

E N R O L L E D

COMMITTEE SUBSTITUTE

for

H. B. 2512

(BY MR. SPEAKER, (MR. THOMPSON)

AND DELEGATE ARMSTEAD)

[Passed April 12, 2013; in effect ninety days from passage.]

AN ACT to amend and reenact §9-5-11 of the Code of West Virginia, 1931, as amended, all relating to state Medicaid subrogation; establishing definitions; establishing recipient assignment of subrogation rights against third parties; excluding Medicare benefits from assignment; authorizing release of information; prioritizing the department's subrogation right; establishing notice requirements for third party claims, civil actions and settlements; permitting the department to enter appearance in an action against a third party; establishing penalties for failure to notify the department; requiring consent to settle; establishing procedures for agreed allocation of award or judgment proceeds from third parties; establishing procedures when allocation is disputed;

establishing procedures for jury trial; establishing post-trial payment procedures; establishing allocation of attorneys fees; prohibiting certain class actions and multiple plaintiff actions; and authorizing authority to settle.

Be it enacted by the Legislature of West Virginia:

That §9-5-11 of the Code of West Virginia, 1931, as amended, be amended and reenacted 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
2 otherwise requires:

3 (1) “Bureau” means the Bureau for Medical Services.

4 (2) “Department” means the West Virginia Department of
5 Health and Human Resources, or its contracted designee.

6 (3) “Recipient” means a person who applies for and receives
7 assistance under the Medicaid Program.

8 (4) “Secretary” means the Secretary of the Department of
9 Health and Human Resources.

10 (5) “Third-party” means an individual or entity that is
11 alleged to be liable to pay all or part of the costs of a recipient’s
12 medical treatment and medical-related services for personal
13 injury, disease, illness or disability, as well as any entity

14 including, but not limited to, a business organization, health
15 service organization, insurer, or public or private agency acting
16 by or on behalf of the allegedly liable third-party.

17 (b) *Assignment of rights.*—

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

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

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

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

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

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

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

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

46 (1) A recipient's legal representative shall provide notice to
47 the department within 60 days of asserting a claim against a third
48 party. If the claim is asserted in a formal civil action, the
49 recipient's legal representative shall notify the department within
50 60 days of service of the complaint and summons upon the third
51 party by causing a copy of the summons and a copy of the
52 complaint to be served on the department as though it were
53 named a party defendant.

54 (2) If the recipient has no legal representative and the third
55 party knows or reasonably should know that a recipient has no
56 representation then the third party shall provide notice to the
57 department within sixty days of receipt of a claim or within
58 thirty days of receipt of information or documentation reflecting
59 the recipient is receiving medicaid benefits, whichever is later in
60 time.

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

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

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

72 (1) A recipient or his or her representative shall notify the
73 department of a settlement with a third-party and retain in
74 escrow an amount equal to the amount of the subrogation lien
75 asserted by the department. The notification shall include the
76 amount of the settlement being allocated for past medical

77 expenses paid for by the Medicaid program. Within 30 days of
78 the receipt of any such notice, the department shall notify the
79 recipient of its consent or rejection of the proposed allocation. If
80 the department consents, the recipient or his or her legal
81 representation shall issue payment out of the settlement proceeds
82 in a manner directed by the Secretary or his or her designee
83 within 30 days of consent to the proposed allocation.

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

92 (3) If the department rejects the proposed allocation, the
93 department shall seek a judicial determination within 30 days
94 and provide a detailed itemization of all past medical expenses
95 paid by the department on behalf of the recipient for which the
96 department seeks reimbursement out of the settlement proceeds.

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

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

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

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

117 (e) *Department failure to respond to notice of settlement.*—
118 If the department fails to appropriately respond to a notification
119 of settlement, the amount to which the department is entitled to
120 be paid from the settlement shall be limited to the amount of the
121 settlement the recipient has allocated toward past medical
122 expenses.

123 (f) *Penalty for failure to notify the department.*— A legal
124 representative acting on behalf of a recipient or third party that
125 fails to comply with the provisions of this section is liable to the
126 department for all reimbursement amounts the department would
127 otherwise have been entitled to collect pursuant to this section
128 but for the failure to comply. Under no circumstances may a pro
129 se recipient be penalized for failing to comply with the
130 provisions of this section.

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

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

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

139 (3) Upon the entry of judgment on the verdict, the court
140 shall direct that upon satisfaction of the judgment any damages

141 awarded for past medical expenses be withheld and paid directly
142 to the department, not to exceed the amount of past medical
143 expenses paid by the department on behalf of the recipient.

144 (h) *Attorneys' fees.*— Irrespective of whether an action or
145 claim is terminated by judgment or settlement without trial, from
146 the amount required to be paid to the department there shall be
147 deducted the reasonable costs and attorneys' fees attributable to
148 the amount in accordance with and in proportion to the fee
149 arrangement made between the recipient and his or her attorney
150 of record so that the department shall bear the pro-rata share of
151 the reasonable costs and attorneys' fees: *Provided*, that if there
152 is no recovery, the department shall under no circumstances be
153 liable for any costs or attorneys' fees expended in the matter.

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

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

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, House Committee

Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within _____ this the _____
day of _____, 2013.

Governor

