

THE EARLY OFFER ALTERNATIVE IN MEDICAL MALPRACTICE LITIGATION: A Statutory Trap to Limit Liability

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INTRODUCTION

On June 27, 2012, over the veto of the Governor of New Hampshire and over the objections of the two largest medical malpractice insurers in New Hampshire, medical malpractice plaintiffs' lawyers, the New Hampshire Association for Justice, and New Hampshire citizens harmed by medical malpractice, the New Hampshire legislature passed SB 406, the so-called "Early Offer" bill, into law, enacting RSA chapter 519-C. This new law was pushed through the legislature in less than five months, with only two public hearings, with consideration and hearing by only one committee (Judiciary) in each chamber of the General Court, and after being rejected by every other jurisdiction in the United States where it has been proposed, as well as by the United States Congress.³ Perhaps most notably, this law was not necessary in New Hampshire since insurers and physicians have always had the right to make an early offer to a plaintiff if a negligent medical error occurred.

Medical malpractice practitioners on both sides of the aisle should be aware of this new law, which changes many of the rules for medical malpractice claims.⁴ Your clients, both patients and doctors, are at risk of harm if they opt in to this new alternative system. Many injured patients will unknowingly have already done so before they even come to you for help, making their cases even more expensive to pursue and less likely to lead to a favorable outcome. Many doctors, if they opt into this system without their medical malpractice insurer's consent, are at risk for losing liability coverage for medical injury claims.⁵

This new law is one-sided in both the benefits it offers and the penalties it imposes. It unilaterally tilts the playing field in favor of hospitals and medical providers by providing them with the benefit of offering plaintiffs less for their injuries and it conversely tilts the playing field against injured plaintiffs by penalizing them if they do not take the early offer from the medical provider. By opting into this

system and accepting an early offer, injured patients lose their right to recover all of their non-economic damages caused by medical injury, as well as their right to appeal any adverse determination of their economic damages.⁶ By eliminating recovery of non-economic damages, such as pain, suffering, loss of enjoyment of life and loss of earning capacity, this bill unreasonably discriminates against those already disadvantaged classes of plaintiffs such as women, the elderly, the poor, and those most severely injured by medical negligence and most in need of an "early offer."⁷ The severity of injury scale for additional payments will also have a disparate impact across these classes of plaintiffs.⁸

If, after receiving an offer, injured plaintiffs opt out of the system because they realize the offer would not adequately compensate them, they will be required to secure a jury verdict of 125 percent of the early offer at trial to avoid paying the medical provider's attorney's fees and costs from the early offer process and post a bond just to enter the courtroom and exercise their constitutional right to a remedy.⁹ No similar penalties are imposed upon the hospitals and health care providers using this system if a plaintiff receives a verdict substantially in excess of a rejected early offer. It is notable that New Hampshire's two largest medical malpractice insurance companies project that physicians and hospitals will be subject to increased reporting requirements under this system and can expect to see increased premiums for medical liability coverage.¹⁰ They may also need to find new medical liability insurers if these companies withdraw their business from the state.¹¹

In this article we examine the new law, the history of the early offer law proposal in the United States, the way the law was enacted in New Hampshire, what it means for New Hampshire citizens, why it is unworkable as enacted, and we offer suggestions to improve its implementation if it stays on the books.

THE NEW LAW: RSA CH. 519-C

Five months after being submitted as an admittedly "late bill,"¹² and not having "the benefit of the thorough subcommittee consideration necessary for a new and untested procedure,"¹³ the final version of SB 406 passed, attached to two unrelated bills to get the votes needed

to pass the General Court. The final title of SB 406, after the override of the Governor's veto, was: "An act relative to establishing an early offer alternative in medical injury claims, *relative to confidentiality of police personnel files and establishing a committee to study referrals of patients for use of implantable medical devices.*"¹⁴

The reported purpose of this law is to reform "the legal system for resolving claims for medical injury" and "to encourage fast and efficient payment of meritorious claims."¹⁵ This is a good purpose for a new law, to which few would disagree if its purpose is achieved. Unfortunately, this purpose is based on several erroneous or misinterpreted factual findings, resulting in an unnecessary and counterproductive law that imposes unreasonable burdens on injured plaintiffs and provides limited benefits to medical providers.

First, the legislature found the current legal system for medical injuries inefficient because it produces inconsistent results for similar injuries to different plaintiffs.¹⁶ This finding is absolutely correct, but it is grossly misinterpreted by the legislature. Individual plaintiffs should receive individualized results for their injuries. Individualized results for plaintiffs injured by medical negligence mean that the system is working as it should. All New Hampshire citizens are different and the effect of an injury on one citizen may be drastically different than its effect on another. For this reason, New Hampshire citizens are entitled to be made whole for their injuries and be compensated for their individualized losses; losses which may well differ substantially across plaintiffs despite similar injuries arising from similar incidences of medical negligence. A law that eliminates individualized recoveries for non-economic loss will have a disparate impact for different types of plaintiffs.

Second, the legislature found that the current legal system was inefficient because there are long waits for the parties to get their cases resolved due to the complexities of medical injury cases and the statutory requirements for specialized medical evidence and testimony.¹⁷ While true, these systemic delays and inefficiencies are attributed to the very statutes that the legislature enacted in other efforts at tort reform, such as the added legislative requirements for the complex evidence and expert witnesses contained in RSA Ch. 507-E and the statutory screening panel process under RSA Ch. 519-B, supposedly also enacted to resolve claims for medical injury "as early and inexpensively as possible to contain system costs."¹⁸

Third, the legislature found that the current legal system was inefficient because the costs of litigation are exorbitant in medical injury claims.¹⁹ Costs, however, are not likely to decrease substantially under a system of early offers because the litigation costs in medical injury claims are substantially front-loaded in gathering information and having it reviewed by medical experts. Once medical experts have reviewed the claim, the parties have a good idea if it is meritorious. If a claim has merit, insurers will ask to mediate and resolve it without litigation. Such mediation allows resolution of a claim without litigation and without taking away the plaintiff's right to be compensated for his or her non-economic losses. Most medical injury claims settle prior to trial. Litigation costs are incurred because insurers spend inordinate sums fighting valid claims and providers refuse to take responsibility for

their negligence. Consequently, the only way costs will decrease under this statutory system is if more valid and fair early offers are made by insurers, including compensation for plaintiffs' non-economic losses, to avoid the high litigation costs of going through the screening panel process and trial.

Fourth, and finally, the legislature found that the current legal system was inefficient because claims for medical injury result in the practice of defensive medicine, which means physicians are ordering unnecessary tests and treatment, with little or no expected benefit to their patients, in order to guard against their own liability.²⁰ If that is true and those physicians receive payments from Medicare or Medicaid, they are committing fraud under federal and state law. A physician who bills Medicare or Medicaid for tests and procedures performed for a purpose such as avoiding liability exposure, as opposed to being medically necessary for a patient, is committing fraud under those statutory schemes.²¹

In enacting this law, the legislature said that medical malpractice victims "will benefit from the early offer process . . . 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."²² In exchange for the benefits of this process, a medical malpractice victim gives up the right to seek damages for pain, suffering, emotional distress, loss of enjoyment of life, and his or her spouse gives up the right to seek damages for loss of companionship, support and services, and his or her right to appeal an adverse economic damages determination.²³ Unfortunately, this early offer process is neither simple nor clear. Nor does it come close to assuring prompt and sure recovery for all economic losses by plaintiffs.

The way this early offer process works, according to the statute, is as follows:

When a patient is injured by medical negligence, he or she has three options: (1) suffering in silence and doing nothing; (2) requesting an early offer under RSA Ch. 519-C and receiving limited compensation for his or her economic losses; or (3) pursuing a traditional medical malpractice claim in the courts under RSA Ch. 507-E and RSA Ch. 519-B in an effort to be made whole by receiving full compensation for his or her injuries. If the patient chooses to request an early offer, then he or she must execute a waiver of his or her constitutional rights to a jury trial and a free, complete, and prompt remedy for the damages he or she has suffered.²⁴ The patient must also file a detailed notice of claim with the medical provider.²⁵

In a vein similar to criminal plea and sentencing forms, the waiver of these important constitutional rights says that the patient has the right to an attorney.²⁶ In contrast to criminal plea and sentencing forms, however, if the patient does not have an attorney, the medical provider, rather than the court, appoints a "neutral" advisor for the patient at the medical provider's expense.²⁷ After consulting with the attorney or "neutral" advisor appointed by the medical provider, the patient then only has five business days to decide if he or she wants to participate in the early offer process and give up his or her right to be made whole in the traditional tort system.²⁸ The detailed notice of

claim requirement is essentially equivalent to a standard demand or settlement package in traditional tort litigation because it must include medical records and bills, theories of liability, causation and damages, and a demand for economic losses such as lost wages, medical bills and out-of-pocket costs.²⁹

After getting a free look at the patient's potential case, the medical provider then has 90 days to respond to the patient's notice of claim by either extending an early offer or declining to extend an offer of settlement.³⁰ Alternately, the medical provider can require a medical examination before responding to the offer, giving the medical provider an additional 30 days to decide whether to extend an early offer.³¹ If the medical provider extends an offer under this process, the patient has 60 days to decide to accept the offer, reject the offer or request a hearing to dispute the offered amount.³²

If the patient accepts the early offer, the medical provider must pay his or her previously incurred economic losses within 15 days and pay future economic losses as they accrue.³³

"Economic loss" means monetary expenses incurred by or on behalf of a claimant reasonably related to a medical injury and its consequences, including *actual out-of-pocket medical expenses*, replacement services, *additional payment to the claimant pursuant to RSA 519-C:7*, and 100 percent of the claimant's salary, 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, damages for loss of enjoyment of life (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.*³⁴

The additional payment referenced is a payment based solely on the nature of the injury the plaintiff sustained and does not take into account the effect of the injury on individual plaintiffs.³⁵ The additional payment can range from \$2,100, for a temporary injury involving insignificant harm, to \$140,000, for a permanent injury resulting in grave harm or death.³⁶ How injuries are classified under this severity scale is not defined in the statute. Nor is there any explanation for arbitrarily limiting the value of the lives of New Hampshire citizens at \$140,000. The statute references the National Practitioner Data Bank severity scale, but provides the injured patient no insight regarding its methodology.

The provider can dispute a patient's future claims for economic losses by merely issuing a denial to the patient, meaning either the patient will not be compensated for his or her claimed economic losses or the patient will have to go through an administrative hearing each time a submitted loss is denied.³⁷ Again, there will be no right to appeal and the patient will be bound by the determination of the hearings officer.³⁸ This could subject an unwary patient to a future of unending litigation through administrative hearings just to get a

hope of compensation for his or her losses because there is no limit on the frequency with which a medical provider can deny a patient's claim.³⁹ In lieu of the prospect of ongoing litigation, the patient can agree to a lump sum payment for his or her future economic losses, which must be agreed upon and approved or determined by a hearing officer.⁴⁰ This is a dangerous option for someone with a chronic illness or injury, for which the future consequences may be unknown.

If the patient chooses to reject the early offer, he or she must pay a penalty and post a bond to get back his or her constitutional rights and access the traditional tort system of justice.⁴¹ Once that happens, the patient must then recover at least 125 percent of the early offer amount from a jury, or the patient must pay for the medical provider's attorney's fees and costs incurred in the early offer system.⁴² The question remains whether this 125 percent requirement refers to the total jury verdict or only the economic loss component of the verdict, which would impose an even greater penalty on a patient for exercising his or her constitutional rights.⁴³ In either event, a patient can win at trial and still be penalized because he or she will have to pay both parties' attorney's fees and costs out of his or her jury award. This will have a substantial chilling effect on injured patients and will discourage them from exercising their constitutional rights to a remedy awarded by a jury at trial.

The final option for a patient who receives an unacceptable early offer from a medical provider is to challenge the amount of the offer and request a hearing at the Insurance Department before a hearings officer.⁴⁴ The hearings officer must be "a person of judicial and/or legal training . . . chosen by agreement of the parties from a list of neutral persons maintained by the judicial branch office of mediation and arbitration."⁴⁵ The hearing is a complex alternative dispute resolution procedure governed by New Hampshire Administrative Rules for the Department of Insurance, Chapter 4800 and RSA 519-C:10 (2012). The hearing is limited to four issues: (1) whether the early offer includes all of the patient's economic losses; (2) whether past or future economic losses are reasonably related to the injury caused by medical negligence; (3) what severity level for additional payments the patient's injury falls under; and (4) what the net present value of an early offer is for purposes of determining attorney's fees.⁴⁶ This hearings process is very similar to a trial in that parties may file motions for summary judgment on issues in dispute and parties must file witness and exhibit lists.⁴⁷ The hearings officer's decision is binding on the parties, however, and there is no right to appeal.⁴⁸ Furthermore, if the hearing officer finds that the position of either party is frivolous, the officer can award attorney's fees and costs up to \$1,000.⁴⁹

When a plaintiff files a traditional medical injury lawsuit, the case is reported to the New Hampshire Medical Board, which triggers an immediate investigation. Proceedings under the early offer chapter are confidential; however, meaning the medical provider can get a free look at the plaintiff's case without ever being subject to the reporting requirements of the Board of Medicine.⁵⁰ In fact, there is no reporting requirement at all for the medical provider unless a final settlement is reached under the early offer process.⁵¹ A patient also cannot bring claims against additional medical providers who caused him or her

harm if he or she accepts an early offer from one provider.⁵² Despite this, a provider extending the early offer can bring a contribution claim against other negligent medical providers and the patient is expected to cooperate and participate in those additional proceedings.⁵³ Statutes of limitations on claims remain the same, except they are tolled for the period that a patient participates in the early offer process.⁵⁴

Finally, insurance companies are granted a right of subrogation against the medical providers who make early offers for any medical bills or lost wages they have already paid for the patient's injuries.⁵⁵ This provision is problematic for both patients and providers because the economic losses allowed under the early offer process are only out-of-pocket costs, which means payments a patient makes after insurance policies or other collateral sources have been exhausted.⁵⁶ Consequently, either the medical provider must make an early offer for the value of all reasonable medical bills incurred by the plaintiff, regardless of who or how much is already paid, to ensure there are enough funds to pay applicable subrogation liens, or the medical provider must make a lowball offer excluding all medical bills or wages paid from other sources and be subject to suit in the future from those insurance companies who choose to assert their subrogation rights against the provider.

Perhaps the greatest concern of all to New Hampshire patients and practitioners should be the waiver of rights form, which is written in confusing legal jargon and does not inform the patient of all of the rights he or she is giving up by entering into this process.⁵⁷ Furthermore, there is nothing in the statute precluding medical providers from including this waiver form opting patients into this process in standard admission packets signed when patients present for treatment.⁵⁸ If that happens and a patient unknowingly signs this waiver form on admission for medical treatment, inadvertently opting into this process, and then the patient is injured by medical negligence and fails to submit a notice of claim, he or she may be precluded from bringing a medical injury claim in the traditional tort system, because "a claimant's failure to submit notice of injury requesting an early offer . . . shall not be subject to review in any hearing, court or proceeding of any kind."⁵⁹ This provision raises significant constitutional concerns.

In his veto message on SB 406, Governor John Lynch, who has never been an opponent of tort reform, recognized the problems inherent in this statute as being weighted toward medical providers and lacking "certain fundamental safeguards that are necessary to protect injured patients."⁶⁰ The Governor was particularly troubled by the waiver of rights and five-day limitation provided for injured patients to consult with a "neutral" advisor appointed by the medical provider. Governor Lynch wrote that it was "too short a period of time for an unrepresented patient to adequately consult with the advisor concerning his or her rights and the merits of their case [especially when] the medical provider is afforded at least 90 days to evaluate a patient's request for an early offer."⁶¹ The Governor also opposed the chilling effect of the penalties imposed on patients for exercising their legal rights to a remedy by rejecting an early offer, specifically citing the one-sided "loser pays" provision requiring the patient to post a bond to go to trial and achieve a verdict greater than 125 percent of the

early offer to avoid paying attorney's fees and costs.⁶² Unfortunately, the legislature overrode the Governor's veto and we are left with this game-changing legislation that has been rejected by every other jurisdiction in the United States where it was presented.

THE HISTORY OF EARLY OFFER ALTERNATIVES

SB 406, the so-called "early offer" legislation, was drafted, in large part, by Jeffrey O'Connell, a retired University of Virginia Law professor. He has been advocating for early offer programs through the elimination of non-economic damages and creation of no-fault insurance systems for the past 40 years.⁶³ Professor O'Connell is "a proponent of tort reform, particularly in the area of medical malpractice."⁶⁴ In fact, Professor O'Connell has been writing about "no-fault" insurance for accidents and personal injuries since at least 1971.⁶⁵ He has been advocating for "no-fault" insurance plans such as early offers for medical malpractice claims since the early 1970s.⁶⁶ He has been advocating eliminating payment for pain and suffering to victims of all types of accidents since at least 1972.⁶⁷ Finally, Professor O'Connell has been advocating for an early offer system to completely eliminate plaintiffs' personal injury claims for at least 30 years, since 1982.⁶⁸

Professor O'Connell has presented this system to many states across the nation over the past three decades and to the United States Congress in 2006.⁶⁹ None, however, statutorily adopted the approach until he came to New Hampshire this year. Most states have rejected it as being too radical to be enacted.⁷⁰ Despite having acknowledged the validity of a *New England Journal of Medicine* study documenting that nuisance or manifestly invalid claims are not widespread and, generally the medical malpractice claims resolution system leads to the right result,⁷¹ Professor O'Connell advocates for this system because he feels that medical malpractice cases are too complex and expensive to pursue, which results in excessive, unpredictable liability exposure for insurance companies.⁷²

In explaining his early offer system to law students at the University of Virginia, Professor O'Connell proposed enacting legislation at both the state and federal levels to simplify medical malpractice claims by allowing physicians and health care providers to avoid liability by having the option to pay medical expenses and wage losses periodically as they accrue, beyond any collateral sources already available to the patient.⁷³ If the physician makes that offer, the patient is required to accept it unless he or she can prove gross negligence beyond a reasonable doubt.⁷⁴ He suggests to students that this proposal should apply to all adverse events during medical care, regardless of fault, and he likens the proposed system to recovery under contract claims and non-liability insurance policies such as fire and life insurance.⁷⁵ Under Professor O'Connell's system, no non-economic losses would be recoverable.⁷⁶ This would eliminate pain and suffering as elements of damages for plaintiffs and compensation for pain and suffering would be non-recoverable. He says the reason for eliminating these damage elements is to move the liability system closer to other contractual insurance disputes, noting that "pain and suffering are unique in the payment of claims for personal injuries. They are not recoverable in contract claims or property damage claims."⁷⁷

Professor O'Connell made a similar presentation to the New Hampshire legislature, essentially advocating for the elimination of the basic premises of tort common law that a person injured by the legal fault of another is entitled to a sum of money to compensate for the harm.⁷⁸

I [am] stunned at the appallingly inefficient way that the law deals with personal injuries. There are two basic issues that lead to bitter, prolonged and often uncertain arguments, and that [sic] is whether or not the defendant, in this case a hospital provider, a health care provider, was negligent about which there can be almost infinite disagreement. And secondly, tort law allows the plaintiff, claimant to recover the monetary value of their nonmonetary loss, their pain and suffering. And the problem is trying to determine the value of somebody's psychic pain from an aching back or a lost limb is obviously, once again, conducive to very prolong[ed] argument. The result is, as others have suggested, is tremendous uncertainty about whether insurance is going to pay. . . .

Now, no other form of insurance is anything like as [sic] uncertain as that. I mean, when I die my life insurance pays me on the act of my death . . . we don't have a lot of litigation over the payment of life insurance. . . . And the same thing is true with pain and suffering. When I die it doesn't make any difference whether my survivors, especially my wife, love me or hated me, or was [sic] indifferent to me. . . . no, there's a face amount on the policy and that's paid. . . .

And, the same thing is true with health insurance. My wife gives birth to a child, she's pregnant, . . . the child is born, we pay the obstetric bills and the bills from the hospital, and the matter is closed. . . . we didn't take pictures of her and say, you know you've got a hell of a claim here for her pain and suffering. We just, once again, put in for our bills and were paid them. . . .

And, when there's fire insurance; a fire, my home is destroyed by fire, there isn't any inquiry about whether I was careless, I was smoking in bed, I left some oily rags under the cellar stairs, and oh, there's a fire, and I paid in the insured event [sic] . . . I can't get the psychic value of the loss of the house because my great grandfather built it, no, I'm paid the face amount of the fire insurance policy.⁷⁹

The problem with these comments is that medical malpractice and personal injury claims are governed by tort law, which is unique from contract law because they do require harm caused by the legal fault of another to trigger recovery. Life insurance, fire insurance, and health insurance are all premised on contract law that you pay a premium to be reimbursed for certain items or services when an event occurs. They do not require fault to be proven for compensation to be paid. In contrast, liability insurance will only pay for losses when an injury is caused by negligence and fault is proven. Loss alone does not trigger coverage under professional liability claims.⁸⁰ Professional

liability coverage is premised on a finding of fault or negligence.⁸¹ Liability triggers coverage. A "no-fault process is not compatible with traditional professional liability coverage."⁸²

Professor O'Connell acknowledges as much when he explains why medical malpractice claims are not amenable to true no-fault insurance principles, recognizing that medical providers cannot be held liable every time a patient suffers an injury during medical care.⁸³ He acknowledges that some injuries are risks of the procedure being performed, others are complications from the underlying disease or injury and, others, however, are due to adverse events or caused by the negligence of a medical provider.⁸⁴ Despite this O'Connell proposes this statute with a no-fault foundation to give defendants an incentive to make an early offer to victims for their net economic losses when an adverse event occurs. If an early offer is made, plaintiffs must then give up their rights to receive compensation for full common law damages for economic and non-economic losses.⁸⁵ O'Connell's early offer system cleverly takes advantage of pre-existing collateral sources by only paying for medical bills and rehabilitation expenses to the extent that they exceed other collateral payment sources such as health insurance, and only paying lost wages to the extent that they are not covered by collateral sources such as disability insurance.⁸⁶

If, after getting a free look at the plaintiff's case and delaying pursuit of it through the judicial system, a defendant chooses not to make an early offer, the plaintiff can proceed with litigation in the normal course, which places everyone in the same position as they were before.⁸⁷ If a defendant makes an early offer that is low and a plaintiff declines the offer to pursue full compensation, the plaintiff is imposed with a higher burden of proof.⁸⁸ Defendants will make an early offer only when it makes economic sense for them to do so.⁸⁹ An early offer will only be made when the amount will be less than the defendant's forecast of potential liability and reserves made for litigation.⁹⁰ Meanwhile, plaintiffs opting in to this system lose their right to a full and fair recovery determined by a jury or judge at trial.⁹¹

Professor O'Connell makes his biases regarding the early offer system clear by noting that cost savings to the insurer are prerequisites to an insurer making an early offer.⁹² Professor O'Connell also is clear about the one-sided nature of the early offer system, explaining that early offers are viable only if defendants, *not claimants*, are allowed to make binding early offers.⁹³ He says that if plaintiffs are allowed to bind defendants to early offers, they would do so through bringing frivolous claims.⁹⁴ By the defendant initiating the system, when presented with a marginal or meritless claim, the defendant does not have to make an offer at all.⁹⁵

Professor O'Connell demonstrated similar bias in presenting his proposal to the New Hampshire legislature, stating:

We're not trying to pay a flood of new claimants . . . , [the bill's] been rather carefully drafted to see to it that we don't impose new burdens on the defendant because the defendant has an option of saying, is this a worthy claim based on our criteria or how we define a worthy claim. And, if it isn't, we won't make an offer. . . . And so the savings in both attorney's fees and not paying for non-economic loss for claimants who want that will be very substantial.⁹⁶

One of the non-economic losses he specifically excludes in his proposal is lost earning capacity of the plaintiff, often one of the largest elements of economic loss in a tort claim. This is based on his misguided understanding of what lost earning capacity is:

Loss of earning capacity has a special meaning. This bill will pay for lost earnings [not lost earning capacity]. Lost earning capacity means the capacity of someone who's not working and doesn't plan to work, but has lost the opportunity to work, so that's not economic loss. So in other words, if I'm a homemaker and I'm married to a very wealthy person who's taking care of me and I have no prospects of having to go to work, and I lose my capacity to work, I'm [not] entitled to compensation for that lost opportunity. But if I lost actual work wages I would be entitled under this plan by all means to recover them. So, lost earning capacity is a term of art that, in effect, is non-economic loss.⁹⁷

In making this statement, Professor O'Connell either showed a blatant disregard for New Hampshire law or demonstrated why his proposal lacks all credibility and reason. The New Hampshire Supreme Court defines loss of earning capacity as an element of economic loss recoverable as damages in a personal injury claim:

Loss of earning capacity damages are "based upon the amount by which the earning capacity of the plaintiff has been reduced through the conduct of the tortfeasor." Restatement (Second) of Torts § 906(b) comment *c* at 462 (1965). "[T]he measure of damages for impairment of earning capacity is the difference between the amount which the plaintiff was capable of earning before the injury and the amount which he or she is capable of earning thereafter." 2 J. Stein, *Stein on Personal Injury Damages* § 6:5, at 6–15 (3d ed. rev.1997); see 2J. Nates *et al.*, *Damages in Tort Actions* § 10.01, at 10–3 to 10–6 (2006) (noting distinctions among claims for "future loss in earnings," "future loss of earning capacity," and "lifetime loss of earning capacity").⁹⁸

Consider, for example, that a 30-year old female lawyer is permanently injured by medical negligence during treatment of post-partum complications while she is on maternity leave, and she is unable to return to work as an attorney. Because she was not currently working at the time of her injury and did not plan to for the duration of her maternity leave, under Professor O'Connell's analysis, now codified at RSA 519-C:1, IV, she would not be entitled to lost wages *or* lost earning capacity. Under existing New Hampshire law she would be and should be entitled to both, because she had the capacity for significant earnings and earnings growth when she returned to the work force after her maternity leave based solely on her education, training and experience. Under Professor O'Connell's approach, not paying damage claims like this to injured plaintiffs is beneficial because it is a cost savings to insurers.

Professor O'Connell summed up his proposal by making clear his goal is to save insurers money and pay plaintiffs less as follows:

We're not trying to pay a flood of new claimants But we can, by encouraging payment promptly, without [] non-economic loss,

and much less expensively as to attorneys' fees on both sides, we can make much better application of rules to take care of claims that we're now paying. And that is what this bill tries to do, and *I would hope that New Hampshire would be the first to try it.*⁹⁹

IV. HOW NEW HAMPSHIRE BECAME THE FIRST TO TRY EARLY OFFERS

Douglas Dean, President and CEO of Elliot Health System, heard Professor O'Connell speak about early offers at a seminar and quickly sought its implementation in New Hampshire in an effort to preemptively limit liability exposure and losses in an era of managed care.¹⁰⁰ Dean spoke on behalf of the New Hampshire Hospital Association, the New Hampshire Medical Society and the New Hampshire Dental Society in support of the bill, explaining: "We're all concerned for the future of health care and the ability of limited resource[s] to be able to fund the demands that we project that will occur in our state. And, it's not too much more complex than that."¹⁰¹

Our practitioners are doing everything they can to maintain the rising tides of demand in this community. They fear suit every day.

....

But I will tell you this as a hospital administrator. I'm concerned for the next couple years. We've just gone through a very difficult

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year with Medicaid. One of the responses of the state and the considerations for the state and Medicaid [i]s managed care. Managed care has one concept that will allow the state to save money, that's less medical intervention. This type of situation in medical malpractice serves exactly against that type of opportunity for the state. And to give these practitioners an opportunity to function within an environment where they *see* themselves solely in a professional state of obligation in the interest of the patient and not fear medical malpractice reprisal. And, that's what motivates this whole discussion.¹⁰²

As Dean made clear through his testimony, managed care means less care being provided to New Hampshire patients, which will result in more liability exposure for hospitals.

This preemptive limitation on liability exposure for hospitals and doctors in the managed care era appears to be the underlying purpose for enacting this law. Based on the testimony of the proponents of the law, the purpose is not, as stated in the findings and purpose of the statute, "to encourage fast and efficient payment of meritorious claims,"¹⁰³ due to the inconsistent results, litigation delays and costs of the current system, which notably are listed as the findings and purpose in every tort reform measure advocated in the legislature. Indeed, Dr. Cynthia Cooper, President of the New Hampshire Medical Society, who testified in support of the early offer system stated:

We don't completely agree with the preamble of the bill because we believe the pretrial panel law, RSA 519-B is working, but we do support the idea of offering patients and health care providers another option to get a quick resolution to malpractice cases without having to go through a full blown, jury trial. . . .

You can just get it done; go on with your life. And, instead of going through depositions where you are personally attacked, and where sometimes the lawyers will try to attach your house, your car, even though you have insurance, just to scare you in to settling. It's just a terrible situation. . . . *I can't emphasize enough that I think the early offer will take some of this emotional part out of it [for doctors], and I encourage you to pass it as stated.*¹⁰⁴

Doctor Cooper's testimony is ironic because, in addition to being a bill that completely favors physicians and takes the emotional part out of litigation for them by allowing their insurers to just pay their claims so they can go on with their lives, it leaves the injured victim of medical malpractice completely vulnerable, subject to the emotional costs of both their injury and this early offer process and unable to recover for their emotional suffering due to the total elimination of non-economic damages. The injured victims are then left with emotional trauma from the malpractice, which they will live with for rest of their life without compensation. The only legitimate and fair way to decrease the costs of medical malpractice to everyone is to decrease the incidences of medical malpractice. This law makes no effort to do that and places no heightened regulations or scrutiny on the physicians

it protects.

While Doug Dean brought Jeffrey O'Connell and the early offer idea to New Hampshire hospitals, it was Senator Jeb Bradley who introduced it as a "late bill" to the New Hampshire Senate on February 8, 2012.¹⁰⁵ Senator Bradley described the bill as an "innovative concept," supported by the New Hampshire Hospital Association, the New Hampshire Business and Industry Association, the New Hampshire Medical Society and the New Hampshire Dental Society.¹⁰⁶ Senator Bradley called the bill "a win, win, win and a win for . . . the patient, the provider, the attorney and the public."¹⁰⁷ He said it was necessary because it currently takes four years for medical injury claims to proceed through the system and it was a win for everyone because it brings certainty and rationality to the outcomes of these claims while avoiding costly and protracted litigation.¹⁰⁸

Notably, this bill was not supported by the two major medical malpractice insurers in the state, who resolve medical injury claims on behalf of medical providers and will be affected by this process more than anyone other than patients.¹⁰⁹ Both insurers, ProSelect and Medical Mutual of Maine, reported that this system was unnecessary in New Hampshire because they already have effective early offer processes in place and New Hampshire medical injury claims are usually resolved within two to three years of presentation, rather than the four or five years they see in other states.¹¹⁰ New Hampshire Insurance Department statistics on closed claims support the testimony of the medical malpractice insurers and were ignored or grossly misconstrued by the legislature.¹¹¹

Proponents of this bill consistently reported to the legislature that the majority of medical injury claims take four years to resolve. The actual statistics from the Insurance Department belie this assertion. Those statistics show that 87 percent (86.9 percent) of medical injury claims are closed within three years of being brought and 62 percent (61.5 percent) of medical injury claims are closed within two years of being brought.¹¹² These statistics support the testimony of the insurers and the experience of our office for resolution of medical injury claims. It appears that the statistics misrepresented to the legislature actually represent the time from date of injury to date of claim closure. This timeframe would presumably remain unchanged under this law since statutes of limitations for entering the early offer process are identical to those for traditional medical injury claims. The Insurance Department statistics for date of injury to date of claim closure show that 64 percent (63.7 percent) of medical injury claims are closed within four years of injury and 79 percent of medical injury claims are closed within five years of date of injury.¹¹³ In sum, the legislature passed this bill on erroneous statistics on claims data manipulated by the proponents of the legislation and ignored the testimony of all of the people who are actually involved in resolving these claims, the medical malpractice attorneys, the medical malpractice insurers, and the patients themselves.

The president of Medical Mutual of Maine said as much when explaining her objections to the law:

[T]he purported 'early offer program' established by SB 406 was essentially developed by persons who did not have expertise in medical

professional liability claims management or litigation and . . . is not only unnecessary, but will inevitably and significantly impact the ability of companies like Medical Mutual to hold premium rates at a reasonable level and may potentially impact our continued ability to do business in [the State of New Hampshire].¹¹⁴

In addition to finding the law unnecessary, the medical malpractice insurers had many concerns about its implementation because it may encourage a flood of claimants by allowing anyone injured by medical malpractice to give notice of a claim and would significantly increase administrative burdens and reporting requirements due to the payment schedules and periodic payment provisions for future economic losses.¹¹⁵ The insurance companies made clear that the new costs imposed by this system may preclude them from continuing to do business in New Hampshire and that medical providers are subject to losing coverage if they opt in to this system without the consent of their insurers.¹¹⁶

Despite the insurers' objections, the legislature effectively dismissed the threats that these insurers would withdraw their business. In addressing the issue of the increased numbers of claims, the proponents made clear that this bill was not created to help patients in any manner; but was created solely to reduce costs for medical providers and reduce the payouts made to injured patients.

Attorney James Bianco, who represented Doug Dean and the Elliot Health System in assisting to draft this legislation, explained that:

[T]he flood gate is controlled . . . anybody can go forward if you have a claim. But you decide, the insurer or the hospital, or physician whether it's meritorious. If you do not want to pay all you have to say is I'm not going to pay you. You control that alleged flood gate. And then a person goes off to court just as they do now, no change in that.¹¹⁷

His partner, Attorney Bob Best, who assisted with drafting this legislation, explained the expected payouts and claims rates based on his own interpretation of Insurance Department reports and said that, for what is classified as a level 5 injury, which would have received an average verdict or settlement of \$177,000 in the traditional tort system, patients can now expect to receive \$82,000 under the early offer system, which is a 54 percent reduction in the amount an injured patient receives.¹¹⁸ Meanwhile, he noted that under the current system only 35 percent of medical injury claims made result in payments and that would not change under the new law: "We don't expect it to be any higher a payment rate or any higher a frequency of claims because the insurer controls the gate and will make payments on those claims."¹¹⁹ In sum, because insurers control the gate and decide if any early offer will be made, there will be no impact on insurers other than to reduce the amount of payments made to injured patients. Patients, however, will be left in a worse position under this law than they would before because they can expect to receive payment on the same claims, but will receive less than half of what they would in the traditional tort system. This result is not a win for patients in any way.

Finally, and purportedly in recognition that some of the patients most grievously harmed by medical negligence may have no economic

losses, the legislature created a minimum "additional payment" based on the severity of the injury sustained by the patient. As initially introduced, the additional payment scale based on severity of injury ranged from \$1,700 for a temporary injury involving insignificant harm to \$117,500, for a permanent injury involving grave harm, and allotting \$57,000, for an injury resulting in death.¹²⁰ These arbitrary and low values resulted in significant opposition across the board. After several amendments, the final additional payment scale is not much better, ranging from \$2,100 for a temporary injury involving insignificant harm to \$140,000 for a permanent injury involving grave harm or death.¹²¹ The classification of injuries to determine additional payments is supposed to be determined by the National Practitioner Data Bank severity scale.¹²² While this severity of injury scale appears facially neutral, it is not because it fails to take into account the differences between and among individual plaintiffs. For example, a 99-year old bedridden plaintiff with no spouse or family who is killed by medical negligence at a nursing home would receive the same recovery as a 29-year old wife and homemaker who homeschools her four children who is killed by medical negligence. In the traditional system, the estates of these plaintiffs would receive vastly different recoveries to compensate for their losses.

After introduction in the Senate in February 2012, the bill was amended slightly, passed by the Senate 18-5, largely along party lines, and referred to the House Judiciary Committee.¹²³ The House Judiciary Committee held the only public hearing on the bill in April 2012, at which objections to the law were largely ignored.¹²⁴ House Representative Brandon Giuda, a Chichester attorney, then substantially rewrote the bill in May 2012 to eliminate the Senate amendments and bring it closer to its original form and intent.¹²⁵ The bill was accepted by the House and referred back to the Senate which did not concur with the House amendments.¹²⁶ It was then referred to a Committee of Conference, which must unanimously approve a bill for it to pass.¹²⁷ Senator Molly Kelly, who had been appointed to the committee by Senate President, Peter Bragdon, voiced extreme opposition to the bill as amended, as she had in the Senate. In an effort to push this bill through the legislature, Senator Kelly was unceremoniously removed from the Committee and replaced by one of the bill sponsors, Senator Forsythe.¹²⁸ Not surprisingly, having removed the opposition, the bill passed through the Committee of Conference and was approved by both houses of the General Court, the House of Representatives voting 220-141 in favor, and the Senate voting 18-4.¹²⁹ The bill passed the General Court on June 6, 2012, less than four months after its introduction.¹³⁰ The Governor of New Hampshire, recognizing the lack of protections for patients in this bill, vetoed the law on June 20, 2012.¹³¹ The General Court overrode the veto on June 27, 2012, and the bill became law with an effective date of January 1, 2013.¹³²

This bill, rejected by every other state that considered it, passed the New Hampshire legislature in record speed over the objection of all parties who are most affected by it. Senator Bradley made clear when he introduced this bill that he wanted to see tort reform measures passed, saying he would like to see measures passed in New Hampshire similar to those, "most notably in Texas."¹³³ Unfortunately, however, he did not present the Texas analysis of early offer proposals on medical

malpractice cases, which was conducted in 2009, to the New Hampshire legislature.¹³⁴ Texas has never adopted an early offer system as part of its tort reform measures, which are stronger than most states in the nation, and would likely reject its proposal.

V. EVIDENCE FROM TEXAS ON THE EFFECTS OF EARLY OFFERS

In 2009, Bernard Black and David Hyman, professors at the University of Texas and University of Illinois law schools and Charles Silver, a finance professor at the University of Texas School of Business, conducted an in-depth analysis of the effects of Professor O'Connell's proposed "early offer" rules.¹³⁵ Their analysis was based on a review of detailed closed claim data from Texas from 1988 through 2005.¹³⁶ The authors studied claims data from both tried and settled cases and found similar results for both sets.¹³⁷ The data analyzed came from the Texas Closed Claims Database (TCCD), a publicly accessible database maintained by the Texas Department of Insurance (TDI), which contains individual reports of all closed personal injury claims involving payouts of \$25,000 or more.¹³⁸

For this study, the authors attempted to simulate the effect of the early offer program by applying its rules (payment of economic damages and attorney's fees but not non-economic or punitive damages) to the cases in the TCCD data set.¹³⁹ For settled cases without an apportionment of damages, assumptions were made based upon the results in tried cases and a sensitivity analysis was performed by changing the assumptions.¹⁴⁰ To estimate the effects of an early offer program in this study, the authors also assumed that plaintiffs and defendants agreed on the amount of economic damages and that defendants made an offer equal to 100 percent of economic damages plus a percentage meant to cover attorney's fees and costs.¹⁴¹ The authors recognized that this assumption of agreement does not carry over to existing claims resolution in the tort system. "In standard litigation models, cost savings and risk aversion drive the parties to settle most cases. Cases go to trial when the parties settlement ranges do not overlap because they disagree on the plaintiff's chances of prevailing, on expected damages, or both."¹⁴²

The conclusions of the Texas study were that early offers will sharply reduce payouts to plaintiffs in cases with small economic damages (under \$100,000) and would normally increase payouts in cases with economic damages over \$200,000, so an early offer is unlikely to be made.¹⁴³ "Whether an early offer program will affect payouts turns on whether fast payment of 100 percent of economic damages plus attorney's fees is larger or smaller than the status quo" through tort litigation, which means slower payment but recovery of economic and non-economic and potentially punitive damages.¹⁴⁴ "Defendants will make early offers only if they expect to gain by doing so," which is why early offers are only likely to be made in cases with small economic damages.¹⁴⁵ Because of this, the authors found that "[a]n early offer program will have very different effects on different types of plaintiffs, with especially large payout reductions for elderly and deceased plaintiffs."¹⁴⁶ After analyzing the differing demographics of the plaintiffs in the closed claim data sets, the authors concluded

that early offer programs will result in "large payout declines for elderly and deceased plaintiffs, limited effects on employed adults in non-death cases and children, and almost no effect on baby cases."¹⁴⁷ "In general, payout reductions are largest in death versus non-death cases; elderly versus nonelderly cases; adult nonelderly unemployed versus employed. Although the program is facially neutral, its impact varies greatly depending on plaintiff demographics, employment status and type of harm."¹⁴⁸

The authors found that an early offer program is effectively a cap on non-economic damages, because it includes an offer of economic loss, a percentage for attorney's fees and an additional minimum payment for non-economic losses.¹⁴⁹ The difference with an early offer cap on non-economic damages, however, is that it is only available at the defendant's election and it does not translate to the traditional tort system.¹⁵⁰ Non-economic damages caps disproportionately affect certain groups and have a profound negative impact on them.¹⁵¹ The authors found that early offers rarely affect baby cases due to the severity of future economic losses, but they significantly affect elderly and death cases and average payouts decline more than 66 percent.¹⁵² This is striking because often the plaintiffs most severely harmed by medical negligence will receive the least recovery. Likewise, the plaintiffs most in financial need of an early offer are the ones who are impacted the most by this system because their economic losses, numerically, are the smallest. Consequently, their early offers will be the lowest and they will lose the opportunity to recover for non-economic losses.

The authors suggest that when deciding whether to reform the system for medical injury claims the underlying question for social value should be: how do the benefits we get from medical malpractice litigation – by deterrence of medical malpractice and achieving fair compensation for injured patients – compare to the litigation costs for the claims?¹⁵³ If the benefits outweigh the costs, nothing should be changed.¹⁵⁴ The authors assume based on their analysis that early offers will decrease litigation costs, but will also decrease compensation to plaintiffs.¹⁵⁵ The question then becomes whether the early offer system will increase deterrence of medical malpractice or increase the incidence of malpractice due to easy settlement requirements out of court without public accountability.¹⁵⁶ "Will any decrease in deterrence be offset by increased access to health care through reduced health care costs? The question is whether the early offer system is more fair or more efficient than our current system."¹⁵⁷

The law passed in New Hampshire would not pass any social value analysis based on the answers to these questions. We know from the testimony in the New Hampshire legislature that this system is only being proposed because incidences of malpractice are expected to increase under managed care. We also know that the increasing incidences of malpractice will not reduce health care costs since insurance premiums are expected to rise. Consequently, under any social value analysis of this system, SB 406 should never have become law.

VI. PRACTICAL EFFECTS OF THE EARLY OFFER ALTERNATIVE

The Texas study found significant problems with the practical

effects of the early offer system, which are directly translatable to New Hampshire.

First, the early offer system is extremely one-sided and results in inequitable treatment of plaintiffs and defendants.¹⁵⁸ The system imposes huge penalties on plaintiffs who refuse an early offer and then fail to prove a higher amount of economic damages at trial, but there is no similar penalty for a defendant who makes an unreasonable offer, which is rejected, when a plaintiff gets a verdict significantly higher than his or her demand or the defendant's offer.¹⁵⁹ Indeed, in New Hampshire, the medical provider is given so much discretion to make an offer and so much cost-cutting motivation to eliminate a plaintiff's claimed economic damages that a plaintiff may be forced to go to trial, despite having a meritorious case. If a plaintiff does so and rejects an unreasonable offer, he or she may still be punished by paying defense fees and costs, despite winning a verdict at trial.

In addition to the inequitable penalties imposed, there is an inequitable treatment of litigation costs and attorney's fees across plaintiffs and defendants.¹⁶⁰ The stated goal of the law is to decrease litigation costs for all. Plaintiffs, however, are awarded none of their litigation costs and their attorney's fees are reduced by 13 percent (from 33 1/3 to 20 percent) when an early offer is made, but there is no corresponding elimination of insurers paying defense litigation costs or reducing fees by 13 percent. To truly achieve the stated goals of the litigation, there must be an equal reduction in litigation fees and costs for plaintiff and defense attorneys as a *quid pro quo*.¹⁶¹ This one-sided reduction may make it more difficult for injured plaintiffs to obtain counsel to bring claims because no out-of-pocket costs will be paid and the attorney fee is reduced by 13 percent and based on limited to no damages.¹⁶²

Second, by eliminating recovery of non-economic losses, the early offer system has a significantly disparate impact across different classes of plaintiffs and different demographic groups, specifically on women, the elderly, children, and the poor, who are already the most underserved and disadvantaged groups in society and who represent the largest portion of medical malpractice plaintiffs.¹⁶³ A recent study conducted by the Harvard School of Public Health showed that women constitute 60 percent of medical malpractice plaintiffs.¹⁶⁴ Babies and the elderly (over age 65) represent 31 percent of medical malpractice plaintiffs.¹⁶⁵ There was no analysis of different economic classes in this study. Joanne Doroshow, the Executive Director of the Center for Justice and Democracy has said:

Bills like this are particularly harmful to women, children, the elderly and the poor who may suffer grievously but have few economic damages because their incomes are low or no longer exist. Women are particularly harmed by elimination of non-economic damages because certain injuries affecting their sexual or reproductive health are compensated only through non-economic damages. Non-economic damage caps therefore amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women. This bill is worse than a cap because it completely eliminates the right to recover for non-economic losses.¹⁶⁶

In several states, caps on non-economic losses that discriminate like this have been characterized as "kill granny cheap" tort reform efforts because an elderly plaintiff who is killed by medical negligence will have limited past losses and no future economic losses.¹⁶⁷ This effectively gives defendants an incentive to provide poor medical care to these plaintiffs because it would most likely be cheaper to let them die under this statute than to spend time providing future medical care. Furthermore, if an early offer is combined with a collateral source rule, defendants may pay nothing for economic losses to these types of plaintiffs.¹⁶⁸ This is especially true in the cases of the elderly or disabled who receive Medicare or Medicaid, which pays for all medical expenses and who are most likely not employed so there are no other economic losses to recover.¹⁶⁹ Another significant component of non-economic losses, which was improperly eliminated from this law, is the loss of earning capacity. Women on maternity leave or professionals on sabbatical from the workforce are particularly harmed by this provision.¹⁷⁰

Third, the amounts of additional payments based on the severity scale are well below the value of the actual injuries.¹⁷¹ Paradoxically, the patients with the most severe injuries and strongest cases are harmed the most by the cap on non-economic damages through this severity scale.¹⁷² The schedule of payments on the severity scale arbitrarily caps non-economic damages and eliminates plaintiffs' constitutional right to be made whole for their injuries by a jury. Duke University Law Professor Neil Vidmar has testified against similar compensation schedules and observed:

Even when some leeway is built into compensation schedules, they cannot take into account the number of factors and extreme variability of pain and suffering, physical impairment, mental anguish, loss of society and companionship, and other elements of damages that fall under the rubric of non-economic damages. That is why these matters have been entrusted to juries. They provide justice on an individualized basis.¹⁷³

Fourth, early offers have no deterrent effect on negligent medical care. Early offers avoid public accountability through the litigation process.¹⁷⁴ Lack of accountability means less attention paid to negligent errors. Additionally, by placing arbitrary values on the amount of a life or a limb, doctors know they will not suffer much penalty for harming a patient and will not be deterred.

Fifth, and finally with respect to the New Hampshire system, it is not a voluntary system for plaintiffs. As the testimony at the legislature made clear, the medical provider controls the early offer process and decision. If a plaintiff opts in to this process, he or she must waive important constitutional rights without knowing what, if any, offer will be made.¹⁷⁵ Furthermore, a plaintiff cannot opt out of this process without penalty after five days. If a plaintiff unknowingly signs this form on admission for treatment, he or she will forfeit his or her rights completely. The waiver document itself is complex and confusing and cannot be the basis of informed consent.¹⁷⁶ It conflicts with the statute in several respects and is written in legalese that few lay persons would be able to understand. It does not make clear the gravity of the rights the plaintiff is giving away or the enormity of discretion that is

being given to the medical provider.¹⁷⁷ Nor does it make clear that the patient will be opting into this process for the remainder of their life if they suffered permanent injury requiring ongoing medical care or resulting in ongoing wage loss.¹⁷⁸

There is little doubt that an uneducated or uninformed patient, particularly one who is catastrophically injured and suffering, will be pressured by the hospital to accept a fraction of what he or she needs or deserves, particularly for future legal expenses.¹⁷⁹ When there is an injury with serious complications that may not be known for years, a lay person will have no idea what his or her future needs may be for medical care without the assistance of counsel or medical experts.¹⁸⁰ This waiver and this system are designed to settle claims before the extent of the injury is known. The extent and repercussions of medical injuries often take years to be fully realized. Under the early offer system, plaintiffs may be forced into years of litigation or to take a lump sum, which will not make them whole but will seem like a lot of money in the face of medical bills and other costs resulting from their injuries. Only when the money is gone will the plaintiff realize the extent and scope of losses sustained and the economic reality of living under their new medical constraints and expenses. Furthermore, when a lump sum offer is made, a plaintiff's life expectancy due to his or her injuries may be unknown, which will lead to further litigation. Finally, the severity of future economic losses may exceed a defendant's malpractice coverage. This is especially true in cases involving infants or children. When this happens, either a plaintiff will not be able to be compensated for his or her injuries or the defendant will merely decline to make an early offer in a clearly meritorious case.

One of New Hampshire's leading consumer protection advocates, Professor Peter Wright at the University of New Hampshire School of Law, has significant experience in dealing with waiver forms and disclosure statements and predicts significant harm to plaintiffs from the waiver form:

Over my years of practicing and teaching in the area of consumer protection, I have found the Legislature's undue reliance upon disclosure statements as a means of protecting consumers woefully misguided. The recent financial crisis in our national economy aptly illustrates this failure. Disclosure of financing terms, mandated by Truth in Lending and similar statutes, utterly failed to warn consumers of the perils of option arm mortgages, adjustable rate and 80/20 loans and other predatory schemes. Consumers either failed to read or failed to understand the disclosures which were whisked under their noses at loan closing. There is a very real possibility of similar abuse in the hands of an aggressive claims adjuster intent on steering injured patients with meritorious claims into the waiver of significant financial recovery under the guise of speedy process.¹⁸¹

Unfortunately, the New Hampshire legislature ignored these admonitions and enacted this law.

VII. POTENTIAL IMPROVEMENTS TO THE EARLY OFFER SYSTEM

As unfair and unbalanced as it may be, the reality is that the

"early offer" system is now the law in New Hampshire and must be followed. After conducting their detailed analysis of closed claims in Texas, the authors made certain suggestions as to how an early offer system could be made fairer by making the process two-sided, with benefits and risks for both sides.¹⁸² Some of those suggestions include: (1) placing incentives to settle cases on both sides for a fair amount by creating a duty to settle meritorious claims, rather than having it be an option elected by defendants; (2) imposing penalties for not settling on both sides by creating a similar penalty for the defense if a plaintiff refuses an early offer and receives a verdict for economic damages significantly in excess of his or her demand or the defendant's early offer; (3) requiring payment of full economic damages without consideration of collateral sources; (4) paying full market value for attorney's fees and including out-of-pocket costs in an early offer or reducing defense attorney's fees and out-of-pocket costs in kind; (5) eliminating the plaintiff penalty for refusing an early offer; (6) requiring defendants to carry more malpractice insurance in event economic damages exceed malpractice coverage; and (7) recognizing the uncertainty of future economic damages and accounting for that in the offers made.¹⁸³

Under this two-sided system, there is at least a presumption of equal footing for plaintiffs and defendants.¹⁸⁴ A two-sided early offer program moves toward the stated purpose of expediting compensation for plaintiffs for their full economic losses and creates incentives for both sides to resolve claims and imposes penalties for both sides if they unreasonably do not. A two-sided early offer program is evenhanded because it punishes whichever side rejects a settlement offer that would have otherwise fully covered economic losses and reduced litigation costs.¹⁸⁵ While a two-sided early offer proposal is likely to speed settlements and reduce litigation costs, it does not correct for the inherent deficiencies in the early offer process, which include weakened deterrence of malpractice and payout reductions that disproportionately affect already disadvantaged plaintiff's groups.¹⁸⁶

CONCLUSION

Long known for being first in the nation, New Hampshire now has the dubious distinction of being first to enact this law that has been rejected by all other states who have considered it. By doing so, New Hampshire's victims of medical malpractice will also be victims of this radical tort reform legislation drafted solely to benefit New Hampshire's self-insured hospitals and medical providers. This legislation eliminates centuries of New Hampshire tort common law and infringes upon the New Hampshire Constitution by eliminating the rights to a full, fair and *free* remedy being awarded by a jury in medical injury claims.¹⁸⁷

This law is unnecessary and unfair to plaintiffs. Nothing in our current system prevents medical providers from settling valid claims quickly and fairly before they ever enter litigation. Many providers already do this and most insurers already have these programs in place. Expediency is not the goal of this law. The goal is to save insurance companies money and pay patients less as incidences of medical malpractice increase under managed care. If plaintiffs reject an early

offer, they are punished by having to pay a penalty by posting a bond just to access the courts and regain their Constitutional rights and, then, despite winning at trial, they may be punished further by having to pay defense attorney's fees and costs if they do not get a verdict significantly higher than the early offer. If plaintiffs accept an early offer, they will never be made whole because the law arbitrarily limits the compensation they can receive now and then condemns them to a lifetime of litigation through administrative hearings with medical providers to receive payment for future economic losses. This ongoing litigation increases costs to both injured plaintiffs and medical providers, yet these increased costs are never addressed by the statute. We can discern no good reason why a law that is harmful to and opposed by both patients and the insurers of medical providers should have been allowed to become law.

The success of this "early offer" law also has implications beyond our state borders. National news reports and blogs make clear that this profit-driven tort reform measure will be introduced in other jurisdictions in coming months. As with other legislation, once passed in one state, others will quickly follow unless legislators are educated about the dangers of stripping away constitutional rights with illusory promises of settlement under the guise of an "alternative" and "voluntary," one-sided system. The inherent deficiencies in the early offer process will result in weakened deterrence of medical malpractice in our state in this era of managed care. They also will result in payout reductions that disproportionately affect the most disadvantaged classes of plaintiffs, including women, the elderly and the poor. The only way to reduce medical malpractice costs is to deter medical malpractice. This law does nothing to achieve that and until a legislative proposal does, tort reform measures like this should not remain law in New Hampshire.

ENDNOTES

1 Holly B. Haines is an attorney at Abramson, Brown & Dugan, P.A. in Manchester, where she devotes her professional practice to representing plaintiffs who are injured by medical malpractice in New Hampshire.

2 William D. Woodbury is an attorney at Normandin, Cheney & O'Neil, PLLC, in Laconia. Attorney Woodbury serves on the Board of Governors and as the Legislative Committee Chair for the New Hampshire Association for Justice and devoted countless hours at the legislature on behalf of NHAJ and the citizens of New Hampshire in active opposition to passage of SB 406.

3 See Official Docket of SB 406 available at: http://gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=3067&sy=2012&sortoption=&txtsessionyear=2012&txtbillnumber=sb406&q=1; and Statement of Joanne Doroshow, Executive Director, Center for Justice and Democracy at New York Law School to the House Judiciary committee in opposition to SB 406 – An Act Establishing an Early Offer Alternative in Medical Injury Claims (April 26, 2012).

4 See N.H. RSA ch. 519-C (effective date January 1, 2013).

5 Coverys (ProSelect Insurance Company) Comments on New Hampshire SB 406 An Act Establishing an Early Offer in Medical Injury Claims (May 18, 2012).

6 See N.H. RSA 519-C:1, IV and RSA 519-C:10, XI (2012)

7 See RSA 519-C:1, IV (2012).

8 See RSA 519-C:7 (2012).

9 See RSA 519-C:2, XII (2012).

10 Letter from Gregg L. Hanson, President and CEO, Coverys (Pro Select Insurance Company), to Governor John Lynch, Requesting Veto of SB 406 (dated June 13, 2012) and Letter from Mary Elizabeth Knox, Vice President of Claims, Medical Mutual Insurance Company of Maine to Governor John Lynch, Requesting Veto of SB 406 (dated June 12,

2012).

11 See *id.*

12 Establishing an Early Offer Alternative in Medical Injury Claims: Hearing on SB 406 Before the Senate Comm. on Judiciary, 162nd General Court, 2012 Session (N.H. March 15, 2012) (statement of Jeb Bradley, Senator)

13 House Judiciary Committee Minority Report, 34 House Record 44, HJ 21, pp. 2378-2391, 162nd General Court (May 16, 2012).

14 2012 N.H. Laws ch. 288.

15 2012 N.H. Law 288:1.

16 2012 N.H. Law 288:1, II(a).

17 2012 N.H. Law 288:1, II(b).

18 N.H. RSA 519-B:1, I (2007).

19 2012 N.H. Law 288:1, II(c).

20 2012 N.H. Law 288:1, II(d).

21 See, e.g. 42 U.S.C. § 1320c-5(a)(1) and 42 U.S.C. § 1395y(a)(1)(A).

22 2012 N.H. Law 288:1, V.

23 2012 N.H. Law 288:I, VI.

24 RSA 519-C:2, III (2012).

25 See *id.*

26 RSA 519-C:13, I (2012).

27 *Id.* and RSA 519-C:3, I (2012)

28 RSA 519-C:13, I (2012)

29 RSA 519-C:1, VIII (2012).

30 RSA 519-C:2, IV and VI (2012).

31 RSA 519-C:2, VII and VIII (2012).

32 RSA 519-C:2, IX (2012).

33 RSA 519-C:5, I & II (2012).

34 RSA 519-C:1, IV (2012) (emphasis added).

35 RSA 519-C:7, II (2012).

36 See *id.*

37 RSA 519-C:5, II and RSA 519-C:10.

38 RSA 519-C:10, XI .

39 See *id.*

40 RSA 519-C:5, IV (2012).

41 RSA 519-C:2, XII (2012);

42 See *id.*; but cf. RSA 519-C:13 (requiring plaintiff to obtain **economic damages** of greater than 125% of the amount of the early offer to avoid paying defense attorney's fees and costs incurred under RSA 519-C.).

43 *Id.*

44 RSA 519-C:2, IX and RSA 519-C:10 (2012).

45 RSA 519-C:1, V.

46 RSA 519-C:10.

47 See *id.*

48 See *id.*

49 See *id.* at para. XII & XIII.

50 RSA 519-C:4 (2012).

51 See *id.*

52 RSA 519-C:9 (2012).

53 See *id.*

54 RSA 519-C:11 (2012).

55 RSA 519-C:12 (2012).

56 Compare *id.* with RSA 519-C:1, IV.

57 RSA 519-C:13 (2012).

58 See *id.*

59 RSA 519-C:2, V.

- 60 Governor's Veto Message, 34 House Record 53, pp. 2631-2634, 162nd General Court (June 27, 2012).
- 61 *See id.*
- 62 *See id.*
- 63 *See Jeffrey O'Connell – Faculty Biography at University of Virginia School of Law* available at: <http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbl/1195694> and *Jeffrey O'Connell - Publications List* available at: http://www.law.virginia.edu/pdf/faculty/oconnell/oconnell_pubs.pdf.
- 64 *See University of Virginia Lecture Series Video of Jeffrey O'Connell Explaining Early Offer System*, available at: <http://www.youtube.com/watch?v=QE3rC1DJlxA>.
- 65 *See, e.g., Jeffrey O'Connell, The Injury Industry and the Remedy of No-Fault Insurance* (Urbana University of Illinois Press) (1971).
- 66 *See, e.g., Jeffrey O'Connell, No-Fault Insurance for Injuries Arising From Medical Treatment: A Proposal for Elective Coverage*, 24 Emory L. J. 21-42 (1975).
- 67 *See, e.g., Jeffrey O'Connell and Rita James Simon, Payment for Pain and Suffering: Who wants What, When and Why?* (Champaign-Urbana Insurors Press) (1972) and Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 Ill. L. J. 333-69.
- 68 *See, e.g., Jeffrey O'Connell, Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendant's Prompt Tender of Claimant's Net Economic Losses*, 77 NW. U. L. Rev. 589-632 (1982).
- 69 *See Doroshow, supra* note 3.
- 70 *See Establishing an Early Offer Alternative in Medical Injury Claims: Hearing on SB 406 Before the Senate Comm. on Judiciary, 162nd General Court, 2012 Session* (N.H. March 15, 2012) (statement of Jeffrey O'Connell, Professor, University of Virginia School of Law).
- 71 Jeffrey O'Connell, *The Large Cost Savings and Other Advantages of an Early Offer "CrimTorts" Approach to Medical Malpractice Claims*, 17 Widener L.J. 835, 838-39 (2008).
- 72 *See id.* at 840-43, *see also* Video of Jeffrey O'Connell, *supra* note 64.
- 73 *See O'Connell Video, supra* note 64.
- 74 *See id.* (this was initially proposed to the New Hampshire legislature as well, but was eliminated by amendment)
- 75 *See id.*
- 76 *See id.*
- 77 *Id.*
- 78 Statement of Jeffrey O'Connell, Professor, University of Virginia School of Law, *supra* note 70 (comments regarding each type of insurance are consolidated and presented together for ease of narrative report).
- 79 All quotes for all persons testifying at the Senate Judiciary Committee Hearing on March 15, 2012 are the authors' best interpretation of the audio recording of the hearing and are not from an official transcript of the proceedings. No official written transcript exists. All attempts at accuracy have been made and any errors are solely due to quality of recording.
- 80 ProSelect Insurance Company Comments on New Hampshire SB 406 An Act Establishing an Early Offer in Medical Injury Claims (May 18, 2012).
- 81 *See id.*
- 82 *Id.*
- 83 Jeffrey O'Connell, et al., *Early Offers: An Approach to Medical Malpractice Reform, Contingencies*, 42-46 (Sept/Oct 2006).
- 84 *See id.* at 43-44.
- 85 *Id.* at 42.
- 86 *See id.*
- 87 *See id.*
- 88 *See id.* at 43.
- 89 *See id.*
- 90 *See id.* at 46.
- 91 *See id.* at 43
- 92 *See O'Connell, supra* note 71, at p.840.
- 93 *See id.* at 848.
- 94 *Id.*
- 95 *Id.*
- 96 Statement of Jeffrey O'Connell, Professor, University of Virginia School of Law, *supra* note 70.
- 97 *Id.*
- 98 *Laramie v. Stone*, 160 N.H. 419, 428 (2010).
- 99 Statement of Jeffrey O'Connell, Professor, University of Virginia School of Law, *supra* note 70. (emphasis added).
- 100 Establishing an Early Offer Alternative in Medical Injury Claims: Hearing on SB 406 Before the Senate Comm. on Judiciary, 162nd General Court, 2012 Session (N.H. March 15, 2012) (statement of Douglas Dean, President and CEO of Elliot Hospital / Elliot Health System).
- 101 *Id.*
- 102 *Id.*
- 103 2012 N.H. Law 288:1.
- 104 Establishing an Early Offer Alternative in Medical Injury Claims: Hearing on SB 406 Before the Senate Comm. on Judiciary, 162nd General Court, 2012 Session (N.H. March 15, 2012) (statement of Cynthia Cooper, M.D., President, New Hampshire Medical Society) (emphasis added).
- 105 *See Official Docket of SB 406, supra* note 3. *See also* Statement of Jeb Bradley, Senator, *supra* note 12.
- 106 *See* Statement of Jeb Bradley, Senator, *supra* note 12.
- 107 *See id.*
- 108 *See id.*
- 109 Letter from Gregg L. Hanson, President and CEO, Coverys (Pro Select Insurance Company), to Governor John Lynch, Requesting Veto of SB 406 (dated June 13, 2012) (with supporting memoranda) and Letter from Mary Elizabeth Knox, Vice President of Claims, Medical Mutual Insurance Company of Maine to Governor John Lynch, Requesting Veto of SB 406 (dated June 12, 2012).
- 110 *See id.*
- 111 *See* New Hampshire Insurance Department Annual Report to the Medical Malpractice Panel and Insurance Oversight Committee (November 1, 2011).
- 112 *See id.* at Exhibit 3-B (Date Reported to Date of Closure for all Claims).
- 113 *See id.* at Exhibit 3-C (Date of Injury to Date of Closure for all Claims).
- 114 Letter from Mary Elizabeth Knox, Vice President of Claims, Medical Mutual Insurance Company of Maine to Governor John Lynch, Requesting Veto of SB 406 (dated June 12, 2012).
- 115 Letter from Gregg L. Hanson, President and CEO, Coverys (Pro Select Insurance Company), to Governor John Lynch, Requesting Veto of SB 406 (dated June 13, 2012) (with supporting memoranda) and Letter from Mary Elizabeth Knox, Vice President of Claims, Medical Mutual Insurance Company of Maine to Governor John Lynch, Requesting Veto of SB 406 (dated June 12, 2012).
- 116 *See id.*
- 117 Establishing an Early Offer Alternative in Medical Injury Claims: Hearing on SB 406 Before the Senate Comm. on Judiciary, 162nd General Court, 2012 Session (N.H. March 15, 2012) (statement of James Bianco, Esquire).
- 118 Establishing an Early Offer Alternative in Medical Injury Claims: Hearing on SB 406 Before the Senate Comm. on Judiciary, 162nd General Court, 2012 Session (N.H. March 15, 2012) (statement of Bob Best, Esquire).
- 119 *Id.*
- 120 SB 406 as introduced 2/8/12.
- 121 *See* RSA 519-C:7, II (2012).
- 122 *See id.*
- 123 *See Official Docket of SB 406, supra* note 3, and Amendments 2012-1418s and 2012-1472s (3/28/12).
- 124 *See Official Docket of SB 406, supra* note 3 (4/18/12).
- 125 *See Official Docket of SB 406, supra* note 3, and Amendments 2012-1980h and 2012-2280h (5/16/12).
- 126 *See Official Docket of SB 406, supra* note 3 (5/23/12).
- 127 *See Official Docket of SB 406, supra* note 3 (5/23/12-5/31/12).
- 128 *See Official Docket of SB 406, supra* note 3 (5/31/12).
- 129 *See Official Docket of SB 406, supra* note 3 (6/6/12).
- 130 *See id.*

- 131 See Official Docket of SB 406, *supra* note 3 (6/20/12).
- 132 See Official Docket of SB 406, *supra* note 3 (6/27/12).
- 133 See Statement of Jeb Bradley, Senator, *supra* note 11.
- 134 See Bernard Black, David A. Hyman and Charles Silver, *The Effects of "Early Offers" in Medical Malpractice Cases: Evidence From Texas*, 6 J. Empirical Legal Stud. 723-67 (2009).
- 135 See *id.* at 723.
- 136 See *id.* (noting limitation that Texas imposed a cap on non-economic damages effective September 2003, so the last cases in the data set were limited by that cap).
- 137 See *id.* at 724.
- 138 See *id.* at 727.
- 139 See *id.* at 729.
- 140 See *id.*
- 141 See *id.* at 731.
- 142 *Id.* at 726.
- 143 See *id.* at 724.
- 144 *Id.* at 732.
- 145 *Id.* at 724.
- 146 *Id.* at 723.
- 147 *Id.* at 724.
- 148 *Id.* at 742.
- 149 See *id.* at 738.
- 150 See *id.*
- 151 See *id.* at 741.
- 152 See *id.* at 742.
- 153 *Id.* at 754.
- 154 See *id.*
- 155 See *id.*
- 156 See *id.*
- 157 *Id.*
- 158 See *id.* at 755.
- 159 See *id.*
- 160 See *id.*
- 161 See *id.*
- 162 See *id.* at 755-56.
- 163 See *id.* at 756.
- 164 See David M. Studdert, Michelle Mello et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 New Eng. J. Med. 2024, 2026 (2006)
- 165 See *id.*
- 166 Statement of Joanne Doroshow, *supra* note 3.
- 167 Black, *supra* note 134, at p.756.
- 168 See *id.*
- 169 See *id.*
- 170 See *id.*
- 171 See *id.* at 756-57.
- 172 See *id.* at 756.
- 173 Testimony of Neil Vidmar, Russell M. Robinson II Professor of Law, Duke Law School, before the U.S. Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 18 (citations omitted).
- 174 See Black, *supra* note 134, at 756-57.
- 175 See Statement of Joanne Doroshow, *supra* note 3.
- 176 See *id.*
- 177 See *id.*
- 178 See *id.*
- 179 See *id.*
- 180 See *id.*
- 181 Letter from Peter Wright, Professor at University of New Hampshire School of Law, to Chairman Robert Rowe on House Judiciary Committee, in Opposition to SB 406 (dated April 24, 2012).
- 182 See Black, *supra* note 134, at p. 757.
- 183 See *id.*
- 184 See Bernard Black, David A. Hyman and Charles Silver, *O'Connell Early Settlement Offers; Toward Realistic Numbers and Two-Sided Offers*, 7 J. Empirical Legal Stud. 379-401 (June 2010).
- 185 See *id.* at 395.
- 186 See *id.* at 398.
- 187 See N.H. Const., Pt. I, Art. 14 & 20.

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