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
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COMMITTEE SUBSTITUTE
FOR
H. B. 2578

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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.

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

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

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

(c) The term "federal-state assistance" means and
includes (1) all forms of aid, care, assistance and services
to or on behalf of persons, which are authorized by, and
who are authorized to receive the same under and by
virtue of, subchapters one, four, five, ten, fourteen, sixteen,
eighteen and nineteen, chapter seven, Title 42, United
States Code, as those subchapters have heretofore been
and may hereafter be amended, supplemented and revised
by acts of Congress, and as those subchapters so amended,
supplemented and revised have heretofore been and may
hereafter be supplemented by valid rules and regulations
promulgated by authorized federal agents and agencies,
and as those subchapters so amended, supplemented and
revised have heretofore been and may hereafter be
supplemented by rules and regulations promulgated by
the state division of human services, which division rules
and regulations shall be consistent with federal laws, rules
and regulations, but not inconsistent with state law, and (2)
all forms of aid, care, assistance and services to persons,
which are authorized by, and who are authorized to
receive the same under and by virtue of, any act of Congress, other than the federal Social Security Act, as amended, for distribution through the state division of human services to recipients of any form of aid, care, assistance and services to persons designated or referred to in (1) of this definition and to recipients of state assistance, including by way of illustration, surplus food and food stamps, which Congress has authorized the secretary of agriculture of the United States to distribute to needy persons.

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

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

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

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

(h) The term "domiciled in this state" means being physically present in West Virginia accompanied by an intention to remain in West Virginia for an indefinite
period of time, and to make West Virginia his or her permanent home. The state division of human services may by rules and regulations supplement the foregoing definition of the term "domiciled in this state", but not in such a manner as would be inconsistent with federal laws, rules, and regulations applicable to and governing federal-state assistance.

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

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

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

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

(m) The term "services" means nursing facility services, home and community-based services, and related hospital and prescription drug services for which an 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.
(a) Submission of an application to the department of health and human resources for medical assistance is, as a matter of law, an assignment of the right of the applicant or legal representative thereof, to recovery from personal insurance or other sources, including, but not limited to, liable third parties, to the extent of the cost of medical services paid for by the medicaid program. This assignment of rights does not extend to medicare benefits.

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

If medical assistance is paid or will be paid to a provider of medical care on behalf of a recipient of medical assistance because of any sickness, injury, disease or disability, and another person is legally liable for such expense, either pursuant to contract, negligence or otherwise, the department of health and human resources shall have a right to recover full reimbursement from any award or settlement for such medical assistance from such other person, or from the recipient of such assistance if he has been reimbursed by the other person. The department shall be legally assigned the rights of the recipient against the person so liable, but only to the extent of the reasonable value of the medical assistance paid and attributable to the sickness, injury, disease or disability for which the recipient has received damages. When an action or claim is brought by a medical assistance recipient or by someone on his or her behalf against a third party who may be liable for the injury, disease, disability or death of a medical assistance recipient, any settlement, judgment or award obtained is subject to the claim of the department of health and human resources for reimbursement of an amount sufficient to reimburse the department the full amount of benefits paid on behalf of the recipient under the medical assistance program for the injury, disease, disability or death of the medical assistance recipient. The
claim of the department of health and human resources
assigned by such recipient shall not exceed the amount of
medical expenses for the injury, disease, disability or death
of the recipient paid by the department on behalf of the
recipient. The right of subrogation created in this section
includes all portions of the cause of action, by either
settlement, compromise, judgment or award, notwithstanding
any settlement allocation or apportionment that
pursuits to dispose of portions of the cause of action not
subject to the subrogation. Any settlement, compromise,
judgment or award that excludes or limits the cost of
medical services or care shall not preclude the department
of health and human resources from enforcing its rights
under this section. The secretary may compromise, settle
and execute a release of any such claim in whole or in
part.

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

If the action be tried by a jury, the jury shall not be
informed as to the interest of the department of health and
human resources, if any, and such fact shall not be
disclosed to the jury at any time. The trial judge shall,
upon the entry of judgment on the verdict, direct that an
amount equal to the amount of medical assistance given
be withheld and paid over to the department of health and
human resources. Irrespective of whether the case be
terminated by judgment or by settlement without trial,
from the amount required to be paid to the department of
health and human resources there shall be deducted the
attorney fees attributable to such amount in accordance
with and in proportion to the fee arrangement made
between the recipient and his or her attorney of record so
that the department shall bear the pro rata portion of such attorney fees. Nothing in this section shall preclude any person who has received medical assistance from settling any cause of action which he may have against another person and delivering to the department of health and human resources, from the proceeds of such settlement, the sums received by him or her from the department or paid by the department for his or her medical assistance. If such other person is aware of or has been informed of the interest of the department of health and human resources in the matter, it shall be the duty of the person to whose benefit the release inures to withhold so much of the settlement as may be necessary to reimburse the department to the extent of its interest in the settlement. No judgment, award of or settlement in any action or claim by a medical assistance recipient to recover damages for injuries, disease or disability, in which the department of health and human resources has interest, shall be satisfied without first giving the department notice and reasonable opportunity to establish its interest. The department shall have sixty days from receipt of such written notice to advise the recipient of his or her representative in writing of the department's desire to establish its interest through the assignment. If no such written intent is received within the sixty-day period, then the recipient may proceed and in the event of full recovery forward to the department the portion of the recovery proceeds less the department's share of attorney's fees and costs expended in the matter. In the event of less than full recovery the recipient and the department shall agree as to the amount to be paid to the department for its claim. If there is no recovery the department shall under no circumstances be liable for any costs or attorneys fees expended in the matter. If, after being notified in writing of a subrogation claim and possible liability of the recipient, guardian, attorney or personal representative for failure to subrogate the department, a recipient, his or her guardian, attorney or personal representative disposes of the funds representing the judgment, settlement or award, without the written approval of the department, that person
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shall be liable to the department for any amount that, as a result of the disposition of the funds, is not recoverable by the department. In the event that a controversy arises concerning the subrogation claims by the department, an attorney shall interplead, pursuant to rule twenty-two of the rules of civil procedure, the portion of the recipient's settlement that will satisfy the department exclusive of attorneys fees and costs regardless of any contractual arrangement between the client and the attorney.

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

§9-5-11a. Notice of action or claim.

If either the medical assistance recipient or the department of health and human resources brings an action or claim against a third person, the recipient, his attorney or such department shall, within thirty days of filing the action, give to the other written notice of the action or claim by certified mail. This notice shall contain the name of the third person and the court in which the action is brought. If the department of health and human resources institutes said action, the notice shall advise the recipient of their right to bring such action in their own name, in which they may include as a part of their claim the sums claimed by such department. Proof of such notice shall be filed in said action subject to the notice and intent procedure as outlined in section eleven of this article. If an action or claim is brought by either the recipient or the department of health and human resources, the other may, at any time before trial, become a party to the action, or shall consolidate his action or claim with the other if brought independently: Provided, That this consolidation or entry as a party does not delay the proceedings.
§9-5-11c. Right of the department of health and human resources to recover medical assistance.

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

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

(c) The state shall have the right to place a lien upon the property of individuals who are inpatients in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution who, after notice and an opportunity for a hearing, the state has deemed to be permanently institutionalized. This lien shall be in an amount equal to medicaid expenditures for services provided by a nursing facility, intermediate care facility for the mentally retarded or other medical institution, and shall be rendered against the proceeds of the sale of property except for a minimal amount reserved for the individual's personal needs. Any such lien shall dissolve upon that individual's discharge from the medical institution. The secretary has authority to compromise or otherwise reduce the amount of this lien in cases where enforcement would create a hardship.
(d) No lien may be imposed on such individual's home when the home is the lawful residence of: (1) The spouse of the individual; (2) the individual's child who is under the age of twenty-one; (3) the individual's child meets the Social Security Act's definition of blindness or permanent and total disability; or (4) the individual's sibling has an equity interest in the home and was residing in the home for a period of at least one year immediately before the date of the individual's admission to a medical institution.

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

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

Upon the effective date of this section, the Attorney General, on behalf of the state of West Virginia, shall commence an action in a court of competent jurisdiction to test the validity, constitutionality, and the ability of the Congress of the United States to mandate the implementation of this section. This subsection does not
limit the right of others, including recipients, to intervene in any litigation, nor does it limit the discretion of the Attorney General or appropriate counsel to seek affected persons to act as parties to the litigation, either individually or as a class.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

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

Governor
PRESENTED TO THE GOVERNOR

Date 3/23/55
Time 11:34 am