

# CMIC POSITION PAPER ON HOUSE BILL NO. 5537

## I CONNECTICUT MEDICAL INSURANCE COMPANY

CMIC was formed in 1984 in response to a malpractice insurance crisis marked by issues of availability and affordability. The mission of the Company's founders was then, and remains today, "to provide competitively priced, service-oriented, financially strong, long-term sources of insurance products and services to CMIC members." Unlike many other malpractice insurance companies that are in business to produce a return to investors, CMIC is a company that is owned by its members, all of whom are health care providers. It is a company run by and for doctors. Today, it insures over 2500 health care providers in the state of Connecticut.

## II BACKGROUND OF THE CONNECTICUT GOOD FAITH CERTIFICATE

The 1986 Tort Reform Act implemented the requirement that plaintiffs' attorneys obtain a "Good Faith Certificate" before filing a case for malpractice against a physician or hospital. The Good Faith Certificate was intended to be an affirmation from the plaintiff's attorney that he or she had made an inquiry and received an opinion from a physician certified in the same area of practice as the putative defendant that there was good reason to believe that malpractice had occurred. This requirement, which was met with high expectations by the medical community, was intended to present a threshold test that would screen out unmeritorious cases. In practice, however, the Good Faith Certificate as initially implemented had had little positive effect.

The initial Good Faith Certificate was a concept that was doomed from the outset because the requirement had no teeth and no mechanism for meaningful scrutiny. In the courts, whatever positive impact the Good Faith Certificate might have had was entirely eliminated by decisions that removed every obstacle to the filing of a suit. Courts routinely disallowed inquiry into the *bona fides* of a plaintiff's Good Faith Certificate and ruled that the failure to obtain the Good Faith Certificate as required by law was not fatal to the case except in the rarest of circumstances.

In 2004-2005, members of the medical community in the state rallied on the steps of the State Capitol in their white coats urging passage of a cap on noneconomic damages. What ensued in the wake of this rally was an extended debate on the medical malpractice law. The Legislature held extensive hearings and heard from all interested parties. Eventually, the Legislature passed Public Act 05-275. This law rejected caps on noneconomic damages, but in deference to the members of the medical profession Public Act 05-275 implemented badly needed changes in the way that malpractice cases were handled in the courts. One of these badly needed changes dealt with the Good Faith Certificate. Public Act 05-275 enacted the requirement that before a health care provider could be sued for malpractice in the courts of this state the plaintiff's attorney must obtain and file with the complaint a detailed written report by a "similar health care provider" stating why malpractice had occurred. Since 2005, this statute has provided a measure of protection for members of the medical community against law suits that are baseless. House Bill No. 5537 now seeks to completely undo these changes.

## III SPECIFIC PROBLEMS WITH HOUSE BILL NO. 5537

House Bill No. 5537 contains four categories of changes that would completely eviscerate the Good Faith Certificate requirement implemented under Public Act 05-275. These categories are discussed hereinafter.

### 1. "Detailed Basis" for Suit No Longer Necessary

In its current form, General Statute Section 52-190a requires a plaintiff's Good Faith Certificate to be accompanied by an expert report setting forth a "detailed basis for the formation of [an] opinion" that medical malpractice has been committed." House Bill No. 5537 removes this salutary requirement and puts in its stead a requirement that the report merely state in conclusory fashion "one or specific breaches of the prevailing professional standard of care." No explanation would be necessary to inform the defendant of any of the details underlying the opinion.

Even more significantly, under Section 2, subsection (e)(2) of the Bill, if an expert has provided a report that even one violation of the standard of care has occurred, plaintiffs' attorneys would have free rein to include as many additional, unsupported allegations of negligence in the complaint as their word processors would allow. ("The written opinion required by subsection (a) ... shall (2) not limit the allegations in the complaint against any named defendant or limit the testimony of expert witnesses.") In effect, the one opinion stated by the expert in the

written opinion becomes merely the entre to a smorgasbord of allegations that health care providers will have to defend in the suit.

## *2. Expert Qualifications Are Left Entirely to the Court's Unfettered Discretion*

Section 2, subsections (a) and (f) of the Bill operate in tandem to reverse the recent Appellate Court case of *Bennett v. New Milford Hospital*, AC 29944, October 13, 2009 and to completely remove any significant limitation on the qualifications of the authors of expert reports. The *Bennett* case upheld the requirement of the present Section 52-190a that, in most cases, expert reports must be authored by "similar health care providers" who are Board Certified in the same area as the defendant named in the suit. House Bill No. 5537, however, introduces a "catch all" category of authors who would qualify as "similar health care providers." Under this bill, a "similar health care provider" could be anyone "who, to the satisfaction of the court, possesses sufficient training, experience and knowledge in a related field of medicine ..." It is immediately evident that standard is so low and this category is so vast that all other stated limitations would become entirely meaningless.

## *3. Only One Expert Report Would Be Necessary No Matter How Many Health Care Providers Are Sued*

Section 2, subparagraph (f)(2) of the Bill contains what is easily the most overreaching section of the Bill. This subsection provides that an author qualifies as a "similar health care provider" if he or she is a "health care provider who would be qualified to testify ... with respect to any defendant that is a corporation or business entity ..." In common parlance, this language means that an author who qualifies to write a report against an institutional defendant (e.g., a hospital) will be deemed to automatically qualify as a "similar health care provider" against all other defendants whether or not the author is Board Certified in the same areas as those other defendants. Henceforth, plaintiffs' attorneys will need only one report for all defendants in a case rather than separate reports for each.

## *4. The Bill Removes All Effective Challenges to the Expert Report*

House Bill No. 5537 not only lowers the bar for expert reports to barely discernable levels, it also removes every possibility for effective challenge of the expert report.

First, by changing one word in the existing law, House Bill No. 5537 completely guts the expert report requirement. General Statute Section 52-190a currently states that "the failure to obtain and file the written opinion required ... *shall* be grounds for the dismissal of the action." (Emphasis added.) House Bill No. 5537, Section 2, subsection (c) changes the mandatory word "shall" to the permissive word "may," which means that dismissal is entirely discretionary and will, therefore, almost never occur. This is tantamount to a repeal of existing law.

In addition, House Bill No. 5537 states that the case cannot be dismissed for failure to obtain an expert report from a similar health care provider "unless the plaintiff has failed to remedy such failure within thirty days after being ordered to do so by the court." In effect, plaintiffs are given multiple bites at the apple. One suspects with good reason that even the thirty day requirement in this subsection will be subject to discretionary extensions of time.

## **IV CONCLUSION**

House Bill No. 5537 is breathtaking in its scope. It imposes so many limitations, qualifications and circumlocutions on the current expert report requirement that the requirement would become completely illusory. The hard-won and relatively paltry limitations on malpractice suits that health care providers fought for in 2004-2005 would be largely swept away. The result would be more suits against physicians, higher costs to defend such suits and higher premiums for the dwindling number of health care providers who still believe that Connecticut is a good place to practice medicine.

On behalf of its members, Connecticut Medical Insurance Company vociferously opposes this Bill.