

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

Senate Bill 502 (Senator Astle)
Judicial Proceedings and Finance

Maryland Medical Assistance Program - Judgments - Third-Party Tortfeasors

This bill requires the amount of a judgment obtained in favor of a Medicaid recipient against a third-party tortfeasor for damages that include payments made by the Department of Health and Mental Hygiene (DHMH) on behalf of the Medicaid recipient to be increased by an amount equal to the amount of the payments made by DHMH if the judgment is not paid by the third-party tortfeasor within 30 days after the judgment is final and all appeals are exhausted.

If a judgment in favor of a Medicaid recipient is increased, DHMH may collect from the recipient the full amount of payments made by DHMH on behalf of the recipient without a reduction for attorney's fees or procurement costs.

Fiscal Summary

State Effect: Special fund revenues for the Medicaid program increase by an indeterminate amount beginning in FY 2014, to the extent that judgments are increased under the bill. Any additional filings for modifications of judgments under the bill are anticipated to have a negligible effect on the Judiciary.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: If a Medicaid recipient has a cause of action against a person, DHMH must be subrogated to that cause of action to the extent of any payments made by DHMH

on behalf of the recipient that result from the occurrence that gave rise to the cause of action. Any Medicaid recipient or attorney, guardian, or personal representative of a recipient who receives money in settlement of or under a judgment or award in a cause of action in which DHMH has a subrogation claim must, after receiving written notice of the subrogation claim, hold the amount of money required for the subrogation claim for DHMH after deducting applicable attorney's fees and litigation costs.

DHMH is not liable for payment of or contribution to any attorney's fees or litigation costs of any Medicaid recipient or attorney, guardian, or personal representative of a recipient. The deduction of applicable attorney's fees and litigation costs may not be considered as payment for or contribution to those fees or costs by DHMH. DHMH may compromise or settle and release its subrogation claim if collection of the claim will cause substantial hardship to the recipient or, in a wrongful death action, to the surviving dependents of a recipient.

Under § 11-112 of the Courts and Judicial Proceedings Article, the amount permitted to be recovered by a payor (*i.e.*, a health insurance carrier) for health care benefits or services for an injured person paid or payable by a payor must be reduced by dividing the amount of the total recovery into the total amount of the attorney's fees incurred by the injured person and multiplying the result by the amount of the payor's subrogation claim unless the payor files a petition to intervene in the personal injury action and is independently represented by counsel. The payor's subrogation claim cannot be reduced by more than one-third.

Background: Although not specified in statute or regulations, current Medicaid policy limits recovery in subrogation claims to the lesser of full recovery of Medicaid costs or 50% of the net settlement (the total settlement amount less attorney's fees and costs). According to DHMH, this policy is intended to ensure that the Medicaid enrollee always receives a share of the settlement proceeds regardless of the amount of the settlement or Medicaid costs. This provides an economic incentive to an enrollee to pursue third-party litigation, without which Medicaid may never reclaim third-party liabilities.

For example, under current Medicaid policy, if a recipient is awarded \$500,000 (including \$200,000 in Medicaid costs) and incurred attorney's fees of \$150,000, DHMH's recovery would be \$175,000 $((\$500,000 - \$150,000) \times .5)$. The recipient would then retain \$175,000.

Under the bill, if a recipient is awarded the same judgment (\$500,000, including \$200,000 in Medicaid costs) and the third-party tortfeasor has not paid within 30 days after the judgment is final and all appeals are exhausted, the amount of the judgment would be increased by \$200,000 (an amount equal to the payments made by DHMH). Thus, the total judgment would be \$700,000. DHMH would be authorized to collect

from the recipient the full \$200,000 in payments made by DHMH on the recipient's behalf without any reduction for attorney's fees or procurement costs, while the recipient could retain the remaining balance less any attorney's fees.

State Fiscal Effect: Medicaid special fund revenues increase by an indeterminate amount beginning in fiscal 2014 to the extent that judgments obtained in favor of a Medicaid recipient are increased as specified under the bill. DHMH would be exempt from paying attorney's fees or procurement costs association with the judgments. The amount of any revenue increase will depend on the number and amount of judgments increased and cannot be reliably estimated at this time. According to DHMH, in fiscal 2012, Medicaid recovered \$7.9 million in special fund revenues under the current subrogation policy.

Additional Comments: Related bills, SB 575/HB 961 of 2012, would have reduced the amount of money permitted to be recovered by DHMH under a Medicaid subrogation claim by up to one-third unless DHMH filed a petition to intervene in a cause of action and was independently represented by counsel. The bills also would have authorized DHMH to voluntarily reduce a subrogation claim relating to a Medicaid recipient if DHMH found that collection of the claim would cause substantial harm to a trust created for the benefit of the recipient. SB 575 passed the Senate and received a hearing in the House Health and Government Operations Committee, but no further action was taken on the bill. HB 961 also received a hearing in the House Health and Government Operations Committee, but no further action was taken on the bill.

Additional Information

Prior Introductions: None.

Cross File: HB 600 (Delegate Pena-Melnyk) - Health and Government Operations.

Information Source(s): Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Department of Legislative Services

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