

H. B. 2512

(By Mr. Speaker, (Mr. Thompson) and Delegate Armstead)
[By Request of the Executive]
[Introduced February 15, 2013; referred to the
Committee on Health and Human Resources then the
Judiciary.]

A BILL to amend and reenact §9-5-11 of the Code of West Virginia,
1931, as amended, relating to reforming the state Medicaid
subrogation statute; reorganizing the statute for clarity;
defining "department" as the Department of Health and Human
Resources; establishing the department's subrogation right;
prioritizing the department's subrogation right; establishing
twenty-one day notice requirement upon action, claim or
settlement offer affecting the department's subrogation right;
requiring joinder of the department upon filing of action or
claim; enacting penalty provision for failure to comply with
twenty-one day notice requirement; requiring specific
allocation of damages for any settlement, compromise, judgment
or award; providing a sixty day review period for the
department to assess a proposed settlement allocation;
providing requirements for evidentiary damages hearings in

1 instances where the department cannot agree with the parties
 2 on the allocation of damages in settlement; establishing
 3 post-trial payment procedures; and making other technical
 4 changes.

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

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

8 **ARTICLE 5. MISCELLANEOUS PROVISIONS.**

9 **§9-5-11. Assignment of rights; right of subrogation by Department**
 10 **of Health and Human Resources to the rights of**
 11 **recipients of medical assistance; rules as to effect**
 12 **of subrogation.**

13 (a) Definition. For purposes of this section, "department"
 14 means the Department of Health and Human Resources.

15 ~~(a)~~ (b) Assignment of rights. Submission of an application
 16 to the ~~Department of Health and Human Resources~~ department for
 17 medical assistance is, as a matter of law, an assignment of the
 18 right of the applicant or legal representative thereof to recovery
 19 from personal insurance or other sources, including, but not
 20 limited to, liable third parties, ~~to the extent of the cost of for~~
 21 past medical services expenses paid for by the Medicaid program;

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

1 rights and the legal implications of making such assignment as
2 provided in this section.

3 (2) This assignment of rights does not extend to Medicare
4 benefits. ~~Provided, That~~ Further, the first \$25,000 of the death
5 benefit of a life insurance policy is exempt from assignment under
6 the provisions of this section.

7 (3) Nothing in this section shall be construed so as to
8 prevent the recipient of medical assistance or his or her legal
9 representative from maintaining an action for injuries received by
10 the recipient against any other person and from including therein,
11 as part of the compensatory damages sought to be recovered, the
12 amount or amounts of his or her past medical expenses.

13 ~~At the time the application is made, the department shall~~
14 ~~include a statement along with such application that explains that~~
15 ~~the applicant has assigned all such rights and the legal~~
16 ~~implications of making such assignment as provided in this section.~~

17 ~~If medical assistance is paid or will be paid to a provider~~
18 ~~of medical care on behalf of a recipient of medical assistance~~
19 ~~because of any sickness, injury, disease or disability, and another~~
20 ~~person is legally liable for such expense, either pursuant to~~
21 ~~contract, negligence or otherwise~~

22 (4) In obtaining reimbursement pursuant to this section, the
23 ~~Department of Health and Human Resources~~ department shall have a
24 priority right to ~~recover full reimbursement from any award or~~

1 ~~settlement for such medical assistance from such other person or~~
2 ~~from the recipient of such assistance if he or she has been~~
3 ~~reimbursed by the other person. The department shall be legally~~
4 ~~assigned the rights of the recipient against the person so liable,~~
5 ~~but only to the extent of the reasonable value of be paid first out~~
6 ~~of any payments made to the medical assistance paid and~~
7 ~~attributable to the sickness, injury, disease or disability for~~
8 ~~which the recipient has received damages recipient for past medical~~
9 ~~expenses before the recipient can recover any of his or her own~~
10 ~~costs for medical care.~~

11 (c) Notice requirement. When an action or claim is brought
12 by a medical assistance recipient or by ~~someone~~ on his or her
13 ~~behalf~~ legal representative against a third party who may be liable
14 for the injury, disease, disability or death of a medical
15 assistance recipient, ~~any settlement, judgment or award obtained is~~
16 ~~subject to the claim of the Department of Health and Human~~
17 ~~Resources for reimbursement of an amount sufficient to reimburse~~
18 ~~the department the full amount of benefits paid on behalf of the~~
19 ~~recipient under the medical assistance program or when a third~~
20 ~~party who may be liable for the injury, disease, disability or~~
21 ~~death of a medical assistance recipient makes an offer to settle~~
22 ~~such liability, the medical assistance recipient ~~The claim of the~~~~
23 ~~Department of Health and Human Resources assigned by such recipient~~
24 ~~shall not exceed the amount of or his or her legal representative~~

1 shall notify the department within twenty-one days of such action,
2 claim, or offer: *Provided*, That in the instance of the filing of
3 an action, the medical assistance recipient or his or her legal
4 representative shall also join the department in the action:
5 *Provided, however*, That the third party or any person or entity
6 acting on behalf of the third party shall also notify the
7 department within twenty-one days of making an offer to settle such
8 liability if the third party or any person or entity acting on
9 behalf of the third party knows or has reason to suspect that the
10 medical assistance recipient is not represented by legal counsel.

11 (d) *Penalty for failure to notify the department.* Any person
12 or entity acting on behalf of a medical assistance recipient or a
13 third party that fails to comply with the provisions of subsection
14 (c) of this section is liable to the department for \$1,000 for
15 every day notice is not provided under this section: *Provided*,
16 That the maximum liability authorized pursuant to this section is
17 \$50,000 or the total past medical expenses ~~for the injury, disease,~~
18 ~~disability or death of the recipient~~ paid by the department on
19 behalf of the medical assistance recipient, whichever is greater.

20 (e) *Specific allocation of past medical expenses required.*
21 The right of subrogation for past medical expenses created in this
22 section ~~includes all portions of the cause of action, by either~~
23 ~~settlement, compromise, judgment or award, notwithstanding any~~
24 ~~settlement allocation or apportionment that purports to dispose of~~

1 ~~portions of the cause of action not subject to the subrogation. Any~~
2 ~~requires that any~~ settlement, compromise, judgment or award ~~that~~
3 ~~excludes or limits the cost of medical services or care shall not~~
4 ~~preclude the Department of Health and Human Resources from~~
5 ~~enforcing its rights under this section. The secretary may~~
6 ~~compromise, settle and execute a release of any such claim, in~~
7 ~~whole or in part.~~

8 ~~(b) Nothing in this section shall be construed so as to~~
9 ~~prevent the recipient of medical assistance from maintaining an~~
10 ~~action for injuries received by him or her against any other person~~
11 ~~and from including therein, as part of the compensatory damages~~
12 ~~sought to be recovered, the amount or amounts of his or her medical~~
13 ~~expenses, even though such person received medical assistance in~~
14 ~~the payment of such medical expenses, in whole or in part on a~~
15 ~~claim involving damages for past medical expenses paid by the~~
16 ~~department on behalf of a medical assistance recipient be~~
17 ~~specifically allocated amongst other categories of damages,~~
18 ~~including, but not limited to, future medical expenses, pain and~~
19 ~~suffering, lost wages and loss of consortium.~~

20 (1) No settlement involving damages for past medical expenses
21 paid by the department on behalf of a medical assistance recipient
22 shall be consummated or judicially approved unless the department
23 has been notified and has been provided sixty days to review the
24 parties' allocation of damages. If the department fails to respond

1 within the sixty-day notice period, then the parties may proceed
2 with consummation of the settlement agreement and forward to the
3 department the portion of the recovery proceeds allocated for past
4 medical expenses.

5 (2) If the department responds within sixty days of notice,
6 but the parties cannot agree on the allocation of damages within
7 that time period, the parties must seek judicial allocation. If
8 judicial allocation becomes necessary, the trial court is required
9 to hold an evidentiary damages hearing, whereupon all parties and
10 the department are provided ample notice of the same and are given
11 just opportunity to present the necessary evidence, including fact
12 witness and expert witness testimony, to establish what each
13 contends is an appropriate allocation of damages. In challenging
14 an allocation of damages proposed by the parties, the department
15 has the burden of proof to establish that the allocation agreed to
16 by the parties was improper. For purposes of appeal, the trial
17 court's allocation decision should be set forth in a detailed order
18 containing the requisite findings of fact and conclusions of law to
19 support its rulings.

20 (f) Miscellaneous provisions relating to trial. (1) Where an
21 action implicating this section is ~~If the action be~~ tried by a
22 jury, the jury shall not be informed at any time as to the interest
23 of the ~~Department of Health and Human Resources~~ department. ~~if~~
24 any, and such fact shall not be disclosed to the jury at any time.

1 (2) Where an action implicating this section is tried by
2 judge or jury, the trial judge shall upon allocate damages or, in
3 the instance of a jury trial, require that the jury allocate
4 damages, including past medical expenses, future medical expenses,
5 pain and suffering, lost wages and loss of consortium.

6 (3) Upon the entry of judgment on the verdict, the court
7 shall direct that an amount equal to the amount of medical
8 assistance given any damages awarded for past medical expenses be
9 withheld and paid over directly to the Department of Health and
10 Human Resources department, not to exceed the amount of past
11 medical expenses paid by the department on behalf of the medical
12 assistance recipient.

13 (g) Attorney's fees. Irrespective of whether ~~the case be an~~
14 action or claim is terminated by judgment or by settlement without
15 trial, from the amount required to be paid to the ~~Department of~~
16 ~~Health and Human Resources~~ department there shall be deducted the
17 attorney fees attributable to such amount in accordance with and in
18 proportion to the fee arrangement made between the recipient and
19 his or her attorney of record so that the department shall bear the
20 pro rata portion of such attorney fees: ~~Nothing in this section~~
21 ~~shall preclude any person who has received medical assistance from~~
22 ~~settling any cause of action which he or she may have against~~
23 ~~another person and delivering to the Department of Health and Human~~
24 ~~Resources, from the proceeds of such settlement, the sums received~~

~~1 by him or her from the department or paid by the department for his
2 or her medical assistance. If such other person is aware of or has
3 been informed of the interest of the Department of Health and Human
4 Resources in the matter, it shall be the duty of the person to
5 whose benefit the release inures to withhold so much of the
6 settlement as may be necessary to reimburse the department to the
7 extent of its interest in the settlement. No judgment, award of or
8 settlement in any action or claim by a medical assistance recipient
9 to recover damages for injuries, disease or disability, in which
10 the Department of Health and Human Resources has interest, shall be
11 satisfied without first giving the department notice and reasonable
12 opportunity to establish its interest. The department shall have
13 sixty days from receipt of such written notice to advise the
14 recipient or his or her representative in writing of the
15 department's desire to establish its interest through the
16 assignment. If no such written intent is received within the
17 sixty-day period, then the recipient may proceed and in the event
18 of full recovery forward to the department the portion of the
19 recovery proceeds less the department's share of attorney's fees
20 and costs expended in the matter. In the event of less than full
21 recovery the recipient and the department shall agree as to the
22 amount to be paid to the department for its claim. If Provided,
23 That if there is no recovery, the department shall under no
24 circumstances be liable for any costs or attorney's fees expended~~

1 in the matter. ~~If, after being notified in writing of a subrogation~~
2 ~~claim and possible liability of the recipient, guardian, attorney~~
3 ~~or personal representative for failure to subrogate the department,~~
4 ~~a recipient, his or her guardian, attorney or personal~~
5 ~~representative disposes of the funds representing the judgment,~~
6 ~~settlement or award, without the written approval of the~~
7 ~~department, that person shall be liable to the department for any~~
8 ~~amount that, as a result of the disposition of the funds, is not~~
9 ~~recoverable by the department. In the event that a controversy~~
10 ~~arises concerning the subrogation claims by the department, an~~
11 ~~attorney shall interplead, pursuant to rule twenty-two of the Rules~~
12 ~~of Civil Procedure, the portion of the recipient's settlement that~~
13 ~~will satisfy the department exclusive of attorney's fees and costs~~
14 ~~regardless of any contractual arrangement between the client and~~
15 ~~the attorney.~~

16 ~~(e)~~ (h) Class actions and multiple plaintiff actions not
17 authorized. Nothing contained herein shall authorize the
18 ~~Department of Health and Human Resources~~ department to institute a
19 class action or multiple plaintiff action against any manufacturer,
20 distributor or vendor of any product to recover medical care
21 expenditures paid for by the Medicaid program.

22 (i) Secretary's authority. The secretary may compromise,
23 settle and execute a release of any claim relating to the
24 department's right of subrogation, in whole or in part.

NOTE: The purpose of this bill is to reform the Medicaid subrogation statute. The bill reorganizes the statute, clarifies the department's subrogation right, and provides a twenty-one day notification requirement upon actions, claims or settlement offers affecting the department's subrogation right. The bill creates civil penalties for violations of the notice requirement in the amount of \$1,000 per day, up to \$50,000 or the amount of past medical expenses at issue, whichever is greater. The bill requires any settlement or judgment of a claim against a third party to be allocated to include past medical expenses and approved by either the department or a judicial body.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.