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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1995



# ENROLLED

Com. Sub. For  
HOUSE BILL No. 2578

(By ~~Delegate~~ *Mr. Speaker, Mr. Chambers,  
and Delegate Ashley*)  
*[By Request of the Executive]*

Passed March 11, 1995

In Effect Ninety Days From Passage



**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR

**H. B. 2578**

(BY MR. SPEAKER, MR. CHAMBERS, AND DELEGATE ASHLEY)  
[By Request of the Executive]

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[Passed March 11, 1995; in effect ninety days from passage.]

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AN ACT to amend and reenact section two, article one, chapter nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections eleven and eleven-a, article five of said chapter; and to further amend said article by adding thereto a new section, designated section eleven-c, all relating to definitions, assignment of rights, right of assignment to department of health and human resources to rights of recipients of medical assistance in certain cases, designation of damages in certain cases, requirement that department provide notice to perfect assignment, and right of the department of health and human resources to recover from the estates of recipients of medical assistance.

*Be it enacted by the Legislature of West Virginia:*

That section two, article one, chapter nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections eleven and eleven-a, article five of said chapter be amended and reenacted; and that article

five of said chapter be further amended by adding thereto a new section, designated as section eleven-c, all to read as follows:

**ARTICLE 1. LEGISLATIVE PURPOSE AND DEFINITIONS.**

**§9-1-2. Definitions.**

1 The following words and terms when used in this  
2 chapter shall have the meaning hereafter ascribed to them  
3 unless the context clearly indicates a different meaning,  
4 and any amendment of this section shall apply to any  
5 verdict, settlement, compromise or judgment entered after  
6 the effective date of the amendments to this section  
7 enacted during the regular session of the Legislature, one  
8 thousand nine hundred ninety-five.

9 (a) The term "department" means the state division of  
10 human services.

11 (b) The term "commissioner" means the commissioner  
12 of human services.

13 (c) The term "federal-state assistance" means and  
14 includes (1) all forms of aid, care, assistance and services  
15 to or on behalf of persons, which are authorized by, and  
16 who are authorized to receive the same under and by  
17 virtue of, subchapters one, four, five, ten, fourteen, sixteen,  
18 eighteen and nineteen, chapter seven, Title 42, United  
19 States Code, as those subchapters have heretofore been  
20 and may hereafter be amended, supplemented and revised  
21 by acts of Congress, and as those subchapters so amended,  
22 supplemented and revised have heretofore been and may  
23 hereafter be supplemented by valid rules and regulations  
24 promulgated by authorized federal agents and agencies,  
25 and as those subchapters so amended, supplemented and  
26 revised have heretofore been and may hereafter be  
27 supplemented by rules and regulations promulgated by  
28 the state division of human services, which division rules  
29 and regulations shall be consistent with federal laws, rules  
30 and regulations, but not inconsistent with state law, and (2)  
31 all forms of aid, care, assistance and services to persons,  
32 which are authorized by, and who are authorized to

33 receive the same under and by virtue of, any act of  
34 Congress, other than the federal Social Security Act, as  
35 amended, for distribution through the state division of  
36 human services to recipients of any form of aid, care,  
37 assistance and services to persons designated or referred to  
38 in (1) of this definition and to recipients of state assistance,  
39 including by way of illustration, surplus food and food  
40 stamps, which Congress has authorized the secretary of  
41 agriculture of the United States to distribute to needy  
42 persons.

43 (d) The term "federal assistance" means and includes  
44 all forms of aid, care, assistance and services to or on  
45 behalf of persons, which are authorized by, and who are  
46 authorized to receive the same under and by virtue of, any  
47 act of Congress for distribution through the state division  
48 of human services, the cost of which is paid entirely out of  
49 federal appropriations.

50 (e) The term "state assistance" means and includes all  
51 forms of aid, care, assistance, services and general relief  
52 made possible solely out of state, county and private  
53 appropriations to or on behalf of indigent persons, which  
54 are authorized by, and who are authorized to receive the  
55 same under and by virtue of, state division of human  
56 services' rules and regulations.

57 (f) The term "welfare assistance" means the three  
58 classes of assistance administered by the state division of  
59 human services, namely: Federal-state assistance, federal  
60 assistance and state assistance.

61 (g) The term "indigent person" means any person who  
62 is domiciled in this state and who is actually in need as  
63 defined by department rules and regulations and has not  
64 sufficient income or other resources to provide for such  
65 need as determined by the state division of human  
66 services.

67 (h) The term "domiciled in this state" means being  
68 physically present in West Virginia accompanied by an  
69 intention to remain in West Virginia for an indefinite

70 period of time, and to make West Virginia his or her  
71 permanent home. The state division of human services  
72 may by rules and regulations supplement the foregoing  
73 definition of the term "domiciled in this state", but not in  
74 such a manner as would be inconsistent with federal laws,  
75 rules, and regulations applicable to and governing  
76 federal-state assistance.

77 (i) The term "medical services" means medical,  
78 surgical, dental and nursing services, and other remedial  
79 services recognized by law, in the home, office, hospital,  
80 clinic and any other suitable place, provided or prescribed  
81 by persons permitted or authorized by law to give such  
82 services; such services to include drugs and medical  
83 supplies, appliances, laboratory, diagnostic and therapeutic  
84 services, nursing home and convalescent care and such  
85 other medical services and supplies as may be prescribed  
86 by such persons.

87 (j) The term "general relief" means cash or its  
88 equivalent in services or commodities expended for care  
89 and assistance to an indigent person other than for care in  
90 a county infirmary, child shelter or similar institution.

91 (k) The term "secretary" means the secretary of the  
92 department of health and human resources.

93 (l) The term "estate" means all real and personal  
94 property and other assets included within the individual's  
95 estate as defined in the state's probate law.

96 (m) The term "services" means nursing facility  
97 services, home and community-based services, and related  
98 hospital and prescription drug services for which an  
99 individual received medicaid medical assistance.

**ARTICLE 5. MISCELLANEOUS PROVISIONS.**

**§9-5-11. Assignment of rights; right of subrogation by  
department of health and human resources to the  
rights of recipients of medical assistance; rules as  
to effect of subrogation.**

1 (a) Submission of an application to the department of  
2 health and human resources for medical assistance is, as a  
3 matter of law, an assignment of the right of the applicant  
4 or legal representative thereof, to recovery from personal  
5 insurance or other sources, including, but not limited to,  
6 liable third parties, to the extent of the cost of medical ~~are~~ ✓  
7 services paid for by the medicaid program. This assign-  
8 ment of rights does not extend to medicare benefits.

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9 At the time the application is made, the Department  
10 shall include a statement along with such application that  
11 explains that the applicant has assigned all such rights and  
12 the legal implications of making such assignment as  
13 provided in this section.

14 If medical assistance is paid or will be paid to a  
15 provider of medical care on behalf of a recipient of  
16 medical assistance because of any sickness, injury, disease  
17 or disability, and another person is legally liable for such  
18 expense, either pursuant to contract, negligence or  
19 otherwise, the department of health and human resources  
20 shall have a right to recover full reimbursement from any  
21 award or settlement for such medical assistance from such  
22 other person, or from the recipient of such assistance if he  
23 has been reimbursed by the other person. The department  
24 shall be legally assigned the rights of the recipient against  
25 the person so liable, but only to the extent of the  
26 reasonable value of the medical assistance paid and  
27 attributable to the sickness, injury, disease or disability for  
28 which the recipient has received damages. When an action  
29 or claim is brought by a medical assistance recipient or by  
30 someone on his or her behalf against a third party who  
31 may be liable for the injury, disease, disability or death of  
32 a medical assistance recipient, any settlement, judgment or  
33 award obtained is subject to the claim of the department of  
34 health and human resources for reimbursement of an  
35 amount sufficient to reimburse the department the full  
36 amount of benefits paid on behalf of the recipient under  
37 the medical assistance program for the injury, disease,  
38 disability or death of the medical assistance recipient. The

39 claim of the department of health and human resources  
40 assigned by such recipient shall not exceed the amount of  
41 medical expenses for the injury, disease, disability or death  
42 of the recipient paid by the department on behalf of the  
43 recipient. The right of subrogation created in this section  
44 includes all portions of the cause of action, by either  
45 settlement, compromise, judgment or award, notwithstand-  
46 ing any settlement allocation or apportionment that  
47 purports to dispose of portions of the cause of action not  
48 subject to the subrogation. Any settlement, compromise,  
49 judgment or award that excludes or limits the cost of  
50 medical services or care shall not preclude the department  
51 of health and human resources from enforcing its rights  
52 under this section. The secretary may compromise, settle  
53 and execute a release of any such claim in whole or in  
54 part.

55 (b) Nothing in this section shall be construed so as to  
56 prevent the recipient of medical assistance from  
57 maintaining an action for injuries received by him against  
58 any other person and from including therein, as part of  
59 the compensatory damages sought to be recovered, the  
60 amount or amounts of his or her medical expenses, even  
61 though such person received medical assistance in the  
62 payment of such medical expenses, in whole or in part.

63 If the action be tried by a jury, the jury shall not be  
64 informed as to the interest of the department of health and  
65 human resources, if any, and such fact shall not be  
66 disclosed to the jury at any time. The trial judge shall,  
67 upon the entry of judgment on the verdict, direct that an  
68 amount equal to the amount of medical assistance given  
69 be withheld and paid over to the department of health and  
70 human resources. Irrespective of whether the case be  
71 terminated by judgment or by settlement without trial,  
72 from the amount required to be paid to the department of  
73 health and human resources there shall be deducted the  
74 attorney fees attributable to such amount in accordance  
75 with and in proportion to the fee arrangement made  
76 between the recipient and his or her attorney of record so

77 that the department shall bear the pro rata portion of such  
78 attorney fees. Nothing in this section shall preclude any  
79 person who has received medical assistance from settling  
80 any cause of action which he may have against another  
81 person and delivering to the department of health and  
82 human resources, from the proceeds of such settlement,  
83 the sums received by him or her from the department or  
84 paid by the department for his or her medical assistance.  
85 If such other person is aware of or has been informed of  
86 the interest of the department of health and human  
87 resources in the matter, it shall be the duty of the person to  
88 whose benefit the release inures to withhold so much of  
89 the settlement as may be necessary to reimburse the  
90 department to the extent of its interest in the settlement.  
91 No judgment, award of or settlement in any action or  
92 claim by a medical assistance recipient to recover damages  
93 for injuries, disease or disability, in which the department  
94 of health and human resources has interest, shall be  
95 satisfied without first giving the department notice and  
96 reasonable opportunity to establish its interest. The  
97 department shall have sixty days from receipt of such  
98 written notice to advise the recipient <sup>of</sup> ~~of~~ his or her  
99 representative in writing of the department's desire to  
100 establish its interest through the assignment. If no such  
101 written intent is received within the sixty-day period, then  
102 the recipient may proceed and in the event of full  
103 recovery forward to the department the portion of the  
104 recovery proceeds less the department's share of attorney's  
105 fees and costs expended in the matter. In the event of less  
106 than full recovery the recipient and the department shall  
107 agree as to the amount to be paid to the department for its  
108 claim. If there is no recovery the department shall under  
109 no circumstances be liable for any costs or attorneys fees  
110 expended in the matter. If, after being notified in writing  
111 of a subrogation claim and possible liability of the  
112 recipient, guardian, attorney or personal representative for  
113 failure to subrogate the department, a recipient, his or her  
114 guardian, attorney or personal representative disposes of  
115 the funds representing the judgment, settlement or award,  
116 without the written approval of the department, that person

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117 shall be liable to the department for any amount that, as a  
118 result of the disposition of the funds, is not recoverable by  
119 the department. In the event that a controversy arises  
120 concerning the subrogation claims by the department, an  
121 attorney shall interplead, pursuant to rule twenty-two of  
122 the rules of civil procedure, the portion of the recipient's  
123 settlement that will satisfy the department exclusive of  
124 attorneys fees and costs regardless of any contractual  
125 arrangement between the client and the attorney.

126 (c) Nothing contained herein shall authorize the  
127 department of health and human resources to institute a  
128 class action or multiple plaintiff action against any  
129 manufacturer, distributor or vendor of any product to  
130 recover medical care expenditures paid for by the  
131 medicaid program.

**§9-5-11a. Notice of action or claim.**

1 If either the medical assistance recipient or the  
2 department of health and human resources brings an  
3 action or claim against a third person, the recipient, his  
4 attorney or such department shall, within thirty days of  
5 filing the action, give to the other written notice of the  
6 action or claim by certified mail. This notice shall contain  
7 the name of the third person and the court in which the  
8 action is brought. If the department of health and human  
9 resources institutes said action, the notice shall advise the  
10 recipient of their right to bring such action in their own  
11 name, in which they may include as a part of their claim  
12 the sums claimed by such department. Proof of such  
13 notice shall be filed in said action subject to the notice and  
14 intent procedure as outlined in section eleven of this  
15 article. If an action or claim is brought by either the  
16 recipient or the department of health and human  
17 resources, the other may, at any time before trial, become  
18 a party to the action, or shall consolidate his action or  
19 claim with the other if brought independently: *Provided,*  
20 That this consolidation or entry as a party does not delay  
21 the proceedings.

**§9-5-11c. Right of the department of health and human resources to recover medical assistance.**

1 (a) Upon the death of a person who was fifty-five  
2 years of age or older at the time the person received  
3 welfare assistance consisting of nursing facility services,  
4 home and community-based services, and related hospital  
5 and prescription drug services, the department of health  
6 and human resources, in addition to any other available  
7 remedy, may file a claim or lien against the estate of the  
8 recipient for the total amount of medical assistance  
9 provided by medicaid for nursing facility services, home  
10 and community-based services, and related hospital and  
11 prescription drug services provided for the benefit of the  
12 recipient. Claims so filed shall be classified as and  
13 included in the class of debts due the state.

14 (b) The Department may recover pursuant to  
15 subsection (a) only after the death of the individual's  
16 surviving spouse, if any and only after such time as the  
17 individual has no surviving children under the age of  
18 twenty-one, or when the individual has no surviving  
19 children who meet the Social Security Act's definition of  
20 blindness or permanent and total disability.

21 (c) The state shall have the right to place a lien upon  
22 the property of individuals who are inpatients in a nursing  
23 facility, intermediate care facility for the mentally  
24 retarded, or other medical institution who, after notice and  
25 an opportunity for a hearing, the state has deemed to be  
26 permanently institutionalized. This lien shall be in an  
27 amount equal to medicaid expenditures for services  
28 provided by a nursing facility, intermediate care facility  
29 for the mentally retarded or other medical institution, and  
30 shall be rendered against the proceeds of the sale of  
31 property except for a minimal amount reserved for the  
32 individual's personal needs. Any such lien shall dissolve  
33 upon that individual's discharge from the medical  
34 institution. The secretary has authority to compromise or  
35 otherwise reduce the amount of this lien in cases where  
36 enforcement would create a hardship.

37 (d) No lien may be imposed on such individual's home  
38 when the home is the lawful residence of: (1) The spouse  
39 of the individual; (2) the individual's child who is under  
40 the age of twenty-one; (3) the individual's child meets the  
41 Social Security Act's definition of blindness or permanent  
42 and total disability; or (4) the individual's sibling has an  
43 equity interest in the home and was residing in the home  
44 for a period of at least one year immediately before the  
45 date of the individual's admission to a medical institution.

46 (e) The filing of a claim, pursuant to this section, shall  
47 neither reduce nor diminish the general claims of the  
48 department of health and human resources, except that  
49 such department shall not receive double recovery for the  
50 same expenditure. The death of the recipient shall neither  
51 extinguish nor diminish any right of such department to  
52 recover. Nothing in this section affects or prevents a  
53 proceeding to enforce a lien pursuant to this section or a  
54 proceeding to set aside a fraudulent conveyance.

55 (f) Any claim or lien imposed pursuant to this section  
56 is effective for the full amount of medical assistance  
57 provided by medicaid for nursing facility services, home  
58 and community-based services, and related hospital and  
59 prescription drug services. Said lien attaches and is  
60 perfected automatically as of the beginning date of  
61 medical assistance, the date when a recipient first receives  
62 treatment for which the department of health and human  
63 resources may be obligated to provide medical assistance.  
64 A claim may be waived by such department, if such  
65 department determines, pursuant to applicable federal law  
66 and rules, and regulations, that the claim will cause  
67 substantial hardship to the surviving dependents of the  
68 ~~deceased.~~ *deceased.*

69 (g) Upon the effective date of this section, the Attorney  
70 General, on behalf of the state of West Virginia, shall  
71 commence an action in a court of competent jurisdiction  
72 to test the validity, constitutionality, and the ability of the  
73 Congress of the United States to mandate the  
74 implementation of this section. This subsection does not

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75 limit the right of others, including recipients, to intervene  
76 in any litigation, nor does it limit the discretion of the  
77 Attorney General or appropriate counsel to seek affected  
78 persons to act as parties to the litigation, either individually  
79 or as a class.

A large, faint, and illegible signature or stamp is visible in the lower center of the page. The text is too light to read clearly but appears to be a handwritten name or an official seal.

Enr. Com. Sub. for H. B. 2578] 12

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

*Randy Schorover*  
Chairman Senate Committee

*Ernest E Moore*  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

*Barrett B. Jones*  
Clerk of the Senate

*Donald L. Kapp*  
Clerk of the House of Delegates

*Earl Ray Kneibin*  
President of the Senate

*Paul E. Cullen*  
Speaker of the House of Delegates

The within *is approved* this the *24th*  
day of *March* 1995.

*Gaston Caperton*  
Governor



PRESENTED TO THE

GOVERNOR

Date 3/23/95

Time 11:54 am