

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

House Bill 4392

BY DELEGATES ELLINGTON, HANSHAW, HOUSEHOLDER,

SHOTT AND SUMMERS

[Reported February 23, 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 extending the definition of a liable “third-party” to include certain insurers; establishing
4 notice requirements for claims and civil actions; providing authority for the secretary to
5 negotiate and incentivize Medicaid members to prosecute lawsuits against liable third
6 parties; requiring department authorization before finalizing settlement in certain
7 circumstances; establishing the notice, procedure and consent requirements for
8 settlement allocation; establishing procedure in the event the department rejects the
9 proposed allocation; establishing the burden of proof regarding allocation dispute
10 proceedings in court; requiring the trial court to consider the department’s interests in
11 maximizing recovery for purposes of the operation of the Medicaid program in an
12 allocation dispute; where a final subrogation lien is less than \$1,500 those matters are
13 exempt from the provisions of this section; modifying the penalty for failure of recipient’s
14 legal representative to notify the department to include interest, 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

9 (A) An individual or entity that is alleged to be liable to pay all or part of the costs of a
10 recipient's medical treatment and medical-related services for personal injury, disease, illness or
11 disability, as well as any entity including, but not limited to, a business organization, health service
12 organization, insurer, or public or private agency acting by or on behalf of the allegedly liable third-
13 party; and,

14 "Any insurer that may be liable under an uninsured or underinsured motorist policy
15 covering the injuries to the recipient.

16 (b) *Assignment of rights.*

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

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

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

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

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

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

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

36 (c) *Notice requirement for claims and civil actions, Secretary's authority to intervene and*
37 *to settle.*

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

43 (2) If the recipient has no legal representative and the third party knows or reasonably
44 should know that a recipient has no representation then the third party shall provide notice to the
45 department within 60 days of receipt of a claim or within 30 days of receipt of information or
46 documentation reflecting the recipient is receiving Medicaid benefits, whichever is later in time.

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

50 (4) The department shall provide the recipient and the third party, if the recipient is without
51 legal representation, notice of the amount of the purported subrogation lien within 30 days of
52 receipt of notice of the claim. The department shall provide related supplements in a timely
53 manner, but no later than 15 days after receipt of a request for same.

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

57 (d) *Notice of settlement requirement.*

58 (1) A recipient or his or her representative shall notify the department of a settlement with
59 a third-party and retain in escrow an amount equal to the amount of the subrogation lien asserted
60 by the department. The notification shall include the amount of the settlement being allocated for
61 past medical expenses paid for by the Medicaid program. ~~Within 30 days of the receipt of any~~
62 ~~such notice, the department shall notify the recipient of its consent or rejection of the proposed~~
63 ~~allocation. If the department consents, the recipient or his or her legal representation shall issue~~
64 ~~payment out of the settlement proceeds in a manner directed by the secretary or his or her~~
65 ~~designee within 30 days of consent to the proposed allocation.~~ The settling parties shall obtain
66 the department's consent before finalizing a settlement, unless, the amount of the settlement is
67 sufficient to fully reimburse the amount of the Department's subrogation lien.

68 (2) Within 30 days of the receipt of any such notice of a proposed settlement, the
69 department shall notify the recipient of its consent or rejection of the proposed allocation. If the
70 department consents, the recipient or his or her legal representation shall issue payment out of
71 the settlement proceeds in a manner directed by the secretary or his or her designee within 30
72 days of consent to the proposed allocation.

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

78 (4) If the department rejects the proposed allocation, the ~~department~~ recipient or his or her
79 legal representative shall seek a judicial determination within 30 days and ~~provide a detailed~~

80 ~~itemization of all past medical expenses paid by the department on behalf of the recipient for~~
81 ~~which the department seeks reimbursement out of the settlement proceeds~~ regarding the
82 appropriateness of the proposed settlement in the court in which the action is then pending or, in
83 the event no such action is pending, in any court in which the recipient could have filed such
84 action for damages.

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

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

96 ~~(4) (5) Any settlement by a recipient with one or more third parties which would otherwise~~
97 ~~fully resolve the recipient's claim for an amount collectively~~ If the amount of the Department's final
98 subrogation lien does not exceed \$1,500 the settlement ~~not to exceed \$20,000~~ ~~\$500~~ shall be
99 exempt from the provisions of this section.

100 ~~(5) (6)~~ Nothing herein prevents a recipient from seeking judicial intervention to resolve any
101 dispute as to allocation prior to effectuating a settlement with a third party.

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

106 (f) *Penalty for failure to notify the department.* A legal representative acting on behalf of a
107 recipient or third party that fails to comply with the provisions of this section is liable to the
108 department for all reimbursement amounts the department would otherwise have been entitled to
109 collect pursuant to this section but for the failure to comply, plus interest at the legal rate from the
110 date of the settlement. ~~full amount of the department's subrogation lien.~~ Under no circumstances
111 may a pro se recipient be penalized for failing to comply with the provisions of this section.

112 (g) *Miscellaneous provisions relating to trial.*

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

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

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

122 (h) *Attorneys' fees.* Irrespective of whether an action or claim is terminated by judgment
123 or settlement without trial, from the amount required to be paid to the department there shall be
124 deducted the reasonable costs and attorneys' fees attributable to the amount in accordance with
125 and in proportion to the fee arrangement made between the recipient and his or her attorney of
126 record so that the department shall bear the pro-rata share of the reasonable costs and attorneys'
127 fees: *Provided*, That if there is no recovery, the department shall under no circumstances be liable
128 for any costs or attorneys' fees expended in the matter.

129 (i) *Class actions and multiple plaintiff actions not authorized.* Nothing in this article shall
130 authorize the department to institute a class action or multiple plaintiff action against any

131 manufacturer, distributor or vendor of any product to recover medical care expenditures paid for
132 by the Medicaid program.

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

136 (k) *Effective Date.* — The amendments to this section enacted during the 2018 regular
137 session of the West Virginia Legislature shall be effective with respect to claims against third
138 parties arising on or after July 1, 2018.