

# MEDICAID LIENS IN PENNSYLVANIA

## PENNSYLVANIA ACT 44 (62 P.S. § 1409)

### 1. IN GENERAL

- Relevant for recipients of Medicaid (“Medical Assistance” or “MA”) through Pennsylvania’s Department of Public Welfare (DPW).
- DPW can now sue third parties and insurers directly, or petition to intervene in an existing lawsuit, for reimbursement.
  - 3<sup>rd</sup> parties (*e.g.*, potential defendants) and Insurers should create a **direct relationship** with DPW Division of Third Party Liability.

### 2. NOTICE OBLIGATION

- If 3<sup>rd</sup> Party or Insurer has information indicating that plaintiff is a MA beneficiary<sup>1</sup> they **must notify DPW**.
  - 3<sup>rd</sup> Parties/Insurers are deemed to have knowledge if:
    - (i) the information comes from the claimant’s counsel; or
    - (ii) is set forth in the records reviewed as part of the claim process.
- Notice is required of:
  - **Suit or claim**
  - Any kind of **motion to limit/exclude damages** for MA
  - **Settlement**

### 3. SATISFYING THE NOTICE REQUIREMENT

- **Notifying DPW that adverse party** (*e.g.*, payout recipient by insurer or adverse party in settlement) **is a MA beneficiary**:
  - Must give written notice ((by personal service, registered, certified mail)
    - Division of Third-Party Liability  
Department of Public Welfare  
P.O. Box 8486  
Harrisburg, PA 17105
  - Substantive Requirements:
    - Name of beneficiary
    - Medicaid Number (if known)
    - Birthdate of MA beneficiary
    - Attorney name
    - Date of injuries
    - Court/ Docket # for pending claim
    - Lawsuit *filing* date
    - Close of *discovery* date

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<sup>1</sup> Act 44 broadly defines MA beneficiaries to include “any person who has received benefits or will be provided benefits under this act because of an injury for which another person may be liable. It includes such beneficiary’s guardian, conservator, or other personal representative, his estate or survivors.” 62 Pa. Stat. Ann. § 1409 (West). It appears DPW has adopted a narrower view for purposes of Medicaid liens: “beneficiary’ includes both present and former adult and minor recipients of MA benefits, and includes individuals receiving benefits through an MA managed care organization.” 55 Pa. Code § 259.2 (omitting mention of persons who are *future* recipients of MA); *accord* 55 Pa. Code § 259.3, 55 Pa. Code § 259.4.

- **Notice to Limit or Exclude Medical Benefits from the Claim**
  - Moving party must provide DPW with 30 days' notice and an opportunity to be heard prior to adjudication of the motion.
  - Applies to actions/claims commenced *prior* to 9/2/2008
- **Notice of Settlement**
  - Must give DPW 30 days' "reasonable notice"
    - Notice is **reasonable** if it allows DPW sufficient time to **intervene** in action
- **Negative Election (by the Claimant/Plaintiff)**
  - Beneficiary **must** give notice to DPW (instead of 3<sup>rd</sup> party / insurer):
    - (i) if the action will exclude MA benefits; or
    - (ii) if beneficiary initially includes damages request for medical benefits, but later attempts to exclude them from damages sought
  - **Reasonable Notice**
    - Must be 30 days prior to settlement execution
    - Must be given **before** close of discovery
  - Beneficiary **must help DPW adjudicate direct claim against 3<sup>rd</sup> Party/Insurer**
  - Beneficiary must notify third party or insurer about negative election and that the 3<sup>rd</sup> party / insurer remains "on the hook to DPW"
  - Settlement agreement cannot provide for the plaintiff/beneficiary to release (hold harmless) or indemnify 3<sup>rd</sup> party/insurer against liability for DPW MA benefit reimbursement claim (lien)

#### 4. DPW CLAIM LIMITATIONS

- (A) Current Federal-law Limitation:
  - DPW cannot claim portions of the recovery that are "distinct from medical costs" (*e.g.*, pain and suffering, lost wages, and loss of future earnings). *See Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (limiting states' recovery of portions of award/settlement that are "distinct from medical costs").
- (B) Impending Changes in Federal Limitation:
  - The "Bipartisan Budget Act of 2013" (H.J. Res. 59) expands the power of states to recover Medicaid expenditures:
    - States can recover costs from the **full amount of a beneficiary's liability settlement**, instead of only the portion of the settlement designated for medical expenses.
    - Establishes an option for states to place liens against Medicaid beneficiaries' liability settlements.
  - Centers for Medicare & Medicaid Services has issued a memo address these (and other unrelated) changes. *See CMCS Informational Bulletin* (December 27, 2013), available at <http://www.medicaid.gov/Federal-Policy-Guidance/downloads/CIB-12-27-13.pdf>.
- (C) State-law Limitations:
  - In the absence of a court order allocating award, **1/2 of the net recovery** (the gross recovery minus attorney's fees, costs and the beneficiary's out of pocket medical expenses) are allocated by law to be available to repay injury-related MA expenses. 55 Pa. Code § 259.2.
  - DPW is **not bound** by parties' allocation of damages in settlement. 55 Pa. Code § 259.2.

## 5. SAFE HARBOR

- 3<sup>rd</sup> Parties/Insurers can avoid liability for liens if:
  - (i) 3<sup>rd</sup> Parties/Insurers and DPW resolve claim **directly**; or
  - (ii) (settlements only) 3<sup>rd</sup> Parties/Insurers require beneficiary to make DPW a “payee” **AND** requires beneficiary to “**satisfy**” DPW claim; or
  - (iii) (settlements only) 3<sup>rd</sup> Parties/Insurers get statement from DPW that DPW has **no claim** against settlement

## 6. PENALTIES

- Up to \$5,000 per violation upon any person who wilfully fails to comply. 55 Pa. Code § 259.6.

## 7. MISCELLANEOUS CONSIDERATIONS

- Action/claim by beneficiary is **not necessary** to trigger DPW right to sue for reimbursement
- Statute of limitations is 7 years from date it **learns** of settlement to bring claim.
  - Statute of Limitations for actions/claims for minor beneficiary is tolled until beneficiary turns 18
- DPW can **waive** their claim if there is an *undue hardship* on the MA beneficiaries’ estate (*e.g.*, wrongful death action)