

MONITOR EDITORIAL

Bad bill deals all the cards to insurers

By Monitor staff

March 25, 2012

The state Senate is considering medical malpractice legislation so skewed against the interests of patients that it appears to have been written by the insurance industry's equivalent of Montgomery Burns, the villainous nuclear power plant owner in the television series *The Simpsons*. If Senate Bill 406, "an act establishing an early offer alternative in medical injury claims," makes it to Gov. John Lynch's desk, he should veto it.

Jeffrey O'Connell, the Virginia lawyer who created the "early offer" approach to medical malpractice cases, has been trying to convince states to adopt his idea for two decades but had no takers. New Hampshire should not be the first.

The proposed "early offer" law would allow an insurance representative to offer a patient who believes that he or she has suffered harm at the hands of a medical provider a sum to settle the claim without going through the long, costly and uncertain process of first convincing a medical screening panel that the case has merit and then going to trial. Patients who accepted the insurer's offer likely would receive compensation far sooner than the current New Hampshire average of 44 months. But in exchange, they would lose the ability to seek compensation for anything beyond medical costs, lost income and legal fees. Injured patients who weren't currently employed - housewives or husbands or students, for example - would get nothing save medical costs and legal fees since they earned no income.

Patients who accepted an offer would also give up the right to seek compensation for "pain and suffering, punitive damages, enhanced compensatory damages, exemplary damages, hedonic damages, inconvenience, physical impairment, mental anguish, emotional pain and suffering, and loss of the following: earning capacity, consortium, society, companionship, comfort, protection, marital care, parental care, attention, advice, counsel, training, guidance or education, and all other non-economic damages of any kind."

A patient who took the money would also waive the right to sue any third party whose negligence contributed to the harm - say the maker of medical equipment that failed, or a catheter that was contaminated at the factory. It

does, however, allow defendants to pursue such third parties to seek payment for a share of the settlement.

The bill goes on to specify how much, in addition to payment for lost income, medical costs and attorney fees, insurers must pay for different levels of harm. Permanent injury with minor harm is good for \$26,250; permanent injury with grave harm is worth \$117,500. But for medical negligence that kills the patient, the bill sets the compensation level at \$57,000, a figure that makes it cheaper for insurers to bury their mistakes. No one who isn't desperate for money, confused, naive or without legal counsel is likely to accept an insurer's offer, one that can safely be presumed to be guided as much by the odds of whether or not the victim would prevail in court as by the severity of the harm.

The legislation is designed to take advantage of the vulnerable, but in some ways it would hurt injured patients who turn down the insurer's offer even more. Refuse even a lowball offer, and the legal standard for proving negligence on the part of the medical provider in court automatically goes up. Patients who now must prove negligence by a preponderance of evidence would have to present "clear and convincing evidence" of negligence. That standard is almost impossible to meet. It essentially allows insurers to negotiate with patients at gunpoint.

In 2007, O'Connell said that early-offer legislation would result in insurance industry savings of \$556,000 on the average claim and more than \$1 million per claim when the injuries are severe. It's easy to see why. The legislation gives insurers a cannon and injured patients a pea shooter.

Source URL: <http://www.concordmonitor.com/article/319479/bad-bill-deals-all-the-cards-to-insurers>