

Senate Bill No. 180

(By Senators Kessler (Mr. President) and M. Hall,

By Request of the Executive)

[Introduced February 15, 2013; referred to the Committee on
Health and Human Resources; and then to the Committee on the
Judiciary.]

11 A BILL to amend and reenact §9-5-11 of the Code of West Virginia,
12 1931, as amended, relating to reforming the state Medicaid
13 subrogation statute; reorganizing the statute for clarity;
14 defining "department" as the Department of Health and Human
15 Resources; establishing the department's subrogation right;
16 prioritizing the department's subrogation right; establishing
17 21-day notice requirement upon action, claim or settlement
18 offer affecting the department's subrogation right; requiring
19 joinder of the department upon filing of action or claim;
20 enacting penalty provision for failure to comply with 21-day
21 notice requirement; requiring specific allocation of damages
22 for any settlement, compromise, judgment or award; providing
23 a sixty-day review period for the department to assess a

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

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

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

9 **ARTICLE 5. MISCELLANEOUS PROVISIONS.**

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

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

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

1 (1) At the time an application for medical assistance is
2 made, the department shall include a statement along with such
3 application that explains that the applicant has assigned all such
4 rights and the legal implications of making such assignment as
5 provided in this section.

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

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

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

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

1 ~~contract, negligence or otherwise~~

2 (4) In obtaining reimbursement pursuant to this section, the
3 ~~Department of Health and Human Resources~~ department shall have a
4 priority right to ~~recover full reimbursement from any award or~~
5 ~~settlement for such medical assistance from such other person or~~
6 ~~from the recipient of such assistance if he or she has been~~
7 ~~reimbursed by the other person. The department shall be legally~~
8 ~~assigned the rights of the recipient against the person so liable,~~
9 ~~but only to the extent of the reasonable value of~~ be paid first out
10 of any payments made to the medical assistance ~~paid and~~
11 ~~attributable to the sickness, injury, disease or disability for~~
12 ~~which the recipient has received damages~~ recipient for past medical
13 expenses before the recipient can recover any of his or her own
14 costs for medical care.

15 (c) Notice requirement. When an action or claim is brought
16 by a medical assistance recipient or by ~~someone~~ on his or her
17 ~~behalf~~ legal representative against a third party who may be liable
18 for the injury, disease, disability or death of a medical
19 assistance recipient, ~~any settlement, judgment or award obtained is~~
20 ~~subject to the claim of the Department of Health and Human~~
21 ~~Resources for reimbursement of an amount sufficient to reimburse~~
22 ~~the department the full amount of benefits paid on behalf of the~~
23 ~~recipient under the medical assistance program~~ or when a third

1 party who may be liable for the injury, disease, disability or
2 death of a medical assistance recipient makes an offer to settle
3 such liability, the medical assistance recipient ~~The claim of the~~
4 ~~Department of Health and Human Resources assigned by such recipient~~
5 ~~shall not exceed the amount of~~ or his or her legal representative
6 shall notify the department within twenty-one days of such action,
7 claim, or offer: Provided, That in the instance of the filing of
8 an action, the medical assistance recipient or his or her legal
9 representative shall also join the department in the action:
10 Provided, however, That the third party or any person or entity
11 acting on behalf of the third party shall also notify the
12 department within twenty-one days of making an offer to settle such
13 liability if the third party or any person or entity acting on
14 behalf of the third party knows or has reason to suspect that the
15 medical assistance recipient is not represented by legal counsel.

16 (d) Penalty for failure to notify the department. Any person
17 or entity acting on behalf of a medical assistance recipient or a
18 third party that fails to comply with the provisions of subsection
19 (c) of this section is liable to the department for \$1,000 for
20 every day notice is not provided under this section: Provided,
21 That the maximum liability authorized pursuant to this section is
22 \$50,000 or the total past medical expenses ~~for the injury, disease,~~
23 ~~disability or death of the recipient paid by the department on~~

1 behalf of the medical assistance recipient, whichever is greater.

2 (e) Specific allocation of past medical expenses required.

3 The right of subrogation for past medical expenses created in this
4 section ~~includes all portions of the cause of action, by either~~
5 ~~settlement, compromise, judgment or award, notwithstanding any~~
6 ~~settlement allocation or apportionment that purports to dispose of~~
7 ~~portions of the cause of action not subject to the subrogation. Any~~
8 requires that any settlement, compromise, judgment or award that
9 ~~excludes or limits the cost of medical services or care shall not~~
10 ~~preclude the Department of Health and Human Resources from~~
11 ~~enforcing its rights under this section. The secretary may~~
12 ~~compromise, settle and execute a release of any such claim, in~~
13 ~~whole or in part.~~

14 ~~(b) Nothing in this section shall be construed so as to~~
15 ~~prevent the recipient of medical assistance from maintaining an~~
16 ~~action for injuries received by him or her against any other person~~
17 ~~and from including therein, as part of the compensatory damages~~
18 ~~sought to be recovered, the amount or amounts of his or her medical~~
19 ~~expenses, even though such person received medical assistance in~~
20 ~~the payment of such medical expenses, in whole or in part on a~~
21 claim involving damages for past medical expenses paid by the
22 department on behalf of a medical assistance recipient be
23 specifically allocated amongst other categories of damages,

1 including, but not limited to, future medical expenses, pain and
2 suffering, lost wages and loss of consortium.

3 (1) No settlement involving damages for past medical expenses
4 paid by the department on behalf of a medical assistance recipient
5 shall be consummated or judicially approved unless the department
6 has been notified and has been provided sixty days to review the
7 parties' allocation of damages. If the department fails to respond
8 within the sixty-day notice period, then the parties may proceed
9 with consummation of the settlement agreement and forward to the
10 department the portion of the recovery proceeds allocated for past
11 medical expenses.

12 (2) If the department responds within sixty days of notice,
13 but the parties cannot agree on the allocation of damages within
14 that time period, the parties must seek judicial allocation. If
15 judicial allocation becomes necessary, the trial court is required
16 to hold an evidentiary damages hearing, whereupon all parties and
17 the department are provided ample notice of the same and are given
18 just opportunity to present the necessary evidence, including fact
19 witness and expert witness testimony, to establish what each
20 contends is an appropriate allocation of damages. In challenging
21 an allocation of damages proposed by the parties, the department
22 has the burden of proof to establish that the allocation agreed to
23 by the parties was improper. For purposes of appeal, the trial

1 court's allocation decision should be set forth in a detailed order
2 containing the requisite findings of fact and conclusions of law to
3 support its rulings.

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

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

14 (3) Upon the entry of judgment on the verdict, the court
15 shall direct that ~~an amount equal to the amount of medical~~
16 ~~assistance given~~ any damages awarded for past medical expenses be
17 withheld and paid ~~over~~ directly to the ~~Department of Health and~~
18 ~~Human Resources~~ department, not to exceed the amount of past
19 medical expenses paid by the department on behalf of the medical
20 assistance recipient.

21 (g) Attorney's fees. Irrespective of whether ~~the case be~~ an
22 action or claim is terminated by judgment or by settlement without
23 trial, from the amount required to be paid to the ~~Department of~~

1 ~~Health and Human Resources~~ department there shall be deducted the
2 attorney fees attributable to such amount in accordance with and in
3 proportion to the fee arrangement made between the recipient and
4 his or her attorney of record so that the department shall bear the
5 pro rata portion of such attorney fees: ~~Nothing in this section~~
6 ~~shall preclude any person who has received medical assistance from~~
7 ~~settling any cause of action which he or she may have against~~
8 ~~another person and delivering to the Department of Health and Human~~
9 ~~Resources, from the proceeds of such settlement, the sums received~~
10 ~~by him or her from the department or paid by the department for his~~
11 ~~or her medical assistance. If such other person is aware of or has~~
12 ~~been informed of the interest of the Department of Health and Human~~
13 ~~Resources in the matter, it shall be the duty of the person to~~
14 ~~whose benefit the release inures to withhold so much of the~~
15 ~~settlement as may be necessary to reimburse the department to the~~
16 ~~extent of its interest in the settlement. No judgment, award of or~~
17 ~~settlement in any action or claim by a medical assistance recipient~~
18 ~~to recover damages for injuries, disease or disability, in which~~
19 ~~the Department of Health and Human Resources has interest, shall be~~
20 ~~satisfied without first giving the department notice and reasonable~~
21 ~~opportunity to establish its interest. The department shall have~~
22 ~~sixty days from receipt of such written notice to advise the~~
23 ~~recipient or his or her representative in writing of the~~

1 ~~department's desire to establish its interest through the~~
2 ~~assignment. If no such written intent is received within the~~
3 ~~sixty-day period, then the recipient may proceed and in the event~~
4 ~~of full recovery forward to the department the portion of the~~
5 ~~recovery proceeds less the department's share of attorney's fees~~
6 ~~and costs expended in the matter. In the event of less than full~~
7 ~~recovery the recipient and the department shall agree as to the~~
8 ~~amount to be paid to the department for its claim. If Provided,~~
9 ~~That if there is no recovery, the department shall under no~~
10 ~~circumstances be liable for any costs or attorney's fees expended~~
11 ~~in the matter. If, after being notified in writing of a subrogation~~
12 ~~claim and possible liability of the recipient, guardian, attorney~~
13 ~~or personal representative for failure to subrogate the department,~~
14 ~~a recipient, his or her guardian, attorney or personal~~
15 ~~representative disposes of the funds representing the judgment,~~
16 ~~settlement or award, without the written approval of the~~
17 ~~department, that person shall be liable to the department for any~~
18 ~~amount that, as a result of the disposition of the funds, is not~~
19 ~~recoverable by the department. In the event that a controversy~~
20 ~~arises concerning the subrogation claims by the department, an~~
21 ~~attorney shall interplead, pursuant to rule twenty-two of the Rules~~
22 ~~of Civil Procedure, the portion of the recipient's settlement that~~
23 ~~will satisfy the department exclusive of attorney's fees and costs~~

1 ~~regardless of any contractual arrangement between the client and~~
2 ~~the attorney.~~

3 ~~(c)~~ (h) Class actions and multiple plaintiff actions not
4 authorized. Nothing contained herein shall authorize the
5 ~~Department of Health and Human Resources~~ department to institute a
6 class action or multiple plaintiff action against any manufacturer,
7 distributor or vendor of any product to recover medical care
8 expenditures paid for by the Medicaid program.

9 (i) Secretary's authority. The secretary may compromise,
10 settle and execute a release of any claim relating to the
11 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.