

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

House Bill 4697

BY DELEGATE SOBONYA

[Introduced February 23, 2016; Referred
to the Committee on the Judiciary.]

1 A BILL to amend and reenact §9-5-11 of the Code of West Virginia, 1931, as amended, relating
 2 to the right of the Department of Health and Human Resources to subrogation to a
 3 settlement by a recipient of assistance under the Medicaid Program for third-party liability;
 4 and providing that a settlement in the aggregate that does not exceed \$20,000 is exempt
 5 from the provisions of this section.

Be it enacted by the Legislature of West Virginia:

1 That §9-5-11 of the Code of West Virginia, 1931, as amended, be amended and reenacted
 2 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 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 an individual or entity that is alleged to be liable to pay all or part
 9 of the costs of a recipient's medical treatment and medical-related services for personal injury,
 10 disease, illness or disability, as well as any entity including, but not limited to, a business
 11 organization, health service organization, insurer, or public or private agency acting by or on
 12 behalf of the allegedly liable third-party.

13 (b) *Assignment of rights.*—

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

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

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

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

25 (5) The department shall be legally subrogated to the rights of the recipient against the
26 third party: Provided, That any settlement by a recipient with one or more third-parties which
27 would otherwise fully resolve the recipient's claim for an aggregate amount that does not exceed
28 \$20,000 from any individual third party is exempt from the provisions of this section.

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

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

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

36 (1) A recipient's legal representative shall provide notice to the department within 60 days
37 of asserting a claim against a third party. If the claim is asserted in a formal civil action, the
38 recipient's legal representative shall notify the department within sixty days of service of the

39 complaint and summons upon the third party by causing a copy of the summons and a copy of
40 the complaint to be served on the department as though it were named a party defendant.

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

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

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

52 (d) *Notice of settlement requirement.*—

53 (1) A recipient or his or her representative shall notify the department of a settlement with
54 a third-party and retain in escrow an amount equal to the amount of the subrogation lien asserted
55 by the department. The notification shall include the amount of the settlement being allocated for
56 past medical expenses paid for by the Medicaid program. Within thirty days of the receipt of any
57 such notice, the department shall notify the recipient of its consent or rejection of the proposed
58 allocation. If the department consents, the recipient or his or her legal representation shall issue
59 payment out of the settlement proceeds in a manner directed by the secretary or his or her
60 designee within thirty days of consent to the proposed allocation.

61 (2) If the total amount of the settlement is less than the department's subrogation lien, then
62 the settling parties shall obtain the department's consent to the settlement before finalizing the
63 settlement. The department shall advise the parties within thirty days and provide a detailed
64 itemization of all past medical expenses paid by the department on behalf of the recipient for

65 which the department seeks reimbursement out of the settlement proceeds.

66 (3) If the department rejects the proposed allocation, the department shall seek a judicial
67 determination within thirty days and provide a detailed itemization of all past medical expenses
68 paid by the department on behalf of the recipient for which the department seeks reimbursement
69 out of the settlement proceeds.

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

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

79 ~~(4) Any settlement by a recipient with one or more third parties which would otherwise fully~~
80 ~~resolve the recipient's claim for an amount collectively not to exceed \$20,000 shall be exempt~~
81 ~~from the provisions of this section.~~

82 ~~(5)~~ (4) Nothing herein prevents a recipient from seeking judicial intervention to resolve any
83 dispute as to allocation prior to effectuating a settlement with a third party.

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

88 (f) *Penalty for failure to notify the department.*— A legal representative acting on behalf of
89 a recipient or third party that fails to comply with the provisions of this section is liable to the
90 department for all reimbursement amounts the department would otherwise have been entitled to

91 collect pursuant to this section but for the failure to comply. Under no circumstances may a pro
92 se recipient be penalized for failing to comply with the provisions of this section.

93 (g) *Miscellaneous provisions relating to trial.*—

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

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

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

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

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

114 (j) *Secretary's authority.* — The secretary or his or her designee may compromise, settle
115 and execute a release of any claim relating to the department's right of subrogation, in whole or
116 in part.

NOTE: The purpose of this bill is to .affirm the right of the Department of Health and Human Resources to subrogation for third-party liability settlements, by recipients who receive assistance under the Medicaid Program. The bill provides that a settlement in the aggregate that does not exceed \$20,000 is exempt from the provisions of this section.

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