgment entered, then there is no requirement that the settlement or judgment be reported, as Medicare would have no recovery rights against such a payment.

**EFFECTIVE DATE: November 26, 2024**

*\*Unless otherwise specified, the effective date is the date of service.*

**IMPLEMENTATION DATE: November 26, 2024**

*Disclaimer for manual changes only: The revision date and transmittal number apply only to red italicized material. Any other material was previously published and remains unchanged. However, if this revision contains a table of contents, you will receive the new/revised information only, and not the entire table of contents.*

**II. CHANGES IN MANUAL INSTRUCTIONS:** (N/A if manual is not updated)

R=REVISED, N=NEW, D=DELETED-Only One Per Row.

<b>R/N/D</b>	<b>CHAPTER / SECTION / SUBSECTION / TITLE</b>
R	7/Table of Contents
R	7/10/10.8/Wrongful Death Statutes

**III. FUNDING:**

**For Medicare Administrative Contractors (MACs):**

The Medicare Administrative Contractor is hereby advised that this constitutes technical direction as defined in your contract. CMS does not construe this as a change to the MAC Statement of Work. The contractor is not obligated to incur costs in excess of the amounts allotted in your contract unless and until specifically authorized by the Contracting Officer. If the contractor considers anything provided, as described above, to be outside the current scope of work, the contractor shall withhold performance on the part(s) in question and immediately notify the Contracting Officer, in writing or by e-mail, and request formal directions regarding continued performance requirements.

**IV. ATTACHMENTS:**

**Business Requirements  
Manual Instruction**

# Attachment - Business Requirements

<b>Pub. 100-05</b>	<b>Transmittal: 12898</b>	<b>Date: October 24, 2024</b>	<b>Change Request: 13831</b>
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## **II. GENERAL INFORMATION**

**A. Background:** Wrongful death statutes (including survival statutes) are state laws that permit an entity (such as a decedent’s estate, personal representative or survivors) to assert the claims and rights that the decedent had at the time of death and/or to recover damages arising from that death itself. These laws may include recovery for the deceased’s medical expenses. Medicare’s right of recovery in relation to these statutes is governed by 42 CFR § 411.24 and is discussed further in Internet Only Manual (IOM) 100-05, Chapter 7, Section 10.8.

### **B. Policy:**

When a settlement, judgment, award, or other payment was obtained under a wrongful death theory of liability, documentation of that claim should be retained by the beneficiary’s estate, personal representative, or other claimant. In the event of a dispute, submission of supporting documentation may be required in the form and manner specified by the Secretary. The documentation should be maintained regardless of whether other claims were also asserted, or whether the wrongful death statute was not the sole claim related to the settlement, judgment, award, or other payment. In cases where a lawsuit is actually filed based on a wrongful death theory of liability, such documentation should include the court pleadings (including both the original pleadings and any amendments thereto).

## **III. BUSINESS REQUIREMENTS TABLE**

*"Shall" denotes a mandatory requirement, and "should" denotes an optional requirement.*

Number	Requirement	Responsibility								
		A/B MAC			DME MAC	Shared-System Maintainers				Other
		A	B	HHH		FISS	MCS	VMS	CWF	
13831.1	The A/B Medicare Administrative Contractors (MACs) and Durable Medical Equipment (DME) MACs	X	X	X	X					BCRC, BCRS, CRC

Number	Requirement	Responsibility								
		A/B MAC			DME MAC	Shared-System Maintainers				Other
		A	B	HHH		FISS	MCS	VMS	CWF	
	shall be aware of the additional policy language for Wrongful Death claims in IOM 100-05, Chapter 7, Section 10.8 and abide by this update.									

**IV. PROVIDER EDUCATION**

None

**Impacted Contractors:** None

**V. SUPPORTING INFORMATION**

**Section A: Recommendations and supporting information associated with listed requirements:** N/A

*"Should" denotes a recommendation.*

X-Ref Requirement Number	Recommendations or other supporting information:

**Section B: All other recommendations and supporting information:** N/A

**VI. CONTACTS**

**Post-Implementation Contact(s):** Contact your Contracting Officer's Representative (COR).

**VII. FUNDING**

**Section A: For Medicare Administrative Contractors (MACs):**

The Medicare Administrative Contractor is hereby advised that this constitutes technical direction as defined in your contract. CMS does not construe this as a change to the MAC Statement of Work. The contractor is not obligated to incur costs in excess of the amounts allotted in your contract unless and until specifically authorized by the Contracting Officer. If the contractor considers anything provided, as described above, to be outside the current scope of work, the contractor shall withhold performance on the part(s) in question and immediately notify the Contracting Officer, in writing or by e-mail, and request formal directions regarding continued performance requirements.

**ATTACHMENTS: 0**

# Medicare Secondary Payer (MSP) Manual

## Chapter 7 – MSP Recovery

### Table of Contents

*(Rev.12898; Issued: 10-24-24)*

#### Transmittals for Chapter 7

10.8 – Wrongful Death *Statutes*

## 10.8 – Wrongful Death *Statutes*

*(Rev. 12898; Issued:10-24-24; Effective:11-26-24; Implementation:11-26-24)*

Wrongful death statutes (including survival statutes) are state laws that permit an entity (such as a decedent's estate, personal representative or survivors) to assert the claims and rights that the decedent had at the time of death and/or to recover damages arising from that death itself. These laws may include recovery for the deceased's medical expenses. Medicare's right of recovery in relation to these statutes is governed by 42 CFR § 411.24 and is as follows (note that the analysis of wrongful death statutes described below would be similar to an analysis of wrongful death actions at common law):

- a) When a liability insurance payment is made under a wrongful death statute, Medicare may recover on account of that payment if the wrongful death statute permits recovery of the deceased's medical expenses. If a state wrongful death statute does not permit recovery of the deceased's medical expenses, Medicare has no claim against recovery obtained solely under that wrongful death statute;
- b) If the wrongful death statute permits recovery of the deceased's medical expenses, Medicare will pursue MSP claims arising from a primary payment obtained under that statute. Medicare will pursue its MSP claims even if the claimant who asserts the cause of action under the wrongful death statute:
  - i) fails to explicitly request recovery for the decedent's medical expenses, and/or
  - ii) only requests recovery for damages/losses incurred by the decedent's relatives and/or heirs;
- c) When a wrongful death statute permits full recovery of medical expenses but limits the amount that creditors may obtain from that recovery of past medical expenses, Medicare may recover up to the full amount of its conditional payments from the entire recovery obtained under the wrongful death statute. However, if the wrongful death statute limits the amount of medical expenses that may be recovered from the tortfeasor and/or responsible insurer, Medicare may recover only up to that limited amount of the recovery (or up to the amount of the settlement, judgment, award, or other payment if that amount is less than or equal to Medicare's claim).

When a settlement, judgment, award, or other payment was obtained under a wrongful death theory of liability, documentation of that claim should be retained by the beneficiary's estate, personal representative, or other claimant. In the event of a dispute, submission of supporting documentation may be required in the form and manner specified by the Secretary. The documentation should be maintained regardless of whether other claims were also asserted, or whether the wrongful death statute was not the sole claim related to the settlement, judgment, award, or other payment. In cases where a lawsuit is actually filed based on a wrongful death theory of liability, such documentation should include the court pleadings (including both the original pleadings and any amendments thereto).

*In cases where a settlement, judgment, award, or other payment was based entirely on the wrongful death theory of liability, as supported by appropriate documentation, and thus no medical expenses were claimed or released by the settlement procured or judgment entered, then there is no requirement that the settlement or judgment be reported, as Medicare would have no recovery rights against such a payment.*

There may be cases where:

- a) a wrongful death lawsuit was filed, but subsequently withdrawn and resolved with a general release; or
- b) no lawsuit specifically seeking wrongful death recovery was ever filed. In both of these cases, examples of supporting documentation may include:
  - i) a fully executed settlement agreement or release;
  - ii) documents exchanged between the parties during settlement negotiations; and other documents the parties exchanged in anticipation of litigation.

Notwithstanding the above scenarios, the settlement documentation must unambiguously indicate that the settlement, judgment, award, or other payment was obtained under the wrongful death theory of liability and must support that position in order for CMS to acknowledge that recovery may be limited accordingly.