

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 4573

BY DELEGATE HILL

[Passed March 7, 2020; in effect ninety days from passage.]

1 AN ACT 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; providing a priority right to the department for subrogation payments; requiring
7 department authorization before finalizing a settlement in certain circumstances;
8 establishing notice, procedure and consent requirements for settlement allocation; setting
9 forth the procedure when the department rejects a settlement allocation; establishing the
10 burden of proof for allocation dispute proceedings; requiring a trial court to consider the
11 department’s interests in maximizing recovery in an allocation dispute; requiring a trial
12 court to issue findings of fact and conclusions of law; exempting from this section a final
13 subrogation lien of less than \$1,500; modifying the penalty for failure of recipient’s legal
14 representative to notify the department to include interest; and establishing an effective
15 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 “Bureau” means the Bureau for Medical Services.

3 “Department” means the West Virginia Department of Health and Human Resources, or
4 its contracted designee.

5 “Recipient” means a person who applies for and receives assistance under the Medicaid
6 Program.

7 “Secretary” means the Secretary of the Department of Health and Human Resources.

8 “Third party” means:

9 (1) 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 (2) 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 out of any payments made to
31 the recipient for past medical expenses before the recipient can recover any of his or her own
32 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.

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 (5) When determined by the department to be cost effective, the secretary or his or her
52 designee may, in his or her discretion, negotiate for a reduction in the lien.

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

54 (1) A recipient or his or her representative shall notify the department of a settlement with
55 a third party and retain in escrow an amount equal to the amount of the subrogation lien asserted

56 by the department. The notification shall include the amount of the settlement being allocated for
57 past medical expenses paid for by the Medicaid program.

58 (2) Within 30 days of the receipt of any such notice of a proposed settlement, the
59 department shall notify the recipient of its consent or rejection of the proposed allocation. If the
60 department consents, the recipient or his or her legal representative shall issue payment out of
61 the settlement proceeds in a manner directed by the secretary or his or her designee within 30
62 days of consent to the proposed allocation.

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

68 (4) If the department rejects the proposed allocation, the recipient or his or her legal
69 representative shall seek a judicial determination within 30 days regarding the appropriateness of
70 the proposed settlement in the court in which the action is then pending or, in the event no such
71 action is pending, in any court in which the recipient could have filed such action for damages.

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

77 (B) The department shall have the burden to prove by a preponderance of the evidence
78 the amount of its subrogation lien, and the recipient shall have the burden of proving by a
79 preponderance of the evidence that the allocation agreed to by the parties is proper. The trial
80 court shall give due consideration to the department's interests in being fairly reimbursed for
81 purposes of the operation of the Medicaid program. The trial court's decision should be set forth

82 in a detailed order containing the requisite findings of fact and conclusions of law to support its
83 rulings.

84 (5) If the amount of the department's final subrogation lien does not exceed \$1,500, the
85 settlement shall be exempt from the provisions of this section.

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

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

92 (f) *Penalty for failure to notify the department.* — A legal representative acting on behalf
93 of a recipient or third party that fails to comply with the provisions of this section is liable to the
94 department for all reimbursement amounts the department would otherwise have been entitled to
95 collect pursuant to this section but for the failure to comply, plus interest at the legal rate from the
96 date of the settlement. Under no circumstances may a pro se recipient be penalized for failing to
97 comply with the provisions of this section.

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

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

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

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

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

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

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

122 (k) *Effective Date.* — The amendments to this section enacted during the 2020 regular
123 session of the West Virginia Legislature shall be effective with respect to claims against third
124 parties arising on or after July 1, 2020.

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

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Chairman, House Committee

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Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

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Clerk of the House of Delegates

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Clerk of the Senate

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Speaker of the House of Delegates

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President of the Senate

The within this the.....
day of, 2020.

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Governor