SB 406 – AS INTRODUCED

2012 SESSION

12-3067

10/09

SENATE BILL ***406***

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

SPONSORS: Sen. Bradley, Dist 3; Sen. Luther, Dist 12; Sen. Forsythe, Dist 4; Sen. Bragdon, Dist 11; Sen. Gallus, Dist 1; Sen. Barnes, Jr., Dist 17; Sen. De Blois, Dist 18; Sen. Lambert, Dist 13; Sen. Sanborn, Dist 7; Rep. Bettencourt, Rock 4; Rep. Silva, Hills 26; Rep. Kurk, Hills 7; Rep. Reagan, Rock 1; Rep. Tamburello, Rock 3; Rep. O'Brien, Hills 4

COMMITTEE: Judiciary

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.

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

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

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

12-3067

10/09

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 must wait many years for an uncertain recovery

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. The result is a system that has 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) Erratic 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 erratic results with average indemnity payments on similar claims varying by up to 307 percent from year to year.

(b) Long waits for the parties. The overwhelming weight of the testimony before the general court from medical providers and attorneys who represent medical injury plaintiffs and defendants demonstrates that medical injury cases are highly complex, requiring specialized medical evidence and testimony. This complex medical evidence and testimony requires additional discovery and case preparation 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 administrative and litigation costs for all claims for medical injury nearly exceed the amount that claimants receive for their injuries.

(d) Access to care. The overwhelming weight of 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 system 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. Recent data from the American Medical Association, Gallup, Harvard School of Public Health, Health Affairs Magazine, 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 general court further finds that the slow, erratic, and costly nature of the existing medical injury litigation system has a detrimental impact upon injured claimants, whose medical and economic needs require rapid 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 of medical injury claims.

IV. Therefore, the important governmental objective of this act is to supplement the existing medical injury compensation system with an alternative system that will provide fast and certain results for those who use it, while preserving access to the court system for parties that choose to resolve claims under the current system. 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 is substantially related to this important governmental objective.

V. The general court further finds that medical injury claimants will benefit from the early offer process set forth in RSA 519-C as inserted by this act 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 agrees to participate fully in the process, which may affect the damages the claimant can recover, the fees the claimant's attorney may receive, and other important rights or claims that may exist under the existing system.

VII. 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 the burdens imposed on the general public and medical injury claimants.

2 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. "Action for medical injury" means any action against a medical care provider, whether based in tort, contract, or otherwise, to recover damages on account of a medical injury occurring incident to receipt of medical care.

II. "Claimant" 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 personal injury.

III. "Early offer" means an offer to pay an injured person's economic loss, and a reasonable attorney's fee related to a medical injury. No other damages of any kind shall be included in an early offer under this chapter.

IV. "Economic loss" means monetary expenses incurred by or on behalf of a claimant reasonably related to a medical injury, including medical expenses, replacement services, additional payment to the claimant pursuant to RSA 519-C:7, and 100 percent of the claimant'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, 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;

(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;

(e) The severity of the injury using the National Practitioner Data Bank severity scale used by the department of insurance to collect data;

(f) Medical records and medical bills associated with the injury or an authorization allowing the medical care provider to obtain medical records and medical bills associated 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 an authorization allowing the medical care provider to obtain such records;

(h) A demand for economic loss 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’s fee” means 20 percent of the present value of the claimant’s economic loss.

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 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.

519-C:2 Procedure.

I. After a medical injury, the injured claimant 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. If the claimant elects to pursue a remedy under this chapter, the claimant 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. 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.

IV. The medical care provider shall respond to the claimant'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. The medical care provider's written response shall be sent by certified mail, return receipt requested, to the address provided in the claimant's notice of injury.

V. 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 the medical care provider at a time and place reasonably convenient for the claimant. The examining physician shall not be affiliated with the medical care provider alleged to have caused the injury. The cost 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.

VI. If the medical care provider requests that the claimant submit to a physical examination as set forth in paragraph V, the time allowed for a medical care provider to respond to the claimant's notice of injury shall be extended by 30 days.

VII. If the medical care provider extends an early offer, the claimant must accept or reject the medical care provider's written offer in writing within 60 days of the offer being made to the claimant. If the claimant 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 claimant 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.

VIII. If the claimant accepts the medical care provider's early offer, the claimant shall notify the medical care provider in writing by certified mail, return receipt requested, and thereafter, the claimant is barred from pursuing any claim for the same medical injury against any medical care provider.

IX. If the claimant does not accept the medical care provider's early offer as provided by paragraphs VII and VIII, the early offer shall be considered rejected by the claimant 60 days after the medical care provider made the early offer. When an early offer is rejected, a claimant 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 health 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 Claimant. If the claimant is not represented by legal counsel, upon receiving notice of the action for medical injury, the medical care provider shall provide a neutral mediator, at the medical care provider's expense, to offer assistance to the claimant and medical care provider under this chapter.

519-C:4 Confidentiality. Proceedings, records, and communications during negotiation of an early offer shall be treated as private and confidential by the claimant and the medical care provider. 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.

519-C:5 Payment of Early Offer.

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

II. If an early offer is accepted, future economic losses incurred by the claimant shall be payable by the medical care provider to the claimant as such losses accrue.

(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 claimant resulting from failure to make timely payment of medical bills.

(b) Payment of lost wages shall be made weekly.

(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 ½ 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 claimant and medical care provider may agree upon a lump sum payment for any and all potential future economic losses suffered by the claimant.

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 Claimant.

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 claimant.

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: $5,500.

(b) For a temporary injury involving insignificant harm: $1,700.

(c) For a temporary injury involving minor harm: $6,500.

(d) For a temporary injury involving major harm: $26,250.

(e) For a permanent injury involving minor harm: $29,750.

(f) For a permanent injury involving significant harm: $68,250.

(g) For a permanent injury involving major harm: $107,000.

(h) For a permanent injury involving grave harm: $117,500.

(i) For an injury resulting in death: $57,000.

III. Classification of injuries under paragraph II shall be determined using the National Practitioner Data Bank severity scale that is used by the insurance department to collect data.

IV. Upon the request of either party, the commissioner of the insurance department shall conduct a hearing, pursuant to RSA 519-C:10, to resolve any dispute regarding classification of injury severity under this section.

V. The commissioner of the insurance department shall adjust the additional payment amounts under this section annually in order to maximize the number of cases in which the claimant and medical care provider are able to reach an early offer. The insurance commissioner shall adopt rules under RSA 541-A for the collection of data necessary for the implementation of this section. Such annual adjustments shall occur on or before November 30 of each year, and become effective on January 1 of the next calendar year. Such annual adjustments shall not exceed the rate of inflation plus or minus 5 percent.

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's 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 shall bar any further lawsuit or other claims for compensation by the claimant 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 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. This provision may be enforced by the insurance commissioner pursuant to RSA

519-C:10, I and II.

II. Nothing in this section shall limit claims by the claimant against any party other than medical care providers who participated in providing medical care which gave rise to the medical injury.

519-C:10 Dispute Resolution.

I. Upon the request of either party, the insurance commissioner or the commissioner's designated representative shall conduct a hearing to resolve any dispute regarding an early offer made under this chapter. Such hearings shall be conducted within 30 days of the request and a decision issued within 5 business days of the completion of the hearing. Hearings may be conducted in person or telephonically. By agreement of the parties, the insurance commissioner may determine any issues in dispute based upon the pleadings and record, without live testimony.

II. If the insurance commissioner determines that any claimant failed to act in good faith or unreasonably claimed a right to economic loss or attorney fee beyond the actual economic loss, the claimant 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.

III. If the insurance commissioner determines that any medical care provider failed to act in good faith, or unreasonably denied a claim for economic loss or attorney's fee that the claimant is entitled to receive, the medical care provider shall pay the claimant double the amount that was unreasonably disputed or denied.

519-C:11 Limitations of Action.

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

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

IV. Serving notice upon the medical care provider as provided in this chapter shall operate to toll the applicable statute of limitation from the time of service of such notice upon 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, whichever occurs later.

519-C:12 Subrogation. Any insurer or third party who has paid or reimbursed medical costs to or for the benefit of the claimant, 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 electing to pursue resolution of a medical injury under this chapter shall execute a notice and waiver of rights. The insurance commissioner shall adopt rules pursuant to RSA 541-A, which specify the content of the notice and waiver of rights form. At a minimum, the form shall apprise the claimant of his or her constitutional rights and the benefits and burdens of the early offer alternative.

II. A properly executed waiver form by a claimant 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 the rules adopted pursuant to this section.

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

I. The claimant 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 in response to the notice of injury.

519-C:15 Rulemaking. The insurance commissioner shall adopt rules, pursuant to RSA 541-A, regarding the conduct of hearings, procedures and forms for waivers, the collection of injury severity data and adjustments to the additional payments under RSA 519-C:7, and the proper administration of this chapter.

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