



House Judiciary Committee

New Hampshire Senate Bill 406 An Act Establishing an Early Offer Alternative in Medical Injury Claims

April 13, 2012

These comments regarding Senate Bill 406, as amended, are submitted by ProSelect Insurance Company (“ProSelect”), a subsidiary of Medical Professional Mutual Insurance Company (“ProMutual”), and a member company of Coverys. Since 2001, ProSelect has provided medical professional liability coverage to individual physicians, surgeons, certified nurse midwives, medical corporations, and healthcare facilities in New Hampshire. The Company is financially stable and enjoys an A- (Excellent) rating from A.M. Best. As of December 31, 2011, ProSelect writes 748 physicians, 98 dentists, certified nurse midwives, and other allied health providers, and 10 institutions, making it the largest medical professional liability writer in New Hampshire.

Although we submit these comments in opposition, we commend the stated purpose of Senate Bill 406, namely, encouraging the “fast and efficient payment of meritorious claims” as a part of medical professional liability insurance legal reform. The Company has long supported meaningful reform that would help reduce the cost of medical professional liability insurance as a factor of the high cost of health care delivery in the country.

Just a few years ago, ProSelect rolled out its disclosure and compensation program, REACT, in New Hampshire to assist insureds and patients who experience adverse medical events achieve a swift resolution and preserve the patient-physician relationship. Similar to other early offer programs in the country, REACT is limited to relatively low level events as it is unsuitable for serious incidents which are more likely to result in a claim or suit. We are committed to REACT as a means of proactively resolving pre-claim issues and providing better health care for patients.

Senate Bill 406 raises concerns which we would like to bring to the attention of Committee members. Due to such concerns, it does not appear that the legislation’s approach is compatible with the protections provided by ProSelect’s professional liability coverage.

- Section 1(V) of Senate Bill 406 states that it “provides the option of a simple, clear process defined in statute that provides prompt and sure recovery of all economic losses associated with meritorious claims.” The promise of a simple, clear process for a prompt, sure recovery seems to fly in the face of the following statement in Section 1 (II)(B): “medical injury cases are highly complex, requiring specialized medical evidence and testimony.” We understand and agree that medical injury cases can be quite complex, and for that reason, when we created ProSelect’s disclosure and compensation program, REACT, we deliberately restricted it to relatively simple incidents which are conducive to the provision of a swift response to patients in the form of disclosure, medical treatment, and compensation where appropriate for economic loss. In contrast,



Senate Bill 406's proposed process, replete with an adjustable workers compensation-type payment schedule for classes of injury severity, provision of on-going weekly wage payments, and hearings before the Insurance Department, does not appear to be particularly simple or clear. While the current legal system for resolving medical injury claims may not be perfect, we do not view the proposed no-fault program as being substantially simpler.

- As written, Senate Bill 406's implied no-fault premise establishes a presumption of merit for all medical professional liability claims. That is to say, the bill eschews the existing medical screening panels and does not differentiate between a claim which is the result of disappointment over an elective cosmetic procedure, an adverse event which is a known risk of a particular medical treatment (i.e., not the result of negligence), or a harm resulting from an error or omission by a medical care provider. As such, we suggest that it would be more accurate to change "meritorious claim" to "claim" in the bill text.
- Contrary to the "long waits for parties" expressed in Senate Bill 406 as a reason for the early offer program, it has been ProSelect's experience that medical professional liability claims generally close faster in New Hampshire than in our other states of operation; in fact, ProSelect's New Hampshire claims generally close within two or so years compared to the four or so years we see in other jurisdictions.
- By opting into Senate Bill 406's early offer program without the Company's consent, a ProSelect insured risks losing protection provided by our professional liability policy. This is because ProSelect's policy, which is typical of the industry, prohibits insureds from making any settlements or assuming any obligation without our prior consent. In addition, our policy defines a covered "incident" as a "negligent act, error or omission," and covers damages where negligence or error has been established. Because a finding of liability is the trigger for coverage under a liability policy, Senate Bill 406's early offer, no-fault process is not compatible with traditional medical professional liability coverage.
- By authorizing the Insurance Department, ProSelect's regulator in New Hampshire, to resolve disputes in the early offer option context, Senate Bill 406 raises the potential for conflict of interest. Thus, we recommend using New Hampshire's existing medical injury screening panels as an alternative.
- By permitting claimants to seek damages from one health care provider with no regard to other providers' proportionate responsibility, Senate Bill 406 puts an unreasonable onus on the named health care provider who must seek contribution from other responsible parties with "reasonable" cooperation from the claimant. In some cases, a claimant might randomly choose one of several potentially liable health care providers from whom to seek damages: the one selected could be viewed as the easiest to access whereas another



provider might actually bear the most proportionate liability. In such a situation, it hardly seems fair that the most vulnerable provider should have to seek contribution after the fact from other liable parties.

- In a no-fault context, the goals of cost-reduction and fair compensation may be at odds with each other. Because the provisions of benefits under Senate Bill 406's proposal would cover a more extensive base and require payments for net earnings based on life expectancy, the bill could significantly raise indemnity payments, and thus at least initially, premium costs would increase for traditional insurance. Consequently, New Hampshire health care providers would have to pay more for their policies.
- We understand that Senate Bill 406's "waiver" by plaintiffs choosing the early offer option may run afoul of the New Hampshire constitution's guarantee of a "full and fair recovery" in civil actions. ProSelect also questions the bill's provision that if a health care provider makes an offer under the bill's early offer option, and the offer is rejected, the claimant may pursue an action against the health care provider, provided however, that to prevail, the claimant must prove by clear and convincing evidence that the health care provider acted with gross negligence.

Conclusion

We believe the concerns raised above are common to all traditional insurers in New Hampshire's medical professional liability market. Based on our concerns, we oppose Senate Bill 406 and we urge Committee members to reject it. At the least, the Committee should modify the legislation to create a pilot program with a one or two-year life span so that its effectiveness can be monitored.

Thank you for considering our comments, which we hope will be helpful to you. As always, we are available to serve as a resource to you and the Committee as you consider this matter.