

1 COMMITTEE SUBSTITUTE

2 for

3 **H. B. 2512**

4  
5 (By Mr. Speaker, (Mr. Thompson) and Delegate Armstead)

6 (By Request of the Executive)

7 (Originating in the Committee on the Judiciary)

8 [March 27, 2013]

9  
10 A BILL to amend and reenact §9-5-11 of the Code of West Virginia,  
11 1931, as amended, all relating to state Medicaid subrogation;  
12 establishing definitions; establishing recipient assignment of  
13 subrogation rights against third parties; excluding Medicare  
14 benefits from assignment; authorizing release of information;  
15 prioritizing the department's subrogation right; establishing  
16 notice requirements for third party claims, civil actions and  
17 settlements; permitting the department to enter appearance in  
18 an action against a third party; establishing penalties for  
19 failure to notify the department; requiring consent to settle;  
20 establishing procedures for agreed allocation of award or  
21 judgment proceeds from third parties; establishing procedures  
22 when allocation is disputed; establishing procedures for jury  
23 trial; establishing post-trial payment procedures;  
24 establishing allocation of attorneys fees; prohibiting certain

1 class actions and multiple plaintiff actions; and authorizing  
2 authority to settle.

3 *Be it enacted by the Legislature of West Virginia:*

4 That §9-5-11 of the Code of West Virginia, 1931, as amended,  
5 be amended and reenacted to read as follows:

6 **ARTICLE 5. MISCELLANEOUS PROVISIONS.**

7 **§9-5-11. Definitions; Assignment of rights; right of subrogation**  
8 **by the Department for third-party liability; notice**  
9 **requirement for claims and civil actions; notice**  
10 **requirement for settlement of third-party claim;**  
11 **penalty for failure to notify the department;**  
12 **provisions related to trial; attorneys fees; class**  
13 **actions and multiple plaintiff actions not authorized;**  
14 **and Secretary's authority to settle.**

15  
16 (a) Definitions.- As used in this section, unless the context  
17 otherwise requires:

18 (1) "Bureau" means the Bureau for Medical Services.

19 (2) "Department" means the West Virginia Department of Health and  
20 Human Resources, or its contracted designee.

21 (3) "Recipient" means a person who applies for and receives  
22 assistance under the Medicaid Program.

23 (4) "Secretary" means the Secretary of the Department of Health  
24 and Human Resources.

1 (5) "Third-party" means an individual or entity that is alleged  
2 to be liable to pay all or part of the costs of a recipient's  
3 medical treatment and medical-related services for personal injury,  
4 disease, illness or disability, as well as any entity including,  
5 but not limited to, a business organization, health service  
6 organization, insurer, or public or private agency acting by or on  
7 behalf of the allegedly liable third-party.

8 (b) Assignment of rights.-

9 (1) Submission of an application to the department for medical  
10 assistance is, as a matter of law, an assignment of the right of  
11 the applicant or his or her legal representative to recover from  
12 third parties past medical expenses paid for by the Medicaid  
13 program.

14 (2) At the time an application for medical assistance is made,  
15 the department shall include a statement along with the application  
16 that explains that the applicant has assigned all of his or her  
17 rights as provided in this section and the legal implications of  
18 making this assignment.

19 (3) This assignment of rights does not extend to Medicare  
20 benefits.

21 (4) This section does not prevent the recipient or his or her  
22 legal representative from maintaining an action for injuries or  
23 damages sustained by the recipient against any third-party and from  
24 including, as part of the compensatory damages sought to be

1 recovered, the amounts of his or her past medical expenses.

2 (5) The department shall be legally subrogated to the rights of  
3 the recipient against the third party.

4 (6) The department shall have a priority right to be paid first  
5 out of any payments made to the recipient for past medical expenses  
6 before the recipient can recover any of his or her own costs for  
7 medical care.

8 (7) A recipient is considered to have authorized all third-parties  
9 to release to the department information needed by the department  
10 to secure or enforce its rights as assignee under this chapter.

11 (c) Notice requirement for claims and civil actions.-

12 (1) A recipient's legal representative shall provide notice to the  
13 department within 60 days of asserting a claim against a third  
14 party. If the claim is asserted in a formal civil action, the  
15 recipient's legal representative shall notify the department within  
16 60 days of service of the complaint and summons upon the third  
17 party by causing a copy of the summons and a copy of the complaint  
18 to be served on the department as though it were named a party  
19 defendant.

20 (2) If the recipient has no legal representative and the third  
21 party knows or reasonably should know that a recipient has no  
22 representation then the third party shall provide notice to the  
23 department within 60 days of receipt of a claim.

24 (3) In any civil action implicated by this section, the department

1 may file a notice of appearance and shall thereafter have the right  
2 to file and receive pleadings, intervene and take other action  
3 permitted by law.

4 (4) The department shall provide the recipient notice of the  
5 amount of the purported subrogation lien within 30 days of receipt  
6 of notice of the claim. The department shall provide related  
7 supplements in a timely manner, not later than 15 days after a  
8 recipient request.

9 (d) Notice of settlement requirement.-

10 (1) A recipient or his or her representative shall notify the  
11 department of a settlement with a third-party and retain in escrow  
12 an amount equal to the amount of the subrogation lien asserted by  
13 the department. The notification shall include the amount of the  
14 settlement being allocated for past medical expenses paid for by  
15 the Medicaid program. Within 30 days of the receipt of any such  
16 notice, the department shall notify the recipient of its consent or  
17 rejection of the proposed allocation. If the department consents,  
18 the recipient or his or her legal representation shall issue  
19 payment out of the settlement proceeds in a manner directed by the  
20 Secretary or his or her designee within 30 days of consent to the  
21 proposed allocation.

22 (2) If the total amount of the settlement is less than the  
23 department's subrogation lien, then the settling parties shall  
24 obtain the department's consent to the settlement before finalizing

1 the settlement. The department shall advise the parties within 30  
2 days and provide a detailed itemization of all past medical  
3 expenses paid by the department on behalf of the recipient for  
4 which the department seeks reimbursement out of the settlement  
5 proceeds.

6 (3) If the department rejects the proposed allocation, the  
7 department shall seek a judicial determination within 30 days and  
8 provide a detailed itemization of all past medical expenses paid by  
9 the department on behalf of the recipient for which the department  
10 seeks reimbursement out of the settlement proceeds.

11 (A) If judicial determination becomes necessary, the trial court  
12 is required to hold an evidentiary hearing. The recipient and the  
13 department shall be provided ample notice of the same and be given  
14 just opportunity to present the necessary evidence, including fact  
15 witness and expert witness testimony, to establish the amount to  
16 which the department is entitled to be reimbursed pursuant to this  
17 section.

18 (B) The department shall have the burden of proving by a  
19 preponderance of the evidence that the allocation agreed to by the  
20 parties was improper. For purposes of appeal, the trial court's  
21 decision should be set forth in a detailed order containing the  
22 requisite findings of fact and conclusions of law to support its  
23 rulings.

24 (4) Any settlement by a recipient with one or more third-parties

1 which would otherwise fully resolve the recipient's claim for an  
2 amount collectively not to exceed \$20,000 shall be exempt from the  
3 provisions of this section.

4 (5) Nothing herein prevents a recipient from seeking judicial  
5 intervention to resolve any dispute as to allocation prior to  
6 effectuating a settlement with a third party.

7 (e) Department failure to respond to notice of settlement.— If the  
8 department fails to appropriately respond to a notification of  
9 settlement, the amount to which the department is entitled to be  
10 paid from the settlement shall be limited to the amount of the  
11 settlement the recipient has allocated toward past medical  
12 expenses.

13 (f) Penalty for failure to notify the department.— A legal  
14 representative acting on behalf of a recipient or third party that  
15 fails to comply with the provisions of this section is liable to  
16 the department for all reimbursement amounts the department would  
17 otherwise have been entitled to collect pursuant to this section  
18 but for the failure to comply. Under no circumstances may a pro se  
19 recipient be penalized for failing to comply with the provisions of  
20 this section.

21 (g) Miscellaneous provisions relating to trial.—

22 (1) Where an action implicated by this section is tried by a jury,  
23 the jury may not be informed at any time as to the subrogation lien  
24 of the department.

1 (2) Where an action implicated by this section is tried by judge  
2 or jury, the trial judge shall, or in the instance of a jury trial,  
3 require that the jury, identify precisely the amount of the verdict  
4 awarded that represents past medical expenses.

5 (3) Upon the entry of judgment on the verdict, the court shall  
6 direct that upon satisfaction of the judgment any damages awarded  
7 for past medical expenses be withheld and paid directly to the  
8 department, not to exceed the amount of past medical expenses paid  
9 by the department on behalf of the recipient.

10 (h) Attorneys' fees.- Irrespective of whether an action or claim  
11 is terminated by judgment or settlement without trial, from the  
12 amount required to be paid to the department there shall be  
13 deducted the reasonable costs and attorneys' fees attributable to  
14 the amount in accordance with and in proportion to the fee  
15 arrangement made between the recipient and his or her attorney of  
16 record so that the department shall bear the pro-rata share of the  
17 reasonable costs and attorneys' fees: Provided, that if there is  
18 no recovery, the department shall under no circumstances be liable  
19 for any costs or attorneys' fees expended in the matter.

20 (i) Class actions and multiple plaintiff actions not authorized.-  
21 Nothing in this article shall authorize the department to institute  
22 a class action or multiple plaintiff action against any  
23 manufacturer, distributor or vendor of any product to recover  
24 medical care expenditures paid for by the Medicaid program.



1 (j) Secretary's authority. – The Secretary or his or her designee  
2 may compromise, settle and execute a release of any claim relating  
3 to the department's right of subrogation, in whole or in part.