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MY TURN

## Let's not be insurance industry guinea pig

Malpractice proposal is terrible for patients

By [Paul W. Chant](#) / [For the Monitor](#)

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Imagine that you have sought medical care and been injured due to the negligence of your provider. Your hospital has sent you bills totaling tens of thousands of dollars. You cannot work for a period of time. As a result, you are struggling to pay your bills, your mortgage payments are late and you are at risk of losing your home. Imagine that your hospital or medical provider offers to pay your medical bills and your lost wages, quickly; all you have to do in exchange is give up your right to sue for full, fair and adequate damages under New Hampshire law.

This is the scenario offered as a "new choice" for patients injured through medical negligence under Senate Bill 406. In truth, the choice is not new at all; under existing law, the malpractice carrier certainly can make you such an offer, and you can accept it. Seeking early settlement is not uncommon; it can often save both sides money, time and anguish. What is new is the penalty SB 406 creates for patients who do not accept the offer of settlement. It is this penalty which makes the bill so unfair, so hostile to consumers and so darn appealing to insurers.

Under current law, if you say no to a settlement offer, you can still go to court and seek damages not just for your bills and lost wages, but also for what are called "non-economic damages." If medical negligence results in a lifelong disability, it may not impact your wages but it may change forever the way you live your life, interact with others, plan for the future. These changes are a real cost to you. Current law allows you to recover for them if you can prove negligent care by a preponderance of the evidence.

Under SB 406, in exchange for your willingness to consider an early offer, you must give up forever the right to seek non-economic damages, you must give up the right to sue for ordinary negligence, and you must walk away from the hospital without any compensation whatsoever unless you can prove by clear and convincing evidence that your provider acted with gross negligence.

Evidence of "gross negligence" is akin to the surgeon being proven to be intoxicated. Even proponents of the bill admit that proving gross negligence by such a high standard is a close to insurmountable hurdle.

If the bill is so bad, why would anyone choose to invoke this new option? Good question. Certainly no patient with counsel would ever waive his or her rights. Only patients approached by insurer representatives and enticed by early money at a difficult time in their life would sign away their rights. Who would benefit? Not patients. Not doctors. Only the insurance companies that have dreamed up this scheme.

SB 406 is the brainchild of a Virginia law professor who has been well compensated by the insurance industry in past "tort reform" efforts. To their credit, proponents acknowledge that New Hampshire would be the first state to try this approach, which is not under consideration in other states. I say let's not be the insurance industry guinea pig to try out radical, consumer-unfriendly programs.

***(Paul W. Chant of Chocorua is president-elect of the New Hampshire Association for Justice.)***

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