

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 4392

BY DELEGATES ELLINGTON, HANSHAW, HOUSEHOLDER,

SHOTT AND SUMMERS

[Passed March 10, 2018; in effect ninety days from passage.]

1 AN ACT to amend and reenact §9-5-11 of the Code of West Virginia, 1931, as amended, relating
2 to Medicaid subrogation liens of the Department of Health and Human Resources;
3 extending the definition of a liable “third-party” to include certain insurers; establishing
4 notice requirements for claims and civil actions; providing authority for the secretary to
5 negotiate and incentivize Medicaid members to prosecute lawsuits against liable third
6 parties; providing a priority right to the department for subrogation payments; requiring
7 department authorization before finalizing settlement in certain circumstances;
8 establishing the notice, procedure and consent requirements for settlement allocation;
9 establishing procedure in the event the department rejects the proposed allocation;
10 establishing the burden of proof regarding allocation dispute proceedings in court;
11 requiring the trial court to consider the department’s interests in maximizing recovery for
12 purposes of the operation of the Medicaid program in an allocation dispute; requiring the
13 trial court decision to reflect findings of fact and conclusions of law; where a final
14 subrogation lien is less than \$1,500 those matters are exempt from the provisions of this
15 section; modifying the penalty for failure of recipient’s legal representative to notify the
16 department to include interest, and setting effective date.

Be it enacted by the Legislature of West Virginia:

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 otherwise requires:

2 (1) “Bureau” means the Bureau for Medical Services.

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

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

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

8 (5) "Third-party" means

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

14 Any insurer that may be liable under an uninsured or underinsured motorist policy covering
15 the injuries to the recipient.

16 (b) *Assignment of rights.*

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

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

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

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

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

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

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

36 (c) *Notice requirement for claims and civil actions, Secretary's authority to intervene and*
37 *to settle.*

38 (1) A recipient's legal representative shall provide notice to the department within 60 days
39 of asserting a claim against a third party.

40 (2) If the recipient has no legal representative and the third party knows or reasonably
41 should know that a recipient has no representation then the third party shall provide notice to the
42 department within 60 days of receipt of a claim or within 30 days of receipt of information or
43 documentation reflecting the recipient is receiving Medicaid benefits, whichever is later in time.

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

47 (4) The department shall provide the recipient and the third party, if the recipient is without
48 legal representation, notice of the amount of the purported subrogation lien within 30 days of
49 receipt of notice of the claim. The department shall provide related supplements in a timely
50 manner, but no later than 15 days after receipt of a request for same.

51 (5) When determined by the department to be cost effective, the secretary or his or her
52 designee may, in his or her sole discretion, negotiate for a reduction in the lien in an amount
53 sufficient to incentivize Medicaid members to settle claims against liable third parties.

54 (d) *Notice of settlement requirement.*

55 (1) A recipient or his or her representative shall notify the department of a settlement with
56 a third-party and retain in escrow an amount equal to the amount of the subrogation lien asserted
57 by the department. The notification shall include the amount of the settlement being allocated for
58 past medical expenses paid for by the Medicaid program. The settling parties shall obtain the
59 department's consent before finalizing a settlement, unless, the amount of the settlement is
60 sufficient to fully reimburse the amount of the Department's subrogation lien.

61 (2) Within 30 days of the receipt of any such notice of a proposed settlement, the
62 department shall notify the recipient of its consent or rejection of the proposed allocation. If the
63 department consents, the recipient or his or her legal representation shall issue payment out of
64 the settlement proceeds in a manner directed by the secretary or his or her designee within 30
65 days of consent to the proposed allocation.

66 (3) If the total amount of the settlement is less than the department's subrogation lien, then
67 the settling parties shall obtain the department's consent to the settlement before finalizing the
68 settlement. The department shall advise the parties within 60 days and provide a detailed
69 itemization of all past medical expenses paid by the department on behalf of the recipient for
70 which the department seeks reimbursement out of the settlement proceeds.

71 (4) If the department rejects the proposed allocation, the recipient or his or her legal
72 representative shall seek a judicial determination within 30 days regarding the appropriateness of
73 the proposed settlement in the court in which the action is then pending or, in the event no such
74 action is pending, in any court in which the recipient could have filed such action for damages.

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

80 (B) The department shall have the burden of proving by a preponderance of the evidence
81 that the allocation agreed to by the parties is proper. The trial court shall give due consideration
82 to the department's interest in being fairly reimbursed for purposes of the operation of the
83 Medicaid program. The trial court's decision should be set forth in a detailed order containing the
84 requisite findings of fact and conclusions of law to support its rulings.

85 (5) If the amount of the Department's final subrogation lien does not exceed \$1,500 the
86 settlement shall be exempt from the provisions of this section.

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

89 (e) *Department failure to respond to notice of settlement.* If the department fails to
90 appropriately respond to a notification of settlement, the amount to which the department is
91 entitled to be paid from the settlement shall be limited to the amount of the settlement the recipient
92 has allocated toward past medical expenses.

93 (f) *Penalty for failure to notify the department.* A legal representative acting on behalf of a
94 recipient or third party that fails to comply with the provisions of this section is liable to the
95 department for all reimbursement amounts the department would otherwise have been entitled to
96 collect pursuant to this section but for the failure to comply, plus interest at the legal rate from the
97 date of the settlement. Under no circumstances may a pro se recipient be penalized for failing to
98 comply with the provisions of this section.

99 (g) *Miscellaneous provisions relating to trial.*

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

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

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

109 (h) *Attorneys' fees.* Irrespective of whether an action or claim is terminated by judgment
110 or settlement without trial, from the amount required to be paid to the department there shall be
111 deducted the reasonable costs and attorneys' fees attributable to the amount in accordance with
112 and in proportion to the fee arrangement made between the recipient and his or her attorney of
113 record so that the department shall bear the pro-rata share of the reasonable costs and attorneys'
114 fees: *Provided,* That if there is no recovery, the department shall under no circumstances be liable
115 for any costs or attorneys' fees expended in the matter.

116 (i) *Class actions and multiple plaintiff actions not authorized.* Nothing in this article shall
117 authorize the department to institute a class action or multiple plaintiff action against any
118 manufacturer, distributor or vendor of any product to recover medical care expenditures paid for
119 by the Medicaid program.

120 (j) *Secretary's authority.* The secretary or his or her designee may, in his or her sole
121 discretion, compromise, settle and execute a release of any claim relating to the department's
122 right of subrogation, in whole or in part.

123 (k) *Effective Date.* — The amendments to this section enacted during the 2018 regular
124 session of the West Virginia Legislature shall be effective with respect to claims against third
125 parties arising on or after July 1, 2018.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, House Committee

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Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

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Clerk of the House of Delegates

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Clerk of the Senate

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Speaker of the House of Delegates

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President of the Senate

The within this the.....
day of, 2018.

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Governor