

ACT 211

H.B. NO. 2448

A Bill for an Act Relating to Medicaid.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

SECTION 1. The legislature finds that the United States Supreme Court has significantly limited the states' ability to recover full reimbursement in medicaid third-party-lien cases. However, states may use formulas to address the allocation and distribution of proceeds in these cases. Many states have implemented such formulas to address this issue and to clarify the distribution of settlements in these cases. Section 346-37(h), Hawaii Revised Statutes, requires that a reasonable amount be contributed towards a claimant's attorney's fees and costs. This has resulted in disputes regarding the meaning of a "reasonable amount".

The legislature also finds that the medicaid program's ability to recover moneys that it is entitled to must be strengthened to help sustain the viability of the medicaid program. The medicaid program has had budget cuts that result in reduced benefits for all the recipients. Recovering reimbursements helps to reduce the burden on the program while helping to ensure the program is avail-

able for the community. These amendments would enhance the ability to recover these moneys.

The purpose of this part is to establish a formula for calculating the amount to be contributed by the State towards a claimant's attorney's fees and costs, in lieu of recovering the full amount.

SECTION 2. Section 346-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Medical institution” means a facility in which health care services are provided that also provides long-term care services at a nursing facility level of care for the purposes of dealing with medicaid liens in this chapter.”

SECTION 3. Section 346-29.5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) The department may also place a lien against the real property of any recipient receiving medical assistance who is an inpatient in a nursing facility, intermediate care facility for individuals with intellectual disabilities, or other medical institution, after a state determination, pursuant to notice and hearing requirements of chapter 91, that the recipient cannot reasonably be expected to be discharged from the medical institution and returned home. The written notice of lien shall be accompanied by an itemized list of payments made by the department that identifies the provider of services, the dates of services, the amounts billed and paid, and the dates of payments, and shall be provided to the person against whom restitution is sought. Absent a good faith basis contesting the amount or validity of a specific line item charge or charges in the lien, the entire lien amount shall be presumed to be valid. There is a rebuttable presumption that the recipient cannot reasonably be expected to be discharged from the facility and return home if the recipient or a representative of the recipient declares that there is no intent to return home or if the recipient has been institutionalized for six months or longer without a discharge plan.

- (1) The department may not place a lien on the recipient's home if the recipient's:
 - (A) Spouse;
 - (B) Minor, blind, or disabled child; or
 - (C) Sibling who has an equity interest in the home and who was residing in the home for a period of at least one year immediately before the date of the recipient's admission to the medical institution;

is lawfully residing in the home.
- (2) The department shall not recover funds from the lien on the recipient's home when:
 - (A) A sibling who was residing in the home for a period of at least one year immediately before the date of the recipient's admission to the medical institution; or
 - (B) A son or daughter who was residing in the recipient's home for a period of at least two years immediately before the date of the recipient's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to the recipient [~~which~~] that permitted [~~such~~] the recipient to reside at home rather than in an institution;

lawfully resides in the home and has lawfully resided in the home on a continuous basis since the date of the recipient's admission to the medical institution.

- (3) The department also shall not recover funds from the lien if the recipient has a surviving spouse; or surviving minor, blind, or disabled child.
- (4) Any lien imposed with respect to this subsection shall be dissolved upon the individual's discharge from the medical institution and return home."

SECTION 4. Section 346-37, Hawaii Revised Statutes, is amended as follows:

- 1. By amending subsections (d), (e), (f), (g), (h), and (i) to read:

"(d) The department, as to this right of reimbursement, shall also be subrogated to all rights or claims that a claimant has against the third person for ~~[all damages]~~ medical assistance and burial payments not to exceed the full extent of the costs of medical assistance or burial payment furnished or to be furnished by the department. ~~[The department's right to full reimbursement of the costs of medical assistance or burial payment as a subrogee of a claimant shall not be diminished by the recovery of any judgment, settlement, or award of an amount less than the value of the original or settled claim as perceived or calculated by the claimant or any other person.]~~

To enforce its rights, the department may intervene or join in any action or proceeding brought by a claimant against the third person. If the action or proceeding is not commenced within six months after the first day on which medical assistance or burial payment is furnished by the department in connection with the injury, disease, or death involved, the department may institute and prosecute legal proceedings against the third person for the injury, disease, or death, in a state court, either alone (in its own name or in the name of a claimant) or in conjunction with the claimant.

(e) An attorney representing a claimant or third person shall make reasonable inquiry as to whether the claimant has received or is receiving from the department medical assistance related to the incident involved in the action. If the claimant, claimant's attorney, or claimant's heirs, representatives, or beneficiaries, or any third person have received from the department actual notice of its right to reimbursement or if they have reason to know that the claimant has received or is receiving from the department medical assistance related to the incident, then the claimant, claimant's attorney, claimant's heirs, representatives, or beneficiaries, or third person or third person's attorney shall give to the department timely written notice of any claim or action against a third person. At any time during the pendency of any claim or action, the claimant, claimant's attorney if represented, claimant's heirs, representatives, or beneficiaries, or third person or third person's attorney may contact the department to ascertain the full amount of the costs of medical assistance or burial payment made, which information shall be provided in a reasonable time by the department. Upon obtaining a judgment or reaching a settlement through negotiation or legal proceedings, but before the release of any award or settlement proceeds to any person:

- (1) The claimant's attorney or third person or third person's attorney, if the attorney has received actual notice from the department of a lien or if the attorney or third person has reason to know that a lien exists; or
- (2) The claimant or the claimant's heirs, representatives, or beneficiaries, if not represented by an attorney who has received actual notice of the lien,

shall notify the department immediately in order to ascertain and ~~pay the full amount of the~~ satisfy the department's right to reimbursement for costs of medical assistance or burial payment made.

(f) If liability is found to exist, or if the issue of third-party liability is settled or compromised without a finding of liability, regardless of who institutes legal proceedings or seeks other means of recovering, the department shall have a right to recover up to the full amount of the costs of medical assistance or burial payment made~~[-]~~ from a settlement, award, or judgment. To aid in the recovery of the costs, the department shall have a first lien ~~in~~ for up to the full amount of the costs of medical assistance or burial payment made against the proceeds from ~~[all]~~ damages [awarded] recovered in a [suit or] settlement[-], award, or judgment. The lien shall attach as provided by subsection (g).

(g) The lien of the department for reimbursement of costs of medical assistance or burial payments under subsection (f), shall attach by a written notice of lien served upon the claimant's attorney or upon the third person, the third person's agent, attorney, or insurance company. The method of service shall be by certified or registered mail, return receipt requested, or by delivery of the notice of lien personally to ~~[the]~~ these individuals [referred to]. Service by certified or registered mail is complete upon receipt. The notice of lien shall state the name of the injured, diseased, or deceased person, the amount of the lien, and the date of the accident or incident ~~[which]~~ that caused the injuries, disease, or death ~~[which]~~ that necessitated the department's medical assistance or burial payments. If the notice of lien is served upon the claimant's attorney, the notice of lien shall state that the claimant's attorney shall pay the ~~[full amount of the]~~ lien from the proceeds of any judgment, settlement, or compromise based on the incident or accident[-] as provided in this section. If the notice of lien is served upon the third person, or the third person's agent, attorney, or insurance company, the notice of lien shall state that the third person shall pay the ~~[full amount of the]~~ lien as provided in this section prior to disbursing any of the proceeds to the claimant or to the claimant's attorney. A notice of lien may be amended from time to time until extinguished, each amendment taking effect upon proper service.

When restitution is sought in a criminal proceeding from a third person who has caused injury to a recipient of medical assistance, a written notice of lien and an itemized list of payments made by the department that identifies the provider of services, the dates of services, the amounts billed and paid, and the dates of payments, shall be provided to the court and to the person against whom restitution is sought. Absent a good faith basis contesting the amount or validity of a specific line item charge or charges in the lien, the entire lien amount shall be presumed valid by the court in determining the amount of restitution pursuant to section 706-646.

(h) The lien shall attach as provided by subsection (g). If a notice of lien is properly served upon the attorney representing the claimant as provided in subsection (g), that attorney shall pay the ~~[full amount of the]~~ lien[-] as provided in this section prior to disbursing any of the proceeds of the suit or settlement to the attorney's client. If a notice of lien is properly served upon the third person, the third person's agent or attorney, or the third person's insurance company, as provided in subsection (g), it shall be the responsibility of the person receiving the notices to pay the ~~[full amount of the]~~ lien as provided in this section prior to disbursing any of the proceeds to the claimant's attorney. The lien shall be satisfied from that portion of the settlement, award, or judgment allocated or allocable to payments by the department for medical assistance and burial payments. Any allocation by a judge, jury, arbitrator, or similar dispute resolution person or tribunal shall be binding; provided that the department's medical as-

sistance and burial payments are included as part of the case or claims brought by the claimant in any action. Any allocation by the claimant or third party may be considered but is not binding on the department. If there is no allocation, a reasonable allocation shall be determined by agreement, administrative hearing under subsection (i), or a court of competent jurisdiction.

If, after having received timely written notice of any claim or action under subsection (e), the department did not intervene or join in the action or prosecute its own claims or actively participate with claimant or claimant's attorney in the prosecution of claims, or a distribution agreement was not entered into between the parties, reimbursement shall be as follows: If the lien is less than or equal to one-third of the settlement, award, or judgment, and there is no allocation by a judge, jury, arbitrator, or similar dispute resolution person or tribunal, then there shall be a rebuttable presumption that the amount of reimbursement due the department is the total payments for medical assistance or burial payments by the department or one-third of the settlement, award, or judgment, whichever is less. Any party challenging this rebuttable presumption shall bear the burden of proof. The department's fair share of claimant's reasonable attorney's fees and expenses shall be deducted from the department's lien recovery. There shall be a rebuttable presumption that one-third of the department's gross reimbursement amount plus a proportionate share of the general excise tax is a reasonable amount for the department's contribution towards claimant's attorney's fees and expenses. Any party challenging this rebuttable presumption shall bear the burden of proof.

If the department alone prosecutes claims that include its medical assistance or burial payments, it shall not be required to reduce its lien on account of attorney's fees or expenses, if any, incurred by the claimant or claimant's attorney.

If the claimant's attorney and the department contribute to the recovery of medical assistance or burial payments made by the department, then the [department shall determine its] department's fair contribution toward [attorney] the claimant's attorney's fees and costs incurred [in the action that] shall be a reasonable amount based solely upon legitimate costs and services rendered by the claimant or claimant's attorney in recovering the lien amount. Any dispute regarding the department's determination of its contribution to claimant's attorney's fees and costs may be submitted to administrative hearing under subsection (i) or a court of competent jurisdiction. The value of services contributed by the claimant and department may be considered in fairly allocating fees and costs between the claimant and department where both contribute to recovering the lien amount.

The department's lien, after reduction for its contribution to claimant's attorney's fees and expenses, shall not exceed one-third of the settlement, award, or judgment. Payment of one-third of the settlement, award, or judgment to the department and two-thirds to the claimant and claimant's attorney shall satisfy the entire lien if the department's lien, after reduction for its contribution to claimant's attorney's fees and expenses, exceeds one-third of the settlement, award, or judgment. Any claimant who asserts that reimbursement to the department should be less than one-third of the settlement, award, or judgment, under the circumstances of that claim, shall bear the burden of proof.

(i) [Notwithstanding any other law to the contrary, if] If there is a dispute between the claimant, the claimant's agent or the claimant's attorney, and the department concerning the existence of the lien or the amount of the lien, or the amount to be reimbursed, the claimant, the claimant's agent, or the claimant's attorney [shall] may submit the dispute to a court of competent jurisdiction or request in writing [a] an administrative hearing on the dispute. After receipt

by the department of a written request, the department shall conduct an administrative hearing within a reasonable period of time. Chapter 91, including any provisions for judicial review or appeal, shall apply to the hearing. Funds sufficient to fully satisfy the reimbursement rights of the department shall be either retained by the person served with the notice of lien, shall be paid to the department, or otherwise reserved subject to agreement with the department pending [its] a decision by the court or the department and any subsequent judicial review or appeal.”

2. By amending subsection (k) to read:

“(k) Any person who is subject to the lien who fails to pay the full amount due under this section to the department for reimbursement of the costs of medical assistance, although able to do so from the proceeds of the suit or settlement, shall be personally liable to the department for any damage proximately caused to the department by [such] the failure.”

3. By amending subsection (o) to read:

“(o) In third-party liability situations, the medical assistance program of the department shall be fully reimbursed the amount due under this section or funds sufficient to fully reimburse the department the amount due under this section shall be retained by the person served with the notice of lien or otherwise reserved in a manner agreeable to the department before the claimant receives any money from the settlement or award. This section is not intended to restrict or diminish the right of the department to settle or compromise its reimbursement rights under this section for less than the full amount due or enter into any agreement with claimant, claimant’s attorney or representative, or other party for the distribution of proceeds from a suit or settlement.”

SECTION 5. Section 706-646, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

“(1) As used in this section, “victim” includes any of the following:

- (a) The direct victim of a crime including a business entity, trust, or governmental entity;
- (b) If the victim dies as a result of the crime, a surviving relative of the victim as defined in chapter 351; or
- (c) A governmental entity [which] that has reimbursed the victim for losses arising as a result of the crime[-] or paid for medical care provided to the victim as a result of the crime.”

PART II

SECTION 6. The department of human services may collaborate with the Healthcare Association of Hawaii, the Hawaii Long Term Care Association, nursing facility providers, and home- and community-based service providers, including adult residential care homes and foster family homes, to develop a revised methodology for determining the level of acuity of nursing facility residents who are medicaid recipients, including those with complex medical conditions, to set reimbursements at levels that are fair and equitable. The department of human services and the collaborating organizations and providers may submit to the legislature a joint report containing recommendations and an implementation plan no later than twenty days prior to the convening of the regular session of 2013.

SECTION 7. The department of human services may work with the department of health to develop an equitable referral system relating to the discharge of medicaid patients from hospitals, nursing homes, and long-term care

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facilities based on the patient's acuity level for proper placement in either an adult residential care home, community care foster family home, or an expanded adult residential care home.

PART III

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

(Approved July 3, 2012.)