

Sunday, April 15, 2012

## ‘Early offer’ malpractice more like bait and switch

By DAVID GOTTESMAN

Guest Commentary

“Early offer to settle,” as contained in SB 406 now before the House of Representatives, is a perfect sound-bite manufactured by medical malpractice insurance carriers to convince the Legislature that there is a better way to resolve medical malpractice claims.

“Bait and switch” may be more appropriate.

Remember when we were told that we needed medical screening panels to review cases so that there would be quicker settlements to malpractice cases and how it would reduce health-care expenses?

Well, they never worked. The insurance companies and the New Hampshire Medical Society that pushed so hard for them are now complaining the screening panel system is not working. They say that it can take up to 44 months to get a case fully resolved.

Medical screening panels are supposed to do it in six months. Injured victims don’t want these cases dragged out. The insurance companies look under every rock, stone and pebble to try to shift the blame to anyone other than the responsible medical provider. That takes time and costs money.

Only after the conclusion of a screening panel is a jury trial allowed. The panels have become minitrials that require expensive expert testimony. If there is not a unanimous finding, then it is as if nothing ever happened, and all the time and money that was expended to go to the panel is wasted.

So rather than just letting juries decide in the first instance whether the medical providers’ treatment was negligent, what is the solution to this colossal waste of time and money?

The insurance companies want to see if they can convince some injured people to enter an early offer system to allow the insurers to try to settle these cases without going to court.

Sounds good, right? Wrong!

First of all, people injured and without resources will not understand the legal

consequences of such an election.

How about putting in a very easy to understand warning so that any person who is approached by insurers to enter this system would be told what their legal rights were.

How about telling them that if the insurer does not make an acceptable offer, the victim can proceed to trial, but the standard of proof is raised to having to prove “gross negligence,” a virtually impossible standard to attain. No insurers seem to like that idea.

Did I mention that victims give up all rights for recovery except economic losses, a small payment for the injury or death and attorney fees? There is no compensation for pain and suffering, loss of enjoyment of life, physical impairment, nor for the loss of the care, comfort or support of your spouse, to name a few.

What about the value of a person who stays at home out of necessity of caring for their family? They get nothing for the value of their economic loss. This gives no value to stay-at-home parents. Unfair you say?

If there are any disputed issues under the SB 406 system, they are heard by a hearings officer appointed by the Insurance Department of the state of New Hampshire. Did you know the Insurance Department is funded by the insurance industry?

What if there is an unfavorable decision in the process? Is there a right of appeal to court, like in the Administrative Procedures Act used throughout government? No; nothing. Oh, did I mention that the hearings officer would be paid by the malpractice insurer as well?

SB 406 sets forth a schedule of arbitrary award amounts for levels of injury that a person suffers; a sort of one size fits all for loss of life and limb.

Despite the fact that the amounts are extremely low, this sort of valuation does not take into account any worth of that person’s loss of enjoyment of his or her life.

This is not the way justice has been delivered in New Hampshire, based upon years of case law that has defined valuation of people’s lives. This effort to further distance the injured victim from a jury of his or her peers should be rejected and put to rest.

SB 406 is flawed. It has been rejected coast to coast by states such as Washington and Massachusetts, proving New Hampshire should reject the request to become the new guinea pig of the nation. We just don’t need it.

**David Gottesman is an attorney at Gottesman & Hollis, PA in Nashua and a former state senator from District 12.**