

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4392

BY DELEGATES ELLINGTON, HANSHAW, HOUSEHOLDER,

SHOTT AND SUMMERS

[Introduced February 1, 2018; Referred
to the Committee on Health and Human Resources
then the Judiciary.]

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; 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 out of any payments made to
29 the recipient for past medical expenses before the recipient can recover any of his or her own
30 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.*

35 (1) A recipient's legal representative shall provide notice to the department within 60 days
36 of asserting a claim against a third party. If the claim is asserted in a formal civil action, the
37 recipient's legal representative shall notify the department within 60 days of service of the
38 complaint and summons upon the third party by causing a copy of the summons and a copy of
39 the complaint to be served on the department as though it were named a party defendant.

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 (d) *Notice of settlement requirement.*

52 (1) A recipient or his or her representative shall notify the department of a settlement with
53 a third-party and retain in escrow an amount equal to the amount of the subrogation lien asserted
54 by the department. ~~The notification shall include the amount of the settlement being allocated for~~
55 ~~past medical expenses paid for by the Medicaid program. Within 30 days of the receipt of any~~
56 ~~such notice, the department shall notify the recipient of its consent or rejection of the proposed~~
57 ~~allocation. If the department consents, the recipient or his or her legal representation shall issue~~
58 ~~payment out of the settlement proceeds in a manner directed by the secretary or his or her~~
59 ~~designee within 30 days of consent to the proposed allocation~~

60 (2) If the total amount of the settlement is less than the department's subrogation lien, then
61 the settling parties shall obtain the department's consent to the settlement before finalizing the
62 settlement. The department shall advise the parties within 30 days and provide a detailed
63 itemization of all past medical expenses paid by the department on behalf of the recipient for
64 which the department seeks reimbursement out of the settlement proceeds.

65 ~~(3) If the department rejects the proposed allocation, the department shall seek a judicial~~

66 ~~determination within 30 days and provide a detailed itemization of all past medical expenses paid~~
67 ~~by the department on behalf of the recipient for which the department seeks reimbursement out~~
68 ~~of the settlement proceeds.~~

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

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

78 ~~(4) (3) Any settlement by a recipient with one (3) or more third-parties which would otherwise~~
79 ~~fully resolve the recipient's claim for an amount collectively not to exceed \$20,000 shall be exempt~~
80 ~~from the provisions of this section.~~

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

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

87 ~~(f) (e) *Penalty for failure to notify the department.* A legal representative acting on behalf~~
88 ~~of a recipient or third party that fails to comply with the provisions of this section is liable to the~~
89 ~~department for all reimbursement amounts the department would otherwise have been entitled to~~
90 ~~collect pursuant to this section but for the failure to comply. Under no circumstances may a pro~~
91 ~~se recipient be penalized for failing to comply with the provisions of this section.~~

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

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

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

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

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

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

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

116 (j) *Effective Date.* - The amendments to this section enacted during the 2018 regular
117 session of the West Virginia Legislature shall be effective with respect to claims against third

118 parties 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.