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Press Release

LEGAL ADVOCATES FOR PATIENTS OPPOSE SB 406

Cite one-sided legislation that harms patients already injured through negligent care

Concord, N.H. — Imagine a legal system where, in order to obtain an early offer of settlement from a negligent medical care provider, you must first sign away your right to sue for the negligent care in the event you decline the undisclosed offer. Imagine that this system did not include any sanctions on the provider for making a wholly unreasonable offer. Imagine that proponents of the system tried to sell it as a patient-friendly reform of current law. Sadly, that is the case with SB 406, a bill to be heard this afternoon before the Senate Judiciary Committee.

“Parties injured as a result of medical negligence in New Hampshire are already burdened with a costly and ineffective screening panel system. Under SB 406, an insurance company that entices an injury party to opt into early offer with the prospect of a prompt resolution can then make a low ball offer and benefit from its bad faith,” says William Woodbury, Chair of the Legislative Committee of the New Hampshire Association for Justice. “The injured party would have to either accept an inadequate offer or, in rejecting the offer, trigger a provision that excuses negligent medical care and forces the injured party to prove ‘gross negligence’ by ‘clear and convincing evidence.’ This increased legal burden constitutes a dramatic and unjustifiable infringement upon the rights of parties injured by medical error.”

“This bill is a kind of Trojan horse,” says David Slawsky, former Governor of the New Hampshire Association for Justice. “It’s easy to see how nice people who just want answers will fall into a trap. Sign this document for an early resolution, and then we’ll explain how your loved one was so badly injured. Only later do they learn that they’ve given up any chance they have if the insurance company won’t cooperate.”

NHAJ believes that all laws should be just and balanced. SB 406 includes language stating an intent to improve the medical negligence system as it relates to all parties. To meet that goal, the bill must balance its call for the relinquishment of rights by the injured with a call for an equal relinquishment of rights by the provider. NHAJ has drafted an amendment to SB 406 which would ensure such balance, a summary of which is attached.

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NHAJ is a statewide association of trial attorneys committed to good lawyers and good law. The NHAJ Government Affairs program seeks to keep the scale of justice in balance, protecting the rights of individuals, consumers, and small business by advocating for an accessible, transparent and fair civil justice system that holds wrongdoers accountable.

PROPOSED AMENDMENT TO SENATE BILL 406

Summary: The proposed amendment to SB 406 replaces a one sided defense bill that undermines the ability to hold negligent professionals accountable with a fair and balanced proposal that (1) replaces the medical screening process with an early offer option and (2) provides a level playing field within the early offer process by mandating a balanced waiver of rights.

Findings and Purpose: The additions help to identify the weaknesses of the present medical negligence system, including the increased costs and delays associated with the medical screening panel process. These additions further provide data from the most recent submission of the Department of Insurance to the NH legislature showing the decreasing average monetary payments in medical negligence cases.

Waiver of Rights: SB 406 as written requires that injured patients give up the right to recover extensive damages in exchange for the option to pursue an early offer. The proposed amendment includes provisions to ensure informed consent, including (a) notice of the full scope of the rights and related recovery waived under the Early Offer option and (b) including a waiting period to allow consultation with counsel. Moreover, given that the Early Offer process should treat both sides equally, the proposed amendment balances the claimant waiver of significant damages with a defense waiver of confidentiality for apologies and/or admissions of fault.

Attorneys Fees: Under SB 406 as written, only the injured's attorney fees are set at an arbitrary amount. The proposed amendment creates balance by limiting the attorney fees either side may pay to the amount generally billed and received. Note that this limitation uses the same standard imposed on hospital rates for self pay patients under RSA 151:12-b.

Notice of Injury: SB 406 as written requires claimant to file a detailed notice of injury. The proposed amendment creates balance by requiring a response to the notice of injury that specifies the grounds for defense.

Discovery: SB 406 requires the injured to submit to a medical examination by a medical provider chosen by the insurer. The proposed amendment seeks to assure transparency by allowing the claimant to video record any medical examination.

Penalty for Rejection of Early Offer: Perhaps the most troubling provision of the bill as written is that any claimant who rejects an early offer, no matter how unreasonable or inadequate that offer may be, waives the right to compensation for negligent medical care, retaining the right to pursue recovery only for grossly negligent care that can proven by 'clear and convincing evidence.' Such a system would tie the hands of the justice system, preventing it from enforcing the standard of care defined by medical professionals and leaving the patient on his or her own to live with the scars, disabilities and other losses suffered as a result of a provider's negligence.

Compensation under Early Offer System: SB 406 as written provides for a statutory scheme of compensation which values human life at \$57,000. This proposal changes that statutory scheme to provide more defensible compensation based on real life.

Comparative Fault: SB 406 as written requires that the injured give up the right to seek compensation from others whose negligence contributed to the injury; at the same time, it allows the provider(s) to seek contribution from such parties. The proposed amendment creates balance by (1) requiring provider(s) to name any providers they allege to have contributed to the injury as part of the early offer notice process, (2) preventing the provider from pointing the finger at other providers not disclosed in the response to the notice of injury, and (3) allowing claimant to pursue compensation against unnamed providers.

Disputes under Early Offer Statute: SB 406 as written limits dispute resolution to administrative appeals. The proposed amendment requires a full and complete recording of all administrative actions with appeal de novo to the superior court.