

COMMITTEE SUBSTITUTE

for

H. B. 2512

(BY MR. SPEAKER, (MR. THOMPSON)
AND DELEGATE ARMSTEAD)

(Originating in the Committee on the Judiciary)

[March 27, 2013]

A BILL to amend and reenact §9-5-11 of the Code of West Virginia, 1931, as amended, all relating to state Medicaid subrogation; establishing definitions; establishing recipient assignment of subrogation rights against third parties; excluding Medicare benefits from assignment; authorizing release of information; prioritizing the department's subrogation right; establishing notice requirements for third party claims, civil actions and settlements; permitting the department to enter appearance in an action against a third party; establishing penalties for failure to notify the

department; requiring consent to settle; establishing procedures for agreed allocation of award or judgment proceeds from third parties; establishing procedures when allocation is disputed; establishing procedures for jury trial; establishing post-trial payment procedures; establishing allocation of attorneys fees; prohibiting certain class actions and multiple plaintiff actions; and authorizing authority to settle.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 5. MISCELLANEOUS PROVISIONS.

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

- 1 (a) Definitions.— As used in this section, unless the context
- 2 otherwise requires:
- 3 (1) “Bureau” means the Bureau for Medical Services.
- 4 (2) “Department” means the West Virginia Department of
- 5 Health and Human Resources, or its contracted designee.

6 (3) “Recipient” means a person who applies for and receives
7 assistance under the Medicaid Program.

8 (4) “Secretary” means the Secretary of the Department of
9 Health and Human Resources.

10 (5) “Third-party” means an individual or entity that is
11 alleged to be liable to pay all or part of the costs of a recipient’s
12 medical treatment and medical-related services for personal
13 injury, disease, illness or disability, as well as any entity
14 including, but not limited to, a business organization, health
15 service organization, insurer, or public or private agency acting
16 by or on behalf of the allegedly liable third-party.

17 (b) Assignment of rights.—

18 (1) Submission of an application to the department for
19 medical assistance is, as a matter of law, an assignment of the
20 right of the applicant or his or her legal representative to recover
21 from third parties past medical expenses paid for by the
22 Medicaid program.

23 (2) At the time an application for medical assistance is
24 made, the department shall include a statement along with the
25 application that explains that the applicant has assigned all of his

26 or her rights as provided in this section and the legal
27 implications of making this assignment.

28 (3) This assignment of rights does not extend to Medicare
29 benefits.

30 (4) This section does not prevent the recipient or his or her
31 legal representative from maintaining an action for injuries or
32 damages sustained by the recipient against any third-party and
33 from including, as part of the compensatory damages sought to
34 be recovered, the amounts of his or her past medical expenses.

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

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

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

45 (c) Notice requirement for claims and civil actions.—

46 (1) A recipient's legal representative shall provide notice to
47 the department within 60 days of asserting a claim against a third
48 party. If the claim is asserted in a formal civil action, the
49 recipient's legal representative shall notify the department within
50 60 days of service of the complaint and summons upon the third
51 party by causing a copy of the summons and a copy of the
52 complaint to be served on the department as though it were
53 named a party defendant.

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

58 (3) In any civil action implicated by this section, the
59 department may file a notice of appearance and shall thereafter
60 have the right to file and receive pleadings, intervene and take
61 other action permitted by law.

62 (4) The department shall provide the recipient notice of the
63 amount of the purported subrogation lien within 30 days of
64 receipt of notice of the claim. The department shall provide
65 related supplements in a timely manner, not later than 15 days
66 after a recipient request.

67 (d) Notice of settlement requirement.—

68 (1) A recipient or his or her representative shall notify the
69 department of a settlement with a third-party and retain in
70 escrow an amount equal to the amount of the subrogation lien
71 asserted by the department. The notification shall include the
72 amount of the settlement being allocated for past medical
73 expenses paid for by the Medicaid program. Within 30 days of
74 the receipt of any such notice, the department shall notify the
75 recipient of its consent or rejection of the proposed allocation. If
76 the department consents, the recipient or his or her legal
77 representation shall issue payment out of the settlement proceeds
78 in a manner directed by the Secretary or his or her designee
79 within 30 days of consent to the proposed allocation.

80 (2) If the total amount of the settlement is less than the
81 department's subrogation lien, then the settling parties shall
82 obtain the department's consent to the settlement before
83 finalizing the settlement. The department shall advise the parties
84 within 30 days and provide a detailed itemization of all past
85 medical expenses paid by the department on behalf of the
86 recipient for which the department seeks reimbursement out of
87 the settlement proceeds.

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

93 (A) If judicial determination becomes necessary, the trial
94 court is required to hold an evidentiary hearing. The recipient
95 and the department shall be provided ample notice of the same
96 and be given just opportunity to present the necessary evidence,
97 including fact witness and expert witness testimony, to establish
98 the amount to which the department is entitled to be reimbursed
99 pursuant to this section.

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

106 (4) Any settlement by a recipient with one or more
107 third-parties which would otherwise fully resolve the recipient's

108 claim for an amount collectively not to exceed \$20,000 shall be
109 exempt from the provisions of this section.

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

113 (e) Department failure to respond to notice of settlement.—
114 If the department fails to appropriately respond to a notification
115 of settlement, the amount to which the department is entitled to
116 be paid from the settlement shall be limited to the amount of the
117 settlement the recipient has allocated toward past medical
118 expenses.

119 (f) Penalty for failure to notify the department.— A legal
120 representative acting on behalf of a recipient or third party that
121 fails to comply with the provisions of this section is liable to the
122 department for all reimbursement amounts the department would
123 otherwise have been entitled to collect pursuant to this section
124 but for the failure to comply. Under no circumstances may a pro
125 se recipient be penalized for failing to comply with the
126 provisions of this section.

127 (g) Miscellaneous provisions relating to trial.—

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

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

135 (3) Upon the entry of judgment on the verdict, the court
136 shall direct that upon satisfaction of the judgment any damages
137 awarded for past medical expenses be withheld and paid directly
138 to the department, not to exceed the amount of past medical
139 expenses paid by the department on behalf of the recipient.

140 (h) Attorneys' fees.— Irrespective of whether an action or
141 claim is terminated by judgment or settlement without trial, from
142 the amount required to be paid to the department there shall be
143 deducted the reasonable costs and attorneys' fees attributable to
144 the amount in accordance with and in proportion to the fee
145 arrangement made between the recipient and his or her attorney
146 of record so that the department shall bear the pro-rata share of
147 the reasonable costs and attorneys' fees: *Provided*, that if there

148 is no recovery, the department shall under no circumstances be
149 liable for any costs or attorneys' fees expended in the matter.

150 (i) Class actions and multiple plaintiff actions not
151 authorized.— Nothing in this article shall authorize the
152 department to institute a class action or multiple plaintiff action
153 against any manufacturer, distributor or vendor of any product
154 to recover medical care expenditures paid for by the Medicaid
155 program.

156 (j) Secretary's authority. — The Secretary or his or her
157 designee may compromise, settle and execute a release of any
158 claim relating to the department's right of subrogation, in whole
159 or in part.

