

SB 406 – AS AMENDED BY THE SENATE

03/28/12 1418s

03/28/12 1472s

2012 SESSION

12-3067

10/09

SENATE BILL **406**

ANALYSIS

This bill establishes a system of early offers for medical injury claims as an alternative to litigation or screening panels under RSA 519-B.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twelve

AN ACT establishing an early offer alternative in medical injury claims.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Findings and Purpose.

I. The general court finds that the legal system for resolving claims for medical injury requires reform to encourage the fast and efficient payment of meritorious claims. Under the current system individuals with meritorious claims ~~wait for an uncertain recovery~~ are deprived of a fair and reasonable opportunity for recourse ~~to~~ under the laws, to obtain right and justice freely, in a timely manner while medical providers are deprived of a fair and reasonable opportunity to address and resolve claims in a timely manner. In addition, the general public is adversely affected because significant resources are diverted from health care and spent on ~~litigation costs and defensive medicine~~ insurer defense costs, which have a significant influence of the premium levels charged in New Hampshire.¹ The result is a system that has longer than necessary timelines, uncertain outcomes, increased costs and reduced access to justice. ~~higher than necessary health care costs, higher liability insurance premiums, higher health insurance premiums, and ultimately reduced access to care.~~

II. These overarching conclusions are based upon the following factual findings:

(a) Inconsistent Results: Recent data presented to the general court by the New Hampshire insurance department pursuant to RSA 519-B:14, II shows that ~~the current medical injury liability system produces inconsistent results with average indemnity payments on similar claims varying substantially from year to year.~~ average indemnity payments for all closed claims have decreased 10.5% from 2006 to 2011, while average indemnity payments for only those closed claims with indemnity paid decreased 25% during the same period of time. The sharpest decrease occurred in the average indemnity paid for claims with defense counsel expense, which declined 29.6% in the years from 2006-2011.²

(b) Long waits for the parties: The testimony before the general court demonstrates that medical injury cases are highly complex, requiring specialized medical evidence and testimony. ~~This complex medical evidence and testimony requires~~ The current statutory system which provides for a preliminary trial before a screening panel has increased the steps necessary to get to trial, requiring additional discovery and case preparation, as well as repeated testimony from expert witnesses, that results in a particularly lengthy process for resolving cases.

(c) Costly litigation: Recent data presented to the general court by the New Hampshire insurance department pursuant to RSA 519-B:14, II shows that the aggregate insurer expense payments average more than 31% of the total claim costs. For claims with less severe injuries, the expense ratio rises to 89.3%. ~~administrative and litigation costs for all claims~~

¹ Medical Malpractice Panel and Insurance Oversight Committee Report at page 3, November 1, 2011.

² Draft presented to NHAJ stated that the current medical injury liability system produces erratic results with average indemnity payments on similar claims varying by up to 307 percent from year to year. However, the report filed by the DOI states on page 3 that differences in distributions by range of indemnity payment "most often can be attributed to those ranges which have very few claims assigned to that 'bucket.'"

for medical injury nearly exceed the amount that claimants receive for their injuries. The longer the time from the date of an injury to the date of closure of the insurance claim, the larger the proportion of expense payments to the overall payments (expense plus indemnity). In looking at the costs of claims resolution, the Commissioner of Insurance stated that “the relationship between indemnity and expense costs is ultimately a significant influence in the premium levels charged in New Hampshire.”

(d) Access to care: The testimony before the general court has established that access to care in New Hampshire can be compromised by the negative aspects of the current medical ~~injury-~~ insurance defense system. The report presented to the general court by the New Hampshire insurance department pursuant to RSA 519-B:14, II states that rate revisions since 2005 have been across the board and “not focused on specific classes or categories of risk,” negating the testimony before the general court that as physicians and other providers avoid high risk medical specialties and/ or high risk treatments in order to avoid exposure to liability.

(e) Defensive medicine: Data from the GAO (government accountability office) indicate that studies of defensive medicine by interest groups such as American Medical Association, Gallup, Harvard School of Public Health, and Health Affairs Magazine cannot be generalized to estimate the cost of defensive medicine practices.³ ~~and other reliable sources estimate that defensive medicine, practiced in response to the current medical injury system, increases the annual health care expenditures in the United States by billions of dollars. These organizations consider defensive medicine to be diagnostic tests or treatments that have little or no expected benefit to the patient, ordered primarily as a means to guard against claims of liability.~~

III. The legislature further finds that the slow, inconsistent, and costly nature of the existing medical injury litigation system has a detrimental impact upon injured claimants/parties, whose medical and economic needs ~~require rapid~~ would be better served by timelier resolution of their claims ~~with less uncertainty, risk, and costs~~, as well as upon medical providers whose provision of patient care is disrupted by lengthy and costly ~~litigation-~~ defense of medical injury claims.

IV. Therefore, the important governmental objective of this act is to ~~supplement-~~ revise the existing medical injury compensation system by creating an early offer system that will provide limited compensation in exchange for expedited payment and by improving ~~with an alternative system that will provide fast and certain results for those who use it, while preserving~~ access to the court system and medical injury screening panels for parties that choose to resolve claims under the current system. by repealing the medical screening panels for medical injury claims set forth in RSA 519-B. The general court further finds that the early offer process set forth in RSA 519-C as inserted by this act to resolve medical injury claims , and the repeal of medical screening panels set forth in RSA 519-B, are ~~is-~~ substantially related to this important governmental objective.

V. The general court further finds that medical injury claimants-litigants will benefit from the early offer process set forth in RSA 519-C as inserted by this act and the repeal of screening panels set forth in RSA 519-B, as it will simplify the process of assuring full and fair legal recourse in a more timely manner. ~~as 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 settled pursuant to RSA 519-C. The early offer process, if elected, would be more efficient and cost effective in many cases than the high-risk, high-cost traditional litigation process.~~

VI. In exchange for the benefits of the early offer process established in this act, the claimant-injured and the medical provider(s) agrees to participate fully in the process, which may affect the damages the claimant-injured party can recover, the fees the claimant’s attorneys may receive, and other important rights or claims that may exist under the existing system.

VII. In exchange for the benefits of the early offer process established in this act, the medical provider(s) and insurer(s) agree to waive any confidentiality granted under law or otherwise for statements made to the injured, the injured family whether in the form of an apology or a discussion of the causes or effects of the injury, including any current or

³ Defensive Medicine has also been called that last test the doctor does to be certain there is no other disease contributing to the illness.

future law granting a medical provider the ability to make statements or admissions under the commonly known “I’m Sorry” statutes or other statutes designed to allow confidential communications concerning the incident and any occurrences related.

VIII. The general court finds that the benefits to the public and to the parties to medical injury claims from the process established in this act ~~far exceed~~ provide a balance against the burdens imposed on the general public, ~~and those injured by~~ medical negligence, injury claimants, medical providers and insurers.

2 Repeal Chapter; Screening Panels for Medical Injury Claims. Amend RSA by repealing chapter 519-B.

32 New Chapter; Early Offers for Medical Injury Claims. Amend RSA by inserting after chapter 519-B the following new chapter:

CHAPTER 519-C

EARLY OFFERS FOR MEDICAL INJURY CLAIMS

519-C:1 Definitions. In this chapter:

I. “Claim for medical injury” means any claim against a medical care provider, whether based in tort, contract, or otherwise, to recover damages on account of a medical injury.

II. “~~Claimant~~Injured party” means an individual who, in his or her own right, or on behalf of another as otherwise permitted by law, is seeking compensation for a medical injury.

III. “Early offer” means an offer to pay an injured person’s economic loss, and a reasonable attorney fee related to a medical injury. No other damages of any kind shall be included in an early offer under this chapter. Early offers specifically exclude compensation for serious losses, such as blindness, physical disfigurement, and loss of limb(s), that may limit the ability to enjoy life, limit earning capacity, and limit the ability to participate in family care and support.

IV. “Economic loss” means monetary expenses incurred by or on behalf of a claimant reasonably related to a medical injury, including actual out-of-pocket medical expenses, replacement services, additional payment to the ~~claimant~~injured party pursuant to RSA 519-C:7, and 100 percent of the ~~claimant~~injured party’s wages or income from self-employment or contract work lost as a result of the medical injury. Economic loss does not include: pain and suffering, punitive damages, enhanced compensatory damages, exemplary damages, hedonic damages, inconvenience, physical impairment, mental anguish, emotional pain and suffering, and loss of the following: earning capacity, consortium, society, companionship, comfort, protection, marital care, parental care, attention, advice, counsel, training, guidance or education, and all other non-economic damages of any kind.

V. “Medical care provider” means a physician, physician’s assistant, registered or licensed practical nurse, hospital, clinic, or other health care provider or agency licensed by the state, or otherwise lawfully providing medical care or services, or an officer, employee, or agent thereof acting in the course of and scope of employment.

VI. “Medical injury” or “injury” means any adverse, untoward, or undesired consequences caused by professional services rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services; from rendition of such services without informed consent or in breach of warranty or in violation of contract; from failure to diagnose; from premature abandonment of a patient or of a course of treatment; from failure properly to maintain equipment or appliances necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services.

VII. “Notice of injury” means written notice provided to the medical care provider alleged to have caused a medical injury, and containing:

- (a) The name and address of the ~~claimant~~injured party;
- (b) The date and place of the medical injury;
- (c) The nature of the injury;

- (d) An explanation, if known, as to how the injury is alleged to have been caused including any discussions or apology from the medical provider or providers;
- (e) ~~The severity of the injury using the National Practitioner Data Bank severity scale;~~
- (f) ~~Medical records and medical bills associated with the injury or a limited authorization allowing the medical care provider to obtain medical records and medical bills associated directly related to with the injury;~~
- (g) Evidence of lost wages or income from self-employment or contract work for the individual suffering a medical injury, which may be supplied through income tax returns or paycheck stubs for the year prior to the injury and any subsequent records up to the date of the notice of injury, or a limited authorization allowing the medical care provider to obtain such records;
- (h) A demand for economic loss, current and future, resulting from the injury, that includes only medical expenses, replacement services, reasonable attorney fees, and lost wages, or income from self-employment or contract work; and
- (i) A request that the medical care provider extend an early offer of settlement of the claim.

VIII. "Personal representative" means an executor, administrator, successor personal representative, or special administrator of a decedent's estate or a person legally authorized to perform substantially the same functions.

IX. "Reasonable attorney fee" means ~~20 percent of the present value of the claimant's economic loss~~ loss that fee which is agreed to by injured party and his or her attorney that is consistent with the fees generally billed and received in this area of the law plus reimbursement of all direct costs incurred by the attorney in preparation of the notice of injury, including any review of documentation by outside experts.

X. "Replacement services" means expenses reasonably incurred in obtaining ordinary and necessary services from others, who are not members of the injured person's household, in lieu of those the injured person would have performed for the benefit of the household, but could not because of the injury.

XI. "Wages" means monetary payment for services rendered, and the reasonable value of board, rent, housing, lodging, fuel, or a similar advantage received from the employer and gratuities received in the course of employment from others than the employer; but "wages" shall not include any sum paid by the employer to the employee to cover any special expenses incurred by the employee because of the nature of the employment. For individuals receiving unemployment benefits pursuant to RSA 282-A:25 at the time of the injury, wages shall equal the wage rate used for the last six months of employment, whether those months be consecutive or not, to determine the unemployed individual's unemployment benefit pursuant to RSA 282-A:25. For a minor who is injured prior to reaching the age of 18 and who is unable to perform any gainful work as a result of the medical injury, upon reaching the age of 18 wages shall equal the mean New Hampshire per capita income as shown by the American Community Survey's 1-year Estimate (inflation adjusted), produced by the United States Census Bureau. For a student over age 18 who is unable to perform the work for which he or she was studying as a result of the medical injury, wages shall equal the mean New Hampshire per capital income for the profession or occupation for which the student was training, as measured by the American Community Survey's 1-year Estimate (inflation adjusted), produced by the United States Census Bureau.

519-C:2 Procedure.

I. After a medical injury, the injured claimantinjured party or personal representative may:

- (a) Pursue resolution of a claim for medical injury pursuant to this chapter; or
- (b) Pursue an action for medical injury as provided in RSA 507-E ~~and RSA 519-B.~~

~~II. For so long as the claimant and medical provider are proceeding under this chapter, this section shall govern the procedure for resolving the medical injury claim at issue between the 2 parties, notwithstanding any other provision of law.~~

III. If the claimantinjured party elects to pursue a remedy under this chapter, the claimantinjured party shall serve a notice of injury to the medical care provider alleged to be responsible for the injury and an executed notification and waiver of rights in the form set forth in RSA 519-C:13, by certified mail, return receipt requested.

~~III~~V. Upon the receipt by the medical care provider of a notice of injury and an executed notification and waiver of rights, the medical care provider may elect to:

- (a) Extend an early offer of settlement; or
- (b) Decline to extend an early offer of settlement.

~~V. A claimant's failure to submit a notice of injury requesting an early offer, or a provider's failure to extend an early offer, shall not be subject to review in any hearing, court, or other proceeding of any kind.~~

IV. The medical care provider shall respond to the ~~claimant~~injured party's notice of injury in writing, within 90 days, setting forth the details of its early offer, or indicating that the medical care provider has decided not to extend an early offer of settlement.

(a) Upon initial contact with the injured party for purposes of extending the early offer option, the provider shall provide the injured party with the following written advisory:

INJURIES DUE TO MEDICAL ERROR MAY NOT BE IMMEDIATELY APPARENT. WARNING:

The extent, severity and permanent nature of injuries caused by medical error(s) may not be readily apparent immediately following said error. You are strongly advised to seek independent medical verification of your medical prognosis as it pertains to the medical error at issue. You are further advised that New Hampshire law affords persons injured by medical negligence a period of three (3) years before a lawsuit must be filed seeking damages for such injuries giving time for you to know more fully the full extent of your injuries. You are advised to consult with independent counsel prior to entering into any early settlement of your case which will preclude compensation for any injuries/damages discovered following settlement. If you are a Medicaid or Medicare insured patient you should consult the Medicaid or Medicare office to fully understand the amount that must be reimbursed to them from any settlement.

The advisory shall be printed on a separate page in 12 Point Font and Bold type and shall require a date and signature line for the injured party to acknowledge said advisory. No signature shall be obtained from the injured party until a period of 72 hours has passed from the date the advisory is provided to the injured party.

(b) The medical care provider's written response shall include:

(i) The name and address of any other medical care providers, or combination of providers, that may have contributed to the injury, and an executed notification and waiver of rights to assign fault to any party other than those named in the Notice of Response;

(ii) A statement of the cause of the injury, including any discussions or apology from the medical provider or providers;

(iii) A statement of the severity of the injury, including any evidence that the injury may have more serious consequences than the injured party lists and any evidence of similar claims against the medical providers within the past five (5) years;

(iv) Medical records and medical bills associated with the injury created or reviewed by the medical provider prior to, in the course of, or subsequent to treatment of the injured party, including any records reviewed in determining the offer of settlement;

(c) The medical care provider's written response shall be sent by certified mail, return receipt requested, to the address provided in the ~~claimant~~injured party's notice of injury.

VII. The medical care provider may request in writing that an individual who alleges a medical injury submit to an examination by a qualified physician chosen by agreement of the injured party and the medical care provider at a time and place reasonably convenient for the ~~claimant~~injured party. **The injured party is entitled to a video recording of the examination, a copy of which shall be provided to the injured party upon the conclusion of the examination, so long as the request for the video recording is made at least 5 days prior to the exam.** The examining physician shall not be affiliated with the medical care provider alleged to have caused the injury. The cost of the examination, including all reasonable ~~travel~~-expenses for the ~~claimant~~injured party and all expenses associated with the recording of the examination, shall be the responsibility of the medical care provider. Any physician conducting medical examinations under this section shall be certified by the appropriate specialty board as recognized by the American Board of Medical Specialties and in good standing with the New Hampshire board of medicine. ~~The claimant may request a video recording of the examination at his or her own expense.~~

VIII. If the medical care provider requests that the [claimantinjured party](#) submit to a physical examination as set forth in paragraph VII, the time allowed for a medical care provider to respond to the [claimantinjured party](#)'s notice of injury shall be extended by 30 days.

VIIIX. If the medical care provider extends an early offer, the [claimantinjured party](#) shall accept or reject the medical care provider's written offer in writing within ~~60-90~~ days of the offer being made to the [claimantinjured party](#). If the [claimantinjured party](#) requests a hearing pursuant to RSA 519-C:10, to resolve any dispute with respect to the content of an early offer, the timeframe within which the [claimantinjured party](#) may accept or reject the early offer shall be extended until 10 days after the decision on the disputed issue is issued by the insurance commissioner.

VIIIIX. If the [claimantinjured party](#) accepts the medical care provider's early offer, the [claimantinjured party](#) shall notify the medical care provider in writing by certified mail, return receipt requested, and thereafter, the [claimantinjured party](#) is barred from pursuing any claim for the same medical injury against ~~any the~~ medical care provider.

IXI. If the [claimantinjured party](#) does not accept the medical care provider's early offer as provided by paragraphs IX and X, the early offer shall be considered rejected by the [claimantinjured party](#) ~~60-90~~ days after the medical care provider made the early offer. When an early offer is rejected, a [claimantinjured party](#) may pursue an action for medical injury against the medical care provider pursuant to RSA 507-E and RSA 519-B. ~~However, in order to prevail against a medical care provider that extended an early offer pursuant to this chapter, the claimant shall prove by clear and convincing evidence that the medical care provider acted with gross negligence in causing the injury.~~

519-C:3 Unrepresented [ClaimantInjured party](#). If the [claimantinjured party](#) is not represented by legal counsel, upon receiving notice of the claim for medical injury, the medical care provider shall provide a neutral mediator, at the medical care provider's expense, to offer assistance to the [claimantinjured party](#) and medical care provider under this chapter.

519-C:4 Confidentiality.

I. Proceedings, records, and communications during negotiation of an early offer shall be treated as private and confidential by the [claimantinjured party](#) and the medical care provider; ~~however all information shall be available for use by both parties in court should an early offer be rejected.. The outcome and any other writings, evidence, or statements made or offered by a party or a party's representative during negotiation of an early offer are not admissible in court or in a screening panel hearing under RSA 519-B, shall not be submitted or used for any purpose in a subsequent trial, and shall not be publicly disclosed.~~

II. A notice of injury provided pursuant to RSA 519-C:2, III, and subsequent actions taken pursuant to this chapter shall be exempt from the reporting requirements of RSA 329:17 and administrative rules adopted thereunder, unless the parties reach a settlement under this chapter. Settlements reached pursuant to this chapter are not exempt from the reporting requirements of RSA 329:17 and said administrative rules.

519-C:5 Payment of Early Offer.

I. If an early offer is accepted, economic losses previously incurred by the [claimantinjured party](#) as a result of the medical injury and the reasonable attorney fee shall be paid by the medical care provider to the [claimantinjured party](#) within 15 days of the [claimantinjured party](#) accepting an early offer.

II. If an early offer is accepted, future economic losses incurred by the [claimantinjured party](#) shall be payable by the medical care provider to the [claimantinjured party](#) as such losses accrue. If any requested payment is denied, the medical provider shall notify the [claimantinjured party](#) in writing of the denial and the basis for denial, and inform the [claimantinjured party](#) ~~that of their right to contest the decision and to litigate the remaining value of the existing conditions by filing a complaint with the superior court any request for a hearing under RSA 519-C:10 regarding the denial must be made~~ within 30 days of the date of denial.

III. If an early offer is accepted, aggregate defense attorneys fees shall be based on actual hours billed, with a cap of no more than the “amount generally billed and received” imposed on plaintiff attorneys.

(a) Payments for medical bills arising after the early offer settlement is reached shall be made within 30 days after the medical care provider receives reasonable proof of the fact and the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof shall be paid within 30 days after such proof is received. Any part or all of the remainder of the claim that is later supported by reasonable proof shall be paid within 30 days after such proof is received by the medical care provider. The medical care provider shall pay any and all fees and charges incurred by the [claimantinjured party](#) resulting from failure to make timely payment of medical bills.

(b) Payment of lost wages shall be made weekly. **Such payments shall be adjusted upward in accordance with the consumer price index as it is published.**

(c) Payment of any other amounts due under an early offer shall be paid within 30 days of the date that the provider receives notice and proof of the fact and amount that is due.

III. Interest shall accrue at the rate of 1-1/2 percent per month on any amounts due under an early offer that are not paid as prescribed by this section.

IV. In lieu of periodic payments, the [claimantinjured party](#) and medical care provider may agree upon a lump sum payment for any and all potential future economic losses suffered by the [claimantinjured party](#).

519-C:6 Compensation for Death. If death results from a medical injury, the amount of an early offer pursuant to this chapter shall include:

I. Any economic loss incurred by the decedent prior to death;

II. The value at the time of death of what would have been the net earnings of the deceased, less living expenses during the period of his or her life expectance, but for the medical injury;

III. The value of replacement services during the period of the decedent’s life expectance, but for the medical injury;

IV. The additional payment determined pursuant to RSA 519-C:7; and

V. A reasonable attorney fee.

519-C:7 Additional Payment to the [ClaimantInjured party](#).

I. In addition to the lost wages, medical expenses, and replacement services, economic loss included in any early offer under this chapter shall include an additional payment to the [claimantinjured party](#).

II. The additional payment, as adjusted under paragraph V, that must be included in an early offer shall be:

(a) For a temporary injury involving only emotional harm, without physical injury: ~~\$25,500~~.

(b) For a temporary injury involving insignificant harm: ~~\$304,700~~.

(c) For a temporary injury involving minor harm: ~~\$406,500~~.

(d) For a temporary injury involving major harm: ~~\$5026,250~~.

(e) For a permanent injury involving minor harm: ~~\$7529,750~~.

(f) For a permanent injury involving significant harm: ~~\$10068,250~~.

(g) For a permanent injury involving major harm: ~~\$250107,000~~.

(h) For a permanent injury involving grave harm, or an injury resulting in death: ~~\$500117,500~~.

III. Classification of injuries under paragraph II shall be determined using the National Practitioner Data Bank severity scale.

IV. Either party may request a hearing pursuant to RSA 519-C:10 to resolve a dispute regarding classification of injury severity under this section.

V. The additional payment amounts in paragraph II shall be adjusted annually on July 1 beginning in 2013 ~~by in an amount equal to or greater than the rate of inflation~~ factor equal to the percentage change in the CPI-U index for medical care for the Northeast Region for the prior 12 months established by the Federal Bureau of Labor Statistics.

519-C:8 Assignments; Certain Claims of Creditors.

~~I. Payments for economic loss under this chapter shall not be assignable.~~

~~II. Claims for child support, spousal support, or combination child and spousal support payments, pursuant to RSA 458-B, may be enforced against economic loss settlements.~~

519-C:9 Multiple Parties Alleged to have Contributed to Causing Medical Injury.

I. Every early offer to settle a claim under this chapter shall include all of the economic loss, plus a reasonable attorney fee as set forth herein, and shall not be reduced or apportioned based on comparative fault of multiple providers. Any medical care provider, or combination of providers alleged to have contributed to causing an injury may extend an early offer as provided in this chapter, and acceptance of that offer by the claimant injured party shall not bar any further lawsuit or other claims for compensation by the claimant injured party against all medical care providers arising as a result of the same medical injury. However, any medical care provider that extends an early offer to a claimant injured party that fully compensates all injured parties may seek contribution in a separate action against any medical care provider or other party that contributed to causing the medical injury. The injured individual shall not be a party to any action for contribution between medical care providers, ~~however, the injured individual shall reasonably cooperate with the proceedings and provide such reasonable information and testimony as may be necessary to resolve the contribution claim. The parties to the action shall pay the injured individual all reasonable costs associated with such reasonable cooperation and testimony. The parties to the action shall pay the injured individual all reasonable costs associated with such reasonable cooperation and testimony.~~

II. Nothing in this section shall be regarded as exempting contribution claims from any applicable provisions of RSA 519-B.

III. Nothing in this section shall limit claims by the claimant injured party against any party other than medical care providers who participated in providing medical care which gave rise to the medical injury and who are explicitly covered by the terms of the written early offer.

519-C:10 Dispute Resolution.

I. Upon the request of either party, the insurance commissioner shall appoint a qualified hearing officer to resolve a dispute regarding an early offer made under this chapter.

II. Dispute resolution under this chapter shall be limited to the following issues:

(a) Whether an early offer includes all of the economic loss related to the injury that is required by this chapter;

(b) Whether economic loss of any kind, past or future, asserted by the claimant injured party, is reasonably related to an injury that is the subject of an early offer;

(c) Which severity level, pursuant to RSA 519-C:7, most closely describes the injury that is the subject of an early offer; or

(d) What the net present value of an early offer is, for the purposes of calculating the appropriate payment for reasonable attorney fees.

(e) Whether the injured has suffered additional injury or complications associated with the underlying medical negligence, which injury or complication was not known at the time of the offer or acceptance of the early offer, for purposes of setting aside the waiver of rights set forth in RSA 519-C:13.

(f) Whether the injured failed to act in good faith or unreasonably claimed a right to economic loss or attorney fee beyond the actual economic loss, in which case the injured shall reimburse the medical care provider for its costs related to presenting the dispute to the insurance commissioner, up to a maximum of \$1,000.

(g) Whether any medical care provider failed to act in good faith, or unreasonably denied a claim for economic loss or attorney's fee that the injured is entitled to receive, the medical care provider shall pay the injured double the amount that was unreasonably disputed or denied plus all legal costs.

III. No other disputes arising under this chapter may be the subject of, or resolved through a hearing under, this section.

IV. Any request for a hearing pursuant to this section shall contain a complete statement of the issue or issues to be resolved in the hearing, and shall be served upon the opposing party. Any issue not listed in paragraph II shall not be considered. Hearings concerning economic loss that arises after a settlement under this chapter shall be requested within 30 days of the date payment for such economic loss is denied under RSA 519-C:5, II.

V. The medical care provider or, if applicable, the medical care provider's insurer shall pay all reasonable costs associated with a hearing under this section.

VI. Hearings conducted under this chapter shall be governed solely by this section and by any rules specific to this chapter that the commissioner may adopt pursuant to RSA 519-C:15. ~~Hearings under this section shall not be subject to the requirements of RSA 541, RSA 541-A, RSA 400-A, the rules of evidence, or any other statute or rule that is not specific to this chapter.~~

VII. Any hearing conducted under this chapter shall be conducted within 45 days of the request and a decision shall be issued within 10 days of completion of the hearing. Hearings may be conducted in person or telephonically.

~~VIII. On a motion from any party, or on his or her own motion, a hearing officer may summarily determine any issue in dispute without a hearing if it appears from the record that there are no material issues of fact in dispute. By agreement of the parties, any dispute may be determined by the hearing officer on the written record without a hearing.~~

~~IX. Hearings conducted pursuant to this chapter shall be limited to not more than one day in length, divided equally among the parties, however the hearing length may be extended at the discretion of the hearing officer. A record of the hearing shall be maintained, including an audio recording of all testimony.~~

~~VIII~~X. Parties to a hearing under this section shall exchange exhibits and witness lists at least 30 days prior to the hearing. No exhibit may be introduced or witness called in a hearing unless exchanged with the opposing party pursuant to this paragraph.

IX. A full and complete record shall be kept of all hearings, and all testimony at any hearing shall be recorded verbatim.

XI. The hearing officer shall issue a written decision resolving the issues in dispute. If the hearing officer finds against the medical provider on any issue, the decision shall modify the terms of the early offer. The early offer, as modified by the decision of the hearing officer, shall be binding on the parties.

XII. In a hearing conducted pursuant to paragraph II(b) of this section, if the hearing officer determines the claimant injured party's position to be frivolous, the claimant injured party shall reimburse the medical care provider for its costs related to presenting the dispute to the hearing officer, up to a maximum of \$1,000.

XII. In a hearing conducted pursuant to paragraph II(b) of this section, if the hearing officer determines the medical care provider's position to be frivolous, the medical care provider shall pay the claimant/injured party double the amount that was frivolously disputed or denied.

XIII. An appeal of any decision of the insurance commissioner, under this chapter, may be taken to the superior court within 30 days of the determination. The superior court shall hear the matter de novo, and shall give an appeal under this chapter priority on the court calendar.

519-C:11 Limitations of Claims.

I. Except for claims on behalf of deceased individuals, claims for medical injury to a competent adult under this chapter shall be subject to the limitation set forth in RSA 508:4.

II. Except for claims on behalf of deceased individuals, claims for medical injury to a minor or incompetent under this chapter shall be subject to the limitation set forth in RSA 508:8.

III. Claims for medical injuries on behalf of deceased individuals shall be subject to the limitations set forth in RSA 556:7.

IV. Providing a notice of injury to a medical care provider as provided in this chapter shall operate to toll the applicable statute of limitation with respect to that injury from the time such notice is provided to a medical care provider until the expiration of time for a medical care provider to extend an early offer, or if an early offer is extended, until the acceptance or rejection of an early offer by the claimant/injured party, whichever occurs later.

519-C:12 Subrogation. The right of subrogation shall not exist or be claimed in favor of the Any insurer or third party who has paid or reimbursed economic losses to or for the benefit of the claimant/injured party, ~~shall have the right of subrogation against the medical provider entering into an early offer of settlement under this chapter.~~

519-C:13 Notice and Waiver of Rights.

I. Claimants/Injured parties electing to pursue resolution of a medical injury under this chapter shall execute a notice and waiver of rights which contains the following wording:

WAIVER OF RIGHTS

By agreeing to submit a notice of injury to the medical care provider, I understand that my rights to seek legal remedies and a jury trial for my injuries guaranteed by Part I, Articles 14 and 20 of the New Hampshire Constitution may be affected.

I understand that I have the right to consult and retain an attorney to represent me regarding this matter, and that if an early offer settlement is reached, my attorney will be paid pursuant to RSA 519-C:6, V by the health care provider, in addition to any amount that is paid for my economic loss.

If after submitting a notice of injury, the medical care provider does NOT extend an early offer (RSA 519-C:1 III), I am free to pursue my legal remedies as defined in New Hampshire law without restriction; however, the medical care provider has the right to require I submit to a medical examination by a doctor chosen by its insurer before it has to decide if it will extend an offer.

If after submitting a notice of injury, the medical care provider does extend an early offer (RSA 519-C:1, III), I may either:

(1) Accept the early offer, understanding that I will not have the right to any compensation for losses other than wages and medical care;

(2) Request a hearing before a hearing officer appointed by the Department of Insurance to determine whether the early offer includes all of the economic loss and medical care compensation to which I am entitled to under the statute, understanding that I may not seek compensation for losses other than wages and medical care;

~~and if necessary, the hearing officer may order the medical care provider to increase the early offer to meet the requirements of the early offer law, or~~

(3) Reject the early offer and seek legal remedies, understanding that, while I will still be able to seek full damages for negligence based on a preponderance of the evidence, the insurer may now be at an advantage due to the physical examination it conducted under the early offer rules. However, if I reject the early offer, I may only sue for gross negligence and will be required to prove my case by clear and convincing evidence.

~~I UNDERSTAND THAT WHEN I SUBMIT A NOTICE OF INJURY AND SUBSEQUENTLY RECEIVE AN EARLY OFFER, I WILL HAVE RELINQUISHED MY RIGHT TO SUE FOR ORDINARY NEGLIGENCE, BREACH OF CONTRACT OR BREACH OF WARRANTY OR ANY OTHER CLAIM CONNECTED TO THE INJURY DESCRIBED IN THE NOTICE OF INJURY.~~

I understand that if an early offer is made by the medical care provider and I accept that offer, disputes regarding the early offer can be resolved only in accordance with RSA 519-C:10 by a hearing officer appointed by the New Hampshire Department of Insurance at my request or the request of the medical care provider, with a right of appeal de novo to the Superior Court. ~~-If, after submitting disputes to the Department of Insurance, either party believes that the result is unlawful, that party may seek discretionary review in the New Hampshire court system; however, there is no assurance that the courts will undertake such review.~~

Date _____ Signature _____

II. A properly executed waiver form by a claimant/injured party who is competent at the time the waiver is executed shall be conclusively presumed to be a sufficient, knowing, and voluntary waiver if the waiver form complies with this section.

519-C:14 Other Action for Injury. Except as set forth in RSA 519-C:2, IX, an an claimant/injured party may only pursue an action for medical injury as provided in RSA 507-E and RSA 519-B when:

I. The claimant/injured party elects not to submit a notice of injury pursuant to this chapter; or

II. The medical care provider elects not to extend an early offer pursuant to this chapter in response to the notice of injury.

519-C:15 Rulemaking. The insurance commissioner shall adopt rules, pursuant to RSA 541-A, necessary to carry out this chapter.

3 Effective Date. This act shall take effect 60 days after its passage.