

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 623

BY SENATORS TAKUBO, MARONEY, GAUNCH, AND BOSO

[Introduced February 19, 2018; Referred
to the Committee on Health and Human Resources]

1 A BILL 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 harmonizing subrogation law with recent changes to federal laws by removing restrictions
 4 on amounts subject to recovery by the department; adding certain insurance coverage as
 5 subject to subrogation; removing all provisions relating to allocation for medical expenses
 6 in a judgment or settlement; permitting negotiation to reduce amount of department's
 7 claim; 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 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. "Third party" also includes any insurer that may be liable

13 under an uninsured or underinsured motorist policy covering the injuries to the recipient.

14 (b) *Assignment of rights.*

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

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

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

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

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

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

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

34 (c) ~~Notice requirement for claims and civil actions~~ Secretary's authority to intervene and
35 to settle.

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 60 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 60 days of receipt of a claim or within 30 days of receipt of information or~~
44 ~~documentation reflecting the recipient is receiving Medicaid benefits, whichever is later in time~~

45 ~~(3) (1) 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 30 days of~~
50 ~~receipt of notice of the claim. The department shall provide related supplements in a timely~~
51 ~~manner, but no later than 15 days after receipt of a request for same~~

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

55 ~~(d) *Notice of settlement requirement.*~~

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

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 ~~(2) 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 30 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 (3) If the department rejects the proposed allocation, the ~~department~~ recipient or his or her
72 legal representative shall seek a judicial determination within 30 days ~~and provide a detailed~~
73 ~~itemization of all past medical expenses paid by the department on behalf of the recipient for~~
74 ~~which the department seeks reimbursement out of the settlement proceeds~~ regarding the
75 appropriateness of the proposed settlement in the court in which the action is then pending or, in
76 the event no such action is pending, in any court in which the recipient could have filed such
77 action for damages.

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

83 (B) The ~~department~~ recipient shall have the burden of proving by a preponderance of the
84 evidence that the allocation agreed to by the parties ~~was improper. For purposes of appeal, the~~
85 is proper. The trial court shall give due consideration to the department's interests in maximizing
86 recovery for purposes of the operation of the Medicaid program. The trial court's decision should
87 be set forth in a detailed order containing the requisite findings of fact and conclusions of law to
88 support its rulings.

89 ~~(4)~~ (3) Any settlement by a recipient with one or more third-parties which would otherwise
90 fully resolve the recipient's claim for an amount collectively not to exceed \$20,000 \$500 shall be

91 exempt from the provisions of this section.

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

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

98 ~~(f) (e) *Penalty for failure to notify the department.* A legal representative acting on behalf~~
99 ~~of a recipient or third party that fails to comply with the provisions of this section is liable to the~~
100 ~~department for all reimbursement amounts the department would otherwise have been entitled to~~
101 ~~collect pursuant to this section but for the failure to comply full amount of the department's~~
102 ~~subrogation lien. Under no circumstances may a pro se recipient be penalized for failing to comply~~
103 ~~with the provisions of this section.~~

104 ~~(g) (f) *Miscellaneous provisions relating to trial.*~~

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

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

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

114 ~~(h) (g) *Attorneys' fees.* Irrespective of whether an action or claim is terminated by judgment~~
115 ~~or settlement without trial, from the amount required to be paid to the department there shall be~~
116 ~~deducted the reasonable costs and attorneys' fees attributable to the amount in accordance with~~

117 and in proportion to the fee arrangement made between the recipient and his or her attorney of
118 record so that the department shall bear the pro rata share of the reasonable costs and attorneys'
119 fees: *Provided*, That if there is no recovery, the department shall under no circumstances be liable
120 for any costs or attorneys' fees expended in the matter.

121 ~~(h)~~ (h) *Class actions and multiple plaintiff actions not authorized.* Nothing in this article shall
122 authorize the department to institute a class action or multiple plaintiff action against any
123 manufacturer, distributor or vendor of any product to recover medical care expenditures paid for
124 by the Medicaid program.

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

128 (j) Effective Date. - The amendments to this section enacted during the 2018 regular
129 session of the West Virginia Legislature are effective with respect to claims against third parties
130 arising on or after July 1, 2018.

NOTE: The purpose of this bill is to harmonize Medicaid subrogation law with recent changes to federal laws by removing restrictions on amounts subject to recovery by the department.

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