CONNECTICUT MEDICAL INSURANCE COMPANY

POSITION PAPER

S. B. 243: AN ACT CONCERNING CERTIFICATES OF MERIT

As one of the leading medical malpractice insurers in the state of Connecticut, CMIC must voice its strenuous opposition to Senate Bill 243. The proponents of the Bill offer this legislation for the ostensible purpose of ameliorating harsh effects of the recent case of Bennett v. New Milford Hosp., 300 Conn. 1 (2011). It is quite evident, however, that the proposed Bill goes far beyond any ameliorative purpose. This highly partisan bill completely eviscerates the expert report requirement that has been part of Connecticut law since 2005 by removing all barriers to the qualifications of experts who author those reports and creating insurmountable obstacles to challenging those experts in court.

The following proposed changes will have an inimical effect on Connecticut health care providers and their insurers and deserve the closest scrutiny by the Judiciary Committee.

> Section 1 (d) of the Bill amends General Statute §52-184c by expanding the definition of "similar health care provider," that is, one who is allowed to either testify in a malpractice trial or author a report to support a plaintiff's Certificate of Merit. Under the existing definition of "similar health care provider," an expert would generally not qualify to author an expert report in support of a Certificate of Merit unless that expert practiced in the same medical specialty and had certifications similar to those of the defendant provider. Under the expanded definition, a person would qualify as long as he or she was someone "who to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide [such] expert testimony as to the prevailing professional standard of care in a given field of medicine." The intent of this change is to remove all meaningful qualifications to the definition of "similar health care provider" and thus commit the determination of who qualifies to the unfettered discretion of the trial court. This is a serious step backward for the health care providers and insurers in the state of Connecticut who fought long and hard for protections against frivolous lawsuits. The 2012 legislature should be concerned not with removing these protections, but with strengthening them and thereby ensuring that only meritorious claims are brought against Connecticut's health care providers.
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> The requirements for the qualifications of experts who author these reports are also significantly affected by a provision

unobtrusively placed at the end of Section 2 of the Bill. The proposed amendment to subsection (f) of General Statute §52-190a would allow any expert who qualified to author a report against an institutional defendant such as a hospital to *automatically* qualify against any other defendant named in the Complaint no matter what medical specialty that other defendant practiced in and no matter the status of the expert's certifications. Under this proposed provision, a plaintiff could theoretically use one expert report authored by an uncertified General Practitioner as the basis to sue a Connecticut hospital and an unlimited number of Board Certified physicians from a multitude of medical specialties. Were the provision to pass, the one expert report against an institutional defendant would turn into a dragnet bringing numerous health care providers into the case with little or no basis.

Section 2 of the Bill amends General Statute §52-190a by, among other things, significantly changing the content requirements for expert opinions that are submitted in support of Certificates of Merit. No longer would these reports be required to include a "detailed" basis for the expert's opinion, but instead would be required to include merely a conclusory statement that at least one breach of the standard of care had occurred. This proposed change would defeat the entire purpose of requiring an expert report in the first instance. A report that is barren of detail reveals nothing about how or why the expert determined the *bona fides* of the lawsuit.

Section 2 of the Bill also contains procedural obstacles to the challenge of expert reports that are so numerous and so complex that it would be a practical impossibility ever to challenge the adequacy of an expert report successfully. Current law provides that the "the failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." (Emphasis added.) The proposed Bill changes the mandatory "shall" to the permissible "may," thus removing the teeth of the 2005 legislation that implemented the current law and making judicial dismissal of the action a matter of discretion. The proposed Bill would also prevent a defendant from challenging the qualifications of an expert who authored a report until "the completion of discovery," which for all practical purposes means that the defendant must endure the time and expense of defending the case until it is on the threshold of trial, a course that can take many years and tens of thousands of dollars in expenses. At the same time, the Bill provides that when the court is considering such a challenge filed it may consider "other factors with regard to the existence of good faith." This is a round-about way of saying that the court will be allowed to consider not only the qualifications of the author of the original report, but also the qualifications of any other expert whom the plaintiff was able to

> find in the time between the original filing of suit and the time of trial. In effect, the proposed Bill would allow a plaintiff to file suit on the flimsiest of grounds and then use the time preceding trial to search for a supportable basis for suit. This undermines the entire purpose behind the existing *pre-suit* inquiry into the merits of the claim and leads inevitably to frivolous lawsuits.

The proponents of Senate Bill 243 claim that this bill is necessary to address the "harsh" effects of the Bennett case, but the Judiciary Committee should seriously examine the underpinnings of this claim. At the same time that the Connecticut Supreme Court decided Bennett, it also decided the case of Plante v. Charlotte Hungerford Hosp., 300 Conn. 33 (2011), which held in effect that the large majority of cases dismissed because of a failure to comply with the requirements of General Statute §52-190a could be refiled in court under the provisions of General Statute §52-592, the so-called "Accidental Failure of Suit Statute." In Plante, the Supreme Court held that only "egregious" failures to comply with §52-190a would prevent a plaintiff from being able to utilize the Accidental Failure statute. Under the Plante decision, therefore, most plaintiffs are provided with a second chance to correct any inadvertent deficiencies in their original filing and the "harsh" effects of the Bennett case are reserved for the few cases that justly deserve harsh treatment. This is not a situation that cries for legislative intervention. The proponents of Senate Bill 243 appear to be using the Bennett decision as a cover to rewrite §52-190a to their liking.

In summary, the passage of Senate Bill 243 would remove an important obstacle to the filing of frivolous cases in Connecticut courts. It would raise the cost of defending medical malpractices cases and ultimately increase the premiums that health care providers are required to pay for malpractice protection. CMIC urges the Committee to reject this partisan and ill-considered Bill.

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