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STATE OF NEW HAMPSHIRE

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Legislative

SENATE CALENDAR ADDENDUM

REPORT & AMENDMENT

**THE SENATE WILL MEET IN SESSION ON
THURSDAY, APRIL 7, 2005 AT 10:00 A.M.**

REPORT

JUDICIARY

SB 214, relative to screening panels for medical injury claims.
Ought to pass with amendment, Vote 4-2
Senator Foster for the committee.

AMENDMENT

Senate Judiciary
April 5, 2005
2005-1019s
06/01

Amendment to SB 214

Amend the bill by replacing all after the enacting clause with the following:

1 New Chapter; Screening Panels for Medical Injury Claims. Amend RSA by inserting after chapter 519-A the following new chapter:

CHAPTER 519-B SCREENING PANELS FOR MEDICAL INJURY CLAIMS

519-B:1 Findings, Purpose, and Intent.

I. Availability and affordability of insurance against liability for medical injury is essential for the protection of patients as well as assuring availability of and access to essential medical and hospital care. This chapter affirms the intent of the general court to contain the costs of the medical injury reparations system and to promote availability and affordability of insurance against liability for medical injury. Claims for medical injury should be resolved as early and inexpensively as possible to contain system costs. Claims that are resolved before court determination cost less to resolve than claims that must be resolved by a court. Meritorious claims should be identified as quickly as possible, as should non-meritorious claims. Defendants should consider paying or compromising meritorious claims and plaintiffs should consider withdrawing or compromising non-meritorious claims, as soon as the merits of the claims are known to the parties. Presentation of claims to a medical review panel is intended to help identify both meritorious and non-meritorious claims without the delay and expense of a court trial. It is essential to the effectiveness of the panel process that panel proceedings be confidential unless and until a matter heard by a panel proceeds to trial. It is equally essential to the effectiveness of the panel process that a panel's unanimous findings be presented to the jury in any matter that is not resolved prior to trial. The panel process will encourage the prompt resolution of claims, because both sides will be given an objective view of the merits. If the panel finds that a claim has merit, the defendant will be more likely to pay the claim or negotiate a compromise that is favorable to the claimant. If the panel finds that the claim lacks merit, the claimant is more likely to withdraw the claim or accept a nominal settlement.

II. The purposes of pretrial screening panels are:

(a) To identify claims of professional negligence which merit compensation and to encourage early resolution of those claims prior to commencement of a lawsuit; and

(b) To identify claims of professional negligence and to encourage early withdrawal or dismissal of nonmeritorious claims.

519-B:2 Definitions. In this chapter:

I. "Action for medical injury" means an action for medical injury as defined in RSA 507-E:1, I.

II. "Medical care provider" means a medical care provider as defined in RSA 507-E:1, II.

III. “Medical injury” means a medical injury as defined in RSA 507-E:1, III.

519-B:3 Formation and Procedure.

I. The chief justice of the superior court shall maintain a list of retired judges, persons with judicial experience, and other qualified persons to serve on screening panels under this chapter, from which he or she shall choose a panel chairperson under paragraph II of this section. The chief justice of the superior court shall maintain lists of health care practitioners, and attorneys with litigation experience primarily representing plaintiffs in actions for personal injury, recommended by their respective professional organizations and associations, or otherwise volunteering to serve on screening panels under this chapter. As required by the chief justice, the professional organizations and associations shall inform the chief justice of the names of volunteers to serve on panels.

II. Screening panel members shall be selected as follows:

(a) Upon the entry of a medical injury case, the clerk of the superior court in which the medical injury case is filed shall notify the chief justice of the superior court.

(b) Within 14 days following the return date, the chief justice shall choose a retired judge, a person with judicial experience, or other qualified person from the list maintained by the chief justice to serve as chairperson of the panel to screen the claim. If at any time a chairperson chosen under this paragraph is unable or unwilling to serve, the chief justice shall appoint a replacement following the procedure in this paragraph for the initial appointment of a chairperson.

(c) The chief justice shall notify the clerk of the name of the person designated to serve as chairperson and shall provide the clerk with the lists of health care practitioners, health care providers, and attorneys maintained under this section. Upon notification of the chief justice’s choice of chairperson, the clerk shall notify the chairperson and the parties, and provide them with the lists of health care practitioners, health care providers, and attorneys. The chairperson shall choose 2 additional panel members as follows:

(1) One attorney.

(2) One health care practitioner.

(3) When agreed upon by all the parties, the list of available panel members may be enlarged in order to select a panel member who is agreed to by the parties but who is not on the chief justice’s list.

III. The screening panel process shall not delay or postpone the trial of a medical injury case except by agreement of the parties. The superior court may establish a trial date at a structuring conference, or other scheduling conference, and all interim deadlines as it would in any other case.

IV. The chief justice of the superior court shall establish the compensation of the panel chairperson if he or she is not otherwise compensated by the state of New Hampshire. Other panel members shall serve without compensation or payment of expenses.

V. The clerk of the superior court in the county in which a medical injury case is filed shall, with the consent of the chief justice of the superior court, provide clerical and other assistance to the panel chairperson.

VI.(a) Only challenges for cause shall be allowed. Each panel member shall provide a curriculum vitae to counsel for the litigants and disclose any connection the member may have with the litigants or their counsel.

(b) If a panel member other than the chairperson is challenged for cause, the party challenging the member shall notify the panel chairperson. If the panel chairperson finds cause for the challenge, he or she shall replace the panel member.

(c) If the chairperson is challenged for cause, the party challenging the chairperson shall notify the chief justice of the superior court. If the chief justice finds cause for the challenge, he or she shall replace the chairperson.

519-B:4 Panel Procedures.

I. All documents filed with the court in a medical injury action that are part of the screening process are confidential.

II. Within 20 days after the return date, the person or persons against whom the action has been brought shall contact the claimant's counsel and by agreement shall designate a timetable for the exchange of all the relevant medical and provider records necessary to a determination by the panel. If the parties are unable to agree on a timetable within 40 days of the return date, the claimant shall notify the chairperson of the panel. The chairperson shall then establish a timetable for the exchange of all relevant records, which shall be exchanged no later than 90 days from the return date. The hearing shall be no later than 6 months from the return date, unless agreed to by the parties.

III. The pretrial screening may be bypassed if all parties agree upon a resolution of the claim by trial.

IV. All parties to a claim may, by written agreement, submit a claim to the binding determination of the panel. Both parties may agree to bypass the panel for any reason, or may request that certain preliminary legal affirmative defenses or issues be litigated prior to submission of the case to the panel. The panel shall have no jurisdiction to hear or decide, absent agreement of the parties, dispositive legal affirmative defenses, other than comparative negligence.

V. Except as otherwise provided in this section, there shall be one combined hearing for all claims under this section arising out of the same set of facts. Where a medical injury case has been filed against more than one person accused of medical injury based on the same facts, the parties may, upon agreement of all parties, require that hearings be separated.

VI. All requests for extensions of time under this section shall be made to the panel chairperson. The chairperson may extend any time period for good cause, except that the chairperson may not extend any time period that would result in the hearing being held more than 7 months following the return date unless misconduct of the plaintiff makes the hearing impractical or acts or events occur which the panel determines are beyond the control of the litigants. If the hearing cannot be held within the 7-month time period due to any other reason, it shall be deemed to have been waived.

VII.(a)(1) On failure of the plaintiff to prosecute or to comply with rules or any order of the chairperson, or if the plaintiff fails to attend a properly scheduled hearing, and on motion by the chairperson or any party, after notice to all parties has been given and the party against whom sanctions are proposed has had the opportunity to be heard and show good cause, the chairperson may order appropriate sanctions, which may include dismissal of the case. If any sanctions are imposed, the chairperson shall state the sanctions in writing and include the grounds for the sanctions.

(2) Unless the chairperson or the panel in an order for dismissal specifies otherwise, a dismissal under this subparagraph is with prejudice for purposes of proceedings before the panel. A dismissal with prejudice is the equivalent of a finding for the defendant on all issues before the panel.

(b)(1) On failure of a defendant to comply with the rules or any order of the chairperson, or if a defendant fails to attend a properly scheduled hearing, and on motion by the chairperson or any party, after notice to all parties has been given and the party against whom sanctions are proposed has had the opportunity to be heard and show good cause, the chairperson may order appropriate sanctions, which may include default. If any sanctions are imposed, the chairperson shall state the sanctions in writing and include the grounds for the sanctions.

(2) Unless the chairperson or the panel in its order for default specifies otherwise, a default under this paragraph is the equivalent of a finding against the defendant on all issues before the panel.

(c) Any person aggrieved by a chairperson's ruling regarding sanctions may appeal to the superior court, which shall defer to the chairperson's factual findings unless they are clearly erroneous.

519-B:5 Hearing.

I.(a) The claimant or a representative of the claimant shall present the case before the panel by offer of proof and submission of expert witness reports. The person accused of professional negligence or that person's representative shall make a responding presentation by offer of proof and submission of his or her expert witness reports. Any report to be submitted shall be exchanged at least 45 days prior to the hearing and an additional report may be prepared by the opposing expert in reply.

(b) After presentation by the parties, the panel may request additional facts, records, or other information from either party to be submitted in writing within 14 days.

II. The panel shall maintain a tape-recorded record. Except as provided in RSA 519-B:8, the record may not be made public and the hearings may not be public without the consent of all parties.

III. The chairperson of the panel shall attempt to mediate any differences of the parties before proceeding to findings.

519-B:6 Findings by Panel.

I. At the conclusion of the presentations, the panel shall make its findings regarding negligence and causation in writing within 30 days by answering the following questions:

- (a) Whether the acts or omissions complained of constitute a deviation from the applicable standard of care by the medical care provider charged with that care;
- (b) Whether the acts or omissions complained of proximately caused the injury complained of; and
- (c) If fault on the part of the medical care provider is found, whether any fault on the part of the patient was equal to or greater than the fault on the part of the provider.

II. In considering the questions under paragraph I, the panel shall credit the party bringing the medical injury claim with all reasonable inferences that can be drawn from the evidence.

519-B:7 Notification of Findings. The panel's findings, signed by the panel members, indicating their vote, shall be sent by registered or certified mail to the parties within 7 days of the date of the findings. The findings and record of the hearing shall be preserved until 30 days after final judgment or final resolution of the case, after which time it shall be destroyed. All medical and provider records shall be returned to the party providing them to the panel.

519-B:8 Confidentiality and Admissibility.

I. Except as provided in this section, all proceedings before the panel, including its final determinations, shall be treated as private and confidential by the panel and the parties to the claim.

(a) The findings and other writings of the panel and any evidence and statements made by a party or a party's representative during a panel hearing are not admissible in court and shall not be submitted or used for any purpose in a subsequent trial and shall not be publicly disclosed, except as follows:

(1) Any testimony or writings made under oath may be used in subsequent proceedings for purposes of impeachment.

(2) The party who made a statement or presented evidence may agree to the submission, use, or disclosure of that statement or evidence.

(b) In the reasonable discretion of the trial court, if the panel findings as to any question under RSA 519-B:6 are unanimous and unfavorable to the plaintiff, the findings are admissible in any subsequent trial of the medical injury case.

II. The confidentiality provisions of this section shall not apply if the findings were influenced by fraud.

III. The deliberations and discussion of the panel shall be privileged and confidential, and no panel member may be asked or compelled to testify at a later court proceeding concerning the deliberations, discussions, or findings, except such deliberation and discussion as may be required to prove an allegation of fraud.

519-B:9 Mandatory Instructions.

I. When panel findings are offered and admitted into evidence in a subsequent court action in accordance with RSA 519-B:8, I(b), the trial court shall provide the following information to the jury to provide a basis for the jury to understand the nature of the panel findings and to put the panel findings in context in evaluating all of the evidence presented at the trial:

- (a) The panel process is a preliminary procedural step through which malpractice claims proceed.
- (b) The panel in this case consisted of (insert the name and identity of the members).
- (c) The panel conducts a summary hearing based on offers of proof and review of documentary evidence only without the benefit of live witness testimony and is not bound by the rules of evidence.
- (d) The hearing is not a substitute for a full trial and did not include all of the evidence that is presented at the trial.
- (e) The jury is not bound by the findings of the panel and it is the jurors' duty to reach their own conclusions based on all of the evidence presented to them.

(f) The panel proceedings are privileged and confidential. Consequently, the parties may not comment on the panel findings or proceedings except as provided in subparagraphs (a) through (e).

II. The information specified in paragraph I shall be provided to the jury when the findings are admitted into evidence and when the court instructs the jury prior to submitting the case to the jury.

519-B:10 Effect of Panel Findings. Unanimous findings entered by the panel under RSA 519-B:6, I shall be implemented as follows.

I. If findings are in the plaintiff's favor, the defendant may promptly enter into negotiations to pay the claim or admit liability. If liability is admitted, the claim may be submitted to the panel, upon agreement of the parties, for determination of damages.

II. If the findings are in the defendant's favor, the plaintiff shall release the claim or claims based on the findings, without payment, or be subject to the admissibility of those findings in the discretion of the trial court, under RSA 519-B:8, I(b).

519-B:11 Medical Malpractice Panel and Insurance Oversight Committee Established.

I. There is established a committee to study medical malpractice insurance rates in this state and the mandatory panels for medical injury claims process.

II. The committee shall consist of 4 members of the senate appointed by the senate president, and 4 members of the house of representatives, appointed by the speaker of the house of representatives. The house members shall include at least:

- (a) One member of the house judiciary committee.
- (b) One member of the house health, human services and elderly affairs committee.
- (c) One member of the house commerce committee.

III. The members of the committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named house member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Five members of the committee shall constitute a quorum.

IV. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

V. The committee shall review and analyze information provided by the administrative office of the courts and the insurance department related to medical injury liability claim activity in order to determine the effectiveness of mandatory screening panels for medical injury claims established in this chapter. The committee's review shall include, but not be limited to, whether medical malpractice insurance premiums have been affected and whether there has been any limitation of access to the courts by injured parties.

VI.(a) The committee shall make an interim report of its findings about medical liability insurance rates and the mandatory panel process and any recommendations for proposed legislation to the speaker of the house of representatives, the senate president, the house clerk, the senate clerk, the governor, and the state library on or before December 1, 2008.

(b) The committee shall make a final report of its findings about medical liability insurance rates and the mandatory panel process and any recommendations for proposed legislation to the speaker of the house of representatives, the senate president, the house clerk, the senate clerk, the governor, and the state library on or before December 1, 2010. The report shall include a recommendation to terminate, continue, or amend RSA 519-B.

519-B:12 Reports.

I.(a) The administrative office of the courts shall collect data on medical injury claims and submit a report on the screening panel process to the committee established in RSA 519-B:11 and to the insurance commissioner on or before September 30 of each year.

(b) The report required by this paragraph shall include the number of medical injury cases filed, pending, and resolved; and the number of panel hearings and the number of panel hearing days during the fiscal year ending on the June 30 preceding the report date.

(c) The report required by this paragraph shall also include, for medical injury cases resolved during the fiscal year:

- (1) The mean and median lengths of time from initial filing to final resolution.
- (2) The number and average settlement amount of cases that were resolved prior to the panel hearing.
- (3) The number and average settlement amount of cases that were resolved after a panel hearing but before a trial.
- (4) The number and average settlement amount of cases that were resolved by or after a jury verdict.

(d) The report required by this paragraph shall also include, for medical injury cases in which a panel made findings during the fiscal year, the number of cases that fell into each category of possible results of a panel hearing (unanimous for the plaintiff; majority for the plaintiff; unanimous for the defendant; majority for the defendant), the status, and, if applicable, the results of the cases in each category.

(e) To the extent possible, the report required by this paragraph shall include comparative data from the previous 5 years.

II.(a) The insurance commissioner shall report to the committee established in RSA 519-B:11 annually, on or before November 1 of each year, on the medical malpractice market and the effects of the panel process established in this chapter. Such reports shall include, but not be limited to, the average rates of medical liability insurance for categories of medical providers and specialties identified by the insurance commissioner, the frequency and severity of medical injury claims, and the time for resolution of medical injury claims from first notice to final resolution.

(b) The insurance commissioner may adopt rules to collect the data from insurers necessary to prepare the report required by this paragraph. To the extent the commissioner collects information from insurers regarding individual claims, loss adjustment and other expenses, reserves, indemnity payments, or other financial information that is not otherwise reported to the commissioner and available to the public, such information shall be treated as examination materials, kept confidential, and not be subject to RSA 91-A.

2 Repeal. RSA 519-A, relative to professional malpractice claims, is repealed.

3 Repeal. The following are repealed:

- I. RSA 519-B:11, relative to the medical malpractice panel and insurance oversight committee.
- II. RSA 519-B:12, relative to reports.

4 Effective Date.

I. Section 3 of this act shall take effect December 31, 2010.

II. The remainder of this act shall take effect 60 days after its passage.