



GOV. MSG. NO. 1314

EXECUTIVE CHAMBERS
HONOLULU

NEIL ABERCROMBIE
GOVERNOR

July 03, 2012

The Honorable Shan Tsutsui, President
and Members of the Senate
Twenty-Sixth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Calvin Say, Speaker
and Members of the House
Twenty-Sixth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Tsutsui, Speaker Say and Members of the Legislature:

This is to inform you that on July 03, 2012, the following bill was signed into law:

HB2448 HD2 SD2 CD1

RELATING TO MEDICAID.
Act 211 (12)

Sincerely,

NEIL ABERCROMBIE
Governor, State of Hawaii

A BILL FOR AN ACT

RELATING TO MEDICAID.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 PART I

2 SECTION 1. The legislature finds that the United States
3 Supreme Court has significantly limited the states' ability to
4 recover full reimbursement in medicaid third-party-lien cases.
5 However, states may use formulas to address the allocation and
6 distribution of proceeds in these cases. Many states have
7 implemented such formulas to address this issue and to clarify
8 the distribution of settlements in these cases. Section
9 346-37(h), Hawaii Revised Statutes, requires that a reasonable
10 amount be contributed towards a claimant's attorney's fees and
11 costs. This has resulted in disputes regarding the meaning of a
12 "reasonable amount".

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



1 helping to ensure the program is available for the community.
2 These amendments would enhance the ability to recover these
3 moneys.

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

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

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

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

17 "(b) The department may also place a lien against the real
18 property of any recipient receiving medical assistance who is an
19 inpatient in a nursing facility, intermediate care facility for
20 individuals with intellectual disabilities, or other medical
21 institution, after a state determination, pursuant to notice and
22 hearing requirements of chapter 91, that the recipient cannot



1 reasonably be expected to be discharged from the medical
2 institution and returned home. The written notice of lien shall
3 be accompanied by an itemized list of payments made by the
4 department that identifies the provider of services, the dates
5 of services, the amounts billed and paid, and the dates of
6 payments, and shall be provided to the person against whom
7 restitution is sought. Absent a good faith basis contesting the
8 amount or validity of a specific line item charge or charges in
9 the lien, the entire lien amount shall be presumed to be valid.
10 There is a rebuttable presumption that the recipient cannot
11 reasonably be expected to be discharged from the facility and
12 return home if the recipient or a representative of the
13 recipient declares that there is no intent to return home or if
14 the recipient has been institutionalized for six months or
15 longer without a discharge plan.

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



1 the recipient's admission to the medical
2 institution;
3 is lawfully residing in the home.

4 (2) The department shall not recover funds from the lien
5 on the recipient's home when:

6 (A) A sibling who was residing in the home for a
7 period of at least one year immediately before
8 the date of the recipient's admission to the
9 medical institution; or

10 (B) A son or daughter who was residing in the
11 recipient's home for a period of at least two
12 years immediately before the date of the
13 recipient's admission to the medical institution,
14 and who establishes to the satisfaction of the
15 State that he or she provided care to the
16 recipient [~~which~~] that permitted [~~such~~] the
17 recipient to reside at home rather than in an
18 institution;

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



1 (3) The department also shall not recover funds from the
2 lien if the recipient has a surviving spouse; or
3 surviving minor, blind, or disabled child.

4 (4) Any lien imposed with respect to this subsection shall
5 be dissolved upon the individual's discharge from the
6 medical institution and return home."

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

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

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



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

11 (e) An attorney representing a claimant or third person
12 shall make reasonable inquiry as to whether the claimant has
13 received or is receiving from the department medical assistance
14 related to the incident involved in the action. If the
15 claimant, claimant's attorney, or claimant's heirs,
16 representatives, or beneficiaries, or any third person have
17 received from the department actual notice of its right to
18 reimbursement or if they have reason to know that the claimant
19 has received or is receiving from the department medical
20 assistance related to the incident, then the claimant,
21 claimant's attorney, claimant's heirs, representatives, or
22 beneficiaries, or third person or third person's attorney shall



1 give to the department timely written notice of any claim or
2 action against a third person. At any time during the pendency
3 of any claim or action, the claimant, claimant's attorney if
4 represented, claimant's heirs, representatives, or
5 beneficiaries, or third person or third person's attorney may
6 contact the department to ascertain the full amount of the costs
7 of medical assistance or burial payment made, which information
8 shall be provided in a reasonable time by the department. Upon
9 obtaining a judgment or reaching a settlement through
10 negotiation or legal proceedings, but before the release of any
11 award or settlement proceeds to any person:

- 12 (1) The claimant's attorney or third person or third
13 person's attorney, if the attorney has received actual
14 notice from the department of a lien or if the
15 attorney or third person has reason to know that a
16 lien exists; or
- 17 (2) The claimant or the claimant's heirs, representatives,
18 or beneficiaries, if not represented by an attorney
19 who has received actual notice of the lien,
20 shall notify the department immediately in order to ascertain
21 and ~~[pay the full amount of the]~~ satisfy the department's right



1 to reimbursement for costs of medical assistance or burial
2 payment made.

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

15 (g) The lien of the department for reimbursement of costs
16 of medical assistance or burial payments under subsection (f),
17 shall attach by a written notice of lien served upon the
18 claimant's attorney or upon the third person, the third person's
19 agent, attorney, or insurance company. The method of service
20 shall be by certified or registered mail, return receipt
21 requested, or by delivery of the notice of lien personally to
22 ~~[the]~~ these individuals ~~[referred to]~~. Service by certified or



1 registered mail is complete upon receipt. The notice of lien
 2 shall state the name of the injured, diseased, or deceased
 3 person, the amount of the lien, and the date of the accident or
 4 incident [~~which~~] that caused the injuries, disease, or death
 5 [~~which~~] that necessitated the department's medical assistance or
 6 burial payments. If the notice of lien is served upon the
 7 claimant's attorney, the notice of lien shall state that the
 8 claimant's attorney shall pay the [~~full amount of the~~] lien from
 9 the proceeds of any judgment, settlement, or compromise based on
 10 the incident or accident[+] as provided in this section. If the
 11 notice of lien is served upon the third person, or the third
 12 person's agent, attorney, or insurance company, the notice of
 13 lien shall state that the third person shall pay the [~~full~~
 14 ~~amount of the~~] lien as provided in this section prior to
 15 disbursing any of the proceeds to the claimant or to the
 16 claimant's attorney. A notice of lien may be amended from time
 17 to time until extinguished, each amendment taking effect upon
 18 proper service.

19 When restitution is sought in a criminal proceeding from a
 20 third person who has caused injury to a recipient of medical
 21 assistance, a written notice of lien and an itemized list of
 22 payments made by the department that identifies the provider of



1 services, the dates of services, the amounts billed and paid,
2 and the dates of payments, shall be provided to the court and to
3 the person against whom restitution is sought. Absent a good
4 faith basis contesting the amount or validity of a specific line
5 item charge or charges in the lien, the entire lien amount shall
6 be presumed valid by the court in determining the amount of
7 restitution pursuant to section 706-646.

8 (h) The lien shall attach as provided by subsection (g).
9 If a notice of lien is properly served upon the attorney
10 representing the claimant as provided in subsection (g), that
11 attorney shall pay the [~~full amount of the~~] lien[7] as provided
12 in this section prior to disbursing any of the proceeds of the
13 suit or settlement to the attorney's client. If a notice of
14 lien is properly served upon the third person, the third
15 person's agent or attorney, or the third person's insurance
16 company, as provided in subsection (g), it shall be the
17 responsibility of the person receiving the notices to pay the
18 [~~full amount of the~~] lien as provided in this section prior to
19 disbursing any of the proceeds to the claimant's attorney. The
20 lien shall be satisfied from that portion of the settlement,
21 award, or judgment allocated or allocable to payments by the
22 department for medical assistance and burial payments. Any



1 allocation by a judge, jury, arbitrator, or similar dispute
2 resolution person or tribunal shall be binding; provided that
3 the department's medical assistance and burial payments are
4 included as part of the case or claims brought by the claimant
5 in any action. Any allocation by the claimant or third party
6 may be considered but is not binding on the department. If
7 there is no allocation, a reasonable allocation shall be
8 determined by agreement, administrative hearing under subsection
9 (i), or a court of competent jurisdiction.

10 If, after having received timely written notice of any
11 claim or action under subsection (e), the department did not
12 intervene or join in the action or prosecute its own claims or
13 actively participate with claimant or claimant's attorney in the
14 prosecution of claims, or a distribution agreement was not
15 entered into between the parties, reimbursement shall be as
16 follows: If the lien is less than or equal to one-third of the
17 settlement, award, or judgment, and there is no allocation by a
18 judge, jury, arbitrator, or similar dispute resolution person or
19 tribunal, then there shall be a rebuttable presumption that the
20 amount of reimbursement due the department is the total payments
21 for medical assistance or burial payments by the department or
22 one-third of the settlement, award, or judgment, whichever is



1 less. Any party challenging this rebuttable presumption shall
2 bear the burden of proof. The department's fair share of
3 claimant's reasonable attorney's fees and expenses shall be
4 deducted from the department's lien recovery. There shall be a
5 rebuttable presumption that one-third of the department's gross
6 reimbursement amount plus a proportionate share of the general
7 excise tax is a reasonable amount for the department's
8 contribution towards claimant's attorney's fees and expenses.
9 Any party challenging this rebuttable presumption shall bear the
10 burden of proof.

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

15 If the claimant's attorney and the department contribute to
16 the recovery of medical assistance or burial payments made by
17 the department, then the [department shall determine its]
18 department's fair contribution toward [attorney] the claimant's
19 attorney's fees and costs incurred [in the action that] shall be
20 a reasonable amount based solely upon legitimate costs and
21 services rendered by the claimant or claimant's attorney in
22 recovering the lien amount. Any dispute regarding the



1 department's determination of its contribution to claimant's
2 attorney's fees and costs may be submitted to administrative
3 hearing under subsection (i) or a court of competent
4 jurisdiction. The value of services contributed by the claimant
5 and department may be considered in fairly allocating fees and
6 costs between the claimant and department where both contribute
7 to recovering the lien amount.

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

20 (i) [~~Notwithstanding any other law to the contrary, if~~] If
21 there is a dispute between the claimant, the claimant's agent or
22 the claimant's attorney, and the department concerning the



1 existence of the lien or the amount of the lien, or the amount
2 to be reimbursed, the claimant, the claimant's agent, or the
3 claimant's attorney [~~shall~~] may submit the dispute to a court of
4 competent jurisdiction or request in writing [a] an
5 administrative hearing on the dispute. After receipt by the
6 department of a written request, the department shall conduct an
7 administrative hearing within a reasonable period of time.
8 Chapter 91, including any provisions for judicial review or
9 appeal, shall apply to the hearing. Funds sufficient to fully
10 satisfy the reimbursement rights of the department shall be
11 either retained by the person served with the notice of lien,
12 shall be paid to the department, or otherwise reserved subject
13 to agreement with the department pending [~~its~~] a decision by the
14 court or the department and any subsequent judicial review or
15 appeal."

16 2. By amending subsection (k) to read:

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



1 3. By amending subsection (o) to read:

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

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

17 "(1) As used in this section, "victim" includes any of the
18 following:

19 (a) The direct victim of a crime including a business
20 entity, trust, or governmental entity;



1 (b) If the victim dies as a result of the crime, a
2 surviving relative of the victim as defined in chapter
3 351; or

4 (c) A governmental entity [~~which~~] that has reimbursed the
5 victim for losses arising as a result of the crime[-]
6 or paid for medical care provided to the victim as a
7 result of the crime."

8 PART II

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



1 SECTION 7. The department of human services may work with
2 the department of health to develop an equitable referral system
3 relating to the discharge of medicaid patients from hospitals,
4 nursing homes, and long-term care facilities based on the
5 patient's acuity level for proper placement in either an adult
6 residential care home, community care foster family home, or an
7 expanded adult residential care home.

8 PART III

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

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

APPROVED this 3 day of JUL , 2012



GOVERNOR OF THE STATE OF HAWAII

